Conference on Constitution Development

Kibuye, Rwanda
August 19 - 24, 2001

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Lastly, we gratefully acknowledge USAID for providing the necessary funding for this event. Thank you.

Part I: Conference Proceedings

Opening Ceremonies

SUNDAY, AUGUST 19, 2001
Hotel des Mille Collines, Kigali, Rwanda

Tito Rutaremara, President of the Constitutional Commission of Rwanda, opened the conference. Mr. Rutaremara welcomed the participants, guests, scholars and experts to Kigali. Mentioning the desire to promote a stable democracy in which all citizens can flourish, Mr. Rutaremara spoke of the importance of creating a new Rwandan Constitution.

Ergibe Boyd, Public Affairs Officer of the US Embassy, Kigali, then added her own words of welcome. In addition to individually welcoming the participants from many countries – from South Africa to the USA, and from Burundi to Benin – Ms. Boyd underscored the significance and seriousness of the work that lay ahead. She noted that "modern-day constitution making can not occur in isolation" and spoke of the "importance of learning from other countries which have engaged in similar constitution drafting processes." Ms. Boyd also noted the importance of drafting an "inclusive constitution" in which "every voice can be heard" and "which can serve as a living document for the Rwandan people." Ms. Boyd also thanked the numerous supporters and donors who made the conference possible, including USAID, the American Embassy Kigali, and the Legal and Constitutional Commission.

Mr. Stephen Giddings, Deputy Director of USAID Kigali, added his words of welcome to the conference participants. He expressed USAID's pleasure at being able to support such a worthy and important venture.

The Honorable Dr. Vincent Biruta, President of the General Assembly of Rwanda, then officially opened the conference. With pomp and circumstance appropriate for the moment, Dr. Biruta launched the participants on their significant quest toward a new Rwandan Constitution. Referencing the troubled history of 1994 and the aspirations of the Rwandan people to move beyond a history of conflict, Dr. Biruta highlighted the value of an inclusive constitution reflecting the will and desire of all Rwandans. He too expressed his appreciation at the support for the constitution drafting process and for the generosity of the participants who had traveled great distances to participate in this constitution-making process.

Following a reception, participants boarded transport for the journey from Kigali to Kibuye on the shores of Lake Kivu, where the work of the conference was to begin in earnest on Monday morning.

DAY ONE: Monday, August 20, 2001

THE CONSULTATION PROCESS

Moderator: **Kebreab Habte Michael (Eritrea)**
Specialist: **Louis Aucoin (USA)**

Kebreab Habte Michael (Eritrea): The purpose for us today is to raise some important issues for our brothers and sisters in Rwanda. The choices regarding the Constitution and their future are in their hands, but we hope they will make fair choices for the development of constitutional democracy in Rwanda.

Louis Aucoin (USA): I would like to elicit several themes, beginning with humility. I myself feel humility and awe for the huge and daunting task that lies before Rwanda. My methodology, then, will be to offer information, but with the realization that the choices are yours to make. I work for the United States Institute of Peace, on a project to study constitutional processes in order to identify lessons learned, applicable for promoting political stability and peace. The mission of our institution is to achieve peace.

Let us also focus on the issue of legitimacy, one of the most important elements of constitutionalism. The concept of legitimacy can be described as the situation that exists when people have a sense that the constitution belongs to them, and that the document truly reflects the values, history and culture of their country. This proposal may seem simple, but history reminds us that legitimacy lends considerable force to a government. For instance, when legitimacy exists in reality, and if leaders try not to follow the constitution, they will encounter popular resistance.

