

***For the Rule of Law***

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***The Review***

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***International Commission of Jurists***

***The Evolving African  
Constitutionalism***

***Special  
Issue***

***Editor: Adama Dieng***

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***June 1998  
N° 60***

This special issue has been made possible  
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# *Introduction*

## *The Evolving African Constitutionalism: A Constitutionalism of Liberty and Human Rights*

*Bertrand G. Ramcharan<sup>1</sup>*

This special issue of the Review of the International Commission of Jurists has been inspired by a number of considerations: first, African States, and African regional and sub-regional organizations such as the OAU, ECOWAS, and SADC are engaged in a determined effort to address conflicts in the continent and to promote African solutions to African problems; new forms of constitutionalism are a central part of this effort. The International Commission of Jurists (ICJ), as an organization dedicated to the rule of law, whose antecedents include the 'Law of Lagos', has a natural interest in studying these evolving constitutions.

Second, there is a new doctrine of democratic legitimacy taking hold in the continent. The Conflict Prevention Mechanism of the OAU has, on several occasions, insisted that democratically chosen governments will be defended against illegal coups. The Security Council of the United Nations has also come out in favour of this doctrine. The International Commission of

Jurists can only applaud it and must act to help it take root.

Third, it is increasingly being realised that in order to tackle the root causes of conflicts in Africa and elsewhere, one must help plural societies articulate shared national visions of the future and to develop forms of governance that give all parts of the population a stake in the development of the country. Majorities and minorities must work together and one should consciously engender confidence on the part of minorities that the constitutional and legal order will protect them and help them to retain their culture, language and religion. There has so far been little scholarly attention to the protection of minorities in Africa and this is an area which the International Commission of Jurists and other human rights organizations would need to pay more attention to in the future.

Fourth, there have been numerous affirmations by authoritative African leaders and voices that respect for

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human and peoples rights must be the foundation for building lasting peace and justice nationally, regionally and internationally. One therefore sees new constitutions steeped in the philosophy of the African Charter on Human and Peoples Rights, the Universal Declaration of Human Rights, the International Covenants, and other normative instruments. One also sees authoritative pronouncements such as the Commonwealth Harare Declaration and the Harare Declaration of African judges emphasising the centrality of human rights. How this is being done in new national constitutions is of intrinsic interest to the International Commission of Jurists.

The national constitutions and other topics examined in this special issue of the Review bring out one point forcefully: the evolving African constitutionalism is a constitutionalism of human rights and liberty. In all the constitutions discussed, the themes of democracy and respect for human rights are emphasised prominently. There is experimentation in new forms of governance, sure enough, but the thread running through these experiments is an insistence on democratic legitimacy - with the meaning of democracy left open as the experiments unfold.

The need to control the abuse of power by those in authority is also another leading theme. This comes out of recognition, alas, that in too many countries in Africa and elsewhere the people have been the victims of those meant to protect them. Reigning in security forces so as to ensure that

they respect, rather than violate human rights is crucial.

The importance of elections and electoral systems is placed under the spotlight, as are the emerging electoral cooperation regionally and sub-regionally. The rule of law and political liberalisation in Africa is also analysed and the ground travelled, and the challenges to be met are assessed.

The spirit of the times is captured by the Harare Declaration of Human Rights (1989), subscribed to by leading African judges:

Fundamental human rights and freedoms are inherent in humankind. In some cases, they are expressed in the constitutions, legislation and principles of common law and customary law of each society. They are also expressed in customary international law, international instruments on human rights and in the developing international jurisprudence on human rights.

The Harare Commonwealth Declaration (1991) gave voice to the African and international consensus:

We believe in the liberty of the individual under the law, in equal rights for all citizens regardless of gender, race, colour, creed or political belief, and in the individual's inalienable right to participate by means of free and democratic political processes in framing

the society in which he or she lives.

The Bloemfontein Statement adopted by leading African and Commonwealth lawyers in 1995 put these issues in terms of the rule of law and human rights as follows:

In democratic societies fundamental human rights and freedoms are more than paper aspirations. They form part of the law. And it is the special province of judges to ensure that the law's undertakings are realised in the daily life of the people. In a society ruled by law, all public institutions and officials must act in accordance with the law. The judges bear particular responsibility for ensuring that all

branches of government - the legislature and the executive, as well as the judiciary itself, conform to the legal principles of a free society. Judicial review and effective access to courts are indispensable, not only in normal times, but also during periods of public emergency threatening the life of the nation. It is at such times that fundamental human rights are most at risk and when courts must be especially vigilant in their protection.

Instruments, such as these, building upon the African Charter on Human and Peoples Rights, are the bedrock of the evolving African constitutionalism discussed in the ensuing essays.

# Articles

## *Elements of Constitutionalism*

*Louis Henkin\**

At the end of the twentieth century, virtually every State has a constitution and, with rare exceptions (notably the United Kingdom), the constitution is a written formal document. Generally, a constitution sets forth the forms and institutions of government. Usually, it expresses or reflects a political-economic ideology, including the principles governing relations between individual and society.

Constitutions have varied markedly in character and in the ideology they reflect. Some constitutions - such as the socialist constitutions of Eastern Europe after the Second World War - have been essentially manifestos, programmatic. They describe the kind of government and the institutions of government that have already been established and indicate plans and make promises for the future. They nod to the rights of the individual in society but declare the rights which government is prepared to grant, rather than recognizing rights which the government is obligated to respect. (These constitutions also have tended to stress the citizen's duties rather than his/her rights and to subordinate rights to duties.)

Ordinarily, such constitutions have not been enforceable as law and had little normative character. They can be readily amended by political authority.

In contrast, other constitutions - such as contemporary Western constitutions - are normative, prescriptive. They do not describe what is but ordain what must be, establishing a blueprint for how government is to be organized and what the governors must do if government and governors are to have constitutional legitimacy. These constitutions recognise individual rights, and obligate government to respect and ensure them. The constitution declares that it is supreme law and establishes institutions to assure that it is given effect as such. The constitution is not readily amended.

Prescriptive constitutions are not all alike, but in general modern prescriptive constitutions reflect and give effect to "constitutionalism" and "the rule of law." Constitutionalism is nowhere authoritatively defined, but, as commonly used, a constitution designed to reflect constitutionalism

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will have common elements, with variations. It declares the sovereignty of the people and derives its authority from the will of the people. It prescribes a blueprint for representative government responsible and accountable to the people through universal suffrage at periodic elections. Governmental authority is to be exercised only in accordance with law established pursuant to constitutional processes and consistent with constitutional prescriptions and limitations. Government is for the people, but is limited by a bill of individual rights. Many constitutional systems fractionate governmental authority by some separation of powers or other checks and balances. (Some systems divide authority 'vertically' by forms of federalism.) Increasingly, constitutions provide for constitutional review by a court or other independent institutions with authority to monitor compliance with constitutional prescriptions and to provide remedies against their violation. Constitutionalism implies also that the constitution cannot be suspended, circumvented or disregarded by political organs of government, and that it can be amended only by procedures appropriate to change of constitutional character and that give effect to the will of the people acting in a constitutional mode.

Even constitutions committed to constitutionalism have included special accommodations responding to particular historical, political, or demographic considerations. For example, some modern constitutions have provided special representation in parliament for women. Other

constitutions have provided for other forms of "benign discrimination" ("affirmative action") in constitutional political arrangements for ethnic groups, at least temporarily. Some constitutions have given constitutional status to a particular subject, removing it from disposition by the ordinary political process.

In these pages, I elaborate, though still in summary fashion, the elements that have been commonly recognised as essential to constitutionalism. I illustrate them with examples and annotations from existing constitutions, principally the US Constitution, the constitution with which I am best acquainted. I refer also to international instruments, in particular the Universal Declaration of Human Rights and the covenants and conventions that have derived from it.

## **I - Government According to the Constitution**

Constitutionalism implies that public authority can legitimately be exercised only in accordance with the constitution. There can be no extra-constitutional government, no exercise of public authority by any person or institution not designated pursuant to the constitution. There can be no continuation in office beyond the term for which officials were elected or appointed. A constitution may provide for suspension in public emergency of particular institutions or processes but such suspensions are essentially deviations from

constitutionalism and must be strictly limited and sharply scrutinised. (See IX below.)

## II - Separation of Powers

The French Declaration of the Rights of Man and of the Citizen (1789) declared that "any society in which rights are not guaranteed, or in which the separation of powers is not defined, has no constitution." (Article 16.) In the eighteenth century, enlightened opinion saw the separation of powers as essential to limited government and the prevention of tyranny. Separation of powers and other forms of checks and balances in the conduct of government continue to be recognised as essentials of constitutional government in some countries, particularly those with presidential systems of government, e.g., the United States and France. Parliamentary systems, on the other hand, have moved towards parliamentary supremacy essentially unchecked by any independent executive power. Such parliamentary systems may nonetheless maintain limitations on government - through popular accountability by regular elections, through a bill of individual rights, and through constitutional review, generally by a judicial body, to assure conformity to the constitutional blueprint and its bill of rights.

### *Federalism*

In principle, a federal system is no more conducive to constitutionalism than a unitary State, but division of

authority between a central government and constituent entities sometimes serves to protect against too-much concentration of governmental power.

Federal States have come about for different reasons in different circumstances - to help persuade independent entities to join a new union, to protect ethnic, religious or other minorities. The particular history and the particular purpose of creating a federal State have shaped the particular division of authority between the nation and the constituent units. Agreement on a federal character for a State has sometimes made unification politically feasible but federalism has often hampered the development of national policy and has constrained the conduct of international relations which, *inter alia*, may prevent national commitment to common human rights standards. Smaller units lend themselves to stronger communal values but sometimes afford weaker protection for individual and minority rights.

## III - Popular Sovereignty and Democratic Government

"Constitutionalist" constitutions prescribe government by the people through representative institutions. Usually, such constitutions establish a parliamentary or a presidential system, a legislature of one or two chambers deciding by majority, an executive elected directly or indirectly. They provide for universal and equal suffrage by all citizens, freedom of political

activity (speech, press, assembly, association), and political parties. Constitutions may provide for majority or proportional representation, or variations consistent with authentic representative government.

#### **IV - Constitutional Review**

Constitutionalism indicates the need for an institution and a process that will monitor governmental authority for conformity to the constitutional blueprint and for consistency with constitutional limitations. Some constitutional systems (e.g., the United States) have given the power of constitutional review to its judiciary generally, some to a special constitutional court (e.g., the Federal Republic of Germany), some to a non-judicial body (such as the French *Conseil Constitutionnel*).

#### **V - An Independent Judiciary**

Whether or not the judicial branch of government has authority to exercise constitutional review, an independent judiciary is essential to the rule of law, to maintaining a constitutional order, to securing individual rights. The method of selecting judges, and their qualifications, tenure and compensation, can contribute to their independence, but in the end judicial independence has to be nurtured and protected as part of a political culture of constitutionalism.

#### **VI - Controlling the Police**

A constitutionalist system of government includes an effective police institution to enforce democratic law and respect for individual rights. But the police, having a monopoly of legitimate force, must not be allowed to subvert democratic institutions or abuse individual rights.

#### **VII - Civilian Control of the Military**

Civilian control of the military is essential to popular sovereignty, to democracy, to separation of powers, and to individual rights. Constitutionalism requires that the military remain in the barracks and have limited apolitical functions under mandate from constitutionally-constituted civilian authorities. Governance by military junta for however brief a period is anticonstitutional.

#### **VIII - Individual Rights**

Constitutionalism implies obligations on government to respect and ensure individual rights for all inhabitants. Constitutions commonly include bills of rights, frequently supplemented by civil rights legislation and other laws designed to prevent, punish, deter. An accepted catalogue of individual rights ("human rights") is set forth in the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948; the Declaration includes what have come to be characterised as economic-social

rights as well as civil-political rights. Many States have incorporated the Declaration by reference in their constitutions or laws, or have borrowed particular provisions from the Declaration or from international covenants and conventions deriving from it.<sup>1</sup>

Some national constitutions, e.g., that of the United States, have also provided models for constitutional rights provisions in other countries. Judicial review to define and protect rights, exercised by an independent judiciary, as in the United States, or by constituent courts, as in Western European countries, has also served as an example to other constitutional systems. Constitutional jurisprudence in the United States, Canada, Australia, in European countries, in India, and other countries, and the jurisprudence developed pursuant to international agreements by international institutions, notably the European and the American human rights commissions and courts, have also had important influence in other parts of the world.

### **The Jurisprudence as to Several Particular Rights Is Especially Noteworthy**

• *The right to life.* The Universal Declaration declares that everyone has the right to life. (Article 3.) The International Covenant on Civil and

Political Rights obligates States parties to the Covenant to respect and ensure the right to life. (Articles 2,6.) That provision prohibits lawless killing by government and, by extension, also "disappearances." The Covenant does not prohibit capital punishment, but in 1989 the UN General Assembly approved a protocol that would abolish the death penalty in States adhering to it. Some national constitutions have outlawed capital punishment, others have not. The Covenant requires the State to protect the life of an individual against his/her neighbour. It does not require the State to prohibit abortion.<sup>2</sup> Some national constitutions have been interpreted as protecting a woman's right to have an abortion; other constitutions have been interpreted as permitting (or requiring) the State to prohibit abortion.

• *Liberty and security of person.* Article 3 of the Universal Declaration declares that everyone has the right to "liberty and the security of the person." Subsequent articles in the Declaration prohibit slavery and servitude, torture or cruel, inhuman or degrading treatment or punishment, arbitrary detention. The State may deprive a person of liberty (or life) for violation of law but only if the law is not arbitrary and the person is properly convicted; in the criminal process, the accused is entitled to

1 The Declaration was later the basis of two international agreements, a Covenant on Civil and Political Rights and a Covenant on Economic, Social and Cultural Rights. Particular rights have been elaborated in special conventions, for example, on slavery, on genocide, on torture, on freedom from racial discrimination, on discrimination against women.

2 The American Convention on Human Rights appears to require the State to prohibit abortion. Article 4(1).

various guarantees adding up to due process of law. In our time in particular, a key element in due process of law is that the police be subject fully to law, and their activities be subject to scrutiny by political as well as judicial bodies to assure their respect for individual rights.

The Declaration also recognises the right to freedom of movement, residence and travel, and the right to free choice of employment. Later articles guarantee freedom of conscience, expression, religion, association and assembly (see below). Such provisions are common to many constitutions, but with important variations.

There has been debate as to whether the right to "liberty" has independent content - that is, whether its content is defined by the protections for particular freedoms in the subsequent articles or whether it guarantees also freedoms other than those specified. In the United States, for example, "Liberty" has been held to imply essential autonomy, freedom of choice in personal matters, as well as some freedom of economic enterprise (see below).

• *Freedom of religion, press and expression.* Liberal constitutions, and the Universal Declaration, recognise a right to freedom of thought, conscience and religion, freedom of speech, press,

association, assembly. These freedoms are deemed to be essential to political democracy as well as to individual human development and fulfilment.

• *Property and economic enterprise.* The commitment to individual rights implicit in constitutionalism includes the right to property. The Universal Declaration recognises everyone's right to own property and not to be arbitrarily deprived of it (Article 17).<sup>3</sup> Neither the Declaration nor any other authoritative instrument defines the right to property, or indicates the permissible limitations on the use or ownership of property. The Universal Declaration was designed to be acceptable to countries of every economic ideology - free market, socialist or mixed - and expresses no view on free enterprise generally.

The US Constitution has been read as safeguarding freedom of enterprise including freedom of contract; it expressly protects against State impairment of the obligations of contracts. (Article 1, Section 10.) The Constitution protects property against deprivation "without due process of law" (Amendment V) but does not preclude taxation as long as it is not confiscatory. (The Constitution now explicitly permits progressive income taxation. Amendment XVI.) Property and economic liberty are subject to reasonable regulation for public purposes.

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3 That right was omitted from the Covenants as a result of political tensions at the time the Covenants were concluded, reflecting differences as to the scope of the right and its protection, but the right to property was not questioned in principle.

The US Constitution provides in addition that private property shall not be taken for public use without just compensation. (Amendment V.) The jurisprudence of such "eminent domain" (nationalisation, expropriation) has not limited the public uses for which property may be taken; for example, the courts have upheld taking for aesthetic purposes, and for programmes of land reform and redistribution. Constitutional jurisprudence in the United States has struggled with difficult issues as to whether a governmental action was a permissible regulation or constituted a taking requiring compensation, and what compensation is just in general or in particular circumstances.

A number of constitutions promulgated since the Second World War ordained socialism, prescribed public ownership of the means of production and imposed limitations on individual economic enterprise and private property. The demise of communism in Europe has effectively eliminated most socialist constitutions, but in China one billion people continue to live under a totalitarian, "socialist" constitution. It cannot be concluded that the demise of communism in Europe has established that socialism "with a human face" would not be consistent with the values of constitutionalism.

• **Equality.** Equality and the equal protection of the laws are prominent themes in national constitutional law and in international human rights: all human beings are entitled to enjoy human rights and are therefore equal in respect to those rights. In addition,

the Universal Declaration (Article 7) declares:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Equality, equal protection and non-discrimination are also principal themes of the international covenants. The special Convention on the Elimination of All Forms of Racial Discrimination has more adherences than any other human rights convention. The Convention on the Elimination of All Forms of Discrimination against Women has also been widely adhered to.

In the United States, the constitutional jurisprudence of equality and equal protection fills volumes. In general, it has required equal treatment of those similarly situated but has permitted (though not required) unequal, compensatory treatment for those in different circumstances. Constitutional jurisprudence has been uncertain as to various forms of "affirmative action." It is established that in the United States segregation - "separate but equal" - is not equal.

No one has suggested that the equal protection of the laws forbids progressive taxation. (In the United States, as indicated, progressive income taxation was expressly authorised by constitutional amendment.)

- **Economic and social rights.** The Universal Declaration includes economic-social as well as civil-political rights. Economic and social rights include, *inter alia*, the right to work, to adequate food, housing, health care, education. The Covenant on Economic and Social Rights obligates a State party to achieve such rights progressively "to the maximum of its available resources."

Virtually all States are now essentially Welfare States, but not all States prescribe welfare principles in their constitutions. Older constitutions (e.g., the United States) recognised only civil and political rights, but constitutional political rights of many of the States of the United States early established a right to education. Many constitutions developed in the second half of the twentieth century recognise economic and social rights but in general do not provide for their enforcement by means and institutions - for example, judicial review - available to enforce civil and political rights.<sup>4</sup> In the law of some States, however, some rights recognised in the Covenant on Economic and Social Rights may be characterised - and enforced - as civil and political rights, for example, the right to choose one's occupation as a protected liberty, or the right to join a

trade union as an aspect of the right of association.

- **Workers' rights.** The Universal Declaration recognises the right to work, to free choice of employment, to "just and favourable" conditions of work, to protection against unemployment; to equal pay for equal work; to "just and favourable" remuneration ensuring an existence worthy of human dignity; to social security; to rest and leisure. Everyone has the right to join a trade union.

Constitutional protections of the worker differ with different economic systems and in different constitutions. The constitutions of liberal States with liberal economic systems protect the freedom to choose one's work (and one's place of residence), as well as the freedom of association, which includes the right to form and join trade unions. Socialist constitutions may offer different or additional rights to workers, including a right to be provided with work by society.

- **Minority rights.** Neither the Universal Declaration<sup>5</sup> nor the US Constitution addresses "minority rights." Both see rights as individual, and both assume that members of

<sup>4</sup> See, e.g., Article 37 of the Constitution of India.

<sup>5</sup> After World War I, the League of Nations, persuaded that oppression of minorities was a major source of international conflict, promoted a series of "minorities treaties" in which some States undertook to safeguard certain rights of members of ethnic or national minorities in their territories. After the Second World war, the international system did not focus on causes of war in Europe, and sought to maintain international peace and security through the United Nations and acceptance of the right to self-determination. Some minorities it was assumed would achieve self-determination and cease to be minorities. For the rest, members of minorities would find protection for their rights in the new international human rights movement which would protect all human beings equally.

minorities will have their individual rights safeguarded equally with those of all other members of the community.

Increasingly, however, it has been recognised that membership in minority groupings has continued to be a cause and focus of human rights problems. Inter-group hostility has been an important contributor to oppression and to discrimination against individuals. Expulsion and other forms of "ethnic cleansing" have emerged as contemporary, and horrible, violations of human rights. Also, some policies and practices related to group relations have human rights implications, e.g., policies of assimilating minorities ("melting pot") as distinguished from maintaining their identity ("pluralism"), affirmative action programmes, group defamation laws, preferences for some groups in financing education. International human rights agreements have hardly addressed these problems; emerging constitutions have been taking account of them in different ways.

### **Permissible Limitations on Rights**

Constitutionalism, all constitutional systems, and all international human rights instruments, are at one in treating rights as subject to some

limitations in the public interest. The Universal Declaration provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (Article 29).

The Covenant on Civil and Political Rights expressly permits restrictions on some rights, e.g., the freedom of movement and residence, if restrictions are "necessary to protect national security, public order (*ordre public*), public health of morals or the right and freedom of others." The Covenant permits similar limitations on the freedom of expression. (Article 19.)

Neither the Declaration nor the Covenant nor constitutions generally consider which right prevails when two rights compete. Nor is there a developed international jurisprudence as to the scope of "national security," "public order," or "morals," but scholars have explored the international meaning and scope of those terms.<sup>6</sup>

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6 See, e.g., A.C. Kiss, "Permissible Limitations on Rights, in The International Bill of Rights".



The Covenant on Civil and Political Rights not only permits but requires States to impose certain restrictions on freedom of expression.<sup>7</sup> Article 20 provides:

- 1) Any propaganda for war shall be prohibited by law;
- 2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The extent to which a constitutional society may or must limit freedoms in order to safeguard the rights and freedoms of others or the public good is not agreed. Even States committed to constitutionalism and individual rights differ, for example, as to what limitations they tolerate for the sake of public morality. In the United States, the constitution protects even expression that offends others, or that promotes uncivil or uncivilised ideas or policies.

United States jurisprudence draws a line between opinion and advocacy on the one hand and incitement to violence or to other unlawful action. Contrary to the International Covenant, the US Constitution, as interpreted, prevents the prohibition of propaganda for war or racial hatred or discrimination; the law may

prohibit such expression only if it incites to illegal action.

The jurisprudence of liberal constitutions - e.g., the United States - treats virtually no rights as absolute, but has created categories and hierarchies of rights and freedoms. In the United States, freedom of enterprise, and other economic-social activities, are subject to reasonable regulation in the public interest. Some rights, however, are fundamental and preferred, e.g., the freedom of speech, press, religion and assembly, and the right to autonomy (privacy) in intimate matters; infringements of such rights and freedoms are strictly scrutinised and will be upheld only if justified by a compelling public interest. Certain classifications and distinctions in the law, e.g., racial classifications, are suspect and are strictly scrutinised by the courts; distinctions on the basis of gender are also examined more carefully than distinctions on the basis of other criteria.

## IX - Suspension and Derogation

Authority to suspend basic elements of constitutional government in times of "emergency" poses what is probably the most serious threat to constitutionalism and constitutional government.

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7 The Covenant (Article 17) also seems to require a State to protect individual honour and reputation, presumably, *inter alia*, by providing remedies against libellous expression. See also Article 19 which permits laws necessary for "respect of the rights or reputations of others."

Some constitutions provide for suspension of some institutions, or of some rights, in time of public emergency. Unlike most constitutions, the United States Constitution does not provide for suspension of the constitution, of the legislature, or of the courts, and does not permit executive government in any circumstances. Only the privilege of the writ of *habeas corpus* may be suspended, only in case of invasion or rebellion, and only by Congress. (Article I, Section 9.)

The Covenant on Civil and Political Rights (Article 4) provides:

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.<sup>8</sup>

Even in such circumstances some rights - e.g., the right to life, freedom from torture, freedom from slavery - may not be derogated from, and no derogating measures may involve racial, gender or similar invidious discrimination.

## Constitutional Amendment

A constitution reflecting respect for constitutionalism has to be subject to amendment if it is to reflect the sovereignty of the people contemporaneously, rather than the sovereignty of their ancestors who framed the constitution. On the other hand, too-ready amendment would threaten the character of the constitution as fundamental, supreme law. Amendments, of course, should be effected by procedures that reflect the sovereignty of the people acting in a constitutional capacity and mode. Amendments must not be such as to derogate from the commitment to constitutionalism, including respect for individual human rights.

## Conclusion

In brief, at the end of the twentieth century, legitimate, acceptable constitutions must reflect respect for constitutionalism including, in particular, respect for individual human rights. The jurisprudence of the international human national rights movement and of developed constitutions provide the stuff on which new constitutions can draw.

There is no model constitution.

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8 For interpretation of Article 4 see T. Buergenthal, "To Respect and To Ensure: State Obligations and Permissible Derogations" in *The International Bill of Rights: The International Covenant on Civil and Political Rights* (L. Henkin, ed.), Columbia University Press, 1981.

Some constitutions are brief and simple, others extensive and complex. States differ as to how they distribute law between constitution and legislation. Putting provisions into constitutions gives them the status of supreme law and largely immunises them from ordinary political processes. There is ample room for differences reflecting local needs, but there can be no deviation from basic elements - popular sovereignty, accountable government, and respect for the human rights of all the inhabitants without distinction. The Universal Declaration does not require that any rights be "constitutionalised," only that they be recognised, respected and ensured. But it is important that the idea of rights, and the principal rights, have constitutional supremacy, and some rights will not in fact be respected and ensured unless they are rendered effectively supreme law. It is important too that the constitution establish institutions - e.g., an independent judiciary or constitutional court - that will respect and have authority to assure that others respect individual rights.<sup>9</sup>

No two constitutions are or should be the same. A constitution must reflect the particular society, its geography and history, economy, demography, traditions, culture. But whether a constitution prescribes for a unitary or a federal State, a presidential or a parliamentary system, a socialist, free-market or mixed economy, a constitution that is authentically constitutionalist must secure constitutional legitimacy and constitutional review, authentic democracy, accountable government and one that will respect and ensure individual human rights and secure basic human needs.

In the end, no document, no blueprint of government, no bill of rights is sufficient to guarantee constitutionalism. In the end, constitutionalism depends on political, social and economic stability and a political culture that is committed to constitutionalism. What the constitution provides will reflect, contribute to, and help maintain such a culture of constitutionalism.

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9 Some believe that a constitution should promote an independent legal profession to assure due process of law in criminal proceedings but not only in criminal proceedings.

# *Constitutionalism in Africa:*

## *Emerging Trends*

*Mpazi Sinjela\**

### **Introduction**

Sub-Saharan Africa is going through a revolutionary change in its political and constitutional orientation. Ever since the demise of communism, a number of African countries which had adopted the Soviet political system found their constitutional model uprooted over night. Within a short space of time, their constitutional model was deprived of its basis and essence. The ruling circles in these countries had to change if they did not wish to face political annihilation or extinction from the face of the earth.

It is to be recalled that, at independence, most African countries adopted a "Westminster" or a "Gaullist" constitution model after that of the United Kingdom, France or Portugal, the former colonial States. However, most Sub-Saharan countries started shif-

ting away from these types of constitutions, which were viewed as having been imposed upon them by departing colonial States. It was argued that these constitutions were not a suitable vehicle for creating unified States from the different and fragmented nations often mixed in the pre-independence era.<sup>1</sup> Furthermore, a competitive system modelled after that of Western democracies was considered to be unsuitable for bringing about economic development. While Western type democracies encouraged political competition and rivalry, the same was, however, considered to be time wasting and a detraction from economic development programmes set out by these countries. Political parties were themselves often considered to be tribally oriented and said not to be national in character. A multi-party democracy was considered to encourage tribal division and conflict,<sup>2</sup> and was, therefore, undesirable.

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- 1 It has been observed that, «In the developing countries, constitutions were expected to carry a much heavier burden. They had to foster a new nationalism, create national unity out of diverse ethnic and religious communities, prevent oppression and promote equitable development, inculcate habits of tolerance and democracy, and ensure capacity for administration»; See Yash Ghai, «The theory of the State in the Third World and the Problem of Constitutionalism», *Connecticut Journal of Int'l. Law*, Vol. 6, p. 416 (1991).
- 2 See Peter Slinn, «A Fresh Start for Africa? New African Constitutional Perspectives for the 1990s», *Journal of African Law*, Vol. 357 p. 1.

The protagonists of the above arguments led the way for the elimination of multiparty systems of government and their replacement with single-party dictatorial regimes. Where a peaceful transition to a one party rule was not possible, civilian governments were overthrown by force and were replaced by military rule.<sup>3</sup> Particularly prone to military coups were former French colonies.

It is also to be recalled that most of the single-party or military regimes, such as those of Mobutu Sesse Seko of Zaire and Kamuzu Banda of Malawi lasted for more than thirty years due to support from some Western governments. This support was rendered because of Western government's pursuit of narrow selfish interests and counteracting the spread of communism. There was gross violation of human rights in most of these countries, but such violations were condoned.

The political changes in Eastern Europe signalling the end of the Cold War meant that African totalitarian regimes were no longer needed by the West by virtue of their strategic or geographical location.<sup>4</sup> No longer supported but condemned for gross violation of human rights, these dictatorial regimes had to succumb<sup>5</sup> and give way to a new order. A hurricane of political change in Sub-Saharan Africa ensued.

## Political Pluralism

A review of the political reforms taking place in most African countries indicates a return to the old constitutional political order of the independence era. Unlike the constitutional order in the one party State, the emergent new constitutional order includes elaborate human rights provisions and attempts to curb the autocratic power of the executive branch of government.

3 In connection with Africa's experience with constitutionalism, it has been observed that: Africa's experience with constitutionalism has not been a happy one in the thirty years since most Sub-Saharan countries became independent. The great enthusiasm of the early 1960s that greeted new constitutions providing for democracy, the rule of law, and guarantees of human rights has, in many places, been dashed by military coups, emergency decrees, suspension of constitutional guarantees, and autocratic, abusive rule. See J.W. Salacusa, *Third World Legal Studies*, p. xi, (Foreword) (1988).

4 Filip Reyntjens observes that: «The events in Eastern Europe have effectively ended the Cold War, including its extension into Africa under different forms. This has put an end to the inclination, on the part of Western countries, to support regimes that are authoritarian or worse, but 'friendly' to keep communism out. A major reason for condoning gross human rights violations and dictatorships has thus disappeared». See «The Winds of Change. Political and Constitutional Evolution in Francophone Africa, 1990-1991», *Journal of African Law*, Vol. 35, p. 44 (1991).

5 See, for example, Peter Mutharika who expresses the view that Kamuzu Banda was abandoned by the West as a result of the end of Cold War and collapse of *apartheid* in South Africa. *Journal of African Law*, Vol. 40, p. 205 (1996).

The independence of the judiciary is asserted. Under one party rule, the executive branch wielded wide and all embracing powers. The Courts were stripped of any meaningful power to check against abuse of power by the executive branch of government. As a result of this lack of accountability, the principle of good governance was impaired. Corruption was rife and abuse of power could not be questioned. This lack of accountability weakened political institutions. Consequently, economic development stagnated throughout Sub-Saharan Africa.<sup>6</sup>

The wind of political change taking place in Sub-Sahara Africa has been viewed as presenting a window of opportunity through which to press for more political reforms and the establishment of democratic pluralist systems of government. Towards this end, Western governments have been linking political reform of institutions to economic assistance. It has been

asserted that aid should be given to governments with a view to promoting political reform and promotion of good governance. Such aid would be withheld where a government fails to meet the litmus test of "political conditionality". It has been further asserted that democracy should be a condition for any meaningful relationship with a donor country.<sup>7</sup> The guiding principles for support of any government, it has been stressed, should be based on its record of performance in establishing a pluralist government that is accountable to the public and respects the rule of law and human rights. A repressive and corrupt government should therefore not be supported. The objective in giving aid only to those countries that meet this conditionality is desired to foster good governance which would promote "respect for the rule of law, freedom of the press, protection of human rights, and institutions which make government accountable to the governed".<sup>8</sup>

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6 A report of the World Bank on Sub-Saharan Africa has observed that «A root cause of weak economic performance in the past has been the failure of public institutions. Private sector initiative and market mechanisms are important, but they must go hand-in-hand with good governance - a public service that is efficient, a judicial system that is reliable, and an administration that is accountable to the public». See *Sub Sahara Africa: from Crisis to Sustainable Growth*, p. xii (189).

7 The British Foreign Secretary put it bluntly that:  
Countries that tend towards pluralism, public accountability, respect for the rule of law, human rights, market principles, should be encouraged. Governments which persist with repressive policies, corrupt management, wasteful discredited economic systems should not expect us to support their folly with scarce aid resources which could be better used elsewhere.

Speech given to the Overseas Development Institute I London on 6 June, 1990, reprinted in *Human Rights in Foreign Policy*, (Annex), Foreign and Commonwealth Office, London, 1991.

Similarly, M. Mitterrand at a Franco-African summit considered democracy to be the precondition for warm relations with France. See Reyntjens, *op.cit.*, p. 44.

8 Peter Slinn, *op. cit.*, p. 4.

## New Trends in Constitutional Law-Making: High Premium Placed on Protection of Human Rights

A survey of the newly adopted constitutions across Sub-Saharan Africa demonstrates an increased emphasis on individual human rights. The independence of the judiciary is asserted. In many countries, a human rights commission has been established to guarantee respect for human rights. Yet in others, an ombudsman has been appointed to hear and investigate human rights complaints.

A close look at some of the recent constitutional amendments signals a resolve to move away from repressive tendencies towards a more egalitarian society. This resolve is particularly noticeable in countries that had experienced harsh dictatorial one party or military regimes. A Bill of Rights has been included in a number of new constitutions.

The South African Constitution is an excellent example of an egalitarian Constitution emergent after years of oppression. The new Constitution is the supreme law of the land. It provides for an independent judiciary, an enforceable Bill of Rights which guarantees fundamental human rights, including the right of free speech, religion, assembly and movement.<sup>9</sup> Furthermore, to ensure a liberal interpretation of Constitutional provisions

regarding the protection of individual human rights, Article 35 (1) requires the Courts to have regard to public international law in interpreting the Bill of Rights. As an added safeguard, a ten-member Human Rights Commission is established, charged with the mandate of, *inter alia*, reviewing any proposed legislation *vis-à-vis* the Bill of Rights and international human rights norms and standards. The Commission is required to advise the relevant legislative bodies regarding the constitutionality of any proposed legislative measures *vis-à-vis* the Bill of Rights.

The Namibian constitution is yet another example of an egalitarian constitutional model born out of severe repression and abuse of individual human rights. It too contains a vast array of human rights provisions and safeguards against abuse of power. The Constitution places emphasis on life and liberty of the individual and on human dignity. Torture, and cruel, inhuman and degrading treatment are outlawed.<sup>10</sup>

The Ombudsman has been given wide powers and a range of responsibilities which include offering assistance to persons alleging that their fundamental rights or freedoms have been infringed upon. Other general powers of the Ombudsman include the investigation of complaints against officials alleged to have violated fundamental human rights and freedoms,

9 See Gretchen Carpenter and Margaret Bewkes, «The Path to Constitutional Democracy in South Africa: An Update», *Journal of African Law*, Vol 36, p. 169.

10 Article 8 of the Constitution. See also Jill Cotrell, «The Constitution of Namibia», *Journal of African Law*, Vol. 35, p. 71.

abuse of power, unfair, harsh, insensitive or discourteous treatment, manifest injustice, corruption or conduct that would be regarded as unlawful, oppressive or unfair in a democratic society.<sup>11</sup>

The Tanzanian Constitution is yet another Constitution that has recently gone through an amendment to include a Bill of Rights. This Constitutional amendment has been hailed as having "marked the beginnings of a reassertion of legality in the administration of the State".<sup>12</sup>

The new Malawian constitution follows the model of a country emerging from a totalitarian regime. The new constitution proclaims the independence of the judiciary. The courts are required to exercise their powers independent of any person or authority.<sup>13</sup> The Constitution also provides a Bill of Rights; all three branches of government are bound to observe its provisions. The institutions of Ombudsman and Human Rights Commission have also been established. According to Section 123 of the Constitution, the Ombudsman is charged with the responsibility of investigating cases in which an individual

has suffered an injustice. The Human Rights Commission, on the other hand, is charged under Article 129, with the responsibility of investigating cases involving allegations of human rights violations.

The constitutional reforms in Francophone African countries have demonstrated an even more rapid and radical change than in Anglophone countries.<sup>14</sup> By the beginning of the 1990s, multiparty systems had been introduced in almost all Francophone countries. The constitutional reforms accompanying the political reforms have also signalled a return to the independence constitutions modelled after that of France. Like in Anglophone African countries, the new Constitutions include an array of human rights provisions. A mechanism for safeguarding human rights has been established. This includes the establishment of Constitutional Courts or the office of an Ombudsman.<sup>15</sup> In Mozambique, (a former Portuguese colony), a Constitutional Council is established instead, and is charged with determining the constitutionality of acts of the organs of the State as well as supervising elections and referenda.<sup>16</sup>

11 Article 48 of the Constitution. See also Jill Cortrel, *id.*

12 J.M. Mwaikusa, «The Limits of the Judicial Enterprise: Judicial Powers in the Process of Political Change in Tanzania», *Journal of African Law*, Vol. 40, p. 243.

13 See Peter Mutharika, «The 1995 Democratic Constitution of Malawi», *Journal of African Law*, Vol. 40, p. 215.

14 Reyntjens observes that «In Francophone Africa in particular, virtually no country has been untouched by the wave of political reform», *op. cit.*, p. 44, and that «Compared to the marked evolution in the French and Portuguese speaking countries, Commonwealth Africa seems to be lagging behind». *Id.*, p. 53.

15 Reyntjens, *Op. Cit.*, p.51.

16 M. Hall and T. Young, «Recent Constitutional Developments in Zambia», *Journal of African Law*, Vol 35, p.112.



## Conclusion

There is a swift political change taking place in Sub-Saharan Africa in which monolithic dictatorial rule is giving way to multiparty systems in which the government is being called upon to account to the governed. The power of governmental authority is increasingly being restricted through various checks and balances. The protection of individual human rights is also increasingly being asserted through the inclusion of a Bill of Rights which is to be enforced by an independent judiciary.<sup>17</sup>

These positive changes are welcome. However, in order to safeguard them, it is necessary to strengthen the various governmental institutions, particularly the judiciary that must uphold the rule of law and pronounce on any abuse of power, regardless of the position of the abuser in government. No individual or institution should be above the law. It is also necessary to ensure that the checks and balances are instituted in order to prevent any individual from ever acquiring a monopoly of power.

The protection of human rights should be at the core of every constitutional amendment. In order to ensure that individual human rights are pro-

tected and guaranteed, a Bill of Rights should be included in every Constitution.

Having made a full circle in her experimentation with various constitutional law models, it is hoped that Sub-Saharan Africa has finally completed her search for a viable constitutional model. The new political order must ensure that any constitution being promulgated must be "legitimate, credible and enduring, that guarantees rights and freedoms perceived to be fundamental, and that provides structures for the effective conduct of the nation's business, for the achievement of its economic development and for the welfare of its citizens."<sup>18</sup> It is hoped that the changes will be lasting and will lead to the establishment of viable democratic governments based on the rule of law and the respect of humans rights.

In a new democratic constitutional order energies which would otherwise be spent on fighting repression can now be spent on economic and social development of the people. Good governance will foster accountability of the governors to the governed and will lead to economic and social development in which human rights and the worth of the individual can fully be realized by all.

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17 Muna B. Ndulo and Robert B. Kent, «Constitutionalism in Zambia», *Journal of African Law*, Vol 40, p. 277.

18 Id, p, 256.

# *The Rule of Law and Political*

## *Liberalisation In Africa*

*Amedou Ould-Abdallah\**

### **I - Introduction**

The political climate in Africa has changed considerably in the past ten years, and there has been a significant degree of political liberalisation throughout the continent. Most countries now have elected governments, and are in the process of political transition, although to varying degrees. Moreover, better informed public opinions and a new generation of political leaders is coming to the fore, replacing the "big man" autocrats who largely dominated African politics since independence. However, this is not cause for complacency. As the experience of recent years has shown, the trajectory of political transition will not be uniform, and the process itself will not necessarily be smooth. Equally importantly, political transition may not result in a functioning democracy, and it is not certain that democratic regimes will be consolidated effectively. In some instances the process of democratisation may be stalled or blocked by those seeking to maintain the *status quo*, in others incumbents may try to control and direct the process, in yet others governments may be democratically

elected, but democratic governance will remain elusive. Elections alone do not create democracy, and much needs to be done to develop and strengthen the institutions of State and society which are central to the process of democratisation.

This paper focuses on two of the basic building blocks of democracy - constitutions and the rule of law. It first considers reasons why neither constitutions nor the rule of law were effectively consolidated in most of post-colonial Africa, and discusses their importance to good governance and to democracy. It then points to some of the requirements for strengthening the rule of law and building effective legal systems, before suggesting some of the constitutional and legal issues which African countries undergoing the process of political transition will most probably have to address.

### **Post-Colonial Experience**

Many African countries began their post-colonial existence with inherited liberal democratic systems in

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place. They had constitutions which provided for the separation of powers, independent parliamentary bodies, judiciaries and civil services, and a degree of political openness, including recognition of political parties and political representation. However, within a relatively short space of time, most were transformed into one-party States, either through deliberate political action or by default. In some cases, single-party structures were established after military coups ousted civilian governments, while in others the single-party monopolistic system was enshrined in re-written constitutions by civilian governments. The widespread adoption of the one-party State throughout the continent, though varying in degree, was perhaps the single most important reason for the erosion of constitutionally protected rights and the retreat from governance based on the rule of law witnessed by many African countries from independence to the late 1980s.

The ideological basis for the African single-party State was a combination of the colonialist precedent, marxist/social democratic idealism, and African traditions of consensus politics. Colonial rule had demonstrated the "efficiency" of centralised undemocratic government. Marxism as an ideology was in ascendance throughout the developing world at the time that most African countries gained independence, and promoted the idea of a vanguard party which would lead the masses to economic and social development. The African tradition of consensus politics provided a cultural framework for those leaders of anti-colonialist struggle who

were so inclined to argue that multi-party political systems were both "unafrican" and unnecessary at a time when all Africans shared the same goals of self-governance and development. Moreover, proponents of single-party structures argued that they were necessary to promote national unity, while in some instances the former colonial powers actively supported one leader in order to perpetuate their own influence. The military governments which took over in some countries justified their existence on the grounds of defending the nation against corrupt civilian politicians.

In most instances, over time, the State and the ruling party became indistinguishable, and membership of the party was a requirement for social and political advancement. To ensure conformity - or at the least to combat overt resistance - to the prevailing ideology, community and civil society organisations were coopted by the party, the activities of religious groups were curtailed, the media was taken over by the State, and other political groupings were either banned or suppressed. Traditions of legal challenges to non-constitutional actions by the State did not exist in most countries, given their colonial past. In any event, once the single-party State became all encompassing, as it did in many countries, the means to mount those challenges were effectively curtailed. In some cases, the apparatus of control became more repressive, and for the most part those outside of the State-party hierarchy found themselves increasingly excluded from power and influence.

Eventually, in almost all countries which adopted single party politics, both the legislature and the judiciary lost their independence, and either became adjuncts to the State and the ruling party, or were denied the human, financial and technical resources to function effectively. In military regimes, they often found themselves overruled and disregarded. In some instance, constitutions were ignored, especially if their provisions had never been translated into law, and in others they were re-written to explicitly limit the independence of the judiciary and the legislature, and to concentrate power in the executive.

### **Human Rights, Constitutions, and the Rule of Law**

Governments, in principle, should ensure that the rule of law predominates. In instances whereby the government is unable to do this, its ability to govern is called into question. In instances in which the government itself violates the basic tenets of rule of law, it cannot be said to govern lawfully. Democratic governments which behave in an unlawful manner will be voted out of office, while autocratic regimes tend to enter into an ever-increasing spiral of repression in order to stay in power. The legacy of such brutal regimes is often a popular disregard for the rule of law, and a lack of trust in political and legal processes. Countries coming out of violent conflict often face the same problems.

The existence of a constitution, in which basic rights are enshrined, and which is not subject to governmental

manipulation, contributes greatly to a sense of security and predictability. However, if constitutions are to be effective, they need to be relevant to the needs of the people. They also need to be supported by legislation, and upheld by both the State and civil society. The mere existence of a constitution, however comprehensive, will do little to create a stable environment for democracy and development unless people know and understand its provisions, have faith that their governments will not overrule it, and believe that their rights as promulgated within it, will indeed be upheld. Therefore, the existence of an independent judiciary and legislature, a free and competent press, and a vibrant civil society are all necessary to ensure that constitutional provisions are translated into reality.

Most constitutions of African countries embody the rights and freedoms defined in international charters such as the Universal Declaration of Human Rights, the African Charter of Human and People's Rights, and the International Covenant on Civil and Political Rights. Some constitutional provisions, such as those which cover participation in the process of governance through elections based on universal suffrage, lay the basis for democracy. Others, to the extent that they provide for the separation and limitation of powers, guard against the accumulation of power and arbitrary action on the part of the State. Other constitutional provisions guaranteeing freedom of speech, assembly and association, and the press, are fundamental to the existence of democratic governance, while the equality of all

citizens, including minorities and women, is a basic requirement of democratic societies.

The inviolability of the constitution is the essential principle which gives constitutions their symbolic significance. Without respect for this principle, constitutions are of little value, as the recent history of a number of African countries attests. In practical terms, issues such as the extent to which the constitution is generally recognised as the ultimate source of authority and the fundamental instrument for defining and upholding rights, whether the constitution can be amended or changed by the executive branch without a process of consultation, and whether and under what circumstances it can be suspended, are of central importance in ensuring that the principle of inviolability is respected.

In many African countries, constitutions have been re-written as part of the recent and on-going process of political transition. The re-writing has in some instances facilitated quite widespread participation in defining the political system to be followed. It is possible that the process of constitutional negotiation, and not just the constitution itself, may have an impact on the sustainability of democracy. Constitutions which are developed through a process of participation are likely to enjoy greater ownership, in that the process of negotiation serves to build both public support for the provisions of the constitution, and awareness of rights and responsibilities.

Rule of law is essential for a predictable, stable environment in which citizens are informed of their rights and have faith that such rights will be protected by an independent, functioning, legal system. Rule of law is also essential to curb corruption, and to promote a climate favourable to investment and private sector development. Additionally, acceptance of, and adherence to, the rule of law guards against arbitrary governmental action, provided that government officials accept that they are subject to, and not above the rule of law. An unfortunate legacy of single-party politics in some countries is that most people have little faith in either the legal system or the judiciary, and public confidence has to be re-built if the rule of law is to be institutionalised.

The basic concept underlying the rule of law is that the rights and duties of persons should be subject to a set of generally accepted and enforceable rules, and not to the arbitrary actions, coercion or use of force of those in power. Reduced to this basic concept, the rule of law is indeed a universal principle. In democratic societies, the rule of law comprises two components. The first is inherent in the term itself - law and law alone must be the yardstick for determining the rights and duties of individuals, and judging their conduct according to such rights and duties. The second is that the laws and the legal system which enforces them must be just. The concept of a "just" law is embedded in the idea of constitutional democracy, and is embodied in all of the international documents concerning human rights.

Thus, cruel and inhumane punishment is not normally accepted as just, even though it may be consistent with the prevailing laws of a society.

Rule of law requires a just legal system which has certain attributes. A just legal system is most often based on a constitution or similar document, which not only enshrines the basic rights of individuals but also provides for the system of governance and the maintenance of an orderly society. A basic attribute of a just legal system is that it must ensure the personal safety of members of society, and thus penalise acts of aggression, and provide for effect sanction against the aggressor. Although applying for the most part to individuals, this attribute also covers acts of aggression by the State. Those universal human rights which can be classed as the "freedoms from" - freedom from arbitrary arrest, detention, torture, and cruel and inhumane punishment - fall under this attribute. Most legal systems have provisions which permit this attribute to be disregarded in extreme circumstances, but it is important to note that these are exceptions, and must be treated as such. When the exceptions become the rule, as they have under certain autocratic regimes, the whole concept of rule of law is abandoned.

Another basic attribute of a just legal system is that it declares unwarranted aggression and trespass against personal property to be unlawful. The right to own property and the legal protection of such property is attenuated with respect to nationalisation or expropriation of property, both of which have occurred in the past in

some African countries. In the event that the expropriation of private property is declared to be in the national interest, adequate compensation should be made. Freedom of ideological and religious belief and the expression of such belief, and freedom of movement and association are other fundamental attributes of a just legal system. In multicultural societies, these freedoms attain greater significance.

With regard to its own functioning, a just legal system requires that individuals be subjected to as few constraints as possible, and that the province of the law does not extend beyond that which is absolutely essential for the maintenance of public security, the protection of individuals, and the guarantee of basic rights. It also requires that there is provision for judicial discretion. Legal rules, which are essentially an abbreviated form of general principles of justice, lay the framework for acceptable behaviour, but these rules need to be applied to suit specific circumstances if rule of law is to prevail.

In the application of justice, a fundamental principle is that no person should be found guilty of an offence if the act did not constitute an offence at the time it was committed. A corollary of this is that no person should be sentenced to a punishment more severe than that with which the offence was punishable at the time it was committed. In autocratic regimes, both of these fundamental principles tend to be ignored. Another basic attribute of a just legal system is that laws should serve a public purpose and should be legislated with the object of regulating

general conduct. Laws which are passed with the specific intent of penalising a particular individual, or group of individuals, are unjust. However, such laws are a common feature of non-democratic regimes.

### **Promoting the Rule of Law and Developing Effective Legal Systems**

Promotion and maintenance of the rule of law requires an adequate and functioning legal system which can both meet the demands of a rapidly changing environment and ensure the protection of basic rights. Given their recent past, this is a major challenge which a number of African countries are now facing. Although the constitutions adopted by most countries are comprehensive and in line with internationally accepted norms, the problem is to ensure that the provisions of those constitutions, and the rights enshrined in them, are upheld by the rule of law. In many African countries, the legal system itself will require strengthening, and the following are among the problems which will probably have to be addressed.

#### **Independence of the Judiciary**

The independence of the judiciary is a key element of an effective legal system. Since the onset of political liberalisation, judiciaries have begun to assert their independence in many countries. However, this needs to be institutionalised and checks and balances put in place to ensure that the judicial system is free from political interference. Issues such as the

appointment of members of the judiciary, and the responsibilities of oversight bodies still need to be addressed in a number of countries, while the shortage of well-qualified and experienced candidates continues to limit legal professionalism.

### **Legal Training and Skills Development**

As with other sectors, individual and institutional capacity-building in the legal profession is required in the majority of African countries. In many instances, highly competent and well-qualified people exist at the most senior levels, but a "hollowing out" of the profession has occurred, due in part to low salaries and poor conditions of employment. Past actions, which in some instances banned private legal practice, have also meant that there is a shortage of legal expertise in a whole range of areas which are becoming increasingly important. This is worsened in many cases by a shortage of law clerks and ancillary staff.

#### **The Court System**

Developing an effective and just legal system requires more than the independence of the judiciary and the existence of appropriate legal expertise. A functioning court system is also central to the concept of due process. Unfortunately, this is the least developed aspect of the legal system in a number of African countries, in part due to lack of resources. In some instances, even the physical infrastructure is woefully inadequate. Among other things computerized record keeping, access to reference documents, and research

and library facilities would greatly improve the functioning of the court systems in many countries.

### **Revision of Legislation**

A number of countries are faced with the need to both develop new legislation and to revise existing laws. New constitutional provisions need to be translated into law. At the same time, the outdated and often repressive legislation which remains on the statute books needs to be removed or revised. Moreover, the move to more liberal economic systems, privatisation, and the development of the private sector demand new laws, as well as appropriate legal expertise. In addition, globalisation and the new international trading environment require that individual countries enact a range of legislation to bring them in line with international standards.

### **Establishment of Watchdog Bodies**

The establishment of independent watchdog bodies such as the office of the *ombudsman*, anti-corruption agencies, and human rights and electoral commissions which report to parliaments, can be very helpful in promoting the rule of law. Such bodies, provided that they function effectively, send a signal that no-one is above the laws, and that there is recourse in cases of abuse of the law. However, to function effectively, such bodies need to be independent in action, and not just in name, and also require adequate human and financial resources. Although many African countries have established such bodies

in the process of political liberalisation, their track record to date is mixed.

### **Information and Legal Access**

Provision of information about rights, and access to the legal system, are essential if rule of law is to prevail. Comprehensive constitutional and legal provisions, though laudable in principle, are relatively meaningless in practice if people are unaware of them. Moreover, public awareness is the only way to guard against abuse or abandonment of rule of law by those in power. The role of an independent press and civil society organisations in building public awareness, and immobilising public opinion around specific issues is crucial. In most countries, democratisation has resulted in a much more vibrant independent press and civil society. However, in many instances both the professionalism and genuine independence of the press and civil society organisations need to be built. Access to justice, though certainly improved, also remains an issue in most African countries, particularly for the poor and those outside of major urban centres. Provision of legal aid, and development of paralegal services and citizens' advice centres, would greatly improve legal access in most countries, and there are some innovative experiences which could be built upon.

### **Constitutional and Legal Issues**

Obviously, the specific constitutional and legal issues which will arise in countries undergoing political transition will depend on the particular



circumstances which pertain in the country, as well as on its recent past. The following are some of the issues which may, however, be faced by a number of countries.

### **Land Rights and Land Tenure**

Many African countries have to resolve problems of land tenure and land ownership. In some instances, private ownership and inheritance of land was made illegal under single-party regimes, while in others land which had been previously privately owned was expropriated by the State. In such cases, although land can now be owned by individuals, establishing ownership can be a complex process. Even in countries where private ownership of land was always permitted, registration and records of change of ownership are often incomplete. The problems are exacerbated in countries in which conflict led to displacement of large numbers of people, in those where communally owned land was acquired by commercial enterprises, or where there are land shortages. Land issues are a political, as well as a legal problem in many countries. Some are faced with the need for land redistribution, while in others land grabbing by politicians or those in positions of influence has been a cause of tension. In some instances, women do not enjoy equal rights under law to own or inherit land. Land ownership and the right to inherit land can also have an economic impact, as people are unlikely to invest unless they feel that they have some security of tenure.

### **Property Rights**

Property rights are closely linked to land rights in many countries, where similar policies were applied to the private ownership of land and of property. Property rights, and the legal basis for transfer and sale of property, are becoming increasingly important as countries try to encourage private investment and private sector development. Indeed, lack of security of property rights and of lack of contract enforcement mechanisms are among the major constraints to private investment. As with land, people are unwilling to make the longterm investments which provide employment and promote economic growth if they feel that their investments may not be secure. In some countries, past arbitrary governmental action with respect to property contributed significantly to both the crisis of governance and the economic downward spiral which those countries then suffered. To a certain extent, the legacy of such actions persists and is a constraint to development, as people still lack the confidence that their investments are safe.

### **Citizenship**

Democratisation has focused increased attention on citizenship, in terms of both who is eligible to vote, and who is eligible to stand for political office. There is concern that countries will invoke extremely stringent citizenship laws, thus effectively disenfranchising large segments of the population. There is also a danger that political liberalisation may give rise to attempts by politicians to

change citizenship laws for their own advantage. Indeed there are instances in which more restrictive citizenship laws appear to have been applied in order to exclude particular candidates from standing for election.

