RULE OF LAW PROGRAM FOR SUB SAHARAN AFRICA

STAKEHOLDERS' CONFERENCE ON THE THEME 'ECONOMIC RIGHTS AS HUMAN RIGHTS' HELD AT PROTEA PRESIDENT HOTEL, CAPE TOWN, SOUTH AFRICA, 23RD – 26TH SEPTEMBER 2009

CONFERENCE REPORT

This conference was convened under the aegis of the Rule of Law Program for Sub Saharan Africa of the Konrad Adenauer Stiftung as a follow-up to the conference that was held last year in Kigali, Rwanda. It was out of the recognition that economic rights are essential to human development and the ultimate enjoyment of the other segments of human rights that this conference was convened.

The conference's main objective was to offer a platform to participants from various African countries to share and draw lessons and experiences from various jurisdictions both within and without the continent, on how to effectively promote and protect economic rights of the people for their own empowerment and development.

As one of the most advanced economies in Africa, South Africa was chosen as the ideal venue for this conference that was graced by among other dignitaries, the Hon. Justice Pius Langa, the Chief Justice and head of the Constitutional Court of the Republic of South Africa, who delivered the key note address and Hon. Alan Winde, the Minister for Finance, Economic Development and Tourism of the Western Cape, South Africa in whose jurisdiction the conference was hosted. Hon. Justice Langa, Hon. Winde and Prof. Christian Roschmann, the Director of the Rule of Law Program in their opening remarks ably set the tone for the conference by underscoring the importance of full realisation of economic rights and economic empowerment of the African people if real development on the continent is to be achieved.

In her presentation on the relationship between the rule of law and economic development, Hon. Dr. Athalia Molokomme, the Attorney General of the Republic of Botswana argued that the latter facilitates economic development, and therefore its absence or its ineffectiveness inevitably leads to devastating consequences on the prosperity and stability of any society. She further pointed out that over-regulation and bureaucratic hurdles by the economic actors also have equally negative effects to economic development and subsequent enjoyment of economic rights by the masses. She noted that abiding by long and formalized administrative and judicial procedures in itself does not add any value unless it is justifiably meant to enhance and foster transparency and accountability.

She outlined the current situation in Botswana in regard to the organization, protection and limitation of human and economic rights. One of the points raised in this context that solicited special interest among the participants was Botswana's approach to dealing with its mineral resources which are administered centrally by one national institution, as opposed to being administered locally by either tribal or regional leaders as is the case in other jurisdictions. The ensuing discussion dwelt on this topic with participants from Namibia and Nigeria in particular, stating that their respective countries were facing serious questions as regards the effectiveness and equitable distribution and utilisation of their natural resources for the benefit of all citizens thereby curbing against injustices as well as potential and apparent political instability.
Dr. Molokomme called for stronger and effective economic regional blocs in Africa as a means to enhancing the continent's competitive edge in the global market.

On their part, Prof. Hartmut Hamann of the Free University of Berlin, Germany and Prof. Jean-Michel Kumbu of the University of Kinshasa in DRC making a joint presentation on the topic "Necessary Limitations to the Right to Free Enterprise as a Human Right: The European and African Perspective", pointed out the cultural, philosophical and political roots of the concept of human rights in general and of economic rights in particular and their impact on the economic activities on the two continents. They then discussed in detail the systems of protection and restriction of economic rights currently in place in Germany, the European Union and the Democratic Republic of Congo.

In the ensuing discussions, participants pondered about the benefits and drawbacks of some of the limitations that were highlighted in the two presentations, in addition to the restrictions on economic rights which they wondered if they were indeed necessary, and if so, the extent to which they were.

Hon. Justice Ariranga Govindasamy Pillay, Judge President of the SADC Tribunal, Immediate former Chief Justice of the Republic of Mauritius and a Member of the Committee of Economic, Social and Cultural Rights, took participants through the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights that was adopted by the UN General Assembly in December 2008. He highlighted the main objective of the protocol, namely giving individual citizens of State parties to the International Covenant on Economic, Social and Cultural Rights the right to challenge violations of their rights as stipulated in the Covenant. He explained the setup of the body responsible for hearing such complaints under the Optional Protocol, and gave the participants an overview of the relevant procedural and substantial rules. Special emphasis was placed on the mechanism of the so-called "test of reasonableness", which bears similarity to a comparable mechanism in South Africa.

The passionate debate that gripped the floor after the presentation evolved around whether or not African countries need to ratify this protocol. Whereas some thought it will be beneficial especially to the ordinary citizens if states ratified this protocol, its opponents were pessimistic about its success especially in Africa if past experiences are anything to go by. Clearly a lot more remains to be done if the protocol is to be wholly embraced.

Dr. Oliver Ruppel, Director of The Human Rights and Documentation Centre, University of Namibia, presented a paper on the "Regional Economic Communities and Human Rights in East and Southern Africa". He argued that regional economic communities could be a motor for regional development, and play a significant part in the amelioration of the protection of human rights, especially through regional judicial institutions. He nevertheless cautioned that for them to play such a positive role, the need for political goodwill and commitment on the part of the State parties, as well as relentless efforts and pressure by national and regional institution on the member states were paramount.

He cited the example of Zimbabwe as one where lack of political goodwill and commitment by a member state had made a joke of an otherwise sound decision by a regional judicial body in case of *Mike Campbell and Others v The Republic of Zimbabwe SADC (T) Case No. 2/2007*. In this matter, the SADC-Tribunal had ruled against the Republic of Zimbabwe over a violation of property rights under the jurisdiction of the SADC-treaty, and had ordered Zimbabwe to compensate the victim, a decision that Zimbabwe has defiantly disregarded.

The various possible outcomes of this situation, as well as their respective ramifications on the standing of SADC as a community, its tribunal and the potential it has as far as the protection of human rights is concerned, were the main areas of the discussion of this presentation.

Prof. Manfred Hinz, former Dean, Faculty of Law, University of Namibia and Professor of Law, University of Bremen, Germany, presented a paper entitled '60 years of Social Market Economy in Germany – Legal Sociological Observations' in which he endeavoured to explain the socio-cultural, philosophical and historical factors that led to the development of the Social Market Economy, as well as highlighting some of the challenges and opportunities under this model. An issue of special interest was how this model was coping and operating under the current financial crisis. This has seen the implementation of huge savings programmes by the government. Prof. Hinz highlighted some of the aspects of this system which he thinks could serve as viable options worth exploring in the African context by African states.

Participants took special note of the dynamic balance between protection and restriction of economic rights under the Social Market Economy that is essentially open to constant re-definition based on the prevailing political circumstances, under the supervision of the judiciary.

APPENDICES

I. INTRODUCTORY REMARKS BY PROF. CHRISTIAN ROSCHMANN, DIRECTOR, RULE OF LAW PROGRAM FOR SUB-SAHARAN AFRICA

Welcome all of you to this conference of the KAS rule-of-law program. As many of you know, one of the major focuses of our program is human rights and this conference is a continuation of the human rights discussion we started last year in Kigali where we were looking at the successful dealing with the consequences of severe human rights violations.

The topic of this present conference is economic rights in their quality as human rights. We see this as a very important and at the same time difficult topic. It is important because without economic freedom coined as a comprehensive body of economic rights which are treated as inalienable human rights I cannot see much potential for further development in Africa. And it is a difficult topic because economic rights have not only to be promoted, and protected, but they also have to be limited at the same time in order to be effective.

As you probably know, Germany is celebrating 60 years of enshrining her model of Social Market Economy in her constitution. Social Market Economy is a way of balancing economic freedom and social justice, in other words of promoting and protecting economic rights on the one hand and limiting them on the other hand.

Generally speaking, economic freedom can be seen as the unhindered reasonable pursuit of gainful activities and is based on effectively protected economic rights. Economic freedom, however, cannot thrive without support from governments and has its limits in the rights of others and in solidarity with the needy. Economic rights have to be shaped according to these parameters.

Economic rights are generally discussed as so-called second generation human rights, human rights that do not only protect individuals from certain government actions but also constitute claims against governments to create protective social and economic environments, specially protective barriers against economically detrimental actions by other private parties, in other words economic rights are claims against states to promote economic freedom actively instead of just to abstain passively from encroaching activities. The promotion of economic rights of one party can therefore well mean the limitation of another party's rights

Let me now say a word about the limitation of economic rights and then speak about their protection. In our days, economic rights can threaten societies under two different aspects if they are not reasonably limited.

The first is the lack of regulatory instruments to protect societies from the abuse of economic rights by individuals who manage to encroach on others' economic rights in ruthless pursuit of selfish goals. The economic crisis which started last year was caused by the absence of sufficient checks or regulations for the financial markets, a fact that led to

gigantic abuse by a relatively small group of individuals over a long period of time and caused damages in the order of trillions of dollars on a worldwide scale.

The second aspect under which economic rights can threaten societies is the lack of solidarity with the needy- the lack of *umbuntu*, as South Africans say, and hence of social justice. Economic rights have to incorporate mechanisms to limit economic freedom so far as to ensure food, health, shelter, education and other basic goods for the needy and justice for everyone. This is what we are paying taxes for which limit our financial radius of economic activities.

Having mentioned the limitation of economic rights I should now say a few words about their protection. As far as the protection of economic rights is concerned, there are also two major threats. The first is the absence of adequate legislation or its enforcement. This can mean, there are not sufficient or sufficiently implemented protective laws and regulations or there are rules but they are too restrictive to allow for the unfolding of economic activities on a necessary scale and some times they are too restrictively handled and enforced. The latter is the case when corruption comes into play which entails the squandering of economic resources. Otherwise inadequate legislation or its enforcement can be due to incompetence, negligence or evil-will.

The second source of danger to economic rights is the abuse of the political arena by pressure groups in order to achieve economic goals, namely to redistribute wealth that has been acquired by others through legitimate economic activities. This happens when people who believe they should get more than what their fellow humans offer them on the markets acquire enough political clout to appropriate through state-run redistribution schemes what others have acquired through their work or capital. It also happens when individuals or groups simply abuse political or administrative power positions.

Such activities have to be very distinctly distinguished from social justice as we understand it. Social justice is based on sympathy, love, care and responsibility for fellow humans and is embedded as an essential value not only in all responsible political agendas but also in all major religions or philosophies of a cosmic scope. Social justice -justice in general for that matter - always weighs interests reasonably and responsibly.

The unreasonable and irresponsible skimming of those who are believed to have more by way of instrumentalizing state mechanisms is done selfishly through using parliamentary majorities or illegally through the abuse of power and sometimes even the use of sheer violence. Skimming is not based on values but on greed and envy which are evils in terms of philosophy, bads in economic terms and character flaws in everyday language. Skimming is often trickily embedded in theoretical frameworks with a rhetoric of justification which frequently also uses terms like "social justice" but gives them a very different meaning. Such abusive activities have nothing to do with social justice but are simply geared towards participating in the fruits of other people's successes without sharing their risks, costs and efforts and have impoverished more countries faster than anything else in recorded history, short of the bubonic plague. They have caused unspeakable human grief and suffering since 1917.

However, we cannot overlook the fact that in practice in many instances the borderline between skimming and social justice, between reasonable and unreasonable, responsible and irresponsible is heavily disputed and discussions about the protection and limitation of economic rights are generally expected to shed light on this contentious borderline.

As we can see, economic rights, if we take them seriously as human rights, have to have mechanisms of protection as well as of limitation, mechanisms which have to be well balanced, specially as it becomes clear that not only promotional activities of economic rights but also protection devices for one group can be limitations for another and vice versa. This balancing is one of the major challenges when we are dealing with economic rights as human rights.

The German constitutional model of social market economy is just one answer to this challenge. May-be it has been successful because it does not offer definitions, but harmonizes by leaving the establishment of the core components of the model to the judiciary and the extent of the two conflicting elements "social" and "market" open to continuous political discussion. Your countries may have different answers to the challenge, based not least on different circumstances. Finding and discussing them is a major purpose of this conference.

II. RULE OF LAW AND ECONOMIC DEVELOPMENT BY DR ATHALIAH MOLOKOMME, ATTORNEY GENERAL OF THE REPUBLIC OF BOTSWANA

Let me begin by thanking the organizers for inviting me to participate in this conference whose theme, economic rights as human rights, is without doubt critical and most relevant, especially in this part of the world. The subject of human rights has become one of the key challenges in the continuing quest by nations to deepen their democratic processes. Especially since the adoption of the Universal Declaration of Human Rights some six decades ago, the achievement of human rights is now widely accepted a criterion to measure the democratic performance of nations.

It is little wonder therefore that it has become the subject of numerous studies and publications by scholars, as well as raised lively and sometimes controversial debate in legal and political circles. One may wonder therefore what more there is to add to such widely researched, published and debated subjects. I believe the gap that this conference seeks to address is the less written about, and probably more difficult subject of economic rights as human rights.

My presentation will address the related subject of the rule of law and economic development, with specific reference to my country, Botswana. In that way, I hope to make a modest contribution to the debate around these issues. I shall begin by giving my own brief understanding of the meaning and development of the two concepts of human rights and the rule of law.

Human Rights

Human rights is a rather broad subject, as the term refers to the full gamut of rights to which all persons are equally entitled irrespective of their race, sex, colour, national or ethnic origin, economic status, political or religious beliefs etc. At the core of the concept of human rights is the principle that all human beings possess human dignity that must be jealously guarded by all, both governmental and non governmental actors.

Discourses on human rights are generally associated with the United Nations system and its various instruments, such as the UN Charter, and the Universal Declaration of Human Rights (UDHR), which was adopted by the UN in 1948. Although not a legally binding instrument, the standards laid down by the UDHR have become accepted internationally as if they were binding. Regional instruments, as well as the constitutions of many states contain the list of fundamental rights listed in the UDHR. These include the right to life, liberty and security of the person; equality and non discrimination, and freedom of expression, to name just a few.
By 1966, two legally binding human rights instruments had emerged from the UN: the International Covenant on Economic Social and Cultural Rights (ICESR) and the International Covenant on Civil and Political Rights (ICCPR).

This dichotomy became the source of a traditional classification of 'generations' of rights, with civil and political rights (eg the right to equality before the law, vote, liberty, association and assembly etc) being regarded as 'first generation' because they were 'justiciable' or could be enforced by individuals against the state.

Social, economic and cultural rights, on the other hand (eg. the right to work, a fair wage, food, shelter, health care etc), were seen as 'second generation' because they were not 'justiciable' or enforceable by individuals against the state. Others went further to argue that the latter were not really rights, that they could not be guaranteed because they are dependant upon the availability of resources, which states did not always have. To assert these as rights, the argument continues, would therefore be unrealistic, and risks creating false expectations that states are likely to fail to meet.

A third generation or category of rights that has emerged is a broad category which deals with what may be called 'life quality' issues; the right to development being the most well known. However, these have not as yet been incorporated into a legally binding instrument at the international level in the same way as the first two categories. The single exception is the African Charter on Human and Peoples' Rights, (ACHPR) which is one of the few instruments to specifically mention the right to development.

The African Charter on Human and People's Rights was adopted by the Assembly of Heads of State and Government of the Organisation of African Unity in 1981. It is worth noting that the ACHPR goes further than most international instruments in guaranteeing such rights as the rights of all peoples to economic, social and cultural development; the right to freedom from foreign economic exploitation, national and international peace and security, as well as the right to a satisfactory environment.

It is now universally accepted that dividing up human rights into generations, or placing them in hierarchies is inimical to the very concept of human rights. Thus the Vienna Declaration which was adopted following the UN Human Rights Conference in 1993 states that *'all human rights are universal, indivisible, interdependent and interrelated*. Especially in developing countries, the so called second and third human generation rights are of special importance in view of the low levels of economic development, education, limited health facilities and the challenges of poverty and disease, especially HIV/AIDS.

This is why the constitutions of some countries, especially those such as South Africa which are relatively new or recently reviewed, specifically provide for the protection of economic, social, and cultural rights. The older constitutions such as that of Botswana tend to contain a bill of civil and political rights but do not include social, economic and cultural rights.

The Rule of Law

Turning to the related concept of the rule of law, I believe that we all understand it to mean a state of affairs where the law reigns supreme, the lives of citizens and government business is conducted in accordance with the law. It is a state of affairs where there is a defined legal framework for governance that is known and predictable, and one that recognizes the separation of powers between the three branches of executive, legislature and judiciary. the rule of law means that a country will conduct its affairs in accordance with the law and nothing else. That is good governance, which necessarily implies that the government and its officials should be accountable to the people. That accountability, in turn, should be clearly set out in the law.

In other words, these concepts would be meaningless if they were not given legal and binding effect by the Constitution, and other laws. Another attribute of the rule of law which I would add is that it places obligations on both the state and citizens, including civil society, to observe and respect the law. Thus the approach that assumes that the state alone bears an obligation to ensure observance of the rule of law, is not correct. Citizens too, should avoid undermining the rule of law by engaging in unlawful or undemocratic practices.

It is clear from the foregoing that economic development is closely linked to both the rule of law and human rights. Economic development should be seen not only as a goal of countries or governments, but also as a right to which citizens are entitled. Conversely, it has become abundantly clear that economic development cannot thrive or easily be achieved in the absence of the rule of law, or where the rule of law is weak.

Having said that, I must observe that in practice, the presence of the rule of law is no guarantee for the foreign direct investment that countries need to facilitate economic development. This is reflected in the fact that while Botswana has scored high in the field of the rule of law, other countries which do not score as high have attracted more foreign investment. We have often been informed that our rules are too stringent, and that their observance delays the pace of doing business. Investors have been known to move their business to countries where the rule of law is not as strictly observed as it is in Botswana. While we accept that some rules may have been overtaken by events, and the Government is

re-engineering some of its processes, we are not prepared to allow this to undermine the culture of transparency and good governance.

The Botswana Situation

As we are all aware, Botswana is a sovereign republic, and has a written Constitution that provides for among others, the legal framework for the three branches of government, the executive, legislature and the judiciary, their functions as well as the boundaries of their authority. In this regard, clear provision is made for Public Service, and in particular, the appointment and tenure of certain public officers. Finally, issues of finance, especially how public funds are to be kept and expended, are also provided for in our founding document.
I can certainly confirm that these principles are generally observed in our country, and have earned us commendations around the world. However, we are cogniscant of the fact that no system is perfect, and we do face challenges similar to those of other countries in enforcing and sustaining these standards. These challenges include the usual tensions between the three branches of government, persistent gender gaps despite formal legal equality, poverty, unemployment and limited access to legal services for the poor.

Regarding human rights, the Botswana Constitution contains a bill of rights that lays out the fundamental rights and freedoms of the individual, mainly civil and political. As I have already indicated, the Botswana Constitution does not guarantee economic rights, and is not signatory to the Covenant on Economic, Social and Cultural Rights and its Optional Protocol.

Be that as it may, the Government has, since independence, put in place measures that facilitate the delivery of basic services such as health, education and others, in as equitable a manner as possible. I will not, for the purposes of this presentation bother you with a long list of these, and would be prepared to share some of these during the discussion. Suffice to say that Botswana operates a free enterprise system that seeks to create a conducive environment for FDI, while supporting local production and entrepreneurship through subsidized programs in agriculture, manufacturing and the commercial sector. Moreover, government policy combines a free enterprise system with implementation of social welfare programmes that provide safety nets for the vulnerable groups in society.

Most importantly, government policy has adopted an approach where the revenue from exploiting the country's natural resources, especially mining, is in the hands of the state. This is reflected in a memorandum of understanding that was signed soon after independence by tribal leaders, in which they ceded all mineral rights in their territories to the state. This is now embedded in legislation, and wherever mineral deposits are discovered, they vest in the state, and benefits from their exploitation are distributed equitably by the government. In this way, the government is able to deliver basic services to its people irrespective of whether they happen to live in a resource rich or poor part of the country.

Conclusion

By way of conclusion therefore, I would like to observe that the international human rights system is an important point of reference for the realization of human development and

dignity. The increasing recognition of economic rights as human rights should go a long way towards ensuring that these concepts are given substantive content.

The Botswana experience however shows that while signature of international instruments is an important demonstration of collective commitment, economic rights can still be attained in practice even in the absence of such signature. In addition to signing these instruments, countries and Governments need to be fully committed to delivering services to their people, and improving their quality of life.

III. NECESSARY LIMITS TO THE FREEDOM TO ENGAGE IN ECONOMIC ACTIVITY AS A HUMAN RIGHT – EUROPEAN AND AFRICAN PERSPECTIVE

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A. European Perspective

I. Historical and cultural roots

"Liberty consists in the freedom to do everything which injures no one else." These are the opening words of Article 4 of the French Declaration of the Rights of Man and of the Citizen of 1789[1]. It continues: *"The exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law."*

Since the 17th century, in particular since the French Revolution at the end of the 18th century, European law has been based on the concept of man as a free individual. Before that the view of man's role in society had been entirely different. The individual was regarded first and foremost as a being which lived in communities and within the orders which these communities impose; in other words, as a being who only exercised rights and duties as a member of family, professional and political communities and limited by loyalties and social dependencies[2].

The image of mankind as viewed by the French Revolution and European Enlightenment had a profound influence on the development of law in Europe, particularly in the spheres of economics, freedom of contract and the protection of private property[3].

[1] http://www.hrcr.org/docs/frenchdec.html
[2] Böckenförde, Vom Wandel des Menschenbilds im Recht, pp. 9, 15
[3] Böckenförde, op.cit., p. 18

The exponents of European enlightenment were in no doubt about the limits of liberty: legal freedom is by definition a freedom which is limited. A freedom which is not subject to any limitations inevitably results in arbitrariness on the part of the stronger to the detriment of all others. To quote Immanuel Kant: *"Right, therefore, comprehends the whole of the conditions under which the voluntary actions of any one person can be harmonized in reality with the voluntary actions of every other person, according to a universal law of freedom."*[4]Or to translate it into contemporary language: *"Freedom can only exist as an enduring and assured freedom if it is set out in law, through laws which impose limits."*[5]

Article 4 of the Declaration of the Rights of Man and of the Citizen, which is cited above, also addresses the need to set limits to freedom.

This principle still applies today – particularly in the age of a globalised economy. Since the collapse of the financial markets last autumn governments worldwide are considering comprehensive legislative measures to limit the freedoms of players on the financial markets and companies in order to protect economic freedom from itself[6]. This is also true of the US administration, which certainly cannot be accused of wanting to abolish economic freedom[7].

Ever since this concept of freedom became prevalent in Europe over two hundred years ago it has been subject to criticism. As one famous critic of economic freedom once said: *"[...] the right of man to freedom is not based upon the connection of man with man, but rather on the separation of man from man."*[8]8

That famous critic was Karl Marx, and he was right:

The emphasis on the freedom of the individual raises the question of what rules should govern the lives and interaction of people living together in a community. In Europe this can only be done by the law. Generally acknowledged religious norms no longer apply.

II. The current situation

1. Germany

a) Article 15 of the German Basic Law *(Grundgesetz)*

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[4] Immanuel Kant, Metaphysics of Morals, Part. I, Introduction to the Science of Right § B., http://www.mv.helsinki.fi/home/tkannist/E-texts/Kant/Right/part1.html

[5] Böckenförde, Recht schafft Freiheit, indem es Grenzen setzt, in Staat, Nation, Europa, p. 234

[6] In Germany e.g. "Gesetz zur weiteren Stabilisierung des Finanzmarktes", Bundesgesetzblatt 2009 Teil I Nr. 18, p. 725; in detail Kaserer/Köndgen/Möllers, Stellungnahme zum Finanzmarktstabilisierungsergänzungsgesetz, ZBB-Report 2009, 142; Ruffert, Verfassungsrechtliche Überlegungen zur Finanzmarktkrise, NJW 2009, 2093; Weber, die Entwicklung des Kapitalmarktrechts in Deutschland, NJW 2009, 33.

[7] Mildner/Knothe, Abschied vom Benign Neglect? Auf dem Weg zu einer neuen Finanzmarktordnung in den USA, SWP-Studie August 2009, www.swp-berlin.org; Department of the Treasury, Financial Regulatiory Reform – A new Foundation: Rebuilding Financial Supervision and Regulation, www.financialstability.gov/roadtostability/regulatoryreform.html.

[8] Karl Marx, *Die Frühschriften,* Edition Landshut, Stuttgart 1953, pp. 192 f, http://en.wikisource.org/wiki/Selected_Essays_by_Karl_Marx/On_The_Jewish_Question

"Land, natural resources and means of production may for the purpose of socialisation be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation."

This citation comes from Article 15 of the current German constitution.

Thus, the German constitution, otherwise known as the "Basic Law", contains a clause which authorises the state to intervene for the purposes of socialisation as part of the principle of the welfare state. Article 15 indicates a possible clear limit to private economic activity. However, this authority has never been used[9].9 It is apparent that the Basic Law does not clearly favour one specific economic system. The Federal Constitutional Court speaks of a principle of openness towards economic systems of the German Constitution *(Grundsatz der wirtschaftlichen Offenheit des Grundgesetzes)*[10].

At the same time the Basic Law also contains a number of articles which protect the freedom of citizens and companies to engage in economic activity.

b) Art. 2 (1) of the Basic Law

"Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."
This encompasses the right of all citizens to engage freely in economic activity and it also protects the legal activity of legal persons and partnerships under private law[11].

It includes the freedom to contract and private autonomy. The individual should have the freedom to organise his legal relationships as he sees fit.
He is free to decide whether or not to enter into contracts and to decide on the content of such contract[12].

From the outset this freedom is subject to all legal constraints and to all statutes which have been enacted in a constitutional manner and are therefore consistent with the "constitutional order". The constitutional order must be obeyed by all and at the same time safeguards and limits the freedom of everyone else[13].

German constitutional law regards the freedom of the individual not only as a right to defend personal freedom to engage in economic activity against state intervention. The Federal Constitutional Court sees the Basic Rights as a mandate to the State to ensure that all citizens are able to realise this right. The State has a duty to proactively realise this right.

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[9] Bryde in von Münch/Kunig, *Grundgesetz-Kommentar,* 5th edition, Art. 15, para 6 with further references; *Wieland* in Dreier, *Grundgesetz Kommentar,* Art. 15, para 18; in detail Krüger, *Sozialisierung,* in Bettermann/Nipperdey/Scheuner, *Die Grundrechte,* Volume Three, 1st half volume, pp. 267 ff

[10] Current case law of the Federal Constitutional Court, decisions of the Federal Constitutional Court 4, 7 (17 f.), 50, 290/336 f; di Fabio in Maunz/Dürig Art. 2 (1), para. 76 with further references

[11] Di Fabio in Maunz/Dürig Art. 2 (1), para 77

[12] Di Fabio, op. cit., Art. 2 (1), para 101 with further references

[13] Kunig in von Münch/Kunig, *Grundgesetz-Kommentar,* 5th edition, Art. 2, para 22

This mandate includes the enactment of law by legislative power and the application of private law through the courts. For the Federal Constitutional Court this means that the State has an obligation to protect the freedom to engage in economic activity of each individual and to protect the weaker of the parties against the stronger. It must limit the freedom of the stronger party to engage in economic activity in order to preserve the freedom of the weaker.