How, then, does one establish legitimacy? There are three necessary elements. First, one should begin with public education: the public needs to be made aware of the process, the requirements of the process, and the role that individuals can play. The public should not be put in the position of merely accepting or rejecting a document. Here in Rwanda this process has already begun. Secondly, this process needs to be conceived of as a two-way conversation. The drafters need to explain constitutionalism to the people, but, at the same time, the drafters also have to listen to the population. This process requires a great deal of work on the part of the organizers, in terms of identifying the major problems facing the population and the government. Furthermore, these conversations must be structured and the questions posed in such a way that constitution-makers will truly solicit the public's opinions and perspectives. Thirdly, the people's views must be integrated into the constitution. Listening to the people is not sufficient, without taking their views seriously. Thus, constitution-makers must create mechanisms to ensure that the people's views are expressed in the framework of the constitution.

Another foundation for a constitution is the inclusion and expression of values linked to the concept of constitutionalism. The document needs to be impregnated with the genuine values of the society. As an example, the German people, in 1949, wrote a constitution as they confronted their history of genocide. They included their values in the constitution by, first, agreeing on the values they wished to propagate and establishing a hierarchy among these values. The hierarchy of values differs in every society, and the Rwandans' task is to identify and rank their own values. The German people decided that human dignity was the pivotal and fundamental value, in response to the genocide, around which they would form their constitution. The concept of human dignity has taken precedence also in the jurisprudence and the development of law in Germany, and now the concept is everywhere in international human rights law. Here in Rwanda you have the opportunity to do something similar.

QUESTION AND ANSWER SESSION:

Fatoumata Siré Diakité (Mali): On the issue of popular consultation, one can say that legitimacy comes from popular support. Thus, how do you provide, structure and design popular education in

order to ensure this legitimacy? Who takes charge of this education? Furthermore, how do you get the people's views to be received at the highest levels of government?

Joy Ezeilo (Nigeria): What is the relationship between legality and the constitution, given that constitution is itself a legal document?

Patrick Matibini (Zambia): Could the panelist please link the concept of legitimacy with the adoption of a constitution.

Louis Aucoin (USA): I understand your concerns about the details of the process. One issue that is evident, and that one often hears, is that it is impossible to have popular education in a country with high rates of illiteracy. But, in fact, it is very much possible, using radio, theater, and many other means.

To address the second question, it is true that there have to be mechanisms to ensure that the people's views will be included. How do you do it? I think it is our role to reflect on this question together. This issue of inclusion raises a very interesting point, namely the potential for false legitimacy. For instance, the government might request a vote on a question, whereas the people have not really understood the issue. Rather, the people were merely presented with a document. Nevertheless, the government can assert that the process was legitimate. The process, however, needs to be done step by step, little by little, or it will create a false legitimacy, which can strain or destroy the constitution.

I also agree with Joy Ezeilo that there is a relationship between legality and legitimacy. Educated by common law, I think of legality and legitimacy in terms of jurisprudence and tribunals. In the German-Roman tradition, much of the knowledge comes from trial courts. The concept of values implies global, vast values. For the details we have to depend on our judges and on our courts to elaborate these concepts and values. If these values truly come from the society, then these institutions will be successful in their work.

As for the third question, in French constitutional history, legitimacy is often linked to a referendum, a direct expression by the population. We often think of referendum as the last stage of constitution making, namely direct approval by the people. A referendum is absolutely necessary, but often the country does not have the financial means to hold one. There may be other equally legitimate ways, such that every sector of society has representation in the process—otherwise a false legitimacy will again be established.

Abdoulaye Sékou Sow (Mali): I agree with your insistence upon humility. We are in a brother country, with its own identity, and what we are doing here is simply to present one point of view, based on our experiences. Rwandans can utilize foreign experience, but only in the measure that it is useful. In West African constitutions, which usually reflect the French Constitution of 1958, legitimacy is a problem. Values should indeed be the root of legitimacy. Legitimacy is sanctioned, in the end, by the adoption of a constitution by a popular vote. We cannot economize on having a referendum. Even in poor countries, the people have to express their opinion by referendum. Sovereignty lies with the people, who exercise direct force by referendum. Legitimacy is at the heart of the constitution, but there must also be a legitimacy of the rules themselves. This legitimacy is at the heart of African democracy.