Changes in citizenship rights to make them more restrictive could result in political disruption, particularly, in multiethnic countries, if it appears that particular ethnic groups are being targeted. Restrictive citizenship codes also play into the hands of those who want to increase ethnic tension. Conversely, more liberal citizenship laws will potentially diffuse ethnic conflict - which remains a significant challenge to democracy in Africa - by permitting more people to participate in the political process. They can also help to develop a sense of common identity, which can be an important cohesive factor in multiethnic societies. Citizenship also affects economic development. Even more than land and property rights, the likelihood of people making longterm investments in a country if they do not feel their citizenship is protected, is extremely limited.

Concerns over citizenship and nationality laws have also come to the fore because of ethnic conflict and the status of refugees. Many African countries harbour refugees, either in official refugee camps or in informal settlements. In some instances, over time, refugees have become integrated into local communities, often of the same ethnic group. In others, they have settled in neighbouring countries long after the original conflict if over,

though remaining in separate communities. More stringent, and more stringently applied, citizenship laws could lead to the expulsion of those persons not under the protection of formal international refugee agreements, or to hostility toward them by local communities. It can also, has been seen, lead to large numbers of people who have been either living in an area for many years or have been born there, being stripped of their citizenship. The protection of minorities, and the rights afforded to minorities, is closely linked to issues of citizenship.

### **Maintenance of Civil Security**

The effective maintenance of civil security is becoming a pressing issue in many African countries. In some, a willingness to resort to violence in the case of dispute is the legacy of protracted civil conflict. While generations of young people have grown up knowing nothing but war and civil unrest. In others, general lawlessness and crime are the consequence of years of poor governance and lack of employment prospects. The proliferation of small arms, a result of armed conflict and porous borders, as exacerbated the problem, while rapid urbanisation has stretched the capacity of municipal authorities to maintain law and order. For the most part insufficient attention has been paid to the development of politically neutral and professional civilian police forces, due largely to a past tendency to rely on the military and security forces to maintain civil order.

## Corruption

In Africa, as elsewhere, single-party politics and command economies created the conditions for corruption. Corruption is worse in those countries where institutions such as the judiciary and the legislature are weak, where rule of law and adherence to formal rules are not rigorously observed, where political patronage is standard practice, and where civil society lacks the means to bring public pressure to bear. Once established, democratic political systems and open economies provide the best opportunities for controlling corruption. In periods of transition, however, when one set of rules and norms has broken down, and another has not yet been institutionalised, corrupt practices can flourish. Although legal solutions alone are insufficient, they are an essential part of any anti-corruption strategy. Of course, a fundamental requirement is that the judicial itself is not corrupt, but legal sector corruption is a regrettable legacy of single-party politics in some countries. Until corruption and political influence over the judiciary are curbed, neither rule of law nor effective governance will be possible.

## Political Party and Campaign Finance

Most of the recently-revised constitutions of African countries make provision for the existence of political parties and broadly define the electoral system to be followed. In an attempt to guard against past practices, many specify term limits for elected officials, including the presi-

dent. Legislation emanating from such constitutional provisions has for the most part been effective in establishing the basis for the formation and functioning of political parties, but has generally been less so with regard to their funding. As experience with multiparty elections grows, the problems of campaign finance and funding of parties are increasingly coming to the fore. Opposition parties frequently complain of the lack of a level playing field, and of the of excessive advantages of incumbency. In addition, many opposition candidates say that inequality in access to resources essentially tilts the balance in favour of those already in power.

## Conclusion

As African countries develop more open, participatory political systems, there is need for both effective formal rules and behavioural change. Africa's recent past has shown that one without the other is insufficient to ensure good governance. Formal rules can give the outward appearance of democracy while non-democratic behaviour continues. Conversely, behavioural change which is not accompanied by changes in formal rules can be short-lived, and - as experience has shown - freedoms can easily be reversed and repression reintroduced. There is no guarantee that the current process of democratisation in Africa will continue or be sustained. But continued strengthening of the rule of law will help to institutionalise it. Rule of law provides the formal rules

by which societies can be governed and also induces democratic behaviour by providing redress and sanction in cases of abuse. In short, by providing for the promotion and protection of human rights, governance

by the will of the people, and countervailing forced to balance the power of the executive, the rule of law lays the cornerstones of democracy. The rest is up to the people of African countries themselves.

# *Africa and the Universal Declaration of Human Rights*

*Kofi Kumado\**

When, on 10th December 1948, the General Assembly of the United Nations adopted the Universal Declaration (by 48 affirmative votes, none against and 8 abstentions) as a common standard of achievement for all peoples and all nations, most of the present member States of the Organisation of African Unity were still under colonial rule. The participation of Africans in the formulation of the Universal Declaration was therefore negligible. Are we in Africa then entitled to question its claim to universality or the extent to which its standards are common for all peoples and nations?

From one perspective, the Universal Declaration constituted merely the completion of the unfinished business of setting up the agenda for the United Nations commenced in its Charter. For, as is well-known, the UN Charter defines its purpose to include the promotion of international peace and security, the development of friendly relations among nations based on respect for equal rights and self

determination, cooperation in solving international problems of an economic, social, cultural or humanitarian character and the promotion of respect for human rights and fundamental freedoms. Viewed from this angle, its claim to reflect human values which are universal to mankind would seem to be unquestionable.

As the Secretary-General of the International Commission of Jurists noted in his address marking the 36th anniversary of the Universal Declaration, its adoption in 1948 was historic and ground-breaking because for the first time, an international organisation had been created with the object of promoting human rights. At that time, many of those who worked assiduously to formulate it hoped it would derive its strength in part from being perceived as an authoritative interpretation of the obligations which States assumed in subscribing to the Charter. UN practice which has given it almost equal status with the Charter has helped to solidify its foundations. Professor Sohn of Harvard Law

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School was right when he observed some thirty years ago that the practice at the UN had made the Universal Declaration a part of the constitutional law of the world community and together with the UN Charter constituted a world law superior to all other international instruments and to the municipal laws of the member countries of the UN.

The adoption of the Universal Declaration shortly after the Second World War and its provisions respecting self-determination and anti-colonialism - all of these factors established a consciousness, at the international level, of the nexus between peace, national independence and human rights. It ensured that thereafter nobody would require that this nexus be proved but rather that our collective energies would be more gainfully employed on trying to sharpen the tools for their attainment.

One of the greatest achievements of the framers of the Universal Declaration was the refusal to subordinate the rights therein contained to national law or to use language that may have achieved such subordination and the clear recognition between human rights and peace. Confronted as we are in this nuclear age with the question of how to survive in peace in an unjust international system, in the face of religious persecution, military dictatorships, State repression and racial discrimination, the preamble to the Universal Declaration serves as a constant reminder to us of the nexus between human rights and peace when it declares poignantly,

It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and repression that human rights should be protected by the rule of law.

Another factor which has made the Universal Declaration both attractive and enduring is that, contrary to the claim by some myopic scholars, it did not encapsulate any particular ideology or the political philosophy of any country. It thus sent to the world a loud and clear message that its concern was with the dignity of the human being. Nor was it concerned solely with the rights of the individual. Due recognition was given to collective rights or what is referred to in the contemporary literature and jargon as solidarity rights as well as the obligations which the individual must shoulder side by side with his rights. And so the then President of the General Assembly of the UN, Dr. Evatt of Australia could declare at the end of the voting that,

millions of men, women and children all over the world will turn for help, guidance and inspiration to this document.

For us in Africa, it will be wrong to interpret the Universal Declaration in Eurocentric terms or to put an ideological tag on it. The truth is that in the contemporary interdependent and interpenetrating global society of ours, the Universal Declaration and the emerging international law of human rights it has engendered serve as the web around which our hopes for a better and more just world are woven.

Those simple but vague words enshrined in the Universal Declaration ring even more true for us today, especially in the face of the retreat by the rich and developed countries from multilateralism in their international relations to bilateralism - a process which emphasises the strengths and interests of States rather than the welfare of the world community as a whole. In any event, today, forty years since its adoption, if further proof of its universality and its closeness to African thinking on human rights were thought necessary, one only needs to compare the language of the Universal Declaration with the African Charter on Human and Peoples Rights which became operative in October 1986.

There is no doubt that the material and concrete conditions in Africa are difficult. Apart from having to contend with an unfair, unfavourable and unhealthy international economic system, Africa is also faced with poverty on a massive scale, ignorance and disease. Further, there is the debt problem, the solution of which has compelled many African governments to engage in painful and imposed structural adjustment programmes, the human costs of which are only beginning to be appreciated by the international community.

Besides, the fragility of our national systems has meant that those who wield power in Africa have a ready and sometimes plausible excuse for concerning themselves with matters not always conducive to human rights' observance. The first has been the predominance of national independence over supranational regimes for dealing

with the continent's problems. This preoccupation with defending national independence has created almost a fetishistic attachment to the principle of non-intervention in the internal affairs of countries. This attachment has created a near-unanimity in being hostile to any claim that there are higher standards (e.g. universal human rights) with which the sovereignty of each African State may be measured either by the world community or by their brother States. The third norm is the sanctity of the national boundaries inherited from colonial times. Indeed, in some cases the Universal Declaration may well be treated as part of the threat by African governments. How, for example, is the right to self-determination to be treated in the face of unbending faith in pre-independence national boundaries within the context of ethnic multiplicity and scarce resources?

But Africa's predicament, whether social or economic needs more than additional resources to resolve it. A vital element which is missing is the need to situate our governments in the support of their people. There is no denying the fact that many of the rulers in Africa today lost the support of their people a long time ago and, apart from the military elite which keeps them in power, have ceased to be accountable to anyone. If the economic reform packages being instituted by various African governments are meeting with lukewarm response from the populace at large, it is not so much the fact of their constituting painful medicine as the loss of confidence in the leadership. For the hard truth today is that, for most African people,

government has become merely a source of patronage; an inefficient arm of State power maintained against the wishes of the people by monopoly over the coercive apparatus of the State. The argument that a certain system of rule is indigenous to the African and provides the best vehicle for harnessing scarce resources, overcoming ethnic divisions and moving forward in unity has long lost its credibility with the people.

The catalogue of what has been wrong with the African leadership is not difficult to recite. First, there are no checks on governmental authority. Except for a few countries, *Gambia* for example, the idea of constitutional government was killed a long time ago. Secondly, the institutions and organisations which could have developed as counter-weights to the executive have been destroyed, their functionaries detained and tortured or forced into exile. Thirdly, the concept of a free press is denied. What there is, is monopolised by government and bullied or sycophantic. Fourthly, the judiciary is not independent; the security of the judges who try to retain a certain measure of independence is constantly undermined by the government. Fifth, human rights are systematically abused, while sympathetic World Bank Officials and Western diplomats, more intent on acting as apologists for the international financial system than as watchdogs of human decency, file reports extolling the economic performance of the government. Sixth, legislation has ceased to be a deliberative and informed process. Parliament, where it exists, is seldom a forum for informed

national policy-making. Seventh, the Trade Union movement is too intertwined and dependent on central government goodwill to be effective, outside wage issues. In short, government as a deliberative process in which the society as a whole takes part, which was so much an integral part of the ethos of traditional society in Africa, has disappeared since independence.

In redressing the dismal picture just painted, admittedly, the developed world has an important part to play. First, the developed countries can continue to insist, more seriously and without undue regard for their so-called strategic considerations, that a country's human rights record will be an important factor in determining its eligibility for assistance. Secondly, they can be more generous in dealing with the debt problem of African countries. Thirdly, a human face ought to be put routinely on the kind of structural adjustment programmes that the World Bank, the International Monetary Fund and other multilateral or bilateral lending agencies are permitted to impose on reforming Third World countries in general and those in Africa in particular.

But the most important part in the enterprise of integrating human rights into the fabric of modern African States has to be played by the governments in Africa. The responsibility for freeing their citizenry and the media, for giving their citizens real choices, for securing the judiciary - in short for fostering constitutionalism in their respective countries, lies on them.



Authoritarian rule will only end in Africa when new ideas, African ideas, begin to determine the limits of power and the nature of political institutions.

To paraphrase a statement by the Nigerian Nobel Laureate, Wole Soyinka, the African political leadership must move quickly to replace "the divine right of force" to rule with popular will.

It is in the pursuit of these reforms that the Universal Declaration becomes even more relevant for Africa as we celebrate worldwide the 50th year of its adoption. Just as the Universal Declaration acted as the impetus for the emerging international human rights law, so also fresh and reinvigorated approaches to the propagation and observance of its values throughout Africa should ensure the necessary turnaround in the observance of human rights and the rule of law on the continent. Just as the Universal Declaration promoted a humanitarian outlook and consensus at the international level that became increasingly inhospitable to colonialism and contributed in no small measure to the acceleration of the decolonisation process, so should we look up to it for the development of that caring society we all hope for and should strive towards in the years ahead. But how do we achieve this movement forward on the wings of the Universal Declaration?

Candour would compel us to admit that the Universal Declaration, though timeless in its language, has its limitations. Such an admission need not make us despondent, however; for those limitations were its hidden

strength. In 1948, given the dominance of the States in international law and the near-unanimous denial of any room for the individual, a more ambitious programme for human rights, going beyond setting the agenda, would have been doomed to failure. Thus those to whom the task of formulating the Draft Declaration fell wisely confined the exercise to elaborating a universally-acceptable set of values in a language sufficiently vague to be flexible and adaptable to the changes in society.

Since then other human rights instruments have been developed within the UN system and regionally with different types of enforcement mechanisms. All draw their inspiration and strength from the trail blazed by the Universal Declaration. Today, 50 years later, few would deny that human rights have attained respectability.

But, as we celebrate the 50th anniversary of the Universal Declaration, one important task remains which we must continue to tackle vigorously. Indeed, for us in Africa, an assurance that it would be vigorously pursued is the only justification for being jubilatory at this period in our history. We must redouble our efforts to bring human rights out of the international instruments into the homes of the leaders and the governed in Africa. The ratification record of African countries in so far as it relates to the international human rights instruments is poor. No knowledgeable person would deny that if all independent African States were to translate the values embodied in these instruments including the

African Charter on Human and Peoples Rights into the daily lives of their citizenry the gain to the quality of life will be dramatic. The most important element in this reinvigoration process will be education, human rights education. For as Sir Richard Wild, then Chief Justice of New Zealand said three decades ago,

The law cannot itself guarantee human rights. Nor can any government. It is a rational and active public opinion that offers the best assurance of progress.

In Africa, this public opinion also needs to be informed.

We take heart and are encouraged to look forward to the future with

hope from the fact that the Assembly of Heads of State and Government of the Organisation of African Unity at the recent meeting in Ouagadougou, Burkina Faso, adopted a Protocol that adds a Court to the human rights regime in Africa [see Basic Texts]. Even more exciting is the fact that the Protocol was signed immediately by thirty States.

Let this 50th anniversary of the Universal Declaration provide us with the zeal to translate the human rights dream so eloquently captured in the various international and national instruments into reality by focusing more resolutely on the implementation mechanisms and promotional activities.

# *The Ghanaian Constitutionalism of Liberty*

Bertrand de Rossanet\*

## Introduction

The Ghanaian constitution is a remarkable document of liberty. On 28 April 1992, even in the eyes of the opposition at the time, "the people of Ghana expressed their sovereign will in a referendum and chose what is now the 1992 constitution" which "is essentially a liberal democratic constitution which guarantees respect for the rule of law and fundamental human rights".<sup>1</sup>

## The Blessings of Liberty

In the preamble the people of Ghana seek to secure "the blessings of liberty, equality of opportunity and prosperity". They made a solemn declaration and affirmation of their commitment to: freedom, justice, probity, accountability; the principle that all powers of government spring from the sovereign will of the people; the principle of universal adult suffrage; the rule of law; the protection and preservation of fundamental human rights and freedoms, unity and stability.

## Directive Principles of State Policy

In Chapter Six on the Directive Principles of State Policy the following political objectives are enunciated:

- 1) Ghana shall be a democratic State dedicated to the realisation of freedom and justice; and accordingly, sovereignty resides in the people of Ghana from whom Government derives all its powers and authority through this Constitution;
- 2) The State shall protect and safeguard the independence, unity, and territorial integrity of Ghana, and shall seek the well-being of its citizens;
- 3) The State shall promote just and reasonable access by all citizens to public facilities and services in accordance with law;
- 4) The State shall cultivate among all Ghanaians respect for fundamental human rights and freedoms and the dignity of the human person;

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1 B.J. da Rocha, Chairman, New Patriotic Party, in *The Stolen Verdict, Ghana, November, 1992*. Report of the New Patriotic Party, 5 March, 1993.

- 5) The State shall actively promote the integration of the peoples of Ghana and prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, gender or religion, creed or other beliefs."<sup>2</sup>

## **Fundamental Human Rights and Freedoms:**

### **A National Commission on Human Rights**

Chapter Five of the Constitution enshrines fundamental human rights and freedoms to be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and to be enforceable by the courts. Chapter Eighteen provides for establishment of a Commission on Human Rights and Administrative Justice with the following functions:

- a) to investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties;
- b) to investigate complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the Armed Forces, the Police Service and the Prisons Service in so far as the complaints relate to the failure to achieve a balanced structuring of those services or equal access by all to the recruitment of those services or fair administration in relation to those services;
- c) to investigate complaints concerning practices and actions by persons, private enterprises and other institutions where those complaints allege violations of fundamental human rights and freedoms under the Constitution;
- d) to take appropriate action to call for the remedying, correction and reversal of instances specified in paragraphs a), b) and c) above through such means as are fair, proper and effective;
- e) to investigate all instances of alleged or suspected corruption and the misappropriation of public moneys by officials and to take appropriate steps, including reports to the Attorney-General and the Auditor General, resulting from such investigations;
- f) to educate the public as to human rights and freedoms by such means as the Commissioner may decide; and
- g) to report annually to Parliament on the performance of its mandate.<sup>3</sup>

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<sup>2</sup> Article 35.

<sup>3</sup> Article 218.

## **A National Commission for Civic Education**

Chapter Nineteen provides for the establishment of this Commission, with the following functions:

- a) to create and sustain within the society the awareness of the principles and objectives of this Constitution as the fundamental law of the people of Ghana.
- b) to educate and encourage the public to defend this Constitution at all times, against all forms of abuse and violation.
- c) to formulate for the consideration of Government, from time to time, programmes at the national, regional and district levels aimed at realising the objectives of this Constitution.
- d) to formulate, implement and oversee programmes intended to inculcate in the citizens of Ghana awareness of their civic responsibilities and an appreciation of their rights and obligations as free people; and
- e) such other functions as Parliament may prescribe.<sup>4</sup>

## **Decentralisation and Local Government**

Chapter Twenty of the constitution provides that Ghana shall have a

system of local government and administration which shall, as far as practicable, be decentralised.<sup>5</sup> The institution of chieftaincy, together with its traditional councils as established by customary law and usage is guaranteed in Chapter twenty-two of the Constitution

## **Commissions of Inquiry**

The establishment of Commissions of Inquiry is provided for in Chapter Twenty-Three.

## **Code of Conduct for Public Officers**

A Code of conduct for public officers is provided for in Chapter twenty-four.

## **Political Parties**

The right to form political parties is guaranteed under the Constitution. Every citizen of Ghana of voting age has the right to join a political party and a political party is free to participate in shaping the political will of the people, to disseminate information on political ideas, social and economic programmes of a national character, and sponsor candidates for elections to any public office other than to District Assemblies or lower local government units.

Every political party must have a

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4 Article 233.

5 Article 240.

national character, and membership must not be based on ethnic, religious, regional or other sectional divisions. The internal organization of a political party must conform to democratic principles and its actions and purposes must not contravene or be inconsistent with the Constitution or any other law.

The State must provide fair opportunity to all political parties to present their programmes to the public by ensuring equal access to the state-owned media. All presidential candidates must be given the same amount of time and space on the State-owned media to present their programmes to the people. Every candidate for election to Parliament has the right to conduct his campaign freely and in accordance with law.

Political parties are required by law

- a) to declare to the public their revenues and assets and the sources of those revenues and assets; and
- b) to publish to the public annually their audited accounts.

Only a citizen of Ghana may make a contribution or donation to a political party registered in Ghana.

## **Electoral Commission**

Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the

purposes of public elections and referenda.

The Ghanaian Electoral Commission consists of:

- a) a Chairman;
- b) two Deputy Chairmen; and
- c) four other members.

The members of the Commission are appointed by the President under Article 70 of the Constitution. The Chairman of the Electoral Commission has the same terms and conditions of service as a Justice of the Court of Appeal. The two Deputy Chairmen of the Commission have the same terms and conditions of service as are applicable to a Justice of the High Court. The Chairmen and the two Deputy Chairmen of the Commission cannot, while they hold office on the Commission, hold any other public office. The other four members of the Commission are paid such allowances as Parliament may determine. If a member is absent or dies, the Commission shall continue its work until the President, acting on the advice of the Council of State, appoints a qualified person to fill the vacancy.

The Electoral Commission has the following functions:

- a) to compile the register of voters and revise it at such periods as may be determined by law;
- b) to demarcate the electoral boundaries for both national and local government elections;

- c) to conduct and supervise all public elections and referenda;
- d) to educate the people on the electoral process and its purpose;
- e) to undertake programmes for the expansion of the registration of voters; and
- f) to perform such other functions as may be prescribed by law.

Ghana is divided into as many constituencies for the purpose of election of members of Parliament as the Electoral Commission may prescribe, and each constituency is represented by one member of Parliament. No constituency shall fall within more than one region. The boundaries of each constituency are to be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quote.

## Parliament

The Parliament of Ghana consists of not less than one hundred and forty elected members. A person is not to be a member of Parliament unless -

- a) he is a citizen of Ghana, has attained the age of twenty-one years and is a registered voter;
- b) he is resident in the constituency for which he stands as a candidate for election to Parliament or has resided there for a total period of not less than five years out of the ten years immediately preceding the election for which he stands, or

he hails from that constituency; and

- c) he has paid all his taxes or made arrangements satisfactory to the appropriate authority for the payment of his taxes.

## The Judiciary

The Constitution declares that justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to this Constitution. Citizens may exercise popular participation in the administration of justice through the institutions of public and customary tribunals and the jury and assessor systems.

The judicial power of Ghana is vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament can have or be given final judicial power.

The Chief Justice is the Head of the Judiciary and is responsible for the administration and supervision of the Judiciary.

The Judiciary consists of -

- a) the Superior Courts of Judicature comprising -
  - i) the Supreme Court;
  - ii) the Court of Appeal; and
  - iii) the High Court and Regional Tribunals.

b) such lower courts or tribunals as Parliament may by law establish.

The Superior Courts are superior courts of record and have the power to commit for contempt to themselves and all such powers as were vested in a court of record immediately before the coming into force of the Constitution.

In the exercise of the judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, including financial administration, is subject only to the Constitution and shall not be subject to the control or direction of any person or authority.

Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever can interfere with Judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions; and all organs and agencies of the State shall accord to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts, subject to this Constitution.

A Justice of a Superior Court, or any person exercising judicial power, is not liable to any action or suit for any act or omission by him in the exercise of the judicial power. The administrative expenses of the Judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of, persons serving in the judi-

ciary, are charged on the Consolidated Fund.

## The Supreme Court

The Supreme Court consists of the Chief Justice and not less than nine other Justices of the Supreme Court. It is the final court of appeal and has such appellate and other jurisdiction as may be conferred on it by the Constitution or by any other law. The Supreme Court is not bound to follow the decisions of any other court. It may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.

Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in Article 33 of the Constitution, the Supreme Court has exclusive original jurisdiction in -

- a) all matters relating to the enforcement or interpretation of the Constitution; and
- b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.

The Court of Appeal consists of -

- a) the Chief Justice;



- b) not less than ten Justices of the Court of Appeal; and
- c) such other Justices of the Superior Court of Judicature as the Chief Justice may, for the determination of a particular cause or matter request to sit in the Court of Appeal for any specified period.
- a) the Chief Justice who shall be the Chairman;
- b) the Attorney-General;
- c) a Justice of the Supreme Court nominated by the Justices of the Supreme Court;
- d) a Justice of the Court of Appeal nominated by the Justices of the Court of Appeal;

The Court of Appeal has jurisdiction throughout Ghana to hear and determine, subject to the provisions of the Constitution, appeals from a judgment, decree or order of the High Court and Regional Tribunals and such other appellate jurisdiction as may be conferred on it by this Constitution or any other law.

The High Court consists of -

- a) the Chief Justice;
- b) not less than twenty Justices of the High Court; and
- c) such other Justices of the Superior Court of Judicature as the Chief Justice may, by writing signed by him, request to sit as High Court Justices for any period. The High Court has jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by the Constitution.
- g) a representative of the Chairmen of Regional Tribunals nominated by the Chairmen;
- h) a representative of the lower courts or tribunals;
- i) the Judge Advocate-General of the Ghana Armed Forces;
- j) the Head of the Legal Directorate of the Police Service;
- k) the Editor of the Ghana Law Reports;
- l) a representative of the Judicial Service Staff Association nominated by the Association;

m) a chief nominated by the National House of Chiefs; and

n) four other persons who are not lawyers appointed by the President.

## The Judicial Council

There is a Judicial Council comprised of the following persons -

The functions of the Judicial Council are -

- a) to propose for the consideration of Government, judicial reforms to improve the level of administration of justice and efficiency in the Judiciary;
- b) to be a forum for consideration and discussion of matters relating to the discharge of the functions of the Judiciary and thereby assist the Chief Justice in the performance of his duties with a view to ensuring efficiency and effective realisation of justice; and
- c) to perform any other functions conferred on it by or under this Constitution or any other law not inconsistent with this Constitution.

The Judicial Council may establish such committees as it considers necessary to which it shall refer matters relating to the Judiciary.

There is a Rules of Court Committee which consists of -

- a) the Chief Justice, as Chairman;
- b) six members of the Judicial Council other than the Chief Justice nominated by the Judicial Council;
- c) two lawyers, one of not less than ten and the other of not more than five years' standing, both of whom are nominated by the Ghana Bar Association.

The Rules of Court Committee, by constitutional instrument, makes rules

and regulations for regulating the practice and procedure of all courts in Ghana.

Without prejudice to clause (2) of this article, no person sitting in a Superior Court for the determination of any cause or matter shall, having heard the arguments of the parties to that cause or matter and before judgment is delivered, withdraw as a member of the court or tribunal, or as a member of panel determining that cause or matter, nor shall that person become *functus officio* in respect of that cause or matter, until judgment is delivered.

### **Freedom and Independence of the Media**

Freedom and independence of the media are guaranteed subject to the Constitution and any other law not inconsistent with it, there is to be no censorship in Ghana. There is to be no impediments to the establishment of private press or media; and in particular, there can be no law requiring any person to obtain a licence as a prerequisite to the establishment or operation of a newspaper, journal or other media for mass communication or information.

Editors and publishers of newspapers and other institutions of the mass media are not to be subject to control or interference by government, nor shall they be penalised or harassed for their editorial opinions and views, or the content of their publications.

All agencies of the mass media are, at all times, free to uphold the principles, provisions and objectives of this Constitution, and shall uphold the responsibility and accountability of the government to the people of Ghana.

Any medium for the dissemination of information to the public which publishes a statement about or against any person shall be obliged to publish a rejoinder, if any, from the person in respect of whom the publication was made.

There is provision for a National Media Commission consisting of fifteen members as follows -

- a) one representative each nominated by
    - i) the Ghana Bar Association;
    - ii) the Publishers and Owners of the Private Press;
    - iii) the Ghana Association of Writers and the Ghana Library Association;
    - iv) the Christian group (the National Catholic Secretariat, the Christian Council, and the Ghana Pentecostal Council);
    - v) the Federation of Muslim Councils and Ahmadiyya Mission;
    - vi) the training institutions of journalists and communicators;
    - vii) the Ghana Advertising Association and the Institute of Public Relations of Ghana; and
  - viii) the Ghana National Association of Teachers;
  - b) two representatives nominated by the Ghana Journalists Association;
  - c) two persons appointed by the President; and
  - d) three persons nominated by Parliament.
- The functions of the National Media Commission are -
- a) to promote and ensure the freedom and independence of the media for mass communication or information;
  - b) to take all appropriate measures to ensure the establishment and maintenance of the highest journalistic standards in the mass media, including the investigation, mediation and settlement of complaints made against or by the press or other mass media;
  - c) to insulate the State-owned media from governmental control;
  - d) to make regulations by constitutional instrument for the registration of newspapers and other publications, except that the regulations shall not provide for the exercise of any direction or control over the professional functions of a person engaged in the production of newspapers or other means of mass communication; and
  - e) to perform such other functions as may be prescribed by law not inconsistent with this Constitution.



# *Innovations in the Interim and 1996 South African Constitutions*

Jeremy Sarkin\*

## Introduction

Since the Union of South Africa in 1910 and before 1994, South Africa has had three constitutions, adopted in 1910, 1961 and 1983. These constitutions took little account of the multiethnic, multilingual and multicultural nature of South African society. Indeed, they catered almost exclusively for the white, Christian, Afrikaans, patriarchal minority. It is not surprising, therefore, that South Africa was a highly polarised and divided society. Many people had been dispossessed of their land, had their language and cultures marginalised and were the victims of gross human rights violations. The majority of South Africans had been denied access to an enormous variety of amenities, institutions and opportunities, including many places and types of employment, particularly in State institutions. Most of civil society was unimportant, as far as the State was concerned, and this sector played an increasingly oppositional role during the *apartheid* era. Divisions existed between black and white but there were also divides based on

factors of ethnicity, class, culture, religion and language which *apartheid* had specifically accentuated.

The system bred intolerance, a culture of violence and lack of respect for life and, indeed, rights in general. In consequence, levels of political violence were extremely high during the 1980s and 1990s. Between September 1984 and October 1990, some 8500 died in political violence, and levels of violence escalated during the subsequent transition as political rivalry intensified. The number of deaths attributed to political violence in the period January 1990 to the end of 1995 exceeds 16000.

One of the themes exacerbating this violent political rivalry was a conflict between traditionalism and democratic principles. Central to the political strife between the Inkatha Freedom Party (IFP) and the African National Congress (ANC) in KwaZulu-Natal from the mid-1980s was the fact that Inkatha's major support came from people who believed very strongly in the traditional system of

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hereditary chiefs and customary law.<sup>1</sup> The growth of support during the 1980s for the ANC and its allies, who laid emphasis on democracy and appealed to urbanised Zulus, was seen by Inkatha as a threat to its traditional support base. This shift in allegiance to both democratic principles and the ANC as a party threatened Inkatha's status and consequently its ability to bargain for a more central role in the political life of South Africa. It was in this context that violence took increasing precedence as a means of political expression, and it was such predicaments, issues and problems that drove and shaped the negotiation process between the *apartheid* government and liberation movements which delivered a two-phase transition to democracy.

## Negotiations

The transition process is seen to have begun officially on 2 February 1990, when then President F. W. de Klerk made his now famous speech unbanning organisations such as the ANC, the Pan Africanist Congress (PAC), and South African Communist Party (SACP), and announcing the start of negotiations for a democratic

South Africa. Agreement on the mechanics of the transition was reached during the 1993 Multi-Party Negotiating Process at Kempton Park, which had been preceded by two rounds of talks (CODESA I and II). The political pact which sought to navigate the issues while providing security to some groupings, was agreed to by 26 parties, many of whom had little apparent legitimacy and no mandate.<sup>2</sup> It was recorded in the interim Constitution<sup>3</sup> and secured the participation in elections of all but extreme groupings on the political spectrum. The interim Constitution also contained the 34 Constitutional Principles which would govern the final Constitution.

## The Interim Constitution

The first phase of the transition began on 27 April 1994 when the interim Constitution came into force. The second and final phase would begin when the final Constitution, drafted by an elected Constitutional Assembly, came into force in 1997.

Until 27 April 1994, South Africa's white minority parliament was sovereign and the courts, staffed largely

- 1 In KwaZulu-Natal there is a king of the Zulus as well as 250 chiefs who govern the four million people who live under traditional rule.
- 2 Political organisations at the negotiations included 'governments' and parties from the nominally independent homelands. The drafting of the interim Constitution took place with little public input and a degree of secrecy attributed by those involved to the need to reach a settlement. However, participants guaranteed that the drafting of the final Constitution would be a transparent affair which sought and used public input.
- 3 South Africa Constitution Act 200 of 1993.

by white males, functioned as mere technicians who simply interpreted and implemented the law of the land. Thus, there was no check on State power. The legislature could adopt any law and the courts had only a procedural reviewing function. This changed when the interim Constitution came into force.<sup>4</sup>

One of the major themes of the negotiation process was the need to provide protections for minorities and the crucial debate was whether this should occur by way of group rights or in terms of individual rights. The fear was that without the protection afforded by a bill of rights, unrestrained majoritarianism could harm minorities or members of minority groups and that, therefore, a check on the power of the majority was essential. Constitutional supremacy was seen as the solution and was established by section 4, which stated:

This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.

## The Courts

The negotiators of the interim Constitution recognised that the established court system in South Africa could not be relied upon to be the guardian of democracy and human rights. Most of the sitting judges were white males and were thought to be unsuited to decide on constitutional issues in consequence of their training, experience and political temper. A constitutional court was widely seen as necessary.<sup>5</sup> Leaving the old judiciary intact and conferring on them the added powers of judicial review would be to allow law democratically enacted by the majority to be overturned by a court composed of a partisan and insulated minority. Some argued for the decentralisation of the constitutional powers of the courts,<sup>6</sup> wanting to enable all courts to strike down legislation or administrative acts that transgressed constitutional boundaries. Critics of the decentralised model argued, however, that not even the appointment of more judges would solve the basic problem that members of the old *apartheid* judiciary would be the beneficiaries of these enhanced judicial powers and were ill-suited to wield them. The view that won out was that one court, meticulously selected and well-balanced, should have the powers of constitutional review, at

4 Section 251 of the Constitution of the Republic of South Africa Act 200 of 1993.

5 Dugard "Judicial Power and a Constitutional Court" paper delivered at a Conference on a Constitutional Court (1991) 70 at 73.

6 See Chaskalson "A Constitutional Court: Jurisdiction, Possible Models and Questions of Access" paper at the Constitutional Court Conference 91 at 95; Cowling 195 and Didcott quoted in Cowling fn 19.

least for the initial transition period. Thus a new court, the Constitutional Court, was grafted on to the existing judiciary to function at its apex together with the Appellate Division. Composed of 11 judges, this court has jurisdiction as "the court of the final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution".<sup>7</sup>

At the same time, a new structure for appointing judges was established. The Judicial Services Commission (JSC) was a response to calls for a fairer process of judicial appointment than had pertained in the past, and was aimed at securing a wider variety of input on judicial appointments and thus adding broader representation and credibility to the Bench. The JSC is specifically required to:

have regard to the need to constitute a court which is independent and competent and representative in respect of race and gender.<sup>8</sup>

## Bill of Rights

The interim Constitution included a chapter on fundamental rights, the first time in South Africa's history that a bill of rights had been part of the

legal order. To borrow from Judge Jackson in the United States, the belief was that the purpose of a bill of rights in the South African context would be 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 life, 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 elections.<sup>9</sup>

Various sections entrenched the supremacy of the rights contained in Chapter 3 of the Constitution over other law and administrative actions. Section 7(2) stated, for example:

This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

Although it does enshrine rights widely regarded as universal, South Africa's Bill of Rights also reflects the country's unique situation<sup>10</sup>, including provisions aimed at dealing with a brutal past and others recognising a multicultural society. One of the clauses that provoked heated debate was section 28, which protects the

7 Section 98(2).

8 Section 99(5)(d).

9 Judge Jackson in *West Virginia Board of Education v Barnette* 319 U.S. 624, 638 (1943).

10 See J D van der Vyver *Comparative Law in Constitutional Litigation* (1994) 111 *SALJ* 19.



right to acquire property and not to be deprived of it without compensation.<sup>11</sup>

## Equality

The right to equality is a key provision, given the previous lack of equality in the country. The equality section also provides for equal protection,<sup>12</sup> an important amplification in the context of a history of racial oppression whose eradication was at the centre of the struggle for liberation and the transition to democracy. Indeed, the whole thrust of the negotiating process was to ensure a "non-racial, non-sexist South Africa".<sup>13</sup> It must be said, however, that nowhere near as much attention was devoted to overcoming gender oppression as to racial oppression.

In addition to forbidding discrimination on the basis of "race" and "gender", the Bill of Rights also prohibited discrimination on the basis of

sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.<sup>14</sup>

It insulated from constitutional challenge "measures designed to

achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination"<sup>15</sup> and, in similar vein, provided for the "right to respect for and protection" of dignity which has generally been deemed to be the right of individuals to be treated with dignity by the State.<sup>16</sup>

## Religion

The central importance of notions of equality can be seen in provisions on religion, belief and opinion. The right to freedom of conscience, religion, thought, belief and opinion is guaranteed and these provisions effectively reduced the power and influence of the Church, particularly the Dutch Reformed Church, which partnered the *apartheid* regime, giving equal place for the first time to other religious denominations as well as opinions and beliefs outside of organised religion. A much stricter differentiation and separation between Church and State was brought into being and, while the Church is still able to influence individuals, it will not have the power to affect government policy which was wielded by the Dutch Reformed Church in the *apartheid* era.

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11 Section 28.

12 Section 8(1).

13 *Sunday Times* 8 August 1993.

14 Section 8(2).

15 Section 8(3).

16 Cachalia et al (n143) 33.

## Language

In the past, despite the multilingual character of the population, South Africa had only two official languages - English and Afrikaans. One of the proposals on the negotiation table was that the new democratic South Africa should officially recognise only a single language in order to facilitate national unity, communication and easier and cheaper administration. Those who would have had their languages excluded resisted this and their view found favour with the drafters of the interim Constitution. Section 3 thus provided that 11 languages would be the official languages of the State at national level and "conditions shall be created for their development and for the promotion of their equal use and enjoyment". In addition, provision was made for the establishment of an independent Pan South African Language Board to develop South African languages as well as:

German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu, Urdu, and other languages used by communities in South Africa, as well as Arabic, Hebrew, and Sanskrit and other languages used for religious purposes.<sup>17</sup>

In addition the Bill of Rights provides that:

Every person shall have the right to use the language and to participate in the cultural life of his or her choice.<sup>18</sup>

## Structure of the State

The question of the structure of the State was one of the major bones of contention during negotiations. At issue was the extent to which the governing structures in the country should be decentralised. This was highly contested terrain for political parties since much of their support was ethnically based and, in some cases, regionally based.

The inevitable result was a compromise, providing for three levels of government. A legislature (the National Assembly and the Senate) and nine regional parliaments were provided for. Moreover, to ensure a smooth and peaceful transition, 'sunset clauses' were written into the interim Constitution, essentially giving minority parties a stake in government. Thus, while the ANC was the majority party in the legislature, the government is a government of national unity (GNU), with the cabinet composed of the ANC, the National Party (NP) and the IFP. This continued until mid-1996 when the NP withdrew from the GNU.

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<sup>17</sup> Section 3(10)(c).

<sup>18</sup> Section 31.

## Electoral system

The April 1994 elections saw the electorate vote for two of the three tiers of government - national and provincial parliaments on the basis of proportional representation and a party list. This system was established to ensure representation of small parties and minorities which, it was argued, would not occur within the constituency system that operated in South Africa until 1994. However, while ensuring that usually marginalised groups will enjoy some representation, the current system tends to reduce debate in Parliament, limits accountability and decreases the overt concern of individual representatives with public opinion. Parliamentarians tend to toe the party line because the party is able to ensure compliance and because the individual parliamentarian wants to obtain a place on the party list in the future. In other words, under the list system, the power of the party, or rather the party leadership, increases, unless there is an overt attempt by a number of members to remain independent.

An ongoing question is thus whether the list electoral system is the correct one for South Africa or whether a hybrid situated somewhere between the constituency and list systems would be preferable. The argument for a hybrid system is that it would remove the problems associated with the list system while also dealing with concerns arising from the "first past the post" result of the constituency-based system.

At a national level the ANC received just over 63% of the vote. At provincial level the ANC achieved a majority in seven of the nine provinces. Thus, two provinces are controlled by parties other than the ANC: KwaZulu-Natal by the Inkatha Freedom Party, and the Western Cape by the National Party.

In *Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others*,<sup>19</sup> the Constitutional Court<sup>20</sup> focused its attention on the ability of parliament to amend the interim Constitution specifically in relation to the powers of the provinces.<sup>21</sup> The issue had much to do

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19 CCT/36/95; 1995 (12) BCLR 1561 (CC).

20 The court heard argument in the case on 15 November 1995 and delivered its judgment on 29 November 1995.

21 The amendments which were challenged were: clause 149(10), which permitted the President, rather than the relevant provincial legislature, to determine the remuneration of premiers and provincial executive councils; clause 182, which empowered the President to determine guidelines for identifying which traditional leaders would become *ex officio* members of local government councils; clause 184(5), which relieved government of the duty to consult with traditional leaders before passing legislation affecting them until such time as the Council of Traditional Leaders had been set up. This amendment validated legislation giving central government, rather than the provinces, the power to pay traditional leaders. The legislation had been passed by Parliament but had not been signed by the President; clause 245 which provided that local government could not be restructured by provincial governments until 31 March 1996.

with a struggle for power resulting from the election outcome of an ANC-controlled government at national level and two provinces controlled by other parties. The issue also has important ramifications for the strength of the regions *vis-à-vis* the centre.

The applicants in the case argued that the amendments to the Constitution were unlawful because the central government had failed to comply with a section in the Constitution which required that a province must agree to amendments that affected it. The court dismissed this argument, ruling that the section applied only to an amendment that affected a particular province and not, as was the case with the amendments in dispute, where all provinces were affected. In a unanimous decision,<sup>22</sup> the court therefore ruled that the four constitutional amendments affecting local government, traditional leaders and the power of provinces to pay premiers were not unconstitutional.

## Traditional Authority

The role and status of traditional leadership and African customary law are issues that have occupied much attention in South Africa. Besides their relevance (or offensiveness) to South Africans, they have been foregrounded by the fact that Inkatha's

major support base consists of people who believe very strongly in the traditional system of hereditary chiefs.<sup>23</sup>

Under *apartheid* traditional leaders played little formal role and African customary law was treated by the legal system with much derision. Although many South Africans believed in and complied with these laws, they were given very little weight and were not accorded the deference they deserved.

In the *post-apartheid* society customary law will enjoy greater status and this is given constitutional force in various sections. However, as a result of the outcry from women when it seemed that customary law, which is often discriminatory against women, would be given special status and immunity from constitutional review, section 33(2) of the interim Constitution stated:

No law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this chapter.

In addition, section 35(3) stipulated that when performing the

interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.<sup>24</sup>

22 Judgment delivered by Justice Mahomed.

23 In KwaZulu-Natal there is a king of the Zulus as well as 250 chiefs who govern the four million people who live under traditional rule.

24 Section 35(3).

Sections 181 to 184 dealt with traditional authority and provided for the establishment of provincial houses of traditional leaders. These houses were to be consulted on legislation, and were

entitled to advise and make proposals to the provincial legislature or government in respect of matters relating to traditional authorities, indigenous law or the traditions and customs of traditional communities within the province.<sup>25</sup>

A National Council of Traditional Leaders was also established, constituted of 20 individuals elected by an electoral college made up from members of provincial houses of traditional leaders.<sup>26</sup> The council was constitutionally empowered "to advise and make recommendations to the national government" and the President when requested to do so.<sup>27</sup> Parliamentary bills dealing with issues in the competence of the council had to be referred to it. However, opposition by the council to a bill had only a 30-day delaying effect.<sup>28</sup>

## State Institutions Supporting Democracy

The interim Constitution established a number of institutions to promote democracy and human rights. These structures were seen to be critical against the background of the prior absence of human rights and the need to entrench a human rights culture and act against State repression, corruption and anti-democratic practices. The institutions provided for included the Human Rights Commission,<sup>29</sup> the Commission on Gender Equality,<sup>30</sup> the Commission on the Restitution of Land Rights,<sup>31</sup> and the Public Protector.<sup>32</sup>

### Human Rights Commission

The Human Rights Commission's tasks were (and are) to develop and promote human rights by promoting community awareness and education, making recommendations to Parliament, reviewing legislation, and, importantly, investigating alleged violations of fundamental rights and

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25 Section 183(2)(a).

26 Section 184.

27 Section 184(4).

28 Section 184(5)(c).

29 Sections 115-18.

30 Sections 119-20.

31 Sections 121-23.

32 Sections 110-14.

assisting victims to secure redress. Powers of the commissioners are far-reaching. For example, in conducting investigations, they or others directed by them may enter and search premises and gain access to information relevant to any investigation. They may compel any person to produce any document and answer questions under oath. The commission even has the power to take disputes to court.

While such powers can be abused, they were seen as necessary to ensure that the Commission has the ability to promote and protect human rights.

The appointment procedure specified in the interim Constitution provides for commissioners to be nominated by a joint parliamentary committee, composed of one member of each political party in Parliament. The committee must nominate 11 South Africans who are "fit and proper persons" and who are "broadly representative of the South African community". Parliament then approves the nominations. Unfortunately but predictably, this procedure saw the committee appoint commissioners whose political leanings broadly represent the political parties in Parliament.

### **The Public Protector**

The office of the Public Protector was created by the interim Constitution which laid down the

process of establishment and appointment, the imperative of independence and impartiality, powers and functions, staff and expenditure, and provided for the establishment of provincial public protectors.

The functions of the Public Protector are, firstly, to investigate any conduct in State affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; secondly, to report on that conduct; and, finally, to take appropriate remedial action. The Public Protector is also empowered to investigate, report and take remedial action in relation to improper prejudice, maladministration, dishonesty or improper dealings with respect to public money, improper enrichment, and receipt of improper advantage. The office is concerned not only with ensuring the honesty of those working for the State but also with ensuring that they treat citizens with respect. The power of the office is made clear by the right of search, seizure and subpoena conferred on it.

### **Commission on the Restitution of Land Rights**

The question of land restitution is dealt with in the interim Constitution by the establishment of the Commission on the Restitution of Land Rights.<sup>33</sup> This is one of the three legs to the land policy which is

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33 Sections 121-3 of the Constitution of the Republic of South Africa Act 200 of 1993.

currently being pursued by the government. These are land restitution, land redistribution through market-related mechanisms, and land tenure reform.<sup>34</sup> The Commission has the responsibility of receiving, investigating and taking forward claims and the law details how claims must occur and how the Commission must deal with them. The Land Claims Court is tasked with the responsibility of ratifying agreements mediated by the Commission, as well as arbitrating in cases where no agreement can be reached. The Court's principal powers lie in the ability to determine restitution, compensation and rightful ownership.<sup>35</sup>

## Commission on Gender Equality

The Commission on Gender Equality's object is to promote gender equality and to advise and make recommendations to Parliament or other legislatures on laws or proposed laws which affect gender equality and the status of women.

## The Truth and Reconciliation Commission<sup>36</sup>

The interim Constitution also provided for a process, embodied in the Truth and Reconciliation Commission, to establish the truth about the past, promote reconciliation<sup>37</sup> and grant amnesty for politically motivated crimes committed during the *apartheid* years.<sup>38</sup> To promote this endeavour the interim Constitution<sup>39</sup> provided that:

amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of conflicts of the past. To this end Parliament under the constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990, and before 6 December 1993, and providing mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

34 See generally A. J. van der Walt, 'Land reform in South Africa since 1990 - an overview' Vol 10 (1) *South African Public Law* (1995) 18.

35 Guidelines for applications were determined in *Ex Parte Macleanstown Presidents Association; In Re: Certain Erven and Commonage in Macleanstown* (199 6) 3 All SA 259 (LCC).

36 See generally J. Sarkin 'The Trials and Tribulations of South Africa's Truth and Reconciliation Commission' (1996) 12 *The South African Journal on Human Rights* 617 and H. Varney and J. Sarkin 'Failing to Pierce the Hit Squad Veil: An Analysis of the Malan Trial' *South African Journal of Criminal Justice* (1997 forthcoming).

37 There have been further negotiations in KwaZulu-Natal between the ANC and the IFP for another amnesty for perpetrators of violence in that province as part of a peace agreement. This further amnesty arrangement, if agreed to, could have devastating negative results for the rule of law.

38 See the postamble of the interim Constitution.

39 Act 200 of 1993.

It was considered vital for the future of the emerging democracy that a forthright and explicit acknowledgement of the devastating misery of the preceding years should occur. A truth and reconciliation commission was deemed a suitable mechanism for this mission and for the considerable ambition of uniting an intensely polarised populace.

Many resisted the truth-disclosing process on the basis that covering up the trauma of the past would have no negative effects and that reopening old anguish could be destructive. Supporters of this view advocated a blanket pardon for perpetrators of abuses.<sup>40</sup> However, the opinion that held sway was the notion that a democratic State founded on human rights ideals could not deny the atrocities of the past. These had to be revealed and the misery of the victims recognised, thus enabling recovery of a concealed history, albeit only between 1960 and 1993.<sup>41</sup>

It has been of critical importance that victims from all political persuasions have been given a platform<sup>42</sup> to testify to their suffering and reclaim their dignity, while perpetrators have an arena in which to declare their sins and be given amnesty in exchange for the full truth. Thus the possibility of a national catharsis has been established on the basis of testifying by victims, amnesty for perpetrators who make full disclosure, and some type of reparation and rehabilitation for victims. The final report of the Commission, including recommendations,<sup>43</sup> should assist in ensuring that gross human rights violations do not occur in South Africa again.

The creation of this institution was characterised by open debate and significant involvement of civil society. Non-governmental organisations (NGOs), which had frequently been victimised under *apartheid*,<sup>44</sup> now operated in a climate friendly to human rights. While many NGOs were initially averse to playing a

40 G. Simpson "Blanket Amnesty Poses a Threat to Reconciliation" *Business Day* 22 December 1993.

41 The cut-off date for acts for which amnesty could be granted was a major bone of contention. The Freedom Front (FF) and the PAC called for extension of the cut-off date from December 1993 until 10 May 1994, the date of President Nelson Mandela's inauguration. This would have enabled their members who were involved in pre-election violence to be included in the process. While the extension was not agreed to, President Mandela indicated when the enabling legislation was passed that the achievement of peace throughout the country, especially in KwaZulu-Natal, could pave the way for the constitutional amendment which would be necessary to extend the cut-off date. In the spirit of reconciliation, this extension was agreed to, a year after the commission began its work.

42 Some victims disagree with this assertion; see N. Ali "Focus on the Truth" *Sowetan* 14 February 1995; and P. van Zyl "Hiding Behind the Truth" *Weekly Mail* 27 January to 2 February 1995.

43 The Commission's recommendations will possibly include an opinion on whether individuals found to have committed gross human rights violations should hold public office. See this author's comments in Janet Levy 'Perilous Purge' 10 (4) *Democracy In Action* (July 1996) 5.

44 See S Friedman 'An Unlikely Utopia: State and Civil Society in South Africa' (1991) 19(1) *Politikon* 5.



robust role, those that have survived funding and other difficulties have been able to successfully navigate the transition and make important contributions to the ongoing process of political transformation.

The constitutionality of the legislation establishing the Truth and Reconciliation Commission was challenged in *The Azanian Peoples Organisation (AZAPO) and Others v The President of the Republic of South Africa*. The political party Azapo and the families of slain activists challenged the provisions on the grounds that perpetrators who were granted amnesty were exempt from criminal and civil liability. This, it was argued, together with the denial of the right to claim civil compensation from the State, violated the constitutional right to have justiciable disputes settled by a court of law or another independent and impartial forum.

The Constitutional Court ruled against the applicants, finding the amnesty provisions to be constitutionally valid. The court noted that it had been agreed that the granting of amnesty in respect of criminal prosecutions was central to the process of reconciliation and transformation to democracy.

The Court went on to consider arguments against the granting of amnesty in respect of civil liability of wrongdoers. After stressing that amnesty did not necessarily refer only to the narrow context of criminal prosecution, the Court pointed out that wrongdoers would be discouraged from revealing the truth if there was a

threat of potentially substantial civil damages claims.

The Court also dismissed the argument that the State was obliged by international law to prosecute those responsible for gross human rights violations, finding that South Africa was not bound by the international instruments relied on by the applicants.

In relation to the issue of State immunity from civil claims arising from wrongs committed by its employees, the Court had to consider the argument that wrongdoers would not be discouraged from coming forward if their own liberty or property was not threatened by their revelations. While the Court conceded this, it stressed that Parliament had legitimately exercised the choice to divert limited State resources to reconstruction and development. In addition, Parliament had provided for a reparations process in the Act, which would take into account the claims of each victim.

## The 1996 Constitution

The drafting of the final Constitution was the second phase of the transition in South Africa. The interim Constitution, which ushered in the first phase, provided for the Constitutional Assembly to draft the final Constitution. The Constitutional Assembly (CA) process, which began after the 1994 elections and culminated in the adoption ceremony two

years later, on 8 May 1996, has been hailed not only as unique but also as one of the most democratic and inclusive constitution-making exercises in history.

## Drafting Process

The CA, composed of the 490 members of the elected National Assembly and Senate, was given two years to negotiate a constitution in accordance with the Constitutional Principles. Two-thirds majority approval was required and the Constitutional Court would be the final arbiter on whether the text honoured the commitments enshrined in the interim Constitution.

Conflict about the relative power of national and provincial government continued to be a dominant theme in all areas of South African politics, including the Constitutional Assembly. Indeed, the IFP withdrew from participation in the CA on the grounds that other parties had reneged on an agreement about the need

for international mediation on the extent of power which should be given to provinces in the final Constitution. Efforts to draw the IFP back into the process failed, and the IFP boycott threatened to undermine the legitimacy of the final Constitution.

The drafting process proceeded slowly at first but picked up speed by the second year. In accord with ideals of transparency and inclusiveness, a public participation plan was set in motion.<sup>45</sup> Public comment was elicited through various mechanisms, including public hearings, talk-lines, the Internet and written and oral submissions. Two types of public hearings were held: sector hearings, which targeted specific groups such as traditional leaders, business, women and religious groups; and constitutional public meetings, which targeted certain, mainly rural areas. In addition, various theme committees<sup>46</sup> heard submissions and reviewed documents submitted by a variety of interested parties. Over five million draft constitutions in 11 languages were made available to the public for discussion in November 1995.<sup>47</sup> Thus, at the very least, the process was beneficial in imparting

45 See generally Public participation kicks off' *Constitutional Talk* (10-23 February 1995) 1; 'Towards a new constitution' *Constitutional Talk* (30 June-10 August 1995) 1; 3.

46 The themes addressed by these committees were:

- 1) character of State;
- 2) structure of State;
- 3) relations between levels of government;
- 4) fundamental rights;
- 5) judiciary and legal systems;
- 6) specialised structures.

47 The working draft reaches millions' *Constitutional Talk* (9-29 February 1996) 2. Much emphasis was placed on plain language to make the text accessible to all South Africans. Sometimes, however, clarity and precision suffered.

knowledge about constitutionalism to members of civil society.<sup>48</sup> However, the extent of the effect of public comment is unknown.