Example:
A businessman negotiates a bank loan for EUR 100,000.00. The bank demands that his 21-year old daughter stand surety for the loan. She does not have a stake in her father's company. She has no assets.

She stands surety. Her father does not repay the loan and the bank calls on the guarantee. The competent court – a regional court *(Landgericht)* – orders the daughter to pay. This is set aside by the higher regional court *(Oberlandesgericht)* – and the action is dismissed. The Federal Court of Justice *(Bundesgerichtshof)* – sets aside the decision of the higher regional court and restores the original decision of the regional court. The daughter then files a complaint against the decision of the Federal Court of Justice with the Federal Constitutional Court on the grounds that the decision violated her basic rights under Art. 1 (1) (human dignity) and Art. 2 (1) (right to free development of personality including right to free enterprise) in conjunction with the principle of the welfare state *(Sozialstaatsprinzip)*.

The Federal Constitutional Court rules in favour of the businessman's daughter. The complaint is successful. The reasoning of the Federal Constitutional Court is as follows:
"2. a) […] Private autonomy is a matter which must be enforced by the State, of which the judiciary is part. To guarantee private autonomy the legislator must provide legally binding instruments which, in the event of a dispute, are enforceable.
b) […] As all parties to civil law relations are entitled to the protection afforded by Art. 2 (1) of the Basic Law and to invoke the constitutional guarantee of their private autonomy, the law of the jungle cannot be allowed to prevail. […]
c) […] It follows that in construing and applying general clauses of the German Civil Code to the contract in dispute the civil courts have an obligation to ensure contracts do not serve as a means of coercion. If the contracting parties have agreed on a clause which is essentially admissible there would not as a rule be any need for any further control.
If, on the other hand, the content of the contract unduly burdens one of the parties and is clearly inappropriate as a means of balancing interests the courts may not simply say "a contract is a contract". On the contrary, they must establish whether the clause arose due to the disparity between the negotiating strengths of the parties and, if so, make a corrective intervention under the general clauses of the German Civil Code. […]"[14]14

[14] BVerfGE 89, 214 ff, the German text reads: *"[…] Für die Zivilgerichte folgt daraus die Pflicht, bei der Auslegung und Anwendung der Generalklausel darauf zu achten, daß Verträge nicht als Mittel der Fremdbestimmung dienen. Haben die Vertragspartner eine an sich zulässige Regelung vereinbart, so wird sich regelmäßig eine weitergehende Inhaltskontrolle erübrigen. Ist aber der Inhalt des Vertrages für eine Seite ungewöhnlich belastend und als Interessenausgleich offensichtlich unangemessen, so dürfen sich die Gerichte nicht mit der Feststellung begnügen: "Vertrags ist Vertrag". Sie müssen vielmehr klären, ob die Regelung eine Folge strukturell ungleicher Verhandlungsstärke ist, und gegebenenfalls im Rahmen der Generalklauseln des geltenden Zivilrechts korrigierend eingreifen. […]"*

The applicable general clauses of German civil law include § 138 of the German Civil Code *(Bürgerliches Gesetzbuch)* (transactions which are contrary to public morals are void) and § 242 of the German Civil Code *("An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.")*.

In this ruling therefore the Federal Constitutional Court makes it clear that the legislator and the courts have a duty to actively protect the weaker party by limiting the freedom of the stronger. Since then, the Federal Constitutional Court has affirmed these principles on a number of occasions[15] emphasising that the civil courts have a duty to judge the validity of a contract on the merits of the individual case. The Federal Constitutional Court also applies these principles curtailing the economic freedom of dominant contracting parties to marriage contracts[16].

c) Art. 14 of the Basic Law

"(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
(2) Property entails obligations. Its use shall also serve the public good.
(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts."

Article 14 guarantees property. It also states that the content and the limits of property must be set out by law. Lawmakers have considerable latitude[17].

Art. 14 is closely related to the guarantee of personal freedom as set out in Art. 2 (1). The purpose of the freedom associated with property is to preserve responsible individuals from being reduced to a mere object within the state. The more that the right guaranteeing property safeguards personal freedom, the better it is protected. The more that property fulfils a social function the broader the latitude of the lawmaker to limit it[18].

Art. 14 also makes it clear that the protected right "property" cannot exist unless it is set out in and limited by law. The lawmaker decides what objects can be owned privately, what rights are conferred on the owner and how property is transferred[19].

The association between freedom and property goes back to European Enlightenment and the groundwork laid by Hobbes[20], Locke[21] und Kant[2223]

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[15] BVerfG NJW 1994, 2749; BVerfG NJW 1996, 2021
[16] BVerfGE 103, 81
[17] Bryde in von Münch/Kunig, *Grundgesetz-Kommentar,* 5th edition, Art. 14, para 501 ff
[18] Bryde in von Münch/Kunig *Grundgesetz-Kommentar,* 5th edition, Art. 14, para 4 with further references from current case law of the Federal Constitutional Court; Wieland, op.cit., para 88, 89
[19] Bryde, op,cit., para 50 with further references
[20] De Cive, 1642
[21] Leviathan, 1651
[22] Metaphysics of Morals, 1797

In its current form the concept of the protection of property goes much further than the conventional concept of tangible assets. It includes social insurance entitlement and even the right of a tenant to take possession of an apartment which he has leased. This also shows that the Federal Constitutional Court views the basic economic rights as rights which the State has a duty to shape in the interest of all citizens to enable them to protect themselves as responsible individuals.

d) Art. 9 (3) sentence 1 of the Basic Law

"The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession."

Freely formed associations and groups representing employees and employers may decide on substantive aspects of working conditions[24]. The legislature must preserve a neutral position with regard to such associations and groups[25].

e) Art. 12 of the Basic Law
"(1) All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.
(2) No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.
(3) Forced labour may be imposed only on persons deprived of their liberty by the judgment of a court."

Freedom of occupation includes the freedom to choose one's occupation or profession and the freedom to exercise an occupation or profession. This Art. 12 is very important in practice. It *"defines more closely the basic right to free development of personality in the sphere of individual achievement and maintenance of one's livelihood"*[26]. Art. 12 also guarantees the freedom of trade and the freedom of competition[27].

Most Germans exercise their freedom of free enterprise via their job or profession.

As far as Art. 12, Art. 9 or Art. 14 of the Basic Law are concerned they all take precedence over the general clause set out in Art. 2 (1) because they are special provisions.

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[23] Wieland in Dreier, *Grundgesetz-Kommentar,* Art. 14, para 1 with further references
[24] Löwer in von Münch/Kunig, *Grundgesetz-Kommentar,* 5th edition, Art. 9, para 3
[25] Löwer, op. cit., para. 57
[26] Decisions of the Federal Constitutional Court, *(BVerfGE)* 103, 172 (183)
[27] Decisions of the Federal Constitutional Court 50, 290/362; Decisions of the Federal Constitutional Court 32, 311/317; Jarauss/Peiroth GG, 9th edition, para 2

2. France

"The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, […]"

These are the introductory words to the Preamble of the French Constitution.

The French Declaration of the Rights of Man and of the Citizen of 26 August 1789 is therefore applicable constitutional law in France[28].

Thus, one of the landmarks of the right to engage freely in economic growth in European history has been adopted directly into applicable law. This right can and must be limited by law (Art. 4 sentence 2 of the French Declaration of the Rights of Man and of the Citizen).

The current constitution also refers to the Preamble of the Constitution of 27 October 1946 in which the French people also proclaimed – inter alia – that
"- Each person has the duty to work and the right to employment…
- All men may defend their rights and interests through union action …
- All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place.
- All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society …
- The Nation shall provide the individual and the family with the conditions necessary to their development."[29]

Thus from the perspective of French constitutional law too, state protection and a legal structuring of economic life are essential to safeguard the right of all citizens to engage freely in economic activity and this is achieved by limiting economic power[30].

3. United Kingdom

In the United Kingdom the freedom to engage in economic activity is as deeply rooted in the country's history than in France.

There is no one single document setting out the constitution but the Magna Carta Libertatum of 1215, Petition of Right of 1627, Habeas Corpus Act of 1679 and the Bill of Rights 1689 are still in force even today[31].

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[28] Decision of the Constitutional Council of 16 July 1971; Favoreu/Philip, *Les grandes décisions du Conseil constitutionnel,* 14th edition, pp. 235 ff

[29] http://www.conseil-constitutionnel.fr/conseil constitutionnel/root/bank_mm/anglais/cst3.pdf

[30] For further information on French constitutional law: Troper, Constitutional Law in Berman/Picard, Introduction to French Law, p. 15; Guimezanes, *Introduction au droit francais,* 2nd edition, p. 641, 68; Hübner/Constantinesco, *Einführung in das französische Recht,* 4th edition, pp. 39 ff; in detail Robert/Duffar, *Droits de l'homme et libertés fondamentales,* 7th edition

[31] Kimmer, Verfassungen der EU-Mitgliedsstaaten, p. 892

As early as the 13th century the concept of economic freedom was addressed by the Magna Carta. I will limit myself here to just two citations:
"13: And the city of London shall have all its ancient liberties and free customs, both by land and by water …"

"41: All merchants may safely and securely go away from England, come to England, stay in and go through England, by land or by water, for buying and selling under right and ancient customs and without any evil exactions …"[32]

The Human Rights Act 1998 transposed the European Convention on Human Rights into English constitutional law[33].

4. Europe

Article 1 of Protocol to the European Convention on Human Rights (ECHR) guarantees the "Protection of Property":
"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except on the public interest and subject to the conditions provided for by the law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

It is clear that the individual states are entitled to restrict the right to property. The ECHR does not contain any other express provisions on economic liberties[34].

At the same time the primary characteristic of the European Union is that of economic freedom. European law speaks of "four freedoms":
- the free movement of goods (Art. 23, 28, 29 TEC – Treaty establishing the European Community);
- the free movement of persons including the freedom of movement for workers and the freedom of establishment (Art. 17, 39, 43, 48 TEC);
- the freedom to provide services (Art. 49, 50 TEC);
- the free movement of capital (Art. 56 TEC)[35].

These are subjective freedoms which can be pursued by individuals and companies through the courts of the European Union and the courts of the Member States. These freedoms under European law generally take precedence over national law[36].

[32] http://www.constitution.org/sech/sech_044.htm
[33] For further information on English constitutional law: Barendt, An Introduction to Constitutional Law; pp. 26 ff; O. Hood Phillips & Jackson, Constitutional Law and administrative Law, 8th edition, para 1 – 002 ff
[34] Wegener in Ehlers (ed.), European Fundamental Rights and Freedoms, pp. 131, 148
[35] For further details: Ehlers in Ehlers (ed.), European Fundamental Rights and Freedoms, pp. 175 ff
[36] Ehlers, op.cit., pp. 179 f

Under European law too there is no doubt that these rights must and can be defined and limited, both through European and national law[37].

III. Necessary pre-requisites and limitations

1. Limitation of the right to freely engage in economic activity is a prerequisite for its continued existence

Economic freedom can only exist if it is enshrined in law from the outset. Only law can define how a contract comes about or how claims are enforced. It is no coincidence that there was an extensive process of codification civil law and the civil procedural law after the French Revolution. Code Civil in 1804, Code de Procédure Civile in 1806, Code de Commerce in 1807.

In Europe the emphasis on individual economic freedom unleashed forces which led to a great upturn in economic activity. In Germany too, there was a link between the success of economic development around 1900 and the codification of trading and commercial freedoms: the German Commercial Code came into force in 1897 and the German Civil Code in 1900.

At the same time the forces which were unleashed also had negative consequences which affected primarily the economically weaker sections of the population such as those who earned their living in factories and for regions outside Europe which were subject to a colonial regime. The freedom enjoyed by some diminished the freedom of others.

There were also adverse effects on the environment, as we see in climate change.

From the outset the question has been how to mitigate the adverse effects of freedom.

To the intellectual fathers of this concept of freedom such as Immanuel Kant this had always been clear. Likewise to critics of the capitalist system such as Karl Marx, who was however unable to offer a viable alternative.

In Europe the response generally took the form of active state intervention.
- protecting the economically weaker sections of the population by measures such as compulsory state health and pension insurance schemes
- controlling economic activity by close-meshed administrative control, measures such as merger control through the European Commission are another example
- regulating the capital market, as is done in Germany through the Federal Financial Supervisory Authority *(Bundesanstalt für Finanzdienstleistungsaufsicht)*
- maintaining an effective judiciary accessible to all citizens and a criminal prosecution system which applies equally to everyone.

These objectives are not achieved perfectly in Europe as is amply shown by the current debate on how governments should best handle the economic power of large globalised groups of companies and how the legislature and the executive should respond to the crisis on the capital markets.

[37] Ehlers, op.cit., pp. 213 f

- The degree of freedom enjoyed by the players on the financial markets, their unlimited lust for profit and unchecked greed were instrumental in bringing Europe's financial and banking system to the brink of collapse.
- Had this collapse occurred, it would have drastically reduced the freedom of most individuals and companies in Europe to engage in economic activity. On 5 October 2008 the German chancellor Angela Merkel made the following public statement: *"We want everyone to know that their savings are safe. The German government will vouch for this."* During the days which followed the German Ministry of Finance issued further confirmation and details on this statement. It was triggered by the fear of an uncontrollable run on the banks by German savers, which would have caused the banking system to collapse. In legal terms this is not the same as a binding government guarantee. The declaration is politically but not legally binding. Nonetheless it had the desired effect and, for the time being at least, the banking system is now stable[38].
- The European governments were forced to intervene and launched major rescue packages for the banks[39].

These financial measures will have to be followed by legislative measures.

In Germany, France and the United Kingdom there is much debate on legislation to curb the economic freedom hitherto enjoyed by the players on the financial markets to ensure that the freedom to engage in economic activity does not ultimately destroy itself[40].

2. It is the job of the legislative power to formulate this both freedom and the limitations which will safeguard its survival.

a) Statutes are passed and enacted by the legislative power.

The near-collapse of the capital markets revealed a failure on the part of European lawmakers to prevent a crisis of this magnitude.

Deregulation and market liberalisation had become fashionable.

Insufficient attention and vigilance were devoted to imposing and safeguarding necessary limits[41].

Whether the lawmakers will have the courage and the resolve to set the necessary limits remains to be seen. One can of course still debate what limits are necessary. It will be

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[38] Legal nature of the guarantee statement: Roth, Die Garantieerklärung der Bundesregierung: juristisch unverbindlich – politisch bindend, NJW 2009, 566

[39] For further details see Müller-Graff, Finanzmarktkrise und Wirtschaftsordnungsrecht: Aufwind für den „Regulierungsstaat"?, EWS 2009, 201.

[40] For current information on the legal debate in Germany: Ruffert, *Verfassungsrechtliche Überlegungen zur Finanzmarktkrise*, NJW 2009, 2093; Weber, *Die Entwicklung des Kapitalmarktrechts im Jahre 2008,* NJW 2009, 33; Hanau, *Der (sehr vorsichtige) Entwurf eines Gesetzes zur Angemessenheit der Vorstandsvergütung,* NJW 2009, 1652

[41] For information on the law relating to capital markets in Germany: Weber, *Die Entwicklung des Kapitalmarktrechts im Jahre 2008,* NJW 2009, 33

interesting to see whether jurists and economists will develop a fruitful discussion on the interplay between the disciplines of law and economics including relevant aspects of constitutional law[42].

b) Statutory limits are only effective if compliance is guaranteed.

A state which values the freedom to engage in economic activity must have the will and the capacity to protect it and enforce the limits to that freedom.

This is the prime function of the executive.

In the case of the financial crisis the German regulatory authorities failed to recognise the risks early enough, an admittedly difficult task in an environment shaped by politically desired laissez-faire principles[43].

The focus of debate has now shifted to strengthening regulatory powers[44].

This will involve more than simply amending existing laws. Much will hinge on key appointments in the regulatory authorities. At the end of the day, decisions are taken by people. These must have the necessary expertise, authority and the determination to enforce the limits imposed by statute.

They must be able to impose this on companies, whatever the size and however powerful. Particularly in times where the flow of capital and goods is globalised each individual country must acknowledge and bear the responsibility for enforcing the limits imposed by statute on its sovereign territory[45]. This demands political power, impartiality, courage, resilience and resolve – a rare combination of qualities.

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[42] Examples of the discussion: Häberle, *"Wirtschaft" als Thema neuerer verfassungsstaatlicher Verfassungen,* JURA 1987, 577; on the current discussion: Schaefer, *Ordoliberale Grundrechte des Grundgesetzes,* Der Staat 2009, pp. 215 f, who describes "neoliberal competition theory as a social science-based point of reference for interpreting basic rights", which "will permit just and fair allocation of prospects for free development" but does not address the specific problems of the current economic crisis

[43] For information on the duties of the state as set out in the constitution: Ruffert, *Verfassungsrechtliche Überlegungen zur Finanzmarktkrise*, NJW 2009, 2093/2095

[44] See Hopt/Fleckner/Kumpan/Steffek, "Kontrollerlangung über systemrelevante Banken nach den Finanzmarktstabilisierungsgesetzen (FMSEG/FMStErgG)", WM 2009, 821; Müller-Graff, Finanzmarktkrise und Wirtschaftsordnungsrecht: Aufwind für den „Regulierungsstaat?", EWS 2009, 201.

[45] For information on the need for a clear state structure in the face of economic and technical effects of globalisation Loughlin, *In Defence of Staatslehre,* Der Staat 2009, pp. 11 f.: "The implicit argument is that, for particular historical reasons, many jurists have too readily abandoned state theory in favour of adherence to a free-standing constitutionalism, and this has left them without anchorage in the open seas ahead. The contemporary challenges to constitutional doctrine require a return to state-based concepts.", p. 2, a clear position on existing risks: "But without "the people" as a long-stop, the process threatens to transform itself into a new phenomenon, which might be called "authoritarian constitutionalism" through which a new "imperial network" (based on the G8, World Bank, IMF and WTO) will seek to secure the legitimacy of its global rule", p. 26; on constitutional issues of globalisation see also Nolte/Poscher, *Das Verfassungsrecht vor den Herausforderungen der Globalisierung*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, Vol. 67, p. 130.

3. The freedom to engage in economic activity enjoyed by one person is limited by the freedom of another.

This can only work if the individual can defend himself when limits are overstepped. He must be able to assert his rights.

The state must therefore ensure:
a) that there are effective and impartial courts which can be invoked by all and
b) that there is an effective system of criminal prosecution to sanction serious – criminal – transgressions and breaches. If there are no effective sanctions breaches will be rewarded by economic gain which – though unlawful – goes unpunished. This constitutes a violation of the right to freely engage in economic activity of the victims of such action.

Once again, responsibility for ensuring that decisions are just, and that the liberty of the individual is protected and defended lies with those who take these decisions: every judge, every public prosecutor and every lawyer.

Responsibility for creating the statutory basis for an effective judiciary lies with the legislative power. The executive, for its part, must allow the courts to act independently and impartially.

4. A pre-requisite for real freedom of the individual is the capacity to exercise the right to freely engage in economic activity

For someone who is forced by circumstance to devote all their time and energy to simply surviving the right to freely engage in economic activity is academic. A state which values the freedom to engage in economic activity will seek means to provide its citizens with the economic means to exercise that freedom.

This explains why the duties of states to proactively shape, protect and ensure the capacity of all citizens to make use of the constitutionally guaranteed freedoms are so important in Europe, particularly in Continental Europe. This view was not always prevalent but was advanced by the excesses of the industrial revolution in the 19th century and two cataclysmic world wars in the 20th century.

The European welfare states set themselves the goal of assuring that as many citizens as possible were able to enjoy the freedom to engage in economic activity.

The principle of the welfare state places on the state an obligation to guarantee that the basic needs of its citizens are met[46].

Active measures of this type curtail the freedom of economic entities by imposing limits in fields like employment, environmental regulations, taxation, etc.

[46] For information on "services of general economic interest" despite deregulation and globalisation: Bull, *Daseinsvorsorge im Wandel der Staatsformen*, Der Staat 2008, pp. 1 ff

A particular challenge is how to sustain such principles when it is relatively easy for such economic entities to move operations to other less restrictive countries. It remains to be seen whether the European countries with their rapidly ageing populations have the energy and the courage to meet this challenge and whether in the long term politicians, jurists and economists will find a constructive way to balance the conflicting demands of the law and the economy.

In addition to the action which is required at national level, international cooperation will grow in significance. One vital aspect of this will be regional integration, especially cooperation between immediate neighbours.

This is illustrated by the struggle to adopt a uniform European position on regulating the financial markets[47], the difficulty in reaching an agreement on how to address the effects of climate change and the discussions on a European constitution[48].

International communities – like legal entities – cannot act alone. The member countries and their representatives must always take an active role.

It is up to the individual persons in charge to act.

5. To do all this a state needs resources.

a) No state can fulfil all the above tasks and challenges unless it has qualified and motivated staff.
This is one reason why the countries of Europe and the European Union aim to be an attractive employer for a young and qualified elite. This is not always easy, one factor being that the material incentives to work for the state in Europe are well below the rewards offered by large companies.
Another factor is that if the activity of the state is to have sustained and long-term success it must have the positive acceptance and support of the whole people[49].

b) Furthermore, the state needs revenue.
With the exception of oil and natural gas in Norway, Western Europe's natural resources are long depleted. It is therefore essential that the countries of Western Europe levy taxes on individuals and companies.

Taxes are high throughout the major European countries.

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[47] Sarkozy dictates bonus rules to France's banks, Frankfurter Allgemeine Zeitung of 27.08.2009

[48] For information on the current German position see the decision of the Federal Constitutional Court on "Lisbon", BVerfG NJW 2009, 2267 ff; BVerfG, 2 BE 2/08 vom 30.06.2009, http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html; or prior to ruling
see Bryde, Demokratisches Europa und europäische Demokratie, in Gaitanides/Kadelbach/Rodriguez Iglesias (ed.), Europa und seine Verfassung, p. 131

[49] For information on the normative power of the constitution: *Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland,* 20th edition, § 1 para 41 ff; Loughlin, *In defence of Staatslehre,* Der Staat 2009, p. 1/24

6. A state which can provide these pre-requisites can safeguard the freedom to engage in economic activity by proactively limiting and enforcing that freedom.

By limiting the freedom the state protects it from being destroyed by the very forces which it creates. At the same time it assures all its citizens with the freedom to engage in economic activity.

B. African Perspective

I. The place of the right to free enterprise in human rights

Human rights are generally defined as prerogatives and faculties inherent to human beings which promote their well being and dignity. As human rights are inherent to the human person, they therefore exist independently of their proclamation and development in the legal order of a State[50]. If one considers the recognition of human rights by States, they can be defined as being "… the sum of the individual and collective rights recognised by sovereign States and codified in their constitutions and in international law"[51].

They may be grouped into three categories: civil and political rights referred to as first generation rights; economic, social and cultural rights referred to as second generation rights and solidarity rights referred to as third generation rights.

The right to free enterprise is one of the rights referred to as second generation which were born after the civil and political rights and were aimed at the social injustice generated by the industrial revolution.

It was realised that the traditional liberties had little meaning for all those who do not have the material resources necessary to actually enjoy these liberties: for example, what value does the inviolability of the home represent for someone who does not have a home or the liberty of the press for those who have no access to publishing media[52]?

This led to claims for new "economic and social rights". Contrary to the fundamental civil and political rights ("droits-résistance"), these are rights ("droits-créances") which call for positive action on the part of the public authorities to achieve them. Far from replacing the classical liberties, these rights make them complete and allow them to take concrete form. The right to property, the right to trade, to exercise an art and craft, the right to work, the right to free association, the right to free trade unions, the right to strike, the right to marry and found a family.
It should be noted that in the context of this paper allusion shall be made solely to the free enterprise in economic matters referred to as "free commerce and industry" in Congolese legislation.

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[50] This definition corresponds to the jus naturalist perspective which was the origin of the human rights concept.

[51] Manfred Nowak, Droits de l'Homme. Guide à l'usage des parlementaires, Union Interparlementaire, Haut Commissariat aux droits de l'Homme, 2005, p. 1; see also Pierre Akele and Jacques Djoli Eseng 'ekeli, "Enjeux de la démocratie en République Démocratique du Congo", in Pour l'épanouissement de la pensée juridique congolaise. Liber Amicorum Marcel Antoine Lihau, Bruylant (Brussels) – Presses de l'Université de Kinshasa (Kinshasa), 2006, p. 27.

[52] Rusen Ergec, Introduction au droit public. Tome II, les droits et libertés, Brussels, Kluwer Editions Juridiques Belgique, 1995, p.4 ; Danièle Lochak, Les droits de l'homme, Editions La découverte, Paris 2002, p.5

Is such a right an absolute one? What are the conditions for its existence and where do its limits lie? Does the State guarantee the effectiveness of this right?

Are citizens, who have the right to claim this right, in a position to enjoy it?

Have they the vital minimum to make this civil liberty a reality so that the right to free enterprise does not remain an empty shell or vain wish?

So many questions, the answers to which will form the framework of this paper.

The case of the Democratic Republic of Congo will of course be set out in detail before noting some references in member countries of the OHADA and the SADC.

II. The historical evolution of the right to free enterprise in the DRC

It should be highlighted first of all that in economic matters, the principle of free enterprise was always subject to spatio-temporal contingencies. In other words, the exercise of free trade and industry as the right for each person to freely choose his professional activity, to create and manage economic enterprises, clashes with the desire of States to intervene in economic matters of a political nature, as Jean RIVERO conceded in his course on civil liberties. So each of these can decide if there is cause to establish some restrictions, in particular, by breaking equal competition by the support given to one enterprise or another, or by prohibiting one subject or another from having the right to such and such a professional activity.

So this principle has evolved differently in the Congo from one point of time to another in its history.