One of the stumbling blocks is the legitimacy of the leaders. For instance, an elite writes the constitution, in the belief often that thinks it is working on behalf of the people. As a result, education is not only at the level of the constitution—rather, civil education should be a permanent and ongoing feature, based on the society's real and indigenous values, and not just mimic the colonial system. Putting democratic institutions in place is not sufficient, without an emergence of citizen awareness. For people to have ownership of their constitution, they need to be educated on their rights and their responsibilities.

Burundi: Let me describe one democratic experience. From 1991 to 1992, we in Burundi organized a constitution-drafting process. We first established a Constitutional Commission, representing different

political sensibilities of the government. A national debate ensued, reaching to the roots of the society, and the process proceeded smoothly. Third, the Commission synthesized the information to influence the formation of the Constitution. Then the Commission returned to the people and organized a referendum. In order to ensure the legitimacy and authenticity of the process, the population was educated to understand the process. We had the impression that we had truly elicited the input of the population, and that they had clearly expressed their apprehensions. For instance, on the issue of multipartyism, there was concern that political parties would be expressed through ethnic identities. On the whole, we felt that this was a decent consultation process.

The question then becomes how to can explain the failure of the Burundian Constitution—which in the end was a failure. What can explain the failure in a case like that, or in a general sense, if a constitution comes out of a popular experience? Is it possible to speak about how the popular consultation process is envisioned here in Rwanda, and to know what is going to happen in this country?

Otive Igbuzor (Nigeria): I agree with Abdoulaye Sékou Sow that a referendum is necessary to give legitimacy to the constitution. First, the history — particularly in Nigeria — indicates that subsequent leaders have established constitutions that often went counter to the wishes and aspirations of the people. Thus, the referendum is the real test of the people's will. Secondly, the referendum offers a further opportunity to educate the people about the details of the constitution, such that they converse about whether or not to adopt it. Finally, holding a referendum affords civil society or opposition groups the opportunity to mobilize people, and to determine the level of popular support. Zimbabwe, for instance, is currently undergoing a composite test of legitimacy and of its Constitution.

Théodore Holo (Benin): I have a question about the hierarchy of values: does this proposal not pose a problem in African countries, when two values are in contradiction, if not competition? Secondly, we cannot save money on creating durable democracy. Democracy is priceless, and we cannot do without a referendum, as this event gives the population the possibility to express its opinion regarding a text that has been created by experts. This referendum is a source of legitimacy, and we have to strengthen it through transparent processes.

Charles Rugumire Uwiragiye (Rwanda): Rwanda is a country with different ethnic groups. In your presentation, you mentioned the protection of constitutional values for the benefit of the society's human dignity. What is your point of view regarding the constitution-making experience in Rwanda, such that the entire society—Twa, Hutu and Tutsi—will reap the benefits of the constitution?

Louis Aucoin (USA): We have some consensus already here, in that I now understand that holding a referendum is very important in Africa. Outside of Africa, we think referenda have their limitations and financial constraints, but you have a different opinion. Secondly, I am encouraged to see you raise the question of ethnicity. With all the talent in this room, we can address this important question.

To answer the question of my brother from Burundi, you said that the population expressed the desire to have a multiparty system, but that they had apprehensions about such a system. I wonder if Burundi really answered properly the concerns of the population and took them seriously. I cannot be certain, but perhaps this omission might be a cause of the failure.

Furthermore, clearly I am not African, but I can say that African constitution-drafters must create a constitution based on values inherent to the society. The rest of the world might not understand these values, but you must simply arrive at values that are real and rooted in your society. How, then, do we distill the values that can ensure that the interests of the entire society are included? The challenge is great, and I would like to hear the Rwandan perspectives on this question.