The text was finally adopted in Parliament on 8 May 1996 and after the adoption ceremony the Constitution was referred to the Constitutional Court<sup>49</sup> for determination of whether its provisions complied with the 34 Constitutional Principles contained in the interim Constitution.<sup>50</sup>

Initially, only political parties were permitted to present written and oral arguments to the Constitutional Court on the issue of certification. Later, however, provision was made to allow the public to submit argument to the Court as well.<sup>51</sup> Members of the public were permitted to submit written objections by 31 May 1996.<sup>52</sup> Hearings took place during the first weeks of July and a unanimous judgment was delivered on 6 September ruling that certain provisions did not comply with the Constitutional Principles.<sup>53</sup>

Negotiations resumed by mid-September 1996 and the CA committed

itself to finalising the text by 11 October. The IFP then announced its intention to end its boycott of the constitutional process and indications were that the IFP aim was to strengthen provisions dealing with the role of traditional leaders and the Zulu king, particularly in the context of local government.

However, although it was reported that agreement had been reached, the return of the IFP to the CA was short-lived.

The vote in the CA on 11 October mirrored the outcome on 8 May. Argument on the revised text was heard in the Constitutional Court from 18 to 20 November 1996, with the Democratic Party, the Inkatha Freedom Party and the KwaZulu-Natal government requesting the court to reject the text for a second time. A further 18 organisations and individuals also lodged objections. The court unanimously granted certification in its judgment handed down on 4 December.<sup>54</sup> Although certain parts of the interim Constitution remained in force, the revised and final Constitution came into force on 4 February 1997.

48 'Excellent results for CA media campaign' *Constitutional Talk* (22 April-18 May 1996) 7.

49 Section 73(2) read with sections 71(2) and (3).

50 Section 73(1) and 71(1).

51 Letter from the Human Rights Committee to the President of the Constitutional Court dated 18 April 1996.

52 See document submitted by the Human Rights Committee to the Constitutional Court on 29 May 1996 entitled 'Certification of the Constitution adopted by the Constitutional Assembly on 8 May 1996'.

53 *Ex parte Chairperson of the Constitutional Assembly; in re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC).

54 *Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996 CCT 37/96.

## The Bill of Rights

The Bill of Rights in the final Constitution protects more rights than the interim Constitution did. The Bill of Rights not only binds the State (vertical application) but, to the extent that the nature of the rights permit, it also binds private and juristic persons (horizontal application).<sup>55</sup> To what extent it will operate horizontally, however, remains for the courts to determine.

Clauses similar to those contained in the interim Constitution protect cultural, religious and language rights. Among the provisions of the languages clause<sup>56</sup> is a duty on the Pan South African Language Board to "promote and create conditions for the development and use of" all official languages, the Khoi, San and Nama languages and sign language. The rights of cultural, religious and linguistic communities are protected,<sup>57</sup> as is the right to freedom of religion, belief and opinion.<sup>58</sup> It is noteworthy, however, that the exercise of cultural and religious rights is explicitly subject to conformity with the Bill of Rights.

## Equality

The equality clause<sup>59</sup> has been strengthened. While the list of prohibited grounds for discrimination is not exhaustive, three are added: pregnancy, marital status and birth. A further significant addition is protection of the right to substantive equality, achieved by including the terms "the right to equal benefit of the law". Thus, the final Constitution requires more than formal equality in law; equality must be achieved in the effect and impact of laws as well.

## Socio-Economic Rights

An important debate was whether socio-economic rights should be protected as fundamental rights. This was critical in the context of historical exclusion of the majority of South Africans from much of the economic and social life of the country.<sup>60</sup> While all parties expressed commitment to the underlying goal of social and economic upliftment, some balked at affording socio-economic rights the status of fundamental rights. The reasons lay in traditional scepticism about

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55 For a discussion on the implications of direct horizontal application, see Peter Leon 'Nanny or Watchman' - the role of the Bill of Rights under South Africa's Final Constitution' *De Rebus* (July 1996) 461-64; see generally 'Judiciary could make a minefield of Constitution' *Business Day* (16 May 1996) 15.

56 Section 6.

57 Section 31.

58 Section 15.

59 Section 9.

60 See ANC *The Reconstruction and Development Programme: A Policy Framework* (1994) 3.

enforceability of the rights and the desirability of involving courts in decisions about economic and welfare policy. The bias in the interim Constitution in favour of civil and political rights can be explained in light of these concerns.

The final Constitution goes further than the interim Constitution, providing for the right to a basic education (section 29) and the right of access to adequate housing (section 26), health care services, including reproductive health care, sufficient food and water and social security (section 27). Access to land through land reform measures is also provided for (section 25) and children have special entitlements (section 28).

These clauses attempt to ensure that the State will continue to improve the living conditions of South Africans through better nutrition, clean and convenient water sources, and improved health care and housing. It should be noted, however, that the language used circumscribes the scope of most of these rights. Thus, the right is of "access to" adequate housing or sufficient food or water. In addition, the duty imposed on the State is "to take reasonable legislative and other measures" to realise the right. It is, therefore, clear that the realisation of these rights will largely depend on the ability of the State to deliver. However, to counter the problem of enforcement which exists in regard to progressive realisation of rights, section 184(3) mandates the Human Rights

Commission to demand information from relevant organs of state on measures taken towards the realisation of rights relating to housing, health care, food, water, social security, education and the environment.

## Freedom of Expression

In the context of a divided and polarised society the question of what should constitute constitutionally protected speech was highly disputed. The freedom of expression clause<sup>61</sup> was, therefore, the subject of much debate. An ANC proposal that a prohibition against hate speech should be included in the final Constitution proved controversial, drawing opposition from the DP as well as groups advocating free speech. There was particular concern at an internal limitation of the right to freedom of expression in addition to the "reasonable and justifiable" limitation of rights provided for in section 36, the limitations clause. The ANC view prevailed and thus the right to freedom of expression does not extend to propaganda for war, incitement to imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm. Considering the history of South Africa and the potential for unfettered freedom of expression to affect race relations, the reasons for proposing these limitations are understandable. Nevertheless, limiting expression in these ways is no

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61 Section 16.

guarantor of positive social relations and may, in fact, serve to sanction repression of free political debate.

## Property

A provision that was subject to much debate, because of past unjust practices relating to land and present ownership patterns, was the property clause. In fact, during negotiations on the Bill of Rights three issues remained contentious right until the night before adoption day: education, property rights and labour rights.

One of the arguments for including a property clause was that, without it, it would be difficult to entrench the rights of those unfairly dispossessed of rights in property to reclaim what was rightfully theirs. It was also argued that there was value in entrenching a right to acquire property which had been denied to the majority along racial lines, and that such a clause would prevent arbitrary dispossession by the State in the future.

On the other hand, it was contended that the Constitution should not have the effect of protecting unjustly acquired privileges and a clause should therefore not entrench the rights of those unfairly privileged in

property. It was further argued that the Constitution should be drafted to ensure that equitable land reform (restitution and redistribution) could take place.

As a result the property clause permits land, water and related reform to occur<sup>62</sup> as well as restitution or equitable redress to those dispossessed in the past.<sup>63</sup> The clause further mandates the State to "take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis".<sup>64</sup> However, the clause states that "no law may permit arbitrary deprivation of property."<sup>65</sup> Where property is expropriated, this can be done only in terms of "law of general application" and for a "public purpose or in the public interest" and "subject to compensation" which has been "agreed to by those affected or decided or approved by a court".<sup>66</sup> Public purpose is defined to include "land reform" and "reforms to bring about equitable access to all South Africa's natural resources".<sup>67</sup>

In terms of section 25(3), compensation for expropriation must be

just and equitable, reflecting an equitable balance between the public interest and the interests

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62 Section 25(8).

63 Section 25(7).

64 Section 25(5).

65 Section 25(1).

66 Section 25(2).

67 Section 25(4).

of those affected, having regard to all relevant circumstances, including -

- a) the current use of the property;
- b) the history of the acquisition and use of the property;
- c) the market value of the property;
- d) the extent of direct State investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- e) the purpose of the expropriation.

### Traditional authority

Like the interim Constitution the 1996 Constitution affords recognition to traditional authorities and customary law, providing that the

institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.<sup>68</sup>

While the courts are directed to apply customary law when that law is

applicable, this law still remains subject to the Constitution.<sup>69</sup> The Constitution permits national or provincial legislation to provide for the creation of houses of traditional leaders.<sup>70</sup> National legislation, in addition, may establish a council of traditional leaders.<sup>71</sup> and may provide a role for traditional leaders at local level on issues that affect local communities.<sup>72</sup>

### Institutions Supporting Democracy

Again like its predecessor, the 1996 Constitution provides for State institutions supporting democracy. However, the appointment mechanisms fail to ensure that those appointed will be people concerned with human rights rather than political appointees,<sup>73</sup> and this impacts negatively on both the effectiveness and credibility of these structures.

During negotiations on these human rights institutions, the major controversy was whether the power to appoint and dismiss members should rest with the majority party or whether a higher level of consensus should be obtained. The appointment mechanism finally accepted provides for

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68 Section 211(1).

69 Section 211(3).

70 Section 212(2)(a).

71 Section 212(2)(b).

72 Section 212(1).

73 See Barbara Whittle 'The Public Protector, Auditor-General, Public Service Commission and SA Reserve Bank' *De Rebus* (July 1996) 407; 'Independence of the HRC threatened' *Cape Times* (28 November 1996) 2.

nominations made to the National Assembly by a "committee of the Assembly proportionally composed of all parties represented in the Assembly".<sup>74</sup> However, the failure to establish an independent appointment process comparable to that pertaining to the Truth and Reconciliation Commission,<sup>75</sup> is disappointing. The clause permitting civil society involvement in the nomination process is not sufficient safeguard against political appointments.<sup>76</sup>

The institutions are: the Public Protector,<sup>77</sup> the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities<sup>78</sup>, the Commission for Gender Equality, the Auditor-General and the Electoral Commission. Four of these - the Public Protector, the Human Rights Commission, the Gender Commission

and the Auditor General - were also provided for in the interim Constitution.

The Electoral Commission is a new institution, born of the decision to place responsibility for free and fair elections in the hands of an independent structure.

Also new is the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Its establishment represents a compromise reached at the famous Waenhuiskrans multilateral in April 1996 to accommodate the NP's demands for special protection of language and cultural rights.

An Independent Authority to Regulate Broadcasting is also created to ensure fairness and a diversity of views broadly representing South African society.

74 Section 193(5).

75 See generally Jeremy Sarkin 'The Trials and Tribulations of the South African Truth and Reconciliation Commission' (December 1996) *South African Journal on Human Rights* 617.

76 The role of civil society is mentioned a few times in the Constitution. In section 59(1)(a) and 72(1) the National Assembly and National Council of Provinces are directed to facilitate public involvement in the legislative and other processes and conduct their business in an open manner. Unfortunately, however, sections 59(1) and 72 (b) state that 'reasonable measures may be taken to regulate public access, including access of the media'. Both section 59(2) and 72(2) also permit the public to be excluded from a committee if 'it is reasonable and justifiable to do so in an open and democratic society'. One can only hope that these sections will be narrowly construed and that section 42(3), which states that the National Assembly provides a 'national forum for public consideration of issues', will be given due weight.

The role of civil society is also mentioned in regard to appointments to State institutions supporting constitutional democracy. However, section 193(6) is extremely weakly worded and merely states that 'The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a)'.

77 See G. Barrie 'The public protector: fiat ombudsman!' *De Rebus* (September 1995) 5 80-83.

78 To give further incentive to Afrikaners in their quest for a separate 'Volkstaat' provision was also made in section 235 for the 'recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.'



The only interim Constitution commission which is absent from the final text is the Land Claims Commission,<sup>79</sup> an omission which can be explained partly in terms of the body's envisaged short lifespan and partly in terms of provisions in the property clause<sup>80</sup> dealing with land reform measures. In addition, the property clause in the final Constitution<sup>81</sup> provides for restitution or equitable redress to a person or community dispossessed of property after 19 June 1913 as a result of past discriminatory laws or practices.<sup>82</sup>

## Conclusion

The interim and 1996 Constitutions have played a major role in ensuring that the law in South Africa adapts to deal with all the problems and challenges facing the nation. Under the new democratic dispensation the Constitutions have emphasised human rights and individual freedom while at the same time introducing measures to instil confidence and inspire trust in and between individuals and groups. South African law in the past has been overly concer-

ned with the position of Roman and Roman-Dutch law and insufficiently concerned with examining the reasons for such a position. The effect of law on society and what is just, fair and promotes equality are now key determinants in both the legislative and judicial processes.

While the law in South Africa used to be what the politicians said it was, the shift to a constitutional system means that the law will be what the Constitution says it is. It this shift to a constitutional system emphasising individual human rights, freedom and equality, the role of the courts, particularly the Constitutional Court, will be fundamental.<sup>83</sup> One of the best safeguards of a rights-based democracy is an independent judiciary, intrepid in its willingness to uphold the principle of separation of powers and to be the guardian of fundamental human rights and freedoms.

Indeed, the presence of progressive-minded individuals, women and academics on the Constitutional Court bench has already produced decisions that augur well for the future.<sup>84</sup>

79 See generally A. J. van der Walt 'Land reform in South Africa since 1990 - an overview' Vol 10 (1) *South African Public Law* (1995) 18.

80 Section 25.

81 Section 25.

82 This date was chosen to ensure that people who were dispossessed of land in terms of the Black Land Act 27 of 1913 would have access to redress for the land removed from them.

83 For more detail on the role of the court in regard to political matters and in regard to certification see J Sarkin 'The Political Role of the Constitutional Court' 114(1) *SALJ* (1997) 134.

84 See J Sarkin 'Problems and Challenges Facing South Africa's Constitutional Court: An Evaluation of its Decisions on Capital and Corporal Punishment' 113 *South African Law Journal* (1996) 71; J. Sarkin 'Abortion and the Courts' in S. Liebenberg (ed) *Towards A Final Constitution: A Gender Perspective* (1995) 217.

Crucial, also, is the unifying effect of a constitution and bill of rights.<sup>85</sup> These documents, in tandem with such devices as the flag<sup>86</sup> and national anthem<sup>87</sup>, play symbolic roles in facilitating nation building and reconciliation and can also nurture a striving for common goals and aspirations. This is very dependent, however, on the extent to which the constitutional drafting process is perceived to have

been inclusive and legitimate. If there is a sense that all sectors of a society have been incorporated, then national commitment to the ideals and values contained in the constitution is enhanced. If the instrument stems from a process which is only partially successful at inclusivity, those excluded or marginalised will in all probability view the document as a source of conflict.

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85 See J. Sarkin 'Why There Should Be An Abortion Clause in the Final Constitution' 4 *South African Journal of Human Rights* (1995) 582; Peter W Hogg *Constitutional Law of Canada* (3rd ed) (1992) 7967 and Peter Russell 'The Political Purposes of the Canadian Charter of Rights and Freedoms' (1983) 61 *Canadian Bar Review* 30.

86 Section 5.

87 Section 4.

# *The "No Party" or "Movement"*

## *Democracy in Uganda*

George B. Kirya \*\*

I – The purpose of this essay is to introduce the new political philosophy which has been working in Uganda for the last 11 years, the **"No Party" or "Movement" System**. I hope to show people, particularly in the western world, that there are other political systems which can legitimately present themselves to countries and run a democratic government without using the conventional systems now existing in the world. No one is re-inventing the wheel, we are just improving on it.

It has become very evident throughout the world that without democracy and good governance, it is difficult or even impossible to sustain a peaceful, stable and prosperous country. We have to, however, appreciate that democracy cannot be decreed. It is a form of culture which evolves over time. It should be a life style which has to be felt at every level of society and in all sorts of human activities.

One observes that in many countries in the world, politicians are moving away from dogma, rhetoric and simple ideologies which past poli-

ticians used to engage in. There is now a move away from symbols to factual values and substance. The majority of people these days demand clear descriptions of terminologies used in life so that they are left with no doubt as to what these terminologies mean.

Since democracy has now become a measure which different people use to determine what sort of leadership exists in a given country so as to decide whether to deal with that country or not, it has become essential that we all know what we mean when we talk about democracy. I can feel vibrations coming from many of you, wondering why I should speak such nonsense. If I were to ask what one understands by democracy I have no doubt that I would receive many versions of what democracy means. There is, therefore, a need to have an internationally agreed definition of democracy as is the case with "the *Universal Declaration of Human Rights*". As it stands today, one finds that different people have different meanings of democracy. This ultimately makes it difficult to use democracy as a measure for anything or anyone.

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The most precise definition of democracy most universally quoted is that of Abraham Lincoln which talks of "government of the people, by the people and for the people".

There are, however, people particularly from the Northern Hemisphere who think that a country to be democratic must have multi-parties. They state that there cannot be genuine or durable democracy without genuine political parties. In the same breath, there is the expression of there being freedom of choice. And one wonders as to whom this choice is given. One is justified in asking this question because with parties it is known that it is the leadership which decides what the members' choice should be by writing the party manifesto which binds them all through what is called "collective responsibility" which they dare not oppose in future. They also chose for members which candidate they should vote for. Furthermore, some people tend to use pluralism, but one can go beyond that, as is the case with the Movement in Uganda. This thinking in itself in a way tends to drive one to re-write Abraham Lincoln's definition to read "Government of the Party, by the Party and for the Party". People in this case becoming secondary. The Movement, however, covers choice and pluralism in their broadest and freest sense.

II – I wish here to submit that it is a fundamental mistake to assume that because a political system is suitable in one part of the world, it will also be

suitable in other parts of the world, including Africa. There are a number of examples where particular political systems have been imposed on or borrowed by some countries and this has caused disastrous situations.

One, however, sometimes wonders why the western countries tend to believe that to show and prove that a country is democratic, it has to be confrontational. It has to divide itself into "pigeon holes" where each "pigeon hole" has people who never talk to one another except when confronting one another. That there should be a group of intelligent people whose job is to do nothing but oppose, even if opposing a certain obvious issue may appear stupid.

It is high time that people stopped being deceived by symbols. Political parties in a number of African countries are mere symbols behind which are tribal or religious groupings whose interests are not in any way to build the nation but to see themselves in power. This, as a result, leads to lack of policies and lack of ideas to build the nation. This in the end becomes the real enemy of democracy, peace, stability and development.

Experience has shown that in most African countries where there are two or more strong tribes or strong religious, when political parties are formed, they tend to follow tribal or religious lines and not political ideology or policies. My diplomatic situation, unfortunately, does not allow me to give many examples, but they are there for all to see. This has contributed to a large

extent to the conflict and the instability common in Africa.

The only example I can give is that of Ethiopia where the people appreciated the problem and, therefore, decided to base their democracy on their ethnic differences. They vote within tribal groups. The government is broad-based, putting into consideration the different tribes.

This is also why the Movement philosophy in Uganda encourages free participation and discussion of issues by everybody at all times. There is the reality that no body has the monopoly over ideas, and that it is through free exchange of the available ideas that you enable the important cross-fertilisation of these ideas to take place. People are then able to contribute to issues by offering what they consider and believe is the best solution at the material time, instead of waiting until they may be in power themselves or those with similar thinking.

Changing of democratic governments takes time; it takes a minimum of four to five years, often longer. And what has sometimes happened is for a bunch of politicians to say that they know better, and they put out a policy which turns out to be futile without any of the group leadership accepting that fact. By the time there is a change, the damage is done and sometimes irreparably.

The Movement in Uganda, on the other hand, allows alternative ways of managing issues, including the running of state through decisions made

by consensus. And this is where the philosophy of a "*pendulum-opposition*" is developed. No single group wins or loses all the time. The pendulum moves from Zero-opposition on certain issues to, may be, total opposition on other issues. Under this system, therefore, no one group is doomed to be losers all the time. And I must emphasize that this one of the reasons Uganda has in a way eliminated permanent groupings with friction and ill-feelings against others, a common situation under the conventional "fixed-opposition", "the government in waiting" philosophy.

We have to remind ourselves of the many examples in Africa where multi-partism, vehemently pressed for by the Western countries, has resulted in serious confrontations, mostly tribal and other forms of rival and political instability leading into civil wars, destruction of poverty, killings and all sort of atrocities.. We should try to separate between the right of a people to choose freely and the political system where political parties have been found to be the best way of governance. We should also differentiate between pluralism in its general form and political parties. This is why some people strongly feel that to define democracy so that it is all inclusive, one should identify the ingredients or pillars or elements if democracy, so that when one judges who is and is not democratic, these are the ingredients that are put to test.

A country should, therefore, be allowed to evolve a political system which ensures that the principles of democracy are upheld, taking into

consideration the historical background and experience, geographic and cultural peculiarities of the population in the country involved. This should then provide a basis for judging whether a country is democratic or not.

**III** – Based on the experience in Uganda over the last twelve years, one hopes that the international community recognizes that the principles or ingredients of democracy should include:

1. Free, fair and regular elections of those to govern by those to be governed.
2. Freedom of Association.
3. Freedom of the Press.
4. Freedom of Expression.
5. Independent judiciary.
6. Impartial or a genuinely national army.
7. Respect of human rights.
8. Accountability
9. Provision of food, housing, health, clothing and education.
10. The right for the population to develop among themselves measures for a better living and not live under the dangers of poverty.

Since independence, Ugandans appear to have turned themselves into "guinea pigs" for different forms of governance. Since 1962 when Uganda obtained its independence from Britain, it has gone through at least four different forms of governance. As a result Uganda happens to have the largest number of present and former presidents in Africa, which is a record eight in number in a period of only 35 years. It has had multiparty governance twice. One from 1962 to 1967 and again from 1980 to 1985. A one party government once from 1967 to 1971 and a military dictatorship once from 1971 to 1979.

Looking at the track record of all these governments, none of them provided peace or stability for the country which are a pre-requisite for sustained growth and development. The governments were characterized by sectarian politics, Lack of democracy, lack of transparency and a winner takes all attitude during the period, Uganda had three civil wars with large scale killings, destruction of properties, gross violation of human rights and moral decay.

As a result of these sad events in Uganda, the people, through the National Resistance Movement (NRM) led by, now President Yoweri Kaguta Museveni, waged a five-year protracted people's resistance against the regimes that were mismanaging the country then. The NRM took over power in 1986, ushering in fundamental changes in all fields, including a new political philosophy based on the No-Party or Movement political system of democracy.

IV – This is very much in line with what was written by the late Professor Claude Ake when he said:

"Liberal democracy offers a form of political participation which is markedly different from and arguably inferior to the African concept of participation. For the Africans, especially the rural dwellers, participation is linked to community. Africans do not generally see themselves as self-regarding atomised beings in essentially competitive and potentially conflicting interaction with others. Rather, their consciousness is directed towards belonging to an organic whole. The point is to find one's station and duty in life not to assert one's interest and claim rights over others. People participate not because they are individuals whose interests are different and need to be asserted but because they are part of an interconnected whole. Participation rests not on the assumption of individualism and conflicting interests but on the social nature of human beings. Related to this, the African concept of participation is as much a matter of taking part as of sharing the rewards and burdens of community membership. In addition, in the traditional African sense, participation is quite unlike the western notion of the occasional oppor-

tunity to choose, affirm or decent. It is rather the active involvement in a process: that of setting goals and making decisions. More often than not, it is the involvement in the process rather than the acceptability of the end decision which satisfies the need to participate".

The late Ake further says that the African elite to not want this type of democracy because they are mainly interested in democracy as a means to power. They are nervous about the egalitarian implications of increased social and economic rights.

We should remember that when there is a crisis or an issue of general national importance, developed countries with multi-partis put into play all their top brains in what they call cross-party discussion so that at the end they agree to an all party consensus. Thereafter, they address the issue as one and speak with one voice. The reason for this obviously is because, often two heads are better than one. But more importantly, it is to make sure that they get the best from the rest and no mistake is allowed to occur.

It is also being observed that clear cut differences in the community regarding policy, ideology and lifestyle are gradually disappearing. It is now difficult to feel and also see the clear blue water that used to dominate the past. This is, perhaps, one of the reasons why people talk about global village, global economy and so on.

When a person takes a country like Uganda, it is still backward and underdeveloped. There is need to improve and build roads, there is need for more and better equipped schools and hospitals. We also need a more productive and vibrant agricultural and industrial sector. We need to improve our social welfare and many other areas. In such a situation, the most sensible thing is to mobilize the entire population to collectively put their heads together and carefully plan and work for future progress. Leaving the building of a nation to one group with one set of thinking has a danger that if things go wrong, it might take a generation to correct the mistake, if at all. This could be very expensive to the nation, not only in monetary terms, but more so in terms of human lives.

The bottom line to all this is a political system which provides an atmosphere where everybody is free to speak out their minds, everybody is free to contribute to local and national issues, providing the best from each individual at all times.

This is why I say that Uganda is not re-inventing the wheel as far as democracy is concerned, it is just trying to improve on it. And in the Ugandan spirit of all inclusiveness and decisions by consensus, one can predict that countries with multi-parties are going to find it more and more necessary to have cross-party discussions on a number of issues. Confrontation either by word written, or said, or physically, is gradually becoming unacceptable by the majority of people, as a means of solving issues.

The philosophy which is being advanced by the regime in power in Uganda today is, therefore, to build a democracy which allows free choice by the individual, each individual has freedom to participate fully without fear or favour, without coercion or arm-twisting; the emphasis being on political empowerment of the people from the grass-roots leading to participatory democracy rather than confrontational democracy. Decisions are then made by consultation and consensus rather than "winner takes all". The Movement could be the only political system anywhere, which empowers the electorate, both at local and parliamentary levels to recall their representative if it is proved that he or she cannot deliver.

The Movement political system has a mechanism for internal debates on issues which enable it to have an in-built opposition and proposition on the issue being discussed. This makes participants at all levels in the Movement, from the President, the Ministers and Members of Parliament, work extra hard if they have to see any of their motions through. It is a win-win system. No single group is found to lose all the time nor is there any group winning all the time because there is a fluid coalition situation all the time. This has brought about harmony and has made each individual feel armed with power and choice wherever one is.

One needs to emphasize that the No Party or Movement System is not the same as one-party form of government. It is not a party because one does not need to register as a member.



One, therefore, cannot be expelled from the Movement. This is an all embracing, all accommodating Movement System. One is free to express oneself freely any time, associate with anybody any time and join in discussions of general interest any time. The main elements of the Movement democratic philosophy include:

1. All leadership and policies come from grassroots through strong village and local governments.
2. Individuals being elected to political offices on individual merit.
3. Accessibility to all positions of leadership open equally to all citizens and not just a few.
4. Enhancing the culture of tolerance through discussions rather than shutting up people who may not agree with a particular policy.
5. Participatory all-inclusive democracy instead of being confrontational.
6. Forging democratic purpose through a common denominator or national interests.
7. Accountability and transparency .
8. Minimizing differences by providing a broad-based government from the village level up to the national government.
9. Agreeing on issues by consensus rather than trying to outmanoeuvre others.

10. Full participation of women, the youth and the disabled in the democratic process.

For 11 years now since the No Party or Movement Democracy was introduced, Uganda has become the island of tranquillity with peace and stability never experienced before. There is more unity among the peoples of Uganda. The country enjoys among the fastest economies in the region, averaging between 6-12% if GDP per annum.

This, did not come by accident nor can I take it to be purely an act of God. It must have come as a result of a well-planned democratic philosophy, well executed and indeed accepted by the majority of Ugandans. This is why it is essential that people outside Uganda look at this philosophy objectively. I am not a salesman, all I am saying is that let us agree that the Movement is one form of democracy which fulfils all the ingredients, all the principles of democracy.

**VI** – They say that “the taste of the pudding is in the eating” and Uganda has gone through different types of governance as mentioned above without success. But for the last 11 years, under the Movement System, Ugandans have enjoyed peace, stability, unity and economic growth never experienced before. One, therefore, wonders why anyone would not accept this as a true democratic system.

Ugandans have been electing their leaders since 1986 from grassroots level. This democratic principle was further strengthened in 1996 when, for the first time, the President was elected by universal adult suffrage. Uganda has a very free press, there is freedom of speech and expression, there is freedom of association, an independent judiciary, a genuinely national army, accountability and transparency. There is respect for human rights overseen by an independent national human rights commission with human rights sub-committees in every sub-county. In 1996, a Universal Primary Education (UPE) programme was started. There is also free healthcare. All these are there for any doubting Thomas to go and verify.

The Movement operates under a five-tier system, which also operates very well in line with the new policy of government of decentralization and devolution of powers to the grassroots.

Tier one is at the village level, where all people in the village are members of the Local Council, L.C.I. All members in the village are free to assemble and discuss issues affecting their village and the nation at large at any time they wish to do so.

All members who are 18 years old and above are free to stand and also vote for the government that runs the village affairs, known as the L.C.I. Executive. The Executive consists of nine officials who are: Chairperson, Vice Chairperson, Secretary of the

Executive and Secretaries of Defence, Finance, Youth, Women Affairs, Mobilisation and Culture.

Tier two is at the Parish level where all Executive Members from all the villages (L.C.I.) in the Parish form a Parish Council known as L.C.II. Together, they form an electoral college which elects, among themselves, nine officials as mentioned above to run the Parish affairs, as the L.C.II Executives.

Tier three is at the Sub-County level where all Executive Members from all Parishes in the Sub-County form the Sub-County Council called L.C.III. They also elect, among themselves, nine officials of the Executive to run the Sub-County affairs. There is also an elected Human Rights Sub-Committee at every Sub-County for monitoring the situation there.

Tier four is at the District level. All people in the district who are 18 years and above are free to stand and vote for the Chairperson of the District through a one man vote system. They are also free to stand and elect District Councillors for the District on merit and by secret ballot under the No Party System. Sub-counties form the constituencies where candidates stand. Each district then ends up with 40 to 50 Council Members directly elected.

Direct elections under secret ballot also take place for the Mayors of the City of Kampala, the capital, and the Municipal Councils. For the first time, direct secret elections will be taking place under tier four in March 1998.

Tier five is the National Parliament. At the National level, any Ugandan fulfilling certain criteria as spelt out in the Uganda constitution is free to stand for the Presidency. For one to qualify as a presidential candidate, one has to obtain 100 signatures of registered voters to qualify for nomination in at least two thirds of all districts. There are now 46 Districts in Uganda. Any number of candidates is free to stand but the overall winner has to obtain at least 50% of the total votes cast.

In 1996 when Uganda held their first ever presidential elections, there were three candidates. Elections are held through secret ballot by Universal adult suffrage throughout the country. Anyone elected can only serve for a maximum of two terms of five years each term.

All Ugandans are also free to stand for parliament. Candidates have to stand where they have their physical homes and are nominated by 10 voters in their constituency. In each constituency, therefore, one can have as many candidates as are able to be nominated. Elections are also by secret ballot through universal adult suffrage.

Parliamentary elections took place in June 1996 under this system and the elections were carried out in a calm atmosphere unwitnessed in the history of Uganda's politics. The Constitution also allows each district to directly elect one woman representative to Parliament.

In Parliament, Uganda also has interest groups which are represented and these include 10 members of the Army, five representing the Youth, five representing the Disabled and three representing Workers.

During 1997 the Ugandan Parliament passed the "Movement Act" which spells out clearly the way the Movement is to operate. One of the issues was how to elect the Chairperson and leadership of the Movement.

The directly elected members of District Councils, Municipalities and the City are expected to congregate and turn into an Electoral College which is then supposed to elect the Chairperson of the Movement among any Ugandan who may wish to stand. They are also expected to form the Movement Executive.

There is no doubt that among Ugandans there are those who are not happy, with or do not believe in the present system. Many of these are those Professor Ake mentioned as being interested in democracy as a means of power. Although the Movement System allows anyone to aspire and try to obtain the highest office in the country every five years these people feel that the easier way is through multi-parties.

The new Ugandan Constitution, therefore, has given all Ugandans the choice to hold a referendum in the Year 2000 where they will be free to choose to either continue with the Movement or No Party democracy

or to organize Parties. It also allows Ugandans to decide on any other type of democracy, but makes it illegal to declare a one-party government.

We should constantly be reminded that the only way to bring about sustainable peace, stability and economic development is to establish the right form of democracy for the country but not to impose one. This also emphasises the saying that "one man's meat is sometimes another man's poison", so are some of the various forms of democracy in countries like Uganda. It should also be emphasized that without democracy and good governance, there cannot be peace, and without peace, there cannot be sustainable economic development.

The positive changes that have taken place in the political and economic development in Uganda since 1986 have come about as a result of the correct form of democracy which has brought about good leadership and as a result contributed to peace, stability and tranquillity.

You are all aware that water is always composed of two molecules of hydrogen and one molecule of oxygen. Each time you have this combination in the correct environment, you will create water. Equally so, when a country follows all the principles or rules governing democracy as mentioned above, that country ought to be considered democratic.

This is why it is important to emphasize the principles or rules of

democracy so that any time those principles are missing, then one can say that a government or a country, for that matter, is undemocratic.

Once water is formed, one can decide to either leave it in liquid form for quenching one's thirst or for bathing or turn it into ice for cooling one's glass of whisky or turn it into steam if one wants to have a sauna bath. In each case, you have water but in different forms to perform different functions. In the same way, once we have established the core or the rules of democracy, we can then have different forms of democratic governments which may include those with parties which decide to form coalition governments or those whose parties are elected under proportional representation, or those which operate under "winner takes all" or indeed a form like that in Uganda which allows as many free ideas as there are in the electorate and where you allow each person to express himself or herself freely, so that only members of Cabinet in a broad based government are expected to exercise collective responsibility on a particular issue is agreed in Cabinet. One then assumes that each of these different types of governance is chosen for a particular purpose which is relevant to the particular country and people. Trying to impose one form of government to a country just because it happens to work satisfactorily in another country will be like serving ice when once is thirsty or steam to cool one's drink.

**VII – The No Party Or Movement System** is a relatively new democratic philosophy, and like anything else in life it cannot be 100 per cent perfect. I, therefore, welcome suggestions which can improve on this democracy, which has proved successful in Uganda. There is need to carry out objective studies on how the Movement is working, and I am glad to say that there are social scientists

and administrators lined up to go to Uganda to study the Movement. I can hardly wait to receive their report.

To conclude, I wish to reiterate what I said earlier that unless Africa works out a formula which brings about true democracy acceptable to most people in each country, it will remain difficult to sustain peace and stability on the African Continent.

# *Ethiopia:*

## *Constitution for a Nation of Nations*

*Fasil Nahum\**

### **A Departure**

The most important thing to note about the Ethiopian Constitution of 1994 is that it is clearly a departure from all previous Ethiopian constitutions. The State it envisages and the government it establishes are different both in form and content. Unlike the age-old monarchical constitutions that are familiar landmarks in Ethiopian history, this constitution provides for a republican form of government. To be sure, it is the second republican constitution that has been promulgated; but while the former one provided for a single-party system and a unitary government, the 1994 Constitution provides for a federal multiparty system of government. That the name of the State is the Federal Democratic Republic of Ethiopia<sup>1</sup> is no coincidence.

The clearcut departure the Constitution of 1994 makes is based on the evaluation of previous constitutional experiences. It is based on the

understanding that the previous constitutional orders, whether of a feudal monarchical nature or of a Marxist dictatorial type, have failed to deliver what the society expected of them. What the society expected (and still expects), put in a nutshell, is a constitutional order that, without sacrificing the fundamental values of the society, propels it towards a sustainable political and socio-economic development in an orderly and peaceful fashion.

Worldwide, the pace of change since the industrial revolution has been accelerating and Ethiopia could not remain unaffected. Already a big colonial battle was fought victoriously at the end of the last century.<sup>2</sup> A railway line was extended from the sea inland up to the capital in the early years of the new century and this brought in not only new goods but also new ideas. The work of Christian missionaries in education through the decades, together with the government's own

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1 Art. 1 of the Constitution of the Federal Democratic Republic of Ethiopia, *Negarit Gazeta*, 55th year, No.1, 1995. Unless otherwise indicated, articles quoted in this work refer to this Constitution.

2 The battle of Adwa, it may be remembered, was fought in 1896 against the Italians. At about the same time other colonial wars were fought in other parts of Africa, for instance in Madagascar and the Sudan, but with very different results.

efforts, helped create a new intellectual modernizing elite. The Second World War and the United Nations-blessed Eritrean unification<sup>3</sup> at mid-century helped shake the traditional frame of mind. Ethiopia's participation in the United Nations forces in Korea and later in the former Congo played its part in the awakening within the armed forces. And finally the attempted *coup d'Etat* paved the way for a final and decisive confrontation with a late-modernizing feudal monarchy.

With the drought as the last straw to break the camel's back, the monarchy was swept away in 1974.<sup>4</sup> In its eagerness for a short-cut to socio-economic development, Ethiopia, under the leadership of the military junta known as the Derg, soon joined the Cold War bandwagon as a vigorous player and became the Soviet Union's satellite. The Marxist blueprint for overall development, replete with instant friends and foes internally and internationally, initially created a new sense of direction and the feeling that the society was now moving away from centuries-old stagnation. And indeed move it did. But was it in the intended direction? Less than two decades later, the economy was in even greater shambles, the international Soviet system had collapsed, and the society found itself polarized and in a traumatic civil war.

That the Constitution of the Federal Democratic Republic of 1994

is a new beginning is not surprising. The question is: Has Ethiopia chosen wisely this time in order to achieve the goals it has set for itself? The time has not yet come to fully answer the question. What can be answered is what Ethiopia has chosen and what the trend seems to be.

That is why we will now focus on the salient features of the Constitution of 1994.

## Ethnicity as a Major Component

One feature of great import throughout the Constitution, and one that places this constitution on a pedestal of its own, more or less, is the utmost significance given to the ethno-linguistic components of the society. The preamble of the Constitution does not open with the familiar "We the People ..."; it is "We, the Nations, Nationalities and Peoples of Ethiopia...". This is not a constitution of the Ethiopian citizens simply lumped together as a people. The Ethiopian citizens are first categorized in their different ethno-linguistic groupings and then these groupings come together as authors of, and beneficiaries from, the Constitution of 1994. The ethno-linguistic groupings and the nationality issue has historico-political and socio-economic significance beyond the cultural and linguistic

3 In 1952 Eritrea became federated with Ethiopia through UN General Assembly resolution.

4 See Proclamations No.1 and No. 2 of 1974, *Negarit Gazeta*, 34th year, Nos. 1 and 2, which deceptively refer to the "King" and "King-designate."

expressions. Indeed, "We the Nations, Nationalities and Peoples..." recognizes Ethiopia as a Nation of Nations.

The Constitution, therefore, necessarily becomes a constitution of a Nation of Nations. The importance given to the ethno-linguistic components of the society by the Constitution is absolute and real, and cannot be overemphasized. Dealing with the fundamental principles of the Constitution, Chapter 2 starts with the clear provision that "all sovereign power resides in the Nations, Nationalities, and Peoples of Ethiopia."<sup>5</sup> Indeed, the Constitution is considered as nothing more than "an expression of their sovereignty."<sup>6</sup>

This rather unusual constitutional approach has been hailed, on the one hand, as a stroke of genius that will uplift Ethiopia from its age-old backwardness and, on the other, as the sign of the first cracks for disintegration. Could both be correct in that the outcome depends on how the instrument is employed, just as the atom, as a fantastic source of energy, can be used either to greatly benefit mankind or to send it to its doom?

"We the Nations, Nationalities and Peoples of Ethiopia..." is a formula that has been developed to its full extent in the Constitution. As a concept that has bloomed fully, it has

resulted in federalism as the only logical alternative in government.<sup>7</sup> Moreover, the type of federalism it has unfurled is not a territorial federalism but an ethnic federalism.<sup>8</sup> To be sure, it is not as simple as all ethnic groups simply coming together to form the federation. Some minority ethnic groups (i.e., those with significantly less population) have joined with much larger ethnic groups within a State, or have joined together again to form a State. And these States formed on the basis of ethnicity have then come together to form the federation. These States have retained the characteristics of their ethnic groups for governmental and other ongoing constitutional purposes. The ethnicity of States is not just of historical importance, it is of actual significance in the everyday life of the people and of the federation as a whole.

## Parliamentary Democracy

Another salient feature of the Constitution of 1994 is expressed by the term "democratic" that is contained already in Article 1 of the Constitution and also forms part of the nomenclature of the State. What this constitution establishes is a parliamentary democracy much along the manner in which parliamentary democracies have been working in most of Western Europe and North

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5 Art. 8 (1).

6 Art. 8 (2).

7 Art. 1.

8 Art. 46 (2).



America. The use of the term "parliamentary democracy" assumes the exercise of freely and fairly contested, periodic elections and representative assembly or assemblies that are the expression of popular will and hold power for a mandated period. The Constitution in this respect provides for a two chamber parliament known as the Federal Houses. They are the House of Peoples' Representatives and the House of Federation. The Constitution also provides for a one-chamber State Council at State level. The House of Peoples' Representatives is "the highest authority of the Federal Government," and the State Council is "the highest organ of State authority."<sup>9</sup> The House of Federation which is "composed of representatives of Nations, Nationalities and Peoples" is the other representative assembly with specific powers, including the ultimate "power to interpret the Constitution" and to decide on other matters of grave constitutional concern such as the right to secession.<sup>10</sup>

## The Right to Secession

The right to secession is one of the peculiar features of the Constitution that again emanates from the overriding significance given to the ethnolinguistic notion of nation, nationality and people. The right to secession is part of the broader right to self-deter-

mination. The right to self-determination includes the right to develop one's language, promote one's culture and preserve one's history. Beyond that it includes the right to self-government and equitable representation in State and national government. The right to secession is the ultimate extension and expression of the right to self-determination and the Constitution provides a detailed set of procedures by which this right may be exercised, if necessary.<sup>11</sup> The right to secession is definitely the most controversial item in the constitution. This right, which we will examine in greater detail in Chapter 9, under "The Nationality Right" it has been pointed out as a basis for unity in diversity and serves as a litmus test for democracy. It can be a guarantee for sustainable peace and a solid foundation for unity based on equality and mutual respect. The arguments marshalled in favour of the right to secession by any nation, nationality, or people are based on the understanding that the Nation-State exists to serve the people and not vice-versa. If any nation, nationality, or people strongly and consistently feels its interests are not being properly served by the existing *status quo*, it should be able to change it. Obviously the other nations, nationalities, and peoples have quite a say through the process of accommodation. Detailed procedures are provided for the peaceful and constitutional exercise of the right to secession.<sup>12</sup>

9 Art. 50 (3).

10 Art. 62.

11 Art. 39.

12 Art. 39 (4) (a-e).

## Ownership of Land

Another item of the Constitution which is hotly debated, but on economic rather than political terms, is the question of ownership of land. The Constitution explicitly states that, "the right to ownership of rural and urban land... is exclusively vested in the State and in the Peoples of Ethiopia." It goes on to add, "Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of transfer."<sup>13</sup> The general principle that land, be it urban or rural, should not be considered simply as a market commodity is based on Ethiopian experience of long standing. The extraordinary significance attached to land that propels it beyond market forces is usually put in philosophical language. Land is seen in an inter-generational manner as having belonged to one's parents, grandparents, great-grandparents and will belong to one's children, grandchildren, great-grandchildren. Beyond-that, land is also seen as the common property of the extended family, the clan, the tribe, etc. One cannot forget that land touches sensitive chords in a traditional society that is particularly subsistence-agriculture-based. Other modalities of use of land in traditional society will also attribute special value beyond market forces to land and the natural resources contained, be they water, minerals, or pastures and forests.

This does not mean, however, that land is therefore frozen in the interest of

the *status quo*. Its exploitation through market forces and otherwise is not only permitted but expected and encouraged. Where ownership is understood in its original Roman definition as being the sum total of use (*usus*), enjoyment of its fruit (*fructus*), and disposing thereof (*abusus*), it is only the last item that is not available to market forces. The use of the land and enjoyment of its fruits through market forces and in accordance with the laws and regulations that pertain to it are not affected. Thus, the renting, leasing, and developing of land is both expected and encouraged.

## Language Policy

Still another salient feature of the Constitution that emanates from Ethiopia being a country of Nations, Nationalities, and Peoples is the constitutional provisions dealing with languages. Under the general provisions of the first chapter of the Constitution, Article 5 provides both for the equality of languages and for their practical application in government. The general principle is first laid down, that "all Ethiopian languages shall enjoy equal State recognition." When this provision is put together with the provision of Article 39 (2), which provides each Nation, Nationality or People with "the right to speak, to write and to develop its own language..." as part of the right to self-determination, then it becomes clear that this general principle is not a

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<sup>13</sup> Art. 40 (3).

matter of platitude, a principle with a hollow ring. State recognition of every Ethiopian language means that efforts for its development—i.e., the preservation of its literature; the provision for a script, where such does not exist; the documentation of its oral literature; and the further study of each language via grammatical, vocabulary and overall publication and enhanced use of the language—will be done with both State blessing and State support to the extent possible.

Having said this, the question of State use of language has to be settled. Here two provisions are made, one at Federal and the other at State level. At Federal level, Amharic is made the working language of the State.<sup>14</sup> This means that the Federal State in all its official dealings shall employ Amharic as its language. But member States of the Federation are allowed by the Constitution to determine their respective working languages by law.<sup>15</sup> In other words, each member State through a law promulgated by its legislative council will have to determine what the official language of that member State is. There is no question that this process of accommodation at the linguistic level is a reflection of the overall accommodation process that federalism provides. The balance will have to be made between the need for non-cumbersome

mode of communication as is required for a modernizing State on the one hand, and on the other the need of the different ethnic groups to feel that their identity is fully recognized and respected.

## The Importance of Religion

One very important item the Constitution specifically provides for is religion. Religion has played an important part in Ethiopian constitutional history over the centuries.<sup>16</sup> From animism to archaic Judaism, from Christian Orthodoxy to Islam, and from Catholicism to Protestantism, they have all left their strong imprint at one time or other in Ethiopian constitutional history. There has been no time in Ethiopia's monarchical constitutional history when there has not been a State religion. Christianity entered Ethiopia at a relatively early period around 325 A.D. and, by supplanting polytheism and archaic Judaism, became the State religion. Judaism's final attempt to reverse its fortunes around the end of the first millennium is still remembered in Ethiopian history as a dark and bloody era. The other major religion, Islam, has over the centuries slowly and quietly been extending its influence from the peripheral lowlands

14 Arts. 5 (2) and 106.

15 Art 5 (3).

16 See Conti Rossini, *Storia d'Etiopia* (Rome, 1929); Sven Rubenson, *Survival of Ethiopian Independence* (London, 1976); D. Crummey, *Priests and Politicians* (Oxford, 1972); Trimmingham, *Islam in Ethiopia* (London 1952); Gustav Aren, *Evangelical Pioneers in Ethiopia* (Uppsala, 1978).

inward. The one exception to this quiet Islamic development took place towards the end of the fifteenth century, another violent attempt at supplanting Christian Orthodoxy as the State religion. The Portuguese army, with whose help the *status quo* was re-established, became another cause for a civil war, when Catholicism attempted to supplant Orthodoxy as the State religion. It is the history of religious turbulence and its complicity in constitutional upheavals that makes these constitutional provisions significant. First, the general principle is laid down that "State and religion are separate." Secondly, the important departure is officially announced that "there shall be no State religion." To spell out in black and white the implication of the first two provisions, a third-one is added, saying that "Government shall not interfere in the affairs of religion. Religion shall not interfere in the affairs of government."<sup>17</sup> With the constitutional right of individual freedom of conscience and religion provided for by the Constitution,<sup>18</sup> which includes that right to worship, exercise, and propagate one's religion, individually or collectively, and in public or private, the picture is completed.

## Fundamental Rights and Freedoms

A significant thrust of the constitution is achieved in the field of fundamental rights and freedoms. Nearly

one-third of the provisions of the Constitution deal with fundamental rights and freedoms. Chapter 3 of the Constitution is divided into two parts and rights are categorized as human rights and democratic rights. Human rights deal basically with the rights and freedoms of the individual and include the classical, first-generation rights covered by the International Bill of Rights. The right to life, liberty, and the security of the person, as well as the right of the person in a criminal case, to be treated humanely and fairly, with all the procedural and substantive safeguards intact, throughout the process are carefully spelt out. The right to equality before the law, the right to the protection of privacy and the right to freedom of religion, belief, and conscience are all covered as part of human rights.

The compartmentalization of rights as human rights on the one hand and democratic rights on the other is not water-tight. Democratic rights tend to be more group oriented and/or political in nature. The right to freedom of thought and expression, the right of assembly, demonstration, and petition, the freedom of association, and the freedom of movement are included in the second category.

So are the rights of women and children, as well as the right to marriage and family incorporated into democratic rights. The political rights to vote and to seek election, the right of Nations, Nationalities, and Peoples to

<sup>17</sup> Art. 11.

<sup>18</sup> Art. 27 (1).

self-determination, economic, social, and cultural rights, the right to property and the right of labour are made part of democratic rights and are carefully enshrined. Going deep into what have internationally come to be known as second- and third-generation rights or socio-economic and solidarity rights, the Constitution in addition provides for the right to development and environmental right.

To ensure the proper and full exercise of such far-sighted enshrinement of fundamental rights and freedoms, the first article of Chapter 3 of the Constitution introduces two concepts - first, that all organs of State at all levels have the "responsibility and obligation to respect and enforce" fundamental rights and freedoms;<sup>19</sup> and second, that the interpretation of these rights and freedoms shall conform to international standards, specific mention being made of the Universal Declaration of Human Rights and the Bill of Rights.<sup>20</sup>

Federal and member State courts with respective judicial authority and independent judiciary are empowered to interpret and enforce the Constitution and the whole legal regime.<sup>21</sup> A

council of constitutional inquiry is also provided for, whose task is to examine constitutional issues and to submit its findings to the House of Federation for final decision.<sup>22</sup>

That the Council of Peoples' Representatives establishes the Human Rights Commission,<sup>23</sup> and the institution of the Ombudsman<sup>24</sup> reveals the importance given to fundamental rights and freedoms by the Constitution. The clear message of the Constitution is that it is serious with the respect for human rights. One final interesting point to be mentioned! in connection with Chapter 3 of the Constitution is that its amendment procedure is made exceptionally stringent and requires a majority vote in each member State council and a two-thirds majority in both federal Houses.<sup>25</sup>

## Constitutional Interpretation

Since the Constitution, the highest overall authority in the land, is a law, it is argued, its ultimate interpretation should rest with the highest court of law. On such premises, for instance,

19 Art. 13 (1).

20 Art. 13 (2).

21 Arts. 78-79.

22 Arts. 82-83.

23 Art. 55 (14).

24 Art. 55 (15).

25 Art. 105 (1).

26 See famous case of *Mulberry vs. Madison*, US Supreme Ct, 1 Cranch 137, 2nd L. Ed. 60 (1803); See also A. Bickel, *The Least Dangerous Branch* (New York, 1962).

the American Federal Supreme Court is vested with the power of ultimately interpreting the United States Constitution.<sup>26</sup>

In other federal systems, such as in Germany, the ultimate interpretation of the constitution rests with the constitutional court, which - although a specialized institution - is still a court.<sup>27</sup>

The Ethiopian Constitution, on the other hand, in a creative stroke provides for something quite different, emanating from and consistent with the overriding supremacy of the nations, nationalities, and peoples whose sovereignty the constitution expresses. Without losing sight of the constitution as the supreme law of the land, its characteristics as the supreme political instrument for self-determination, peace, democracy, and socio-economic development are fully exploited. Thus, the ultimate interpreter of the constitution is made, not the highest court of law, but the House of Federation. The House of Federation, as the champion of the nations, nationalities, and peoples of Ethiopia, whose equality it promotes and whose unity based on their mutual consent it enhances, whose self-determination right it enforces and whose misunderstandings it seeks to solve, it is

precisely this political institution that is vested with "the power to interpret the Constitution."<sup>28</sup> The constitution does not however consider its interpretation a purely political matter. The constitution establishes the Council of Constitutional Inquiry, a body of mostly legal experts of high standing, headed by the Chief Justice of the Federal Supreme Court, to examine constitutional issues and submit its findings to the House of Federation.<sup>29</sup> The House of Federation thus has the official competent and authoritative legal advice of the Council of Constitutional Inquiry before it makes its final decision on constitutional issues.

However, there is no question but that the authority to ultimately interpret the constitution rests with nobody but the House of Federation. The House of Federation is not bound by the advisory opinion of the Council of Constitutional Inquiry. Indeed the House of Federation can on appeal reverse a decision of the Council of Constitutional Inquiry, finding no grounds for a particular constitutional interpretation.<sup>30</sup> One hopes, however, that law and politics would work hand in hand in unfolding the constitution so that it consistently and increasingly achieves the objectives it set for itself at the preamble.

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27 German Constitution.

28 Art. 62 (1).

29 Art. 82.

30 Art. 84.

## Constitutional Amendment

Another interesting feature of the constitution is its amendment procedures. True to federal systems, it involves both regional and federal legislative organs in the process. The formal initiation of constitutional amendment can come from either regional or federal legislative organs. Where the initiative comes from the regions, a third of State councils must have supported a draft by majority vote. Otherwise either of the Federal Houses can initiate a constitutional amendment by a two-thirds majority vote.<sup>31</sup>

Constitutional amendments are then categorized into two. Ordinary constitutional amendments require a two-thirds majority vote in a joint meeting of the Federal Houses as well as a majority vote in two-thirds of State councils.<sup>32</sup>

Where constitutional amendment deals with fundamental rights and freedoms enshrined in the constitution or the constitutional amendment initiation procedures of Article 104, a more stringent requirement is introduced. In such cases, the Federal Houses must each accept the proposal by a two-thirds majority and all State councils must pass the draft by majority vote.<sup>33</sup> Constitutional amendments in addition require popular discussion

and may be submitted for referendum.<sup>34</sup>

## State of Emergency

State of emergency is an unfortunate and exceptional situation that may arise in the life of a State. To foresee such a possibility and to provide for specific procedures to avert the danger posed is not uncommon in constitutions. How constitutions handle a state of emergency, however, varies from one system to another.

The Ethiopian constitution provides for specific procedures and institutions to come to life on a temporary basis when situations occur that amount to a state of emergency. At the Federal level, any of the following conditions may trigger a state of emergency:

- a) external invasion,
- b) serious breakdown of law and order,
- c) natural disaster, or
- d) serious outbreaks of epidemics.<sup>35</sup>

The Council of Ministers has the power, under such circumstances, to issue a decree proclaiming a state of emergency and, through regulations it issues, take the necessary measures

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<sup>31</sup> Art. 104.

<sup>32</sup> Art. 105 (2).

<sup>33</sup> Art. 105 (1).

<sup>34</sup> Art. 104.

<sup>35</sup> Art. 93 (1 a).

to protect the country's sovereignty and peace, and to maintain public security, law, and order. To this end the Council of Ministers may suspend democratic and political rights provided for in the constitution as necessary.<sup>36</sup> The Council of Ministers, however, has the duty to submit the emergency decree to the House of Peoples' Representatives within 48 hours of its adoption if the House is in session, and within 15 days if not in session.<sup>37</sup>

Once adopted by the House of Peoples' Representatives, an emergency proclamation stays in effect up to six months and can be extended for a four-month period successively.<sup>38</sup> The constitution also provides for the simultaneous establishment of an Emergency Board to oversee the implementation of the state of emergency proclamation. The seven-person Emergency Board appointed by the House of Peoples' Representatives from among its members and from legal experts is particularly empowered to ensure respect for human rights during a state of emergency.<sup>39</sup>

## From Prescription to Application

These, then, are the important considerations that characterize the

Ethiopian Constitution of 1994 and imprint an exclusive personality known as the Federal Democratic Republic of Ethiopia.