1. The ratification of this liberty during the Free State of Congo period[53]

The signatory powers to the General Act of Berlin of 26 February 1885 which had led to the division of Africa and had conferred upon Leopold II, the King of the Belgians, the territory called the Free State of Congo, ratified free trade and the internationalisation of the Conventional Congo Basin was bounded by the watershed line of the adjacent basins including the Niari, Chari and Nile basins to the north, by the eastern watershed line of the affluents of Lake Tanganyika to the east and by the watersheds of the Zambezi and Lozi basins to the

[53] The first text which can be associated with this principle is the Edict of Turgot which, under Louis XVI, abolished the corporations in February 1776, thus establishing the first form of free commerce and industry, the text stipulated that "Any French or foreign person was free to embrace and exercise in our kingdom and in particular in Paris whichever type of commerce and profession of arts and crafts which he so wished and even to exercise several at the same time". This principle was finally to be proclaimed in the law of 2 – 17 March: the Decree of Allarde, a text with fiscal implications which established the trading licence: "As from 1st April of next year, any person is free to exercise whichever trade, profession, art or craft which he deems appropriate, but shall be required to acquire a licence to do so in advance, to pay the price according to the established rates and to comply with any existing or future police regulations". So this principle is intended to be a barrier to corporatism and to regulations issued by the State which could hinder the exercise of this liberty.

south which was considered to be full of new riches[54] following the explorations made by Stanley.

Indeed, the General Act of Berlin of 26 February 1885 made the Congo a land which was wide open to trade and navigation in which foreigners enjoyed an extremely favourable treatment.

The first article of the Act clearly stipulates that *"all the signatory nations will enjoy total freedom of trading within the boundaries of the geographical Congo basin."* This freedom of trading in the Congo basin and its estuaries excluded any signatory power from granting monopolies in commercial matters (art. 5).

As Professor Jacques De BURLET states, the desire to open up the African and Congolese lands in particular to trade had led the major powers to introduce into the General Act of Berlin a clause exempting goods imported in the conventional Congo basin from all import and transit duties.

However, given the unfortunate consequences of this clause for the survival of the Free State of Congo which found itself bankrupt, this measure could not be applied for a long time and the Brussels declaration of 02 July 1890 tempered this freedom by authorising a tax, under certain conditions, on imported goods of up to 10% of their value at the port of export.

Even at this level, it can be noted that the States made their agreement to the setting up of these 10% import duties conditional on the signature of a friendly treaty on trade and navigation with the EIC which was done (see Bull off. 1982, p. 100; and said treaty was repealed in 1924).

Once again this treaty reaffirmed the total freedom of trade and industry and navigation between the inhabitants and citizens of both parties.

2. The ratification of free enterprise during the Belgian Congo period

This principle was ratified by the Convention of Saint-Germain-en-Laye of 10 September 1919 which had replaced the General Act of Berlin of 26 February 1885 of which some clauses had been the subject of heated controversy, in particular that of Article 5 prohibiting the possessionary powers in the conventional Congo basin from granting any privilege whatsoever in commercial matters in the Territories which constitute it.

Although it maintained the main principles of the General Act of Berlin with regard to free trade and navigation, especially in that article 4 had set out again the principle of prohibiting monopolies and privileges decreed by article 5 of the General Act of Berlin, the Convention of Saint-Germain-en- Laye had made innovations by making the equality of treatment of nationals and foreigners subject to the necessities of public order and tranquillity[55].

[54] KANDE BULOBA, Droit commercial, photocopied notes, Faculty of Law, ULK, 2005-2006, p. 19

[55] See K OLONGELE Eberande, Antinomie entre les accords d'exclusivité et le principe de la liberté du commerce et de l'industrie, Dissertation, Faculty of Law, University of Kinshasa, 1999.

From then on, according to the letter and spirit of this convention, the possessionary States had the right to create restrictions to free trade whenever necessary to protect themselves against influences which could jeopardise their existence and internal tranquillity, that is to say, whenever the necessities for developing the colony required it. But this text was at pains to point out that no regulation could stipulate different treatments between the nationals of the signatory powers and the member states of the Society of Nations which adhered to this convention.

In other words, according to article 4 of this convention, the freedom of trade and industry could be undermined each time the colony's development required monopolies or privileges.

The freedom of trade and industry was then protected during this period by penal legislation, in this case by articles 143 and 144 of the penal code, book II, sections IV and V made infringement of free trade and navigation offences.

3. The principle of free trade since the Democratic Republic of Congo

One has to agree with Professor LUKOMBE NGHENDA that as soon as independence was obtained on 30 June 1960, the Congo did not make any clear declaration its new legal order ratifying the principle of free trade and industry. There is no specific mention of this in the fundamental law of 17 June 1960 on civil liberties.

However, the Constitution of 1st April 1964 broke this silence by specifying clearly in article 44 "the exercise of commerce is guaranteed to all Congolese on the territory of the Republic in the conditions set out by national law"; article 46 goes on to say "Any foreigner on the territory of the Republic enjoys the protection afforded to nationals unless an exception is made by national law", which proves that even foreigners enjoyed free trade and industry.

In 1967, even although an article in the transitional arrangements of the Constitution of 24 June 1967 had in principle made provision to keep in force the treaties concluded by Belgium prior to 30 June 1960, the Congo following the usual line of conduct of sovereign states, especially in quest of economic independence, had not really applied the directives on the equality and freedom of trade set out by the Convention of Saint Germainen- Laye. For the laws which followed, in particular in 1974 and 1977 discriminate against foreigners in relation to nationals and even created discriminations amongst foreigners.

It was not until the transitional constitutional act of 09 April 1994 that this principle was clearly proclaimed and guaranteed to nationals and foreigners under the terms and conditions for trading set out by the laws of the Republic. As could be expected in the negotiations of the Global and Inclusive Agreement, this principle was included in its entirety and in the same terms in the Transitional Constitution of 04 April 2004.

III. The principle of free enterprise in the Constitution of 18 February 2006

The Constitution of the Democratic Republic of Congo of 18 February 2006 stipulates, in article 35, that the State guarantees the right to private initiative both to nationals and foreigners.

1. The foundation of the principle

The exercise of commerce in the Democratic Republic of Congo is closely linked to the notion of liberty which, if Montesquieu is to be believed, is "*the good from which other good springs*".

In Congo, anyone has the right to trade in compliance with the laws governing commerce. This principle of free trade, already laid down in France by the Allarde Decree of March 1971, is ratified by the fundamental Congolese law, in this case articles 34 and 35 of the Constitution of the Republic of 18 February 2006.

Article 34 of this fundamental text determines that *"private property is sacred. The State guarantees the right to individual or collective property acquired in accordance with the law or the custom. It encourages and safeguards private, national and foreign investments(…)".* And article 35 adds that *"the State guarantees the right to private initiative of both nationals and foreigners. It encourages the exercise of small businesses, arts and crafts by the Congolese and ensures the protection and promotion of national expertise and competencies (…)"*

This means that in the Congo the principle of free trade and liberty is the rule which applies in matters relating to the exercise of commerce both by foreigners and nationals and is established on a constitutional basis.

Therefore the principle of free trade is one of the fundamental rights guaranteed by the constitution of the country which no law can set aside.

Nevertheless, these texts leave it to the legislator to organise in concreto the practical exercise of this right of free enterprise by defining the different cases of limitation and the conditions for exercising this freedom. This is the case of law no. 73/009 of 05 January 1973, known as the special law on commerce.

But what is meant by the principle of free enterprise in the Congo?

2. Substance of the principle of free enterprise

Free enterprise is a vast concept which essentially has twofold substance in commercial matters. On the one hand, it implies the right guaranteed to each citizen to devote himself to the exercise of any trade or industry of his choice (the freedom of trade and industry); on the other hand, it guarantees every trader the right to compete with other traders in the exercise of the profession in question, as trade in general is not the exclusive property of any individual (free competition). Free competition thus becomes the obligatory corollary of free trade and industry.

a) Free trade and industry

Despite the observation made by Professor Jacques De BURLET according to which "in commercial matters, the Congolese State complied with the habitual conduct of sovereign States which discriminate against foreigners in relation to nationals and make discriminations amongst foreigners depending on the interests of the moment" one cannot but remark with

Professor LUKOMBE NGHENDA that by virtue of the legal principle according to which "that which is not prohibited is allowed", one has to admit that free trade and industry is still ratified in the Congo even for foreigners.

The substance of this principle means on the one hand that any person, national or foreigner, an individual or corporate body, who has the status of trader may engage in any trade or industry of his choice, either by setting up a business for the first time, or by developing an existing activity and managing it as he deems fit.

In addition, this principle involves the right for any person engaging in trade to enter into business relations with the people of his choosing, to establish his business anywhere he likes in the Republic, to start and cease trading at the time he judges necessary and opportune.

Finally, even though this liberty may be restricted by a great number of provisions, it remains the rule in that all commercial or industrial activity which is not expressly prohibited or declared outside commerce is allowed. Free trade is thus considered to be a civil liberty which tolerates no distinction in its exercise, unless by law, with its consequence being that all traders are equal before the law and subject to the same rules.

b) Free competition

Having realised that free trade and industry might only be a vain wish if it was not accompanied in practice by true freedom of action on the part of professionals, the legislator ratified this second aspect of free trade, namely free competition, with the difference that this second aspect is not ratified in the constitution as is the first.

Free competition involves the acknowledged right for every trader to put sufficient, honest means[56] into place to gain customers on the economic market, if necessary, by winning someone else's customers, thus making competitive damage lawful. For customers, in principle, do not belong to anyone if not to the person who knows how to win them, on condition that he does so in accordance with the law and honest business customs and practice.

Therefore, some practices will be sanctioned[57]despite this principle if a competitor resorts to unfair acts (denigration, confusion, etc.), to anticompetitive practices whether individual (abuse of dominant position and monopolisation) or collective (illicit agreements, etc.)[58].

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[56] The legislator lists examples of acts considered to be contrary to honest practice in commercial and industrial matters (legislative ordinance no. 41/63 of 24 February 1950, article 2). This list goes from acts of confusion to acts of denigration, acts of sabotage to acts of industrial espionnage, to deceit as to the origin of products, to non-authorised use of a competitor's material, or his designs and models. It is aimed in general at all acts contrary to honest practice used by "a trader, a producer, an industrialist, or a craftsman to attack the credit of a competitor, or to take away his clients, or to generally attack his ability to compete", article 1, legislative ordinance of 24 February 1950; Roubier gives a classification of unfair means of competition under 4 headings: means of confusion or imitation; denigration; the internal disruption of a rival enterprise; the general disruption of the market (LAMY, concurrence, distribution et consommation, Lamy, Paris 1986, p. 562; AZEMAT, Droit français de la concurrence, 2nd edition, PUF, Paris 1989, pp. 97 ss.) Other laws such as the decree of 20 March 1961 as modified and completed to date and law no.82/001 of 07 January 1982 on industrial property contribute to the fight against unfairness towards competitors and consumers.

[57] MASAMBA Makela, Pour une loi sur les pratiques commerciales restrictives au Zaïre, Bruxelles, Editions De Boeck, Kinshasa, Afrique-Editions, 1986; Idem, Droit de la concurrence et de la consommation, Syllabus,

Restrictions to free competition may be authorised in some cases by a specific text making such a restriction licit. This is the case for various legal monopolies granted to certain public enterprises (for example, the SONAS, the Regideso and the SNEL each have a monopoly for the social object entrusted to them - namely, insurance, the distribution of water and electricity – over the entire national territory, thus excluding all private competition in this sector).

It is appropriate to highlight the 2008 reform which, from the point of view of the legal framework, is founded on the provisions of articles 122 and 123 of the Constitution of the Republic of 18 February 2006. It had become imperative to ensure that the State portfolio had an appropriate institutional framework for the private mode, capable of imposing a new dynamic for its management, and promoting profitability and facilitating, if necessary, the disengagement of the State. In the public enterprise sector, the option for liberalising the economy and insufficient resources had led the State to review its role in the production and trading sectors with a view to devoting itself more to its regulatory mission.

Similarly, considering the specific nature of certain lucrative activities which require specific know-how, the legislator requires that a candidate wishing to devote himself to such an activity must fulfil a certain number of specific conditions to exercise said trade. This is the case for people wishing to trade in and sell medicines and other specific products where the profession requires specific diplomas as pharmacist or other specific titles (for example trademark owner). Here competition is open solely to those people who met these conditions.

So if practices contrary to the imperative rules in matters of competition and/or to honest business practice are committed, they may, depending on the case, fall under the provisions of a violation of legal monopolies or as acts of unfair competition and, in some cases, that of counterfeits[59].

IV. Scope and tempering of the principle of free enterprise in Congolese law

1. Scope

a) Freedom guaranteed to nationals and foreigners

The Congo guarantees the right to any person wishing to do so to exercise any commercial activity of his choice on its territory, to set up where he likes, to manage said activity as he deems fit, to seek the aid of the partner of his choice, and the right to cease trading at any time.

Université de Kinshasa – Droit des affaires. Cadre de la vie des affaires au Zaïre, Cadicec, Kinshasa - De Boeck, Brussels, 1996, pp.108-110 ; KUMBU ki Ngimbi, Législation en matière économique, Ed. Galimage, Kinshasa 2009, pp. 64-66.

[58] Congolese law does not make provision for specific rules on agreements and dominance. Given its level of economic development, the DRC cannot pretend to offer many examples of huge enterprises which are monopolistic in nature. The provisions suppressing illicit coalitions could, if need be, serve as an instrument to fight against the abuse of agreements and dominance.

[59] KUMBU ki Ngimbi, Droit de la propriété intellectuelle, Teaching manual, see counterfeiting, Galimage, Kinshasa 2009.

Article 34 of the Constitution of 18 February 2006 states that *"private property is sacred. The State guarantees the right to individual or collective property acquired in accordance with the law or the custom.*
It encourages and safeguards private, national and foreign investments(…)". And article 35 adds that "*the State guarantees the right to private initiative of both nationals and foreigners. It encourages the exercise of small businesses, arts and crafts by the Congolese and ensures the protection and promotion of national expertise and competencies (…)*

b) On the non absolute nature of this freedom

If one takes a closer look, there is nothing absolute about this freedom except in principle, as the laws and regulations of the country which the constitution entrusted with the task of fixing the practical terms and conditions for this freedom stipulate a number of limitations which consist essentially of cases of incapacity, incompatibility and forfeitures.

So Professor AZAMA LANA (in the legal guide to enterprise) did not fail to point out in this respect that the limitations to this principle are many and that their justification is different.

Professor Alain COMLAN therefore argues that the law prohibits some people who have been bankrupt and convicted and are judged undesirable from exercising a commercial activity often due to a need to clean up commercial activities. It depends on the moral standard required in the exercise of that profession.

It is also necessary when someone is already exercising an activity which requires impartiality, even disinterest, that he may no longer engage in trading as this is an activity too tainted with speculative gain; said activity would be incompatible in this case with the exercise of a commercial activity. This is the case for magistrates and civil servants.

Moreover, commercial activity was also considered to be a dangerous activity and as such it was necessary to regulate access to it so as to protect some people who unable to support its vagaries, as is the case for minors, adults, the mentally ill, the insane, prodigies.

So there was a need to study the way in which the laws and regulations shaped the freedom to exercise a trade (1). And as the Congolese economic area is filled with a good number of foreign economic operators, particularly in the import and manufacturing sectors, and given the fact that the Democratic Republic of Congo, following the example of many modern States, discriminates against foreigners to a certain extent even in commercial matters, it would be interesting to focus specifically on the particularities of the principle of free trade and industry with regard to traders of foreign origin (2).

2. Tempering

a) Tempering linked to economic public order and to protecting the public interest

The principle of free enterprise is subjected to heavy legislative limitations which may cast doubt on its true scope. There are conditions to be met and true constraints which cannot be ignored in the name of a principle. Free enterprise has a constitutional value and imposes itself on the law, but it is neither general nor absolute, it can only exist in application of the law. The legislator is thus allowed to make limitations required by the public interest on condition that these do not distort its scope. So the law cannot question free enterprise, but it must put it into practice.

aa) Nature of the activities declared outside commerce by the law Article 27 of Book III of the Congolese Civil Code states: "Only items of commerce may be the subject of agreements". A contrario, things which are outside commerce cannot be the subject of agreements. In DRC, there is no trading in weapons of war and other military items, human corpses and human flesh, drugs and other psychotropic substances, food which has gone off or is otherwise unfit for consumption, counterfeit items.

bb) Qualification of people
(1) Incapacity to engage in trade
As engaging in trade requires a certain amount of maturity to foresee risks and accept imponderables, the legislator judged it essential to have the legal capacity to practise this profession.

So he started by laying down the principle that ***"in commercial and civil matters, capacity is the rule, incapacity being the exception"*** and did so in application of article 23 of CCCLIII which specifies that *"any person may bind himself by contract unless legally declared unfit to do so"*

He nevertheless judged that there was a category of people who did not have or no longer had this maturity who had to be deemed unfit to engage in trade on their own. These people are declared unfit by law and are subject to specific protection regimes.

This is the case for minors, whether emancipated or not, adult prodigies, feeble-minded adults, the insane or mentally ill, and the specific case of married women.

(a) Minors
Article 219 of law no. 87-010 of 1st August 1987 on the Family Code determines that "*a minor is an individual of either sex who has not yet reached eighteen years of age*". The law states that until he becomes of age or is emancipated this minor remains under the authority of those who have parental authority or guardianship over him with regard to the administration of his property and his financial interests (art. 221, para. 2).

So this means that the commercial ability of the minor to exercise a lucrative activity himself is limited. In this context, the decree of 02 August 1913 on traders and the proof of commercial commitments makes a distinction depending on whether or not the minor is emancipated.
- In the case of a non-emancipated minor, the principle is that he is legally incompetent either to engage in trade himself or through his representatives (father, mother or guardian). Such a minor who engages in commercial activities despite this absolute legal

incapacity will in no way acquire the qualification of trader, deeds done in this way will be deemed void (relative) which only the minor or his legal representative may invoke. Consequently, such a minor may never be declared bankrupt as he was never a trader.
- As for the emancipated minor, the authoritative and abundant doctrine followed by jurisprudence teaches that the emancipation of the minor leads to his full capacity (art. 292 law no. 87/001 of 1st August 1987 on the Family Code).

But this full capacity on the civil level is attenuated in commercial matters as art. 6 of the decree of 02 August 1913 determines that *"any emancipated minor of either sex may engage in trade and is reputed to be of legal age with regard to contractual commitments made by him on commercial grounds,* ***on condition that he has the prior authorisation of the person who exercises parental authority or guardianship over him"***.

Consequently, the commercial freedom of the emancipated minor is subject to the requirement for authorisation from the parent or guardian given in a declaration made before a career magistrate, auxiliary magistrate or notary (art. 6, para. 2). Only a legal judgement can retract such an authorisation (art. 7, para. 2).

(b) Insane or sectioned adults
From a legal point of view, an adult who has been medically certified insane and who has been sectioned is in the same class of commercial capacity as a nonemancipated minor. It is strictly forbidden for him or his representatives to engage in trade.

(c) Prodigies or the feeble-minded
This category of people means adults or emancipated minors whose mental or physical faculties have been permanently altered by an illness, an infirmity or a weakness due to age (art. 298 FC) and this has been certified by a judge on the basis of an expert medical opinion.

It is known that in civil matters these people are placed under the welfare protection regime by means of a guardian appointed by a judgement rendered by the justice of the peace (art. 310 to 312 FC).

In commercial matters, it was always considered that such people could not engage in trade in these conditions, as the guardian's agreement would be required in each case for the commercial operation of the person concerned to take place. Moreover, as they are also prohibited from carrying out all the operations required to accomplish some of these deeds legally, the French Supreme Court of Appeal ruled that the profession of trader was incompatible with the situation of people placed under legal supervision (guardianship).

(d) Married women
Contrary to an adult woman who is single or married but officially separated or divorced who has full legal capacity to engage in trade (art. 23 CCCLIII), a married woman who is not officially separated cannot be a trader, says art. 4 of the decree of 02 August 1913, without the consent of her husband or the district court (in the event of the husband's absence, insanity or interdiction, the effect of such an authorisation ceasing automatically with the cause which gave rise to it).

The trading wife is reputed to be fully competent for everything related to her profession; she can take legal action (art. 5) without her husband's authorisation. The legislator does not cite the case of a husband refusing authorisation as a case justifying the married woman to apply to the court to obtain such authorisation. But in practice, the judge has frequently authorised married women when there were no valid grounds for the refusal of the marital authorisation.

It should also be pointed out that if the husband called upon to give such authorisation is himself a minor, he cannot authorise his wife to engage in trade unless he himself has been authorised to do so by those exercising parental authority or guardianship over him (art. 4, para. 3 of the decree of 12 August 1913).

The legislator has not stipulated any special form for receiving marital authorisation, which means that even the husband's tacit authorisation may be allowed. The legislator will have to specify this as he has done for the emancipated minor.

If, despite the absence of marital or legal authorisation, or the husband's refusal, the married woman were nevertheless to engage in trade (although she is in principle legally incapable to do so), she still does not acquire the status of trader and, consequently, cannot be declared bankrupt.

(2) Incompatibilities and forfeitures
Incompatibilities involve the case of people who are normally capable to engage in trade, but are unfortunately forbidden to do so by the legislator due to noble, public interest functions entrusted to them, functions which do not lend themselves to the simultaneous exercise of activities tainted with too much speculation, as they require great dignity: this is how civil servants, magistrates, officers, non-commissioned officers, members of the liberal professions subject to a professional body, such as lawyers, doctors, pharmacists are forbidden from engaging in trade.

If, despite the incompatibility to which they are subject, the aforementioned people still manage to engage in trade, they expose themselves to disciplinary sanctions imposed by the competent authority, subject to more serious sanctions such as the party concerned being struck off by the order of which he is a member.

As far as the strictly legal regime is concerned, it must be pointed out that commercial acts carried out professionally by such an individual are legally valid and give him the status of trader, with the possibility of him being declared bankrupt should he cease to make payments or become indebted.

As regards forfeitures, these involve the ban on trading for all those who have demonstrated fraudulent behaviour in the past when such behaviour has resulted in their conviction for offences under common law or specifically business law (for example, swindling, abuse of trust, handling stolen goods, bankruptcy, fraud, usury…).

If these people do not comply with the ban on trading, they face penal sanctions. They do, however, qualify as traders for commercial transactions made by them in a professional capacity and may be declared bankrupt if they cease to make payments or become indebted.

cc) State interventionism

Interventionism is the fact either of national authorities excluding all private competition through legally created monopolies, or local authorities which create many services to the extent that this has been referred to by some as "municipal socialism". The detrimental effects of "laisser-faire" liberalisation led the Congolese State to set up public enterprises which were governed by law no. 78/002 of 06 January 1978 on the general regime applicable to public enterprises. Among these were also public enterprises which were industrial and commercial in nature and traditionally in the private sector. There was, however, a problem with regard to the profitability of these production units which were often referred to as "lame ducks". And the search for exit strategies led to the idea of their reform[60]. It was important to ensure that the State portfolio had an appropriate institutional framework for the private mode, capable of imposing a new dynamic for its management, and promoting profitability and facilitating, if necessary, the disengagement of the State.

dd) Prohibition on acts of unfair competition, agreements and monopolies (or dominant positions)

A liberal economy is not about letting anything happen. It requires commercial legislation and compliance with precise rules even if only those on competition which involves, amongst other things, the prohibition on subsidies, price agreements, of ensnaring customers on the pretext of loyalty schemes, counterfeits and positions of monopoly etc. The entrepreneur or trader who engages in certain activities which are contrary to normal commercial practice runs the risk of having his civil responsibility questioned in legal action for unfair competition instigated by any competitor who has been a victim of such unfair acts. In the Democratic Republic of Congo, such matters are governed by the legislative ordinance no. 41/63 of 24 February 1950 on unfair competition.

In the spirit of this legislative ordinance, manoeuvres aimed at enticing customers away from a competitor or fraudulently using his reputation (parasitism), as well as acts which lead to market disruption due to abusive practices or the exercise of an irregular commercial activity are acts which constitute unfair competition. It may also be a disclosure on the part of a former employee of industrial secrets of the company which he has just left.

Trademarks, patents and other intellectual property rights are protected by legal action on counterfeiting, but they make also give rise to legal action on unfair competition if the requirements for the counterfeiting action are not met or if the sanction covered wrongful acts independent of the facts constituting the counterfeit.

Article 258 of the Congolese Civil Code book III decrees a general obligation not to harm other people. So if, by principle, competition is free, unfair competition will make it possible to sanction the excessive use of this liberty. It must be noted that the acts of unfair

[60] J.P. MWANZA M., « Entreprises publiques. Les péripéties d'une réforme adoptée après moult soubresauts », in *La Référence Magazine,* n° 57, January 2008, pp. 40-41

competition covered by article 2 of legislative ordinance no. 41/63 of 24 February 1950 are by nature not solely for ensuring the cleaning up of competitive relations, but also promote consumers' interests in doing so. For unfair competition is also detrimental to consumers in one way or another: confusion sometimes causes them to move away from an establishment which is attentive to their rights (or from a respectable product or service quality) towards a more unscrupulous economic operator (or a mediocre product or service quality). So it is regrettable that consumers are deprived of the means to instigate legal action in unfair competition, action which the afore-mentioned legislative ordinance no. 41/63 reserves for competitors[61].

b) Specificity of the principle of free enterprise for foreign nationals

aa) Situation of foreign traders before law no. 73/009 of 05 January 1973

Since the proclamation of the principle of free enterprise in the Congo, before the afore-mentioned law, there were two main restrictions on the commercial liberty of foreign nationals:
- Traders of foreign nationality could only live and work in the Congo once they had obtained a work permit;
- Likewise, their registration with the trade register (the main effect of which is to have recognition of the status of trader in the profession concerned) was and still is subject to financial guarantees ranging from 20,000 to 50,000 zaires deposited with a Congolese bank in the Congo according to the terms and conditions stipulated by ordinance–law no. 66/260 of 21 April 1966 making the registration of foreigners, foreign companies and some Zaireans with the trade register subject to financial guarantees.

Article 1 of ordinance no. 69-016 of 21 January 1969 on measures for implementing the afore-mentioned Ordinance-Law no. 66/260 stipulates that the existence of the bank deposits required by law is proved by one or more certificates issued by the depository banks to the depositors.