Fatoumata Siré Diakité (Mali): I would like to answer this last point on traditional African values. These traditional values can implicitly constitute a kind of exclusion, especially for women. Can we call discrimination against women a value? Thus, I think we must be careful and vigilant. Who is going to decide which value will be valued, particularly if African values discriminate against women? For this reason, women's ongoing participation in the process is essential.

Regarding referenda, it is important to determine whether or not the population was really informed before the referendum, and whether it was associated with the process since the beginning. A referendum is a positive event, depending on how it is applied. Leaders may do things in the name of the populace, when perhaps the population was not actually involved.

Furthermore, how do we approach the population? The population has its uncertainties, and we leaders do not have the habit of going to ask their opinion; so we hesitate. Nevertheless, political leaders must listen to the public and have faith in the people's views. The process is very delicate, and we have to democratize power to ensure that one group does not hijack the process. Additionally, are we leaders simply going to incite the public to say what we want to hear, or will we really listen? Among women, in particular, illiteracy rates are very high, and often women are not consulted in a frank way.

Aloys Hakizimana (Rwanda): In regards to popular consultation, there are times when the people are not sufficiently educated or well-read to have a personal or group opinion. I also think of the genocide that shook our country and the vast number of people in prison. We must nevertheless have faith in the ideas that will be elicited in the population. Additionally, we must hear the population and accelerate the process of popular consultation. We must also be aware that some issues that concern the population regard the structure and power of authority and their leadership. These issues should arise during the consultation. However, it suffices that the leader of the community is there, the leader's presence will influence what the population will dare to say during the popular consultation, and will prevent the discussion of certain issues.

Henry Richardson (USA): I want to note that human dignity is not simply a value in the constitution process in particular countries, but rather it is a principle embedded in international human rights law. As such, it is obligatory that all countries maintain this as an informing and interpretive principle in their constitution making. This value of human dignity, first enunciated in the Universal Declaration of Human Rights, is now found in other international human rights conventions. Inevitably there is an interaction between basic human rights values and the constitution process, informed by the duty to protect human dignity in a given country.

Louis Aucoin (USA): I think it is very encouraging that all the big questions are already on the table. The door for constitution drafters is not entirely open, because there are already international norms that are in place to protect the whole population. But Fatoumata Siré Diakité is right to raise the point about the protection of women. I think in fact that constitutions in Africa will have provisions that specially protect women and children, as these values are particularly important in Africa. I agree also, regarding the referendum issue, that the result of a vote will be false if the referendum comes out of an illegitimate process. If we can all agree that this is an important method, then the referendum process, too, needs to be open.

Burundi and Rwanda face similar ethnic challenges. It is interesting to hear from our Burundian colleague that the deepest part of the population expresses the will to avoid ethnic problems, and that the population is outraged by these problems and the strife they cause. I recently read a psychological study by a Belgian, who examined the population and found that the people all realized in their hearts that there was no justification for ethnic hatred and violence. In my personal opinion, there is no population that is not "mature" enough to conquer this problem of ethnicity. But any population needs leadership to find a solution to this problem.

Human dignity should be a universal concept, but in the United States we barely see this term used. Even if we recognize this value, we have to take note of how it will be applied in our constitution.

Laurent Kagimbi (Burundi): The 1992 process followed exactly the phases of popular consultation before, during and after the drafting of the constitution. But the Burundian population of all ethnic groups had said that, due to the experience they had gone through thirty years before, they feared the creation of ethnic-based political parties leading to the kind of violence that occurred in 1962. This idea did not prevail because of the necessity of building political parties in 1991. In order to prevent

ethnic clashes, the people of Burundi worked at the grassroots level. The people began to think about national unity, such that democratization would not lead to ethnic-based parties. The population asked the questions: which should come first, national unity or democracy? How do we avoid ethnic mobilization?

Aloys Hakizimana (Rwanda): How can we have respect for life when the leadership tells us to kill? Secondly, should we speed up the consultation process, knowing full well that the population is not mature enough to give ideas that can lead to the drafting of a viable constitution?