The Constitution is "the supreme law of the land" and "any law, customary practice, or decision of an agency of government or official that contravenes this constitution is null and void."<sup>40</sup> That law, in its full sense, is not only prescription but both prescription and application is a notion the realistic school of law has been making and emphasizing for a long time. Indeed, prescription without enforcement is nothing but pretence. But here something totally different is envisaged. At the time of the establishment of the Constitutional Commission in 1993, the President of the Transitional Government in his keynote address emphasized the great importance of the application and enforcement aspect of the constitutional process. Hence one looks forward at this initial stage of the development of the new constitutional process in Ethiopia to the strict application of the provisions of the constitution in the spirit of peace, the enjoyment of human and democratic rights, and in the common interest. This would be the additional distinctive and salient feature of the Constitution.

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36 Art. 93 (4).

37 Art. 93 (2).

38 Art. 93 (3).

39 Art. 93 (5, 6).

40 Art. 9 (1).



# *The Algerian Constitution: a Constitution Based on the Separation of Powers and the Protection of Individual and Collective Freedoms*

*Abdallah Baali\**

Since its independence Algeria has had three different constitutions. They have all constituted important landmarks in the progress towards the foundation of a pluralist democratic society.

The first Constitution approved on 28 August 1963, first by the Constituent Assembly, and then by popular referendum on 8 September, establishes a presidential regime and consecrates the National Liberation Front (NLF) as the single party.

After the assumption of office of Houari Boumédiène on 19 June 1965 and the creation of a Revolutionary Council, the Constitution was suspended.

It was only in 1976, following the adoption of the National Charter which proclaims socialism as an irreversible movement and endows the Algerian Revolution with a philosophical and political platform, that a new Constitution was finally adopted

by referendum. The new Constitution reaffirmed the election of the President of the Republic by direct and universal suffrage and confirmed the status of the NLF as the only party.

Following the events of October 1988, substantial reforms were immediately instituted with, on 3 November of the same year, the "constitutional amendment on a new organization of the executive function". This was followed on 27 November by the adoption by the 6th Congress of the NLF of "profound modifications in the organization of national institutions and politics so as to permanently involve all the actors of the country, without exception, in the political life of the Nation", and on 23 February 1989, by the adoption of the second constitutional amendment on guarantees for individual and collective freedoms. The new Constitution acknowledged, in particular, in Article 40, "the right to create organizations of a political nature".

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Multipartism was hence established and a law was passed on 5 July 1989, by the National Assembly which defined the conditions for the creation of political associations and entrenched the general principles to be applied in such cases.

Within this framework, it is specified that a political association cannot base its existence or action upon an exclusively confessional, linguistic, or regional basis, nor upon the belonging to a same race or a certain professional category.

However, a serious distortion of the conditions governing the creation of political parties occurred with the authorisation of parties based upon religious grounds. This has had dramatic consequences on the political life of the country.

Around sixty political parties have been authorised. The movement of non-political associations which has been authorised since 1988 has also known a spectacular rise with the creation of tens of thousands of non-lucrative associations in all areas of social, cultural and charitable life. Individual and collective freedoms have also gained from the new political climate established by the new Constitution with the creation of dozens of independent newspapers and magazines.

As a consequence of the negative impact on the democratic process of the aggressive activism of the Islamist parties - which took over the mosques, developed a fanatical and obscurantist

rhetoric, and issued calls for civil disobedience - the authority of the State was weakened, notably in the maintenance of order and security. The emergence also of extreme violence in politics as well as in society in general - through the use of terrorism as a means of gaining power - brought the leaders of the country and the political forces that were attached to constitutional legality and hostile to violence, to agree, during the National Entente Conference, held in September 1996, upon a new reform of the Constitution which took place in November of the same year. The objective was to consolidate and intensify the democratic process in Algeria on renewed grounds.

As previously mentioned, the constitutional process in Algeria has evolved according to the historical, political and social conditions which have, at different times, prevailed in the country. They have always evolved towards the establishment of the more democratic society which, long before 1 November 1954, the founding fathers of the new Algeria had set as their objective.

The purpose of this brief reflection is firstly to make a general presentation of the Algerian Constitution, which represents today the fundamental law on which the whole Algerian institutional edifice is based, and secondly to highlight and explain some of the particularities of this Constitution.

## **I - The Algerian Constitution: A Constitution Based on the Separation of Powers which Guarantees the Exercise of Individual and Collective Freedoms**

The Constitution, which includes 182 articles that are grouped under four chapters (i.e., guiding principles ruling the Algerian society; organization of power; the control of consultative institutions; constitutional reform), is "above all" - "it is the basic law which guarantees individual and collective rights and freedoms, protects the free choice of the people and confers legitimacy to the exercise of power".

The fundamental elements, language and religion, are reaffirmed in the Constitution, as well as are enshrined the inalienable principles related to the attributes of the people who are the "source of all power" (Art. 6) and who "exercise sovereignty through the institutions chosen by way of referendum and through elected representatives." (Art. 7)

As for the State, it draws its legitimacy and *raison d'être* from the will of the people to whom it is exclusively dedicated (Art. 11).

### **A. The Separation of Powers**

The President of the Republic, who exercises the highest office of the country, within limits set by the Constitution, and who is elected for a

five year mandate through direct and secret universal suffrage, is the Head of State, embodies the unity of the Nation, and is the guardian of the Constitution.

The President, who is the commander in chief of the armed forces, presides over the Council of Ministers, appoints and discharges the Head of Government, makes military and civil appointments, may grant clemency, and may convoke the people through referenda.

The management of the country's affairs is, however, allotted to the government which reports to the National People's Assembly. The judiciary, on the other hand, is independent and exercises - through the State Council, the Supreme Court and the State High Court - control over the activities of the executive which can extend to crimes and offences committed by the President of the Republic and the Head of Government within the exercise of their functions.

The mandate of the Constitutional Council is to check whether a legislative or executive act conforms with the Constitution.

### **The Executive**

The President of the Republic is responsible for national defence, decides and conducts the foreign policy of the Nation, presides over the Council of Ministers, and appoints

and discharges the Head of Government. These are important powers which are exercised by numerous Heads of State in democratic countries. It is notably the case in France where the Constitution of 4 October 1958, grants the same powers to the President of the Republic.

The management of the country's affairs is, however, in the hands of the Head of Government who presides over the Council of Government, makes public appointments - without prejudice to the prerogatives of the President of the Republic -, and oversees the proper functioning of public administration.

If appointed by the President of the Republic, the Head of Government is responsible before the National People's Assembly (NPA), whose approval of the government's programme is necessary.

On the other hand, the Head of Government can present a communication before the Council of the Nation, which is the second Chamber of Parliament, concerning the government's programme. This may only result in a resolution that bears no legal implications.

In case of non-approval of the programme by the NPA, the appointed Head of Government tenders resignation to the President of the Republic who appoints a new Head of Government.

Should the NPA again reject the new programme presented by the

Head of Government, it is legitimately dissolved and the election of a new Assembly has to take place within three months (Art. 82).

The Head of Government must have, therefore, command a sufficient majority within the National People's Assembly at the time of designating a government whose members are appointed by the Head of State, and, therefore, also when the programme is submitted to the approval of the NPA.

The Head of Government may also re-examine the programme in light of the prevailing debate.

When the programme is approved, the Head of Government applies it. Every year, the Head of Government is obliged to present before the NPA a declaration of general policy which leads to the opening of a debate on the work of the government and, possibly, to the adoption of a resolution.

The NPA can also decide upon a vote of no confidence, thus entailing the resignation of the government.

The President of the Republic may however, according to the terms of Art. 129, dissolve the National People's Assembly and decide upon early parliamentary elections.

Finally, Parliament may initiate a debate on foreign policy which may lead to the adoption of a resolution by a joint session of the two chambers of Parliament. The members of Parliament may question the government regarding issues of current

concern or may address - orally or in writing - questions to a member of the government whose response may be followed by a debate.

## The Legislature

Parliament is composed of two chambers, the National People's Assembly and the Council of the Nation, which draft and adopt laws in a sovereign manner.

The powers of the Parliament are important and are identical to those that are exercised by Parliaments in all democratic States.

As mentioned before, the Parliament, through the NPA, exercises wide control over the action of the government. Parliament can deny the government's investiture by rejecting its programme. It can also deny confidence in the government and can censure it. The government would fall in any such case.

Members of the NPA are elected for five years by direct and secret universal suffrage, whereas the members of the Council of the Nation have a mandate of six years. The latter are, for two-thirds, elected by indirect and secret vote by the members of the Communal People's Assemblies and the *Wilaya* (departmental) People's Assemblies, the remaining third being designated by the President of the Republic among outstanding personalities in the scientific, cultural, professional, economic and social domains.

The number of members of the Council of the Nation is equal to that of half - at the most - of the members of the NPA.

Parliament sits in two ordinary sessions of at least four months each. It can also hold an extraordinary session initiated by the President of the Republic or upon request from the Head of Government or two-thirds of the NPA members.

As it generally is the case in parliamentary democracies, the initiative of laws concurrently belongs to the Head of Government and to the members of Parliament.

To be adopted, a bill has to be approved by the NPA and then submitted, as it has been approved by the latter, to the Council of the Nation, which has to adopt it by a three-quarters majority.

In case of disapproval, the *Commission paritaire* meets in order to propose a compromise text with regard to the dispositions that are object of disapproval.

If the disapproval persists, the text is withdrawn.

Parliament has competence to legislate in all areas where parliaments traditionally have competence:

- fundamental rights and duties;
- rules related to the right of abode, the status of aliens, and nationality;

- rules related to the organization of the judiciary, criminal law, criminal law procedure, civil procedure, civil and commercial obligations and property;
- territorial division, tax, rules for the issuing of the currency, budget, education, health, right to employment, pension regulations, mines and hydrocarbons, real estate, environment, customs, water, forests ...

It also has competence to adopt organic laws concerning:

- the organisation and functioning of the civil service;
- the electoral system;
- the law on political parties
- the law on information;
- the law on the judiciary and judicial organisation; the law on National security.

Organic laws are adopted by the absolute majority of members of the lower house and three-quarters majority of members of the Council of the Nation and are submitted to a conformity control by the Constitutional Council before being promulgated.

Within this framework, it should be noted that in time of state of emergency, of recess of the NPA or during the intersession periods of Parliament, the President can issue decrees, bearing in mind that the President must submit such texts to the two chambers of Parliament for their approval at

their next session and that the laws which are not adopted by the Parliament are rendered null and void.

### The Judiciary

The Constitution guarantees the independence of the judiciary which protects society and liberties and guarantees the protection of fundamental rights for all (Art. 138).

Justice is equal for all, accessible to all, finds expression in the respect of the law, and is administered in the name of the people (Art. 138).

Judges are answerable only to the law and before the *Conseil supérieur de la magistrature* which decides upon nominations, transfers and promotions. As in many democratic States such as France, it is presided over by the Head of State.

The Supreme Court is the regulating organ of the activities of all courts and tribunals whereas the Council of State regulates the activities of administrative jurisdictions. Both these institutions watch over the respect of the law and ensure the compatibility of jurisprudence throughout the country. A Tribunal of Conflicts rules on conflicts of competence between the two institutions.

A High Court of State is established for cases of high treason committed by the President of the Republic or the crimes and offences committed by the Head of State within the exercise of their functions.

## **B - Rights and Freedoms**

Fundamental freedoms as well as human and citizen's rights are guaranteed under the Constitution (Art. 32) - and so is their individual or collective defence (Art. 33).

Are also guaranteed: the sanctity of the person; freedom of conscience and opinion; freedom of intellectual, artistic and scientific creation; the right to private life and sanctity of residence; freedom of expression, association and reunion; freedom of association; the right to education and employment; the right to create trade-unions and the right to strike; the right to health, and freedom of trade and industry.

The right to create political parties is also granted and guaranteed.

Finally, other rights such as the right for all to be presumed innocent until proven guilty, equal access to public positions, the right to choose freely his or her place of residence, the right to enter or leave national territory, the right to vote and the right to stand for election are guaranteed under the Constitution.

## **II - The Specifics of the Algerian Constitution**

Drawing upon the consequences of the mistakes committed since 1988 and the situation of laxism and dereliction that the country has experienced since then, which brought it to the edge of collapse, a consensus emerged

among the political class - within the framework of the national agreement Conference on October 14-15 September 1996 (when 27 political parties representing all the facets of the Algerian political context, including seven national organisations and/or trade unions, two organizations of employers and two associations representing civil society) - to regenerate the constitutional basis upon which politics were being exercised in Algeria.

The constitutional reform which took place in November 1996, through referendum, allowed the introduction of protective measures and amendments that would keep society safe against such drifts in the future.

### **1 - The Non-Utilisation of Identity for Political Purposes**

Article 42(3), which establishes the existence of political parties (parties were only recognized by the 1989 Constitution as political associations), now stipulates that political parties cannot be established on a religious, linguistic, racial, gender, professional or regional basis.

In other terms, national identity, in its triple Muslim, Arabic and Amazigh (Berber) dimension, transcends the political scene and is placed out of reach of demagogic exploitation for political and partisan purposes.

The law on political parties adopted after the reform confirms the

non-utilisation of national identity for political or partisan purposes.

## **2 - Non-Recourse to Violence and Respect for Democracy**

Drawing lessons from the painful experience that Algeria has known in the past few years, a paragraph stipulating that "no political party may resort to violence or constraint, whatever their nature or form" has been introduced by Article 42.

Similarly, the right to create political parties cannot be invoked to threaten the democratic and republican nature of the State (Art. 42(2)). Thus, a party that would openly promote the demise of democracy or of the Republic would be denied legal existence.

Finally, in order to permanently preserve the democratic order and republican nature of the State, Article 178 of the Constitution stipulates that constitutional amendments may not, amongst other things, threaten:

- the republican nature of the State;
- the democratic order based on multipartism;
- fundamental freedoms, and human and citizens' rights.

## **3 - The Presidency**

The President of the Republic is granted similar powers to those which belong to Heads of States in a

number of democratic countries. The President's powers have not been increased by the November 1996 Constitution. On the contrary, amendments leading to a limitation of powers have been made with respect to the exercise of the presidential mandate.

Thus, the number of presidential mandates, which in the past was unlimited, is now limited to two. This constitutes, in all respects, a unique disposition in the Arab world as well as in Africa.

Moreover, the President of the Republic is rendered, within the exercise of his functions - and this is also the case for the Head of Government - accountable before a High Court of State.

Finally, and as far as the power to issue decrees - which may occur only in a situation of State of emergency, recess of the NPA, or during inter-session periods; in other words, in exceptional circumstances - is concerned, it should be emphasised first of all that resorting to decrees is no constitutional innovation neither in Algeria nor in the rest of the world. The decrees which are issued must be submitted to Parliament during the following session and are nullified in case of rejection.

## **4 - The Creation of a Second Chamber**

The Algerian Parliament is now composed of two chambers:



The **NPA**, which is elected by direct universal suffrage and which holds most of the power as is the case in many democracies, notably in Europe. It is indeed the NPA that exercises the political control over the government, approves a government's programme, censures it, and gives or denies its confidence.

The **Council of the Nation**, where two-thirds of the members are elected by indirect ballot as is the case in many countries that have a bicameral system. The designation of one-third of the members of the Council of the Nation is not specific to Algeria, many democracies also resort to this mode of designation.

In creating a second chamber the objective was to introduce more poise and moderation in the legislature at a time when Algeria was undergoing its first pluralist democratic experience, and when the excessive enthusiasm of parliamentarians coupled with their insufficient knowledge of certain issues and political, economic, and social realities, may have led to a situation that would cause prejudice to the country's interests or to the very success of the democratic experience itself.

The examination, by a second authority, of a law which has been adopted by a majority of parliamentarians, ensures that the law meets the expectations of the citizens. This is all the more true since two-thirds of the members of the Council of the Nation represent local and regional communities and the other third is

constituted of civil society representatives whose opinions and skills are not necessarily present in the NPA.

That the requested majority for a law to be definitely adopted at the level of the Council of Nation should be so large constitutes in fact an additional guarantee that the law will properly respond to citizens' expectations. This is the case for **laws initiated by parliamentarians as well as those initiated by the government**, which are both submitted to the three-quarters majority.

## **5 - Control of the Executive and the Legislature**

In addition to the political control that the Parliament exercises over the government, both chambers can, within set limits, establish a commission of enquiry on matters of general interest at any time.

At another level, a Constitutional Council is established to monitor respect for the Constitution, the regularity of polling operations (referenda, presidential and parliamentary elections) and decide over the constitutionality of treaties, laws and rules.

The *Cour des comptes* is in charge of controlling - *à posteriori* - the finances of the State, local communities and public services.

## **6 - The Constitutionalisation of Freedom of Trade and Industry**

In order to render the current liberalisation of the Algerian economy irreversible, and to give a firm

juridical basis to the economic reforms which are necessary to the establishment of market economy, freedom of trade and industry is now part of the freedoms guaranteed under the Constitution.

# *The Supreme Constitutional Court and Its Role in the Egyptian Judicial System*

*Dr Awad Mohammad El-Morr*

*Justice Abd El-Rahman Nossier*

*Dr Adel Omar Sherif \**

## **Introduction**

The Supreme Constitutional Court sits at the apex of the Egyptian judicial system, exercising an exclusive power of judicial review in constitutional cases. By providing an authoritative interpretation of the Constitution it seeks to draw a balance between the need for both consistency and progress in the development of constitutional law in Egypt.

The Court derives its judicial status and powers from Articles 174—78 of

the 1971 Constitution.<sup>1</sup> The 1971 Constitution was the first Egyptian constitutional text to make provision for a supreme court. But the creation of the Supreme Constitutional Court was consistent with the Egyptian practice of specialisation in the judicial system. A Supreme Court had been created in 1969 under a decree law.<sup>2</sup> This court continued to function for a transitional period after the adoption of the 1971 Constitution until the establishment of the Supreme Constitutional Court in 1979.<sup>3</sup>

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\* Egyptian experts on Constitutional Law.

1 Article 174: "The Supreme Constitutional Court shall be an independent judicial body in the Arab Republic of Egypt, and having its seat in Cairo."

Article 175: "The Supreme Constitutional Court alone shall undertake the judicial control in respect of the constitutionality of the laws and regulations, and shall undertake the interpretation of the legislative texts in the manner prescribed by law. The law shall determine the other competencies of the court, and regulate the procedures to be followed before it."

Article 176: "The law shall organise the way of formation of the Supreme Constitutional Court, and prescribe the conditions required of its members, their rights and immunities."

Article 177: "The status of members of the Supreme Constitutional Court shall be irrevocable. The Court shall call to account its members, in the manner prescribed by law."

Article 178: "The judgement issued by the Supreme Constitutional Court in constitutional cases, and its decisions concerning the interpretation of legislative texts, shall be published in the Official Gazette. The law shall organise the effects subsequent to a decision concerning the unconstitutionality of a legislative text."

2 Decree-Law No 81 of 1969.

3 Law No 48 of 1979.

## The Development of Constitutional Judicial Review

### The Power of "Abstention Control"

When the Supreme Constitutional Court was established in 1969 it was vested with the exclusive power of judicial review. Prior to that date all Egyptian courts, irrespective of their level and regardless of the nature or the scope of their jurisdiction, had exercised a form of judicial review known as "abstention control".

By this mechanism a court, in the course of deciding a case before it could refrain from enforcing the relevant legislative provision, if it was found to be in contravention of the Constitution. However, the unconstitutional provision was never declared void, and its operative force remained intact with respect to other cases.

### Abstention Control Compared with Judicial Review

The exercise of the power of judicial review results in the invalidation or the legitimisation of the challenged statute by a judgment which is enforceable in respect to all individuals and public authorities. In contrast, abstention control renders statutes contra-

dicting the Constitution non-operative only in respect to the particular case being determined and affects only the parties involved. It therefore follows that, under abstention control, the same legislative provision may be viewed differently by the same court in another case, as well as by other courts which reach alternative opinions.

Hence under the abstention control, a defective provision could never be declared void; nor its binding force suspended or a ruling against its application considered final. Consequently, the application of the control had the potential to produce contradictory judgments concerning the same constitutional issue in an area where the need for consistency was paramount.

However, the logical basis for both modes of ensuring constitutional supremacy is the same. It has always been implicit in, and incidental to a court's power to interpret the law that preference has to be given to the Constitution over other legislative enactments whether these originate from the legislature or the executive branch. However, this has never implied as was pointed out in a landmark decision of the Administrative Judicature Court in 1948, that the exercise of the power of judicial review means that the judiciary is superior to the legislature.<sup>4</sup> Rather

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4 In *Osborn v Bank of United States*, 22 US (9 *Wheat*) 738, 6 L ed 204 (1824), Chief Justice Marshall stated that "...courts are the instruments of law and can will nothing."

the mechanism of "abstention control", as with full judicial review, is based on the proposition that where the will of the legislature, declared in statutes, stands in opposition to that declared by the nation in the Constitution, courts will be guided by the *maxims* "*Lex specialis derogat legi generali*" and "*Lex posterior derogat legi priori*". The courts rely on the premise that legal provisions and norms are ranked in a strict hierarchy to ensure that those of a lower rank are subjected to and controlled by those of a higher level. Consequently priority must be given to, and be governed by, constitutional provisions when they conflict with other rules.<sup>5</sup>

### **Establishment of the Supreme Court and Recognition of the Principle of Judicial Review**

The deficiencies associated with the abstention control procedure led to the enactment of Law No 81 of 1969 which established the Supreme Court with the exclusive power of judicial review and law No 66 of 1970 which prescribed the applicable procedural rules to be used before it. Thus, judicial review was centralised in one court in contrast to the United States of America where all courts - State and Federal - possess this power.<sup>6</sup>

### **Nature of the Court's Powers**

A fundamental rule is that judicial review may only be exercised in relation to legislation which is being challenged by parties to a case before the courts.

Article 4 of the Supreme Court's Rules stipulated that allegations of disparity between a legislative provision and the Constitution must first be raised before a court by a party to the case. If such a claim is considered by that court as having merit, that court can then prescribe a time limit within which the party might bring the constitutional issue to the Supreme Court for determination. The following requirements must, therefore, be met:

- a) There must be a case before the trial court in which specific rights are claimed.
- b) In the course of deciding this case, a party to it challenges the validity of an applicable legislative provision.
- c) The constitutional issue raised is *prima facie* viewed as affecting the substantive rights claimed, which form the "subject matter" of the original case in question.
- d) Proceedings before the trial court are suspended. However, these are resumed if the constitutional dispute does not reach the Supreme Court within the time

5 Judgment of the Administrative Judicature Court of Egypt, 10th February 1948.

6 Dr. Adel Omar Sherif, *Constitutional Adjudication in Egypt /El-Quadda El-Destory Fee Masr* (Dar El-Shabb, Cairo 1988) 78.

limit prescribed by the court of trial. In these circumstances, the subject-matter of the case shall be decided on the basis of the applicable legislative provision, the conflict with the Constitution not having been established.

- e) Where a judgment is rendered by the Supreme Court as to the validity or otherwise of the questioned legislative provision, it has to be given effect by the trial court, and the subject-matter of the case decided accordingly.

Although the Supreme Court's judicial review function was confined under Article 4 of Law No 66 to Acts of Parliament, the Court determined that its powers could also extend to subordinate legislation.<sup>7</sup>

Pursuant to the 1971 Constitution the Supreme Court was superseded by the "Supreme Constitutional Court" in 1979.<sup>8</sup> Despite its relatively short existence, the Court has actively participated in the process of constitutional law-making, has afforded protection to human rights and freedoms, and has sought to ensure that democratic principles determine the exercise of governmental power.

## Establishment of the Supreme Constitutional Court

While the former Supreme Court was established upon the legislature's own initiative, the Constitution is the source of the current Court's status and powers. Article 174 of the Constitution defines the Court as an independent judicial body having its seat in Cairo. This constitutional foundation of the Court aimed to achieve a number of objectives.

First, it decisively resolved the issue as to whether a constitutional court vested with the power of judicial review should be established or not. Second, it subjects the Court and its members to the rules generally applicable to the judiciary, including their rights, immunities and duties as judicial officials and terms and conditions of service.<sup>9</sup> Third, it affirms the non-political nature of the Court's functions, and enables it to avoid involvement in matters of political controversy. Fourth, it ensures the Court's impartiality, the foundation of public confidence in the institution. Finally, the constitutional basis of the Supreme Constitutional Court enables it to maintain its independence from government and all political parties as

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7 Case No 4 of Judicial Year 1, decided by the Supreme Court on 30 July 1971, *Collection of Decisions*, Vol. 1 at 16.

8 Under Article 192 of the Constitution, the Supreme Court was empowered.

9 Under the Court's Law, Law No 48 of 1979, it is the responsibility of the General Assembly of the Court, not the Executive Branch, to appoint the justices. The only exception is the Chief Justice whose appointment is at the discretion of the President.

well as from all improper influence, inducement and interference from any quarter.

Some further points should also be noted about the status and power of the Supreme Constitutional Court in comparison to its predecessor:

The powers of judicial review and statutory interpretation are laid down in Article 175 of the Constitution, which also delegates to the legislature the role of providing through law the most appropriate mechanisms for their exercise. However, the legislature has no authority to remove either of these powers of the Court, reflecting the subjection of the State to the rule of law as stipulated in Articles 64 and 65 of the Constitution.

Under Article 31 of Law No 66 of 1970 the Supreme Court had held that a judgment invalidating a statute applied *erga omnes* due to the indivisible nature of its annulment, and as a corollary of the statute's violation of the Constitution. Where a judgment upheld the constitutionality of a statute, the Court ruled that it bound no one other than the parties to the dispute and was without prejudice to the right of other parties to introduce new arguments and challenges against that statute. This ruling<sup>10</sup> led to the insertion of Articles 48 and 49 in the Supreme

Constitutional Court Law (No 49 of 1979) which explicitly states that judgments in constitutional controversies, as well as decisions on statutory interpretation are final, irreviewable, and bind all individuals and public authorities.

*Erga omnes* judgments and decisions of the Court as set out in Article 49 of law No 48 are those which bear on the substance of the subject-matter being considered. In constitutional disputes this is the validity or otherwise of the challenged statutory provision, and with regard to statutory interpretation, it is that which reveals the true intent of the Legislature. If the Supreme Constitutional Court declares a case or request for statutory interpretation inadmissible, its decision shall only bind the parties to that dispute.

The Court has repeatedly asserted that judgments upholding a statute or declaring it void, are by virtue of its mandate to be published in the Official Gazette to ensure the widest possible communication.<sup>11</sup> This is also a constitutional requirement.<sup>12</sup>

Neither the Constitution nor subsequent legislation has given the current Court clear authority to function through chambers although the argument is made that this would improve

10 Case No 16 of Judicial Year 7, decided by the abrogated Supreme Court on 5 February 1977, *Collection of Decisions*, Vol 1 at 43. In addition, see its judgment in Case No 8 of Judicial Year 3 (not published).

11 Case No 136 of Judicial Year 5, decided by the Supreme Constitutional Court on 17th March 1984, *Collection of Decisions*, Vol 3, p 49.

12 Article 178 of the Constitution *supra* note 1.

the effectiveness of the Court by increasing its flexibility and mobility. Nevertheless the bulk of opinion in the Court would be against such a proposal.

## The Structure of the Court

The Supreme Constitutional Court is composed of two separate, but inter-dependent judicial bodies: the Court itself and the Commissioners' Body. In addition, the administrative affairs of the Court are handled by its own administrative staff.

### The Court

The Court is composed of the Chief Justice and individual justices. The law does not specify a maximum number of judges. But the Court's statute prescribes that the quorum of judges required to sign a judgment is seven, although all justices may take part in the deliberations of the Court. At present there are ten justices of the Supreme Constitutional Court. In order to be appointed, justices must meet the following eligibility requirements as stipulated in the Judiciary Law.<sup>13</sup>

A justice must be of Egyptian nationality, have at least a LL.B. in law, be of good behaviour, and not

have any criminal convictions. The minimum age required is forty-five. An appointee must be selected from among the following categories:

- a) Current or former members of the judiciary who have been counselors for at least five consecutive years; or
- b) Current or former professors of law, who have held such positions for at least eight consecutive years; or
- c) Attorneys who have practised before the Court of Cassation and the High administrative Court for at least ten consecutive years.

According to Article 5, Section 3 of Law No 48 of 1979, two-thirds of the justices must be chosen from among the first category, i.e. members of the judiciary. In fact since the establishment of the Court, all its justices have been selected from this category.

The Chief Justice is appointed by the President of the Republic. Justices are also appointed by the President based on the advisory opinion of the Supreme Council of Judicial Bodies. Each justice is selected from a choice of two candidates; the first of whom is nominated by the General Assembly of the Supreme Constitutional Court and the second by the Chief Justice.<sup>14</sup>

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<sup>13</sup> Law No 46 of 1972.

<sup>14</sup> *Supra* note 9.



## **The Commissioners' Body**

The Commissioners' Body's principal duty is to prepare all cases, disputes, claims and petitions to be heard by the Court. The Head of the Commissioner's Body is responsible for organising and regulating its work and supervising the work of its counsellors and assistant counsellors. Commissioners are appointed by the President upon receiving the opinion of the Chief Justice and the General Assembly of the Court.

The Head of the Commissioners' Body must meet the same eligibility requirements as the justices of the Court. As for the members of the Commissioners' Body, they must meet the same requirements applicable to their peers, as provided for the Judiciary Law.

In practice, appointments are made on the basis of promotion. Nevertheless, it is possible for posts to be filled by direct appointment from other judicial bodies. Moreover, the Chief Justice has the right, based on the opinion of the General Assembly of the Court, to appoint members of other judicial bodies to fill these posts on a temporary basis. In practice members of other judicial bodies are appointed to work as commissioners for at least one year, and may become permanent if their performance is deemed to warrant it.

The members of the Commissioners' Body, including its Head, are sworn in before the General Assembly of the Court prior to assuming their posts. They are sworn to

respect and preserve the Constitution and the laws, and fulfil the duties of their posts with honesty and credibility.

### ***Administration***

The Court's administrative staff is presided over by a Secretary-General whilst ministerial responsibility is vested with the Chief Justice.

Personnel affairs are managed by a Committee formed by the Chief Justice and consisting of two justices and the Secretary-General. A further committee, composed of three justices who are elected annually by the General Assembly, acts as a disciplinary tribunal for the administrative staff. The Commissioners Body assumes the role of prosecutor before this tribunal, the decisions of which are final.

## **The Independence of the Court**

The Constitution, in several of its articles, emphasises the general independence of judiciary. Article 65 states that:

The independence and immunity of the judiciary are two fundamental guarantees safeguarding rights and liberties.

Article 165 maintains that:

Judges and justices shall be independent, and subject to no other authority but the law. No other authority may intervene in cases or in the affairs of the judiciary.

With specific regard to the Supreme Constitutional Court, Article 174 of the Constitution, *supra*, ensures its independence and this is reiterated in Article 1 of Law No 48 of 1979, which stipulates that Court's Procedures and jurisdiction.

In addition, Article 177 of the constitution states:

The status of the members of the Supreme Constitutional Court shall be irrevocable. The court's members shall be accountable to the court, in the manner prescribed by law.

This accountability of the Court's justices and commissioners exclusively to their peers is reflected in the establishment of the General Assembly of the Court which retains sole responsibility for the court's operation and all its internal and administrative affairs. The Assembly acting as a disciplinary tribunal for the justices and for the members of the Commissioners' Body, has the sole power to remove justices from office, thereby further reinforcing their independence.

The independence of the Court is also strengthened by the manner in which justices and members of the Commissioners' Body are appointed as outlined above. Article 5, Section 1 of Law No 48 of 1979, does give the President of the Republic the power to appoint the Chief Justice, but in practice the most senior justice is usually appointed to this position.

The court itself decides all matters involving the employment of its justices and of the Commissioners' Body. The delegation of court justices, even on a part-time basis, to the governmental agencies is prohibited, except if it is to an international organisation or foreign country, or involves teaching at a university.<sup>15</sup>

The Chief Justice prepares the court's annual budget which is then reviewed and approved by the General Assembly of the Court. The latter retains the same measure of authority as a Treasury minister with regard to the implementation of the budget plan, thereby ensuring the Court enjoys a fair degree of financial independence. The budget plan must, as with the national budget, be ultimately approved by the People's Assembly.

### The Jurisdiction of the Court

The Court is vested by virtue of Article 175 of the Constitution with the power of judicial review, and the power of statutory interpretation. Article 175 also stipulates that the legislature is entitled to indicate other competencies which the Court may possess, and the procedural rules for their exercise. Pursuant to Article 175 the Supreme Constitutional Court has been given the power to resolve jurisdictional conflicts between courts. It has also been given competence to determine financial and administrative disputes that may arise with respect to members of the Court itself and the Commissioners' Body.

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<sup>15</sup> Article 13 of Law No 48 of 1979.

## The Power of Judicial Review

### Introduction

Judicial review forms the core of the Supreme Constitutional Court's jurisdiction allowing it to play a key role in the shaping of the country's social, cultural and political life as the ultimate interpreter of the Constitution.

The exercise of this power is based on the proposition that the Constitution, as the ultimate source of all political power, is recognised as the supreme law from which all the powers of the government are derived. Without effective restrictions on the power of governments and articulated guarantees for the protection of individual rights and freedoms, the principle of the rule of law cannot operate.

Therefore, if the government acts unconstitutionally it must be held to account through the effective exercise of the power of judicial control in order to preserve the constitutional will of the people intact.<sup>16</sup> This is in accord with all written constitutions which have always contained provisions

which yield judicially enforceable rights unable to be overridden by ordinary laws.<sup>17</sup>

The power of judicial review is not only exercised in regard to the Constitution, but may also be used to settle other legal disputes. It has proved to be a very constructive means of introducing progressive change peacefully in the country while also helping to protect the fundamental rights and freedoms of individuals when these have been threatened.

In exercising this jurisdiction the Court has defined many of the general and ambiguous terms in the Constitution, including the equal protection clause, equal opportunities to all citizens, the concepts of a "fair trial" and "natural justice" to which all citizens are entitled; the "social solidarity" upon which the society is based, and constitutional limits of the right to privacy.

However, the power of judicial review is not intended to infringe on, or to be directed against the principle of the separation of powers.<sup>18</sup> On the

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16 Tresolini and Shapiro, *American Constitution Law*, 3rd ed, at 66. However the scope of judicial review must be restrained, in order to prevent the judiciary exercising power in excess of its constitutional mandate (see *Bowers v Harwick*, 478 *US* 186, decided by the United State Supreme Court on 30 June 1986).

17 *Campare Marbury v Madision*, 1 *Cranch* 137 (1803).

18 Elliot L Richardson, "Checks and Balances in Foreign Relations", *AJIL*, Vol 83, No4, October 1989, 737.

contrary, it recognises that the different branches of government share power through a series of checks and balances, holding each other to account.<sup>19</sup> It has been widely recognised that the judiciary is the best mechanism for protecting the constitution particularly if one notes that the Court neither approves nor condemns any legislative policy.<sup>20</sup> A claim of invalidity against a statute once filed with the Court does not have the effect of suspending the statute's powers. The challenged legislative provision remains in force until the Court reaches its decision.

Judicial review is now firmly embedded in the system of Egyptian government enabling the Supreme Constitutional Court to act as arbiter between individual and State through a dynamic interpretation of the Constitution. By performing this function the Court implicitly recognises that the Constitution was never intended to be, nor has in practice proved to be, a straitjacket. As Chief Justice Wendell Holmes aptly pointed out, the provision of the Constitution are not mathematical formulas, but organic living institutions the significance of which have to be determined accor-

ding to their origins and their subsequent development.<sup>21</sup>

### Bringing Constitutional Cases Before the Court

Article 29 of Law No 48 of 1979, specifies two principal procedures whereby a constitutional issue can be raised in connection with the determination of the merits of a case and as a prerequisite for its settlement.

#### *Constitutional Issue Raised by a Party to a Case*

Article 29 sub-paragraph (b), enables a party to a dispute on the merits to question the validity of an applicable statute provided it can show that the party has a personal stake in the outcome of that issue. If the court hearing the case, consider that *prima facie*, the claim of invalidity is well founded, it then prescribes the time limit within which that party has to institute constitutional proceedings before the Supreme Constitutional Court. These proceedings are deemed to be completely independent of those before the trial court, despite the fact that the invalidity of the challenged

<sup>19</sup> The separation of powers is not merely a matter of convenience or a particular system of government. It has a primary and vital objective, namely to prevent the fundamentally different governmental powers falling into the same hands (*O'Donoghue v United States*, 28g US 516, 530, 1933). In his dissenting opinion in *Myers v United States*, 272 US 52, 293, 1926, Justice Brandies wrote that the doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power and thereby save the people from autocracy. However, as Madison argued in the *Federalist* No 48, unless the various branches are connected in such a manner so as to give to each a constitutional control over the others, the degree of separation which the maxim requires as essential in a free society, can never, in practice, be duly maintained.

<sup>20</sup> Mason and Beany, *American Constitutional Law*, 3rd ed, 11-21.

<sup>21</sup> Justice Oliver Wendell Holmes in *Compers v United States*, 233 US 604, 610 (1914).

provisions will affect the subject-matter of the original case.

In considering the allegation of statutory invalidity, the trial court takes no decision on its compatibility with the Constitution. Only the apparent breach of the Constitution is examined and if the court fails to prescribe a time limit for the initiation of constitutional proceedings, but proceeds with consideration of the merits, it is implicit in its decision that the constitutional claim is groundless.

The Supreme Constitutional Court has repeatedly affirmed that the requirements laid down by Article 29 for bringing constitutional disputes before it, for example time limits and the need for precise definition of the issue in question, must be adhered to by the parties. Otherwise the case will be declared inadmissible.<sup>22</sup>

Failure by the party who raised the constitutional issue before the lower court to strictly observe the prescribed time limit for reference to the Supreme Constitutional Court will result in the resumption of the proceedings on the merits. Where a trial court grants permission to raise a constitutional issue before the Supreme Constitutional Court, but fails to lay down any specific time limit, the maximum period of three months must be adhered to.

## **The *Ex Officio* Jurisdiction of Courts to Refer**

### ***Constitutional Issues to the Supreme Constitutional Court***

Sub-paragraph (a) of Article 29 Law No 48 of 1979, entitles a court of trial on its own motion to refer a constitutional issue to the Supreme Constitutional Court. Where in any proceedings it appears to a court that *prima facie* a particular legislative provision appears to be in violation of the Constitution and the constitutional issue has a bearing on the subject-matter of the case, the court may refer the issue of validity to the Supreme Constitutional Court for adjudication. This procedure will be used when the parties to the original case either lack the personal interest to challenge the applicable legislative provision, or are unable to identify the defect. This procedure is less frequently used than a reference by a litigant.

The Supreme Constitutional Court can set aside the referred constitutional issue on the ground that its resolution does not affect the subject-matter of the initial dispute on the merits.

### **The *Ex-Officio* Jurisdiction of the Supreme Constitutional Court**

Sub-paragraphs (a) and (b) of Article 29, of Law No 48 of 1979, prescribe the procedures whereby the

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<sup>22</sup>Case No 48, Judicial Year 3, decided 21st June 1983, *Collection of Decisions*, Vol 2, 148.

Supreme Constitutional Court will normally exercise its power of judicial review.

However, Article 27 also provides that :

Whenever the Court in the exercise of its powers, faces a legislative provision linked to dispute before the Court, that provision may be invalidated by the Court after following the procedural rules prescribed for the examination of constitutional issues.

Under this provision, the Court may examine the constitutionality of a legislative provision linked to a dispute brought before it. This means that this power can be exercised by the Court while examining any issue other than the interpretation requests. The reason for this is that interpretation requests do not include judicial controversy in the accurate sense, and hence, this power can not be exercised.<sup>23</sup> Contrary to this are the constitutional cases within which the Court may examine the constitutionality of a legislative provision which has not been directly addressed by the parties seeking constitutional review but which the Court considers is related to the legislative provision which is being challenged. This power has only been exercised on one occasion to date.<sup>24</sup> In

this case the petitioner, in his capacity as a member of the State Council, challenged a decision to transfer him as being improper, arguing that Article 104 of the Council's Law<sup>25</sup> should be considered void. Upon a *prima facie* finding by the trial court that there was a constitutional issue to be considered, the matter was referred to the Supreme Constitutional Court. The Court observed that the challenged provision was framed in exactly the same manner as Article 83 of the legislation regulating the ordinary judicial body.<sup>26</sup> The Court held that both Articles were, therefore, in violation of Article 68 of the Constitution which grants all individuals the right to undertake litigation, removes the immunity of all administrative decisions from judicial review, and fully guarantees all citizens effective access to natural justice.

As part of its reasoning the Court noted that the connection between the laws in question need not bear on the subject-matter of the dispute before it. Nevertheless some degree of relevance must be established. Apart from this broad guidance the notion of linkage remains vague in the absence of any objective criteria. The Court is not obliged to raise the constitutionality of a related law. It retains a discretion whether to consider the validity of such linked legislation.

23 See the Court's decision in the interpretation request No 2 for the 17 judicial year, rendered on October 21, 1995, published in the *Official Gazette* No. 44 on 2 November 1995.

24 Constitutional Case NO 10, Judicial Year 1, decided 16 May 1982, *Collection of Decisions*, Vol 2, 150.

25 Law No 47 of 1972.

26 Law No 46 of 1972.

## Constitutional Proceedings

In addition to individual petitioners and respondents, who as parties to a constitutional case, enjoy equal rights before a public hearing, by virtue of Article 35(3) of Law No 48 of 1979, the government is automatically accorded the status of a party having an interest in such cases in order to be able to defend the statute in question and to be held accountable for any lack of compliance with the Constitution.

Chapter 2, Part 2 of Law No 48 lays down the specific procedural rules to be followed for cases and requests for adjudication which come before the Court. In the absence of a specified rule, the respective case or request is governed by the relevant general civil and criminal procedure provided that this does not conflict either with the nature of the court's competence, or with its own established procedures.<sup>27</sup>

The following specific rules prescribed for cases and requests filed with the Court may be noted:

- a) Article 30 of Law No 48 stipulates that the petitioner's claim must specify with precision the legislative

provision allegedly contravening the Constitution and the constitutional provision alleged to have been contravened. In addition to having a detrimental effect on the parties' case, lack of clarity will impede the Commissioners' Body from determining the relevant legal and constitutional points for submission in its report to the Court.<sup>28</sup>

- b) In order to ensure fairness and justice on behalf of all parties during the proceedings, all cases and requests should be entered by the Court Registrar on the same day on which the party's claim is filed with the Court.<sup>29</sup>
- c) All interested parties have to be notified within fifteen days of the entry by the Registrar.
- d) In order to grant equal access to both sets of pleadings these should then be presented as follows:

Upon receipt of notification by the Court, each party has to submit arguments, together with supporting documentary evidence, within fifteen days.

Counter arguments with supporting documents, must be submitted within a further

<sup>27</sup> Article 28 of Law NO 48 of 1979.

<sup>28</sup> Case No 54, Judicial Year 3, decided on the 18 December 1983, *Collection of Decisions*, Vol 2, 198.

<sup>29</sup> Compare the dissenting opinion of Justice White in *Lehr v Robertson*, 463 US 248, (decided by US Supreme Court on 27 June 1983), in which he stated that "it is axiomatic that the fundamental requirement of due process, is the opportunity to be heard at a meaningful time and in a meaningful manner". Also in *Morrissey v Brewer*, 408 US 471, 481, 1972, the Court held that due process is flexible and calls for such procedural protection as the particular situation demands.

fifteen days following the expiry of the previous time limit. Further counter replies should then be submitted within a further fifteen days.

- e) At the conclusion of the third and final period, no further pleadings or statements form either the petitioner or the respondent may be presented. All pleadings are then communicated by the Registrar to the Commissioners' Body.

### **The Role of the Commissioners' Body**

The Commissioners' body in the course of its preparatory work for the service of the Court must itself abide by judicial standards guaranteeing a fair and public hearing.<sup>30</sup> To facilitate its work the Body has, *inter alia*, the right to: a) require from governmental branches and departments all relevant information and pertinent documents; b) summon the interested parties for further clarification of the facts of the respective case or request the production of additional documents and supplementary memorials, c) make other inquiries within a prescribed period, and d) fine whoever causes undue delay to the progress of proceedings; the implementation of which shall be final unless totally or partly revoked upon justifiable grounds.

After conducting hearings, the Commissioners' Body issues a report to which all parties have access. This sets forth *inter alia* the legal and constitutional points involved, and the advisory legal opinion it has reached, together with its reasoning.

Within a week of the submission of this report the Court, The Chief Justice decides the day on which proceedings are to commence. Parties are given notice at least fifteen days in advance. However, where necessary, and at the request of a party to the dispute, this period may be reduced by the Chief Justice to not less than three days.

Cases and requests before the Court are considered without an oral hearing unless this is deemed necessary. In such an instance, only counsel and the representative of the Commissioners' Body shall be heard. A party to the dispute in whose name no pleadings were entered, waives his right either to be represented or assisted by counsel.

Where considered appropriate to the circumstances of the case or the request, both sets of counsel may be invited by the Court to make written supplementary submissions within a specified time.

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<sup>30</sup> In *Prentis v Atlantic Coast Line*, the US Supreme Court distinguished commissions acting in a legislative capacity from those conducting a judicial inquiry by stating that a judicial inquiry investigates, decides, and enforces judgments based on present or past facts and according to existing laws. Legislation, on the other hand, looks to the future and changes existing conditions by making anew rule to be applied thereafter to all or some part of those subject to it. 211 US 226, 1908.



## Statutory Interpretation

The Constitution grants the power of statutory interpretation to the Supreme Constitutional Court in accordance with and in a manner to be prescribed by the legislature. Accordingly, under articles 26 and 33 of Law No 48, statutory interpretation extends to those laws and regulations which enjoy the force of law under the Constitution, provided in both cases that the application of the respective provision has been the subject of a number of differing opinions, and that the provision has reached a level of importance which necessitates the Court's intervention in order to secure its unified application.

Envisaged as a remedy against arbitrary distinctions and inequalities occurring in similar or identical circumstances, the Court's decision is enforceable against all individuals and public authorities and invalidates any piece of legislation enacted to the contrary.

### Requesting Statutory Interpretation

Decisions on statutory interpretation are rendered by the Court subsequent to a request submitted by the Minister of Justice upon the application of either the Prime Minister, the Speaker of the People's Assembly, or the Supreme Council for Judicial Bodies. In each instance, the request must precisely indicate the legislative provision to be interpreted; the divergent points of view regarding its application; and why the matter is impor-

tant to justify a judicial interpretation, otherwise it will be inadmissible.

### Exclusions

The power to provide statutory interpretation is not confined to statutes but extends to delegated legislation, and includes legislation made in the exercise of emergency powers under articles 108 and 147 of the Constitution. However, the following are excluded from the Court's mandate:

- a) Regulatory cabinet and ministerial decrees.
- b) Police regulations issued by the President under Article 145 of the Constitution in order to secure the maintenance of public order, public health, security, or tranquillity in either the entire territories of the State or a region or sub-region thereof.
- c) Regulations under Article 74 of the Constitution which grants the President the right to take prompt measures in the face of dangerous threats either to national unity or to the safety of the State or the need to eliminate impediments hindering State officials from the proper performance of their constitutional duties.
- d) Regulations concerning public services as provided for in Article 146 of the Constitution.
- e) Regulations necessary for the execution of legislation as prescribed by Article 144 of the Constitution

whether issued by the President, or his delegate, or by a power assigned by the law for that purpose, provided that these regulations neither amend nor suspend the application of the corresponding law.

### **The Court's Approach to Interpretation**

In exercising its power, the Court seeks to reveal the legislature's true intent, primarily by examining the language used. However, the Court will go beyond the literal language of a statute if sole reliance on it clearly defeats the purpose which the legislature intends to accomplish.<sup>31</sup>

In determining legislative intent the court will examine documents associated with the enactment of the statute including preparatory materials, debates in the Assembly, and the circumstances that led to its adoption. The Court may also, as a secondary source, consider comparative legal materials, national or international.<sup>32</sup> The Court has adopted a new practice of referring to the foreign and international human rights instruments it has consulted in exercise of its functions including in interpretation cases.

The Court's jurisdiction to offer interpretation of statutes does not

extend to examining the constitutionality of a provision, even if the latter appears to be clearly in opposition to the Constitution. Otherwise, the Court would find itself *ex-officio* engaged in exercising a power of judicial review which is greater than that conferred on it originally by the legislature. The Court can only reach binding decisions concerning the interpretation of the Constitution within the scope of its own jurisdiction as determined by Law No 48 of 1979.

### **The Legal Effect of the Court's Decisions on Statutory Interpretation**

The Court's decision applies retroactively from the date on which the provision under review came into force. However, any prior final judgments rendered by other courts which contradict the Supreme Constitutional Court's interpretation remain valid under the principle of *res judicata*.

This rule dates from the Court's predecessor, the Supreme Court, which held that statutory interpretation by a competent body does not establish a new rule, but should be considered to form part of the original provision apart from final judgments which are subject to the *res judicata* norm.<sup>33</sup>

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31 Request No 1 Judicial Year 13 (Interpretation), decided 4 January 1991, *Collection of Decisions*, Vol 5, Part 1, 385.

32 Request No 2, Judicial Year 8 (interpretation), decided 7th May 1988, *Collection of Decisions*, Vol 4, 384. See also, Request No 1, Judicial Year 15 (Interpretation), decided 30 January 1993, *Collection of Decisions*, Vol 5, Part 2, 417.

33 Request No 1, Judicial Year 15 (Interpretation, decided 30 January 1993, *Collection of Decisions*, Vol. 5, Part 2, 417.

The Court's decisions are not subject to review by any other authorities including the legislature. However, the legislature's constitutional competence to abrogate or amend the interpreted provision is not affected unless the subsequent legislation is construed as rendering ineffective any constitutional rights contained in the original document.

## Resolving Conflict of Jurisdiction

### Requests for Adjudication

Where two courts from different judicial bodies<sup>34</sup> either claim or disclaim jurisdiction regarding the same subject-matter, the Supreme Constitutional Court shall at the request of an interested party, and in accordance with Article 25 and 31 of Law No 48, designate which of the two conflicting bodies has the jurisdiction to decide the claim.

The request addressed to the Court must describe the subject-matter of the conflict; the judicial bodies engaged therein and the decisions taken. Such a request is not regarded as a continuation of the deliberation of

the merits of the case, but is totally independent of the original adjudication, any subsequent proceedings, or any sentence rendered.<sup>35</sup> Moreover, requests are subject to the procedural rules generally applicable to all cases which reach the Court and unless the dispute which has arisen between the conflicting judicial bodies concerns a conflict of competence in accordance with those rules the Court will not entertain an application.<sup>36</sup>

Article 34 of Law No 48 of 1979, states that a request addressed to the Court must include two formal copies of the conflicting judgments. However, where both or either of the conflicting judicial bodies have claimed jurisdiction by pursuing consideration of the merits of the case without rendering a final judgment, this requirement may be dispensed with.

There is no time limit on the submission of a request. If a prescribed time limit were to expire and the proceedings of the two pending cases resume, the result would be two final contradictory judgments concerning the same subject-matter. Therefore, the resolution of the conflict by the Supreme Constitutional Court is both conceived as a preventative measure designed to avoid this eventual

34 The expression "judicial bodies" as used in this context, means either two courts *stricto sensu*; two other judicial bodies; or a court and another judicial body. As a general rule, conflicts of competence arise in Egypt due to the fact that there are two main judicial branches: the civil and administrative branches, each of them being independent from the other.

35 Request No 5, Judicial Year 4, (Conflict), decided 7th January 1984, *Collection of Decisions* Vol 3, 367.

36 Request No 1, Judicial Year 6, (Conflict), decided 21st April 1985, *Collection of Decisions*, Vol 3, 428.

contradiction as well as a positive guarantee against any miscarriage of justice occurring as a result of determination by an inappropriate judicial body.

Additionally, a request for the determination of the proper court to hear a dispute is neither intended to be an appeal against a decision nor against the enforcement of sentence or judgment, and therefore it is not subject to the prescribed mandatory periods which usually apply.

Once the request is presented to the Supreme Constitutional Court proceedings before the two conflicting judicial bodies are suspended *jus in re (de plein droit)* until final adjudication of the dispute. Any final judgment on the merits of either of the pending cases rendered subsequent to this mandatory suspension will be viewed by the Court as having not occurred and having no effect on its own judgment on competence.<sup>37</sup>

A request for adjudication shall be inadmissible where the jurisdiction on merits is claimed by one judicial body, and the other body neither claimed the competence to decide the case, nor followed the prescribed proceedings for its adjudication.<sup>38</sup>

The Court has also held that only parties having a personal stake in the outcome of the decision of the particular conflict are entitled to submit a request. Consequently, requests directly referred by other courts lack standing and are inadmissible.<sup>39</sup>

Under Article 52 of Law No 48, the parties to the dispute are waived payment of any legal fees to the Court, since they are deemed not to be responsible for a conflict which if it remains unresolved is an impediment to the proper administration of justice.

### **The Court's Powers to Designate Competence**

In determining which of two judicial bodies is competent to consider the merits of the particular case, preference is given to that body which according to the applicable jurisdictional rules, has the exclusive power to entertain the claim on the merits.<sup>40</sup>

Normally, the enactment of jurisdictional rules is carried out at the discretion of the legislature, unless the Constitution itself specifies the jurisdiction of a particular judicial body, for example the State Council which, under Article 172 of the Constitution, is

37 Paragraph (2) of Article 31 of Law No 48 of 1979.

38 Request No 9, Judicial Year 4, (Conflict) decided 11 June 1983, *Collection of Decisions*, Vol 2, 267.

39 Request No 5, Judicial Year 4, (Conflict) decided 7th January 1984, *Collection of Decisions*, Vol 3, 367.

40 Request No 1, Judicial Year 5, (Conflict) decided 21st January 1984, *Collection of Decisions*, Vol 3, 380.

accorded the exclusive power to decide administrative controversies and disciplinary disputes. However, a precedent was set by the Supreme Constitutional Court in Case No 18 of Judicial Year 9. A conflict of competence arose between an ordinary court and a disciplinary court concerning the annulment of an administrative decision dismissing the claimant from a job. The Supreme Constitutional Court concluded that his dismissal was not effected in the course of disciplinary proceedings, but based on facts directly linked to his professional incapacity which rendered him unfit to discharge his duties. Since the claimant was, at the time of his dismissal, employed by a public sector corporation whose employees were not public servants and hence subject to private law, the Court held that the case fell within the exclusive domain of the ordinary courts.

Article 25 of Law No 48 of 1979, requires that the subject-matter before the conflicting judicial bodies must be the same for there to be an adjudication by the Court. "Subject-matter" whilst covering the claimant's demands which are considered at the merits phase, excludes constitutional issues since adjudication of these directly affects the law to be applied to the merits of the claim, but does not involve any decision concerning whe-

ther the subject-matter of the claim falls within the jurisdiction of the respective judicial body or not. Moreover, the Supreme Constitutional Court is the only which can determine constitutional issues and only then in accordance with its own procedures.<sup>41</sup>

Where the subject-matter of the two cases before the conflicting judicial bodies is not the same or where two cases dealing with the same subject-matter are considered by two courts from the same judicial body, the request for the designation of the competent court cannot be admitted.<sup>42</sup>

### **The Legal Effect of the Court's Decision**

Decisions of the Court are final. Therefore it is impossible for the Court to be viewed as being in conflict with other courts concerning competence, nor can its judgments be reversed upon allegations of having contravened the rule of law or contradicted judgments rendered by other courts.<sup>43</sup>

The Court's decision designating the competent judicial organ to dispose of the case, bestows on that body a new mandate to decide the case notwithstanding any final judgment which it might have delivered prior to that decision.<sup>44</sup>

41 Case No 2, Judicial Year 5, (Conflict) decided 16 June 1984, *Collection of Decisions*, Vol 3, 415.

42 Request No 1, Judicial Year 6, (Conflict) decided 21st December 1985, *Collection of Decisions*, Vol 3, 428.

43 Request No 5, Judicial Year 6, (Conflict) decided 3rd January 1987 (not yet published).

44 Request No 17, Judicial Year 1, (Conflict) decided 7th March 1981, *Collection of Decisions*, Vol 1, 284.

Decisions on competence bind no others than the parties concerned.