It should, however, be noted that Ordinance-Law no. 67-404 of 23 September 1967 which is in complement to Ordinance-Law no. 66/260 exempts foreign nationals from the obligation to hold these funds in a deposit account if they own property in the Congo to a value equivalent to the amounts required as financial guarantee (art. 1).

bb) Changes in the commercial freedom of foreigners since the law of 05 January 1973 to the present day

Since the afore-mentioned law no. 73/009, certain innovations have been made, materialised in two principles:

(1) The law of 05 January 1973 specifically on commerce laid down the principle of the exclusion of foreigners from exercising commercial activities in article 5, namely the import,

[61] MASAMBA Makela, in www.congolegal.cd; MUSOY Kalala, De la protection des consommateurs par la répression des actes de concurrence déloyale en République Démocratique du Congo, Dissertation , Faculty of Law, Unilin, 2006-2007, pp 29-30.

export trade, transit, wholesale, retail wholesale, retail trades and services reputed to be commercial by the law.

The above activities are reserved exclusively for nationals.

Itinerant trade by road, river, lake or air and the remunerated transport of people by automotive vehicle were deemed part of the retail trade.

However, this text made provision for the principle of excluding foreigners to be tempered in two ways:
- Article 2 of this law makes provision for the possibility of the President of the Republic to authorise foreigners by means of an ordinance to exercise the trading activities specified by the latter;
- Whereas article 24 makes provision for foreigners already established in the Congo on the day on which this law entered into force to benefit from a similar dispensation to the one stipulated by the afore-mentioned article 2. Those already established may continue their activities while waiting for this dispensation to be granted.

(2) In addition, this 1973 text laid down a second principle, namely the prohibition of triangular trade, that is to say, the recourse by traders to intermediaries to make commercial transactions between foreign suppliers (or Congolese exporters) and Congolese importers (or foreign addressees).

The legal basis for this principle is article 14 of this law. Here too there is provision to temper this in two ways:
- Article 18 makes provision for the Bank of the Congo to have the power to authorise the setting up of agencies abroad, which were prohibited by the principle laid down in article 14;
- Article 19 adds that importers who have an exclusivity clause are authorised to place orders with the agent instead of the manufacturing or production factory as required by article 14.

Sanctions for failure to comply with this decree are stipulated in articles 21 and 22: fines, prison sentence, ban on trading or deletion from the trade register.

cc) Trading under the regime of law no. 77-027 of 17 November 1977 on the retrocession of Zairean or radicalised property

(1) Principle of association
Article 2 of this law states that for all companies conducting business in the Democratic Republic of Congo, the share retained by foreign individuals or companies may not exceed 60% of the share capital, the rest of the shares making up the remaining maximum of 40% must be held by Congolese.

(2) Right to State participation
Article 4 states that the Congolese State reserves the right to participate in some areas of national interest, in particular, the mines, energy, the forest, maritime, fluvial, air and rail transport.

(3) Ownership of property acquired by Zaireanisation
Article 5 grants the ownership to the Congolese of the farms, livestock, small enterprises and plantations acquired by the Zaireanisation measures except in the case of duly certified bad management, the Government reserves the right to take away some affairs to entrust them to the individuals or companies which it shall designate.

dd) Small business
Following the example of the colonial legislator, the Congolese legislator has dedicated, directly or indirectly, a number of laws to small business.

(1) The Ordinance-Law no. 79-021 of 02 August 1979 on regulating small business
- Notion
This text has the merit of having defined the term *"small business"* for the first time in Congolese law. In article 2 it defines small business in these terms: *"the commerce of all foodstuffs, merchandise, or common consumer goods made by the sale or the offer of sale to the purchaser, either in the seller's own home, door to door or from place to place, or even on the public highway or public square, unless the stall or display constitutes the continuation of a shop."*

This same text deems to be small businesses the short-haul transport of people or merchandise and all craft businesses within the limits set by the joint decree of the ministries responsible for Finance, the Economy, Industry and Commerce[62].

BOLITENGE LOPOKA observes that when the definition just given is studied closely, it can be seen that the Congolese legislator of 1979 had taken part of the text from the definition of itinerant commerce. The activities in this sector are effectively practically of the same nature[63].

So this definition does not make it possible to draw a precise line between small business activities and business activities in general. It was therefore necessary to draw up a criteria which makes it possible to make a clear distinction between these two types of business. This is what gave rise to the Ordinance-Law no. 90-046 of 08 August 1990 which we will mention in the lines that follow.

- Principle
This Ordinance-Law excludes foreigners from having small businesses and does not make provision for the possibility of foreigners having small businesses even with the authorisation of the President of the Republic.

- Condition for trading and sanction (art. 1, para. 1)

[62] Art. 2 of Ordinance-Law no. 79-021 of 02 August 1979 regulating small business
[63] BOLITENGE LOPOKA, *La réglementation du petit commerce et son application en droit congolais,* Dissertation, Faculty of LawDroit, University of Kinshasa, 2005

Trading requires a licence issued in principle by Kinshasa City Hall and by the district authorities. But for some time, this has been issued by the mayors acting by proxy. Noncompliance with the conditions laid down by this Ordinance-Law is subject to the sanctions stipulated in article 12 of this text, namely imprisonment and a fine or both at the same time, the confiscation of merchandise.

(2) The Ordinance-Law no. 90-046 of 08 August 1990

The Ordinance-Law no. 90-046 of 08 August 1990 regulating small business has not been published to date in the official journal. This issue is the subject of a discussion on doctrine as to the applicability or otherwise of this text to foreigners. Be that as it may, the violation of this text is more than evident in practice.

But, contrary to the previous texts, this ordinance law has the merit of having found a criteria which makes it possible to distinguish between small businesses and business in general given that the legislator defines it from now on with reference to maximum turnover.

Under the terms of article 3 of the text being studied, small business means the business of selling small quantities of goods the total value of which does not exceed four hundred thousand zaires.

But, given the frequent devaluation of the zaire currency, the legislator has allowed the President of the Republic to authorise the Ministers of the Administration of the Territory and Decentralisation, of Finance and of Industry, Commerce and the Craft Industry to readjust by means of interministerial decree the turnover limits for the application of the licensing regime and the rates of annual tax in relation to the evolution of the economic, social and monetary situation[64].

(3) The decree-law no. 086 of 10 July 1998

This text does not actually define small business; but it sets out the fiscal regime applicable to SME on professional revenues and domestic turnover.

This is a fiscal reform and not a new approach to small businesses. And the SME are split into four categories here:

- SME with an annual turnover of more than 300,000 CF;
- SME with an annual turnover of between 300,000 CF and 150,000 CF;
- SME with an annual turnover of between 150,000 CF and 75,000 CF;
- SME with an annual turnover of less than 75,000 CF[65]

(4) Law no. 06/004 of 27 February 2006

This law splits SME into the two categories below:

- SME with an annual turnover between the equivalent in Congolese Francs of 50,001 and 400,000 fiscal francs;
- SME with an annual turnover between the equivalent in Congolese Francs of 10,001 and 50,000 fiscal francs.

[64] Art. 1 of the Ord. no. 90-161 of 08 August 1990 on measures for implementing Ord-Law no. 90-046 of 08 August 1990 on regulating small businesses.

[65] Cfr art. 3, points 1, 2, 3 and 4 of the ministerial decree n° 061/CAB/MIN/FIN/99 of 18 October 1999 with regard to the fiscal regime for SME subject to the licensing regime

On the basis of the above, small businesses henceforth can be used to mean the business done by the sale of small quantities of merchandise and craft enterprises with an annual turnover not exceeding the equivalent in Congolese Francs of 10,000 fiscal francs.

V. Conditions for the effectiveness of the right to free enterprise in DRC

The right to free enterprise can only be effective in a State under the rule of law which practices good governance. As the principle is established in a text of law, the fundamental law, it befits the DRC to be a State which applies the laws of the Republic in general and those which incorporate human rights in particular. So it falls to the Executive to make every effort to ensure that the right to free enterprise is not just a set of words in a book with no real content. This means that the State must have sufficient resources both human and financial to implement its policies. Financial resources must be well managed, for if every citizen has the minimum to exist, he may exercise his right to free enterprise.

1. Good governance

Progress towards the Millennium Development Goals has proved to be difficult in sub-Saharan Africa because the customary diagnosis for Africa is that of a continent suffering from a crisis in the exercise of power. If the latter is a problem, the development difficulties for Africa in general and the DRC in particular are much more serious. When viewed more closely, there are visible problems of very bad governance in places.

Bonnie Campbell defines governance as a set of prescriptions in administrative and political management[66]. It is usually characterised by a set of principles such as compliance with the rule of law, good management of public affairs, the fight against corruption, the respect of human rights or the promotion of democracy and participatory development.

2. Requirements for good governance

The most fundamental requirements for good governance are amongst others:

- A State under rule of law in which the force of the law is applied to all without distinction: the State under rule of law means that the executive power, the administration and the system of justice must comply with the law voted by parliament, a law which is incontestable as the expression of the general will; here, the State under rule of law sees itself as the legal State, the State of the law, with no standard being able to judge and take the place of the law made by the State. But the State under rule of law cannot be the State of any law; the laws themselves must be subject to compliance with higher standards which consequently constitute a possible control for the laws.

- Political and social stability: allusion is made here to the absence of rebellion, the desire for secession, contestation and conflicts which could degenerate and become a barrier to the creative spirit and so to free enterprise. Without political and social stability, no activity can be undertaken especially on the economic level. For that, accountable management of public affairs makes it possible to ensure political stability which results in institutional stability in

[66] Bonnie Campbell, "La gouvernance, une notion éminemment politique" in *Les non-dits de la bonne gouvernance*, Ed. Karthala, Paris 2001, pp. 259-261

daily life and less demands in terms of pacifist and/or brutal street demonstrations which create a climate of insecurity unfavourable to the development of economic activities.

- The promotion and respect of human rights and fundamental liberties: the liberty to come and go, the right to privacy, the right to private integrity, the right to security, all these rights generally gathered under the category "rights – liberties" are traditionally considered to be distinct from the State under rule of law. They endow on a very precise and easily identifiable person – the individual – the power to act and they define a sphere within which the State cannot penetrate; in this sense, because they are opposable against the State, these rights constitute the guarantee of the freedom of the individual and, therefore, of free enterprise. Limited in this way by rights-liberties, the State under rule of law is necessarily a minimal State, as the abstention of the State from all sectors of human activity is the necessary condition for the free play of individual wills[67].

- The smooth functioning of the justice system and the equality of all before judges (an accessible and equitable system of justice; laws, edicts and measures which promote production and investments and which guarantee and protect initiative and private property. For this, the State must guarantee the independence of judges and ensure that their working conditions allow them to fulfil their mission of implementing the law with dignity. Judges must not receive instructions from either the executive power or the legislative power; only the law must guide them in this noble task.

- Transparency: this term means the obligation for governments and public managers to respect fair competition, the equal rights of all citizens, the rules on good management of undertakings and public revenues. It is undoubtedly true that the management model of an institution is an important determinant for the conduct of its staff. If an enterprise is managed according to the economic model or a model similar to it, managers must fulfil the aspirations of the beneficiaries of their services who constitute the main source of their revenue, and so this enterprise will function efficiently; on the contrary, an enterprise managed according to the administrative model tends to be less efficient because its survival depends essentially on political and administrative decisions. The unreadability of the management model is no guarantee of transparency as if resources are not allocated in relation to the quality of services but more in relation to the political or administrative choices of the authorities, managers will tend to be transparent only towards these direct authorities[68].

- Responsibility (accountability): the responsibility referred to here is not only of a moral nature, nor even of a political nature in the strictest sense, like the classic governmental responsibility before parliament. It is more the almost literal meaning of replying, giving account, being responsible for its acts and publicly taking responsibility for all the moral, political, legal and, if need be, judicial consequences[69]. So this goes further than implementing political responsibility in the normal sense, which involves the dismissal or resignation of inefficient governments. In the State under rule of law and good governance, governments and the State itself cease to be above the laws, including penal laws.

[67] Dominique Rousseau, L'Etat de droit est-il un Etat des valeurs particulières, Etat de droit.htm, 2005, p. 2
[68] Plan stratégique de l'Université de Kinshasa, op.cit. p. 57
[69] Abdoulaye Bio Tchane, Lutter contre la corruption, Le Flamboyant, Cotonou, p. 167

Government responsibility is no longer taken in the form of intentions, means and action taken or not taken. It is also evaluated and judged in terms of results. In other words, good governance means governments have an obligation for results.

- Management of the army and the forces of law and order by making military power subject to civil power (arma cedant togae) and reducing exaggerated military spending.

- Attempts to decentralise and delegate power and resources to local authorities dependent on a control a posteriori of legality and not a priori of opportunity. The administration in a State under rule of law which truly seeks to serve the public interest and its citizens as the users of its different public services must act with proximity[70].

VI. Free enterprise within the OHADA

The treaty related to the Harmonisation of Business Law in Africa (or OHADA: l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires in French) signed in Port Louis on 17 October 1993, was ratified on 31 December 2000 by sixteen States[71]; it came into force in 1995. The originality of this Treaty resides both in the establishment of the progressive unification of legislations with a view to promoting the harmonious development in all Member States and in the scope of the community integration proposed. Indeed, this is the first time that legal rules are being harmonised on the scale of a continent. It was appropriate to reinforce, throughout the region, a rule of law favourable to economic development. The acts made to adopt the common rules stipulated are known as "Uniform Acts".

The work of the OHADA legislator by means of the Uniform Act relating to General Commercial Law, which came into force on 1st January 1998, bears the stamp of a certain liberalism discernible in the commitment to consensualism and the openness to non-commercial professions. Moreover, the legislator offers an appropriate response to the essential need for security which business creates[72]. Having laid down the principle of free enterprise in the constitutions of the Member States, the Uniform Act on General Commercial Law lays down limitations linked to capacity, incompatible professions, prohibitions (articles 6- 12 UAGCL) to quote but these limitations; while the national legislator may make provision for other incompatibilities, prohibitions are either pronounced by a professional jurisdiction, so limited to the profession, or by a civil or repressive jurisdiction, so general.

OHADA legislation on the issue is not very different from that of the Democratic Republic of Congo set out above, as the Member States of the OHADA and the DRC are tributaries of

[70] Muyer Oyong, Approche politique et administrative de la décentralisation et de la déconcentration, in Actes du colloque sur la décentralisation : obstacles à l'organisation du pouvoir local et de l'administration locale dans la RD Congo post-conflit, Centre CBCO, 14-16 décembre 2004, Kinshasa, pp. 11-19

[71] Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo.

[72] Akuété Pedro SANTOS, Acte uniforme relatif au droit commercial général, commentary, in OHADA, Traité et actes uniformes et annotés, 2nd edition, JURISCOPE, Paris 2002, p. 192

the Napoleonic Code of 1804 through their former major cities. It should also be noted that non-contrary national laws remain applicable[73].

The Treaty set up the Common Court of Justice and Arbitration (CCJA) to settle any disagreements with regard to the interpretation and application of the Uniform Acts and to handle arbitration within the OHADA. This is a very important and very innovative institution which is at the heart of the OHADA legal system. When carrying out its duties, the CCJA is subject respectively to the Regulation on Procedure adopted by the Council of Ministers at N'Djamena (Chad) on 18 April 1996 and to the Regulation on Arbitration adopted in Ouagadougou (Burkina Faso) on 11 March 1999[74].

VII. Free enterprise within the SADC

The declaration and the treaty setting up the Southern African Development Community (SADC), which replaced the coordination conference, were signed at the summit of Heads of State and Government on 17 July 1972 at Windhoek in Namibia. This economic community is dedicated to the ideals of free exchange, free movement of people, a single currency, democracy and respect of human rights.

The treaty creating the SADC came into force on 30 September 1993. The entry of South Africa in 1994 with the end of the apartheid regime greatly reinforced the weight of this sub-regional organisation on the African level and in its relations with the exterior.

The Member States are Angola, Botswana, Democratic Republic of Congo,
Lesotho, Madagascar, Malawi, Mozambique, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.

If one considers the stages of economic integration, the SADC is a free trade area characterised by the free circulation of goods while each country continues to keep its exterior customs rate. But dedicated to development, growth and the creation of riches, the FTA (Free Trade Area) is, for its initiators, a significant step towards the ultimate goals of the SADC, namely Customs Union (2010),

Common Market (2015), Monetary Union (2016) and Single Currency (2018).

So the principle of free enterprise is accepted by means of the ideals of free trade within the member states of this free trade area and in its future mutations. The free circulation of goods may have limitations linked to safeguards tending to protect local production or sanitary measures or phytosanitary measures to protect the population's health or even standardisation requirements, especially for the quality control of merchandise. And yet, a free trade area in which everything is regulated by the market involves the risk of economic domination by the rich and commercially advanced companies over the poor countries followed

[73] On the notion of "contrary law", see CCJA, avis N° 001/2001/EP of 30 April 2001: "…a contrary law may be both a law or a rule of internal law on the same subject as a Uniform Act in which all the provisions are contrary to this Uniform Act, and a law or rule in which only one of the provisions or a few of them are contrary. In the latter case, the provisions which are not contrary to the Uniform Act remain applicable".

[74] For a general bibliography on the CCJA: J. ISSA-SAYEGH, " la fonction juridictionnelle de la CCJA de l'OHADA", in Mélanges Roger Decottignies, Presses universitaires de Grenoble, 2002 ; E. Nsie, "La Cour commune de justice et d'arbitrage", Penant, n°828, 1998, pp. 308 ss

by a political reaction from the latter, both phenomena leading to the break up of the group. This is why the liberal group may seem inadequate in African economies. We believe that in order to commit to development, African countries must build embryonic economies, dedicated totally to industrial capacity due to the fact that they are still dominated by essentially agricultural activities.

C. A Common Perspective

I. The right to engage freely in economic activity is enshrined in national constitutions both in Africa and in Europe. It needs to be shaped and defined by national legislation.

II. The freedom of citizens and companies to engage in economic activity has to be guaranteed by a proactive state. African and European states must ensure this freedom by limiting and protecting it. The principles of good governance are essential for this purpose. They include:

1. The Rule of Law;
2. Political and social stability;
3. An impartial and effective system of justice and
4. State commitment to and enforcement of accountability and transparency.

D. Topics for discussion

I. Economic freedom can only exist as a human right if that freedom is limited from the outset.

II. The state has an obligation to define and enforce the necessary limits. In so doing the state protects the freedom to engage in economic activity from being destroyed by the very forces which it creates.

III. The state can only do this if it has the necessary resources. These include:

- sufficient revenue
- the willingness of a country's elite to serve the state in the interest of all
- acceptance of the state by its citizens

IV. THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANTON ECONOMIC, SOCIAL AND CULTURAL RIGHTS BY JUSTICE ARIRANGA G. PILLAY,Member and former Vice-Chairperson of the Committee of Economic, Social and Cultural Rights; President of SADC Tribunal; Former Chief Justice of Mauritius & Legal Consultant

(Kindly note that some of the comments herein are author's own and do not necessarily represent the position of the Committee on Economic, Social and Cultural Rights)

Introduction

Since 1990, the Committee on Economic, Social and Cultural Rights (the Committee) devoted much of its time and energy to the discussion of a draft Optional Protocol. In 1997, the

Committee's report on a draft Optional Protocol to the Covenant was submitted to, and considered, by the former United Nations Commission on Human Rights which was replaced by the Human Rights Council in 2006.

Over the years, there was ambivalence on the part of States over the adoption of an Optional protocol to the Covenant. In fact, in the Vienna Declaration and Programme of Action (1993) States "encourage[d] the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights".

This commitment was reiterated by the former Commission on Human Rights in 1994. It was, however, only in 2001 that an Independent Expert on the question of a draft optional protocol to the Covenant was appointed and he submitted his report in 2002.

The Commission renewed the mandate of the expert and established a Working Group to consider the various options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, in the light, inter alia, of the report of the Committee on Economic, Social and Cultural Rights to the Commission on a draft optional protocol, comments and views submitted by States, intergovernmental organizations, including United Nations specialized agencies, and non-governmental organizations, and the reports of the independent expert.

In 2004 the first session of the Working Group, which included a representative of the Committee, took place and its mandate was renewed for 2 years.

In 2006 the Human Rights Council came into existence and renewed again the mandate of the Working Group for two more years. The mandate now included also the drafting of an Optional Protocol.

At the fourth session of the working group in 2007, Catarina de Albuquerque, the able and dynamic Chairperson Rapporteur, presented the First Draft Optional Protocol to the Covenant. In 2008, at its fifth and final session, the Working Group agreed on the final draft of the Optional Protocol and submitted it to the Human Rights Council for consideration and approval. The Human Rights Council approved on 18 June 2008 without a vote the final draft, after revising the text which had left out Part I of the Covenant dealing with the right to self-determination of all peoples.

On 10 December 2008, the 60th Anniversary of the Universal Declaration of Human Rights, the Optional Protocol to the Covenant (the Optional Protocol) was adopted by the United Nations General Assembly, thirty- three years after the entry into force of the Covenant in January 1976.

The ceremony for the opening for signature of the Optional Protocol by any State that has signed, ratified or acceded to the Covenant has been fixed to 24 September 2009 at the United Nations Headquarters in New York. It is to be noted that the Optional Protocol will enter into force three months after the tenth State has ratified, or acceded to, it.

The Covenant is now at long last on an equal footing with its sister treaty, the International Covenant on Civil and Political Rights, with its own Optional Protocol having come into force as

far back as 1976.No wonder then that the UN High Commissioner for Human Rights stated that the Optional Protocol "*is of singular importance…closing a historic gap in human rights protection under the international system*" and that her predecessor described the Protocol as a retrieval and renewal of the unified vision of the Universal Declaration of Human Rights.

It is noteworthy also that the Preamble to the Optional Protocol , inter alia, recalls that " *the Universal Declaration of Human Rights and the International Covenants on Human Rights recognize that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil, cultural, economic, political and social rights*" and reaffirms " *the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms*".

Salient Features of the Optional Protocol

a) Communications or individual complaints procedure

Under articles 1 and 2 of the Optional Protocol, the Committee is competent to "*receive and consider communications*" concerning State parties to the Covenant "*by or on behalf of individuals or groups of individuals under the jurisdiction*" of those State parties, that claim to be victims of any of the Covenant rights, including Part I of the Covenant dealing with the right to self-determination of all peoples, as indicated already.

*[*It is doubtful whether the Committee has competence to hear stand-alone violations of the right of peoples to self-determination under a complaints procedure dealing with individuals or groups of individuals. It may, however, be open to the Committee to adjudicate complaints of individuals or groups of individuals relating to violations of the right to self-determination in conjunction with violations of other Covenant rights.]

The communications submitted on behalf of those individuals or groups of individuals must be with their consent unless the author of those communications "*justifies acting on their behalf without their consent".*

Moreover, article 13 of the Optional Protocol requires State parties to take all appropriate measures to ensure that authors of communications sent to the Committee are not "*subjected to any form of ill-treatment or intimidation*".

[NGOs cannot file communications in their own right. The following question may be asked, namely, whether a trade union is a group of individuals which has standing to bring claims relating to trade union rights under article 8 of the Covenant.]

b) Admissibility

Article 3 of the Protocol specifies that a communication is inadmissible if:

I. all available domestic remedies have not been exhausted unless they are unreasonably prolonged;

II. it is not submitted within one year after the exhaustion of domestic remedies unless the author can demonstrate that it had not been possible to submit the communication within this time- limit;

III. the facts of the complaint occurred prior to the entry into force of the Protocol for the State Party concerned unless those facts continued after that date;

IV. the same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

V. it is incompatible with the provisions of the Covenant;

VI. it is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media;

VII. it is an abuse of the right to submit a communication; or

VIII. it is anonymous or not in writing.

Apart from those mandatory admissibility criteria listed above, the Committee may, under article 4 of the Optional Protocol, decline to consider a communication where the author has not suffered "*a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance*".

[Are the admissibility criteria and standing provisions too stringent and will they in practice bar access to the Committee? In general, only victims with the appropriate resources and awareness and ability to file communications and willingness to be named as complainants, will have access to the complaints procedure. There must obviously be public awareness-campaigns concerning the provisions of the Optional Protocol if the complaints procedure is to be of effective use.

With regard to the floodgates argument used to justify all the restrictive admissibility criteria, mentioned above, it is to be noted that under the Optional Protocol to the International Covenant on Civil and Political Rights (OPICCP) which came into force in March 1976, only some 1600 complaints were filed, out of which 242 were ruled inadmissible; there were only 480 in which a violation of a right was established. In 125 complaints there was found no violation.]

c) Interim measures

The Committee may, after the receipt of a communication and before its determination on the merits, request the State party concerned to "*take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations*" (the emphasis is mine}, without prejudice to its eventual determination on admissibility or on the merits of the communication-vide article 5 of the Optional Protocol.

[The exceptional circumstances include, for instance, famine, forced evictions, homelessness and unexpected retrogressive measures.]

d) Transmission of the communication

Any communication which is not considered inadmissible by the Committee shall be transmitted in confidence to the State party concerned which has a period of six months to submit to the Committee its written explanations or comments and any remedy it may have provided (article 6 of the Protocol).

e) Friendly settlement procedure

Under article 7 of the Optional Protocol, the Committee shall use its good offices with a view to reaching a friendly settlement between the parties in relation to the communication lodged "*on the basis of the respect for the obligations set forth in the Covenant*" and any settlement reached puts an end to consideration of the communication.

[This article, together with articles 1, 2, 8, 9 and 14, demonstrate, in the deliberate choice of words used, that the complaints procedure is not concerned with litigation but with dialogue, communication, understanding and persuasion.

The Committee is indeed not a court of law but an adjudicatory body whose findings consist of views and recommendations having no legal effect. The individual complaints procedure is indeed not aimed at supplanting the State party's local policies and practices to deal with its economic, social and cultural problems but rather to remedy and complement them, as we shall see.]

f) Examination of communications

The first three paragraphs of article 8 of the Optional Protocol deal with procedural matters, namely that the Committee is to examine communications in closed meetings and has the right to obtain documentation from various UN institutions and other international and regional organisations provided such documentation is made available to the parties concerned. Paragraph 4 then states as follows-

"*When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant*" (the underlining is mine).

Reference is made in this paragraph to article 2(1) of the Covenant which reads as follows-

"*Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures*" (the emphasis is mine).

The Committee in its Statement of April-May 2007, entitled "AN EVALUATION OF THE OBLIGATION TO TAKE STEPS TO THE 'MAXIMUM OF AVAILABLE RESOURCES'UNDER AN OPTIONAL PROTOCOL TO THE COVENANT", indeed pointedly addresses the issue of how it would examine communications concerning that obligation while fully respecting the authority vested in relevant state organs to adopt what it considers to be its most appropriate policies and to allocate resources accordingly, on the basis of its extensive practice under the periodic reporting process.