Question: There is also the problem of excessive respect for the authority. What can be done about this?

Louis Aucoin (USA): This constitution process is also an opportunity to educate the population, as Otive Igbuzor suggested. As a child you were told not to always follow the authority; it is important to force children to think about difficult issues and to think through the problems. Maybe in Rwanda this is an opportunity to get people to rethink respect for the authority, when the authority is leading you down the wrong path.

Théodore Holo (Benin): In the democratic framework, what the are dominant values in the society?

Elisabeth Pognon (Benin): In Africa, tolerance and dialogue are very important, but they are barely discussed. Solidarity and respect for the elders are predominant values, which should be enshrined in the constitution. In Islamic cultures women are often excluded. Women should take advantage of their numbers to make sure they get involved in the political processes in their countries.

Abdoulaye Sékou Sow (Mali): Human dignity is the most important value. Once there are human beings there is human dignity. I can not agree that this notion comes from the German tradition. In the Universal Declaration of Human Rights and in the United States Constitution, some emphasis was laid on human dignity. This value is inherent to any society, but those of us who were colonized are very sensitive to this concept. This issue was enshrined in our culture through our fights for freedom. There are some initiatives, which violated human dignity – as in Germany. But you can not say that human dignity came from Germany.

You say that there are ways of gaining legitimacy other than through a referendum. You are correct, but the referendum is the best method we have available. It is not possible to ratify the constitution drafting process without the people being truly convinced. In most drafting processes, the elite do everything in the name of the people and then submit their work to the people, who might approve the results without really understanding the document. We have to conceive of a referendum process that goes beyond this unfair process to find a fair process. Professor Aucoin mentioned values that are not necessarily universal, but that are fundamental in our society and that must be enshrined in the constitution. We apply these principles without courts, but through our own traditional mechanisms of justice.

Let us not forget the issues of ethnicity and democracy. We wish to achieve democracy. This statement leads us to ask whether the Western democratic system is valid for countries where there are ethnic problems, such as Rwanda and Burundi. The problem of ethnicity applies all across Africa, but with differing levels of severity. Africa as a whole also faces the problem of national unity. For this reason, the Organization of African Unity wanted to keep colonial borders. Their goal was to avoid dividing people. In most countries we are trying to apply Western democracy, but this application is leading to failures. We need to reflect on the type of democracy that is needed in Rwanda and Burundi. In Africa, democracy is moving toward a multiparty system. Throughout Africa, parties can be freely established without ethnic reference. Constitutions should mention ethnicity in this way. The constitution should also reflect on the nature of democracy.

Rwanda: I understood the major factors you described that strengthen the confidence of the population in the constitution and appreciated the speaker's comment on popular education. But I

would like to point out that it is not just a question of educating the illiterate. I would add that you need to talk about the adoption of positive values, such as the inclusion of the marginalized groups. My concern is education, namely how to make the élites participate in and benefit from education.

Louis Aucoin (USA): To start with the question from our Burundian colleague, there is constantly a great tension between protection of minority/individual rights and the rule of the majority. Our colleague from Burundi brought up an issue that should be one of our major themes of reflection. There will always be conflict between these two components. Understand that democracy is not merely the domination by the majority but also the implementation of some values to protect the minority. This topic will be addressed more fully. We have faced very serious problems in this area in the United States, although we have found some solutions that help us move forward in this area.

In reply to the question from my colleague from Mali, I agree entirely on the concept of human dignity. It is not the Germans who created it; rather, human dignity is a universal human concept. I mentioned the United States, because I am disappointed that we do not protect human dignity enough there. The protection of human dignity is mandatory at the global level.

The last comment regarding the education of the elite is very positive and relevant. How do we educate the elite in the society with regard to all that we are saying about democracy? This challenge is another topic for this meeting. I think it is the responsibility of the Legal and Constitutional Commission not only to educate the people on constitutionalism and democracy, but also to educate the elite.