### Contradictory Judgments

The Supreme Court has also been given the competence to resolve disputes which can arise from attempts to enforce judgments which are in conflict.

### Requests for the Settlement of Conflicts

By virtue of Articles 25 and 32 of Law No 48 of 1979, the Court may adjudicate on disputes arising from the execution of two contradictory final judgments passed by courts belonging to two different judicial bodies. A request has been lodged with the Registry of the Court indicating the contention concerning the execution of the two respective judgments and their alleged contradiction.

The settlement of a conflict may be requested at any time. Requests will be deemed inadmissible if:

- a) Contradictory final judgments are rendered by two courts from the same judicial body since internal applicable rules within that body will provide the means for the settlement of that conflict.<sup>45</sup>

- b) By the time the conflict is decided by the Supreme Constitutional Court the two independent judicial bodies have been amalgamated.<sup>46</sup>
- c) If it can be shown that the execution of both judgments would have the same effect or where evidence shows that either or both of the two judgments are not final or have been fully executed before the settlement of the conflict.
- d) The subject-matter of the two contradictory judgments is not the same.
- e) The interests of the party who lodged the request are not affected by the execution of the judgment of which he complains.
- f) Two formal copies of the two alleged contradictory judgments are not enclosed with the request by the claimant.<sup>47</sup>

### Suspension Orders

In order to avoid irreparable damage being sustained by either party to the conflict by one or both of the judgments complained of being executed against his interests, the Chief Justice of the Supreme Constitutional Court may, at the request of the interested party, and in accordance with paragraph 3 of Article 32 of Law No

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<sup>45</sup> Request No 12, Judicial Year 8, (Conflict) decided 4 February 1989, *Collection of Decisions*, Vol 4, 469.

<sup>46</sup> Request No 4, Judicial Year 6, (Conflict) decided 5 March 1988, *Collection of Decisions*, Vol 4, 439.

<sup>47</sup> Request No 6, Judicial Year 2, (Conflict) decided 7th November 1981, *Collection of Decisions*, Vol 2, 231.

48 of 1979, make a mandatory order suspending the execution of either or both of the two conflicting judgments pending the final adjudication of the conflict. The suspension order sought requires the applicant to show *prima facie* which of the two conflicting judicial bodies has jurisdiction to decide the case on its merits.

Upon such an order being issued, no enforcement measure can be taken to execute the suspended judgment until the Supreme Constitutional Court has reached its final decision on the conflict. The order is not subject to review.

The suspension order has no effect on the outcome of the Court's final decision on the conflict at issue.

### **Approach of the Court to Contradictory Judgments**

The Court has formulated a three-fold rule for the exercise of its jurisdiction:

Firstly, preference has to be given to the judgment of the judicial body which has the jurisdiction to decide the merits of the subject-matter of the case.<sup>48</sup>

Secondly, a request for the settlement of a dispute is not deemed to be a

means for reversing judgments on the basis of errors of fact or law, but is to be determined according to the rules laid down for the allocation of cases amongst the different judicial bodies.<sup>49</sup>

Thirdly, the Court's power to decide conflict is confined to judgments rendered by national judicial bodies. It does not extend to foreign judgments. It also excludes alleged conflicts between final judgments and advisory legal opinions.<sup>50</sup> Decisions passed by the Court are final and bind only the parties to the case.

### **Internal Disputes**

As a general rule, the Supreme Constitutional Court does not decide the merits of a case. An exception concerns disputes arising out of the application of Article 16 of Law No 48, which determines that the following shall fall within the exclusive jurisdiction of the Court. Firstly, cases submitted by any of the Court's members if the subject-matter of the claim is either the annulment of an administrative decision relating to their service or the relevant compensation concerning damages resulting therefrom. Secondly, cases concerning salaries, remuneration and pensions due to be paid to them or to their dependants. As with all other disputes

48 Request No 22, Judicial Year 1, (Conflict) decided 5 January 1985, *Collection of Decisions*, Vol 3, 421.

49 *Ibid.*, at 421.

50 Request No 1, Judicial Year 7, (Conflict) decided 7th March 1987, *Collection of Decisions*, Vol 4, 431, Request No 4, Judicial Year 8, decided 2 January 1988, *Collection of Decisions*, Vol 4, 434.

The International Bill of Human Rights calls upon those who create constitutional orders to establish a "democratic society."<sup>1</sup> It calls for the creation of an elected representative assembly<sup>2</sup> and for governmental institutions and processes to provide for the realisation of universal suffrage and fair and frequent elections.<sup>3</sup> It calls for the establishment of independent courts mandated and adequately empowered to protect human rights.<sup>4</sup> At a deeper level of analysis, the International Bill of Human Rights and other basic United Nations human rights Conventions prescribe adherence to a body of constitutional principles, which facilitate democratic governance and which should be used to structure each organ of government in

a way that obligates that organ to respect democratic practices and human rights when carrying out its particular functions. These principles also help to define a democratic system irrespective of whether the constitution creates a presidency, parliamentary, constitutional monarchy, or some other system of government. The principles call for institutions of government that will promote and protect:

1. *Respect for the sovereignty of the people*, secured, in part, by establishing the supremacy of a constitution that is derived from the exercise of rights of political participation<sup>5</sup> and self-determination,<sup>6</sup> which expresses the "will of the people" and which

1 The International Bill of Human Rights assumes, the existence of a "democratic society." See *E.g. Universal Declaration* Art 29(2), which states:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

*Id.* (emphasis added). For analogous provisions in the Covenants, see *ICCPR*, arts. 14(1), 21, 22; *ICESCR*, Art. 4; and more recently, United Nations World Conference on Human Rights, *Vienna Declaration and programme of Action* (June 25, 1993) pt. 1, pmnl. pt. 2. XX5, 15, 21 in 32 *Int'l Legal Materials* 1661 (1993).

2 The *Universal Declaration* states:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

*Universal Declaration*, Art. 21; see also *ICCPR*, Art 25; *Women's Convention*, Art. 8.

3 See *supra* note 2.

4 *Universal Declaration*, Art. 8 ("Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted to him by the constitution or by law.") *id.* Art 10 "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him."), *id.* Art. 11; *ICCPR*, arts. 2, 6(2), 9, 13, 14, 26; *Women's Convention*, arts 2(c), 15.

5 See *supra* note 2 and accompanying text.

6 *ICESCR*, Art 1(1), (3), *ICCPR*, Art. 1.



provides for continuing opportunities to express that will;<sup>7</sup>

2. *Participation in governance*, secured through recognition of a wide array of political rights including freedoms of association, assembly, speech and press; the rights to vote and participate in free electoral processes; and the right of access to responsible officials in all agencies of government in order to present grievances, demands, and proposals, or to seek information;<sup>8</sup>
3. *Representation in governance*, secured not only through the popular exercise of the right of participation, noted above, and the right to a representative legislative organ,<sup>9</sup> but also through respect for the right of groups to present their views on matters of concern to relevant agencies of government and to have these fairly heard;<sup>10</sup>

and the rights of women and persons of different ethnic, cultural, or religious backgrounds to enjoy equal access to employment in all organs of government and to demand fair representation in government;<sup>11</sup>

4. *Equality of opportunity*, secured not only through bills of rights and legislation, but through *processes* that require each organ of government to hear claims challenging the legality of its actions or the actions of its personnel, and through laws that empower courts or other tribunals to impose adequate remedies when these claims are shown to be valid and unredressed by the wrongdoing agencies;<sup>12</sup>
5. *Equality of treatment to all elements of the population*, secured through respect for the right of all persons to enjoy equal access to positions of

7 See *supra* note 2 and accompanying text; *Universal Declaration* Art. 18 "Everyone has the right of thought, conscience and religion." *id.* Art. 19 ("Everyone has the right to freedom of opinion and expression...."); *id.* Art. 20 ("Everyone has the freedom of peaceful assembly and association").

8 *Universal Declaration*, Art 19 (stating [t]he right...to seek, receive and impart information"); *ICCPR*, *supra* note 10, Art.2.

9 *Universal Declaration* Art. 21(3) ("The will of the people shall be the basis of the authority of government..."). See *supra* note 2.

10 See *supra* note 4.

11 *Universal Declaration*, Art. ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction...such as race, colour, sex, language, [or] religion..."); *id.* Art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law.") *ICESCR* Art. 2(2); *ICCPR*, Art. 2(1); *women's Convention*, arts 3,7,8.

12 See *ICCPR* Article 1(3), which states:

Each State Party to the present Covenant undertakes: (a) To insure that any person whose rights or freedoms as herein recognised are violated shall have effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority....

*ICCPR* Art. 1(3).

government and through appropriate actions to remove historic patterns of discrimination practised against them;<sup>13</sup>

including the security forces, of laws designed to assure the peaceful, democratic character and integrity of all stages of the electoral process;<sup>15</sup>

6. *Transparency in the conduct of governance*, secured through the imposition of obligations to conduct law-making, adjudicatory, and regulatory proceedings in public; obligations to make and preserve prescribed records of official actions and to make these records readily available to the public; and obligations imposed on designated officials in all organs of government to meet with the press and public to explain decisions affecting particular citizens or groups, or the country as a whole;<sup>14</sup>
7. *Free, fair, and frequent elections* secured through the rights of peoples to demand fair enforcement by impartial agencies of government,
8. *Imposition of accountability on all officials who violate these principles*, secured through recognition of the rights of people to demand the disciplining, removal, and imposition of criminal and civil liability on all offending officials, with appropriate powers and duties vested in the courts and other departments of government to enforce these sanctions against offending officials;<sup>16</sup>
9. *Respect for the constitution and the rule of law as a transcendent obligation imposed on all officials*, secured by requiring solemn commitments from all public officials to support the constitution and to obey the law as a condition for office holding,<sup>17</sup> and

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13 See *supra* note 11 and accompanying text; *Women's Convention*, Art. 2(f) ("[T]ake all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."); *id.* Art. 3 ("State Parties shall take...in the political, social, economic and cultural fields, all appropriate measures...to ensure full development and advancement of women..."); see also *id.* arts.4-6.

14 See *supra* note 7, and particularly *ICCPR* Art 25(b) ("[G]enuine periodic elections... shall be held by secret ballot, guaranteeing the free expression of the will of the electors.")

15 See *supra* note 2 and accompanying text.

16 *ICCPR*, Art 2.(3)(a) ("[E]nsure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."); *id.* Art 2(3)(c) ("[E]nsure that the competent authorities shall enforce such remedies when granted.").

17 Paragraph three of the Preamble to the *Universal Declaration* declares that "it is essential...that human rights be protected by the rule of law." *Universal Declaration*, pmb1 XX 3. The *ICCPR*, Article 2(2), imposes the obligation on each State "to take the necessary steps, in accordance with its constitutional processes...to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant." *ICCPR* Art. 2(2). The obligation to take steps to ensure protection runs through the *ICCPR* and is emphasised in the requirement of Article 2(3)(b) of a legal system that provides remedies, see *supra* note 12, and "ensures that the competent authorities shall enforce such remedies." *Id.* Art. 3(c).

through processes of recruitment and training, codes of conduct, and other methods that emphasise loyalty to these principles above all other loyalties, including loyalties owed to the regime in power or to one's party, patron, or superior.<sup>18</sup>

A key problem is how to adapt and apply these prescriptions to the security forces. The first step may be to create a general framework of principles, which in turn can be used to draft the following: (i) provisions of the constitution relating to the security forces; (ii) the basic legislation, to be enacted at a later point, providing for their establishment, organisation, finance, management, and oversight, and for the required standards of conduct, discipline, transparency, and accountability; and (iii) regulations promulgated by the relevant ministries to implement and adapt these legal commands to the army, police, and other law enforcement agencies. Viewed in this light, the proposed framework of principles can be seen as a

projection of an important part a country's constitutional order.

An illustrative Draft Code of Universal Principles (Draft Code), to supply such a framework, is appended. This Draft code is *not* intended as an idiosyncratic statement of personal preferences. Rather, provisions of existing international human rights law were the sources of the principles proposed, demonstrating that the law already calls for the action proposed. In addition to the International Bill of Human Rights, the Draft Code draws on the United Nations *Conventions on the Elimination of All Forms of Discrimination Against Women*<sup>19</sup> and the *Convention on the Elimination of All Forms of Racial Discrimination*.<sup>20</sup> Important parts of the Draft Code are derived also from other international instruments, adopted unanimously by the United Nations General Assembly, that set out standards necessary for humane law enforcement, such as the United Nations *Code of Conduct for Law Enforcement Officers*.<sup>21</sup>

18 The obligation to develop a civic culture that values and respects universal rights is often overlooked. Paragraph 8 of the Preamble to the *Universal Declaration* "proclaims" the *Declaration*, "as a common standard of achievement...to the end that every...organ of society...shall strive by teaching and education to promote respect for these rights." *Universal Declaration*, pmbl. XX8. Further, "education shall be directed to the ...strengthening of respect for human rights." *Id.* Art. 26(2). *See Also ICESCR*, Art. 13(1). "Everyone is entitled to a social ... order in which...his. rights...can be fully realised." *Universal Declaration*, Art. 28. The obligation of the State to ensure respect for universal rights surely includes an obligation of the State to ensure respect for universal rights surely includes an obligation to establish standards of conduct, training, and systems of accountability directed towards that objective.

19 *Women's Convention*.

20 G.A. Res. 2106, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965).

21 G.A. Res. 169, U.N. GAOR, 34th Sess., Annex, U.N. Doc A/34/169 (1979).

The Draft Code addresses a number of subjects, including the following:

- 1) *The Fundamental Mission of the Security Forces.* The security forces are created not simply to provide for "law enforcement" in the abstract, or law enforcement in blind obedience to the commands of the government of the day, but law enforcement subject to, and carried on in accordance with, the commands of the constitutional order. The overriding obligation of law enforcement is to protect and preserve that constitutional order.<sup>22</sup>
- 2) *Legislative control.* The power to establish and abolish, organize, empower and limit powers, and provide for the financing and maintenance of all security forces must reside in the elected legislative branch, which must also enjoy powers of continuing oversight and review over all security forces in order to maintain its and the peoples' sovereignty over them.<sup>23</sup>
- 3) *Judicial Control.* The courts must be adequately empowered to hear and determine all cases alleging abuses of power by the security forces; to impose civil and criminal remedies on wrongdoers; and, when necessary, to provide other remedies requiring the correction of systematic abuses by particular units. These powers of judicial control in
- no way should preclude or deter the legislature and the executive from discharging their obligation to preview and remedy systematic abuses and other faults in the governance or operation of security forces. Even so, a basic commitment to the rule of law as the means to secure democracy and rights implies that the courts or a counterpart independent tribunal must enjoy the power to protect rights when other organs fail to do so.<sup>24</sup>
- 4) *Executive Control.* The civilian chief executive, as well as his ministers and other delegates, should enjoy powers of command over the security forces, but these powers must be exercised in accordance with the limitations imposed by the constitution and legislation governing the security forces and the decisions of the courts interpreting those laws. This concept of dependent and conditional executive control should replace the historic practice of exclusive and autonomous executive control in order to assure vindication of the democratic and human rights principles set out above.<sup>25</sup>
- 5) *Codes of Conduct.* The legislature should enact a fundamental law prescribing both the standards of conduct expected of every person in the various security forces and the processes of enforcing these

<sup>22</sup> See *Draft Code*, Art. I(a)(2), (3).

<sup>23</sup> See *id.* art. II, III(b).

<sup>24</sup> See *id.* arts. III(c), IX(d).

<sup>25</sup> See *id.* art. III(a) (interpreted in the context of Art. IX).

standards. The legislation should require the relevant ministries to implement this law by promulgating detailed codes of conduct for each of the various branches. One purpose of these codes is to promote the protection of human rights in law enforcement by imposing strict discipline on those who violate or condone violations of the code. A second is to use the code as a basic element in the training and orientation of all ranks and elements, a point which may be crucial to the reorganisation and reorientation of the future security forces.<sup>26</sup>

6) *Recruitment, Training, and Orientation.* These processes, as already suggested, must reflect commitments to the principles of equality of access and opportunity and to the duty to protect the constitutional order and to educate all persons with respect to its commands and the commands of the relevant codes of conduct.<sup>27</sup>

7) *Transparency.* Security forces must be required to keep—and make available to the public—prescribed records, such as records of arrests, detentions, and indeed of all other activities which plainly affect the rights of the peoples. Designated officials must be available to the public to answer questions regarding these operations and other matters of public concern.<sup>28</sup>

8) *Liability, Criminal and Civil:* Liability must be imposed on all ranks for violations of codes of conduct or any other laws that impose duties designed to protect the rights and the security of civil society. Defences such as “obedience to superior orders” or “ignorance of the law” must be recognized only in regard to mitigation, not liability.<sup>29</sup>

9) *Empowering Civil society.* The law governing the security forces should enable the press, non-governmental organisations, and other groups in civil society to monitor the governance and conduct of the security forces and to demand accountability for unlawful actions in accordance with the principles set out above.<sup>30</sup>

### III - The Importance of these Principles in Light of the Ethiopian Experience

Cynics or critics may suggest, of course, that all this is aspirational and academic - that the enactment of these laws cannot effectively change the ways of armies, police, and unscrupulous political leaders who use force to gain or maintain power. There are several answers to that charge. The

26 See *id.* arts. IV, V(b).

27 See *id.* Art. V.

28 See *id.* Art. VII.

29 See *id.* Art. VIII.

30 See *id.* Art. X(c).

need for principles is not academic. It is based on the requirements of international human rights law. It is also based on the lessons of experience: the history of military rule and past abuse of rights by the army and police.

Under the Ethiopian constitutions of 1931 and 1955,<sup>31</sup> the Emperor commanded the armed forces and the police, and he retained exclusive executive powers to determine their size, organization, and cost; to establish the law governing their leadership and discipline; to decree emergency powers and martial law; and to deploy security forces, as he deemed necessary, to assure the integrity of the Empire. These powers were elaborated by various executive and legislative instruments promulgated over the years, though much of the detailed law governing the security forces seems obscure and unrevealed to the public.

This body of law can be characterised in general terms as follows:

1. *Centralised Executive Control* exercised directly by the Emperor or by ministers and officers who, in turn, were appointed and dismissed by him;
2. *Autonomy*, in the sense that, subject to the control of the Emperor, the security forces were left free to govern themselves in accordance with their own regulations;
3. *Lack of Accountability to Civil Society* in the sense that governance of both the police and the army were, for all effective purposes, beyond the reach of Parliament, and that these forces were also able to evade, or simply ignore, with impunity the orders of courts and enjoyed considerable *de facto* (if not *de jure*) immunity from the civil law;<sup>32</sup>

31 The Constitution of 1931 (Ethiopia's first written constitution) is reprinted in I *Ethiopian Constitutional Development: A Source Book* 326 (James C.N. Paul & Christopher Clapham eds., 1967), along with an unpublished commentary. *Id.* at 331. See articles 11-13, reserving the Emperor's prerogative to command the armed forces, determine their size, and appoint and dismiss all officers. *Id.* The Revised Constitution of 1955 is reprinted in *id.* at 1. For provisions in the Constitution of 1955 that are similar to those in the 1931 Constitution, see Article 27 (The Emperor "determines the organisation, powers and duties of Ministers...and appoints, promotes...and dismisses officials of the same."): Article 29 (It is the Emperor's prerogative to declare war," to decide what armed forces shall be maintained" [;] to act as "Commander-in-Chief" [;] to "organise" armed forces; to "confer military rank" on all officers; to "declare a state of siege, martial law or a national emergency" [;] and to take "such measures as are necessary to meet a threat to the defence or integrity of the Empire."). See also 2 *Ethiopian Constitutional Development: A Source Book* 498-505 (James C.N. Paul & Christopher Clapham eds., 1971) (commentary on these powers).

While neither constitution treats explicitly with the police, it would appear that these forces are equated with the armed forces for the purpose of determining constitutional powers to organize and control them. See Proclamation No. 6 (actually an executive order) establishing the police. See also *A Proclamation to Provide the Establishment and Government of a Force Styled the Imperial Army*, Proclamation No. 68, *Negarit Gazeta*, Mar. 11, 1944 (Eth.) (establishing the Imperial Army and creating military law governing army); *Imperial Territorial Army Order*, Order No. 21, *Negarit Gazeta*, Feb. 18, 1958 (Eth.) (creating the "Territorial Army" under the Ministry of Interior).

32 See *supra* note 31.

4. *The Absence of Law*, in the sense that rules requiring respect for human rights, obedience to the rule of law, and the constitution hardly figured in either the professional codes governing the security forces, or in the training and accountability of the security forces.

Experience in many countries suggests that this kind of legal structuring - the combination of the above characteristics - helps to create conditions within the security forces that lead not only to military intervention when the government of the day weakens, but to military rule - sustained military rule based on force - which can easily lead to systematic repression, and then to all the other abuses that ultimately attend rule by force of arms.

Centralised executive control, coupled with autonomy from the legislature and civil society, means that the security forces can become increasingly politicised if and when the leadership of the chief executive falters or becomes controversial and disputed. In this situation, loyalties tend to become divided; conspiracies emerge. In the face of political uncertainty, and when the army enjoys autonomy, the temptation to seize government and control its resources with little accountability becomes strong.

Legal autonomy for the security forces often breeds a sense of social

autonomy and political separateness. The very fact that members of the security forces live, to some extent at least, in a distinct society of their own, isolated from the civil society they are supposed to police, creates risks of potentially hostile relationships between them and the public. These risks increase when the suppression of political discontent becomes a major internal security concern, when accountability to the public for the exercise of security powers is diminished, and when leaders of the security forces come to believe that civil society is infested with political and professional elites and others who become ideologically suspect when they appear to be hostile to the regime in power. Thus, professionals, intellectuals, students, and other particular groups, including ethnic groups, come to be seen by the security forces as potential enemies to be watched carefully, repressed by overt force, and controlled by terror, if necessary. The legitimacy of this kind of force against fellow citizens is more readily assumed by soldiers and police when their training and leaders appear to condone it, and when the powers of civil society and the legal system to protest abuses and control the police and military are weak.<sup>33</sup>

These concerns are reflected in a candid, thoughtful paper apparently prepared under the aegis of the

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33 On these phenomena, see, e.g. Jerome H. Skolnick & James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* 89-171 (1993); see also Robin Luckham, *The Nigerian Military: A Sociological Analysis of Authority & Revolt* 161-67 (1971).

Ministry of Defense for the February 1993 Bujumbura Conference, "Democratisation in Africa: The Role of the Military."<sup>34</sup> The paper makes the following points: 1) in a democracy, civil society must enjoy an ultimate power to govern the army; 2) the army must be a truly national army composed of people from all regions and ethnic groups, so that all elements of the population will see it as "their" army; 3) insofar as the army engages in local, internal security operations, it should enlist the participation of affected people in concerned communities in devising appropriate strategies to protect them; 4) the army must be completely separated and disengaged from politics and political parties; 5) the army must be under the control of, and accountable to, the civil organs of government; and 6) the overriding mission of the army must be to sustain the country's constitution, and its loyalties must be rooted in that objective.<sup>35</sup>

In this context, then, the need may be urgent for security forces acculturated and trained to show scrupulous

respect for human rights and the rule of law while performing the difficult security tasks which may confront them. Training to respect human rights means learning new techniques in crowd control that reflect forbearance and strict limitations on the use of force, particularly excessive retaliatory force. So, too, there may be the need for recruitment policies designed to secure the effective integration of different groups into cohesive, disciplined units, including the integration of women into all ranks. It is doubtful that these and similar objectives can be realised in the absence of law mandating them. The very existence of such law empowers civil society to demand its effective implementation.

In a broader context, confidence in the possibilities of democracy can be strengthened, perhaps greatly, to the extent that there is a public belief that those entrusted with weapons and powers to use them can be held accountable to civil society through the legislature, the courts, the press, and other processes of political participation.

34 See Tsadkan Gebre Tensae, *The Unique Experience of Army-Building in Ethiopia* 4 (Feb. 1, 1993). This paper was presented to the February 1993 Bujumbura Conference, "Democratisation in Africa: The Role of the Military," by Tsadkan Gebre Tensae, Chief of Staff of the Armed Forces of Ethiopia. The Transitional Charter is silent on the organisation and governance of the security forces for the TGE. While the Council of Representatives of the TGE has enacted laws calling for the encampment and demobilisation of the military forces of other "liberation fronts," notably the OLF, and for the ultimate reorganisation of the security forces of the TGE and its successor, this legislation is silent on the organisation and governance of this future army. See Proclamation No. 8. This paper was revised and presented as Tsadkan Gebre Tensae, "A Vision of a New Army for Ethiopia," at the Inter Africa Group's Symposium on the Making of the New Ethiopia Constitution in Addis Ababa on May 17-21, 1993.

35 See Tsadkan, *supra* note 34, at 8 ("I would like to stress the point that the relationship between the constitution and the military must be defined on the basis of clear principles."). General Tsadkan's views are striking in that, as far as I know, few military leaders in Sub-Saharan Africa have been so outspoken and explicit in setting out principles governing the constitutional position of the armed forces in a country undertaking establishment of democratic system.



#### IV - Strategies for Developing and Implementing the Principles

Obviously, it is not enough to formulate general principles concerned with the governance of security forces. The principles must be translated into specific legislative provisions, and they must be reinforced and implemented by detailed regulations. Further, this "law in the books" must be given visibility and public support; it must become known and respected.

Several suggested strategies for realising these goals are briefly outlined. They are directed toward:

1. *The processes employed to develop public participation in the new constitutional order.* It repeatedly has been suggested that the new constitutional order must reflect a popular consensus developed through extensive public participation in its making. The principles embodied in the International Bill of Human Rights calling for "self-determination" and a legal order based on "the will of the people"<sup>36</sup>

One way to enlist participation is to encourage full discussion of widely shared public grievances concerned with past and present modes of governance — grievances to be redressed by the new constitutional order. The very process of addressing historic grievances may help to create a popular understanding that the new constitutional

order can be seen as a resource for the people; as something that they can use to define, defend, and promote widely shared social interests; as a law empowering the people to demand protections against recurrence of the abuses of the past.

Certainly, the historic behaviour and role of the security forces in governance is a subject that may provide a fertile source of popular grievances, of shared public concerns to be addressed. In the same way, discussion of new ways to organize, govern, and impose accountability on the security forces may be a matter of great interest to ordinary people.

2. *The processes employed to reorganise, reorient, and retrain the security forces.* "Human rights education" has become a popular international activity to be promoted by the United Nations and other agencies. It may be doubtful, however, that "human rights education" in the abstract produces much meaningful effect on human behaviour. If the purpose of this education is to change behaviour and cultures in the police and the military, the education attempted must be fully integrated with the rules of conduct and the customs that actually govern the security forces, and with the systems of discipline and accountability that are employed to enforce those rules. The central purpose of this training must be to secure both respect for

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<sup>36</sup> See *supra* note 31 and accompanying text.

and obedience to commands of the law that governs them. Training and discipline - education and the creation of new values and loyalties - must all be seen as interrelated, interdependent means and ends to enforce the law.

All this underscores the importance of mandating not only codes of conduct and discipline grounded in human rights law to govern all ranks of the security forces, but mandating a system of education, training, and retraining designed to give effect to the codes.

3. *Techniques to elaborate principles that will put the security forces under the Rule of Law* It is essential that attention be given to the need for principles controlling the governance of the security forces. Guidance could be provided, and action mandated, by appending to the constitution a body of "directive principles" that call upon the government to adopt legislation addressing subjects of major, enduring concern and that set out basic principles to be secured through that legislation.

Directive principles have been incorporated in some constitutions in a form that gives them an effect similar to a preamble. In this approach, the directive principles are cast in the form of abstract, aspirational goals of social justice to which the State is pledged. These kinds of directive principles are often treated as "soft" law in the sense that, unlike other constitutional prescriptions, they are regarded as unenforceable by the courts and often are written in such general terms that

they carry an uncertain meaning, thus little legal effect.

Another way to use directive principles is to cast them in the form of specific commands to the future government to enact legislation on designated subjects that will incorporate certain principles deemed crucial to the ongoing development of the future constitutional order. In this approach, the directive principles provide an important framework for the further development of the constitutional order, a set of *imperative* directions for the ongoing evolution of essential institutions, processes, and principles of governance. Further, the courts can be empowered to use these principles for guidance in constitutional interpretation.

Directive principles of this character have the virtue of providing a proposed map depicting steps necessary to complete the transition. They also provide a text that can be used by public leaders and activists in the ongoing processes of developing that kind of popular civic education and political participation that may be essential to sustain the transition over time.

The appended Draft Code was prepared on the assumption that the principles of the kind prescribed by it are mandated by international human rights law. Experience the world over surely suggests we should no longer tolerate unregulated police or armies as semiautonomous organs of government. Putting the army and the police under a rule of law may be a task of the highest priority to those committed to the cause of building human rights and democracy.

## Appendix

### Draft Code of Universal Principles to Govern the Structure and Accountability of Internal Security Force Operating in all States

#### Introductory Note

The proposed Code sets out a body of principles to govern the legal structure of the police and all other organisations, including military units, that regularly exercise police powers to protect the internal security of a country. These principles are drawn from sources of international human rights law and are intended to reflect universal norms that should be followed in all countries committed to the establishment and maintenance of a democratic constitutional order, protection of widely recognised international human rights, and the rule of law.

The fundamental premise of the Code is that international human rights law mandates the creation of governmental organs that will promote and protect internationally recognized human rights, not subvert them, and that *all* organs of government must be legally structured so as to assure this objective insofar as possible. Since the police and other internal security forces (ISFs) are such important organs of government, exercising powers that, if abused, so obviously may lead to serious subversions of human rights, particular care must be taken in drafting constitutional and

legislative provisions and subsidiary legislation - rules and regulations - that create, organise, and empower an ISF and provide for its governance and accountability to the rule of human rights law and to civil society.

The Code is hardly a novel enterprise. The *United Nations Code of Conduct for Law Enforcement Officials* was intended by the UN General Assembly, without dissent, to have universal applicability. That *Code of Conduct*, combined with other international human rights instruments adopted within the United Nations system, shows us how ISFs must be structured to make them accountable to the goals sought. This proposed Code is simply intended to synthesise these existing mandates.

This Code is simply a draft. The principles stated are suggestions. The purpose is to promote wider interest and debate over the need for a body of universal principles of the character of those proposed here to be developed as an important additional body of international human rights law.

#### Article 1.

##### The Nature, Purposes, and Scope of this Code

##### a) The Principles set out in this Code:

- 1) are derived from existing International Human Rights law;
- 2) are designed to assure that all Internal Security Forces (as

that term is defined below) of all states will be established in accordance with, governed by, and held accountable to rules of law that secure the protection of universally recognized human rights;

3) should be incorporated into the constitutions and/or other laws that create, organize, empower, and otherwise provide for the existence of all ISFs established by the State or by any of its subsidiary organs.

b) The term Internal Security Forces (ISFs) as used in this Code refers to all police, military, intelligence gathering, custodial and other organizations that are authorised to exercise any of the following police powers:

- 1) arrest or detention of persons (including emergency powers of detention);
- 2) surveillance of persons or premises, or search for or seizure of evidence from persons or premises;
- 3) interrogation of people in order to secure evidence;
- 4) custodial functions, such as the administration of prisons or places of detention and the guarding or care of prisoners.

## Commentary

ISFs are established to protect the constitutional order of the State and the rights of its people. They are *not* created to maintain the regime of the day in power or to advance its interests.

The principles enumerated herein should be incorporated into the laws relating to the establishment and governance of ISFs so as to make them accountable to the people at all times and to reinforce the obligations of all ISF personnel to protect the rule of law and human rights.

The definition of ISF organisations in this Code is purposely made broad enough to include military organisations that are regularly used to maintain internal security by exercising police powers as defined above.

## Sources

*United Nations Universal Declaration of Human Rights*,<sup>1</sup> Art. 28.

"Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession." *United Nations*<sup>2</sup> Art.1.

1 G.A. Res. 217A. UN GAOR, 3rd Sess., pt, at 71 UN Doc A/180 (1948) [hereinafter *Universal Declaration of Human Rights*].

2 G.A. Res. 169, U.N. GAOR, 34th Sess. Annex, U.N. doc A/34/169 (1979); reprinted in 18 UN Resol. 185 (Dusan J. Djonovich ed., 1985) [hereinafter *Code of Conduct for Law Enforcement Officials*].

“(a) The term ‘law enforcement officials’ includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. (b) In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.” *Code of Conduct for Law Enforcement Officials*, *supra* note 2, art. 1 cmts. (a), (b).

“The armed forces owe respect to the political order determined by the sovereign will of the people and all political order determined by the sovereign will of the people and all political or social changes generated by that will, in accordance with democratic procedures consistent with the Constitution.” *Peace Agreement Between the Government of El Salvador and the Frente Farabundo Martí para la Liberación nacional*,<sup>3</sup> ch. I(1)(C).

“[The National Civil Police’s] mission shall be to protect and safeguard the free exercise of the rights and freedoms of individuals, to prevent and combat all types of crimes, and to maintain internal peace, tranquillity, order and public security in both urban and rural areas.” *Peace Agreement*, *supra* note 3, ch. II(I)(A).

## Article II.

### Source of Organic Legislation Establishing and Empowering ISF Organisations

a) Organic legislation. The law establishing and setting forth the functions and powers of every ISF organization (or expanding its functions and powers should be:

- 1) enacted by the representative, elected legislative organ of the Government, and never by decree promulgated by the executive organ without the advice and consent of the legislative body;

- 2) the product of political participation, including processes enabling transparency and public debate;

- 3) consonant with the principles of universal human rights law and the provisions of this Code.

b) Subsidiary legislation. Rules, regulations, and all other subsidiary legislation promulgated by the Executive Branch (or by the Chief Officer of an ISF) pertaining to the organization,

3 *The Situation in Central America: Threats to International Peace and Security and Peace Initiatives*, U.N. GAOR, 46th Sess., Annex, Agenda Item 31, at 1, U.N. Doc. A/46/864 81992) [hereinafter *Peace Agreement*].

**empowerment, governance, and monitoring of an ISF should be:**

- 1) **published in the official government journal that records legislation;**
- 2) **made subject to legislative review; and**
- 3) **clearly consistent with the ISF's organic legislation and with this Code.**

### **Commentary**

In order to achieve the goals of this Code, it is important to establish and enforce a complete legal structure for each ISF that is consistent with the principles of this Code. It is important that the laws empowering ISFs incorporate the existing provisions of human rights law regarding surveillance, search, arrest, detention, imprisonment, the use of force, and other rights limiting the exercise of police powers. Often, the organic laws that create and govern ISFs are not the product of participation and debate. Requiring these laws to be enacted through an open democratic process will help to eliminate the granting of broad and ambiguous powers and will give a government and civil society committed to human rights a greater ability to control ISFs. The legislative review process should include public

hearing so as to enhance the ability to revise rules governing an ISF, when appropriate in light of experience.

### **Sources**

"Everyone is entitled to a social... order in which the rights and freedoms set forth in this Declaration can be fully realised." *Universal Declaration of Human Rights*, *supra* note 1, Art. 28.

"(I) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives...(3) The will of the people shall be the basis of the authority of the government." *Id.* Art. 21. Similar provisions appear in the *International Covenant on Civil and Political Rights*,<sup>4</sup> Art. 25(a); *African Charter on Human and Peoples' Rights*,<sup>5</sup> Art. 13; *American Convention on Human Rights*,<sup>6</sup> Art. 23.

"[E]ach State Party...undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." *International Covenant on civil and Political Rights*, *supra* note 4, Art. 2(2). Similar provisions appear in *American Convention on Human Rights*, *supra* note 6, Art. 2; *African Charter for Human and Peoples' Rights*, *supra* note 5, Art.1.

4 G.A. Res 2200A, U.N. GAOR, 21stSess., Supp. No. 16, at 52, UN Doc A/6316 (1966)), reprinted in 6 *Int'l Legal Materials* 58 (1982).

5 O.A.U. Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 *Int'l Legal Materials* 58 (1982).

6 O.A.S. Off. Rec. OER/Ser.L/V/II.23/Doc. 21/Rev. 6 (1979).

"(b)...[T]he effective maintenance of ethical standards among law enforcement officials depends on the existence of a well-conceived, popularly accepted and humane system of laws..." *Code of Conduct for Law Enforcement Officials*, *supra* note 2, pmbl.

### Article III.

#### Principles Governing Control of ISFs by the Basic Organs of Government

a) **Executive Control.** Ultimate executive authority over all ISF organizations should be vested in a civil officer who is immediately accountable to the head of government. This civilian officer should have the power to appoint, remove, and order the discipline of all officials of whatever rank within ISF organizations, and such powers should be subject to the oversight of the executive head of government, so that he or she can be held accountable for systematic failures to comply with the Code.

b) **Legislative Control.** The elected representative legislative body should be vested with power to:

- 1) determine the size, functions, powers, and organization of all ISFs;
- 2) enact a budget and appropriate funds for their equipment and operations;

3) exercise financial oversight over their activities;

4) investigate their activities in order to determine whether they are operating in accordance with the principles set out in this Code.

c) **Judicial Control.** Courts should be vested with all judicial powers necessary to assure that all principals set out in this Code are followed.

#### Commentary

Each branch of government should have powers of oversight and control over ISF organisations consistent with its essential constitutional role. By establishing a clear chain of command over ISFs, their operations will be less able to avoid accountability for wrongdoing. Continuing legislative oversight is necessary and appropriate because the legislature represents the voice of the people, who provide both the funds, and authority for all organs of government in a democratic State committed to the protection of human rights. Thus, the ISFs remain responsive to the people they are supposed to protect.

#### Sources

"States...should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily

available appropriate rights and remedies for victims of such acts." *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*,<sup>7</sup> Art. 21.

"(a)...[E]very law enforcement agency should be representative of and responsive and accountable to the community as a whole...(d)...[T]he actions of law enforcement officials should be responsive to public scrutiny..." *Code of Conduct for Law Enforcement Officials*, *supra* note 2, pmbl.

#### Article IV.

#### Enactment of a Code of Conduct as Part of the Law Governing All ISFs

a) The legislative body should enact a Code of Conduct governing the internal operations of all ISF organizations and prescribing the conduct of each individual ISF member.

- 1) The obligations and restrictions set forth in the Code of Conduct should be clear and specific, so that all ISF personnel are aware of the limits on their power.
- 2) The Code of Conduct should incorporate all relevant human rights standards and impose clear duties to assure adherence to these standards

and protection of the rights prescribed.

3) The Code of Conduct should provide for internal discipline and punishment of violators of those rights.

A) Internal sanctions imposed under the Code of Conduct should reflect the gravity of the offense and should be publicized both within and without the ISF organization, so as to maximise the deterrent effect.

B) Such sanctions should never preclude civil or criminal liability in the courts, when necessary in order to vindicate and redress the rights of persons injured by violation of the Code.

4) No ISF official should be disciplined, either officially or unofficially, for refusing to follow an order that he or she reasonably believes would lead to a violation of the Code of Conduct or to a violation of human rights protected by the laws of the land.

b) Members of ISFs should have a duty under the Code of Conduct to report violations of the Code or violations of any other law applicable to the ISF, to superior

7 G.A. Res. 40/34, U.N. GAOR, 40th Ses. Supp. No. 53 at 213, U.N. Doc. A/40/53 (1985), reprinted in 24 UN RESOL. 419 (Dusan J. Djonovich ed., 1988).



officers and, if necessary, to responsible civil officers of the government and to persons charged with ISF oversight.

- 1) Failure to report known violations should be grounds for punishment under the Code of Conduct.
  - 2) The duty to report should transcend all other obligations grounded in loyalty and discipline.
  - 3) No ISF official should be disciplined, either officially or unofficially, for good faith attempts to discharge the duties imposed by this Article and the Code of Conduct.
- c) The civil officer with ultimate authority over an ISF should take appropriate steps to assure that the Code of Conduct will be understood and strictly enforced at all levels within the organization.

### Commentary

Without a Code of Conduct governing the internal operations of ISF organisations, ISF members are left unrestrained and unguided in their enforcement of the laws. A Code of Conduct that sets forth the steps necessary to enforce rules that recognise, protect, and reinforce basic human rights and that explains the consequences for violations of these rights is necessary to provide guidance for all ISF personnel. The Code of Conduct governing ISF members should incorporate all relevant human

rights law regarding surveillance, search, arrest, detention, imprisonment, the use of force, and other rights limiting the exercise of police powers.

The requirement of reporting human rights violations emphasises the overriding importance of protecting human rights as a paramount duty of all law enforcement officials. It must be recognized that the observance of basic human rights and the maintenance of the rule of law transcends norms commanding loyalty to the ISF. In furtherance of this, an official who reports such violations by fellow officials cannot be punished for doing so, whether by losing his job; not being promoted; being assigned only to less desirable, menial duties; or in any other way designed to penalise him or her.

### Sources

"[E]very law enforcement agency, in fulfilment of the first premise of every profession, should be held to the duty of disciplining itself in complete conformity with the principles and standards herein provided." *Code of Conduct for Law Enforcement Officials*, *supra* note 2. pmb., cmt. (d).

"Law enforcement officials shall respect the law and the present Code. They shall also to the best of their capability, prevent and rigorously oppose any violations of them. Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary,

to other appropriate authorities or organs vested with reviewing or remedial power." *Id.* Art. 8.

"Governments shall prohibit orders from superior officers or public authorities authorising or inciting other people to carry out any such extra-legal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officers shall emphasize the above provisions." *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.*<sup>8</sup> Art. 3.

## Article V.

### Recruitment and Training

#### a) Recruitment. The law governing each ISF should provide:

- 1) that no person be barred from serving or advancing in any ISF organisation because of race, ethnicity, color, sex, religion, or other status;
- 2) that procedures be initiated to encourage the equitable representation of all racial, ethnic, and cultural groups at every level of the ISF organisation; and

3) that all full participation of women and their equal opportunity to be promoted to all ranks be ensured.

#### b) Training. The law governing each ISF should provide:

- 1) that education and sensitisation regarding human rights, and the obligation of ISF personnel to respect those rights, be fully incorporated into all relevant aspects of basic training;
- 2) that additional training on the human rights obligations of ISF officials be repeated and emphasised throughout an ISF member's period of service.

### Commentary

ISF memberships often consist primarily, or solely, of male members of a majority (or a particular) ethnic, racial, or cultural group. This fact often tends to reinforce prejudices between ISFs and other groups and increases the risk of discrimination in the enforcement of laws against minorities and women. ISF organisations should strive for equality among the different groups and genders. By recruiting members from varying backgrounds, the ISF forces not only become ethnically mixed, but their members should become more sensitive

8 E.S.C. Res. 1989/65, U.N. ESCOR, 1st Sess., Supp. No. 1, at 52, U.N. doc. E/1989/89 (1989) (endorsed by the General Assembly Dec. 15, 1989).

to the need to respect cultural, linguistic, religious, and gender differences. This should result in more equal enforcement of the laws and diminish abuses against minority groups and women.

Proper training should also serve to sensitise members to the need to respect all citizens and to reinforce human rights obligations under existing international law.

### Sources

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Universal Declaration of Human Rights*, *supra* note 1, Art. 21(2).

"Every citizen shall have the right and the opportunity...[t]o have access, on general terms of equality, to public service in his country." *International Covenant on Civil and Political Rights*, *supra* note 4, Art. 25(c). A similar provision appears in *American Convention on Human Rights*, *supra* note 5, Art. 23(1)(c).

"Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure

that all public authorities and public institutions, national and local, shall act in conformity with this obligation." *International Convention on the Elimination of All Forms of Racial Discrimination*.<sup>9</sup> Art. 2(1)(a).

"State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure, on equal terms with men, the rights[]...[t]o participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government." *Convention on the Elimination of All Forms of Discrimination Against women*.<sup>10</sup> Art. 7(b).

"Each State Party shall ensure that education and information regarding prohibition against torture are fully included in the training of law enforcement personnel, civil or military... and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment." *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*.<sup>11</sup> Art. 10(1).

"(e)...[S]tandards as such lack practical value unless their content and meaning, through education and training and through monitoring,

9 G.A. Res. 2106, U.N. GAOR, 20th Sess. supp. No. 14, at 47, U.N. Doc A/6014 (1965).

10 G.A. Res. 34/180 (XXXIV), 34, U.N. GAOR, Supp. No. 46, At 194, U.N. Doc A/34/830 (1979), reprinted in 19 *Int'l Legal Materials* 33 (1980) (adopted at New York, Dec. 18, 1979).

11 G.A. Rs. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), reprinted in 23 *Int'l Legal Materials* 1028 (1984).

become part of the creed for every law enforcement official." *Code of Conduct for Law Enforcement Officials*, *supra* note 2, pmb.

"Police...and other personnel concerned should receive training to sensitise them to the needs of victims, and guidelines to ensure proper and prompt aid." *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, *supra* note 7, Art. 16.

## Article VI.

### Prohibition of Extra-Legal Security Forces

None of the police powers defined in Article I(b), should be performed by any individual who is not a member of an authorised ISF organization.

- 1) Exercise of police powers by persons other than members of an ISF organisation, created in accordance with this Code, should be a criminal offense under State law.
- 2) No ISF official should be permitted to request that another person, other than a member of an ISF, perform the functions defined in Article I(b). The making of such a request should be a crime under State law, as well as grounds for internal discipline.
- 3) No ISF official should be permitted to perform functions while off-duty that he or she would be prohibited from performing while on-duty.

## Commentary

Currently there is a problem in many countries concerning "unofficial" security forces that operate outside the existing laws of the country. Sometimes ISF officials are members of, or associated with, these extra-legal groups; sometimes they condone and cooperate with them. Officials must understand that the obligations to which they are bound while working as an officer bind them when they are off duty. Any officer caught cooperating in any way with an extra-legal security organisation or encouraging its activities should be punished.

## Article VII.

### Duty to Keep and Release Records

#### a) Laws governing ISFs should:

- 1) mandate the keeping of complete records regarding all arrests, detentions, interrogations, and other security activities directly affecting the rights of particular persons;
- 2) require records on the internal standing orders of the ISF;
- 3) provide for public access to these records; and
- 4) provide for sanctions against responsible ISF officials for failure to comply with these provisions.

b) Privileges protecting ISF records from public access or disclosure should not be allowed:

1) to protect records concerning the arrest, detention, or surveillance of any person under any circumstances;

2) to protect records concerning the internal operations and policies of ISF organisations unless there is a *bona fide* concern for national security or for the safety or protection of the basic rights of a third party.

c) The Courts should be adequately empowered to secure enforcement of this Article.

### Commentary

Security forces often are allowed to operate behind a veil of secrecy. This protection, often enabling concealment of wrongdoing, must be removed, and ISF organizations must be made to operate more transparently. Rules requiring certain record-keeping will assist concerned people and relevant government officials to maintain proper oversight and keep ISFs accountable. Privileges allowing the withholding of certain records from the public should be few and should be only allowed where clearly necessary to protect national security or the basic rights of persons. All limitations to public access to these records should be narrowly construed.

### Sources

"1. There shall be duly recorded: (a) The reasons for the arrest; (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority; (c) The identity of the law enforcement officials concerned; (d) Precise information concerning the place of custody." Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law." *Body of Principles for the Protection Of All Persons under Any Form of Detention or Imprisonment*,<sup>12</sup> princ. 12.

"1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law. 2. A detained or imprisoned person, or his counsel when provided by law, shall have access to [this] information." *Id.* princ. 23.

"(1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received: (a) Information concerning his identity; (b) the reasons for his commitment and the authority therefor; (c) The day and hour of his admission and release. (2) No person shall be received in an institution without a valid

12 G.A. Res. 43/173, U.N. GAOR, 43d Sess., Supp. No. 49, at 297, U.N. Doc A/43/49 (1988).

commitment order of which the details shall have been previously entered in the register." *Standard Minimum Rules for the Treatment of Prisoners*.<sup>13</sup> rule 7.

"Governments shall ensure that persons deprived of their liberty are held in officially recognised places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyer or other persons of confidence." *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, *supra* note 8, princ.6.

#### Article VIII.

##### Liability of Officials for Violation of Rights

a) The penal laws of a country should contain explicit provisions criminalising the clear violation of the basic human rights of citizens by ISF officials acting under color of law.

1) Punishments imposed by a court or other tribunal should reflect the gravity and depravity of the offense committed, the complicity of the perpetrator, the role and culpability of the perpetrator for the crime or crimes committed, and the need to deter such conduct.

2) Defences such as "superior order" should not be allowed.

3) Mitigation of sanctions can only come after determination of guilt, and then only in accordance with criteria that reflect the gravity of the human rights violations.

4) Amnesty or impunity should not be granted for violations committed under predecessor governments.

5) Once the guilt of an offender has been admitted or established, the tribunal trying him or her (or the Executive Official with power to commute punishments) may, after a proper and full apology and a commitment regarding the offender's future conduct, suspend any punishment when it is determined that this course is in the public interest and will not subvert the basic purposes of this Article or allow a grave violation of human rights to go unpunished.

b) The civil laws of a country should provide adequate remedies, including the award of compensatory and punitive damages, for victims of families of victims of human rights violations by ISF officials.

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<sup>13</sup> E.S.C. Res. 663 (XXIV) C. 24 U.N. ESCOR, Supp. No. 1 at 11, U.N. Doc E/3048 (1957).

- c) The award of a civil remedy should never preclude the possibility of criminal liability, and the imposition of criminal sanctions should never preclude the availability of a civil remedy.

### Commentary

One of the most important ways to ensure that human rights are protected is accountability. ISF officials can only be held accountable if a variety of civil and criminal penalties face them if they are found to violate this Code or citizens' rights. Without a method of enforcement, including adequate punishment for the wrongdoer, the gravity of the violations is lost on the ISF officials, both the wrongdoer and his or her colleagues. Proper remedies must exist to serve as a deterrent factor for other ISF officials. Full enforcement of human rights law is only possible where a meaningful remedy is available to the victims of such violations. These remedies, either criminal or civil in nature, must be available against any and every violator of human rights or the fundamental rule of law, and be unable to blame their misbehaviour on a higher, possibly unknown, officer by claiming "superior order."

### Sources

*Criminal liability:* "Each State Party shall ensure that all acts of torture are offences under its criminal law. The

same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture." *Convention on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, *supra* note 11, Art. 4(1)

"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." *Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>14</sup> Art. 1.

"International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organisations and institutions and representatives of the State, [committing, participating in, directly inciting, conspiring, abetting, encouraging, or cooperating in the crime of *apartheid*]." *International Convention on the Suppression and Punishment of the Crime of "Apartheid"*,<sup>15</sup> Art. III.

"Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences." *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, *supra* note 8, princ.1

14 G.A. Res. 260 U.N. GAOR, 3d Sess., pt. 1, Annex, at 174 U.N. Doc A/810 (1948) (adopted at New York, Dec. 9, 1948).

15 G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. No. 30, at 75, U.N. Doc A/9030 (1974).

*No immunity:* "Each State Party to the present Convention undertakes...[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an Official capacity." *International Covenant on Civil and Political Rights, supra* note 4, Art. 2(3)(a).

"Persons committing genocide or any of the other acts enumerated...shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." *Convention on the Prevention and Punishment of the Crime of Genocide, supra* note 14, art IV. "The law must be enforced fully with respect to any law enforcement official who commits an act of corruption, as governments cannot expect to enforce the law among their citizens if they cannot, or will not, enforce the law against their own agents...." *Code of Conduct for Law Enforcement Officials, supra* note 2, Art. 7, cmt.(a).

"The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority." *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, supra* note 12, princ.9.

"Superiors, officers or other public officials may be responsible for act committed by officials under their authority if they had a reasonable opportunity to prevent such acts. In

no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary of summary executions." *Principles of the Effective Prevention of Extra-legal, Arbitrary of Summary Executions, supra* note 8, princ. 19.

*No Defences:* "[N]or may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment." *Code of Conduct for Law Enforcement Officials, supra* note 2, Art. 5.

"(2) No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as justification of torture. (3). An order from a superior office or a public authority may not be invoked as a justification of torture." *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra* not 11, Art. 2(2), (3).

"Governments shall prohibit orders from superior officers or public authorities authorising or inciting other persons to carry out any such extra-legal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officers shall emphasize the above provisions." *Principles of the Effective Prevention of Extra-legal, Arbitrary of Summary Executions, supra* note 8, princ. 3.



*Civil liability:* "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." *International Covenant on Civil and Political Rights*, *supra* note 4, Art. 9(5).

"Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the government under whose authority the victimising act or omission occurred is no longer in existence, the State or government successor in title should provide restitution to the victims." *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*, *supra* note 7, princ. 11.

"Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to applicable rules on liability provided by domestic law." *Body of Principles for the Protection of All Persons under Any Forms of Detention or Imprisonment*, *supra* note 12, princ. 35(1).

"Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as result of an act of torture, his dependants shall be entitled to compensation." *Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 11, Art. 14(1).

"The families and dependent of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time." *Principles of the Effective Prevention of Extra-legal, Arbitrary of Summary Executions*, *supra* note 8, princ. 20.

## Article IX.

### Principles Governing the Monitoring and Maintenance of the Continuing Accountability of All ISFs by the Legislative, Executive and Judicial Branches

- a) **The Legislature.** Legislative oversight for regular ISF operations should be established and continuously maintained. This oversight should include powers to compel the production of records and the giving of testimony before the legislative body or its committees. The law should narrowly define and delimit privileges to withhold evidence from the legislature.
- b) **The Executive.** The law should require the executive responsible for ISF's duties of oversight and powers to take all appropriate steps necessary to enforce these Principles. The executive responsible for ISF's should be under a legal obligation to maintain a close watch over daily operations.
- c) **The Attorney or Procurator General.** The attorney or procurator general should be vested

with duties and powers to investigate and enforce criminal sanctions for violations of this Code and all other legislation pertaining to ISFs. This office must be empowered to maintain independence and objectivity in the enforcement of its duty.

d) **The Courts.** Courts should be vested not only with the usual powers to hear cases and provide remedies, but with additional powers to assure adherence to the principles of this Code. These powers should include the power to appoint commissions to investigate allegations of systematic abuse and other serious conditions and practices. Courts should be able to frame appropriate remedial and equitable orders, when appropriate; to prevent ongoing abuses; and to compel individuals to comply with these remedial measures.

e) **Internal Ombudsman.** An ombudsman or other independent official and office should be created within each ISF. This office should maintain independence from external forces. It should serve as a liaison between individual officials and their supervisors, other branches of government, or the public and should be available to receive reports of misconduct regarding ISF officials or superiors officers and to investigate such allegations.

## Commentary

All branches of government should be involved in maintaining daily oversight of ISF activities. This system of continuing checks and balances prevents one branch from taking over the ISF organisations and defeating the democratic objectives of the people. Ensuring accountability on all levels will serve to keep the ISFs in line.