The Committee, first, refers to its General Comment No. 3 which has already examined the terms of article 2(1) of the Covenant and "*reiterates that in order to achieve progressively*

the full realization of the Covenant, States parties must take deliberate, concrete and targeted steps within a reasonably short time after the Covenant's entry into force for the States concerned. The steps should include 'all appropriate means, including particularly the adoption of legislative measures', the provision of judicial or other remedies, where appropriate, as well as administrative, financial, educational and social measures".

The Committee then goes on to give the following explanations:

"4. The 'availability of resources', although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction. Where the available resources are demonstrably inadequate, the obligation remains for a State Party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances. The Committee has already emphasized that, even in times of severe resource constraints, States Parties must protect the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes.

5. The undertaking by a State party to use 'the maximum' of its available resources towards fully realizing the provisions of the Covenant entitles it to receive resources offered by the international community. In this regard, the phrase 'to the maximum of its available resources' refers to both the resources existing within a State as well as those available from the international community through international cooperation and assistance.

6. As regards the core obligations of States parties in relation to each of the Covenant rights, General Comment No. 3 states that, in order for a State party to be able to attribute its failure to meet its core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those core obligations.

7. Apart from the obligation to take steps (art. 2.1), States parties have an immediate obligation to 'guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind' (art. 2.2). This obligation frequently requires the adoption and implementation of appropriate legislation and does not necessarily require significant resource allocations. Similarly, the obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of Covenant rights and does not necessarily require significant State involvement. For example, the right of women to an equal salary for equal work should be implemented immediately. The obligation to protect and, to a greater extent, the obligation to fulfil, on the other hand, often require positive budgetary measures in order to prevent third parties from interfering with the rights recognized in the Covenant (obligation to protect) or to facilitate, provide and promote the enjoyment of these rights (obligation to fulfil).

8. In considering a communication concerning an alleged failure of a State party to take steps to the maximum of available resources, the Committee will examine the measures that the State party has effectively taken, legislative or otherwise. In assessing whether they are 'adequate' or 'reasonable', the Committee may take into account, inter alia, the following considerations:

a) *the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;*

b) *whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;*

c) *whether the State party's decision (not) to allocate available resources is in accordance with international human rights standards;*

d) *where several policy options are available, whether the State party adopts the option that least restricts Covenant rights;*

e) *the time frame in which the steps were taken; and*

f) *whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.*

9. The Committee notes that in case of failure to take any steps or of the adoption of retrogressive steps, the burden of proof rests with the State party to show that such a course of action was based on the most careful consideration and can be justified by reference to the totality of the rights provided for in the Covenant and by the fact that full use was made of available resources.

10. Should a State party use 'resource constraints' as an explanation for any retrogressive steps taken, the Committee would consider such information on a country- by-country basis in the light of objective criteria such as:

(a) *the country's level of development;*

(b) *the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;*

(c) *the country's current economic situation, in particular whether the country was undergoing a period of economic recession;*

(d) *the existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict;*

(e) *whether the State party had sought to identify low-cost options; and*

(f) *whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.*

11. In its assessment of whether a State party has taken reasonable steps to the maximum of its available resources to achieve progressively the realization of the provisions of the Covenant, the Committee places great importance on transparent and participative decision-making processes at the national level. At all times the Committee bears in mind its own role as an international treaty body and the role of the State in formulating or adopting, funding and implementing laws and policies concerning economic, social and cultural rights. To this end, and in accordance with the practice of judicial and other quasi-judicial human rights treaty bodies, the Committee always respects the margin of appreciation of States to take

steps and adopt measures most suited to their specific circumstances" (the emphasis is mine).

[In the light of the Committee's Statement taken as a whole, the test of reasonableness contained in article 8(4) for assessing a State party's compliance with its Covenant obligations does not mean that the Committee will be reluctant to adjudicate thoroughly a complaint or provide a remedy to a deserving complainant on account of the fact that the State party is better placed to make policy decisions or to allocate resources.

What is acknowledged is the fact that the implementation of Covenant rights can be achieved through multiple policy choices, that the Committee will not itself choose the means of achieving compliance with the Covenant since it respects the margin of discretion of State Parties in the matter but will rather recommend a process through which compliance can be achieved if it finds that a Covenant obligation has been breached.

Although the Optional Protocol is silent about the core obligations of State parties, the Committee has made it clear in its Statement, mentioned above, that in considering the standard of reasonableness in relation to an alleged breach, it will take into account whether the breach involves the enjoyment of the minimum core content of the Covenant i.e. the minimum essential levels of every Covenant right which must be implemented immediately and are no more than the minimum subsistence level necessary for survival and for living a life of dignity.

Moreover, the standard of reasonableness adopted by the Committee is comparable with the one adopted by the Constitutional Court in the cases of Grootboom and Others v.Government of the Republic of South Africa and Others, Treatment Action Campaign and Khosa v. Mahlanle.

In deciding whether the relevant measure is reasonable or not, the Court considers especially whether it is comprehensive and coordinated, appropriate financial and human resources have been provided, it is balanced and flexible and makes appropriate provision for short, medium and long term needs, is reasonably formulated and implemented, is transparent and, above all, responds to the urgent needs of those in desperate situations. A policy which excludes a significant segment of society or discriminates against an individual or groups of individuals is unreasonable. The standard of reasonableness is thus based on results, not on intent.

Moreover, it is to be noted that the Constitutional Court also recognises a minimum core which is admittedly different from that of the Committee, in considering whether a government measure is reasonable or not, namely, the needs of the most vulnerable groups in a particular society that are entitled to the protection of the right in issue and which must be addressed as a matter of priority.]

g) Follow-up procedure

Article 9 of the Optional Protocol provides for the Committee submitting its views on a communication before it, together with its recommendations, to the parties concerned. The State Party "*shall give due consideration to the views of the Committee, together with its recommendations*" and has six months to give its written response, "i*ncluding information on any action taken, in the light of the views and recommendations of the Committee*" (the

underlining is mine). Any further requests for information from the Committee are to be taken up in the State reporting procedure.

h) Inquiry and inter-state procedure

Article 10 of the Optional Protocol provides for an Inter-State complaints procedure. It is an opt-in procedure in that it will only apply if both the State complaining and the State defending have made a declaration at any time recognising the competence of the Committee.

Article 11 sets up an inquiry procedure enabling the Committee to investigate if it receives "*reliable information indicating grave or systematic violations by a State Party of the rights set forth in Parts II and III of the Covenant*". Where necessary and with the consent of the State concerned, the inquiry may include a visit to its territory. This procedure also operates, however, on an opt-in basis, given that a State must expressly declare at any time that it recognises the competence of the Committee.

[It is doubtful whether these two procedures will be of much practical use since they require the positive and express support of State parties. In any event, the inter-state complaints procedure that exists in similar international instruments, like the OPICCP, has never been used up to now.]

i) International assistance and cooperation

Article 14 of the Optional Protocol provides that, with the consent of the State Party, the Committee may transmit to various UN institutions and other competent bodies "*its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance*" (paragraph 1).

The Committee may also, with the consent of the State Party, take up with those bodies "*the advisability of international measures likely to contribute to assisting*" that State in achieving progress in the implementation of the Covenant rights (paragraph 2).

A UN trust fund is to be established on a voluntary basis to provide expert and technical assistance to State Parties (paragraph 3).

Paragraph 4 makes it clear that the provisions of Article 14 are "*without prejudice to the obligations of each state Party to fulfil its obligations under the Covenant*".

[Paragraph 2 of article 14 of the Optional Protocol enables the Committee, for instance, to bring to the attention of international financial institutions the negative impact that some of the stringent austerity measures prescribed by them and adopted by the State Party might have on the enjoyment of economic, social and cultural rights, especially by disadvantaged and marginalised individuals and groups. As for the UN trust fund, it is doubtful whether it will ever be set up, being voluntary in nature.

Conclusions

It is my hope that many countries will ratify, or accede to, the Optional Protocol so that it comes into operation as quickly as possible and provides a right of adjudication and remedy to all those who are denied the enjoyment of their economic, social and cultural rights, in

particular the most disadvantaged and marginalised individuals and groups, the more so since the text of the Optional Protocol has been finalised, after long debates and discussions have taken place and after various compromises have been reached over its contentious aspects, in order to achieve consensus.

I consider that many benefits will accrue from the coming into operation of the Optional Protocol, including in particular-

1) The individual complaints procedure is a useful complement to the existing dialogue between the Committee and the State party during the examination of the latter's periodic report and will –

    i. breathe new life into the Covenant rights since those rights will no longer be considered as mere abstract legal principles but will be applied by the Committee to concrete cases. In the process, the contours and content of those rights will be delineated and clarified;

    ii. encourage State parties to take the Covenant rights more seriously since they know that their decisions, actions and omissions will be reviewed by the Committee and might pre-emptively improve their policies and practices or develop and improve access to domestic remedies;

    iii. State parties will benefit from the views and recommendations of the Committee after the latter hears a complaint and will be able to improve their policies and practices and take advantage of international cooperation and technical assistance.

    iv. The Committee's views and recommendations regarding a complaint against a State party will be publicised and used to name and shame it and used by civil society groups to urge their governments to adopt corrective measures to deal with the problems of, for instance, discrimination, economic and social deprivation and basic health care.

2) The Committee, for its part, will give detailed reasons for its views so that its reasoning can be scrutinised. Its decisions will no doubt be influenced by the case-law of national jurisdictions. Reasons will also be given for rejecting inadmissible complaints. The Committee knows that its influence depends on having the respect and confidence of State parties, complainants, NGOs and other interested parties. Without that respect and confidence, not only the legitimacy and credibility of the Committee will be eroded but hesitant State parties waiting in the wings will not come forward to ratify, or adhere to, the Optional Protocol.

3) The Committee's views will, I am confident, gradually over the years build up into a body of case-law that will transform the Covenant into a living instrument and help States, government officials, national courts, NGOs and all other interested parties in having a correct understanding of the Covenant rights and their interpretation and lay to rest, once for all, claims that the Covenant rights are not justiciable.

V. REGIONAL ECONOMIC COMMUNITIES AND HUMAN RIGHTS IN EAST AND SOUTHERN AFRICA BY DR. OLIVER C RUPPEL*

Introduction

The dawn of regional economic communities (RECs) in Africa can be traced back to the 1960s, when the United Nations Economic Commission for Africa (UNECA) encouraged African states to incorporate single economies into subregional systems with the ultimate objective of creating a single economic union on the African continent. In order to realise this aim, the Organisation of African Unity (OAU, predecessor of the African Union, AU) identified the need to enhance regional integration within the organisation, recognising that each country on its own would have little chance of, inter alia, attracting adequate financial transfers and the technology needed for increased economic development.[75]

Africa has, since then, taken various steps towards enhancing the process of economic and political integration on the continent.[76] The road has been paved by several decisions and declarations relating to regional economic and political integration, especially –

- the 1977 Kinshasa Declaration, which provides for the successive establishment of the African Economic Community (AEC)
- the Monrovia Declaration, providing for guidelines relating to economic and social development
- the 1980 Lagos Plan of Action, and
- the Abuja Treaty, realising the establishment of the AEC, the African Union's economic and umbrella institution for RECs.

The Abuja Treaty, which was adopted in June 1991, came into force in 1994. Since then, 52 out of the 53 AU member states have signed the Treaty,[77] while 49 have ratified it.[78]

Meanwhile, several RECs have been established on the continent.[79] At the seventh ordinary session of the AU's Assembly of Heads of State and Government in Banjul, The Gambia, in

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75 For the process of regional integration within SADC, see Hansohm & Shilimela (2006:7).

76 On various initiatives by African leaders to carry out the integration process in Africa, cf. Kouassi (2007).

77 Eritrea has not yet signed the Abuja Treaty; cf. status list of countries regarding the Abuja Treaty, available at http://www.africa-union.org/root/au/Documents/Treaties/List/Treaty%20Establishing%20the%20African%20Economic%20Community.pdf.

78 The countries which have signed but not yet ratified the Abuja Treaty are Djibouti, Madagascar and Somalia; cf. status list of countries regarding the Abuja Treaty, available at http://www.africa-union.org/root/au/Documents/Treaties/List/Treaty%20Establishing%20the%20African%20Economic%20Community.pdf.

79 The number of RECs varies depending on the definition of *REC* and on whether specific subgroups or monetary unions such as the Central African Economic and Monetary Community or certain free trade areas such as the Euro-Mediterranean Free Trade Area (with Egypt, Morocco and Tunisia, and states

July 2006, the AU officially recognised eight such communities.[80] Alphabetically listed, these are as follows:

- The Arab Maghreb Union (AMU)
- The Community of Sahel-Saharan States (CEN-SAD)
- The Common Market for Eastern and Southern Africa (COMESA)
- The East African Community (EAC)
- The Economic Community of Central African States (ECCAS)
- The Economic Community of West African States (ECOWAS)
- The Intergovernmental Authority on Development (IGAD), and
- The Southern African Development Community (SADC).

All AU member states are affiliated to one or more of these RECs, as tabulated below:

Table 1: State members of RECs officially recognised by the AU

AMU	**CEN-SAD**	**COMESA**	**EAC**	**ECCAS**	**ECOWAS**	**IGAD**	**SADC**
Algeria	Benin	Burundi	Burundi	Angola	Benin	Djibouti	Angola
Libya	Burkina Faso	Comoros	Kenya	Burundi	Burkina Faso	Ethiopia	Botswana
Mauritania	Central African Republic	DRC	Rwanda	Cameroon	Cape Verde	Kenya	DRC
Morocco	Chad	Djibouti	Tanzania	Central African Republic	Cote d'Ivoire	Somalia	Lesotho
Tunisia	Comoros	Egypt	Uganda	Chad	Gambia	Sudan	Madagascar
	Cote d'Ivoire	Eritrea		Congo	Ghana	Uganda	Malawi
	Djibouti	Ethiopia		DRC	Guinea		Mauritius
	Egypt	Kenya		Gabon	Guinea-Bissau		Mozambique
	Eritrea	Libya		Guinea	Liberia		**Namibia**
	Gambia	Madagascar		São Tomé and Príncipe	Mali		Seychelles
	Ghana	Malawi			Niger		South Africa
	Guinea-	Mauritius			Nigeria		Swaziland

around the Mediterranean) are counted or not. Viljoen (2007:488) states that at least 14 subregional integration groupings exist in Africa.

80 See the decision relating to the recognition of RECs, namely (Assembly/AU/Dec.112 (VII) Doc. EX.CL/278 (IX)); text in French available at http://www.africa-union.org/Official_documents/Assemblee%20fr/ASS06b.pdf; last accessed 22 December 2008.

AMU	CEN-SAD	COMESA	EAC	ECCAS	ECOWAS	IGAD	SADC
	Bissau						
	Kenya	Rwanda			Senegal		Tanzania
	Liberia	Seychelles			Sierra Leone		Zambia
	Libya	Sudan			Togo		Zimbabwe
	Mali	Swaziland					
	Mauritania	Uganda					
	Morocco	Zambia					
	Niger	Zimbabwe					
	Nigeria						
	São Tomé and Príncipe						
	Senegal						
	Sierra Leone						
	Somalia						
	Sudan						
	Togo						
	Tunisia						

This paper will focus on RECs in East and southern Africa and how each such community incorporates human-rights-related issues into its respective legal setting. However, a few more general considerations regarding RECs and human rights first deserve attention. The relevance of human rights for topics such as regional integration and harmonisation, and the issues of overlapping memberships and concurrent jurisdiction, which usually occur in an economic context, form part of these introductory remarks as well.

RECs, regional integration and human rights

The first question that arises is this: What role do human rights play in RECs and the integration process in general?

In general terms, *regional integration* can be described as a path towards gradually liberalising the trade of developing countries and integrating them into the world economy.[81] At first glance it appears that the promotion and protection of human rights is not within the

[81] Andresen et al. (2001:3).

RECs' focal range. However, as this article will show, human-rights-related matters play a vital role within the RECs' legal framework as well as in their daily practice, as many have implemented certain provisions in their mandate that have an impact on human rights and good governance.

All RECs analysed here[82] have, to some extent, incorporated human rights into their treaties. In most cases, a general tribute to recognising and protecting human rights can be found in the basic legal concepts underpinning RECs. Some even cover specific human rights issues, such as HIV and AIDS, equality and gender issues, humanitarian assistance and refugees, and children's rights, to name but a few.

The reasons for integrating human rights into the structure of RECs are manifold. One reason certainly is that states have committed themselves to respecting human rights by acceding to specific human rights treaties, conventions or declarations on the international, regional and subregional level, including the Universal Declaration of Human Rights; the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; the Convention on the Elimination of Racial Discrimination; or the African Charter on Human and Peoples' Rights. The obligations and commitments resulting from such human-rights-related legal instruments are also reflected in the conceptualisation of RECs. One further aspect of incorporating human rights into the legal regimes of RECs is that human rights and good governance – the latter being "an effective democratic form of government relying on broad public engagement (participation), accountability (control of power) and transparency (rationality)"[83] – play an essential role in economic development. The extent of good governance can be regarded as the degree to which the promise of civil, cultural, economic, political and social rights is realised.[84] For example, human rights and good governance have an impact on the investment climate, which contributes to growth, productivity and the creation of jobs, all essential for economic growth and sustainable reductions in poverty. The furtherance of economic development and the promotion of human rights should, thus, go hand in hand. Indeed, there is no need to choose between economic development and respecting human rights: an analysis of the legal structure of RECs with regard to human rights shows that a peaceful environment which recognises and promotes human rights is regarded as a fundamental prerequisite for economic development.

The interrelationship between human rights and economic development has become closer over the past few years due to increasing discussions in the world community on the issue.[85] This interconnection can be seen as a two-way relationship insofar as economic development is obliged to respect human rights in a democratic society. Conversely, human rights can be given more effect through economic growth, as one outcome of economic growth is the increasing availability of resources, resulting in the reduction of poverty and a higher standard of living.

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82 It should be noted that this article deals only with the RECs in East and southern Africa that have been officially recognised by the AU.

83 Kersting (2007:69).

84 UN High Commissioner for Human Rights; see http://www.unhchr.ch/development/governance-01.html; last accessed 24 July 2008.

85 Ruppel (2008a:116).

Therefore, the promotion of human rights plays an important role in the process of regional integration, as envisaged by the Abuja Treaty as well as by REC constitutive legal instruments. However, the integration process faces many obstacles and challenges, which do also touch on human rights. The fear of losing State autonomy, the fear of losing identity, socio-economic disparity among members, historical disagreement, lack of vision, and unwillingness to share resources are some of the obstacles that present themselves when it comes to regional integration. One specific challenge is the heterogeneity of AEC or REC member states. This heterogeneity is not only reflected by surface area, population figures, the size of domestic markets, per capita income, the natural resource endowment, and the social and political situation, but also by the variety of legal systems applied, and the extent to which human rights are respected by the different member states.[86]

Of increasing significance will be the harmonisation of the law. This can be achieved by the implementation and transformation of legally binding instruments aiming to reduce or eliminate the differences among national legal systems by inducing them to adopt common legal principles. This applies to human rights cases in particular. While a specific action might be classified as a violation of human rights in country A, this may not be the case in country B, although both countries are members of the same REC. This is especially true as regards labour standards, which are generally very sensitive in terms of human rights concepts. In this regard, amending laws to achieve interregional legal conformity is central to reducing normative barriers within RECs, as unified law promotes greater legal predictability as well as legal certainty – both essential for the investment climate and economic development in general.

The Abuja Treaty aims at the coordination, harmonisation and progressive integration of the activities of RECs, which in turn are regarded as the building blocks of the AEC. The integration process covers a prospective period of 34 years, with the possibility of being extended. Human rights protection is specifically laid down in the second chapter of the Treaty, which covers issues of the RECs' establishment, principles, objectives, general undertaking, and modalities. Article 3 provides that the contracting parties –

> … in pursuit of the objectives stated in Article 4, [sic] of this Treaty solemnly affirm and declare their adherence to the following principles: …
>
> (g) Recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; …

Besides the promotion of economic, social and cultural development and the integration of African economies, one further objective of the AEC is to –

> … promote co-operation in all fields of human endeavour in order to raise the standard of living of African peoples, and maintain and enhance economic stability, foster close and peaceful relations among Member States and contribute to the progress, development and the economic integration of the Continent; …

Therefore, member states are expected to promote the coordination and harmonisation of the integration activities of those RECs to which they belong, within the gambit of their activities on the AEC.

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86 On the heterogeneity of SADC member states, see Ruppel & Bangamwabo [Forthcoming].

Promoting human rights: A mandate for RECs?

Assuming that the responsibility for upholding human rights and fundamental freedoms rests primarily on the individual states themselves, the question may arise as to the role that RECs play when it comes to the protection of human rights, and whether or not – and if so, how – RECs can function as guardians of human rights. Although states might be primarily responsible for upholding human rights because they are answerable to their citizens, the international community, and the UN if they fail to respect human rights in their countries,[87] the influence of RECs should not be underestimated. It has already been stated that, in some way or another, RECs have incorporated the respect for and/or promotion of human rights into their constitutive instruments. Therefore, RECs do indeed have the duty to translate human rights principles and ideals into practice. This can be realised by several means, all resulting in the enforcement of human rights. Two principal categories can be identified, namely the judicial and extrajudicial promotion and enforcement of human rights.

Enforcing and promoting human rights outside of courts is, in the first place, realised by merely administrative means. The legal instruments of RECs, be they their constitutive acts, protocols, declarations, guidelines, policies or memoranda of understanding, place the onus on member states and institutional organs to act in accordance with specific principles such as the rule of law, democracy or respect for human rights. Therefore, RECs' decision-making processes should always be guided by human rights principles laid down in such legal instruments, or that apply because they are general principles of customary law. Thus, it can be stated that specific principles of human rights are authoritative when it comes to decisions taken by RECs that relate to conflict resolution, peacekeeping, or the drafting of policies or other legal instruments relating to sectors such as trade liberalisation, freedom of movement, anti-corruption, health or any other issues under the REC's competency.

On the judicial side, the enforcement of human rights within RECs works through the activities of regional community courts or similar institutions. Most RECs have judicial bodies that deal with any controversies relating to the interpretation or application of community law. Depending on how human rights are incorporated into the legal frameworks of different RECs, subregional organisations have a number of options open to them in respect of enhancing the protection of human rights.[88] Considering that human rights do, to some extent, form part of the community law of all RECs, their regional community courts can unquestionably contribute towards the promotion and protection of human rights, provided that decisions by regional judicial institutions are properly enforced at a national level. One important question with regard to the enforcement of human rights is whether private persons can approach regional courts in cases of alleged human rights violations. The rules of

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87 Cf. European Commission (2001).

88 Four options have been outlined by Viljoen (1999:208ff), who favours the third of the following options: (a) to ignore human rights issues, leaving it to the domestic or regional legal system to redress violations; (b) to use the limited human rights mandate in the relevant organisation's treaty as a basis to cultivate a better human rights environment in the member states concerned; (c) to adopt own subregional charters on human rights; or (d) to fully incorporate the African Charter on Human and Peoples' Rights into the subregional treaty.

procedure of the various judicial bodies address this issue within provisions relating to jurisdiction.

The fact that human-rights-related issues are subject to judicial review at REC level is reflected by the jurisprudence of some regional community courts that deal with such issues.[89] With regard to an envisaged process of harmonisation of law and jurisprudence, human-rights-relevant case law at regional level is required because harmonisation can only take place if the application of law by national courts in comparable cases leads to roughly the same results.[90] In light of the above, regional community courts can be considered a *motor of integration*.[91]

As an interim result, it can be stated that RECs have a clear mandate to promote and protect human rights. However, some critical issues with regard to RECs and the protection of these rights needs to be mentioned here. These issues refer to concurrent jurisdiction and overlapping memberships.[92] It is commonly accepted that, from a long-term perspective and with a view to their merging into a single institution, RECs need to be strengthened and consolidated. However, the fact that many African states are members to various RECs can be regarded as a hurdle in respect of the integration process.[93] Despite multiple costs for membership contributions and negotiation rounds, and technical problems such as the application of different external tariffs in respect of each member country and the eventual lack of identification with one specific REC,[94] the question of the concurrent jurisdiction of different judicial organs has to be addressed.

Figure 1 graphically illustrates that the issue of overlapping memberships is highly relevant as most African countries which are parties to one of the RECs recognised by the AU are also members to at least one other REC.

Figure 1: Overlapping memberships

89 Examples in respect of human rights jurisprudence by African regional tribunals include the SADC Tribunal (*Mike Campbell and Others v The Republic of Zimbabwe* SADC (T) Case No. 2/2007), and the ECOWAS Community Court of Justice (*Moses Essien v Gambia* Suit No. ECW/CCJ/APP/05/05; Judgment No. ECW/APP/05/07 of 29 October 2007). So far, the EAC Court of Justice has no jurisdiction in human rights cases (Article 27.2 of the EAC Treaty provides that a respective Protocol is to be concluded subsequently, which has not yet been realised), but it does not abdicate from exercising its jurisdiction of interpretation of the Treaty "merely because the Reference includes allegation of human rights violation". Cf. *Katabazi and 21 Others v Secretary General of the East African Community and Another* (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 2007).

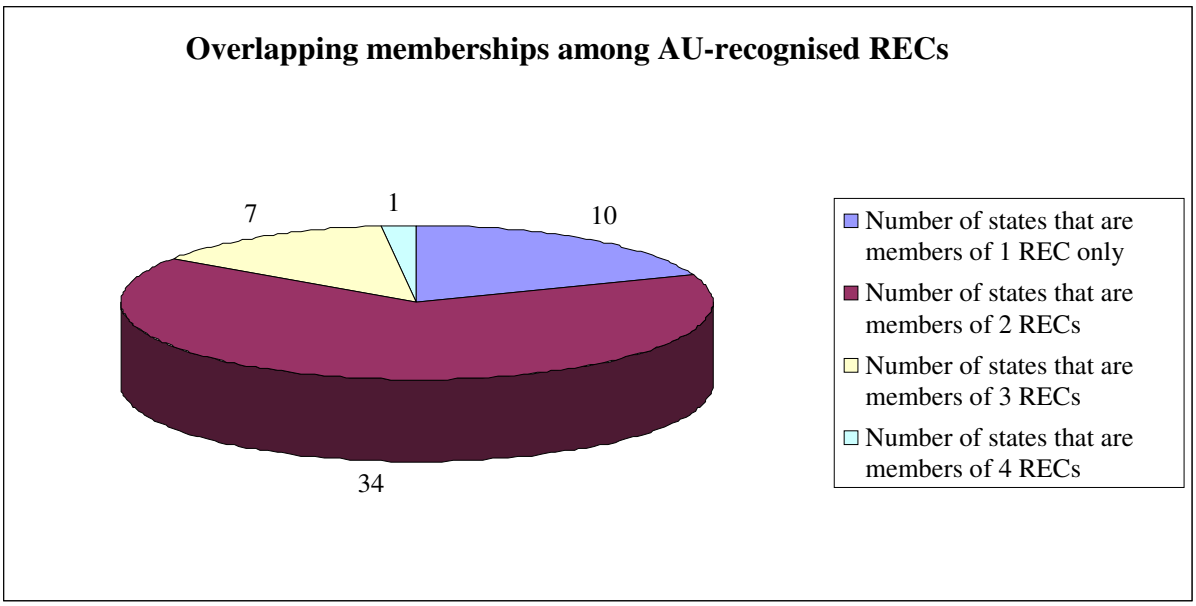
90 See http://knowledge-sharing.uneca.org/uneca/member-states/copy_of_trade-ministerial-conference-of-african-and-south-american-countries; last accessed 8 August 2008.