THE AFRICAN EXPERIENCE, A GLOBAL VIEW: CONSTITUTIONALISM IN TRANSITION

Moderator: Adrien Wing (USA)
Participants: Benin, Nigeria, Uganda, Mali, Zambia

Adrien Wing (USA): How have each of your countries dealt with the issue of consultation? Did you do popular education? How did you deal with the question of legitimacy? How did you deal with the issue of ethnicity? Gender? Did you look to international treaties? Was a referendum used? How do you make your constitution legally penetrate into the masses of the people?

Théodore Holo (Benin): The procedure of constitution writing must sustain a move toward a stable state that guarantees fundamental freedom, and should represent a switch from an authoritarian regime to a democratic system. When no group is in a position to impose its power, then you will find a willingness to seek a compromise and a willingness to share power.

In Benin, we in the government created a mechanism for dialogue with the society. In this regard, we had a rare opportunity to set up a Constitutional Commission at the level of a National Conference, linked to the High Council of the Republic. This independent commission worked in conjunction with High Council, and it solicited debate at the National Conference to consider the type of democracy we should implement. Constitutionalism did not appear as a philosophy for strengthening the power of national unity and development. Rather, the population was consulted on the basis of the text prepared by the Constitutional Commission. Teams crossed the country to discuss the draft constitution. This consultation made it possible to improve the text of the Constitution, which was then submitted to the people for ratification.

On three questions, no consensus was reached: for instance, the Constitution provides an age limit of seventy years for a presidential candidate. The people expressed their choice by casting either a white ballot (to keep the age limitation) or a green ballot (to remove the age limitation). Several questions were similarly submitted to the people to decide through a referendum. Every person had two weeks to campaign, using the public media and resources.

The principal concerns during the National Conference were the following:

1. Establishment of the rule of law;
2. Restoration of human dignity; and
3. Guarantee of the freedom of citizens.

To limit power, the National Conference proposed the following:

1. Power should be a means to meet the needs of the general populace, not an end in and of itself. The validity of power must conform to the laws, in order to address the issue of the legitimacy of the power.
2. Power should be distributed between the central and local levels. The population should have an involvement at the local level, so that the population can take charge of its own destiny.
3. The President's mandate should be limited: instead of having a lifetime presidency, the presidency should be limited to two terms of five years each.

To control power, we propose the following:

1. Provisions should be specified to place limitations on those who govern;
2. Transparent, honest, free, and competitive elections; and
3. The consideration of public opinion, in the context of a real, vibrant and responsive political society.

What are some of the guarantees of freedom?

1. The recognition and the consecration of human rights. Benin looked at the African Charter and the Universal Declaration of Human Rights for input.
2. Human freedoms should be emphasized by establishing the independence of the judicial system and the creation of a Constitutional Court able to censure the acts of all government powers.

3. The freedom of the press must be assured to promote free and varied information. The press is free if all citizens have equal access to the media.
4. A multi-party system should be established, with all parties being based on ideas. Despite the banning of ethnic and regional parties, the tendency to form these still persists.
5. Proportional elections.

Abdoulaye Sékou Sow (Mali): African and western socialists are trying to formulate a theory of transition, and are still drawing partial lessons from specific cases. On this subject, I will quickly tackle a number of questions. First, what is a transition? A passage from a given situation to another situation. Political transition has been defined as the passage from an authoritarian regime to a democratic regime. To the extent that an authoritarian regime is characterized by a single party system, where then do transitions come from? Usually transitions arise from a democratic movement fighting to promote democratic ideas, as in Mali, where we have experienced various transitions.