The independence of supervising offices is vital to insure objective investigation of complaints and abuses. The ombudsman, while serving as an independent officer, also serves to allow access to ISF organisations. Designating a single individual to speak on behalf of the ISF will eliminate one aspect of the accountability problem - the fact that no one ever is available to speak about complaints.

## Sources

"States should periodically review existing legislation practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts and should develop and make readily available appropriate rights and remedies for victims of such acts." *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, *supra* note 7, Art. 21.

"[P]laces of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible

to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment." *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, *supra* note 12, princ 29. A similar provision appear in *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 13, rule 55.

"Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture." *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 11, Art. 22.

"In order to prevent extra-legal, arbitrary and summary executions, Government shall ensure strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody and imprisonment, as well as those officials authorised by law to use force and firearms." *Principles of the Effective Prevention of Extra-legal, Arbitrary of Summary Executions*, *supra* note 8, princ. 2.

"Qualified inspectors, including medical personnel, or an equivalent independent authority, shall conduct inspections in places of custody on a regular basis, and be empowered to undertake unannounced inspections on their own initiative, with full guarantees of independence in the exercise

of this function. The inspectors shall have unrestricted access to all persons in such places of custody, as well as to all their records." *Id.* princ. 7.

"[States undertake t]o adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish...persons responsible for, or accused of, the acts defined..." *International Convention on the Suppression and Punishment of the Crime of "Apartheid"*, *supra* note 15, Art. IV (b).

"[T]he actions of law enforcement officials should be responsive to public scrutiny, whether exercised by a review board, a ministry, a procuracy, the judiciary, an ombudsman, a citizens' committee or any combination thereof, or any other reviewing agency." *Code of Conduct for Law Enforcement Officials*, *supra* note 2, pmbl.

"There shall be a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions... Governments shall maintain investigative offices and procedures to undertake such inquiries." *Principles of the Effective Prevention of Extra-legal, Arbitrary of Summary Executions*, *supra* note 8, princ. 9.

"[States undertake t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities,...and to develop the possibilities of judicial remedy." *International Covenant on Civil and Political Rights*, *supra* note 4, Art. 2(3)(b).

"Everyone has the right to an effective remedy by the competent tribunals for acts violating the fundamental rights guaranteed him by the constitution or law." *Universal Declaration of Human Rights*, *supra* note 1, Art. 8.

"Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority." *Body of Principles for the Protection of Persons Under Any Form of Detention or Imprisonment*, *supra* note 12, princ. 4.

"Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case." *Id.* princ. 34.

"Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible." *Declaration of Basic Principles for Victims of Crime and Abuse of Power*, *supra* note 7, princ. 5.

"Every person may resort to the courts to ensure respect for his legal

rights." *American Declaration of the Rights and Duties of Man*,<sup>16</sup> Art. 18.

"Governments shall make every effort to prevent extra-legal, arbitrary and summary executions through measures such as diplomatic intercession, improved access of complainants to intergovernmental and judicial bodies, and public denunciation." *Principles of the Effective Prevention of Extra-legal, Arbitrary of Summary Executions*, *supra* note 8, princ. 8.

## Article X.

**Principles Governing the Monitoring and Maintenance of the Continuing Accountability by Press and the Public**

a) The Press. The role of the press in monitoring ISF violations should be protected and encouraged, and standards and processes should be established to enable any member of the public to secure access to official records, detainees, and responsible officials.

1) The law should establish a press privilege to protect informants.

2) The office created under Article IX(e), should serve as liaison to the public and the press, who is available and

16 O.A.S. Off. Rec. OER/Ser.L/V/II.23/Doc.21/Rev.6 (1979), reprinted in *International Human Rights Instruments: A Compilation of Treaties, Agreements and Declarations of Especial Interest to the United States* 430.1 (Richard B. Lillich ed., 1990).

knowledgeable to answer questions which may arise.

- b) **Independent Tribunal.** Human rights commissions or ombudsman agencies should be created and adequately empowered to monitor ISFs, investigate abuses, expose wrongdoing, refer cases for prosecution, and propose legal and administrative reforms that may enhance the accountability system. These commissions and its members should be separate and independent of all other branches of the government.

- c) **Public Participation and the Role of Citizen Organisation.** The law should protect and encourage the rights and power of citizens to form organisations to monitor ISFs; to publicise citizens' rights and ISF abuses of those rights; to represent victims of abuses before any investigative body; to bring class, as well as individual, actions before the courts to prevent or secure remedies for abuses; and to publicise grievances concerning the conduct of ISF personnel or of the organization as a whole.

### Commentary

Currently, citizens have virtually no input into how ISFs are created and governed. ISFs thus operate without fear of public opposition or any public control. They become insulated from the very people they are designed to protect. The establishment of public powers over ISFs are therefore

central to long term efforts to control ISFs. In a rights-sensitive political system, citizen groups, peoples organisations, and the press are integral components of the political system and constitutional order. Educating the public in human rights is perhaps the most effective tool in promoting observance of those rights. Together with a government that is accountable to the people, the public can work to develop principles and guidelines and effect changes for the internal operations of ISFs.

### Sources

"In some countries, the mass media may be regarded as performing complaint review functions...." *Code of Conduct for Law Enforcement Officials*, *supra* note 2, Art. 8, cmt. (d).

"An African Commission on Human and Peoples' Rights... shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa." *The African Charter on Human and Peoples' Rights*, *supra* note 5, Art. 30; *see also id.* arts. 45, 46.

"In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons. Governments shall pursue investigations through an independent commission of inquiry or

similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry." *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, supra* note 8, princ. 11.

"(a)...[E]very law enforcement agency should be representative of and responsive and accountable to the community as a whole....(d)...[T]he actions of law enforcement officials should be responsive to public scrutiny, whether exercised by...a citizens' committee...or any other reviewing agency." *Code of Conduct for law Enforcement Officials, supra* note 2, pmbl.

# *Election and Electoral Systems in Africa: Purposes, Problems and Prospects*

Amare Tekle\*

Africa has been gripped by an election mania since the beginning of this decade. This election mania and, consequently, the search for genuine and pragmatic electoral systems, cannot be understood in isolation from the democracy movement and the democratisation process that have presumably been triggered on the continent. This may be either as a result of the pressure of *bona fide* African social movements for political change or the conditionalities imposed by aid-giving countries or institutions. Rightly or wrongly, the commitment to, and the holding of, elections have become the litmus test of a sincere commitment to democratic governance. Needless to say, it was to be affected by the choices and constraints that have accompanied the democratisation process.

Reference to the post-colonial Africa State is imperative since its nature, and failures, have informed the debate on the democratisation process and because of its relevance to the examination of elections and electoral systems.

The post-colonial African State was an artificial entity bedevilled by ethnic, religious and regional differences and rivalry, if not outright antagonism. More often than not, it was ruled by one or other ethnic or religious group at the expense of the others, thus making no moral or political sense to the majority of its citizens. Governments were not bestowed legitimacy by, and could not conceivably expect the allegiance of, such populations. Cross-border loyalties were common which made ruling very difficult. Under the circumstances, the rulers almost invariably had to mobilise support on a narrow ethnic and religious basis and to resort to brutal repression in the absence of broad, consensual support. More often than not, they did need external support.

They were also incompetent, prebendal and woefully anti-developmental. Being both the indispensable wheel withal for wealth and honour and the only instrument to safeguard it, those who controlled the State and their supporters were determined to

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cling to power indefinitely at all costs. Consequently, the State was almost invariably privatised to meet the demands of the ruling elite which created the political systems and State institutions which enabled them to monopolise power and to perpetuate their stranglehold of the State. Conversely, they rejected democratic values, principles and processes in the name of nation-building, social harmony and rapid economic growth.

Yet, the institutions and systems they created not only failed to solve these problems but actually ended up exacerbating them. This excessive autonomy of the African State, coupled with the fragmentation of society into small social units separated from the state and from each other along ethnic, linguistic, religious and geographical lines, weakened governments and, in some cases, caused the collapse of the State. It also made it relatively easy for small but well-organized groups (both civilian and military) to seize power and to rule brutally, since autonomy implied that the group in power could depend only on violence to implement its programmes. Inevitably, such a soft State had to marginalise the majority of its people, particularly those on the periphery.

It was also inevitable that the State was plagued by economic deterioration, social dislocation, instability and endless conflicts which challenged the legitimacy not only of governments but also of the State. Such a weak State did not have the capabilities to either exercise authority over its own

territory and people or to control the spillover from external crises (refugee flows, migration etc.)

Any examination of the purposes of African elections and electoral systems, the challenges that face them and their future, must therefore be made against this background.

It becomes immediately evident that African elections and electoral systems have more missions and functions than their counterparts in Western countries. The function of the latter is, by and large, to organize, administer and supervise elections which reflect the will of the population and ensure a fair representation of the popular will in government. Elections in Western democracies also confer power on the winner. By doing so, they ensure the smooth transfer of power from one party (or coalition of parties) to another party (or coalition of parties) or legitimise continued rule if those already in government return to office.

African elections and electoral systems have, at this juncture of history, a) the additional onus of ensuring the smooth transition to democratic governance and b) conflict resolution, broadly defined. This paper will attempt to present these two facets, to indicate the challenges and dangers that face African election authorities, to suggest some solutions to some of the problems and to formulate certain basic principles which can make future elections meaningful.



## Elections and the Transition to Democratic Governance

Electoral systems and elections constitute a crucial component of the dynamics of transition to democratic governance. The dynamics of transition raise certain fundamental questions both related to the dismantling of the political systems, principles and institutions, which had propped up dictatorial rule, and to their replacement by principles, systems and institutions, which were more conducive to a more open and competitive system. The tension that necessarily exists between the defenders of the *status quo* and the champions of change, and the creation, on the basis of mutual interest and mutual consent, of a stable new political order is here a given. The new order, cooperative or adversarial as the case may be, creates new rules of politics and, in some instances, access to resources to those out of government. The type of electoral system and election is at the heart of such a struggle. The most common issues raised in relation to the content of the electoral law which, in effect, determines the nature of the electoral system include the following:

### a) *Authorship of the electoral law:*

In Western democracies, the electoral law is usually drafted by the executive branch and adopted by the legislative assembly. This has not been quite possible in Africa during what is popularly known as the second era of independence. A consensus has emerged that the African State and its institutions are as illegitimate as they are irresponsible and completely servile to

the whim of the ruling elite. Considered thus morally bankrupt, they have lost public support and sympathy and are viewed as being incapable of fulfilling the people's wish for popular and democratic governance. Under the circumstances, it was difficult for political parties and other organisations seeking democratic change to accept that the State and its institutions would be impartial enough to write an acceptable electoral law and they insisted on the formation of a group that would be representative of a wide spectrum of political views. In this way important decisions about the nature and content of the electoral law could have been taken away from the State and its institutions, thus paving the way for the creation of an independent commission and ensuring free and fair elections.

b) *Constitutional rights and guarantees:* In Western democracies, the constitutional freedom of association is considered the minimum guarantee for free and fair elections. It is also taken for granted that this freedom is expressed by the formation of political parties through which the people can propagate their beliefs and enunciate programs without any interference from the State or any other party or individual. Thus, political parties, which have integrative functions, are considered to have pivotal roles in mobilising citizens to participate in governance. A party system is considered a structural requirement of democracy and government must accept its existence as an indicator of official tolerance of dissent.

Although generally endorsed in Africa, two exceptions to this view have been evident in the evolution of recent African electoral systems. In the first instance, political parties have been proscribed outrightly on the basis of the age-old fear that they are likely to be divisive since they would be formed only along ethnic, religious, linguistic and regional lines. However, all the other constitutional guarantees relating to elections and the right to contest elections on an individual basis have been scrupulously respected. Uganda, which is a good example of such a no-party State, has recently conducted presidential and parliamentary elections. Although its constitution is sure to provide for the formation of political parties, it is almost certain that Eritrea too will prohibit the creation of political parties based on ethnicity, region, language or religion.

In some other countries, the right to form political parties is guaranteed constitutionally although some are denied active political participation by subsequent government action or made almost meaningless by the dominance of one popular mass party (or movement) as in early Indian or Mexican political life. Gambia is an example of the first while Eritrea can be cited as a good example of the second.

The case of Gambia deserves further attention because, more likely than not, it may be repeated in some other African countries. It will also shed light on the predicament of some African countries and their relation with Western donor countries.

In July 1994, a group of inexperienced young army officers overthrew the government of Daouda Jawara, in a military coup and created the Armed Forces Provisional Ruling Council (AFPRC) under Captain Yahya J. Jammeh. Its human rights record was thoroughly condemned by Western countries although it seemed to have popular support because the socio-economic reforms it had inaugurated and the determined action it had taken to weed out corruption, had endeared it to the population. When the military junta decided to hold elections in September 1996, its members resigned their military commission, turned themselves into a political party - The Alliance for Patriotic Re-orientation and Construction (APRC) - and decided to participate in the elections in spite of their previous protestations.

They also banned those parties responsible for bad governance and old politicians (and their allies) were detained and charged with corruption. Every other provision of the electoral law was scrupulously adhered to, although some parties had accused it of unequal use of government facilities (the electronic media) and resources (equipment, vehicles etc.). The US and the UK not only protested the government's action but declared in advance that, in the absence of the banned parties and individuals, they would not participate in election monitoring and would not consider the elections free and fair. Sweden decided to observe the elections.

Two questions must be asked; is the government action justified? And

is the position taken by the US and the UK correct? The answer seems to me that the merit of each decision must be seen within the contest of historical time and space. Eritrea's decision to prohibit the formation of political parties that do not meet certain criteria - and possibly Uganda's action to create a no-party State - may be viewed with approbation. Yet, it must also be noted in the same breath that in some Eastern European countries members of the old ruling communist parties participate actively and meaningfully in political life - and win elections - while in others they have been banned. The decision to unreservedly insist on unlimited participation without taking the objective reality of a given country into account would not only be an act in *reductio ad absurdum* but will, in fact, unwittingly promote the return of undemocratic governance by democratic means. On the contrary, it is not only detrimental to the future of democracy but also dangerous to the State to allow the unlimited participation of parties only to annul results if they are not acceptable to the incumbent, as in Algeria.

c) *The existence of an impartial electoral authority:* In most Western democracies, the organisation, administration and supervision of elections is the preserve of the civil service. This can hardly be acceptable in the present African State because it is not considered to be a neutral body capable of impartially executing its task. The experience of the last three and a half decades of African history is a monumental testimony against the neutrality and impartiality of the

State. To the extent that the public is cynically aware that, in a privatised State, there is hardly any distinction between the ruling elite and the State, and that consequently electoral policy will be unilaterally determined to ensure that the elite remains the sole beneficiary, State institutions are considered illegitimate.

It is certain that it is not possible to conduct free and fair elections in the absence of a competent, dedicated and impartial group of persons of unquestioned integrity who enjoy the respect and broadest possible support of the population. Under the circumstances, the persons, who have championed change to democratic order, have insisted on the creation of independent electoral commissions composed of independent-minded experts in the field of election administration who are committed not only to administer free and fair elections but who, in the process, will also contribute to the promotion of democratic culture in society. Such a commission must of course be legally enabled with executive, legislative and judicial powers.

d) *Free and fair elections:* In addition to the ability of the electorate to articulate its wishes and interests by joining political parties, a free election also consists of the voters' ability to express their choice of party or candidate without interference. This means that voting should take place in an environment free of any threat, intimidation or other influence. This is possible only when the vote is secret and unassisted. Due to this reason the *Open Ballot* or one of its variants

practised in certain African countries (e.g., Nigeria, Gambia) in spite of a UN declaration against it, has been hazardous to free elections. The Open Ballot has hitherto been employed in the belief and hope of minimising malpractice such as vote inflation, technical rigging and other electoral offences. Not only has it not achieved the expected objective, but it has endangered voters and definitely destroyed the integrity of the vote. Many African voters have consequently shied away from voting because they knew they would not be able to express their electoral preferences openly. Experience had taught them the danger of recrimination from spouses (usually husbands), village chiefs or elders, peer groups, employers and benefactors if their preferences did not meet their approval. It had also become a scandalous practice during the *Open Ballot* voting to switch lines (sometimes more than once) on the basis of monetary or other forms of bribes.

The fairness of an election is judged by the capacity of the electoral system and law to enable parties - all legitimate parties - to compete for the electorate's vote without any interference or obstacles. More often than not, the electoral law and system will be perfect, but the application of the letter and spirit of such a law may be woefully lacking. An election can be considered fair only when it is ascertained that the spirit and the letter of the law are scrupulously adhered to both by the electoral authorities and the government of the day and when there exists an enabling atmosphere which renders all contesting parties

the opportunity to win the support of the electorate in an honest way. The acceptance of the principle of equal rights to all parties is a basic requirement in electoral fairness and consequently each contesting party must be taken as a *bona fide* principal in the electoral scheme of things.

Similarly, the principles of free speech and assembly acknowledge the right of political parties to communicate their ideas without any hindrance and to have access not only to potential voters but also to public facilities which would facilitate communication with the electorate.

However, two predicaments become immediately evident in the African electoral setting. First, many an African incumbent has been too ready to violate the letter or spirit (and sometimes both) of the constitution and electoral law, by constant amendment to the latter or even direct executive order, if he/she perceived that he/she would gain or deny his/her opponent possible advantages. This constitutes the crudest form of electoral fraudulence. The use of public facilities and resources is the second - and much knottier - problem and a more subtle issue since it may not involve illegality and can even be explained by the circumstances surrounding it.

The African media, and particularly its electronic component, is largely owned, or controlled, by the State. As in the rest of the world, the media has an important role in campaigning and voter education. This empowers it to highlight the issue of the election and to influence public opinion. We need

to concern ourselves with the worst of conditions where incumbents deny their opponents the use of the public (government owned or controlled) media. In the best of cases, the electoral law and subsequent regulations and guidelines provide for fair access to, and equitable use of, the media. In most instances, these regulations and guidelines make arrangements for free air-time to be available on public radio and television for all parties and, in some cases, impose financial limits on party political advertising even in privately-owned electronic media. Additionally, guidelines have sometimes been issued to ensure that the public media distinguishes the genuine news value of action taken by the government in its official capacity from extensive coverage which may be an abuse of the position of incumbency in an election period. Enforcement, however, has been impossible. In this respect, African leaders (and their ministers) have not been any different from their Western counterparts. What is different is, of course, that the media in the West is either private or (as in Britain) totally independent and immune to government influence.

However, two caveats are in order. Firstly in Africa, where the literacy rate is low, the electronic media is more important than the print media and, among the electronic media, radio plays if not a more significant role then at least a more accessible one. Perhaps this is why most African electoral guidelines on media use focus on electronic air time and, more importantly, on radio. Yet, the importance of even radio cannot be overestimated if only because general air-time is

itself not extensive and also because, in multilingual societies, it cannot adequately reach the whole population within the available air-time. Secondly, access to air-time by all parties, unless equitably distributed, may inadvertently give advantage to small parties which do not command widespread support.

The use of State institutions and resources is a more serious issue since its abuse is more flagrant. The first concerns the relationship between, and respective roles of, the police and other security forces and the election authorities of a country. Incumbents have used the police and intelligence units not only to harass leaders of political parties and candidates but also to intimidate the electorate, especially during public rallies. Of particular importance has been the issue of prompt cooperation of the police over any question of permission needed for political activity in public spaces such as marches, demonstrations and rallies. Often, permission is not given promptly for a variety of reasons used as delaying tactics to frustrate the opposition. Then, there is also the related issue of the neutrality of the police and the security forces and the need for them to abide by the instructions of election authorities on electoral matters. This has all too often been ignored by them.

The second involves the use of State resources for political ends. The issue is particularly relevant to incumbents which may abuse privileges related to office (vehicles, office equipment, official visits outside the capital with travel allowances etc.).

This has been as rampant in Africa as elsewhere.

In both instances, it is evident that there is the dire need for campaign reforms to combat corruption in the financing of campaigns and to ensure transparency and accountability. In the case of the media, it may be suggested that air-time should be accorded in proportion to the support enjoyed by parties. Yet, any such estimation is bound to be subjective (possibly the view of electoral authorities) if made in advance of an election, particularly if it is being conducted for the first time. In the second case, the suggestion that the state finance all parties seems to be impractical in view of the financial conditions of African States.

The fairness of voting will also depend on two other major issues. These are:

e) *Voter eligibility*: Most African electoral laws make citizenship the necessary prerequisite for the right to vote. The determination of citizenship, however, becomes an extremely daunting task because of factors like the existence of ethnic groups across several international boundaries, seasonal migration and nomadism, refugees and guest workers. Under the circumstances, many questions arise in the determination of citizenship and different countries have established different sets of conditions for awarding citizenship based essentially on the principles of *Jus Solis* and *Jus Sanguinis* or both. In Eritrea, for example, *Jus Sanguinis* has been the

preferred principle but it too traces itself so an identity established by *Jus Solis*. Thus "an Eritrean" was the offspring of an Eritrean mother or father who can trace lineage to a progenitor who inhabited the Italian colony of Eritrea when the Eritrean Nationality Proclamation of 1937 enacted that all the inhabitants of the territory (except Italians) were Eritrean subjects. That enabled an assortment of non-indigenous (Ethiopians, Nigerians, Yemenis, Greeks, Indians etc.) individuals to claim citizenship and a right to vote in the independence referendum of 1993. In Eritrea, as elsewhere in Africa, grave difficulties were confronted in identification, despite the use of different methods. Identification by village chiefs was the most important method used.

Once citizenship is ascertained, the next question arises: who can vote? Is residency a feasible requirement? Is it morally and politically defensible to disenfranchise a sizeable number of the population (refugees, exiles, seasonal migrants and nomads which constitute a sizeable percentage of the population)? Do you allow long-term refugees and guest-workers in a country to vote? What should be the criteria for allowing them to vote? Do you allow criminals to vote? Do you allow teenagers to vote?

These and other questions were answered differently by different States. Eritrea arranged for the distribution of citizenship identity cards and voter registration cards in Eritrea, the refugee camps in the Sudan, and the Diaspora. It was able to register almost 100 per cent of eligible voters.

South Africa and Zimbabwe did not keep voter registers even within the country. South Africa successfully allowed long-time Mozambican, Zairian, and other mine-workers, as well as those who had resided in the homelands, to participate in the voting. Eritrea allowed known criminals (common criminals as well as those Eritreans who had committed crimes against the people by collaborating the enemy) to vote because they had not been tried and convicted by a court of law and the whole world agreed that violent acts against *Apartheid* did not constitute a crime. South Africa, following the example of Nicaragua, allowed, on the basis of the principle that those who were old enough to fight and die for their country were old enough to vote in some cases in practice, the vote to sixteen-year olds. But the Eritrean Referendum Commission wrongly decided not to amend the Referendum Proclamation to allow teenage freedom fighters in the belief that it may be considered discriminatory against non-fighters of the same age.

**f) The Electoral Systems:** In the renewed African drive at, and experimentation with, democratic governance, the electoral system adopted by any given country will have grave implications not only for the political system that it will create, and the structure and processes that will consequently evolve, but also for social harmony, peace and stability. In view of the morbidity of the present African State, it is urgent that the electoral system advance the cause of harmony in society and the government while

genuinely reflecting the views of the electorate and its right to use the vote as a political weapon.

In Africa, the determinants that must impact upon the choice of an electoral system must go beyond representativeness, accountability and accessibility to include reconciliation and inclusively. If existing ethnic, religious, linguistic and regional hostilities are to be effectively restrained, it then becomes important that electoral systems facilitate the creation of an environment that will foster cooperation. Mutual appreciation of opposing views must be accepted and the conviction that losers lose everything while winners take it all can no longer be the norm. It must be recognised that, in a democracy, winners and losers are partners and not enemies who must destroy each other. Electoral systems must advance this in law and in practice.

The choice of an electoral system may vary from country to country if only because of differing objective realities and experiences. However, they must all have the common objective of making it necessary for political groups and individuals to create political parties based on ideology and having distinct programs rather than on ethnicity, religion, language or region. They must in fact create the circumstances which will make the latter politically and otherwise unrewarding.

It is encouraging to note that some African countries have, because of the bad experiences of one-party governments in two and a half decades,

adopted inclusionary, cooperative electoral systems containing some form of genuine power sharing with the view to avoiding bloody conflicts.

## **Elections and Conflict Resolution**

Most literature on elections and electoral systems has hitherto concentrated on their role in the introduction or restoration of democratic governance and has neglected their equally significant function in conflict resolution. Yet, elections have also served as useful mechanisms not only between conflicting groups within a State but also among States, particularly among those not directly involved in the conflict. Thus, in Africa, elections have been useful in solving long-standing conflicts in Ethiopia (Eritrea), Angola, Mali and South Africa. As such elections have become the essential agencies for cooperative relations between States and/or conflicting groups which forsake their long-held values and interests in favour of a set of mutually acceptable values and principles designed to promote mutual interests. Peace that is thus achieved not only has had the chance to be enduring but has succeeded in opening new avenues of cooperation between erstwhile enemies. The case of Eritrea and Ethiopia is a good example.

The commitment to hold elections may have been the result of negotiations and, in the scheme of things, elections may constitute only a part of the last stage (i.e. the implementing

stage) of conflict resolution. However, it is important to recognise that the type of electoral system (and particularly the provisions of the electoral law relating to the rules of competition, distribution of power etc.) have been major items on the agendas of negotiations and have been incorporated in the resulting agreements. These agreements have usually contained the principles and institutions for a stable cooperative relationship which have become the foundations for trust and consensus.

Then, too, the promise of elections have facilitated communication between the State and the institutions of civil society thus strengthening linkages and contribution to the realistic appreciation of each others' ideals and the proper understanding of each others' objectives and plans. Such linkages have, more often than not, enhanced mutual trust and confidence thus resulting in the acceptance of the electoral rules of the game, creating the proper environment for cooperation and the incentive to abide by the rules if only because of the promise of the assumption of power in the future.

Naturally, elections which were to be conducted within such an environment have lessened group fear and tensions, instilled confidence in minorities and, coupled with the promise for some meaningful form of representation, have led to their acceptance of the rules of the electoral game.



## Conclusion

In spite of the cynicism that has accompanied them, African elections have understandably been given prominence as important agents in the transition to democracy. They have after all, enabled Africans - and particularly excluded groups - to enjoy their long-forgotten rights to self-determination (broadly defined) at several societal levels. In many instances, they have also been used as mechanisms for conflict resolution, thus effecting political transformation within or rearranging the map of a State. Elections have thus become a critical component of negotiation processes aimed at ushering in political and social changes in Africa.

Yet, it is essential to make some precautionary generalisations on the structural weaknesses and strengths of African elections and the assumptions that must be made, conditions that must be met, principles that must be upheld and rules that must be accepted if elections are to become the effective vehicles for democratic governance and conflict resolution that they promise - and we desire them - to be. These are:

**1 *The "fallacy of electoralism":***  
African elections have brought regime changes. They have not in all instances ushered in a radical transformation of the State and democratic governance or resolved conflicts. If anything, they may have only introduced an era of the game, and the incentive for cooperation, in an interactive political game. To date, the evidence in Africa has been encouraging.

But there is also the important and urgent need to expand the scope of enquiry beyond the study of elections to the critical consideration of the electoral systems most suitable to the needs of African States. Electoral systems have been viewed by some experts as the most critical mechanisms in the manipulation of politics and, while the electoral system itself will not be able to ensure the creation of a stable and democratic order in any given State, it has contributed significantly to it.

Most African States have employed the majoritarian (or First-Past-the-Post) system that they have inherited from colonialism. It may not, in view of the heterogeneity of their societies as well as the perils of implosion and disintegration facing them, be unwise to consider the Proportional Representation (PR) system which has proved to be effective in conflict resolution and in promoting cooperation.

At the minimum, however, African electoral systems must, at this stage of history, provide for a) an independent electoral commission, b) the promotion of tolerance, cooperative effort and common stakes, c) the creation of strong, viable political parties which can meaningfully mobilise popular action, d) equitable use of State resources, e) the neutrality of the security and armed forces, f) the promotion of the creation of strong institutions of civil society and g) a developed civil education system.

**2 *The consolidation of democracy:***  
Despite the holding of elections - and

in most cases only one election has taken place so far - and the apparent espousal of relatively liberal and open political systems, only some tentative steps have been taken towards the achievement of truly democratic States. This is understandable. Elections, even when they are free and fair, must only be regarded as the initial measures in the process of democratisation. *Bona fide* democratic States, which reflect the sovereign will of the governed, respect their rights and allow their full participation in the affairs of the State will come into existence only as a result of the overall development of society, including the creation of viable institutions of civil society, a free press and an independent, dedicated and resolute judiciary, as well as a sound legislature. Any African system must be geared toward the institutionalisation process which will contribute to the strengthening of such a democratisation process.

**3 Africa and the international community:** It is a truism that any society must uphold certain principles if it is to be considered truly democratic. Among these, the most important be the right to vote and the right to seek office through free and fair elections. However, the second imperative (i.e. the right to seek office) must be considered in the context of time and space if elections are not to achieve

unintended, indeed dangerously anti-theoretical objections. In few cases therefore, it may not have been a bad idea and has indeed been necessary to design electoral laws with a view to avoiding legitimisation of the undemocratic by democratic means.

In this respect, it may be incumbent on the international community to be interested in long-term results rather than short-term procedures and to focus on the content (and purpose) rather than the form of elections. While free and fair elections are surely a criteria by which to judge the democratisation process, it may be necessary to insist on electoral laws that will bring about basic behavioural changes that will democratise African politics.

Also, donor countries must examine carefully the prevailing political conditions in each African Country before determining support for democratic governance initiatives, setting conditions, and prescribing out and dried criteria for free and fair elections to be applied in all African countries. This matter becomes extremely serious if only because it would affect not only the relationship of African States with the major global actors but, more importantly, the very democratisation process on the continent.

# *The Evolving Doctrine of*

## *Democratic Legitimacy*

*Bertrand G. Ramcharan\**

### **Introduction**

The 1990s have seen dramatic innovations in African international law and practice for the prevention of conflicts and for the entrenchment of the principle of democratic legitimacy on the part of African governments. This is to be seen in a spectacular fashion in the establishment and functioning of the OAU Conflict Prevention Mechanism; the SADC Organ on Politics, Defence and Security; the policies and pronouncements of the Economic Community of West African States; and in the efforts of ECOWAS and IGAD to develop their capacity for conflict prevention. In the following essay, we shall seek to present the salient parts of the practice of these organizations and to distil from them some general principles of the emerging African international law on conflict prevention. To set the ongoing efforts for conflict prevention in perspective, we shall first call in aid the vision of the African Charter on Human and Peoples Rights and look at the conception of the State in the African Charter.

### **I - The Conception of the State in the African Charter**

The African Charter on Human and Peoples Rights (1981) commits its Member States to upholding freedom, justice, equality and dignity; the equality of peoples; self-determination; protection of the family; the right to participate in government; the independence of the judiciary; non-discrimination; the right to peace; the right to development; the right to a satisfactory environment; and a series of specific rights on equality before the law, equal protection of the law, inviolability and dignity of the human person, liberty and security of person, the right to have one's cause heard, freedom of conscience and religion, the right to receive information, the right to express and disseminate opinions, freedom of association, freedom of assembly, freedom of movement, the right to property, the right to work, the right to health, and the right to education. The salient provisions on the conception of the State in the African Charter are set out below:

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## **Commitment to Freedom, Equality, Justice and Dignity**

The Preamble to the Charter recalls the stipulation in the Charter of the OAU that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples." It also recognises that fundamental human rights stem from the attributes of human beings, which justifies their international protection, and that the reality and respect of peoples' rights should necessarily guarantee human rights.

## **Equality of Peoples**

Article 19 of the Charter stipulates that all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

## **Self-Determination**

Article 20 of the Charter states that all peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to a policy they have freely chosen.

## **The Family**

Article 18 of the Charter lays down that the family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of

its physical and moral health. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

## **The Right to Participate in Government**

Article 13 of the Charter states that every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. Every citizen shall have the right of equal access to the public service of his country.

## **Independence of the Judiciary; National Institutions**

Article 26 provides that States parties to the Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion a protection of the rights and freedoms guaranteed by the Charter.

## **Recognition of Rights**

Article I provides that the States parties shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them. Furthermore, the preamble reaffirms their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other

instruments adopted by the OAU, the Movement of Non-Aligned Countries and the United Nations

### **Non-Discrimination**

Article 2 provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. Article 18 adds that the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. The article further adds that the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

### **The Right to Peace**

Article 23 provides that all peoples shall have the right to national and international peace and security. The principle of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the OAU shall govern relations between States.

### **The Right to Development**

Article 22 holds forth that all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development. Article 21 had already specified that all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to adequate compensation. States parties shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

### **Right to a Satisfactory Environment**

Article 24 provides that all peoples shall have the right to a general, satisfactory environment favourable to their development.

Against the background of the vision of the African Charter<sup>1</sup>, we shall now turn to the conflict

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1 On the African Charter generally, see Evelyn A. Ankumah, *The African Commission on Human and People's Rights Practice and Procedures*. The Hague: Martinus Nijhoff Publishers, 1996.

prevention mechanisms of the OAU and subregional organizations: SADC, ECOWAS and IGAD.

## **II - The OAU Conflict Prevention Mechanism**

At the fifty-sixth ordinary session of the OAU Council of Ministers in June-July 1992, the OAU Secretary-General submitted a report on the establishment within the OAU, of a Mechanism for Conflict Prevention, Management and Resolution. Subsequently, the Assembly of Heads of State and Government adopted "in principle, the establishment, within the framework of the OAU, and in keeping with the objectives and principles of the Charter of a Mechanism for Preventing, Managing and Resolving Conflict in Africa." The Assembly requested the Secretary-General to undertake an in-depth study on all aspects relating to such a Mechanism.

In June 1993, the Heads of State and Government of the OAU, meeting in Cairo, considered the situations of conflict in the continent and, formally established, within the OAU, a Mechanism for preventing, managing and resolving conflicts in Africa. The Assembly decided that the Mechanism would be guided by the objectives and principles of the OAU Charter, in particular: the sovereign equality of Member States, non-interference in the internal affairs of States, respect of the sovereignty and territorial integrity of Member States, their inalienable

right to independent existence the peaceful settlement of disputes as well as the inviolability of borders inherited from colonialism. It would also function on the basis of the consent and the cooperation of the parties to the conflict.

The primary objective of the Mechanism would be the anticipation and prevention of conflicts. In circumstances where conflicts do occur, it would be its responsibility to undertake peacemaking and peace-building functions in order to facilitate the resolution of those conflicts. In this respect, civilian and military missions of observation and monitoring of limited scope and duration may be mounted and deployed.

In setting these objectives, the Assembly was fully convinced that prompt and decisive action in these spheres could, in the first instance, prevent the emergence of conflicts and where they did inevitably occur, stop them from degenerating into intense or generalised conflicts. Emphasis on anticipatory and preventive measures, and concerted action in peacemaking and peace-building would, it was hoped, obviate the need to resort to complex and resource-demanding peace-keeping operations, which African countries found difficult to finance.

In the event that conflicts degenerated to the extent of requiring collective international intervention and policing, the assistance or, where appropriate, the services of the United Nations would be sought under the general terms of its Charter. In this

instance, African countries would examine ways and modalities through which they could make practical contributions to such a United Nations undertaking and participate effectively in the peace-keeping operations in Africa.

The OAU Mechanism is built around a Central Organ, with the Secretary-General and the Secretariat as its operational arm. The Central Organ of the Mechanism is composed of the State members of the Bureau of the Assembly of Heads of State and Government elected annually, bearing in mind the principles of equitable regional representation and rotation. In order to ensure continuity, the States of the outgoing Chairman and (where known) the incoming Chairman are also members of the Central Organ. Between Ordinary Sessions of the Assembly the Central Organ assumes overall direction and coordinates the activities of the Mechanism.

The Central Organ functions at the level of Heads of State as well as of Ministers and Ambassadors accredited to the OAU, or duly authorised representatives. It may, where necessary, seek the participation of other OAU Member States in its deliberations, particularly neighbouring countries. It may also seek, from within the continent, such military, legal and other forms of expertise as it may require in the performance of its functions.

The proceedings of the Central Organ are governed by the pertinent Rules of Procedure of the Assembly of

Heads of State and Government. The Central organ is convened by the Chairman at the request of the Secretary-General, or of any Member State. It should meet at least once a year at the level of Heads of State and Government; twice a year at the Ministerial level; and once a month at Ambassadorial and duly authorised representatives level. The quorum of the Central Organ is two-thirds of its members. In deciding on its recommendations, and without prejudice to the decision making methods provided for in the Rules of Procedure of the Assembly of Heads of State and Government, it shall generally be guided by the principle of consensus. The Central Organ reports on its activities to the Assembly of Heads of State and Government.

In establishing the Mechanism, the Assembly specifically stated that the OAU shall also cooperate and work closely with the United Nations, not only with regard to issues relating to peacemaking but, and especially, also those relating to peace-keeping. Where necessary, recourse would be had to the United Nations to provide the necessary financial, logistical and military support for the OAU's activities in Conflict Prevention, Management and Resolution in Africa in keeping with the provisions of Chapter VIII of the UN Charter on the role of regional organizations in the maintenance of international peace and security. In like manner, the Secretary-General of the OAU is expected to maintain close cooperation with other international organizations.

The Mechanism has so far held almost 50 Ordinary Sessions, as well as some Extraordinary Special and Summit Sessions. It has blazed a new trail in efforts for conflict prevention in Africa as we shall see from its emerging policies and doctrines as set out below.

### **Primary Responsibility of OAU for Anticipation and Prevention of Conflicts**

The First Meeting of the Chiefs of Staff of Member States of the Central Organ of the OAU Mechanism based itself on the principle that the primary responsibility of the OAU should lie with the anticipation and prevention of conflicts in accordance with the relevant provisions of the Cairo Declaration.<sup>2</sup> Secretary-General Salim, in January 1996, also noted in similar vein that "... while recognising the overall and main responsibility of the United Nations, ... Africa also has its role to play in the maintenance of international peace and security in the regions whether in support of the United Nations efforts or through its own initiatives. In this context the OAU is convinced of the need to work closely with the United Nations and of the importance of putting in place a coordinating Mechanism to enhance cooperation between the two Organizations and in pursuance of the common goals."

### **Primary Responsibility for Maintenance of IPS Rests with the UN Security Council**

The First Meeting of the Chiefs of Staff recognized that the primary responsibility for the maintenance of international peace and security particularly in the area of peacekeeping rests with the United Nations Security Council. At the same time the meeting recognized that certain exceptional circumstances can arise which may lead to the deployment of limited peace-keeping or observation by the OAU.<sup>3</sup>

### **Relationship Agreements**

The First Meeting of the Chiefs of Staff, for purposes of strengthening the coordination between the OAU and the UN in peace-related issues, recommended that the relationship between the two Organizations should be formalised. It also recommended that the OAU should continue to coordinate closely with subregional Organizations in its peace support operations taking advantage of existing arrangements with the subregions.<sup>4</sup>

### **Sovereignty and Territorial Integrity**

The Central Organ has underscored the need for the respect of the cardinal principle of territorial integrity

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2 5 June 1996.

3 5 June 1996.

4 5 June 1996.



of Member States and the inviolability of their borders.<sup>5</sup> It has also expressed its commitment to the unity cohesion and respect of the sovereignty and territorial integrity of States undergoing internal conflicts, e.g. Zaire, in accordance with the OAU Charter and in particular the Cairo Declaration of 1964 on territorial integrity and inviolability of national boundaries as inherited at independence.<sup>6</sup>

### **Inalienable Rights**

The Central Organ has reaffirmed the inalienable rights of all peoples within their internationally recognized territorial boundaries as stipulated in the OAU Charter on Human and Peoples' Rights, and other international Conventions relevant to the right of citizenship and nationality.<sup>7</sup> The Central Organ has urged the parties to seek a peaceful solution to their differences through dialogue and negotiations in conformity with the principles enshrined in the Charter of the OAU and the African Charter on Human and Peoples' Rights.<sup>8</sup> On 21 November 1997, the Central Organ called for a study to be made on the idea of establishing an international

panel of renowned personalities to investigate the 1994 genocide in Rwanda and surrounding events.<sup>9</sup>

### **OAU Refugee Convention**

The Central Organ has recognized the crucial importance of the refugees problem to particular crises and has called upon all concerned to respect the relevant provisions and the spirit of the 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa and other related International Instruments.<sup>10</sup>

### **Convention of Government**

In dealing with one internal conflict, the Central Organ reaffirmed its unequivocal support for the "Convention of Government", particularly the principle of power-sharing as enshrined in that Convention.<sup>11</sup>

### **National Debate**

The Central Organ has reiterated, on occasions, the need to engage in national debates for the resolution of conflict.<sup>12</sup>

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5 Twenty Fifth Ordinary Session, 31 October 1996.

6 Fourth Extraordinary Session, 11 November 1996.

7 Fourth Extraordinary Session, 11 November, 1996.

8 Twenty Fifth Ordinary Session, 31 October, 1996.

9 Seventh Ordinary Session at Ministerial level, 21 November 1997.

10 Twenty Fifth Ordinary Session, 31 October, 1996.

11 Third Extraordinary Session, 11 September, 1995.

12 Third Extraordinary Session, 11 September, 1996.

### **Support for Moderate Political Leaders**

The Central Organ has expressed strong support for the efforts of moderate political leaders in particular conflicts and unreservedly condemned the extremist forces.<sup>13</sup>

### **International Conference on Peace, Security and Stability**

The Central Organ, dealing with the Great Lakes Region, underscored the importance and urgency of finding a durable and lasting solution to the crisis and in this context reaffirmed its support for the convening as soon as possible of the International Conference on Peace, Security, and Stability in the Great Lakes Region as already agreed upon by the OAU.<sup>14</sup>

### **Separating Intimidators from Bona Fide Refugees**

In one instance, the Central Organ reiterated the crucial importance of separating intimidators from *bona fide* refugees and requested the Security Council to consider this issue as a vital component of the efforts to ensure the safe and voluntary return of the refugees to Rwanda and create conditions conducive to the resolution of the crisis.<sup>15</sup>

### **Diplomatic Representations**

On 2 January 1998, the Secretary-General of the OAU Dr. Salim Ahmed Salim announced that he was dispatching a high-level OAU mission to Uganda, Burundi and Tanzania, from 3-14 January 1998, composed of the representatives of the three Member States of the Central organ of the OAU Mechanism for Conflict Prevention, Management and Resolution accompanied by a Senior Political Officer of the General Secretariat to convey the concerns expressed by the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution during its Seventh Ordinary Session held in Addis Ababa from 20-21 November 1997, on the situation in Burundi. The Mission would "underscore the need for the urgent resumption of the Earache Process and the participation of all the principal actors within and outside Burundi in the negotiations, as well as the need to defuse the tension between Burundi and Tanzania". During the Mission, the delegation would also hold consultations with the leaders of the countries to be visited and other personalities, to consider the best ways and means of giving a new impetus to the peace process in Burundi.<sup>16</sup>

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13 Third Extraordinary Session, 11 September, 1995.

14 Fourth Extraordinary Session, 11 September, 1996.

15 Fourth Extraordinary Session, 11 September, 1996.

16 Press Release NY//PR/002/98. 2 January 1998.

## Peace-Keeping

The First Meeting of Chiefs of Staff accepted the principle of standby arrangements and earmarked contingents on a voluntary basis. Such earmarked contingents could serve either under the aegis of the United Nations or the OAU or under subregional arrangements.<sup>17</sup>

In a dramatic development on 6 November 1997, the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution authorised the deployment of military observers in the Comoros to avert a worsening of the situation and restoration of confidence among the people.<sup>18</sup> Pursuant to this decision, the conflict prevention centre said it would deploy military observers despite objections from secessionists on the island of Anjouan.

## Neutral Force

In one instance, the Central Organ underscored the position that the setting up of a neutral Force as recommended by a regional summit would have been the most effective manner in facilitating the creation of safe corridors and temporary sanctuaries and ensuring an effective African contribution to such a Force.<sup>19</sup>

## Defence of Democratic Legitimacy

On 26 May 1997, the Central Organ of the OAU Mechanism met to consider developments in Sierra Leone, especially the reported overthrow of the democratically elected government of that country. The Central Organ recalled that it was only 14 months previously that the people of Sierra Leone had held general elections declared by Africa and the international community as a whole to be free and fair. That democratic process had resulted in the election of President Tejan Kabbah and the national Parliament. The Central Organ further recalled that those elections represented the determination of the people of Sierra Leone to take charge of their own destiny even in the midst of very difficult circumstances. They had been hailed as a triumph not only for the people of Sierra Leone but also for the process of democratisation in the continent.

The Central Organ considered it all "saddening and shocking that a group of military officers have taken upon themselves to overthrow the duly elected Government of Sierra Leone led by President Kabbah. This act by elements of the Sierra Leonean military constitutes a clear violation of the constitution of that country and an unacceptable rebuff to the democratic choice of the people of Sierra Leone.

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<sup>17</sup> 5 June, 1996.

<sup>18</sup> Fortieth Ordinary Session, 6 November 1997, UN documents S/1997/869.

<sup>19</sup> Fourth Extraordinary Session, 11 November, 1996.

The Central Organ unequivocally condemned the reported *coup d'Etat* in Sierra Leone and called for the immediate restoration of constitutional order in the country. It called on all African and non-African countries not to take any action which would have the effect of giving comfort or strength to the leaders of the *coup d'Etat*. The Central Organ appealed to the leaders of the ECOWAS sub-region to pursue efforts aimed at assisting the people of Sierra Leone in the restoration of constitutional order. It further appealed to all African countries and the international community at large to support those efforts.<sup>20</sup>

### Forms of Action

The Central Organ has, on different occasions, expressed its: grave concern; profound regret; underscored the urgent need to act; called for immediate cessation of hostilities; urged peaceful solution of differences through dialogue and negotiations in conformity with the principles enshrined in the Charter of the OAU and the African Charter on Human and Peoples' Rights; called upon the Political Leaders, the civil society and all concerned; and appealed for humanitarian assistance.<sup>21</sup>

### III - SADC Organ on Politics, Defence and Security

The Summit of Heads of State or Government of the Southern African Development Community (SADC), meeting at Gaborone, the Republic of Botswana, on 28 June 1996, launched the SADC Organ on Politics, Defence and Security. Earlier, the Heads of State or Government, at their meeting in May 1996, had endorsed recommendations of SADC Ministers responsible for Foreign Affairs, Defence and Security proposing the establishment of a SADC Organ on Politics, Defence and Security. The Gaborone Summit reaffirmed that the SADC Organ constituted an appropriate institutional framework by which SADC countries would coordinate their policies and activities in the areas of politics, defence and security.

#### Principles

The Gaborone Summit agreed that pursuant to Article 4 of the SADC Treaty, the following shall be the guiding principles for the SADC Organ on Politics, Defence and Security:

- a) sovereign equality of all member States;

20 Thirty-Third Ordinary Session, 26 May 1997.

21 On the Mechanism generally, see Secretariat "Resolving Conflicts in Africa. Implementation Options (1993): S.B. Ibok and W.G. Nhara. *Le Système d'Alerte Rapide de l'OUA sur les Situations de Conflit en Afrique*, Secrétariat, 1996.

- b) respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence;
- c) achievement of solidarity, peace and security in the region;
- d) observance of human rights, democracy and the rule of law;
- e) promotion of economic development in the SADC region in order to achieve for all member States equity, balance and mutual benefit;
- f) peaceful settlement of disputes by negotiation, mediation and arbitration;
- g) military intervention of whatever nature shall be decided upon only after all possible political remedies have been exhausted in accordance with the Charter of the Organization of African Unity and the Charter of the United Nations.
- c) develop a common foreign policy in areas of mutual concern and interest, and to lobby as a region, on issues of common interest at international forums;
- d) cooperate fully in regional security and defence through conflict prevention, management and resolution;
- e) mediate in inter-State and intra-State disputes and conflicts;
- f) use preventative diplomacy to preempt conflict in the region, both within and between States, through an early warning system;
- g) where conflict does occur, to seek to end it as quickly as possible through diplomatic means. Only where such means fail would the Organ recommend that the Summit should consider punitive measures. These responses would be agreed in a protocol on peace, security and conflict resolution;

### **The objectives of the Organ**

The SADC Organ on Politics, Defence and Security seeks to:

- a) protect the people and safeguard the development of the region against instability arising from the breakdown of law and order inter-State conflict and external aggression;
- b) promote political cooperation among member States and the evolution of common political value systems and institutions;
- h) promote and enhance the development of democratic institutions and practices within member States; and to encourage the observance of universal human rights as provided for in the charters and conventions of the Organization of African Unity and the United Nations;
- i) promote peacemaking and peace-keeping in order to achieve sustainable peace and security;
- j) give political support to the organs and institutions of SADC;

- k) promote the political, economic, social and environmental dimensions of security;
- l) develop a collective security capacity and conclude a mutual defence pact for responding to external threats. and a regional peace-keeping capacity within national armies that could be called upon within the region, or elsewhere on the continent;
- m) develop close cooperation between the police and security services of the region, with a view to addressing cross-border crime, as well as promoting a community-based approach on matters of security;
- n) encourage and monitor the ratification of United Nations, and other international conventions and treaties on arms control and disarmament, human rights and peaceful relations between States;
- o) coordinate the participation of member States in international and regional peace-keeping operations;
- p) address extraregional conflicts that impact on peace and security in southern Africa.

### **Institutional Framework**

The Gaborone Summit agreed that the SADC Organ on Politics, Defence

and Security shall operate at the summit level and shall function independently of other SADC structures. The Organ shall also operate at ministerial and technical levels. The chairmanship of the Organ shall rotate on an annual and on a troika basis. The Summit elected President Mugabe as the first Chairman of the organ. He assured the Summit that he would work closely with all member States and consult on all issues pertaining to the work of the Organ.

The Gaborone Summit also agreed that the Inter-State Defence and Security Committee shall be one of the institutions of the Organ. The Organ may establish other structures as the need arises.<sup>22</sup>

The SADC Organ is known to have acted behind the scenes with regard to situations in Angola, Lesotho, Swaziland and Zambia.

### **IV - Standing Advisory Committee on Security Questions in Central Africa**

Following an initiative of the Member States of the Economic Community of Central African States and pursuant to United Nations General Assembly resolution 46/37B of 6 December 1991, the United Nations Secretary-General establi-

22 On the SADC Organ, see M. Malan & J. Cilliers, *SADC Organ on Politics, Defence and Security: Future Development*. ISS Paper No. 19 March 1997, issued by the Institute for Security Studies Halfway House. South Africa.

shed on 28 May 1992 the Standing Advisory Committee on Security Questions in Central Africa to promote confidence-building measures, ease regional tensions and thus further disarmament and development in the Central African sub-region. Some of the main achievements of the Committee, since its establishment, have been the signing of a Non-Aggression Pact designed to prevent future armed conflicts and strengthen confidence among the States of the sub-region, the organization of a training seminar on peace operations for Central African States to prepare senior military and civilian officials as instructors to train, upon their return home, the special units within their respective national armed forces to participate in United Nations or peace-keeping operations. Future projects include: a) a sub-regional conference on democratic institutions and peace in Central Africa; b) the establishment of an early warning mechanism in Central Africa; c) the organization of training programmes on governance and human rights issues for security forces; d) a joint meeting of ministers of defence and interior of Member States of the Committee to elaborate measures to control the illicit proliferation of arms in the sub-region.<sup>23</sup>

## V - Economic Community of West African States (ECOWAS)

The Economic Community of West African States (ECOWAS) must be credited with one of the first attempts in the history of international peace-keeping at the use of peace-keeping forces for preventive purposes, something that was later to earn the United Nations credit with its preventive deployment in the Former Yugoslav Republic of Macedonia (FYROM). The Yamoussoukro IV Agreement, concluded under the auspices of ECOWAS on 29 and 30 October 1991, a full year before the UN's preventive deployment in the FYROM was initiated, provided, *inter alia*, for the following tasks for ECOMOG:

- Eliminate external threat to allow the encampment and disarmament programme to be smoothly and effectively carried out.
- Monitoring of all possible avenues of approach into Liberia by patrols and static guards ...<sup>24</sup>

Later on, the Cotonou Agreement of 25 July 1993, would similarly task the ECOMOG peace-keeping force, as follows:

<sup>23</sup> See United Nations document S/1996/1006, 4 December 1996 for the Declaration of the Summit meeting of Heads of State and Government of the members of the United Nations Standing Advisory Committee on Security Questions in Central Africa, 2-3 December 1996. In paragraph 26 of the Declaration, the Standing Committee called for "practical steps to establish the sub-regional early warning mechanism as a basic tool of preventive diplomacy in Central Africa". In paragraph 12, they reiterated the urgent need for "participatory systems of government and to promote human rights and the rule of law as means of preventing conflicts and ensuring the stability of States".

<sup>24</sup> S/24815, p. 6

ECOMOG shall create zones or otherwise seal the borders, whichever is militarily feasible, of Liberia-Guinea, Liberia-Sierra Leone and Liberia-Côte d'Ivoire to prevent cross-border attacks, infiltration or importation of arms. There shall be deployed United Nations observers in all of such zones to monitor, verify and report on any and all of the foregoing and the implementation thereof.

All points of entry including sea-ports, airfields and roads shall be monitored and supervised by ECOMOG. There shall be deployed United Nations observers to monitor, verify and report on the implementation of the foregoing activities.<sup>25</sup>

More recently, at their Summit meeting in the summer of 1997, the Heads of State and Government of ECOWAS, addressing issues of regional peace and security, reaffirmed their determination to create within West Africa the peaceful and stable environment necessary for sustained development and regional integration. Recalling the ECOWAS Declaration of Political Principles adopted at Abuja in July 1991, they reiterated their unwavering commitment to the establishment and smooth functioning of democratic institutions in each ECOWAS member State. They expressed unreserved condemnation of the violent and unconstitutional overthrow of the democratically-

electd Government of Sierra Leone on 25 May 1997.<sup>26</sup>

This followed up on this at an extraordinary summit meeting of the ECOWAS in December 1997, when West African leaders agreed in principle to set up an autonomous and transparent mechanism for conflict prevention and resolution. The ECOWAS Heads of State reaffirmed their commitment to strengthening security and opposing acts of subversion or destabilisation in any Member State and underlined the necessity of reducing and finally eliminating the known causes of regional conflict. Follow-up work will ensue on the establishment of the mechanism.<sup>27</sup>

## **VI - Inter-Governmental Authority on Development (IGAD)**

The Inter-Governmental Authority on Development (IGAD) has also been engaged in efforts to develop a capacity for conflict prevention, management and resolution. Following an IGAD Summit on 25-26 November 1996, IGAD Heads of State and Government emphasised that Conflict Prevention, Management and Resolution and Humanitarian Affairs is the subregion's priority. The Summit reviewed and adopted projects that had been submitted for consideration in the key priority areas of

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25 S/26272, pp. 3-4

26 See the Communiqué of the ECOWAS Summit, 17 December 1997.

27 On ECOWAS generally, see I. Gambari, *The Economic Community of West African States* (19\_).



conflict prevention, management and resolution and humanitarian affairs. UNDP has provided financial support for the development of IGAD's conflict prevention capacity.<sup>28</sup>

## VII - Peace Observation and Peace-Keeping

In the initial proposal on the establishment of the conflict prevention mechanism submitted by the Secretary-General to the Assembly of Heads of State and Government, a component on peace-keeping had been keenly discussed. In the end result, emphasis was placed on the detection and prevention of conflicts. It subsequently became apparent, however, that there would be need, also, to develop Africa's capacity for peacekeeping. At the Summit in Tunis in 1994, the Secretary-General pointed to the need to earmark ready contingents within African national armies and security structures for possible deployment in peace-keeping operations, first and foremost by the United Nations and, in exceptional circumstances, through the deployment of observation missions of limited scope and duration. This proposal was subsequently approved by the 1995 summit in Addis Ababa, which authorised the convening of a meeting of defence chiefs of staff of the members of the Central Organ of the mechanism to look into technical aspects of African peace-keeping.