91 This term was coined by Schwarze (1988:13ff) with regard to the European Court of Justice.

92 For a detailed discussion on the challenges and options regarding overlapping memberships in COMESA, EAC, SACU and SADC, see Jakobeit et al. (2005).

93 Viljoen (2007:525).

94 Andresen et al. (2001:11).



The issue of the conflicting jurisdiction of regional courts on the African continent will become a prominent one with specific importance in cases involving violations of human rights, as many regional judicial bodies have the jurisdiction over human rights cases. For the time being, the consequence of overlapping jurisdiction is that a claimant may in fact choose to which judicial body a case is submitted,[95] since a competent court may not decline jurisdiction on the grounds that another court may be competent as well. In terms of regional integration, the absence of a judicially integrated Africa is, however, undeniably a problem because different judicial bodies may interpret one normative source differently.[96]

Regional economic communities in East and southern Africa

The Common Market for Eastern and Southern Africa – COMESA

Background

COMESA[97] was formally established in 1994 as a successor organisation to the Preferential Trade Area for Eastern and Southern Africa (PTA), which had been in existence since 1981. COMESA focuses on and aims at regional integration in all fields of development, with particular emphasis on trade, customs and monetary affairs, transport, communication and information, technology, industry and energy, gender, agriculture, the environment, and natural resources.

According to the UN Statistical Division,[98] COMESA comprises more than 400 million inhabitants, embraces a land surface area of almost 13 million km^2, and a total gross domestic product (GDP) of over US$360 billion. The official languages are English, French and Portuguese. COMESA's basic legal instrument is the COMESA Treaty which established the body. This Treaty provides, inter alia, for the organs of COMESA, namely the COMESA

95 Referred to as *forum-shopping*; see Viljoen (2007:502).
96 (ibid.).
97 For detailed information on COMESA, see www.comesa.int.
98 http://unstats.un.org/unsd/default.htm.

Authority, composed of the various Heads of State or Government, the COMESA Council of Ministers, the COMESA Court of Justice, the Committee of Governors of Central Banks, the Intergovernmental Committee, the Technical Committees, the Consultative Committee, and the Secretariat, which has its seat in Lusaka, Zambia.

COMESA currently counts 19 states as its members, namely Burundi, the Comoros, the DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, the Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Former member states are Lesotho, Mozambique, Namibia and Tanzania, which have presumably quit the REC to avoid overlapping memberships within organisations that follow largely the same objectives. Indeed, this is one of the major problems of COMESA: all its members are simultaneously members of at least one other REC. Taking COMESA and SADC as an example, seven countries are members of both RECs.[99] This is not only problematic in terms of duplication of work and costs, but also because a subregional customs union is envisaged by both COMESA and SADC, and it is legally and technically impossible to be a member of more than one such union.[100] Therefore, the Tripartite Summit held in October 2008 in Kampala, Uganda, with the Heads of State and Government of COMESA, the EAC and SADC, focused on the broader objectives of the AU – to accelerate economic integration of the continent with the aim of achieving economic growth, reducing poverty, and attaining sustainable economic development. It was resolved that the three RECs should –[101]

> … immediately start working towards a merger into a single REC with the objective of fast[-]tracking the attainment of the African Economic Community.

In the area of trade, customs and economic integration, it was approved that a Free Trade Area (FTA) should be established encompassing EAC, COMESA and SADC member states, with the ultimate goal of establishing a single customs union.

Human rights protection within COMESA

Human rights protection is part of the COMESA Treaty, although it might not be at the core of COMESA's activities.[102] The Treaty deals with human-rights-sensitive provisions at various stages, the most important of which will be outlined in the following discussion.

COMESA has several aims and objectives[103] that relate partially to human rights. One of these aims and objectives is the adoption of policies and programmes to raise the standard of living of its peoples.[104] Furthermore, COMESA aims at contributing towards the establishment, progress and realisation of objectives of the AEC, which include human rights – at least indirectly – by making the promotion of economic, social and cultural development and the raising of the standard of living of African peoples major COMESA objectives.[105]

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99 Dual membership is held by the DRC, Madagascar, Malawi, Mauritius, the Seychelles, Zambia and Zimbabwe.

100 Jakobeit et al. (2005:X).

101 See COMESA–EAC–SADC (2008).

102 Viljoen (1999:206).

103 Laid down in Article 3, COMESA Treaty.

104 Article 3b, COMESA Treaty.

105 Article 4.1, Abuja Treaty Establishing the AEC.

The most relevant provision relating to human rights protection within the COMESA Treaty, establishing it as one of COMESA's fundamental principles, is Article 6(e), which describes the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. The recognition and observance of the rule of law as well as the promotion and sustenance of a democratic system of governance, both undoubtedly intertwined with the status of human rights protection, are similarly laid down as fundamental principles of COMESA.[106] The principles that disputes among member states are to be settled peacefully, and that the recognition of a peaceful environment is a prerequisite for economic development,[107] are further factors which are ultimately beneficial for the status quo of human rights. The fact that trade might have a negative impact on human rights is taken into account in the sixth chapter of the COMESA Treaty, which deals with cooperation in trade liberalisation and development. In this context, provision is made to allow states to impose restrictions on trade affecting, inter alia, the protection of human, animal or plant health or life; the protection of public morality; or the maintenance of food security in the event of war and famine.[108] This is a clear indication that the protection of basic human needs and, therefore, the protection of fundamental human rights do indeed outweigh the interests of trade. However, such restrictions to trade are only permissible if the state imposing such restrictions or prohibitions has informed the Secretary-General about its intention prior to taking the respective action. Moreover, the measures taken may not last longer than necessary in respect of achieving security aims or eliminating other risks, and they are obliged to be applied on the basis of non-discrimination.[109] The COMESA Treaty also refers to environmental concerns, which, under the notion of *third-generation human rights*[110] play an essential role in protecting human rights. In its sixteenth chapter, the COMESA Treaty deals extensively with cooperation in the development of natural resources, the environment and wildlife. In this regard, it is recognised that a clean and attractive environment is a prerequisite for long-term economic growth,[111] and provision is made for any action having an environmental impact to contain the objective to preserve, protect and improve the quality of the environment; to contribute towards protecting human health; and to ensure the prudent and rational utilisation of natural resources.[112] Furthermore, it is explicitly stated that environmental conservation is to be considered in all the fields of COMESA activity.

Gender issues also play a substantial role within the COMESA legal framework – to the extent that an entire additional chapter[113] within the COMESA Treaty deals with women in development and business, and special provisions can also be found at policy level. Recognising that sustainable economic and social development of the region requires the full and equal participation of women, men and youth, COMESA adopted a Gender Policy in 2005.

Within COMESA, a Federation of National Associations of Women in Business (FEMCOM) was established, which functions as a forum for exchanging ideas and experience among women

106 Articles 6(g) and (h), respectively, COMESA Treaty.
107 Article 6(j), COMESA Treaty.
108 Article 50(1)(c) and (f), respectively, COMESA Treaty.
109 Article 50(3), COMESA Treaty.
110 With regard to the environment as a third-generation human right, see Ruppel (2008a).
111 Article 122(2), COMESA Treaty.
112 Article 122(5), COMESA Treaty.
113 Chapter 24, COMESA Treaty.

entrepreneurs of the subregion, as well as an instrument for encouraging and facilitating the setting up or expansion of enterprises. Since 1993, FEMCOM has been working towards promoting programmes that integrate women into trade and development. Among these is a programme to create awareness among women of export markets in the COMESA FTA.[114] In particular, FEMCOM focuses on sectors such as agriculture, fishing, mining, energy, transport, and communication.

However, despite COMESA policies, its noble vision, and its objectives, gender inequality remains a major problem affecting regional integration efforts as women still tend to have limited access to regional and international markets.[115] Inadequate access to trade information and market research, unfamiliar and complicated procedures in export management, low levels of education among the majority of women in COMESA member states, and inadequate access to credit and finance have all been cited by FEMCOM as possible reasons for perpetuating gender inequality. In this sense too, the COMESA Gender Policy states the following:[116]

> A critical analysis of the socio-economic reality of the region shows that gender gaps exist in terms of poverty, disease, education, employment, governance and many other issues. Many problems also exist with regard to COMESA's effort to integrate women in Trade, Industry, Agriculture, Information and Communications, Science and Technology.

Enforcement mechanisms

As one of its organs, COMESA established a Court of Justice in 1994 to ensure adherence to law in the interpretation and application of the COMESA Treaty. Prior to the establishment of the COMESA Court of Justice, the judicial organs of COMESA's predecessor, the PTA, dealt with disputes in its REC. The functions of these organs, namely the PTA Tribunal, the PTA Administrative Appeals Board, and the PTA Centre for Commercial Arbitration, were taken over by the COMESA Court of Justice. The COMESA Court of Justice has the jurisdiction to hear disputes to which member states, the Secretary-General, or residents of member states (individuals and legal persons) may be parties. The Court has the jurisdiction to adjudicate upon all matters which may be referred to it pursuant to the COMESA Treaty. The Seat of the Court was temporarily hosted within the COMESA Secretariat from 1998. In March 2003, the COMESA Authority decided that the Seat should be in Khartoum, Sudan.[117]

References to the Court may be made by member states, the Secretary-General, and legal and natural persons, which is of specific importance with regard to human-rights-related matters. Residents in a member state may approach the Court to determine the legality of any act, regulation, directive, or decision of the Council or of a member state on the grounds that such act, regulation, directive or decision is unlawful or an infringement of the

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114 The FTA includes Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Sudan, Zambia and Zimbabwe.

115 This was stated by Mary Malunga, FEMCOM Chairperson and Director of Malawi's National Association of Business Women (NABW); see Semu-Banda (2007).

116 See subsection 9, Preamble to the COMESA Gender Policy.

117 See http://www.comesa.int/institutions/court_of_justice/Multi-language_content.2003-08-21.2608/view; last accessed 28 July 2008.

provisions of the COMESA Treaty.[118] However, a person who refers a matter to the Court is obliged to have exhausted local remedies in the national courts or tribunals of the member state concerned prior to referring a matter to the COMESA Court of Justice. Decisions of the Court on the interpretation of the provisions of the COMESA Treaty have precedence over decisions of national courts,[119] and national courts can ask the COMESA Court of Justice for a preliminary ruling concerning the application or interpretation of the COMESA Treaty if the court of the member state considers that a ruling on the question is necessary to enable it to give judgment.[120]

Judgments of the COMESA Court of Justice are final and conclusive, and not open to appeal.[121] As to the enforcement of judgements delivered by this Court, the COMESA Treaty provides for member states or the Council to take the measures required to implement the judgment. The Court itself has the option to prescribe such sanctions as it considers necessary to be imposed against a party who does not fulfil its obligation to implement the Court's decision.[122]

In sum, it can be stated that the COMESA Court of Justice has the potential to contribute to the protection and promotion of human rights, as individual actions are subject to the Court's jurisdiction and human rights are anchored within COMESA's legal framework.

Southern African Development Community – SADC

Background

SADC[123] was established in Windhoek in 1992 as the successor organisation to the Southern African Development Coordination Conference (SADCC), which was founded in 1980. SADC was established by signature of its constitutive legal instrument, the SADC Treaty. SADC envisages –[124]

> … a common future, a future in a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice and peace and security for the peoples of Southern Africa. This shared vision is anchored on the common values and principles and the historical and cultural affinities that exist between the peoples of Southern Africa.

To this end, SADC's objectives include the achievement of development and economic growth; the alleviation of poverty; the enhancement of the standard and quality of life; support of the socially disadvantaged through regional integration; the evolution of common political values, systems and institutions; the promotion and defence of peace and security; and

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118 Article 26, COMESA Treaty.
119 Article 29(2), COMESA Treaty.
120 Article 30, COMESA Treaty.
121 Article 31(1), COMESA Treaty.
122 Article 34(3) and (4), COMESA Treaty.
123 For more details on SADC, see http://www.sadc.int/.
124 See SADC's Vision, at http://www.sadc.int/.

achieving the sustainable utilisation of natural resources and effective protection of the environment.[125]

According to the UN Statistical Division,[126] SADC counts a total population of more than 245 million, who inhabit a surface area of almost 10 million km^2, and a total GDP of over US$432 billion. SADC's headquarters are in Gaborone, Botswana, and the SADC working languages are English, French and Portuguese. The institutions of SADC, provided for in the SADC Treaty, are the Summit of Heads of State or Government; the Organ on Politics, Defence and Security Co-operation; the Council of Ministers; the Integrated Committee of Ministers; the Standing Committee of Officials; the Secretariat; the Tribunal; and SADC National Committees.

SADC currently counts 15 states among its members, namely Angola, Botswana, the DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles,[127] South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

The Regional Indicative Strategic Development Plan (RISDP) approved by the SADC Summit in 2003, has defined the following targets for regional integration within SADC:

- An FTA by 2008
- Completion of negotiations of the SADC Customs Union by 2010
- Completion of negotiations of the SADC Common Market by 2015
- SADC Monetary Union and SADC Central Bank by 2016, and
- Launch of a regional currency by 2018.

As a first step towards deeper regional integration, SADC launched the FTA in August 2008 in order to create a larger market, releasing potential for trade, economic development and employment creation.[128]

As many SADC member states are also parties to other RECs,[129] COMESA, the EAC and SADC have decided to accelerate economic integration of the continent, with the aim of achieving economic growth, reducing poverty and attaining sustainable economic development. To this end, it was resolved that the three RECs should –[130]

> … immediately start working towards a merger into a single REC with the objective of fast[-]tracking the attainment of the African Economic Community.

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125 These are some of the SADC objectives laid down in Article 5 of the SADC Treaty.

126 http://unstats.un.org/unsd/default.htm.

127 The Seychelles was a member of SADC from 1997 to 2004; it rejoined SADC in 2008.

128 See Section 14, Final Communiqué of the 28th Summit of SADC Heads of State and Government held in Sandton, South Africa, from 16 to 17 August 2008.

129 COMESA members that are simultaneously SADC members are the DRC, Madagascar, Malawi, Mauritius, the Seychelles, Zambia and Zimbabwe. Burundi, Kenya, Rwanda and Uganda are simultaneously members of EAC and COMESA, while Tanzania is a member of the EAC as well as of SADC. See the respective explanations on overlapping memberships and in the section on the history and facts of COMESA. On the specific issue of overlapping memberships, see Jakobeit et al. (2005).

130 See COMESA–EAC–SADC (2008).

In the area of trade, customs and economic integration, it was approved that an FTA be established, encompassing the three RECs' member states with the ultimate goal of establishing a single customs union.

Human rights protection within SADC

It might appear that the promotion and protection of human rights are not SADC top priority as an organisation that furthers socio-economic cooperation and integration as well as political and security cooperation among its 15 southern African member states. However, the protection of human rights plays an essential role in economic development as it has an impact on the investment climate, which in turn contributes to growth, productivity and employment creation, all being essential for sustainable reductions in poverty.

A ministerial workshop in 1994 called for the adoption of a SADC Human Rights Commission as well as for a SADC Bill of Rights. In 1996, a SADC Human Rights Charter was drafted, albeit by NGOs of several SADC member states.

In the course of establishing the SADC Tribunal in 1997, a panel of legal experts[131] considered the possibility of separate human rights instruments such as a Protocol of Human Rights or a separate Southern African Convention on Human Rights. None of these proposals was realised, however.[132]

Nonetheless, many human-rights-related provisions can be found within SADC's legal framework. The SADC Treaty itself refers to regional integration and to human rights directly or indirectly at several stages. In its Preamble, the Treaty determines, inter alia, to ensure, through common action, the progress and well-being of the people of southern Africa, and recognises the need to involve the people of the SADC region centrally in the process of development and integration, particularly through guaranteeing democratic rights, and observing human rights and the rule of law. The Preamble's contents are given effect within the subsequent provisions of the SADC Treaty. Chapter 3, for example, which deals with principles, objectives, the common agenda and general undertakings, provides that SADC and its member states are to act in accordance with the principles of human rights, democracy and the rule of law.[133] Moreover, the objectives of SADC[134] relate to human rights issues in one way or another. For instance, the objective of alleviating and eventually eradicating poverty contributes towards ensuring, inter alia, a decent standard of living, adequate nutrition, health care and education – all these being human rights.[135] Other SADC objectives such as the maintenance of democracy, peace, security and stability refer to human rights, as do the sustainable utilisation of natural resources and effective protection of the environment – known as third-generation human rights.[136]

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131 This panel consisted of the late Professor Kamba (founding Dean of the Faculty of Law at the University of Namibia) and Justice Jacobs (judge at the Court of Justice of the European Communities). Cf. Viljoen (1999:200).

132 For more details on these historical developments, see Viljoen (ibid.:200f).

133 Article 4(c), SADC Treaty.

134 Article 5, SADC Treaty.

135 UNDP (2000:8).

136 Ruppel (2008a).

Besides the aforementioned provisions and objectives, the SADC legal system offers human rights protection in many legal instruments other than the SADC Treaty. One category of legal documents constitutes the SADC Protocols. The Protocols are instruments by means of which the SADC Treaty is implemented; they have the same legal force as the Treaty itself. A Protocol comes into force after two thirds of SADC member states have ratified it. A Protocol legally binds its signatories after ratification.

The table below outlines all SADC Protocols, as most SADC Protocols are either directly or indirectly relevant to human rights.

Table 2: SADC Protocols

Protocol Against Corruption
Protocol on Culture, Information and Sports
Protocol on Combating Illicit Drugs
Protocol on Education and Training
Protocol on Energy
Protocol on Extradition
Protocol on Control of Firearms, Ammunition and Other Related Materials
Protocol on Fisheries
Protocol on Forestry
Protocol on Gender and Development
Protocol on Immunities and Privileges
Protocol on Legal Affairs
Protocol on Mutual Legal Assistance in Criminal Matters
Protocol on Mining
Protocol on the Facilitation of Movement of Persons
Protocol on Politics, Defence and Security Co-operation
Protocol on the Development of Tourism
Protocol on Trade
Amended Protocol on Trade
Protocol on Transport, Communications and Meteorology
Protocol on the Tribunal and the Rules of Procedure Thereof

Of specific relevance in terms of human rights are the gender-related instruments within the SADC legal framework.[137] For example, the Protocol on Gender and Development was signed during the 28th SADC Summit in August 2008.[138] Recognising that the integration and mainstreaming of gender issues into the SADC legal framework is key to the sustainable development of the SADC region, and taking into account globalisation, human trafficking of women and children, the feminisation of poverty, and violence against women, amongst other things, the Protocol in its 25 Articles expressively address issues such as affirmative action, access to justice, marriage and family rights, gender-based violence, health, HIV and AIDS, and peace-building and conflict resolution. The Protocol provides that, by 2015, member states are obliged to enshrine gender equality in their respective constitutions, and that their constitutions state that the provisions enshrining gender equality take precedence over their customary, religious and other laws.[139]

The implementation of the Protocol's provisions is the responsibility of the various SADC member states,[140] and specific provisions as to monitoring and evaluation are laid down in the Protocol.[141] The SADC Tribunal is the judicial body that has jurisdiction over disputes relating to this Protocol.[142]

Apart from the SADC Treaty and the SADC Protocols, the REC has other instruments at different levels. The latter are not binding, and do not require ratification by SADC members. With respect to their human rights relevance, such instruments include the Principles and Guidelines Governing Democratic Elections; the Charter of Fundamental and Social Rights in SADC; the Declaration on Agriculture and Food Security; and the Declaration on HIV and AIDS.

The Principles and Guidelines Governing Democratic Elections[143] are of specific importance for first-generation human rights, which comprise civil and political rights. The Guidelines focus on citizens' participation in the decision-making processes and the consolidation of democratic practice and institutions. Besides the basic principles for conducting democratic elections, the Guidelines inter alia provide for SADC Electoral Observation Missions that member states can invite to observe their elections; guidelines on the observation of elections; a code of conduct for election observers; and the rights and duties of a member state holding elections.

The 2003 Charter of Fundamental and Social Rights in SADC – although not legally binding – is an important human rights document that specifies the objectives laid down in Article 5 of the SADC Treaty for the employment and labour sector. Rights such as the right to freedom of association; the right to equality; the right to a safe and healthy environment; the right to remuneration; and the right to the protection of specific groups in society, such as children,

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137 Visser & Ruppel-Schlichting (2008:157).

138 See Section 16, Final Communiqué of the 28th Summit of SADC Heads of State and Government held in Sandton, South Africa, 16 to 17 August 2008.

139 Article 4, SADC Protocol on Gender and Development.

140 Article 14, SADC Protocol.

141 Article 17, SADC Protocol.

142 Article 18, SADC Protocol.

143 Referred to hereafter as *the Guidelines*.

the youth, the elderly, and persons with disabilities, are enshrined in the Charter of Fundamental and Social Rights in SADC.

With the 2003 Declaration on Agriculture and Food Security, the Heads of State or Government have given substantial means to some specific objectives laid down in Article 5 of the SADC Treaty, namely the promotion of sustainable and equitable economic growth and socio-economic development to ensure poverty alleviation with the ultimate objective of its eradication; the achievement of sustainable utilisation of natural resources and effective protection of the environment; and mainstreaming of gender perspectives in the process of community and nation building. By this Declaration, SADC States have committed themselves to promote agriculture as a pillar in national and regional development strategies and programmes in order to attain our short, medium, and long-term objectives, on agriculture and food security. The Declaration of Agriculture and Food Security is of specific importance for the human right to food and covers a broad range of human rights relevant issues like the increase of production of crops, livestock and fisheries, the sustainable use and management of natural resources as well as the enhancement of gender equality and human health and the mitigation of chronic diseases such as AIDS.

The 2003 Declaration on HIV and AIDS similarly strives to realise the objectives set forth in the SADC Treaty to promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation; to combat HIV and AIDS and other deadly and communicable diseases; and to mainstream gender in the process of community and nation-building. The Declaration describes specific areas as urgent priorities in terms of attention and action. These areas include prevention and social mobilisation; improving care, access to counselling and testing services, treatment and support; accelerating development and mitigating the impact of HIV and AIDS; intensifying resource mobilisation; and strengthening institutional, monitoring and evaluation mechanisms.

Enforcement mechanisms

Having briefly introduced the most important instruments within the SADC legal environment, the next paragraphs will deal with the question of how human rights contained in the aforementioned instruments can be enforced. Notably, each of these instruments give guidance to the various SADC institutions within the manifold decision-making processes. In the legal sense, however, only provisions of a binding nature can be enforced. Therefore, the SADC Treaty and its Protocols are pivotal to enforcing human rights within SADC.

The SADC Tribunal is the judicial institution within SADC. The establishment of the Tribunal is a major event in SADC's history as an organisation and in the development of its law and jurisprudence. The Tribunal was established in 1992 by Article 9 of the SADC Treaty as one of the institutions of SADC. The Summit of Heads of State or Government, which is the Supreme Policy Institution of SADC pursuant to Article 4(4) of the Protocol on the Tribunal, appointed the members of the Tribunal during its Summit in Gaborone, Botswana, on 18 August 2005. The inauguration of the Tribunal and the swearing in of its members took place on 18 November 2005 in Windhoek, Namibia, in which city Council also designated the Seat of the Tribunal to be. Article 22 of the Protocol on the Tribunal provides that for working

languages of the Tribunal to be English, French and Portuguese.[144] The Tribunal began hearing cases in 2007, and has seen 17 cases filed with it to date.

The SADC Protocol on the Tribunal and the Rules of Procedure thereof circumscribe the Tribunal's jurisdiction. Article 16(1) of the SADC Treaty provides for the following primary mandate:

> The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.

The SADC Tribunal was set up to protect the interests and rights of SADC member states and their citizens, and to develop community jurisprudence, also with regard to applicable treaties, general principles, and rules of public international law.[145] Subject to the principle that local remedies first be exhausted before the Tribunal is approached, the Tribunal has the mandate to adjudicate disputes between states, and between natural and legal persons in SADC.[146] Further, the Protocol states that the Tribunal has jurisdiction over all matters provided for in any other agreements that member states may conclude among themselves or within the community, and that confer jurisdiction to the Tribunal.[147] In this context, the SADC Tribunal also has jurisdiction over any dispute arising from the interpretation or application of the Protocol on Gender and Development that cannot be settled amicably.[148]

The Tribunal was primarily set up to resolve disputes arising from closer economic and political union, rather than human rights.[149] However, a recent judgement by the Tribunal commonly known as the *Campbell* case,[150] impressively demonstrates that the Tribunal can also be called upon to consider human rights implications of economic policies and programmes.

On 11 October 2007, Mike Campbell (PVT) Limited, a Zimbabwean-registered company, instituted a case with the Tribunal to challenge the expropriation of agricultural land in Zimbabwe by that country's government. At the time, the matter was also pending in the Supreme Court of Zimbabwe.[151] As a result, an application was brought in terms of Article 28 of the SADC Protocol for an interim measure to interdict the Zimbabwean Government from evicting Mike Campbell (PVT) Limited and others from the land in question until the main case had been finalised.

The claimant argued that the Zimbabwean land acquisition process was racist and illegal by virtue of Article 6 of the SADC Treaty and the African Union Charter, which both outlaw arbitrary and racially motivated government action. Article 4 of the SADC Treaty stipulates

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144 See http://www.sadc.int/tribunal/; last accessed 20 July 2008.