There are essentially two ways of achieving transitions: one way is through peaceful means, as in Benin, where the National Conference demanded a change. The National Conference led to a new constitution and a new political life. The second approach, used in Mali, employs violence to achieve change through a revolution. Through violence we eliminated the previous regime. We brought about radical change and later had our own national conference with clearly defined objectives, such as the establishment of a democratic electoral code. The objective of this new transition was to write a democratic constitution for the country, a charter for the parties, and so on.

What is the role of transition? It changes the regime to provide a new constitutional status. The first role of transition is to give the country a democratic standing so that the transition itself does not last for too long. The governance of the country must be a democratic matter, and, at the same time, must provide openings for people to be compensated if their rights are violated. The transition itself must have a legal basis and foundation for its work. This approach was followed in Mali, by summoning a national conference of all the social groups.

Mali copied the French Constitution of 1958. For this reason, we needed to revise the Constitution and adapt it to our new realities, particularly to ensure the fundamental rights and liberties of people and satisfy their demand for democracy. That is why in our Constitution, out of 122 articles, there are twenty-four articles dealing with rights and liberties. The government must be able to address the demands of the population.

Mali's Constitution adopted a republican system and laid an emphasis on the republican form of government borrowed from France. In order to protect democracy, the republican form of government cannot be reviewed at all. If the integrity of the territory happens to be threatened, the Constitution cannot be reviewed. Furthermore, coups should not be allowed; our Constitution does not prevent coups, although coups are punishable. Today in Mali there is a movement against the old head of state.

The history of transition and constitutionalism in Africa shows that we have to define the future of constitutionalism in Africa through democratic values. West African constitutions largely emerged from the French system, following the French model of a Parliamentary system—though Benin adopted a Presidential regime. The constitutional problem is still with us in Africa. African democracy should be a participatory democracy. Additionally, consensus does not mean that everybody must think the same way, though even Western regimes have been evolving toward consensual democracy. Already in our culture we favor consensus to bring about mutual understanding in a dialogue. The majority on its own should not exercise power in Africa. It has an obligation to bring in other voices. For countries like Rwanda and Burundi, single parties might be a solution, through a government of national unity.

QUESTION AND ANSWER SESSION:

Joy Ezeilo (Nigeria): I have a question to Uganda on the issue of the fundamental objective and directive state principle. Is this a part of the Ugandan state system? Is it not justiciable, but a part of the Constitution? For instance, are social and economic rights in a separate part of the Constitution that is not judicially enforceable?

Next, a question to Mali regarding the transition in Africa: do we need to reconceptualize the notion of African constitutionalism? Are the Malians working toward a more permanent constitution?

I have a question for the United States on the issue of modern constitutions tending to concentrate excessive power in the person of the President. The Nigerian President is extremely powerful; is this typical of modern constitutions? I would assert that it is not particularly good for new democracies to give so much power to the presidency.

Rwanda: Our colleague from Mali told us that to organize a national conference, Mali underwent the overthrow of a government. I can imagine that Mali had a fairly homogenous society, but that is an irregular situation in African nations, usually characterized by diverse societies. Can you explain also how this worked for Benin?

Fatoumata Siré Diakité (Mali): Benin's experience was of a President who was in power for ten years who left office and then came back for another ten years. Meanwhile, the people were not satisfied with his management. He left office following democratic principles, then returned for another ten years. Are the people satisfied? What type of democracy do they want?

Secondly, we need to be wary of the term "civil society". This term has been overused and abused: some political powers have established their own "civil society". How can we get people to agree on the content of civil society so that it is not misused? Citizens have to create and safeguard the concept of civil society.

To the USA: your country has several ways of suggesting anti-democratic principles to other nations. For instance, there is only one political party in Uganda, but Bill Clinton praised the system as being the best in Africa. Thus, we can identify a fundamental contradiction even in the concept of democracy. The United States chooses a particular notion of democracy, and the politics propagated by the United States is that of the World Bank and International Monetary Fund.