The first meeting of the Chiefs of Defence Staff of the Central Organ of the Mechanism recommended the principle of standby arrangements and earmarked contingents on a voluntary basis with a view to such contingents serving under the aegis of the United Nations or under subregional arrangements. Secretary-General Salim, for his part, consistently advocated cooperation in the areas of standby arrangements, ready contingents, and the prepositioning of non-lethal equipment of logistic depots, joint training, and staff exchanges between military and peace-keeping academies.

The second meeting of the Chiefs of Defence Staff, which was held from 24-25 October 1997 in Harare, took the development of thinking on an African capacity for peace-keeping to a new stage. In their recommendations, the Chiefs recommended that all Peace Support Operations in Africa should be conducted in a manner consistent with both the UN Charter and the Cairo Declaration with a view to enabling them to mobilise for action and to acquire UN support for any initiative. The Chiefs of Staff considered that the conflict situation should guide the level of involvement. In an emergency situation, they should undertake preliminary preventive action while preparing for more comprehensive action, which may include UN involvement. The Chiefs placed emphasis on speed of action and deployment. They felt that, as a principle, they should take the first initiative in

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28 On IGAD generally, see P. Woodward, *The Horn of Africa: State Politics and International Relations*, 1996. I.B. Tauris Publishers. London, New York.

approaching the UN to deploy a peace operation in response to an emergency in the continent. If the UN was unresponsive, they must take preliminary action while continuing efforts to elicit a positive response from the world body.

The concept for Peace Support Operations, in the view of the Chiefs, should be firmly linked to the operationalisation of its Early Warning System, including a network linking each of the Early Warning cells of the various subregional organizations in Africa. Moreover, they felt, that all Peace Support Operations conducted by subregional organizations in Africa should be endorsed by them. They recognized, however, that not all subregional organizations were in a position to conduct Peace Support Operations.

In the judgment of the Chiefs, where there is a deployment of peace operations, these should be conducted by an all-African force. In the event of a UN operation in Africa, the UN principle of universality should be respected. Where Africa provides the majority of troops the Force Commander must be an African. In addition, the UN should consult them on the formulation of mandates, mission leadership and force composition when it deploys Peace Support Operations in Africa.

The Chiefs noted that while the recent trend has been to focus on the problems of intra-State conflict, capacity must also be utilised in the event of a need to engage in Peace Support Operations to prevent or resolve inter-State conflicts. They should take

appropriate measures against countries that breach principles in the area of peace support. Furthermore, the selection of national contingents for participation in Peace Support Operations should not pose a threat to mission success because of the real or perceived lack of impartiality of countries with a direct interest in the conflict. Member States, individually or as part of subregional organizations should supply the Conflict Management Division of the Secretariat with the same data on strengths, tables or equipment as that which they provide to the UN Department of Peace-keeping Operations.

In the view of the Chiefs, they could, as a starting point, earmark a brigade-sized contribution to standby arrangements from each of the five African subregions, which could then be adjusted upwards or downwards according to evolving circumstances. If the prevailing situation in a given subregion did not allow for this, bilateral agreements should be reached with the countries of the region individually. Furthermore, they should identify about 500 trained military and civilian observers (100 from each subregion) as an appropriate starting point for standby capacity. They should also devise a standard structure for battalions, brigades, and perhaps even a division for future deployments. Training should be conducted according to UN doctrine and standards, and should draw on the available training materials, training aids and courses available through the UN system. UN training manuals should be complemented by African specificity.

The Chiefs thought that Member States should be encouraged to include basic training in the concept and conduct of Peace Support Operations as part of the training curriculum for all troops, individuals, units and officers in staff colleges, as well as various civilian role players and the police. Such training should include International Humanitarian Law. Member States should be encouraged to use the expertise of international humanitarian organizations and agencies. Moreover, they should be involved in the planning of all exercises conducted at the subregional level.

The Chiefs were of the view that an African peace-keeping identity must be established through, for example, the use of insignia, and accoutrements, and the drafting of an code of conduct for African peacekeepers. This would emphasize the importance of African unity over national identity.

Finally, taking into consideration the Charter and the 1993 Cairo Declaration of the Assembly of Heads of State and Government establishing the Mechanism for Conflict Prevention, Management and Resolution, the Chiefs were of the view that they could undertake Peace Support

operations excluding peace enforcement with a mandate from the Central Organ and/or within the framework of joint operations with the UN and subregional organisations.<sup>29</sup>

### **VIII - Cooperation Between the UN, the OAU and Subregional Organizations**

Having regard to the rapid development of conflict prevention mechanisms in Africa and bearing in mind efforts to develop an African peace-keeping capacity, the question may be asked how the United Nations is keeping pace in its cooperation with the UN and subregional organizations. A long-standing programme of cooperation between the UN and OAU has been in existence since 1965. The modalities of cooperation were spelt out in a cooperation agreement that the two organizations signed in 1965 and amended in 1992, and involves cooperation in the economic, social, scientific and political areas. With few exceptions, the programmes are developed by the agencies and organizations of the UN system in consultation with the OAU.<sup>30</sup>

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29 See the Report of the Second Meeting of the Chiefs of Defence Staff of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution, document, DCO/MEC/MIN/7 (VII).

30 For the latest report of the UN Secretary-General on cooperation between the United Nations and the, see UN document A1521374. For a similar report on cooperation between the UN and SADC, see A/52/400, 29 September 1997.

In recent years, cooperation between the two Organizations has had to adapt to the changing world situation. The end of the Cold War increased not only the opportunity but also the need for regional organizations to assume greater responsibility for the maintenance of peace and security in their respective areas. It became necessary and opportune, therefore, for the UN and the OAU to review the scope and modalities of their programme of cooperation. The review was called for because the areas of cooperation could be expanded beyond the traditional economic and social issues to include cooperation in conflict prevention, peacemaking, peace-keeping and democratisation areas which are also outside the mandates of the large majority of participants from both the UN system and OAU.

A common vehicle for working out specific programmes of cooperation, assessing their implementation and outcome as well as elaborating on new measures to strengthen and broaden them has been the annual meetings between the secretariats of the UN system and the OAU. Such meetings have been held since 1980, mostly in Addis Ababa but also in Geneva, Nairobi and New York. The General Assembly has approved the convening of a meeting in Addis Ababa in 1997.

Following the assumption of office of Secretary-General Annan in January 1997, he and Secretary-General Salim met that very month and agreed that it would be a good idea to meet twice a year, along with

their senior advisors, to discuss priority areas of cooperation and to coordinate their efforts. In February, Mr. Annan wrote to Mr. Salim and proposed that the two of them consider meeting twice a year, immediately following the OAU Summits and early during the General Assembly. At the first meeting, Mr. Salim's senior colleagues would participate and at the second Mr. Annan would be accompanied by his senior advisors. This arrangement is being implemented currently. At the first meeting, stress was placed on the development of cooperation in support of law, democracy, the rules of and respect for human rights.

In addition to this, regular meetings between the secretariats of the UN and the OAU, exchanges also take place between the UN Secretariat and those of subregional African organizations. The Department of Political Affairs of the United Nations Secretariat has extended invitations to the, SADC, IGAD, and ECOWAS to send representatives for on-the-spot briefings on the conflict prevention activities of the United Nations and has offered to reciprocate in turn. Furthermore, the Department of Political Affairs has arranged for the establishment, from the beginning of 1998, of a Political Affairs Liaison Officer at the whose functions would be:

- a) to facilitate the exchange of information and the coordination of initiatives and efforts in the areas of preventive diplomacy and peace-making as well as in the democratisation process in Africa:

- i) to follow closely the deliberations of the Mechanism for the Prevention, Management and Resolution of Conflicts and advise Headquarters of political initiatives of concern to the United Nations discussed by the Mechanism;
  - ii) to liaise with the Division for Conflict Resolution and the Political Department at large with a view to enhancing cooperation on specific political issues of priority concern to the United Nations and;
  - iii) to support the activities of joint United Nations/ special representatives;
- b) to coordinate the implementation of the programmes of cooperation between the United Nations system and agreed to at the annual meetings between their secretariats;
- c) to perform such representational functions as may be required and necessary at relevant meetings in Addis Ababa.<sup>31</sup>

## Concluding Observations

That Africa continues to be riven by internal conflicts does not gainsay the extraordinary creativity that we have reviewed in this essay on the part

of the OAU and sub-regional institutions. The mechanisms, policies and doctrines are transforming the African public order as never before seen since the advent of decolonisation. The doctrine of democratic legitimacy upheld in cases such as Sierra Leone and Burundi are breaking new ground. The preventive deployment of peace-keeping forces foreseen by ECOMOG in 1991 foreshadowed the United Nations' own preventive deployment in the Former Yugoslav Republic of Macedonia a year later.

If one compares the dynamism of the Central Organ of the OAU Mechanism with the inactivity of the OAU Committee on Mediation that has lain dormant for years, one would realise the breathtaking nature of the developments of recent years. It is also extraordinary that the OAU, SADC, the Standing Committee on Central Africa, ECOWAS, and IGAD have all explicitly and repeatedly affirmed democracy, the rule of law and respect for human rights as the indispensable foundations for preventive action. A recent conference on conflict prevention in Africa held in Earaches in January of 1998 has urged that consideration be given to the establishment of an OAU instrumentality such as the OSCE High Commissioner on National Minorities. The conference also urged the development of national capacities for early-warning and conflict prevention. Within the OAU, the idea of the establishment of an African Court of Human Rights to complement the activities of the

31 See UN document E/AC.51/1997/L.4/Add.4. 11 July 1997.

African Commission is also at an advanced stage.

Outside of the OSCE area, the developments in Africa are far ahead of anything else in the developing world. The ASEAN regional forum is, for the time being only an annual, diplomatic event. The OAS does have procedures to meet urgently in case of need, but they are not as pro-active as those of the OAU Mechanism.

Africa is thus not short of capacity for prevention, or for peacemaking. Unfortunately, difficult situations such as those in the former Zaire require

the deployment of military observers or peace-keepers if conflict is to be averted or minimised. Africa is developing its capacity to contribute to peace-keeping operations whether in the continent or elsewhere. Where it needs assistance most is with logistical, transport, and financial assistance to deploy its peace-keepers. For the time being, the economic state of the majority of African countries would make it difficult for them to deploy and sustain their trained forces in peace-keeping operations. The international community must come to their assistance. This will be the true test of the international community's solidarity with Africa for conflict prevention.

# *Victims of Abuse of Power, with Special Reference to Africa*

*Daniel D. Ntanda Nsereko<sup>1</sup>*

## **I - Introduction**

The Seventh United Nations Congress on Prevention of Crime and Treatment of Offenders meeting at Milan, Italy, in 1985, adopted the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. It did so in response to a recommendation of the Sixth Congress that the United Nations "continue its present work on the development of guidelines and standards regarding abuse of economic and political power."<sup>2</sup> The Declaration comprises twenty-one sections, divided into Parts A and B. Part A consists of seventeen sections and deals with victims of ordinary or street crimes. Part B consists of only four sections, and deals with victims of abuse of power. In this paper we deal with Part B concerning victims of abuse of power, and our primary focus will be on Africa.

## **II - Victims of Abuse of Power**

Who are victims of abuse of power? The Declaration (in s. 18) defines victims of abuse of power as:

Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognised norms relating to human rights.

Conspicuously missing from the Declaration is a definition of the concept of abuse of power. This omission is attributable to the political sensibilities of the national delegations at the Milan congress and to their desire to avoid finger-pointing, which the

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2 Sixth United Nations Congress on Prevention of Crime and Treatment of Offenders. (United Nations Publication, Sales No. F.91.IV.4). Chap. 1. Set. 1 "The Declaration was unanimously approved by the United Nations General Assembly by Resolution No. A/RES/40/N of 11 December 1985.

concept *abuse of power* engenders. Indeed, the majority of delegations might have preferred to dispense with this category of victims altogether. They were more concerned with the non controversial victims of ordinary crimes. It was only at the instant urging of a few Third World delegations and experts that they vouchsafed to its inclusion in the Declaration. So, it was not by accident that they relegated victims of abuse of power to a separate Part, containing only four out of the twenty-one sections. It must, however be stressed that the original primary concern of the Sixth Congress was with victims of "abuse of economic and political power."

What, then is a "abuse of power"? and what is "power"? In the context of the Declaration, power means authority or influence over other people. This authority or influence may be political, economic, social and even marital. It may, in turn, be private or public. It is public when it is vested in one person or group of persons, to be exercised on behalf of the whole community. Power in this sense is essential to the very existence of any civil society. When used legitimately, power can be a blessing to the public at large. It can be used to protect members of the public and their property. It can be used to vindicate the innocent; punish the wrongdoer; and promote peace, harmony, justice and happiness for all. It can also be used to create an environment within which individuals can exert their energies and faculties to

self-fulfilment and development. That is the reason why when asked why he was running for the office of President of the United States, John F. Kennedy replied, "Because that's where power is!"

Power, when abused, becomes a curse. Power is abused when it is used for selfish, illegitimate, or illegal ends. Abuse of public power is particularly evil, because it results in the victimisation of people on whose behalf it is wielded. It is a gross abuse of trust.

According to a United Nations Working Paper, abuse of power includes "(a) the use of power to avoid the imposition or application of legal sanctions or controls on certain behaviour which may occur at high levels of the socioeconomic and political order, and (b) its use to avoid the prosecution of offenders in high positions, even for ordinary offences."<sup>3</sup> We shall now proceed to consider some of the manifestations of abuse of power.

#### **A. Laws or Decrees that Violate Human Rights**

In the first instance, persons in positions of authority use their positions to enact laws or issue decrees that violate universally recognised human rights. Their motive in so doing may be to entrench or perpetuate themselves in positions of power by eliminating real or imagined rivals, or to gain social or economic advantages over those that they strip of those

3 *Crime and Abuse of Power: Offices and Offenders Beyond the Reach of the Law?* (Working Paper prepared by the Secretariat) U.N. doc. A/CONF. 1980.



rights. For example, international human rights law forbids the enactment and application of penal laws with retroactive effect.<sup>4</sup> In spite of this prohibition some African regimes have enacted and used such laws to incarcerate and execute political adversaries. This was done in Ghana,<sup>5</sup> Uganda<sup>6</sup> and Nigeria.<sup>7</sup> Again, international human rights law requires that any person charged with a criminal offence be accorded certain procedural guarantees that are considered essential to a fair trial.<sup>8</sup> Nevertheless, African regimes have set up special "kangaroo" tribunals to summarily try and execute political opponents or critics. This has happened in Ethiopia, Ghana, Liberia, Uganda,<sup>9</sup> Sudan,<sup>10</sup> and Nigeria.<sup>11</sup> Lastly, international human rights law guarantees every individual freedom of speech, freedom of conscience, and freedom of movement. Sad to say, some African regimes have passed laws annulling these freedoms and punishing citizens

who dare exercise them. Thus, for refusing to join the ruling Malawi Congress Party, Jehovah's Witnesses in Malawi were outlawed. They were publicly insulted by the President Banda as "the devil's witnesses." With the full knowledge and consent of the Malawi government, ruling-party youth (the Young Pioneers) rampaged through towns and the countryside, setting fire to Witnesses' homes, looting and destroying their property and crops and leaving whole Witness' villages desolated. They caused all Witnesses in the employment of government or private firms to be dismissed from their jobs. They also assaulted and tortured them, resulting in hundreds of deaths. To escape further tyranny, over ten thousand Witnesses fled to neighbouring countries as refugees.<sup>12</sup> Needless to say, the Malawi Congress Party militants were not prosecuted for these crimes against the Witnesses.

4 See Article II (2) of the Universal Declaration of Human Rights. Also see Article 15 of the International Covenant on Civil and Political Rights; Article 7(B) of the African Charter on Human and Peoples' Rights, Article 9 of the American Convention on Human Rights, and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

5 Under Special Crimes Decree of 1978. See (1979) in *Int'l Comm. Jar. Rev.* 5.

6 Trial by Military Tribunal Decree, Decree No. 12 of 1973.

7 Decree No. 55 of 1992.

8 See Article 10 of the Universal Declaration of Human Rights; Article 14 of the International Covenant on civil and Political Rights; Article 7 of the African Charter on Human and Peoples' Rights; Article 8 of the American Convention on Human Rights, and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

9 See generally D.D.N. Nsereko, "Arbitrary deprivation of Life controls on the Permissible Deprivations" in B.G. Ramcharan ed., *The Right to Life in International law* (Dordrecht, The Netherlands: Martinus Nijhoff, 1985).

10 "Army Officers Executed After Summary Trial" (1990) 10:6 *Amnesty International Newsletter* 1.

11 "Nigeria: Military Injustice" (1991) 5:5 *Africa Watch*.

12 See D.D.N. Nsereko, "Religion, the State, and the Law in Africa" (1986) 28 *Journal of Church and State* 269.

In 1977 Idi Amin of Uganda proscribed about twenty-seven religious denominations, saying that there were too many religions in the country and that this was a threat to national unity. Many would not be intimidated into giving up long-cherished beliefs. They held to them, worshipping secretly.

Another dictator, Macias Nguema of Equatorial Guinea, similarly persecuted and finally outlawed the Catholic Church, to which 80 percent of the population belonged. Before that he had harassed the Church's clergy and arrogated to himself the right to censor their sermons. Nguema even ordered them to begin mass "in the name of the President and his Son."

### B. Conduct Injurious to the Public

In the second instance, persons in authority take advantage of lacunae in the law to perpetrate or condone conduct beneficial to them but injurious to others or to the public at large.<sup>13</sup> For example, many African countries do not yet have adequate legislation regulating the disposal of industrial waste. Avaricious transnational corporations that feel burdened

by costly waste-disposal requirements in their home countries, have taken advantage of these lacunae in African law and have enticed corrupt African officials into deals that permit the corporation to export and dump highly toxic and radioactive industrial waste in Africa. It is estimated that over 20,000,000 tonnes of such waste are exported to African and to other Third-World countries annually.<sup>14</sup> The waste includes highly flammable chemicals, corrosive toxins and carcinogens such as polychlorinated biphenols (PCBs), as well as incinerator ash. Some of these chemicals are hard to eliminate once they have seeped into the underground water table.<sup>15</sup> The danger that these substances pose to the environment and to all forms of life is incalculable. For example, soon after an American company from Philadelphia dumped 15,000 tonnes of incinerator ash into abandoned mines on Kassa Island, off the coast of Guinea, the vegetation on the island began to change colour and the air became noxious.<sup>16</sup> Contracts permitting importation of these dangerous substances, for periods varying from three to ten years, are often negotiated and signed secretly so that members of the public cannot object. They have been concluded between corporations and officials of such countries as

13 One commentator has referred to this type of abuse in "immoral abuse of power" See L.L. Lamborn "The United Nations Declaration on Victims The Scope of Coverage" in M.C. Bassiouni, ed. *International Protection of Victims* (Association internationale de droit pénal, Pres. 1988).

14 See "Toxic Waste Exports Initiatives to Control Dumping" (October 1988) *Keesings Record of World Events* 16250; see also C.M. Peter "The Right to a Clean and Satisfactory Environment: A Note on the Export of Toxic Waste To Africa" (1990) 6 *Lesotho L.J.*

15 Italy dumped such materials in Hendel State, Nigeria in 1988, See Peter, *ibid.*

16 *Ibid.*

Nigeria, the Congo, Benin, Guinea Bissau, the Central African Republic, Guinea (Conakry), Sierra Leone and Equatorial Guinea.<sup>17</sup> Alarmed by the ever increasing number of countries entering into these contracts, the Council of Ministers of the Organisation of African Unity adopted a resolution in 1988 declaring the dumping of nuclear and industrial wastes in Africa to be "a crime against Africa and the African people." It also condemned "all transnational corporations and enterprises involved in the introduction, in any form, of nuclear and industrial wastes in Africa" and demanded that "they clean up the areas that have already been contaminated by them." Quite remarkably, the Council did not condemn those African governments that entered into the contracts with the transnational corporations! The Council was content simply to *call upon* them to "put an end to these transactions."<sup>18</sup>

### C. Illegal Conduct

In the third instance, persons in positions of authority use their positions to commit or condone the commission of conduct that is criminal under the laws of their respective countries. Such acts usually include crimes against national economics, torture, extrajudicial executions, disappearances, and police and military excesses. Since persons in power are the actors or principals of the actors and are at the same time the ones charged with law enforcement, they ensure that their conduct is not investigated, prosecuted, or punished. They ensure that evidence incriminating them is destroyed and that potential witnesses to their conduct are intimidated or killed. They also threaten and sometimes even kill defence lawyers who dare question their conduct or the judges who agree to entertain such questions.<sup>19</sup> They are apparently above the law or beyond the reach of the law.

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17 *Ibid.*

18 Organisation of African Unity, Council of Ministers' Resolution on Dumping of Nuclear and Industrial Waste in Africa, CM/Res. 1153(XI.VII) (23 May 1989). The OAU has since followed up the resolution with the Bamako Convention on the Ban on the Import into Africa and Control of Transboundary Movement and Management of Hazardous Wastes Within Africa (29 January 1991).

19 Generally see R. Brody, ed. *Attacks on Justice; The Harassment and Persecution of Judges and Lawyers July 1989-1990* (Geneva: Centre for the Independence of Judges and Lawyers of the International Commission of Jurists). The report reveals that between 1 July 1989 and 30 June 1990, 430 judges or lawyers in 44 countries were victimised for carrying out their professional duties. Of these 67 were killed, 165 were detained, 40 were attacked, 67 received threats of violence and 54 were officially barred from carrying out their duties.

Crimes against national economics manifest themselves in such corrupt practices as bribery, smuggling, over-invoicing, currency irregularities, and the importation of obsolete and often useless products.<sup>20</sup> For example, it was reported in 1990 that up to 30 per cent of Zaire's coffee, the country's top agricultural product, was being smuggled out of the country every year, resulting in loss of tax revenue and badly needed foreign currency. The smugglers included top industrialists, ex-ministers and members of the security forces. The smuggling was in addition to the salting away of millions of dollars by the Head of State to bank accounts in Europe.<sup>21</sup> Unfortunately nothing can be done to the culprits when they are in power. Even after they have been removed from power they usually cannot be successfully prosecuted, because they often destroy records, leaving behind no trace of evidence on which such prosecutions could be based.<sup>22</sup>

Torture has been condemned as "an offence to human dignity" and is proscribed under international human rights law and under the laws of most nations of the world.<sup>23</sup> Yet it is practised routinely all over Africa, especially in countries with unstable regimes. It is perpetrated by highly-placed governmental officials, usually members of the security forces or intelligence agencies. The victims are usually political opponents of the regime in power or are ordinary citizens from whom the regime wishes to extort information. Hundreds of victims often die in custody as a result of torture; but such deaths are usually explained away as "suicide," "natural causes," or "wounded in the course of attempted escape." For example, early in 1990 the Sudanese Security of the Revolution agency arrested and held in *incommunicado* detention Dr. Ali Fadul who had led a doctors' strike towards the end of 1989. He died

20 Zaire is one of the countries that have been notorious for these practices. See "Zaire Salvaged But Not Saved" (1980) *Africa Confidential*. It was alleged that Lukusa, President Mobutu's uncle and the director of Zaire's metal marketing company played a key role in juggling the company's books in September 1979 so as to enable Mobutu to pocket one million US dollars. See also "Zaire: Mobutu's Millions" (1989) *Africa Confidential*. There it was reported that President Mobutu maintained personal funds at a branch of the Banque Indosuez Paris and that he gave a cheque of five million French Francs to King Hassan II of Morocco as his personal contribution towards the King's grandiose Casablanca Mosque. The cheque was drawn on that account. See also "Zaire Coffee Smuggling" (1990) *Africa Confidential*. The Practice of importing old useless machinery from questionable overseas "suppliers" has been reported in Uganda "The Mehtas: Monkey Tricks Continue?" (2-9 August 1993) 39 *Uganda Confidential*.

21 *Ibid.*

22 *Ibid.*

23 See the 1986 United Nations Convention Against Torture, Article I(I) of the Convention defines torture to mean "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions."

whilst in detention and the authorities attributed his death to "malaria." However, according to an Amnesty International report, Dr. Fadul had actually died of internal haemorrhaging and of a fractured skull - all evidence of torture by his captors.<sup>24</sup>

Extrajudicial execution is murder *par excellence* and is at least as old as the medieval English King Henry II's disposal by thugs of Archbishop Thomas à Becker. It is carried out by and on behalf of the government, by official or semi-official security services, youth sections of the ruling party and other secret death-squads. It is carried out with impunity, the perpetrators being fully aware that they are untouchable or are immune from prosecution. Targeted population groups, such as tribes, religious minorities, and members of opposition parties are often wiped out. In countries

where this evil is practised it is common to find bodies of victims dumped on the streets, in lakes or rivers and in forests to intimidate the living.

Army and police excesses, which are a related form of abuse of power, also account for thousands of deaths, maiming and other outrages in the countries where they occur. They usually take place in the context of political tension or armed opposition to the government in power. The army and the police, in a bid to suppress the opposition, often commit indescribable atrocities and horrors against the civilian population, devastating entire villages and towns.<sup>25</sup> All this is done in violation of the Geneva Conventions and the Protocols thereto. Millions upon millions of Africans have perished or been left homeless in recent years in such countries as Uganda,<sup>26</sup> Angola,<sup>27</sup>

24 See "Sudan: Doctor Tortured to Death" (1990 *Amnesty International Newsletter*). More recent reports of torture have been made with respect to Senegal. "Torture in Casamance Region." *Amnesty International Newsletter*, *ibid.* and with respect to Uganda: "Uganda: Torture in Text" (1996) 11:6 *Africa Confidential* 8.

25 *Supra* note 9.

26 See e.g. Amnesty International *Human Rights in Uganda* (1998); Amnesty International *Human Rights Violations in Uganda* (1982); Yusutu Lule "Human Rights Violations in Uganda Under Obote" in *Munger Africana Notes* (Pasadena: California Institute of Technology, T. Lansner, "Army Brutality Pushes Uganda into Tribal War" *The Observer* (London) November 1981 14; M. Caisman "Obote's Uganda Plunges Back into Bloodshed" *The Sunday Times* (London) (29 August 1982) 8 R. Righner, "Massacre in the Camps of Death" *The Sunday Times* (London) (5 June 1983) 9; C. Rand "Uganda: Like Nazi Germany all Over Again" *□ Pictorial* (Britain) (24 July 1983); C. Tessill "Terror of Army that Writes its Own Rules" *The Times* (London) (21 August 1983).

27 See Amnesty International "Angola: Assault on the Rights to Life" (August 19xx) AI Index: AI 12/04/93, Distr: SC/CO/GR. Also see "Angola: The Worst War in the World" (1993) *Africa Confidential*: "In what diplomats and relief agency officials currently believe to be the world's bloodiest conflict, the human tragedy is unremitting despite a reported death toll of 1,000 people a day. Western and United Nations policy towards Angola appears paralysed. The horrendous conditions in Cuno, where dogs feed on corpses in the streets and medical and power supplies are virtually non-existent would shock even those viewers acclimatised to the atrocities in Bosnia and Herzegovina."

Zaire,<sup>28</sup> Burundi,<sup>29</sup> Liberia,<sup>30</sup>  
 Rwanda,<sup>31</sup> the Sudan,<sup>32</sup> and  
 Somalia.<sup>33</sup>

The phenomenon of disappearances is akin to that of extrajudicial executions in that the victims disappear at the hands of government agents. As has been the practice in Latin America, the authorities deny knowledge of the whereabouts of the disappeared persons even when it is known that they were last seen in official custody.<sup>34</sup> Enforced disappearance is commonplace in Africa. It has been particularly widespread in Uganda. Thousands of Ugandans, including politicians, journalists, clergymen, businessmen, lawyers and judges perished this way. A result of pressure from the international community Idi Amin appointed a judge to inquire into these disappearances. Fearing what might happen to him on submitting a report that was bound to displease Amin, the judge decided to flee the country and to send the report

to the dictator through the post. Of course nothing became of the report.

As a result of all these forms of victimisation linked to abuse of power, millions of Africans are forced to flee their home countries in search of freedom or economic survival. There are currently over 7,000,000 refugees roaming the African continent (mostly from Angola, Burundi, Ethiopia, Liberia, Mali, Mozambique, Rwanda, Sierra Leone, Somalia, and the Sudan). The United Nations High Commissioner for Refugees estimated that during 1991-1992 over 5,000 persons fled their homes each day in search for freedom and safety.<sup>35</sup>

Because their flight is unplanned, refugees encounter enormous problems, and suffer untold hardships in their countries of asylum. Penniless and jobless, they are often the subject of public ridicule and social ostracism. Faced with an unfamiliar and inhospitable environment and often exposed

28 See "Zaire Inciting Hatred: Violence Against Kasiens in Shaba" (1993) 5:10 *Africa Watch*.

29 See "Burundi: The Terror Behind the Putsch" (199x) 1-125 *Africa Confidential*: "Inside the country bands of soldiers continue to massacre civilians. Outside, some 800,000 refugees. Rwanda, Tanzania and Zaire face chronic food shortages and will starve to death unless food reaches their makeshift camps soon."

30 See "Liberia; Waging War to Keep Peace: The ECOMOG Intervention and Human Rights" (1993) 5:6 *Africa Watch*.

31 See "Beyond the Rhetoric Continuing: Human Rights Abuses in Rwanda" (1993) 5:7 *Africa Watch*.

32 See "Sudan: The Politics of Human Rights" (1992) *Africa Confidential*. "There are now an estimated two million displaced Southerners living mainly in shanty towns, in and around Khartoum, virtually half of the capital's population. Their mainly cardboard and sacking huts have been subject to sporadic bulldozing by a series of governments."

33 See "Somalia: Ways to End the Slaughter" (1992) 11:2 *Africa Confidential*.

34 For a classic case see *Velasquez Rodriguez v. Honduras* (1988) Annual Report of the Inter-American Court of Human Rights, Annex VI (1988).

35 Office of the United Nations High Commissioner for Refugees, UNHCR, *Activities Financed by Voluntary Funds: Report for 1991-1992, and Proposed Programmes and Budget for 1993* U.N. doc. A/AC/96/796 (Part I) 1992.

to the elements and to squalid and unsanitary living conditions, they often fall prey to epidemic diseases and various forms of exploitation and human degradation. On the other hand, the sudden, unplanned, and often uncontrollable influx of foreigners on the asylum country's borders is bound to create enormous economic, ecological, social, political and security problems for it. To a developing country whose government can barely feed, house, educate, employ and provide health and other social services and amenities for its own people, the sudden appearance of tens of thousands of refugees from other countries can be unsettling. Therefore, much as the country of asylum may wish to assist the asylum seekers, it is often unable to do so. If it does not turn the refugees back to their persecutors it leaves them to live in abject, inhuman conditions referred to above. Like Shakespeare's Orlando, the African refugee may bemoan his plight of double victimisation:

Thus must I from the smoke  
into the smother  
From a tyrant duke unto a  
tyrant brother!<sup>36</sup>

### III - Redress

Victims of abuse of power need justice. They need redress. Refugees want to go back home and to live in

safety.<sup>37</sup> others who do not manage to flee also need relief from repression. But as is often the case, victims of abuse of power have no peaceful avenues of recourse at the national level. And, in the past, they would have no recourse at the international plane either. According to the traditional conception of sovereignty treatment of citizens by their State remained an internal affair. To discuss, let alone question, the way that a State treated its citizens was to interfere in its internal affairs. Individuals and their rights were not part of the international legal system. They were the object, not the subject of international law. This position has now changed. According to R. Nicolussi:

While the States were considered the only subjects of International Law, individuals and their rights were juridically neglected. But already a dawn of a new idea is in sight where governments are reminded that States are not celestial bodies but products of man for man.<sup>38</sup>

This idea is slowly but surely becoming concrete reality. It has been particularly so since the birth of the United Nations. The UN Charter lists as one lofty objective the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. For this reason the UN Charter requires

<sup>36</sup> *As You Like It* (act 2, scene 2, line 280).

<sup>37</sup> See D.D.N. Nsereko, "The Right to Return Home" (1981) 21 *Indian J. Int'l L* 445.

<sup>38</sup> F. R. Nicolussi, "Displaced Persons and International Law", (1948) 73 *Res. des cours*.

States to respect and to ensure realisation of human rights by their inhabitants. It requires them to treat them in accord with accepted international standards.

These standards are already in place. They are found in myriad instruments, some of which are contractual in nature while others are binding as part of customary international law. States may now be called to account on the way they treat their inhabitants before such fora as the Human Rights Commission,<sup>39</sup> the Human Rights Committee,<sup>40</sup> The Committee Against Torture,<sup>41</sup> The Committee on the Elimination of Racial Discrimination,<sup>42</sup> and before the UN Security Council, if the situation within its borders threatens or is likely to threaten international peace and security.<sup>43</sup> States may similarly be required to render an account under regional arrangements. Thus, States, individually and collectively under the international human rights system, have not only a right but also a duty to be vigilant: to ask each other questions about the way they treat their inhabitants. In matters of human rights other States no longer have a duty to remain silent or not to intervene.

Do States also have a right or, indeed a duty, to physically intervene in each other's territory in order to stop gross and flagrant violations of human rights? Or are they limited to asking questions, conducting debates, and passing resolutions, while the world watches population groups being massacred or wiped out by famine? It has been argued that short of responding to an armed attack, by exercising the right of self-defence under Article 51 of the UN Charter, or participating in enforcement measures mandated by the Security Council under Chapter VII, a State has no right to physically intervene in the territory of another.<sup>44</sup>

With due respect, current international legal opinion and practice have rendered this view obsolete. States may be justified to intervene on another State's territory to save life and to stop or alleviate human suffering. Indeed, States have in the past asserted the right of humanitarian intervention to protect their citizens on the territory of another State when the lives of those citizens appeared to be in mortal danger. The right of humanitarian intervention is predicated on the State's right of

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39 Under ECOSOC Resolution (XI.VIII) of 27 May 1970.

40 Under the International Covenant on Civil and Political Rights, Articles 40 and 41, and under the Optional Protocol thereto.

41 Under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 19, 21, 22.

42 Under the International Convention on the Elimination of All Forms of Racial Discrimination, Articles 9, 11, 14.

43 Under Articles 34 and 35 of the UN Charter.

44 See V. Sandoz "Droit" or "devoir d'ingérence" and the Right to Assistance: the Issues Involved" (May-June 1992) *International Review of the Red Cross* 215.



protection.<sup>45</sup> A new right that entitles States to intervene on the territory of another on behalf of people who are not its citizens has also recently emerged. It is *the right to intervene on humanitarian grounds*. This right is asserted when it manifestly appears to the intervening States that the lives of sections of the civilian population in another country are in peril. The basis for this right are considerations of humanity and international solidarity engendered by the "global village" that the world has become today. No outrage occurring at any spot of the globe completely escapes notice,

thanks to the watchful eye of the ever-vigilant world news media. Consequently, publicity of such outrages will arouse international public sympathy and, sometimes, spur it to action on behalf of the victims. Thus, as the General Assembly in one of its resolutions recently asserted, "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity."<sup>46</sup> World leaders, including Pope John Paul II have supported the right to intervene on humanitarian grounds.<sup>47</sup> So have

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45 For example Israel intervened in Uganda in 1976 to rescue her nationals held hostage from a Hijacked Air France plane and the United States intervened in Iran in 1980 in an attempt to rescue American citizens detained in Tehran. Again the United States intervened in Liberia in 1990 to rescue US citizens and certain other foreign nationals. The US did the same thing in Somalia in 1991. France and Belgium also intervened in Zaire in 1991 to rescue their nationals whose lives were at risk. Their right to intervene was not seriously questioned by other States. Generally see R.B. Lillich "Forcible Self Help to Protect Human Rights" (1970) 52 *Iowa L. Rev.* 144.

46 See the preamble to Resolution 43/131 of 8 December 1988 entitled "Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations." The resolution was reaffirmed and strengthened by Resolution 43/100 of 14 December 1990.

47 President François Mitterrand of France is reported to have said on 14 July 1991 that "France has taken the initiative of this new right, rather extraordinary in the history of the world, which [ ] in a way the right of intervention within a country, when a part of its population is victim of persecution." Hans Dietrich Genscher of Germany similarly told the United Nations General Assembly that "where human rights are trampled upon, the family of nations cannot be confined to a role of spectator. It can, and should interfere." The Belgian Foreign Minister is reported to have told the same session that "the international community should help States to respect human rights, and to help them to do so if necessary." Pope John Paul II is also reported to have told an international conference in Rome in December 1992, days after the UN deployed troops in Somalia, that "the conscience of humanity requires that humanitarian intervention be obligatory in situations that seriously endanger the survival of people and entire ethical groups. It is the obligatory duty of nations and of the international community. See M. Bettati "The Right of Humanitarian Intervention or the Right of Free Access to Victims?" (1992) 49 *Int'l Comm. Jur. Rev.* See also B.G. Ramcharan "The Security Council: Maturing of International Protection of Human rights" (1992) 48 *Int'l comm. Jur. Rev.*

writers and international professional bodies.<sup>48</sup> The right has been invoked incrementally by the UN Security Council in authorising humanitarian operations in Iraq, Somalia, Bosnia and Herzegovina, and Rwanda - countries beset with gross and massive violations of human rights. In the case of Rwanda, when the United Nations was slow to act, France took the initiative, intervening in June 1994 ahead of the United Nations force (UNAMIR) to protect the civilian Rwandans from further massacres.<sup>49</sup> By this time over 500,000 Rwandans had been slaughtered by rival ethnic armies. France's humanitarian initiative billed as *Operation Turquoise*, had the blessing of the Security Council.<sup>50</sup> It is noteworthy that in all these cases the Security Council not only "insisted"<sup>51</sup> or "demanded"<sup>52</sup>

unimpeded access to victims for the UN and other relief workers to victims, but also condemned and threatened to hold responsible persons in those countries who deliberately prevented relief supplies reaching the victims.<sup>53</sup>

The action in Liberia in 1990 of the Economic Community Cease Fire Monitoring Group (ECOMOG), under the Economic Community of West African States (ECOWAS), is further evidence of the right of intervention on humanitarian grounds. Although ECOMOG's success has to date been limited, it managed to bring a halt to ethnic-based killings and brutality in the capital of Monrovia, and to remove obstacles to the delivery of relief supplies and the re-establishment of civil order in that city.<sup>54</sup>

48 See M. Bettati, *ibid.* B.G. Ramcharan, *ibid.* W.M. Reiseman "Sovereignty and Human rights in Contemporary International Law" (1990) 84 *AJIL* 866 K.K. Pease & D.P. Forsyth "Human Rights, Humanitarian Intervention, and World Politics" (1993) 15 *Hum.Rts.Q.*2 See also the document entitled "Guiding Principles on the Right to Humanitarian Assistance adopted by the Council of the International Institute of Humanitarian Law . Principle 7 explicitly states that "(1) the competent United Nations organs and regional organisations may undertake necessary measures, including coercion in accordance with their respective mandates, in the event of severe, prolonged and mass suffering of populations, which could be alleviated by humanitarian assistance. These measures may be resorted to when an offer has been refused without justification, or when the provision of humanitarian assistance encounters serious difficulties." (Nov-Dec 1993) *International Review of the Red Cross* 539.

49 See Security Council Resolution 925 (1994) of 8 June 1994.

50 See Security Council Resolution 929 (1994) of 22 June 1994. See also "French Troops Headed for Rwanda" *The Globe and Mail* (23 June 1994) A6:

The French deployment, which will begin today, comes after nearly three months of what many consider international inaction in the face of widespread slaughter. "The grave humanitarian crisis in that country demands a swift response from the international community, and we commend the French for acting to address the need". Madeline Albright the US Ambassador to the UN told the Council.

51 See Resolution 688 of 5 April 1991 on Iraq.

52 See Resolutions 770 and 771 on Bosnia and Herzegovina and Resolution 929 (1994) on Rwanda.

53 See Resolution 794 of 3 December 1992 on Somalia.

54 "Liberia: Waging War to Keep Peace: The ECOMOG Intervention and Human Rights" (1993) *Africa Watch*.

Following the abortive coup d'Etat and outbreak of ethnic violence in Burundi in October 1993, the Organisation of African Unity also voted to send a force (the International Mission of Protection and Observation in Burundi) to that country to help restore order and end the senseless killings.

Does the right to intervene on humanitarian grounds abrogate State sovereignty? No! In all resolutions in which they invoked the right to intervene, the General Assembly and the Security Council acknowledged the sovereignty of the States concerned. They also recognised and emphasised the primary responsibility of those States to remedy the unsavoury situations within their borders.<sup>55</sup> It is only when it is abundantly clear that the State concerned is either unable or unwilling to remedy the situation, that other States or the international community are entitled to intervene. In recent UN humanitarian actions the consent of the established authorities, if there were any, was sought. It

must, however, be emphasised that sovereignty or the consent of the authorities in question does not seem to have been considered a bar to international action on behalf of the populations concerned. After all, what is sovereignty without the people? The issue is not sovereignty. The issue is humanity and the right to life. Sovereignty must not stand up as the impregnable veil behind which States commit crimes against humanity with impunity.<sup>56</sup>

To guard against abuse of the right to intervene on humanitarian grounds, the following safeguards are suggested: (1) as a general rule intervention should not be undertaken militarily. It should, whenever possible, be undertaken under the mandate of the United Nations or a regional organisation; (2) intervention should be undertaken only in cases of natural or man-made disasters involving gross, flagrant or massive violations of human rights; (3) the objectives of the intervention should always be clearly spelt out in the enabling

55 For example, operative paragraph 2 of General Assembly Resolution 43/131 of 1988 reads as follows:

Reaffirms also the sovereignty of affected States and their primary role in the initiation, organisation, coordination and implementation of humanitarian assistance within their respective territories.

Preamble paragraph 7 of Security Council Resolution 688 of 1991 reads as follows:

Reaffirming the commitment of all Member States to the sovereignty and political independence of Iraq and of all States in the area.

56 In situations of armed conflict the International Committee of the Red Cross may carry out humanitarian operations in areas not under the control of the government of the country concerned without the consent of that government. It did so in Nigeria during the Nigerian Biafran war. See L.S. Wiseberg "Humanitarian Intervention: Lessons from the Nigerian War" (1974) *Hum. Rts. J.* 61. See also M. Torrelli "From Humanitarian Assistance to Intervention on Humanitarian Grounds?" (May June 1992) *International Review of the Red Cross*.

instrument;<sup>57</sup> (4) the intervention must be for a limited duration, long enough to ensure the safety of the population on whose behalf it was undertaken.

Stopping the killings and other outrages against a people is the essential step towards ending the victimisation of that people. It is, however, not the end of the matter. The victimisers must be brought to justice. They must be prosecuted and, if convicted, punished. The importance of prosecution and punishment is that it meets the demand of retributive justice. It also usually has a deterrent effect and thereby helps prevent a recurrence of the victimisation, and generally contributes to the protection of human rights. The General Assembly underscored this point in its Resolution 2712 (XXV) of 15 December 1970 on the question of the punishment of war criminals and of persons who have committed crimes against humanity. In the fifth preamble paragraph the Assembly asserted that:

...a thorough investigation of war crimes and crimes against

humanity as well as the arrest, extradition and punishment of persons guilty of such crimes wherever they may have been committed...and the establishment of criteria for determining compensation to the victims of such crimes [are] important elements in the prevention of similar crimes now and in the future, and also in the protection of human rights and fundamental freedoms...and the safeguarding of international peace and security.

Indeed in cases in which victims of criminal conduct are aliens, a State's failure to take prompt and efficient action to apprehend, prosecute and adequately punish an offender has been held to constitute a denial of justice, amounting to an international delinquency, and giving rise to the delinquent State's liability to pay compensation to the victim or, in case of death, to the victim's estate.<sup>58</sup>

For reasons already noted, prosecution of persons responsible for crimes related to the abuse of power at

57 The objectives should primarily be limited to protecting human life; preventing and alleviating human suffering (in particular, by supplying food, medicines and health care, and sanitation systems); creating conditions of safety for relief operations (including use of force where necessary); restoring civil society by maintaining law and order, and by assisting national authorities to re-establish civil institutions such as the police, the courts and penitentiary systems, promoting reconciliation between the warring parties, and generally assisting national authorities to create conclusions conducive to a return to normalcy and observance of human rights.

58 For example, see *United States (Laura B. Jane) v. Mexico* (1927), a *U.N. Rep. Int'l Arb. Awards* 84. Note may also be made of a statement by the expert appointed to probe the fate of Missing and Disappeared Persons in Chile when he asserted that the Government of Chile had obligation "to punish those responsible for the disappearances, to compensate the relatives of the victims and to take measures to prevent such acts from recurring in the future." See U.N. Doc. A/14/136 (1980).

the national level is generally out of the question. Unless the offending regime is overthrown it is well nigh impossible to enforce the law against its members. Promise for an effective application of the remedy therefore lies at the international level. International criminal law may be invoked against those who commit genocide, *apartheid*, crimes against peace, war crimes, and crimes against humanity. There is no doubt that the atrocities committed in many parts of the world, particularly Africa, qualify as crimes against humanity and fall within the competence of an international criminal court. Crimes against humanity can be committed independently of war situations. They have been defined by the International law Commission as:

Inhuman acts such as murders, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.<sup>59</sup>

Unfortunately, there is as yet no such court with universal jurisdiction. But the ends of justice demand it. The continued existence of an international legal order justifies it.<sup>60</sup> Urging the establishment of such a court, Pieter N.Drost Wrote:

If they are not to go... free and to remain outside and above the law, the principals and agents of State are to be subject to international criminal law and jurisdiction. Besides, they are themselves the keepers of the law of the land. The national custodians of the criminal law and penal system, main machinery of governmental cruelty and oppression, must be held at bay by a superior legal force which is to be found in an international penal enforcement system. International criminal law and jurisdiction should afford a measure of protection against the worst abuses and perversions of the international penal system.<sup>61</sup>

As long as the Cold War raged the court could not be established, since many dictators and possible criminal

<sup>59</sup> See Draft Code of Offences Against the Peace and Security of Mankind, G.A.O.R. Ninth Sess. Supp. No. 8; also see D. Thiam *First Report of the Draft Code of Offences Against the Peace and Security of Mankind* A/CN.164/1984.

<sup>60</sup> As the Nuremberg International Military Tribunal observed "crimes against international law are committed by man, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *In re Goering and Other* (1946) 92Ann Dig. 202.

<sup>61</sup> *The Crime of State* (Leiden. I.A.W. Sythoff, 1959); see also J.A. Leach & M. C Bassiouni, *An International Criminal Court*, Parliamentarians for Global Action, Occasional Paper I, (New York, 1992).

defendants were sheltered by one or the other of the Superpowers. In this respect one remembers with sorrow the distinction that President Reagan made between authoritarian regimes, which he supported, and despotic regimes, which he opposed. He classified the *apartheid* regime in South Africa as merely authoritarian and was favourably inclined towards it, while he classified the communist regime in Cuba as despotic and did everything in his power to destabilise it. Luckily, the Cold War is no more, and it will not be long before an international criminal court is established. By Resolution 82 of 25 May 1993 the Security Council established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991.<sup>62</sup> On 23 November 1993 the General Assembly also passed a resolution noting the substantial progress made by the International Law Commission of the draft statute for an international criminal court and urging the Commission "to continue its work as matter of priority... with a view to elaborating a draft statute." These actions should sound a warning to violators in all parts of the world that the hand of the law may one day reach them.

Compensation has been referred to in General Assembly Resolution 2712 (XXV) as one remedy that should be available to persons whose human rights are violated. Indeed it is a general principle of law that he who violates a right or an obligation incurs a duty to make reparation. And to us in Africa compensation is the heart and soul of criminal justice. Article 3 of the 1907 Hague Regulations Respecting the Law and Customs of War recognises this principle when it provides that:

A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

The peace treaties following the first and second World Wars also required the defeated powers to pay full compensation to victims of the war crimes and crimes against humanity perpetrated by their forces on the territories of Allied and Associated Powers.<sup>63</sup> Iraq was similarly required to pay compensation to victims of its atrocities during the Gulf War.<sup>64</sup>

62 See J.C. O'Brien "Current Developments; The International Tribunal for Victims of International Humanitarian Law in the Former Yugoslavia" (1993) 87 *AJIL* 639.

63 For a detailed discussion on the criteria for determining compensation to victims of war crimes and crimes against humanity, see the Secretary General's *Report on the Question of the Punishment of War Criminals and of Persons who Have Committed Crimes Against Humanity* (U.N. Doc. A/N345 (1971)). See Also B.B. Ferencz "Compensating Victims of the Crimes of War" (1972) 12 *Va. J. Int'l L.*

64 See Security Council Resolution 687 (1991), 705 (1991) and 706 (1991).

In a non-international setting it is the primary responsibility of the government of the errant State to provide effective remedies, including compensation, to its victims. Thus, soon after World War II Germany instituted a compensation scheme, the *Wiedergutmachung*, under which it paid and continues to pay compensation to victims of Nazi tyranny. However, to most African countries that are bedevilled by chronic economic ills, such a scheme may not be feasible. For example, at the downfall of the Obote government in Uganda in 1985, there were hundreds of thousands of displaced people in the country. Once prosperous and productive villages and communities had been devastated and left desolate. There were thousands of orphans whose parents had been murdered by the Obote regime who needed care and protection. There were also thousands of citizens who had been dispossessed of their property, had been incarcerated without trial, and had suffered physical and mental injury and anguish. The national economy had also been left in shambles. Quite clearly, the new government could not do much to do justice to all these victims. It did set up a victims fund and invited private citizens and other people and organisations of goodwill to contribute to the fund. However, not much was collected, and the majority of the victims did not and probably will never be able to obtain any redress for the wrongs wrought unto them. Here, again, the international community should step in and assist poorer States to do justice to

their citizens who might have been so grievously wronged. The international community's duty to assist flows from its legal obligation to protect human rights. Should anyone consider the basis of this duty tenuous, social solidarity could be used as an alternative basis.

#### IV - Prevention

As noted earlier, power or authority is essential to the existence of civil society. It is vested in the hands of a select few with the view that they exercise it for the attainment of certain common societal goals. Uppermost among these goals is the securing of liberty. However, Montesquieu observed, "Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go."<sup>65</sup> As Lord Acton also remarked, "power corrupts - absolute power corrupts absolutely." There is no denying that victimisation linked to abuse of power is most rampant in countries where executive arm of government wields excessive power. There are no adequate legal limits to such power. Where a semblance of limitation of governmental power exists there are no remedies against the erring officials, hence the rampant and unchecked misuse of power and the concomitant victimisation of citizens.

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65 Montesquieu *L'Esprit des lois* chap. XI.

Therefore, one way to prevent victimisation linked to abuse of power is to limit the powers of the executive branch of government. To achieve this there is an urgent need to establish in Africa governments based constitutions that impose restraints on the powers of the executive, that embody justiciable bills or charters of rights and that require primacy of the rule of law.

The revolutionary ideas of *glasnost* and *perestroika* initiated by Mikhail Gorbachev in the former Soviet Union have already had beneficial impact in Eastern Europe and have resulted in the dismantling of repressive political systems. The influence of those ideas in Africa is a slowly but surely starting to be felt. Several countries, such as Benin, Burundi, Cameroon, Gabon, Lesotho, Kenya, Malawi, Mozambique, Swaziland, Tanzania and Zambia have abandoned or are in the process of abandoning one-party systems in favour of democratic pluralism. If these changes were given chance to take root in the hearts of the people particularly the political actors, then there is bound to be a considerable reduction in the rate of abuse of political power. Resistance or liberation wars will be reduced. Victimisation and the tide of refugee movements that follow will also be reduced.

Akin to the problem of absolute power is the problem of over centralised power, particularly in countries that are ethnically, culturally, linguistically and religiously diverse. The diverse groups that make up a country, although desirous of uniting with the

others to form a strong united nation, rarely give up their cultural identity or the desire to manage their own internal affairs (self-determination). In one form or another they wish to be able to preserve their cultural institutions, speak their language, and practise their religion without hindrance. They desire unity in diversity. Forms of governments that ignore this truism sow seeds for discontent, discord, and instability. In many parts of the world where mass victimisation occurs it is usually linked to the peoples' yearning for self-determination and the central government's attempt to throttle that yearning. Armed conflicts in the West Sahara region of Morocco, the Southern Region of the Sudan, the Casamance region of Senegal and until recently, Eritrea in Ethiopia, are all attributable to this yearning for self-determination. The spontaneous assertion of independence or greater autonomy by the various republics and regions that constituted the former Soviet Union, including the Russian Federated Republics, and the ongoing conflict in the former Yugoslavia, vividly demonstrate how difficult it is to extinguish this yearning for self-determination.

A further measure for preventing or reducing victimisation linked to abuse of power in ethnically or culturally diverse societies must, therefore, be to promote the principle of internal self-determination or the right to internal autonomy. This is the right to be different and to be left alone, and the right to preserve, protect, and promote values that are beyond the legitimate reach of the rest of society. This principle, already recognised under



various international human rights instruments, should be enshrined in the constitutions of the countries concerned as one of the fundamental principles of those constitutions. It can be expressed in the form of federalism, quasi-federalism, or devolutionism. The choice of the form will depend on the historical, economic, social, cultural, and political forces operating in each country concerned. Whatever the form, however, this principle can and should act as a check against genocidal conflicts within the country and against central government tendencies to absolutism and tyranny.<sup>66</sup>

With regard to law enforcement, military, and other public agencies whose members are used to carry out the abuses, the United Nations General Assembly urged member States to endeavour, *inter alia*:

To promote observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, medical, social service and military personnel, as well as the staff of economic enterprises.<sup>67</sup>

This recommendation is salutary as far as it goes, but unless the political ambience within which these agencies operate is cleansed, it will be nearly impossible for them to observe the codes of conduct and ethical norms

alluded by the General Assembly. It should be recalled that it is politicians and others bent on pursuing and holding on to power for power's sake who turn these agencies into handy tools for victimising others. They sway them from their accepted course of conduct to irregular and illegal practices. They establish networks of spies to monitor the activities of or to eliminate their opponents. They follow this up with the establishment of special security units and death squads to torture, maim, dispossess, and liquidate opponents or entire communities that they perceive to be unsympathetic to their causes. Promotion must therefore be pursued simultaneously with political liberalisation and constitutional reforms along the lines suggested above. These reforms must aim at, among other things, guaranteeing the independence, impartiality and accountability of the security and other agencies mentioned in the cited General Assembly recommendation.<sup>68</sup>

Territorial asylum, recognised as a peaceful and humanitarian institution, has also been extremely useful to victims of abuse of power. Without asylum the millions of victims populating refugee camps in Africa, would have perished. The institution must therefore be preserved and strengthened at all costs. Other States must be willing to assist countries of first asylum by

<sup>66</sup> Generally see C. Palley *Constitutional Law and Minorities*, Minority Rights Group Report No. 16 (London 1976).