145 Chidi (2003).

146 Article 15(2), Protocol on the Tribunal and Rules of Procedure thereof.

147 Hugo (2007).

148 Article 18, SADC Protocol on Gender and Development.

149 Viljoen (2007:503).

150 *Mike Campbell & Another (PVT) Limited v The Republic of Zimbabwe* SADC (T) 2/2007.

151 See *Mike Campbell (PVT) Ltd et al. v The Minister of National Security responsible for Land, Land Reform and Resettlement and the Attorney-General*. Constitutional Application No. 124/06 (unreported case: Supreme Court of Zimbabwe).

that SADC and its member states are obliged, inter alia, to act in accordance with the principles of human rights, democracy and the rule of law, as well as in line with the principles of equity, balance and mutual benefit, and the peaceful settlement of disputes. According to Article 6(2) of the Treaty, –

> SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability.

It was put forward that the constitutional amendments behind the farm seizures were contrary to SADC statutes, and that the Supreme Court of Zimbabwe had failed to rule on an application by Campbell and 74 other Zimbabwean white commercial farmers to have the race-based acquisition declared unlawful.[152] The claimant alleged that he had suffered a series of invasions on his farm. The defendant state in turn argued that the land had to be given back to even out a colonial imbalance in land distribution, and that Campbell had not exhausted local remedies. The relationship between the legal regime of SADC on the one hand and Zimbabwe's national law on the other is at the core of this case.

Section 23 of the Constitution of the Republic of Zimbabwe states the following:

> No law shall make any provision that is discriminatory either of itself or in its effect; and no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

In 2005, however, the Zimbabwean Constitution was amended. The Constitutional Amendment Act No. 17 of 2005 allows the Zimbabwean Government to seize or expropriate farmland without compensation, and bars courts from adjudicating over legal challenges filed by dispossessed and aggrieved white farmers. Section 2(2) of the Constitutional Amendment Act provides that –

> … all agricultural land – [a description of such agricultural land identified by the Government is given here] … is acquired by and vested in the State with full title therein …; and … no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

The practical implications of the Constitutional Amendment Act resulted in farm seizures, where most of the approximately 4,000 white farmers were forcibly ejected from their properties with no compensation being paid for the land, since, according to Harare, it was stolen in the first place. The Zimbabwe Government has compensated some farmers only for developments on the land such as dams, farm buildings and other so-called improvements.[153]

After an interim order was issued by the Tribunal[154] that Campbell should remain on his expropriated farm until the dispute in the main case had been resolved by it, the Zimbabwean Supreme Court[155] (sitting as a Constitutional Court) dismissed the application by the white

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152 Grebe (2008a).

153 Incidentally, these land reform measures have plunged Zimbabwe into severe food shortages.

154 On 13 December 2007.

155 On 22 January 2008.

commercial farmers challenging the forcible seizure and expropriation of their lands without compensation. The Court ruled that –[156]

> … by a fundamental law, the legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded.

The main hearing before the SADC Tribunal was scheduled for 28 May 2008, but was postponed until 16 July 2008. In the meantime, Campbell and members of his family were brutally beaten up on their farm in Zimbabwe and allegedly forced to sign a paper declaring that they would withdraw the case from the SADC Tribunal.[157] Subsequently, the applicants and other interveners in the *Campbell* case made an urgent application for non-compliance to the Tribunal, seeking a declaration to the effect that the respondent state was in breach and contempt of the Tribunal's orders. After hearing the urgent application, the Tribunal found that the respondent state was indeed in contempt of its orders. Consequently, and in terms of Article 32(5) of the Protocol, the Tribunal decided to report the matter to the Summit for the latter to take appropriate action.[158]

The hearing of the *Campbell* case was finalised on 28 November 2008. In its final decision, the SADC Tribunal ruled in favour of the applicants Mike and William Campbell and 77 other white commercial farmers.[159]

In conclusion, the Tribunal held that the Republic of Zimbabwe was in breach of its obligations under Articles 4(c) and 6(2) of the SADC Treaty, and that –[160]

- the applicants had been denied access to the courts in Zimbabwe
- the applicants had been discriminated against on the ground of race, and[161]
- fair compensation was payable to the applicants for their lands compulsorily acquired by the Republic of Zimbabwe.

Furthermore, the Tribunal directed the Republic of Zimbabwe to take all necessary measures to protect the possession, occupation and ownership of the lands of applicants who had not yet been evicted from their lands, and to pay fair compensation to those three applicants who had already been evicted from their farms. The ruling is considered to be a landmark decision which will no doubt influence the legal landscape in the SADC region. Meanwhile, the Zimbabwean Government has announced that it will not accept the judgement, which raises the question of how the SADC Tribunal's judgements are to be enforced.

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156 See http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=13001:campbell-case-heads-of-argument-summary&catid=31:top%20zimbabwe%20stories&Itemid=66; last accessed 18 June 2008.

157 Grebe (2008b).

158 So far, no official measures have been taken by the SADC Summit in the *Campbell* case.

159 *Mike Campbell (PVT) Limited & Another v The Republic of Zimbabwe* SADC (T) 2/2007.

160 *Mike Campbell (PVT) Limited & Another v The Republic of Zimbabwe* SADC (T) 2/2007, at page 57f.

161 The issue of racial discrimination was decided by a majority of four to one. Judge Tshosa, in his dissenting opinion, concluded that "Amendment 17 does not discriminate against the applicants on the basis of race and therefore does not violate the respondent's obligation under Article 6(2) of the Treaty". He argued that "the target of Amendment 17 is agricultural land and not people of a particular racial group" and that – although few in number – not only white Zimbabweans had been affected by the amendment. See *Mike Campbell (PVT) Limited & Another v The Republic of Zimbabwe* SADC (T) 2/2007, dissenting opinion of Hon. Justice Dr Onkemetse B Tshosa.

The Tribunal's decisions are final and binding.[162] Sanctions for non-compliance may be imposed by the Summit according to Article 33 of the SADC Treaty, and are determined on a case-by-case basis. However, no specific sanction is outlined for non-compliance with judgements issued by the SADC Tribunal.[163] The Tribunal itself can only refer cases of non-compliance to the SADC Summit for the latter to take appropriate steps. Therefore, the future will show to what extent the Tribunal's judgements are taken seriously by SADC member states and by SADC itself. Even if the Tribunal is unable to heal all domestic failures in human rights matters, since such matters are not in the focus of the institution or its mandate for regional integration, it remains to be seen whether SADC is politically and legally mature enough to apply the necessary lessons.

Of significance is the fact that none of the cases heard by the Tribunal so far have dealt with disputes among member states, whereas 15 cases relate to disputes between natural/legal persons and member states, and 2 to disputes between SADC employees and SADC institutions. This interim balance shows that there is indeed a need for a supranational judicial body to decide on matters that relate to cases of imbalances between national law on the one hand and community law on the other. The Tribunal can, therefore, significantly contribute not only towards a deeper harmonisation of law and jurisprudence, but also towards a better protection of human rights at community level – provided that SADC and its institutions put the necessary emphasis on the enforcement of the Tribunal's judgements.

The Eastern African Community – EAC

Background

The history of the EAC[164] goes back to 1967, the year in which it was originally founded. In 1977, after ten years of operation, the EAC was dissolved[165] and was defunct until 2000, when it was revived. Today, the EAC has been officially recognised by the AU as one of the pillars of the AEC.

According to the UN Statistical Division,[166] the EAC covers a land surface area of almost 2 million km^2, which a total of almost 125 million inhabitants call home. The REC has a total GDP of over US$149 billion. The official languages are English, French and Kiswahili. The basic

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162 Article 16 (5) of the SADC Treaty.

163 Interestingly, a draft SADC Human Rights Charter drawn up by NGOs of SADC member states in 1996 contained a provision according to which any state "which does not comply with an order of the Court interpreting this Charter shall be suspended from SADC for the duration of its non-compliance with such order". This proposal, although it appears very effective, has, however, not been realised. See Viljoen (1999:201f).

164 For more details on the EAC, see www.eac.int.

165 Many reasons have been cited for the stranding of the EAC in 1977. Viljoen (2007:490f) states that "Businessmen in Kenya pressurized government to withdraw, because the Court's appellate jurisdiction had affected their financial and commercial interests, even though Kenya benefited from an inequitable distribution of benefits. Differences in economic policies and political approaches also constituted important reasons for failure".

166 http://unstats.un.org/unsd/default.htm.

legal instrument of the EAC is the Treaty Establishing the East African Community.[167] The Treaty was signed in 1999 and came into force in 2000, allowing the EAC to be officially launched in January 2001.

The EAC focuses on and aims at widening and deepening cooperation among its member states in political, economic, social and cultural fields; and in research and technology, defence, security, and legal and judicial affairs, for their mutual benefit.[168] Furthermore, the EAC Treaty provides for, inter alia, the organs of the EAC, namely the Summit, the Council of Ministers, the Co-ordination Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly, and the Secretariat, which has its seat in Arusha, Tanzania.

The EAC currently counts five states as its members, namely Burundi, Kenya, Rwanda, Tanzania, and Uganda. All EAC members are at the same time state parties to other organisations in the region.[169] The EAC has just recently concluded an agreement with SADC and COMESA to form an expanded FTA to include all their member states, with the ultimate goal of establishing a single customs union. The Tripartite Summit held with the Heads of State and Government of the three RECs in October 2008 in Kampala, Uganda, focused on the broader objectives of the AU to accelerate the economic integration of the continent, with the aim of achieving economic growth, reducing poverty and attaining sustainable economic development. It was resolved that the three RECs should –[170]

> … immediately start working towards a merger into a single REC with the objective of fast[-]tracking the attainment of the African Economic Community.

Human rights protection within the EAC

Although the EAC's focus has primarily been on economic integration, good governance and human rights issues are coming to the fore as the EAC moves deeper into regional integration.[171] Among the fundamental principles of the EAC are many which relate to the protection of human rights. The most relevant provision is Article 6(d), which reads as follows, and governs the achievement of EAC objectives by its member states:

> … good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples['] rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; …

The governing principles for the practical achievement of the objectives of the EAC – referred to as *operational principles* – also contain provisions relevant to human rights. Thus, Article 7(2) urges member states to –

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167 In the following referred to as the *EAC Treaty*.

168 See Article 5, EAC Treaty.

169 Tanzania, for example, is a member of the EAC and simultaneously of SADC. Members of the EAC that are simultaneously members of COMESA are Burundi, Kenya, Rwanda and Uganda.

170 See COMESA–EAC–SADC (2008).

171 As stated by the Secretary-General of the EAC, Juma V Mwapachu, on 3 September 2007, at a meeting held with a delegation of the Kituo Cha Katiba, a regional civil society organisation with observer status in the EAC. The delegation had called on him in Arusha to discuss a draft East African Bill of Rights; cf. EAC (2008a).

> … undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

Furthermore, the protection of human rights is a governing principle in respect of common foreign and security policies as the objectives of such policies are designed to develop and consolidate democracy and the rule of law as well as the respect for human rights and fundamental freedoms.

The aforementioned provisions cover human rights protection in general, whereas the EAC Treaty and other legal instruments and programmes focus on specific human-rights-related issues. The role of women and men in society is one such issue. To this end, the mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic and technological development is laid down as one specific objective of the community.[172] The fact that gender equality is recognised as one of the fundamental principles of the EAC[173] is reflected in the provisions relating to the appointment of staff,[174] which provides that gender balance is to be taken into account within the appointment and composition of staff in EAC organs and institutions. Besides these more general provisions, in recognition of women making a significant contribution towards the process of socio-economic transformation and sustainable growth, the Treaty has dedicated an entire chapter, Chapter 22, to enhancing the role of women in socio-economic development. Chapter 22 comprises a broad range of progressive provisions aimed at improving the situation of women within EAC member states. Chapter 22 urges states to, amongst other things, take appropriate legislative and other measures to –[175]

- abolish legislation and discourage customs that discriminate against women
- promote effective education awareness programmes aimed at changing negative attitudes towards women, and
- take measures to eliminate prejudices against women and promote gender equality in every respect.

The preservation of peace and security are other features contained in the EAC Treaty that are closely related to human rights protection, since a state of war substantially affects human rights. By signing the Treaty, member states acknowledge that peace and security are prerequisites to social and economic development within the EAC, and that they are vital to achieving EAC objectives. In this regard, the Treaty envisages fostering and maintaining an atmosphere conducive to peace and security by means of cooperation and consultation with a view to the prevention, resolution and management of disputes and conflicts between member states.[176] Moreover, member states have agreed to establish common mechanisms for the management of refugees.[177]

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172 Article 5(3)(e), EAC Treaty.
173 Article 6(d), EAC Treaty.
174 Article 9(5), EAC Treaty.
175 Articles 121 and 122, EAC Treaty.
176 Article 124(1), EAC Treaty.
177 Article 124(5)(a), EAC Treaty.

Further human-rights-related provisions have been included in the EAC Treaty with regard to the free movement of persons; labour services; the right of establishment and residence;[178] agriculture and food security;[179] health, cultural and social activities;[180] and management of the environment and natural resources.[181]

On the sub-Treaty level, other EAC instruments that enhance the protection of human rights more specifically need to be mentioned as well. In 2008, the EAC Council of Ministers adopted the EAC Plan of Action on the Promotion and Protection of Human Rights in East Africa.[182] The Plan of Action envisages the following, inter alia, within a three-year period:

- The establishment of new and the strengthening of existing national human rights institutions
- The development of training manuals or guidelines for human rights actors and agencies, and
- The training of actors involved in the promotion and protection of human rights, including judges/judicial officers, Electoral Commissions, policymakers and implementers, legislators, and civil society.

The preservation of environmental goods and the prevention of environmental threats are essential for human life; in this sense, they are vital for maintaining a healthy standard of human rights. Thus, the EAC adopted a Protocol on Environment and Natural Resources, which was ratified by EAC member states in 2008.[183] The Protocol was adopted in recognition of the fact that a clean and healthy environment is a prerequisite for sustainable development, and beneficial to present and future generations.[184] To this end, the Protocol makes provision for cooperation in environmental and natural resource management, covering a broad variety of sectors such as biodiversity, forests, wildlife, water, genetic resources, mining and energy resources, drought, climate change and the ozone layer.[185] Provisions are also made for environmental impact assessments and audits, as well as for the establishment of a Sectoral Committee on Environment and Natural Resources. Disputes between states as regards the Protocol are referred to the East African Court of Justice (EACJ) where all other attempts to resolve the situation have failed.

Unquestionably, the EAC Treaty and other EAC instruments serving as guidelines for cooperation and decision-making processes provide for an in-depth protection of human rights. Considering that the EAC is still in its infancy, the question of whether and to what degree human-rights-related provisions are put into practice cannot be answered at this stage. What is clear, however, is that a treaty such as the EAC's formulates many provisions as visions and guidelines to be realised 'on the way'. One prerequisite for the realisation of such laudable vision, however, is that proper mechanisms are put in place to give effect to the rights contained in the legal instruments concerned.

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178 Chapter 17, EAC Treaty.

179 Chapter 18, EAC Treaty.

180 Chapter 21, EAC Treaty.

181 Chapter 19, EAC Treaty.

182 (EAC/CM 15/Decision 36). See EAC (2008c:20).

183 See EAC (2008c:15).

184 Cf. Preamble to the EAC Protocol on Environment and Natural Resource Management.

185 Cf. Chapter 3, EAC Protocol.

Enforcement mechanisms

The East African Court of Justice (EACJ) is the judicial body of the East African Community. It is temporarily seated in Arusha, Tanzania, until the Summit determines the Court's permanent Seat. The Court was established in 1999 under Article 9 of the EAC Treaty, and became operational in 2001.[186] Although a successor to the East African Court of Appeal, which was the judicial organ of the EAC until it became defunct in 1977, the EACJ is different in composition and jurisdiction.[187] Procedural provisions relevant to the EACJ are the Rules of the Court and the EACJ Arbitration Rules.

The Court has jurisdiction over the interpretation and application of the EAC Treaty. Therefore, it plays an important role in embodying the fundamental principles of the EAC, such as adherence to the rule of law and good governance.[188] Reference to the Court may be by legal and natural persons, member states, and the EAC Secretary-General. The decisions of the EACJ are binding on the parties to the dispute.[189] Recently, the structure of the EACJ was extended from a single instance court to a first instance division and an appellate division.[190]

Although the EAC Treaty provides for broad protection with regard to human rights, notably the East African Court of Justice has to date had no jurisdiction in human rights cases. This is because Article 27(2) of the EAC Treaty provides that jurisdiction on human-rights-related matters is subject to a respective Protocol, which has not yet been concluded. This is an indication that the Court may not rule on issues relating to human rights. However, the Court itself has stated that it does not abdicate from exercising its jurisdiction of interpretation of the Treaty –[191]

> … merely because the Reference includes allegation of human rights violation.

It is hoped that a Protocol enabling the court to exercise jurisdiction in cases dealing with human rights is currently under debate. The so-called Zero Draft (Draft Protocol on extending the jurisdiction of the EACJ)[192] was drafted by the EAC's Secretariat in 2005, but has not yet been approved by the Meeting of the EAC Council of Ministers.[193] The fact that the 2005 version of the Draft Protocol was criticised in the past[194] is one of the reasons why the Court does not yet have explicit jurisdiction for human rights cases. The criticism is

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186 For some recent decisions of the Court, see Mutai (2007:177–203).

187 The defunct East African Court of Appeal was designed as an appeal court for national court decisions on civil and criminal matters, but with the exception of constitutional matters and the offence of treason in Tanzania. See http://www.eac.int/index.php/organs/eacj.html?start=1.

188 As stated by the EAC's Secretary-General, Juma V Mwapachu, at the Induction Workshop for EACJ Judges held in Arusha on 30 July 2008; cf. EAC (2008b:14).

189 Article 35, EAC Treaty.

190 See EAC (2008b:14).

191 Cf. *Katabazi & 21 Others v Secretary General of the East African Community & Another* (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 2007).

192 Text available at http://www.ealawsociety.org/Joomla/UserFiles/File/draft_protocol_eacj.pdf.

193 As stated by the Secretary-General of the EAC, Juma V Mwapachu, on 3 September 2007 at a meeting held with a delegation of the Kituo Cha Katiba, a regional civil society organisation with observer status in the EAC. The latter delegation called on the Secretary-General in Arusha to discuss a draft East African Bill of Rights; cf. EAC (2008a:21f).

194 Bossa (2006); see also Bossa (2005).

based on, inter alia, the envisaged combined jurisdiction of the EACJ as a Court of Justice and a Human Rights Court, and on the lack of clarity on the issue of applicable law.[195]

It is hoped that the EACJ will soon have at hand a legal instrument providing explicit jurisdiction in human rights cases. For the time being, cases involving human rights violations can either be brought before other subregional courts[196] or be referred to the respective judicial institution at regional level.[197] The only other option for the EACJ is to still accept human-rights-related cases on the basis of implicit jurisdiction, as it has done in the past.[198]

Economic Community of Central African States – ECCAS

Background

ECCAS[199] was formally established in 1983 by Cameroon, the Central African Republic, Chad, the DRC, Equatorial Guinea and Gabon, all members of the *Union Douanière e Économique de l'Afrique Centrale*[200] (UDEAC, Customs and Economic Union of Central Africa, members of the *Communauté Économique des Pays des Grands Lacs*[201] (CEPGL, Economic Community of the Great Lakes States, namely Burundi, Rwanda and the then Zaire), and by São Tomé and Príncipe. Due to financial[202] and political[203] difficulties, ECCAS ceased to exist in 1992, but was revived in 1998.

According to the UN Statistical Division,[204] ECCAS counts a total population of 121 million inhabitants. The Community spans a surface area of 6.5 million km^2, and its members produce a combined GDP of over US$175 billion. The working languages are English, French, Portuguese and Spanish. The primary objective of ECCAS is to pave a way for deeper regional integration, with the ultimate goal of establishing a central African common market. The basic legal instrument of ECCAS is the Treaty Establishing the Economic Community of Central African States. This Treaty provides, inter alia, for the institutions of ECCAS, namely the Conference of Heads of State and Government; the Council of Ministers; the Court of Justice; the Consultative Commission; specialised technical committees or organs as set up or provided for by the ECCAS Treaty; and the General Secretariat, which has its seat in Libreville, Gabon.

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195 Bossa (2006:12,15).

196 Parties could opt to bring a case before the COMESA Court of Justice.

197 This would be the African Commission for Human Rights, considering that the African Court on Human and Peoples' Rights is not yet operational, although judges were elected in 2006.

198 Cf. *Katabazi & 21 Others v Secretary General of the East African Community & Another* (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 2007).

199 For detailed information on ECCAS, see http://www.ceeac-eccas.org/.

200 The UDEAC was established by the Brazzaville Treaty in 1966.

201 The CEPGL was established in 1976.

202 Financial difficulties arose due to non-payment of member fees.

203 The war in the DRC was a central problematic issue.

204 http://unstats.un.org/unsd/default.htm.

ECCAS currently counts ten states as members, namely Angola, Burundi, Cameroon, the Central African Republic, Chad, the Republic of Congo, the DRC, Gabon, Guinea, and São Tomé and Príncipe.[205]

Human rights protection within ECCAS

The ECCAS Treaty does not explicitly refer to human rights protection as an objective or principle of the Community. Although the Treaty clearly indicates that aspects of economic development stand at the core of ECCAS, individual statements indicate that, at least implicitly, human rights do play a role within the ECCAS system. The envisaged cooperation between member states in the fields of economic and social activity such as agriculture, natural resources, trade, education, culture, and the movement of persons, aim at raising the standard of living of its peoples, increasing and maintaining economic stability, fostering close and peaceful relations between member states, and contributing to the progress and development of the African continent.[206] The observance of international law is mentioned in the Treaty as one of its founding principles. Therefore, international human rights standards in the sense of international human rights conventions or of customary law principles of international law can be regarded as forming part of the ECCAS legal regime, as the list to which Article 3 of the Treaty refers contains examples only, and includes general principles that are relevant to human rights, such as respect for the rule of law.[207]

Chapter 8 of the ECCAS Treaty probably contains the most relevant provisions within the Treaty framework as regards human rights, since it covers the group of second-generation human rights, which are founded on the status of the individual as a member of society. Chapter 8 refers specifically to culture and education. The peculiarities of these social, economic and cultural rights have found a more profound regulation within one of the Annexes to the Treaty, namely the Protocol on Cooperation in the Development of Human Resources, Education, Training and Culture Between Member States of the ECCAS.[208]

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205 Rwanda withdrew its membership from ECCAS in June 2007 in order to reduce its integration engagements to fewer regional blocs. The country remains a member of the CEPGL (Economic Community of the Great Lakes States), COMESA and the EAC. See http://www.iss.co.za/static/templates/tmpl_html.php?node_id=1435&slink_id=3067&slink_type=12&link_id=3893.

206 Article 4, ECCAS Treaty.

207 Article 3 of the ECCAS Treaty reads as follows: "By this Treaty, the HIGH CONTRACTIVE PARTIES undertake to observe the principles of international law governing relations between States, in particular the principles of sovereignty, equality and independence of all States, good neighbourliness, non-interference in their internal affairs, non-use of force to settle disputes and the respect of the rule of law in their mutual relations".

208 Several Protocols form part of the ECCAS legal framework, which are annexed to the Treaty. These are as follows: Protocol on the Rules of Origin, which deals with products to be traded between ECCAS member states; Protocol on Non-Tariff Trade Barriers; Protocol on the Re-export of Goods within ECCAS; Protocol on Transit and Transit Facilities; Protocol on Customs Cooperation within ECCAS; Protocol on the Fund for Compensation for Loss of Revenue; Protocol on Freedom of Movement and Rights of Establishment of Nationals of Member States within ECCAS; Protocol on the Clearing House for ECCAS; Protocol on Cooperation in Agricultural Development Between Member States of ECCAS; Protocol on Cooperation in Industrial Development Between Member States of ECCAS; Protocol on Cooperation in Transport and Communications Between Member States of ECCAS; Protocol on Cooperation in Science and Technology Between Member States of ECCAS; Protocol on Energy Cooperation Between Member States of ECCAS; Protocol on Cooperation in Natural Resources Between Member States of ECCAS; Protocol on

At sub-Treaty level, further activities can be regarded as contributing towards enhancing human rights – at least indirectly. Some of the core activities of ECCAS relate to peace and security, which is of specific importance as the political situation in the ECCAS region is still very unstable and issues that have an impact on the humanitarian situation in that region need special attention. To this end, in 1999 member states decided to create the Council for Peace and Security in Central Africa (COPAX), for the promotion, maintenance and consolidation of peace and security. The respective Protocol[209] which establishes the technical organs of COPAX[210] has meanwhile entered into force.

Moreover, ECCAS member states have adopted a Strategic Framework for the Fight against HIV/AIDS in Central Africa, and a Declaration on the Fight against AIDS/HIV in 2004.[211] Of further specific importance with regard to ECCAS and human rights is the fact that the 11th Ordinary Session of Heads of State and Government in Brazzaville in 2004 adopted a declaration on gender equality as well as an Action Plan for the Implementation of the ECCAS Gender Policy.

Enforcement mechanisms

The ECCAS Treaty generally provides that disputes on the implementation of the provisions of the Treaty are primarily to be settled amicably by direct agreement between the parties concerned. However, in its Article 16, the Treaty provides for the establishment of a Court of Justice, which has the function of ensuring that the law is observed in the interpretation and application of the Treaty, and that the Court also decides in cases where an amicable solution cannot be reached for the dispute.[212] The decisions of the Court of Justice are binding on ECCAS member states and its institutions.[213] However, the judicial body of ECCAS exists solely on paper, as it is not yet operational.[214] Furthermore, the ECCAS Treaty does not address the question of who will have the power to question the legality of ECCAS laws; nor does the Treaty refer to the sources of applicable law. It is expected that, once the procedures for operationalisation of the Court begin, a special Protocol will be drafted on the Court's rules of procedure.

Cooperation in the Development of Human Resources, Education, Training and Culture Between Member States of ECCAS; Protocol on Cooperation in Tourism Between Member States of ECCAS; Protocol on the Simplification and Harmonization of Trade Documents and Procedures within ECCAS; and the Protocol on the Situation of Landlocked, Semi-Landlocked, Island, Part-Island and/or Least Advanced Countries.

209 Protocol Relating to the Establishment of a Mutual Security Pact in Central Africa.

210 The technical organs of COPEX include the Central African Early Warning System (MARAC, *Mécanisme d'Alerte Rapide de l'Afrique Centrale*), which is responsible for the collection and analysis of data for the early detection and prevention of crises; the Defence and Security Commission (CDS, *Commission de Défense et de Sécurité*), being a meeting of chiefs of staff of national armies and commanders-in-chief of police and gendarmerie forces from the various member states, and which is responsible for planning, organising and providing advice to the decision-making bodies of COPAX in order to initiate military operations if needed; and the Multinational Force of Central Africa (FOMAC, *Force multinationale de l'Afrique Centrale*), a non-permanent force consisting of military contingents from member states, which is responsible for accomplishing missions of peace, security and humanitarian relief.

211 See UNDP (2008:116ff).

212 For more detail on the various techniques of alternative dispute resolution, see Ruppel (2007:3ff).

213 Article 17, ECCAS Treaty.

214 See http://www.ceeac-eccas.org/index.php?rubrique=presentation&id=2.

At this stage though, the potential for claiming human rights violations on the sub-regional level of ECCAS is very low. This relates to both components of enforcing human rights, namely statutory and enforcement. On the statutory level, only a few provisions indirectly grant human rights protection; on the level of enforcement, no judicial institution has yet been empowered to deal with human rights cases.

Intergovernmental Authority on Development – IGAD

Background

IGAD[215] was formally established in 1996 to succeed the Intergovernmental Authority on Drought and Development (IGADD), which had existed since 1986.

According to the UN Statistical Division,[216] IGAD has jurisdiction over some 188 million inhabitants, a surface area of more than 5 million square kilometres, and a total GDP of over US$225 billion. IGAD currently counts six states as members, namely Djibouti, Ethiopia, Kenya, Somalia, Sudan, and Uganda.[217] By way of increased cooperation, IGAD strives to assist and complement its member states' efforts to achieve food security and environmental protection; promote humanitarian affairs and maintain peace and security; and enable economic cooperation and integration.[218]

IGAD's basic legal instrument is the Agreement Establishing IGAD.[219] The Agreement provides for, inter alia, the organs of IGAD, namely the Assembly of Heads of State and Government; the Council of Ministers; the Committee of Ambassadors; and the Secretariat, which has its seat in Djibouti City, Djibouti.

Human rights protection within IGAD

IGAD pursues several principles and objectives, some of which relate to human rights. IGAD has incorporated into its principles the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;[220] the promotion of regional food security and the free movement of goods, services, and people within the region; the combating of drought; the initiation and promotion of programmes and projects for the sustainable development of natural resources and environmental protection; and the promotion of peace and stability in the subregion.[221]

Humanitarian aspects also play an essential role within the IGAD legal regime. One of the functions of the Council of Ministers, for example, is to monitor and enhance humanitarian

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215 For more details on IGAD, see http://www.igad.org/.

216 http://unstats.un.org/unsd/default.htm.

217 Eritrea unilaterally declared its suspension in 2007.

218 This is IGAD's vision; cf. http://www.igad.org/index.php?option=com_content&task=view&id=43&Itemid=53&limit=1&limitstart=1.

219 Referred to as the *IGAD Agreement*.

220 Article 6A, IGAD Agreement.

221 Article 7, IGAD Agreement.

activities;[222] the Secretariat assists policy organs in their work relating to political and humanitarian affairs;[223] and member states are urged to develop and enhance cooperation in respect of the fundamental and basic rights of the peoples of the subregion, so that they can benefit from emergency and other forms of humanitarian assistance.[224] Furthermore, the IGAD Agreement states that, at the national level and in their relations with one another, member states should be guided by the objectives of saving lives, of delivering timely assistance to people in distress, and of alleviating human suffering.[225] Specific provision is made to facilitate the repatriation and reintegration of refugees, returnees and displaced persons, and demobilised soldiers.[226] All these provisions reflect that, due to the current political situation, there is an obligation at supranational level to offer guidance and to cope with the humanitarian disasters that arise from armed conflicts in the subregion.[227]

According to the IGAD Executive Secretary, gender issues are high on the IGAD agenda, and gender-related programmes are among the organisation's top priorities.[228] In 2006, IGAD drafted the IGAD Sexual and Reproductive Health and Rights Plan of Action 2007– 2010. The Plan focuses on the principal components of sexual and reproductive health, such as family planning, and maternal and newborn health. The Plan also addresses the issues of HIV and AIDS, harmful traditional practices such as female genital mutilation, and gender-based violence.

In 2007, the IGAD Ministers of Health adopted a Declaration on HIV and AIDS to, inter alia, support the realisation of the IGAD Regional HIV and AIDS Partnership Programme (IRHAPP) objectives, and to improve access to basic HIV and AIDS prevention, treatment, care and support, as well as to other health-related services to those most at risk.[229]

Enforcement mechanisms

The IGAD Agreement does not make provision for a judicial body within the IGAD regime. Recognising that security and stability are prerequisites for economic development and social progress, Article 18A of the Agreement, dealing with the resolution of conflicts, urges member states to act collectively to preserve peace, security and stability. To this end, member states are to take effective collective measures to eliminate threats to regional cooperation, and establish an effective mechanism of consultation and cooperation for the pacific settlement of differences and disputes. By signing the IGAD Agreement, member states commit themselves to dealing with disputes among themselves before they are referred to other regional or international organisations.[230]

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222 Article 10.2.j, IGAD Agreement.
223 Article 12.2.f, IGAD Agreement.
224 Article 13A.q, IGAD Agreement.
225 Article 13A.r, IGAD Agreement.
226 Article 13A.s, IGAD Agreement.
227 This is specifically relevant in respect of the situation in Somalia.
228 Statement by IGAD Executive Secretary, Mabhoub Maalim, during a working visit to the Djibouti Minister for the Advancement of Women, Family Welfare and Social Affairs, Nimo Boulhan Hussein. See http://www.igad.org/index.php?option=com_content&task=view&id=203&Itemid=92.
229 See UNDP (2008:104f).
230 Article 18.c, IGAD Agreement.

Individual human rights violations cannot be enforced at IGAD level. However, given that all state members except Somalia are also parties to COMESA, human rights violations could theoretically be brought to the COMESA judicial body, provided that national remedies have first been exhausted. The enforcement of human rights at AU level would be another option.

Concluding remarks

RECs have taken into account that human rights are important on the way to realise their main objectives, commonly defined to consist in deeper regional integration aimed at enhancing economic development. The harmonisation of laws and jurisprudence is considered to be one step towards deeper regional integration. To this end, one objective must be to develop a uniform human rights standard, applicable for all member States of the single REC.

At this stage, it can be concluded, that altogether, human rights protection does indeed play a vital role at sub-regional level in East and Southern Africa. While ECCAS and IGAD have a less developed system of human rights protection, COMESA, SADC and the EAC have integrated human rights to a more elaborated extent into their respective legal frameworks. Only two judicial bodies are currently able to accept human-rights-related matters, namely the COMESA Court of Justice and the SADC Tribunal. States or individuals who do not have access to sub-regional courts can still opt to bring a case to the African Commission of Human Rights, as long as the judicial organ of the African Union, the African Court of Justice or the African Court of Human and Peoples' Rights is not yet operational. The relationship between the African Court of Human and Peoples' Rights and the sub-regional judicial bodies in respect to human rights cases that have undergone the national legal process will be one of the issues that need to be clarified in the near future.

References

Andresen, H, H Brandt, H Gsänger, U Otzen, R Qualmann & HM Stahl. 2001. "Promoting regional integration in SADC". *Reports and Working Papers, No. 5/2001*. Bonn: German Development Institute.

AU/African Union. 2006. *Décision relative au moratoire sur la reconnaissance des Communautés économiques régionales* (CER) (*Decision relating to the recognition of Regional Economic Communities) (Assembly/AU/Dec.112 (VII) Doc. EX.CL/278 (IX))* (*Decision relating to the recognition of Regional Economic* Communities); available in French at http://www.africa-union.org/Official_documents/Assemblee%20fr/ASS06b.pdf; last accessed 10 January 2009.

Bossa, SB. 2005. "Towards a protocol extending the jurisdiction of the East African Court of Justice". *East African Lawyer*, 10, March.

Bossa, SB. 2006. "A critique of the East African Court of Justice as a human rights court". Unpublished paper presented to a conference hosted by Kituo cha Katiba on Human Rights Institutions in Eastern Africa, 26 October 2006, at Arusha Impala Hotel, Arusha, Tanzania; available at http://www.icj.org/IMG/_Speech_BOSSA_.pdf; last accessed 18 January 2009.

Chidi, AO. 2003. "Complementarity, competition or contradiction: The relationship between the African Court on Human and Peoples' Rights and regional courts in eastern and southern Africa". Unpublished paper presented at the Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples' Rights, Gaborone, Botswana, 9–10 December 2003.

COMESA–EAC–SADC/Common Market for Eastern and Southern Africa–East African Community–Southern African Development Community. 2008. *Final Communiqué of the COMESA–EAC–*

SADC Tripartite Summit of Heads of State and Government, held in October 2008 in Kampala, Uganda: Towards a single market – Deepening COMESA–EAC–SADC integration; available at http://about.comesa.int/attachments/078_Final_Communique-Kampala_22_10_08.pdf; last accessed 13 December 2008.

EAC/East African Community. 2008a. "EAC turns attention to elaborate Bill of Rights that envisages unity of East Africans". *The Community* (EAC magazine), 7 October:21–22.

EAC/East African Community. 2008b. "EACJ's contribution to regional rule of law acclaimed". *The Community* (EAC magazine), 7 October:14.

EAC/East African Community. 2008c. *16th Meeting of the Council of Ministers: Report of the Meeting*. Arusha International Conference Centre, Arusha, Tanzania, 13 September, Ref. EAC/CM 16/2008:15.

European Commission. 2001. *COM(2001) 252: Communication from the Commission to the Council and the European Parliament: The European Union's role in promoting human rights and democratisation in third world countries*. Brussels: EC.

Grebe, Doro. 2008a. "Klägerschar vervielfacht – 74 simbabwische Farmer dürfen mit Campbell Enteignung anfechten". *Allgemeine Zeitung*, 31 March 2003.

Grebe, Doro. 2008b. "Simbabwe: Brutaler Überfall auf Campbell – Schlägertrupps misshandeln Farmerfamilie schwer und erpressen Verzichtserklärung für Prozess am SADC Tribunal". *Allgemeine Zeitung*, 1 July 2008.

Hansohm D & R Shilimela. 2006. "Progress in economic integration within SADC". In Bösl, A, W Breytenbach, T Hartzenberg, C McCarthy & K Schade (Eds). *Monitoring regional integration in southern Africa: Yearbook 6*. Stellenbosch: trade law centre for southern africa.

Hugo, G. 2007. "Assessing the SADC Tribunal". Unpublished article for the Institute for Security Studies, Tshwane (Pretoria); available at http://www.iss.co.za/static/templates/tmpl_html.php?node_id=2895&slink_id=5324&slink_type=12&link_id=24; last accessed 20 March 2009.

Jakobeit, C, T Hartzenberg & N Charalambides. 2005. *Overlapping membership in COMESA, EAC, SACU and SADC*. Eschborn: Deutsche Gesellschaft für Technische Zusammenarbeit.

Kersting, N. 2007. "SADC and good governance: Regional integration and electoral reform". In Bösl, A, W Breytenbach, T Hartzenberg, C McCarthy & K Schade (Eds). *Monitoring regional integration in southern Africa: Yearbook 7*. Stellenbosch: trade law centre for southern africa.

Kouassi, RN. 2007. "The itinerary of the African integration process: An overview of the historical landmarks". *African Integration Review*, 1(2), July:1–23.

Mutai, HK. 2007. "Lessons from two recent decisions of the East African Court of Justice (EACJ) for southern African trade blocs". In Bösl, A, W Breytenbach, T Hartzenberg, C McCarthy & K Schade (Eds). *Monitoring regional integration in southern Africa: Yearbook 7*. Stellenbosch: trade law centre for southern africa.

Ruppel, OC & FX Bangamwabo. [Forthcoming]. "The SADC tribunal: A legal analysis of its mandate and role in regional integration". In Bösl, A, W Breytenbach, T Hartzenberg, C McCarthy & K Schade (Eds). *Monitoring regional integration in southern Africa: Yearbook 8*. Stellenbosch: trade law centre for southern africa.

Ruppel, OC. 2007. *Interdisziplinäre Schlüsselqualifikation Mediation*. Hamburg: Kovač.

Ruppel, OC. 2008a. "Third-generation human rights and the protection of the environment in Namibia". In Horn, N & A Bösl (Eds). 2008. *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia.

Ruppel, OC (Ed.). 2008b. *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Education Namibia.

Schwarze, SJ. 1988. *The role for the European Court of Justice in the interpretation of uniform law among the member states of the European Communities*. Baden-Baden: Nomos.

Semu-Banda, P. 2007. *Why women remain trapped in informal trade*. New York: Global Policy Forum; available at http://www.globalpolicy.org/socecon/inequal/gender/2007/0928trade.htm; last accessed 6 January 2009.

UNDP/United Nations Development Programme. 2000. *Human rights and development: Human Development Report 2000*. New York: United Nations Publications.
UNDP/United Nations Development Programme, AIDS and Human Rights Research Unit. 2008. *Compendium of key documents relating to human rights and HIV in eastern and southern Africa*. Pretoria: Pretoria University Press.
Viljoen, F. 1999. "The realisation of human rights through sub-regional institutions". *African Yearbook of International Law*, 7:185–216.
Viljoen, F. 2007. *International human rights law in Africa*. Oxford: Oxford University Press.
Visser, W & K Ruppel-Schlichting. 2008. "Women and custom in Namibia – The legal setting". In Ruppel, OC (Ed.). 2008. *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Education Namibia.

VI. 60 YEARS OF SOCIAL MARKET ECONOMY IN GERMANY – LEGAL SOCIOLOGICAL OBSERVATIONS BY PROF. MANFRED O HINZ, FACULTY OF LAW, UNIVERSITY OF NAMIBIA[231]

1 Introduction

It is interesting to note for an observer in Africa, even more so when the observer is of German origin, how social marked economy is a point of reference in the campaigns for the federal elections in Germany, which will happen on this very forthcoming weekend. Measures to cope with the current global economic crisis, measures how to limit the consequences of the crisis for the average citizen of Germany have been unavoidably on the agenda of basically all pre-election debates: in the news papers, in public speeches, in radio and on TV.

The proponents of the two major political parties, the incumbent Chancellor of Germany, Angela Merkel, who is also the chancellor candidate of the CDU / CSU for the next terms of government, and Frank-Walter Steinmeier, Vice Chancellor cum Minister of Foreign Affairs in the coalition government of Germany, and the SPD candidate for the chancellorship appeared on TV on 13 September to make their cases to the nation and convince, in particular undecided voters to vote for them. The social market economy as a concept and the platform for state interventions featured highly on the agenda of the encounter. The nation-wide observed encounter was announced in TV language as a *duel*. Some commentators having watched the 90-minute interrogation of the two top politicians replaced the advertised *duel* with *duet*. These commentators had hoped for attacks of one politician against the other; they had hoped to see *political blood*. Political blood did not flow.

The debate certainly revealed differences, but it also revealed a broad common basis, a common point of departure called *social market economy*. The orientation towards social market economy provided for a common platform, which assisted the CDU / SPD coalition over the last years, and more so, since the members of the international community started feeling the consequences of the economic crisis, with jointly accepted tools to embark on national measures to combat consequences of the crisis. In the mentioned TV duel / duet, one

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of the top politicians referred to a *new* social market economy and the need for a *new start* of the social market economy, while the other was satisfied with the concept as it stood and its capacity for political action.

As an academic spectator, one would certainly be surprised if the proponents of the two historically differently rooted political parties would be in agreement on the measures to employ in combating the economic crisis, but one also has to note with emphasis that the concept of social market economy is obviously firmly rooted in both of the political approaches, which have reflected the opinion of the majority of the German people, at least during the last years of the coalition government.

This has not always been the case. The acceptance of social market economy is the result of a political process that goes back to the beginning of post-nazi Germany, the year of 1949, in which the German Basic Law, the *Grundgesetz,* was adopted as the constitution of Germany.

Therefore, the objective of my contribution will be to take you back to the legal debate at the time when the Constitution of Germany was enacted and implemented. (2.1) I will shed some light on the debate, which had to deal with the realities; but also say some words on the current challenge to the concept of social market economy. (2.2) In my conclusion, I will lead the discussion back to Southern Africa and offer some comparative observations.

2 *Social market economy* from a constitutional perspective

2.1 *Social state* and *social market economy*

One of the questions which occupied the minds of lawyers and legally minded members of the public at large after the adoption of the German Constitution of 1949 was what type of economy the Constitution wanted to see in place. It was obvious from environment that led to the drafting of the Constitution that a socialist economy in a strict, i.e. communist sense, was not to be tolerated by the Constitution. The rest was not obvious. How social or how liberal was the economy allowed to be?

Where do we find assistance in developing a constitutional framework, which would allow putting emphasis either on the liberality or on the sociality? There is not much we find in the Constitution. There are the fundamental rights and freedoms, which basically follow the international standards as they were in place at the time of the making of the *Grundgestz*. There is, apart from the guarantee of the right to property, the guarantee to be allowed to do whatever you want to do, provided you do not infringe on the rights of others and do not offend the constitutional order or the moral code. (Article 2(1))

Does this general guarantee of liberty encompass the right to engage in economic activities, in entrepreneurial activities? Whatever some may have said against, there will eventually be no argument to exclude one of the most important dimensions of human being namely to be *homo oeconomicus* from protection of liberty. What remained as a constitutional ground to argue?

The chapter in the Constitution that follows the chapter on human rights and freedoms deals with the relationship between the federal state and the states. Article 28 sets certain legal conditions for the constitutions of the states and says in its Sub-article 1(1):

> The constitutional order of the states must conform to the principles of republican, democratic and social government based on the rule of law, within the meaning of the Basic Law.

The words *social government based on the rule of law* are an attempt to translate what the German text of the Constitution terms *sozialer Rechtsstaat*. *Rechtsstaat*, rule of law is by now understood internationally. *Sozial* is an adjectival amendment to it to qualify its social dimension.

What is the legal meaning of this constitutional innovation? Is there meaning at all? The post-1949 debate shows two schools of thought: The one followed a conservative interpretation according to which the reference to *social* did not lead to any substantial change in the provision of rights. The provision of rights remained the principal objective of liberal constitutionalism, while the reference to social was interpreted as expression of a mere programme and thus left to administrative actions, to be embarked upon by the administration of the state as need arises. The second referred to the achievements of social movements since the times of industrialisation and their right to the right to sociality. Social in the words of the Constitution was interpreted to mean the recognition of social rights against the state and, by recognising social rights, the obligation to balance the liberal rights.

A number of cases brought forward to the Federal Constitutional Court provided an opportunity to the court to pronounce itself on the debate. One can summarise the verdicts of the court, as follows:

- The social state clause is not just an expression of a programme, but a proper legal provision with legally traceable consequences. This was held in a very early decision of the Federal Constitutional Court. It rejected the above first mentioned interpretation.
- As part of the binding body of law, the social state clause creates legal obligations of the state.
- However, the asocial state clause is not the basis for immediately enforceable rights.
- Therefore, the social state clause is primarily directed towards the state, i.e., the legislator to concretise its application and, thus, provide for legal instruments the citizens can use in pursuing their social rights.
- The social state clause has to be taken into account when the laws are being interpreted. In other words, the social state clause assists in the interpretation of law in the sense that a situation where different interpretations are possible the interpretation that gives the sociality preference is to prevail.
- Wherever there is discretion for the administration, the discretion has to be exercised to give the social state clause prominence.

With respect to the more principal question of whether the Constitution did not at least inherently decided in favour of a specific economic order, it was more and more accepted that the Constitution was order-neutral, meaning that whatever was not in conflict with the

Constitution was permitted. In other words, the eventually basically accepted interpretation of the Constitution opened for a variety of political programmes addressed to social questions caused by otherwise liberally-minded economic developments.

2.2 The challenge of social realities

Addressing the social question has a long history in Germany. It goes back to Imperial Germany when Chancellor von Bismarck promoted the famous social laws, which were attempts to react to developments prompted by the growing industrialisation. The well-known German scholar and politician Lorenz von Stein developed his concept of *social kingship* to show that the king had to do more than to rule, but to promote some kind of social balance between the haves and the have-nots.

What we have in the 1949 Constitution was meant to sustain the very understanding as it developed during Imperial times and the Weimar constitutional period. However, the post-war constitution making could not ignore that things had changed since the then. Social demands had more and more developed into the domain of rights and law, resulting in the debate mentioned in the previous chapter.

There is no doubt that the social market interpretation of the social state clause in the post 1949 development of Germany was all in all successful. It was possible to establish a legal framework that responded adequately to social demands, in terms of support to families, heath care, situations of sickness, unemployment, pension funds etc. A very efficient social welfare system could be established over the years.

Looking at the recent years of the 60 years of social market economy, we see challenges as they were not experienced before. The first challenge to the system occurred with the changing age structure according to which more and more old citizens relied on welfare provisions. Serious restructurings were undertaking, basically leading to increased contributions of the recipients of welfare. The second challenge came more as a surprise, I refer here to the current economic crisis. Major production units in Germany were affected by the crises and faced with the threat to close down, leaving hundreds of thousands unemployed. Collapses of banks threatened the economy with severe consequences. How would the social state react to this? Would the social state allow for so far unheard state interventions?

It did. What nobody would have expected to hear some years ago, namely about the possibility to expropriate enterprises in order to prevent serious consequence for the economy was debated. It was debated without references one would have encountered some year ago according to which the proposal to expropriate was a clear indication that the proponent of such a proposal could only be a communist.

Financially huge savings programmes were put together to assist the economy to live through the period of crisis. The case of the GM-owned car producer, Opel, is a very significant example about the political interpretation of what can be done on the basis of the social state clause and in crafting the social market economy. The Opel project programme and other interventions have turned out to be widely accepted as economically viable social

market economy interventions, at least on the national level, leaving the opposition of the FDP aside. Whether the Opel project will stand the European test, has to be seen.

3 Conclusion

Is there anything to learn from in an African country such as Namibia or South Africa? Namibia and South Africa have gone different ways in taking constitutional note of social and economic rights. The Constitution of Namibia has only very limited social rights, second generation rights not to speak of third generation rights. Second and third generation rights are basically drafted as State Policy Principles. The Constitution of South Africa has a gone a different way. The Constitution of South Africa provides for a number of economic rights.

What is the meaning of these differences in reality? What do / can economic rights achieve? Where are the economic rights when taking note of what the Constitutional Court of South Africa said in the *Grootboom* case? Where are economic rights in view of the limited resources a state has? Have we not reached the *limits of law*, when economic rights are at stake?

Whatever lawyers will say when comparing the different approaches to social, social rights and their places in the respective legal systems, there is one thing that one could learn from the debate between the parties which campaign to win the elections in Germany on Sunday, be it to be able to nominate the next chancellor, be it to have enough votes to attract a coalition with one of the bigger parties: Unless the proponents in the TV-transmitted discussions do not care much about the watchers in the nation – which is unlikely to happen – most of the debates and most of the contributions by the governing parties CDU / CSU plus SPD, on the one side, and the opposition parties FDP, the greens (Bündnis 90 / Die Grünen) and the Left Party, on the other, have shown until this very moment a degree of commitment to a debate of high standard through arguing economic details which the African political discourse - I refer in particular to my country Namibia - is missing. I remind my colleagues from Namibia on what happened when the BIG project (Basic Income Grants) was an issue in the news papers!

Being sceptical with respect to general social and economic rights, which can only pretend to be enforceable rights, I believe more in social movements and the achievements these movements will be able to secure through a societal discourse.

Sources

Books:

Hasse, R H ; Schneider, H; Weigelt, K (2008): eds, Social market economy history, principles and implementation. Johannesburg: Konrad-Adenauer-Stiftung

Hinz, M O (1971): Tarifhoheit and Verfassungsrecht. Eine Untersuchung über die tarifvertragliche Vereinbarungsgewalt. Berlin: Duncker & Humblot

Cases:

Decisions of the Federal Constitutional Court of Germany (BVerfGE):

BVerfGE 1,97
BVerfGE 9, 124
BVerfGE 27, 253

Decision of the Constitutional Court of South Africa:
Government of the Republic of South Africa and Others v Grootboom and Others, 2000 (11) BCLR 1169 (CC)

VII. SYNOPSIS

60 years ago, the Universal Declaration of Human Rights proclaimed a wide spectrum of human rights that every human being has. These rights include economic, social and cultural rights as stipulated in the International Covenant on Economic, Social and Cultural Rights of 1966. Within the African context, these rights are also espoused in the African Charter on Human and Peoples. Thus, nearly every country in the world is party to a legally binding treaty that guarantees these rights.

States bear the primary responsibility of making human rights including economic rights a reality. Because of varying national resources, international law allows for the fact that making economic, social and cultural rights a reality can only be achieved progressively over time. However, the duty of governments to respect and protect these rights and to ensure freedom from discrimination is immediate irrespective of the resource endowment or lack of it. For instance, governments must not discriminate in their laws, policies or practices and must prioritize the most vulnerable when allocating resources.

Further, states also have obligations when acting beyond their borders for instance through trade, to respect, protect and fulfill economic, social and cultural rights of the people involved.

As stated in the Universal Declaration of Human Rights, "every organ of society" has human rights responsibilities; thus, corporations also play an increasingly significant role globally in the realization or denial of human rights.

Despite international guarantees of these rights, millions of people around the world and especially in Africa face levels of deprivation that undermine the right to live with dignity which is not only as a result of natural disasters, but mostly because of the unchecked human rights violations.

Not only is the right to free pursuit of economic activities to be seen as a core individual human right, but it has also proven to be an indispensable element of any economic and social progress mankind has ever made. This is starkly evident in many of the socialist economies. The promotion of economic freedom is one of the political priorities of the Konrad Adenauer Stiftung.

In many countries, economic, social and cultural rights are not recognized or enforceable by law. Existing remedies may also be ineffective in providing reparation, including compensation, rehabilitation and restitution to victims or inadequately enforced.

In December 2008, the UN General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol) as part of the efforts towards rectifying historic imbalances in the universal protection of economic, social and cultural rights.

Inter alia, this Optional Protocol establishes an international mechanism for individuals whose economic, social and cultural rights are violated and who are denied a domestic remedy to seek justice at the international level.

This conference seeks to address some of these issues vis-à-vis the enhanced trend towards the adoption of free enterprise in today's global market.

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