<sup>67</sup> See *supra* note 2.

<sup>68</sup> See D.D.N. Nsereko, "The Police, Human Rights and the Constitution: An African Perspective" (1994) 15 *Hum. Rts.Q.* 465.

resettling refugees who swarm their frontiers. This helps ease the economic, social and administrative burdens on those countries that have to look after so many refugees. It also helps ease the security risk that the admission of refugees entails. Again, when States of origin launch cross-border incursions and attack refugee camps in the countries of asylum, the international community should be able to respond more concretely than it has been willing to do in the past.

Other existing international mechanisms for protecting victims of abuse of power can be further augmented. For example, for long there has been a need for an international early-warning system to monitor and alert the international community on impending occurrences of massive violations anywhere on the globe. As the saying goes, "to be forewarned is to be forearmed." If the international community knew beforehand of some of these occurrences, it might be able to prevent them or at least minimise their impact. If such a system existed, it is possible that the death roll of Ethiopians who perished in the famine of the early 1980s would have been reduced. The Western media came to know of that disaster after over a million people had already died. If an early-warning system existed the massacre

of Hutus in Burundi in 1974 might have been averted.<sup>69</sup> The United Nations has established the office of UN High Commissioner for Human Rights.<sup>70</sup> The mandate of the High Commissioner is broad and flexible enough to enable the monitoring of potentially dangerous human rights and humanitarian situations and to alert the States concerned as well as the international community at large of any impending disasters so that they can be addressed before they erupt.<sup>71</sup> It is unfortunate that the fact-finding is not included within the High Commissioner's mandate. If used impartially and non-selectively fact-finding would be a vital element in the international human rights protection mechanism.

## V - Concluding Remarks

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power attempts, among other things, to define who are victims of abuse of power. A serious flaw in the definition is the exclusion of persons who suffer as a result of conduct that, although linked to abuse of power, is already criminalised under the laws of a given State.

69 See *Selective Genocide: Burundi* Minority Rights Group Report No. 29 (London 1974).

70 Resolution 48/141, 20 December 1993.

71 The High Commissioner's mandate includes "(a) Promoting and protecting the effective enjoyment by all of all civil, cultural, economic, political and social rights... (f) Playing an active role in removing the current obstacles and in meeting the challenge to the full realisation of all human rights and in preventing the continuation of human rights violations throughout the world...(g) Engaging in a dialogue with all Governments in the implementation of his/her mandate with a view to securing respect for all human rights..."

This means that the majority of persons who suffer as a result of the abuses outlined in this paper are not victims of abuses of power! Surely, this cannot be so. Although, technically, these persons qualify as victims of crime they cannot be adequately dealt with on the same footing as victims of ordinary crimes. They encounter problems that ordinary victims do not encounter. It is often impossible for them to identify their individual victimisers or to garner the evidence necessary to prove a case against them. The cause of this difficulty has been indicated in this paper. Their victimisers are people with power and who apparently are above or beyond the reach of the law. Their victims number in the thousands, indeed hundreds of thousands in some countries. That is why they are sometimes referred to as "collective victims."

It has been noted that as long as the victimising regime is in power, victims have virtually no avenues of recourse at the national level. In this respect the international remedies become supremely important. The right of intervention on humanitarian grounds holds some hope to millions of victims threatened with annihilation by governments or by natural disasters. Again, with the cessation of the

victimisation it is important that the international community assist governments of poor countries to "make good" the harm and damage wrought upon the victims of abuse of power. Additionally, with the Cold War behind us, it is now propitious to establish an international criminal court to try and to punish persons who believe that they are above the law. Such a court will lend teeth to the international human rights protection regime.

Lastly, prevention is always better than cure! An early-warning system to monitor and alert the international community about impending disasters is a preventive measure that needs to be put in place. At the national level, bridling executive power by constitutional mechanisms, by recognizing the right to internal self-determination and by ensuring transparency at all levels of government are important measures that can be employed to prevent abuse of power by government officials. Depoliticising and professionalising the army and the police might also help prevent these services from being abused by power-hungry politicians. Ultimately, however, inculcation of the virtues of the rule of law in the minds of the rulers and ruled alike, remains the strongest fortress against tyranny and abuse of power.



## Economic and Social Council

Distr.  
GENERAL

E/CN.4/1994/103  
3 February 1994

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS  
Fiftieth session  
Items 10 and 12 of the provisional agenda

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED  
TO ANY FORM OF DETENTION OR IMPRISONMENT

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL  
FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR  
REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES  
AND TERRITORIES

Letter dated 28 January 1994 from the Permanent Representative of the  
Transitional Government of Ethiopia to the United Nations Office at  
Geneva addressed to the Assistant Secretary-General for Human Rights

I have the honour to request you to have your office circulate the  
enclosed statement by the Special Prosecutor's Office of the Transitional  
Government of Ethiopia as the official document of the fiftieth session of the  
United Nations Commission on Human Rights.

(Signed) Yousuf Imbrahim Omar  
Ambassador

## THE QUESTION OF THE IMPUNITY OF PERPETRATORS OF HUMAN RIGHTS VIOLATIONS

### 1. Political Background

At the end of May 1991 the EPRDF (Ethiopian Peoples' Revolutionary Democratic Front), who had allied with other multi-ethnic political organizations, took control of Addis Ababa, the Ethiopian capital, and ended Mengistu's 17-year rule.

The Transitional Period Charter of Ethiopia, which will serve as the supreme law of the land during the period of transition, was adopted on 5 July 1991.

The principles enunciated in Part One of the Charter are of particular interest to the democratization process during the transitional period.

In its preamble, the Charter asserts that "freedom, equal rights and self-determination of all the peoples shall be the governing principles of political, economic and social life" in Ethiopia and the adoption of a "proclamation of a democratic order is a categorical imperative," in order to realize such aspirations and to ensure the prevalence of peace within the country.

The framework adopted by the Charter in order to realize these objectives is two-pronged: the protection of individual rights, based on the Universal Declaration of Human Rights of the United Nations, as stated in Article One, and the protection of the right of nations, nationalities and peoples to self-determination, as stated in Article Two.

The Transitional Government will be holding elections on 5 June 1994 to elect members of the constituent assembly. This body will discuss and finalize the constitution. Once the constitution is finalized, in late 1994 or early 1995, elections will follow shortly thereafter.

Ethiopia has no democratic heritage. Democratic institutions for the first time are now being constructed. This is a complex process and it is clear it will take years to fully develop a democratic culture in Ethiopia. None the less, the Transitional Government has made progress toward this goal.

### 2. The human rights record of the ousted regime

The existence of a pattern of systematic human rights violations and of grave breaches of humanitarian law under the former Ethiopian regime is well known to several human rights bodies of the United Nations system.

It is sufficient to cite the annual reports of several thematic organs of the Commission on Human Rights, such as the reports of the Working Group on Enforced or Involuntary Disappearances, the reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions and the reports of the Special Rapporteur on the question of torture.

This situation was a matter of concern for many countries in the world during the long years of the Mengistu regime as demonstrated by parliamentary hearings and diplomatic complaints.

The international human rights community is also aware of this record, as stated in numerous reports elaborated by prestigious human rights and humanitarian non-governmental organizations.

According to an Africa Watch report <sup>1</sup>/ members of the Mengistu Government bear responsibility for the deaths of at least half a million Ethiopian civilians. Under Mengistu's regime, the Ethiopian army and air force killed tens of thousands of civilians. The notorious urban "Red Terror" of 1977/78 where thousands died was matched by indiscriminate violence against rural populations, especially in Eritrea and Tigray. Counter-insurgency strategies involved forcibly relocating hundreds of thousands of rural people and cutting food supplies to insurgent areas. These military policies were instrumental in creating famine and the former Government used relief supplies as weapons to further its war aims.

3. The creation of the Special Prosecutor's Office, its purposes and organization

The Special Public Prosecutor's Office (S.P.O.) was established on 8 August 1992, as an Office accountable to the Prime Minister of the Transitional Government. The Office, in accordance with the law, has the power to conduct investigations and institute proceedings against those it suspects of committing crimes and/or abusing their positions of authority in the former regime.

Laws concerning criminal investigations and criminal proceedings that apply to ordinary prosecutors also apply to the activities undertaken by the S.P.O.

At present the S.P.O. is investigating the global phenomenon of human rights violations and abuse of authority that transpired during the Mengistu regime. Specifically, the S.P.O. presently has 1,200 detainees under its jurisdiction, all of whom are being held in accordance with the Ethiopian Criminal Procedure Code and are suspected of particularly serious offences. Some 1,000 out of the 2,000 former officials who were detained after the fall of the Mengistu regime have been released on bail since the S.P.O. was established.

In terms of the current status of our work, the investigations are moving forward. The computerization process has begun. For example, the S.P.O. has hired well over 400 people to search for and collect the numerous government documents relating to human rights violations that can still be found throughout the country. The S.P.O. will probably add an additional 200 people to finalize the search and to facilitate the computer coding process. We

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<sup>1</sup>/ EVIL DAYS, Thirty Years of War and Famine in Ethiopia. An Africa Watch Report. Human Rights Watch. New York/Washington/Los Angeles/London, 1991.

expect usable reports by mid-March. Thereafter, we will make the final policy decisions regarding who we will be charging and for what. Barring any major unforeseen problems, trials shall commence in the first quarter of the year.

#### 4. The issue of impunity

The fight against impunity is a legitimate concern of the international community as stated in the Vienna Declaration adopted by the World Conference on Human Rights:

"91. The World Conference on Human Rights views with concern the issue of impunity of perpetrators of human rights violations (...)"

"60. States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law."

"62. (...). The World Conference on Human Rights reaffirms that it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators."

According to these principles, it is the duty of the Transitional Government of Ethiopia to bring to justice those persons with respect to whom there are serious reasons for considering that they are responsible for serious violations both of international law and domestic law that can be assimilated in some cases to crimes against humanity.

#### 5. The problem of the victims

As stated in the preliminary report on the question of the impunity of perpetrators of human rights violation prepared by Mr. Guissé and Mr. Joinet (E/CN.4/Sub.2/1993/6), although action to combat impunity has its roots in the need for justice, it cannot be reduced to the sole objective of punishing the guilty. It must conform to three requirements: the punishment of those responsible according to the judicial guarantees, satisfying the victim's right to know and to obtain redress, and enabling the authorities to fulfil their mandate as the public agency which guarantees law and order.

The crimes committed under the former regime were not only crimes against the victims and the Ethiopian people; in many cases they were crimes against humanity - crimes that the international community has a particular interest to prevent, to investigate and to punish.

The Transitional Government of Ethiopia is aware of its obligations concerning the duty to prosecute the systematic violations of human rights and the grave breaches of humanitarian law. It has also decided to respect and guarantee the right of the families to know the fate of their relatives and to receive restitution. The TGE has encouraged the families to give testimonies

for the establishment of a historic record on the past human rights violations, which also constitutes a prior measure for the prosecution of those considered responsible for heinous crimes.

6. The rights of the defendants

These trials shall be an important step in the construction of the rule of law in Ethiopia. The TGE vows to enforce the principle enshrined in the Universal Declaration of Human Rights, according to which everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of all rights and obligations and of any criminal charge against such person.

Therefore, defendants will be brought before the Courts in full respect of the judicial guarantees established by the main international instruments of human rights and humanitarian law. The trials, which shall begin in the next few months, will be opened to the press, the public and the broadest international monitoring.

The TGE is currently working on a bill to improve the provisions of law concerning fair trial and due process of law. The complexity, coupled with the potential historic import of these trials, cannot be underestimated. Specifically, the TGE intends to comply fully with international standards in these proceedings to demonstrate its commitment to and fortify the establishment of the rule of law in Ethiopia.

7. The Judiciary in the ongoing process towards democratization

Article Nine (f) of the Charter provides that "the Courts shall, in their work, be free from any governmental interference with respect to (individual rights)". To implement the principle of an independent judiciary, Proclamation No. 23/1992 entitled "A Proclamation to Provide for the Independence of Judicial Administration" was enacted on 8 August 1992. Article 4 of this proclamation provides for the complete independence of judges in the discharge of their judicial functions and states that judges are to abide by international treaties, customs and laws that are not inconsistent with the Charter.

8. Balancing the rights of the victims, the rights of the defendants, the values of justice and reconciliation

The Office of the Special Prosecutor has been mandated to create a historical record of the abuses of the Mengistu regime and to bring those criminally responsible for human rights violations and/or corruption to justice.

The ambitious nature of this task has been clear from the beginning, given the scope and legal complexities involved. We must balance many factors: our international and domestic legal obligation to investigate and bring to justice gross human rights violators, our international and domestic legal obligations to respect due process, and our role in the construction of a society based upon the rule of law.



There is no easy or apparent magic balance of these factors. We must consider our legal obligations, our moral obligations, the future of our country and the resources and potential not only of this office but also the court, defence and prison systems.

The assistance of the international community is necessary to enable the S.P.O. to fully consider and balance all of these factors.

9. Role of the international community

Cognizant of its obligations and painfully aware of its resource limitations, shortly after it began working the S.P.O. formally requested assistance from the international community.

While it took some time for the international community to respond to the Transitional Government's appeal for assistance, by December of 1993 the following Governments had committed financial and/or technical support: Sweden, Denmark, the United States of America, Norway, the Netherlands, Canada and France. At present, there are international experts from Argentina, Denmark, France, the United Kingdom, Norway and the United States working with the S.P.O. Further, NGOs like the Carter Center, the Argentine Anthropological Forensic Team, and the American Bar Association are providing assistance. And finally, S.P.O. will soon host the Attorney General of France and a mission of United Nations experts.

The recent influx of resources has played an important role in moving the S.P.O. towards compliance with international standards. For example, the Transitional Government, with the assistance of the Danish Government, has recently established an Office of Public Defence to provide an advocate for those S.P.O. defendants who are not at present represented by counsel. It is clear that continued international support will be essential, in order that the process fully contributes to the democratization of Ethiopia.

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# *Basic Texts*

## **African Charter on Human and Peoples' Rights**

### **PREAMBLE**

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights";

*Recalling* Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of "a preliminary draft on an African Charter on Human and Peoples' Rights providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights";

*Considering* the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

*Reaffirming* the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

*Taking into consideration* the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

*Recognizing* on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand, that the reality and respect of peoples' rights should necessarily guarantee human rights;

*Considering* that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

*Convinced* that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

*Conscious* of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism, and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion;

*Reaffirming* their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

*Firmly convinced* of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

HAVE AGREED AS FOLLOWS:

## PART I RIGHTS AND DUTIES

### CHAPTER I. HUMAN AND PEOPLES' RIGHTS

#### *Article 1*

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

#### *Article 2*

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

#### *Article 3*

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

#### *Article 4*

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

### *Article 5*

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

### *Article 6*

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

### *Article 7*

1. Every individual shall have the right to have his cause heard. This comprises:

(a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

(c) the right to defence, including the right to be defended by counsel of his choice;

(d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

### *Article 8*

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

### *Article 9*

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

### *Article 10*

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

### *Article 11*

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

### *Article 12*

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a State party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

### *Article 13*

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

#### *Article 14*

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

#### *Article 15*

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

#### *Article 16*

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

#### *Article 17*

1. Every individual shall have the right to education.

2. Every individual may freely take part in the cultural life of his community.

3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

#### *Article 18*

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.

2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

#### *Article 19*

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

### *Article 20*

1. All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

### *Article 21*

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.

4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

### *Article 22*

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

### *Article 23*

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.

2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:

(a) Any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;

(b) Their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

#### *Article 24*

All people shall have the right to a general satisfactory environment favourable to their development.

#### *Article 25*

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

#### *Article 26*

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

### CHAPTER II. DUTIES

#### *Article 27*

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.

2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

#### *Article 28*

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.



## *Article 29*

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

## PART II

### MEASURES OF SAFEGUARD

#### CHAPTER I. ESTABLISHMENT AND ORGANIZATION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

## *Article 30*

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

## *Article 31*

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.

2. The members of the Commission shall serve in their personal capacity.

#### *Article 32*

The Commission shall not include more than one national of the same State.

#### *Article 33*

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter.

#### *Article 34*

Each State party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States parties of the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

#### *Article 35*

1. The Secretary-General of the Organization of African Unity shall invite States parties to the present Charter at least four months before the elections to nominate candidates.

2. The Secretary-General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

#### *Article 36*

The members of the Commission shall be elected for a six-year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

#### *Article 37*

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

#### *Article 38*

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

### *Article 39*

1. In case of death or resignation of a member of the Commission, the Chairman of the Commission shall immediately inform the Secretary-General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.

2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary-General of the Organization of African Unity, who shall then declare the seat vacant.

3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

### *Article 40*

Every member of the Commission shall be in office until the date his successor assumes office.

### *Article 41*

The Secretary-General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the cost of the staff and services.

### *Article 42*

1. The Commission shall elect its Chairman and Vice-Chairman for a two-year period. They shall be eligible for re-election.

2. The Commission shall lay down its rules of procedure.

3. Seven members shall form the quorum.

4. In case of an equality of votes, the Chairman shall have a casting vote.

5. The Secretary-General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

### *Article 43*

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

#### *Article 44*

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

### CHAPTER II. MANDATE OF THE COMMISSION

#### *Article 45*

The functions of the Commission shall be:

1. To promote Human and Peoples' Rights and in particular:

(a) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments;

(b) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations;

(c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.

3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the Organization of African Unity or an African organization recognized by the Organization of African Unity.

4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

### CHAPTER III. PROCEDURE OF THE COMMISSION

#### *Article 46*

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary-General of the Organization of African Unity or any other person capable of enlightening it.

#### *COMMUNICATION FROM STATES*

#### *Article 47*

If a State Party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the

Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary-General of the Organization of African Unity and to the Chairman of the Commission. Within three months of the receipt of the communication the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

#### *Article 48*

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other State involved.

#### *Article 49*

Notwithstanding the provisions of Article 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary-General of the Organization of African Unity and the State concerned.

#### *Article 50*

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

#### *Article 51*

1. The Commission may ask the States concerned to provide it with all relevant information.
2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representations.

#### *Article 52*

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall prepare, within a

reasonable period of time from the notification referred to in Article 48, a report stating the facts and its findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government.

#### *Article 53*

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

#### *Article 54*

The Commission shall submit to each Ordinary Session of the Assembly of Heads of State and Government a report on its activities.

### *OTHER COMMUNICATIONS*

#### *Article 55*

1. Before each session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.

2. A communication shall be considered by the Commission if a simple majority of its members so decide.

#### *Article 56*

Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

1. Indicate their authors even if the latter request anonymity;
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter;
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity;
4. Are not based exclusively on news disseminated through the mass media;
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United

Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

#### *Article 57*

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

#### *Article 58*

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.

2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.

3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

#### *Article 59*

1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.

2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.

3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

### CHAPTER IV. APPLICABLE PRINCIPLES

#### *Article 60*

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within

the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

#### *Article 61*

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by Member States of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.

#### *Article 62*

Each State party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

#### *Article 63*

1. The present Charter shall be open to signature, ratification or adherence of the Member States of the Organization of African Unity.

2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary-General of the Organization of African Unity.

3. The present Charter shall come into force three months after the reception by the Secretary-General of the instruments of ratification or adherence of a simple majority of the Member States of the Organization of African Unity.

### PART III

### GENERAL PROVISIONS

#### *Article 64*

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.

2. The Secretary-General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.



#### *Article 65*

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of its instrument of ratification or adherence.

#### *Article 66*

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

#### *Article 67*

The Secretary-General of the Organization of African Unity shall inform Member States of the Organization of the deposit of each instrument of ratification or adherence.

#### *Article 68*

The present Charter may be amended if a State party makes a written request to that effect to the Secretary-General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the States parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary-General has received notice of the acceptance.

*Adopted by the eighteenth Conference of Heads of State and  
Government of the Organization of African Unity,  
June 1981—Nairobi, Kenya.*

*Protocol to the African Charter  
on Human and Peoples' Rights  
on the Establishment of an African Court  
on Human and Peoples' Rights*

The Member States of the Organization of African Unity hereinafter referred to as the OAU, States Parties to the African Charter on Human and Peoples' Rights:

**Considering** that the Charter of the Organization of African Unity recognizes that freedom, equality, justice, peace and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples;

**Noting** that the African Charter on Human and Peoples' Rights reaffirms adherence to the principles of human and peoples' rights, freedoms and duties contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, and other international organizations;

**Recognizing** that the twofold objective of the African Charter on Human and Peoples' Rights is to ensure on the one hand promotion and on the other protection of human and peoples' rights, freedoms and duties;

**Recognizing** further, the efforts of the African Commission on Human and Peoples' Rights in the promotion and protection of human and peoples'

rights since its inception in 1987;

**Recalling** resolution AHG/Res.230 (XXX) adopted by the Assembly of Heads of State and Government in June 1994 in Tunis, Tunisia, requesting the Secretary-General to convene a Government experts' meeting to ponder, in conjunction with the African Commission, over the means to enhance the efficiency of the African Commission and to consider in particular the establishment of an African Court on Human and Peoples' Rights;

**Noting** the first and second Government legal experts' meetings held respectively in Cape Town, South Africa (September, 1995) and Nouakchott, Mauritania (April, 1997), and the third Government Legal Experts meeting held in Addis Ababa, Ethiopia (December, 1997), which was enlarged to include Diplomats;

**Firmly convinced** that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights.

## **Have Agreed as Follows:**

### **Article 1 - Establishment of the Court**

There shall be established within the Organization of African Unity an African Court on Human and Peoples' Rights hereinafter referred to as "the Court", the organization, jurisdiction and functioning of which shall be governed by the present Protocol.

### **Article 2 - Relationship Between the Court and the Commission**

The Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights hereinafter referred to as "the Commission", conferred upon it by the African Charter on Human and Peoples' Rights, hereinafter referred to as "the Charter".

### **Article 3 - Jurisdiction**

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

### **Article 4 - Advisory Opinions**

1. At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.
2. The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting decision.

### **Article 5 - Access to the Court**

1. The following are entitled to submit cases to the Court
  - a. The Commission;
  - b. The State Party which has lodged a complaint to the Commission;
  - c. The State Party against which the complaint has been lodged at the Commission;
  - d. The State Party whose citizen is a victim of human rights violation;
  - e. African Intergovernmental Organizations.
2. When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join.

3. The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34 (6) of this Protocol.

#### **Article 6 - Admissibility of Cases**

1. The Court, when deciding on the admissibility of a case instituted under Article 5 (3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible.
2. The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.
3. The Court may consider cases or transfer them to the Commission.

#### **Article 7 - Sources of Law**

The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned.

#### **Article 8 - Consideration of Cases**

The Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.

#### **Article 9 - Amicable Settlement**

The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.

#### **Article 10 - Hearings and Representation**

1. The Court shall conduct its proceedings in public. The Court may, however, conduct proceedings in camera as may be provided for in the Rules of Procedure.
2. Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require.
3. Any person, witness or representative of the parties, who appears before the Court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court.

#### **Article 11 - Composition**

1. The Court shall consist of eleven judges, nationals of Member States of the OAU, elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights.

2. No two judges shall be nationals of the same State.

### **Article 12 - Nominations**

1. States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State.
2. Due consideration shall be given to adequate gender representation in the nomination process.

### **Article 13 - List of Candidates**

1. Upon entry into force of this Protocol, the Secretary-General of the OAU shall request each State Party to the Protocol to present, within ninety (90) days of such a request, its nominees for the office of judge of the Court.
2. The Secretary-General of the OAU shall prepare a list in alphabetical order of the candidates nominated and transmit it to the Member States of the OAU at least thirty days prior to the next session of the Assembly of Heads of State and Government of the OAU hereinafter referred to as "the Assembly".

### **Article 14 - Elections**

1. The judges of the Court shall be elected by secret ballot by the Assembly from the list referred to in Article 13 (2) of the present Protocol.
2. The Assembly shall ensure that in the Court as a whole there is repre-

sentation of the main regions of Africa and of their principal legal traditions.

3. In the election of the judges, the Assembly shall ensure that there is adequate gender representation.

### **Article 15 - Term of Office**

1. The judges of the Court shall be elected for a period of six years and may be re-elected only once. The terms of four judges elected at the first election shall expire at the end of two years, and the terms of four more judges shall expire at the end of four years.
2. The judges whose terms are to expire at the end of the initial periods of two and four years shall be chosen by lot to be drawn by the secretary-general of the OAU immediately after the first election has been completed.
3. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of the predecessor's term.
4. All judges except the President shall perform their functions on a part-time basis. However, the Assembly may change this arrangement as it deems appropriate.

### **Article 16 - Oath of Office**

After their election, the judges of the Court shall make a solemn declaration to discharge their duties impartially and faithfully.

## Article 17 - Independence

1. The independence of the judges shall be fully ensured in accordance with international law.
2. No judge may hear any case in which the same judge has previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the Court.
3. The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law.
4. At no time shall the judges of the Court be held liable for any decision or opinion issued in the exercise of their functions.

## Article 18 - Incompatibility

The position of judge of the Court is incompatible with any activity that might interfere with the independence or impartiality of such a judge or the demands of the office, as determined in the Rules of Procedure of the Court.

## Article 19 - Cessation of Office

1. A judge shall not be suspended or removed from office unless, by the unanimous decision of the other judges of the Court, the judge

concerned has been found to be no longer fulfilling the required conditions to be a judge of the Court.

2. Such a decision of the Court shall become final unless it is set aside by the Assembly at its next session.

## Article 20 - Vacancies

1. In case of death or resignation of a judge of the Court, the President of the Court shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. The Assembly shall replace the judge whose office became vacant unless the remaining period of the term is less than one hundred and eighty (180) days.
3. The same procedure and considerations as set out in Articles 12, 13 and 14 shall be followed for the filling of vacancies.

## Article 21 - Presidency of the Court

1. The Court shall elect its President and one Vice-President for a period of two years. They may be re-elected only once.
2. The President shall perform judicial functions on a full-time basis and shall reside at the seat of the Court.

3. The functions of the President and the Vice-President shall be set out in the Rules of Procedure of the Court.
2. The seat of the Court may be changed by the Assembly after due consultation with the Court.

### **Article 22 - Exclusion**

If a judge is a national of any State which is a party to a case submitted to the Court, that judge shall not hear the case.

### **Article 23 - Quorum**

The Court shall examine cases brought before it, if it has a quorum of at least seven Judges.

### **Article 24 - Registry of the Court**

1. The Court shall appoint its own Registrar and other staff of the registry from among nationals of Member States of the OAU according to the Rules of Procedure.
2. The office and residence of the Registrar shall be at the place where the Court has its seat.

### **Article 25 - Seat of the Court**

1. The Court shall have its seat at the place determined by the Assembly from among States parties to this Protocol. However, it may convene in the territory of any Member State of the OAU when the majority of the Court considers it desirable, and with the prior consent of the State concerned.

### **Article 26 - Evidence**

1. The Court shall hear submissions by all parties and if deemed necessary, hold an enquiry. The States concerned shall assist by providing relevant facilities for the efficient handling of the case.
2. The Court may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.

### **Article 27 - Findings**

1. If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.
2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

### **Article 28 - Judgement**

1. The Court shall render its judgement within ninety (90) days of having completed its deliberations.
2. The judgement of the Court decided by majority shall be final and not subject to appeal.

3. Without prejudice to sub-article 2 above, the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure.
4. The Court may interpret its own decision.
5. The judgement of the Court shall be read in open court, due notice having been given to the parties.
6. Reasons shall be given for the judgement of the Court.
7. If the judgement of the Court does not represent, in whole or in part, the unanimous decision of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.

#### **Article 29 - Notification of Judgement**

1. The parties to the case shall be notified of the judgement of the Court and it shall be transmitted to the Member States of the OAU and the Commission.
2. The Council of Ministers shall also be notified of the judgement and shall monitor its execution on behalf of the Assembly.

#### **Article 30 - Execution of Judgement**

The States parties to the present Protocol undertake to comply with the judgement in any case to which they are parties within the time stipulated

by the Court and to guarantee its execution.

#### **Article 31 - Report**

The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgement.

#### **Article 32 - Budget**

Expenses of the Court, emoluments and allowances for judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court.

#### **Article 33 - Rules Of Procedure**

The Court shall draw up its Rules and determine its own procedures. The Court shall consult the Commission as appropriate.

#### **Article 34 - Ratification**

1. This Protocol shall be open for signature and ratification or accession by any State Party to the Charter.
2. The instrument of ratification or accession to the present Protocol shall be deposited with the Secretary-General of the OAU.
3. The Protocol shall come into force thirty days after fifteen instruments



of ratification or accession have been deposited.

4. For any State Party ratifying or acceding subsequently, the present Protocol shall come into force in respect of that State on the date of the deposit of its instrument of ratification or accession.
5. The Secretary-General of the OAU shall inform all Member States of the entry into force of the present Protocol.
6. At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.
7. Declarations made under sub-article (6) above shall be deposited with the Secretary General, who

shall transmit copies thereof to the State parties.

#### Article 35 - Amendments

1. The present Protocol may be amended if a State Party to the Protocol makes a written request to that effect to the Secretary-General of the OAU. The Assembly may adopt, by simple majority, the draft amendment after all the States Parties to the present Protocol have been duly informed of it and the Court has given its opinion on the amendment.
2. The Court shall also be entitled to propose such amendments to the present Protocol as it may deem necessary, through the Secretary-General of the OAU.
3. The amendment shall come into force for each State Party which has accepted it thirty days after the Secretary-General of the OAU has received notice of the acceptance.

# *Harare Declaration of Human Rights*

*April 1989*

Between 19 and 22 April 1989 there was convened in Harare, Zimbabwe, a high level judicial colloquium on the Domestic Application of International Human Rights Norms. The colloquium followed an earlier meeting held in Bangalore, India, in February 1988 at which the Bangalore Principles were formulated. The operative parts of the Principles are an annexure to this Statement.

As with the Bangalore colloquium, the meeting in Harare was administered by the Commonwealth Secretariat on behalf of the Convenor, the Hon. Chief Justice E. Dumbutshena, (Chief Justice of Zimbabwe) with the approval of the Government of Zimbabwe and with assistance from the Ford Foundation and INTER-IGHTS.

The colloquium was honoured by the attendance at the first session of His Excellency the Hon. R. G. Mugabe, President of Zimbabwe, who opened the colloquium with a speech in which he reaffirmed the commitment of his Government to respect for human rights, the independence of the judiciary, the rule of law and a bill of rights which is justiciable in the courts.

## **The participants were:**

- Chief Justice E. Dumbutshena, Zimbabwe (Convenor)
- Justice A. Ademola, Nigeria
- Chief Justice E. O. Ayoola, the Gambia
- Justice P. N. Bhagwati, India
- Chief Justice B. P. Cullinan, Lesotho
- Justice A. R. Gubbay, Zimbabwe
- Justice M. D. Kirby, CMG, Australia
- Justice Rajsoomer Lallah, Mauritius
- Mr. Recorder Anthony Lester, QC, United Kingdom
- Chief Justice E. Livesey Luke, Botswana
- Chief Justice F. L. Makuta, Malawi
- Chief Justice Cecil H. E. Miller, Kenya
- Chief Justice F. L. Nyalali, Tanzania
- Justice E. W. Sansole, Zimbabwe
- Chief Justice E. A. Seaton, Seychelles
- Chief Justice A. M. Silungwe, Zambia
- Justice J. N. K. Taylor, Ghana
- Justice L. E. Unyolo, Malawi

The participants examined a number of papers which were presented for their consideration. These included papers which reviewed the development of International Human Rights Norms particularly in the years since 1945; a paper which examined the domestic application of the African Charter on Human and Peoples' Rights; a paper on personal liberty and reasons of State and a paper on ways in which judges, in domestic jurisdiction, may properly take into account in their daily work the norms of human rights contained in international instruments whether universal or regional.

The participants paid especially close attention to the provisions of the African Charter on Human and Peoples' Rights. That Charter was adopted as a regional treaty by the Organisation of African Unity in 1981 and entered into force on 21 October 1986. At the time of the Harare meeting, 35 African countries had ratified or acceded to the Charter.

Various opinions were expressed by the participants concerning ways of strengthening the implementation of the Charter including:

- the interpretation of the provisions in the light of the jurisprudence which has developed on similar provisions in other international and regional statements of human rights;
- the clarification and strict interpretation of some of the provisions which are derogating from important human rights; and

- enlargement, at an appropriate time, of the machinery provided by the Charter for the consideration of complaints and the provision of effective remedies in cases of violation.

In particular the participants noted that:

- the opening recital of the Charter of the United Nations contains a ringing re-affirmation of 'faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women';
- the Charter of the Organisation of African Unity includes reference to "freedom, equality, justice and legitimate aspirations of the African peoples";
- the Preamble to the African Charter of Human and Peoples' Rights proclaims that fundamental human rights stem from the attributes of human beings and that this justifies their international protection;
- the freedom movement in Africa has had as a central tenet the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence which dignity and independence can only be realised fully if the internationally recognised human rights norms are observed and fully protected;
- there is a close inter-linkage between civil and political rights and

economic and social rights; neither category of human rights can be fully realised without the enjoyment of the other. Indeed, as President Mugabe said at the opening of the colloquium: "The denial of human rights and fundamental freedoms is not only an individual tragedy, but also creates conditions of social and political unrest, sowing seeds of violence and conflict within and between societies and nations."

The participants were encouraged in their work by the declaration of President Mugabe that the nations of Africa, having freed themselves of colonial rule and the derogations from respect for human rights involved in such rule, have a particular duty to observe and respect the fundamental human rights for which they have sacrificed so much to win, including the struggle against racial discrimination in all its aspects. The ultimate achievement of the freedom struggle in Africa will not be complete until the attainment throughout the continent of proper respect for the human rights of everyone as an example and inspiration to humankind everywhere. In the words of Nelson Mandela, to which President Mugabe drew attention, "Your freedom and mine cannot be separated".

### **The participants agreed as follows:**

1. Fundamental human rights and freedoms are inherent in humankind. In some cases, they are expressed in the constitutions, legislation and principles of common law and customary law of each country. They are also expressed in customary international law, international instruments on human rights and in the developing international jurisprudence on human rights.
2. The coming into force of the African Charter on Human and Peoples' Rights is a step in the ever widening effort of humanity to promote and protect fundamental human rights declared both in universal and regional instruments. The gross violations of human rights and fundamental freedoms which have occurred around the world in living memory (and which still occur) provide the impetus in a world of diminishing distances and growing interdependence, for such effort to provide effectively for their promotion and protection.
3. But fine statements in domestic laws or international and regional instruments are not enough. Rather it is essential to develop a culture of respect for internationally stated human rights norms which sees these norms applied in the domestic laws of all nations and given full effect. They must not be seen as alien to domestic law in national courts. It is in this context that the Principles on the Domestic Application of International Human Rights Norms stated in Bangalore in February 1988 are warmly endorsed by the participants. In particular, they reaffirmed that, subject always to any clearly applicable domestic law to

the contrary, it is within the proper nature of the judicial process for national courts to have regard to international human rights norms - whether or not incorporated into domestic law and whether or not a country is party to a particular convention where it is declaratory of customary international law - for the purpose of resolving ambiguity or uncertainty in national constitutions and legislation or filling gaps in the common law. The participants noted many recent examples in countries of the Commonwealth where this had been done by courts of the highest authority - including in Australia, India, Mauritius, the United Kingdom and Zimbabwe.

4. There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms - stated in international instruments and otherwise. In this respect the participants endorsed the spirit of Article 25 of the African Charter. Under that Article, States Parties to the Charter have the duty to promote and ensure through teaching, education and publication, respect for the rights and freedoms (and corresponding duties) expressed in the Charter. The participants looked forward to the Commission established by the African Charter developing its work of promoting an awareness of human rights. The work being done in this regard by the publication of the *Commonwealth Law Bulletin*, the *Law Reports of the Commonwealth* and the bulletin of INTERIGHTS (the International Centre for the Legal

Protection of Human Rights) was especially welcomed. But to facilitate the domestic application of international human rights norms more needed to be done. So much was recognised in the Principles stated after the Bangalore Colloquium which called for new initiatives in legal education, provision of material to libraries and better dissemination of information about developments in this field to judges, lawyers and law enforcement officers in particular. There is also a role for non-government organisations in these as in other regards, including the development of public interest litigation.

5. As a practical measure to carrying forward the objectives of the Principles stated at Bangalore, the participants requested that the Legal Division of the Commonwealth Secretariat arrange for a handbook for judges and lawyers in all parts of the Commonwealth to be produced, containing at least the following:

- the basic texts of the most relevant international and regional human rights instruments;
- a table for ease of reference to and comparison of applicable provisions in each instrument; and
- up to date references to the jurisprudence of international and national courts relevant to the meaning of the provisions in such instruments.

6. If the judges and lawyers in Africa - and indeed of the Commonwealth and of the wider world - have ready access to reference material of this kind, opportunities will be enhanced for the principles of international human rights norms to be utilised in proper ways by judges and lawyers performing their daily work. In this way, the long journey to universal respect of basic human rights will be advanced. Judges and lawyers have a duty to familiarise themselves with the growing international jurispru-

dence of human rights. So far as they may lawfully do so, they have a duty to reflect the basic norms of human rights in the performance of their duties.

In this way the noble words of international instruments will be translated into legal reality for the benefit of the people we serve but also ultimately for that of people in every land.

*Harare*  
*Zimbabwe*  
*22 April 1989*

# *Harare Commonwealth Declaration*

20 October 1991

1. The Heads of Government of the countries of the Commonwealth, meeting in Harare, reaffirm their confidence in the Commonwealth as a voluntary association of sovereign independent States, each responsible for its own policies, consulting and cooperating in the interests of their peoples and in the promotion of international understanding and world peace.

2. Members of the Commonwealth include people of many different races and origins, encompass every stage of economic development and comprise a rich variety of cultures, traditions and institutions.

3. The special strength of the Commonwealth lies in the combination of the diversity of Its members with their shared inheritance in language, culture and the rule of law. The Commonwealth way is to seek consensus through consultation and the sharing of experience. It is uniquely placed to serve as a model and as a catalyst for new forms of friendship and cooperation to all in the spirit of the Charter of the United Nations.

4. Its members also share a commitment to certain fundamental principles. There were set out in a Declaration of Commonwealth Principles agreed by our predecessors at their Meeting in Singapore in 1971.

Those principles have stood the test of time, and we reaffirm our full and continuing commitment to them today. In particular, no less today than 20 years ago:

- we believe that International peace and order, global economic development and the rule of international law are essential to the security and prosperity of mankind;
- we believe in the liberty of the individual under the law, in equal rights for all citizens regardless of gender, race, colour, creed or political belief, and in the individual's inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives;
- we recognise racial prejudice and intolerance as a dangerous sickness and a threat to healthy development and racial discrimination as an unmitigated evil;
- we oppose all forms of racial oppression, and we are committed to the principles of human dignity and equality;
- we recognise the importance and urgency of economic and social development to satisfy the basic needs and aspirations of the vast majority of the peoples of the

- world, and seek the progressive removal of the wide disparities in living standards amongst our members.
5. In Harare, our purpose has been to apply those principles in the contemporary situation as the Commonwealth prepares to face the challenges of the 1990s and beyond.
  6. Internationally, the world is no longer locked in the iron grip of the Cold War. Totalitarianism is giving way to democracy and justice in many parts of the world. Decolonisation is largely complete. Significant changes are at last under way in South Africa. These changes, so desirable and heartening in themselves present the world and the Commonwealth with new tasks and challenges.
  7. In the last twenty years, several Commonwealth countries have made significant progress in economic and social development. There is increasing recognition that commitment to market principles and openness to international trade and investment can promote economic progress and improve living standards. Many Commonwealth countries are poor and face acute problems, including excessive population growth, crushing poverty, debt burdens and environmental degradation. More than half our member States are particularly vulnerable because of their very small societies.
  8. Only sound and sustainable development can offer these millions the prospect of betterment. Achieving this will require a flow of public and private resources from the developed to the developing world, and domestic and international regimes conducive to the realisation of these goals. Development facilitates the task of tackling a range of problems which affect the whole global community such as environmental degradation, the problems of migration and refugees, the fight against communicable diseases, and drug production and trafficking.
  9. Having reaffirmed the principles to which the Commonwealth is committed, and reviewed the problems and challenges which the world, and the Commonwealth as part of it, face, we pledge the Commonwealth and our countries to work with renewed vigour, concentrating especially in the following areas:
    - the protection and promotion of the fundamental political values of the Commonwealth;
    - democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;
    - fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief;



- equality for women, so that they may exercise their full and equal rights;
  - provision of universal access to education for the population of our countries;
  - continuing action to bring about the end of *apartheid* and the establishment of a free, democratic, non-racial and prosperous South Africa;
  - the promotion of sustainable development and the alleviation of poverty in the countries of the Commonwealth through:
    - a stable international economic framework within which growth can be achieved;
    - sound economic management recognising the central role of the market economy;
    - effective population policies and programmes;
    - sound management of technological change;
    - the freest possible flow of multilateral trade on terms fair and equitable to all, taking account of the special requirements of developing countries;
    - an adequate flow of resources from the developed to developing countries, and action to alleviate the debt burdens of developing countries most in need;
  - the development of human resources, in particular through education, training, health, culture, sport and programmes for strengthening family and community support, paying special attention to the needs of women, youth and children;
  - effective and increasing programmes of bilateral and multilateral operation aimed at raising living standards;
  - extending the benefits of development within a framework of respect for human rights;
  - the protection of the environment through respect for the principles of sustainable development which we enunciated at Langkawi;
  - action to combat drug trafficking and abuse and communicable diseases,
  - help for small Commonwealth States in tackling their particular economic and security problems,
  - support of the United Nations and other international institutions in the world's search for peace, disarmament and effective arms control; and in the promotion of International consensus on major global political, economic and social issues.
10. To give weight and effectiveness to our commitments we intend to focus and improve Commonwealth

cooperation in these areas. This would include strengthening the capacity of the Commonwealth to respond to requests from members for assistance in entrenching the practices of democracy, accountable administration and the rule of law.

11. We call on all the intergovernmental institutions of the Commonwealth to seize the opportunities presented by these challenges. We pledge ourselves to assist them to develop programmes which harness our shared historical, professional, cultural and linguistic heritage and which complement the work of other international and regional organisations.

12. We invite the Commonwealth Parliamentary Association and non-governmental Commonwealth

organisations to play their full part in promoting these objectives in a spirit of cooperation and mutual support

13. In reaffirming the principles of the Commonwealth and in committing ourselves to pursue them in policy and action in response to the challenges of the 1990s, in areas where we believe that the Commonwealth has a distinctive contribution to offer, we the Heads of Government express our determination to renew and enhance the value and importance of the Commonwealth as an institution which can and should strengthen and enrich the lives not only of its own members and their peoples but also of the wider community of peoples of which they are a part.

*20 October 1991*

# *Judicial Colloquium on the Domestic Application of International Human Rights Norms: Freedom of Expression and Non-Discrimination*

*Bloemfontein, South Africa*

*3-5 September 1993*

## **The Bloemfontein Statement**

1. Between 3-5 September 1993, a significant event took place in Bloemfontein, South Africa, when for the first time senior judicial figures from around the Commonwealth and the United States of America joined with South African judges and jurists in a judicial colloquium on the domestic application of international human rights norms.
2. The colloquium, the sixth in a series, was held in South Africa in response to the wishes of a broad section of South Africans, who wished to use the opportunity it presented to assist the transition process by furthering informed discussion on the interpretation and implementation of human rights provisions.
3. The colloquium was administered by INTERIGHTS (the International Centre for the Legal Protection of Human Rights) with assistance from the Commonwealth Secretariat and with financial support from the British Overseas Development Administration, the Commission of the European Communities, the Kagiso Trust, the Canadian Embassy Dialogue Fund and the British Council.
4. The participants reaffirmed the general principles stated at the conclusion of the Commonwealth judicial colloquium in Bangalore, India in 1988, as developed by subsequent colloquia in Harare, Zimbabwe in 1989, in Banjul, The Gambia in 1990, in Abuja, Nigeria in 1991 and at Balliol College, Oxford, England in 1992.
5. The participants welcome the movement towards a non-racial democracy in South Africa devoid of *apartheid* and discrimination, with a constitution which guarantees the protection of fundamental human rights.
6. Participants were keenly aware that their own meeting, attended as it was by a large preponderance of males, itself reflected a legacy of discrimination against women over many generations and in many societies, and which needs urgent remedial action.

7. The participants believe that the provision of equal justice requires a competent and independent judiciary trained in the discipline of the law and sensitive to the needs and aspirations of all the people. They stressed their conviction that it is fundamental for a country's judiciary to enjoy the broad confidence of the people it serves; to the extent possible, a judiciary should be broadbased and therefore not appear (rightly or wrongly) beholden to the interest of any particular section of society. They saw this as being of special relevance in cases involving complaints of discrimination in all their countries and so of being of the highest importance in the context of the judiciary which will interpret and enforce a new South African constitution with a justiciable Bill of Rights.
8. The Colloquium affirmed the importance both of international human rights instruments and international and comparative case law as essential points of reference for the interpretation of national constitutions and legislation and the development of the common law.
9. The specific subject matter of the Bloemfontein Colloquium was the effective protection through law of the fundamental rights to equal treatment without any discrimination and to freedom of expression.
10. There was substantial consensus that the principle of equality requires public authorities to take

affirmative action to diminish and eliminate conditions which cause or perpetuate discrimination and to ensure equal access to and enjoyment of basic human rights and freedoms. Such affirmative action must be appropriate and necessary to achieve equality. Discrimination takes many forms in all societies. It may be indirect and unconscious as well as direct and deliberate. The principle of equal treatment forbids not only intentional discrimination. It also forbids practices and procedures which have a disparate adverse impact upon particular groups and which have no objective justification. It is essential to secure the elimination of indirect discrimination of this kind.

11. In democratic societies fundamental human rights and freedoms are more than paper aspirations. They form part of the law. And it is the special province of judges to ensure that the law's undertakings are realised in the daily life of the people. In a society ruled by law, all public institutions and officials must act in accordance with the law. The judges bear particular responsibility for ensuring that all branches of government - the legislature and the executive, as well as the judiciary itself conform to the legal principles of a free society. Judicial review and effective access to courts are indispensable, not only in normal times, but also during periods of public emergency threatening the life of the nation. It is at such

times that fundamental human rights are most at risk and when courts must be especially vigilant in their protection.

12. Where derogations from fundamental human rights and freedoms are permissible they must be strictly construed so as to avoid

weakening the substance of the rights and freedoms themselves, and only to the extent demonstrably necessary in an open and democratic society.

*Bloemfontein*

*South Africa*

*5 September 1993*

# *The Windhoek Declaration on Democratic Institutions and the Transition to Democracy in Africa*

25 August 1993

## [Excerpts]

African parliamentarians, it was recognised, knew above all other colleagues the world over the scourge of economic injustice, with resulting poverty and famine for the peoples they represent. A precondition of democracy was the meeting of minimum basic human needs. They appealed to all parliamentarians in developed countries to respond to the economic plight of Africa and urge their governments to advance fairer policies to finally conclude agreements on debt relief for African countries and support for increased financial flows. At the same time, they recognised that the goal of economic development cannot be used as a pretext for thwarting or delaying the democratic aspirations of the people.

Governing parties must resist any temptation to abuse the power and privileges of office for the purpose of political dominance or electoral advantage. Opposition parties must work within the bounds of proper political criticism and dignified parliamentary and public behaviour. Both must avoid any manipulation of the electoral process and respect the outcome of free and fair elections, publicly pledging this in advance of the event.

The military has, on many occasions, exceeded its true role and usurped that which is rightfully accorded to others. The role of the army is to protect and defend the nation from external threat or danger; it is not to use the power entrusted to it for internal and sectional purposes. The internal use of power by the army fosters political instability. In those countries which have suffered thus, the army must return to its traditional role as a neutral guardian of the body politic.

## Strategy

The Special Task Force on Africa therefore agreed upon a strategy to further the cause of democracy and economic recovery in the region. The essential aim is to:

- defend democracy in those countries which have attained it;
- regenerate the democratic process in those countries which have suffered recent setbacks;
- assist those countries in the early stages of the transition process;
- encourage those countries that have not yet commenced the democratic transition, to do so.

### **Political support Through Twinning**

A sub-network of parliamentarians should be established in countries of Africa and of the North to maintain regular and frequent contact, such that any parliamentarian member during a crisis in his or her country may be in immediate contact with colleagues in other countries in and outside Africa.

### **Economic Recovery**

The Task Force agreed to develop a political action plan to create a more enabling environment for African economies in terms of debt relief, open markets in the industrialised countries, and increased capital flows to Africa.

### **Election Observation and Assistance**

A sub-network of members, in Africa and in the North, should be established for the purpose of election observation in response to requests from African countries, whether such requests might come from governments, parliamentarian colleagues or other sources.

### **Non-Member Assistance**

A sub-committee should be established to investigate the possibility of developing contacts with appropriate persons in countries with no democratic institutions and assisting them in the commencement of the transition process, as resources would allow.

### **Monitoring Against Military Intervention**

A sub-network should also be established to monitor political developments closely in transitional countries, to ensure that new democracies suffer no regression to military rule. The network would undertake appropriate action in response to any violations.

### **Conclusion**

The Task Force undertook to do everything within its resources to defend and promote democracy and economic recovery within Africa through the above means.

Signed - The Global Action Task  
Force on Africa

## **Conference in Support of Democratic Opportunities in the African Great Lakes Region**

### **Objectives**

The main objective of this Conference was to begin in-depth consideration of issues related to democracy on the basis of the experience of actors in civil society. This is to be accomplished by identifying obstacles and adopting a Plan of Action designed to strengthen democracy in Zaire, Burundi, and Rwanda by:

- supporting the work of non-governmental organizations;
- encouraging government to establish democratic processes;
- helping to advise groups that wish to create conditions for genuine democracy in the region.
- The development of citizenship and democracy in the countries of the region is a matter of concern for all their citizens; all the vital forces within their societies should therefore have the opportunity to participate.
- In all three of these countries women usually bear the heaviest burden caused by hostilities and authoritarian rule; special attention should therefore be taken to ensure that they participate democratically in all aspects of society.
- Any foreign involvement should support the initiatives taken by the democratic forces within these countries, and should be designed and implemented in collaboration with said forces.
- Any local or international measures should include the concept of human rights and be intended to strengthen efforts on the local level.

### **Guidelines for Analysis and Measures Defined in the Plan of Action**

- There is an intrinsic link between democracy and respect for human rights, which must be considered as priorities for any involvement in the region.
- Consensus building in the countries of the region must be based on adherence to an inclusive conception of citizenship; on that, without disregarding them, goes beyond regional, ethnic, or other ties.
- The international community must assume a political role to settle this crisis, by ensuring that the United Nations and the Organization of African Unity give on-going support to that process, notably by creating a "Group of friendly countries."
- Civil society must participate in the debates towards finding a peaceful solution.

### **Highlights from the Plan of Action**

#### **For the entire Great Lakes region:**

- The international community must assume a political role to settle this crisis, by ensuring that the United Nations and the Organization of African Unity give on-going support to that process, notably by creating a "Group of friendly countries."
- Civil society must participate in the debates towards finding a peaceful solution.



- All parties involved in the hostilities should agree to observe an immediate cease-fire and to engage in negotiations aimed at achieving peace.
- The international community should declare a full arms embargo for the region.
- The next session of the UN Commission of Human Rights should dedicate a full day's discussion to the situation in the region.
- The Conference condemns the coup d'Etat of July 1996.
- The Government and all parties should observe a cease-fire and start negotiations to find a peaceful solution leading to a new transitional accord.
- The embargo on Burundi should be lifted.
- All parties should support the former President of Tanzania, Julius Nyerere, in his attempt to move towards a peaceful solution.

#### **For Zaire**

- The Government and the rebels should declare an immediate cease-fire and begin a dialogue to find a peaceful end to the conflict.
- All parties should respect the norms of international humanitarian law.
- The Government should make a commitment to hold elections within a reasonable period of time.
- The international community should encourage the creation of a structure to monitor the democratic process.
- The Government should promptly begin to put the country's economy back on its feet, particularly by curbing corruption.

#### **For Burundi:**

- Those in power should ensure that the judiciary is fair, independent, and represents the ethnic make-up of society.
- Those in power should provide for the security and reintegration of displaced people.

#### **For Rwanda:**

- The rights of all Rwandans, including the human rights of women, must be respected, notably their right to life and physical security.
- Local organizations should be assisted in monitoring the Government's observance of its international commitments.
- The Government should recognize the right of all parties to participate in national political life and should begin a dialogue to reach national reconciliation.

- To ensure that national reconciliation takes place, the judiciary should be fair; those accused of crimes should be entitled to proper and complete means of defence; and the victims of the genocide should have access to legal and rehabilitation assistance.
- Refugees who have come back to the country should be accompanied so that they can recover their belongings, and reintegrate into society.

#### **For the International Community:**

- It should strengthen the action of African development and

human rights NGOs by supporting them with respect to the power structures in their own countries.

- These NGOs should exert pressure on the regimes presently in power in the region to encourage them to find peaceful solutions to their conflicts and move toward democracy.
- These NGOs should urge their Governments to increase public development assistance for democratic institutions and organizations in the Great Lakes region.



## **Recent ICJ/CIJL Publications**

### **Tibet : Human Rights and the Rule of Law**

**Published by the ICJ in English, 370pp. Geneva 1997,  
25 Swiss francs (US\$17.00) plus postage**

The ICJ has recommended that China allow a United Nations supervised referendum in Tibet to determine the future of the region which it invaded in 1950 and occupied since. In this 370-page report, the ICJ describes the Tibetans as a "people under alien subjugation", and entitled under international law to the right of self determination. It is found that the autonomy which China claims Tibetans enjoy, is "fictitious", as power is really, in effect, in Chinese hands. Chinese repression in Tibet has escalated since the beginning of 1996, together with the widespread use of torture and other forms of violence. Choekyi Nyima, the eight year old boy designated by the Dalai Lama as the reincarnation of the Panchen Lama, the second most important figure in Tibet's Buddhist hierarchy, remains in detention. At the same time, Chinese leaders have begun a campaign against certain aspects of traditional Tibetan culture identified as both obstacles to development and links to Tibetan nationalism. China has sought to suppress Tibetan nationalist dissent and extinguish Tibetan culture by encouraging and facilitating the mass movement of ethnic Chinese population into Tibet, where they dominate the region's politics, security as well as the economy. According to the report, Tibetans and other persons resident in Tibet before 1950 and their descendants, as well as Tibetan refugees and their descendants should be eligible to vote in the referendum.

### **Economic, Social and Cultural Rights - A Compilation of Essential Documents**

**Published by the ICJ in English, 103pp. Geneva 1997,  
12 Swiss francs, plus postage**

The purpose of this compilation of essential documents of economic, social and cultural rights, is to provide lawyers, inter-governmental organisations, non-governmental organisations, governments and academics with a ready reference tool when tackling problems in the field of economic, social and cultural rights. Reproduced *in extenso* in this compilation, is the International Covenant on Economic, Social and Cultural Rights - together with State reservations and dates of accession -, the current draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, the Limburg Principles on the implementation of the Covenant, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, and the ICJ Bangalore Declaration and Plan of Action.