Furthermore, what does civil society do about all of the contradictions in Nigeria regarding Islamic law, *shari'a*, particularly since it is applied in flagrant violation of the Constitution. Women are the victims of application of *shari'a*. In addition, Nigeria says that political leaders do not want to revise the Constitution, but I would propose the contrary, namely that leaders do want to spend money on changing the Constitution, especially when they feel that their interests are at stake.

In Mali, people decided to move on after thirty years of single-party rule. The transition phase in Mali was a positive development, during which time women in Mali were able to acquire the rights for which they had fought for over thirty years. The Constitution of Mali says that the sovereign state guarantees the defense of the rights of the child and the mother. There are twenty-four provisions on individual and collective rights in Mali, and one sees a real thirst for these kinds of rights in Mali. However, there is too much power given to the President under the Malian Constitution. Civil society around Africa could also learn from the experience of Mali: the commitment of the grassroots people permitted them, including women and youth, to make their contribution to the content of the Constitution.

Théodore Holo (Benin): I will not have enough time to respond to all the issues. Benin had two important considerations going into the National Conference: first, an internal search for greater freedom and democracy, and second, a tradition of consultation in the country. Likewise, the failure of the Soviet economy made it so that our Marxist system no longer had external support. External sources said that in order for the government to maintain its support, political power had to be democratized.

We know that the government wants to use the civil society to promote its own agenda within the population, and we realize that civil society can no longer pursue its own aims. It is not enough simply to draft a constitution and believe that democracy is a reality. Rather, you need a culture of democracy to internalize a number of values.

What is the role of money in politics? Often, the results of the election do not reflect the choice of the people. There was a political changeover in Benin in 1991, and in 1996, the incumbent President was defeated. Thus, the electoral machinery makes it possible to ensure that one individual does not impose himself on the rest.

Political changeover raises major concerns: for instance, all political parties have to be given the opportunity to participate and be involved in the power race on an equal footing. The case of Benin today is rather unique, in that we have a government dominated by one political trend, and a Parliament that is hostile to the government. Thus, the government has to negotiate with Parliament and take into account the groups represented in Parliament. Consequently, there is no monopoly on power. This balance is necessary so that democracy does not appear as the will of a single group. Everybody should be able to voice his or her opinion.

Zam Zam Nagujja Kasujja (Uganda): There are provisions outside of the constitution that are not justiciable. In Uganda, the Constitution says that a one-party state is not permitted, and that the nation is supposed to be participatory democracy. In the last election, we experienced a failure to reach a consensus in the Constituent Assembly. Those members who did not walk out decided that the Movement in Uganda would go on for five years, and then the government would ask the people by referendum if a multiparty system should be reinstated, or whether the Movement should continue. This decision had the effect of ensuring that political parties would act only at the national level, not at the grassroots. By placing limitations on political parties, political groups cannot go down to grassroots to solicit support. In the Constituent Assembly, political party movements are limited. Nevertheless, there is more democratic awareness among Ugandan people currently. These political parties have increased the level of debate.

Otive Igbuzor (Nigeria): Regarding the *shari'a* question: under the Nigerian Constitution, religion should not be a topic for politics in any region. However, there is room for regional courts to intercede. *Shari'a* is not new, and has been practiced for a long time. There was initially a consensus that *shari'a be* restricted to personal law, such as marriage and inheritance. The problem arose in the application of *shari'a* to criminal jurisdiction. There were two main reasons for this change: first, a shift of power from the northern to the southern part of country, such that the expectations of the northern elite were not met. *Shari'a* was like a form of opposition to the current regime. Second, a new breed of politicians was trying to use religion as a political base. Thus, *shari'a* became a political issue, with many effects for women. Civil society has tried to monitor the implementation of the system and advocate for a review of the Constitution to make clear that Islamic law should be restricted to personal Islamic law. As a result, the secretary has made recommendations on the changes needed. You need clear provisions for multi-religious countries, in order to prevent these problems. Furthermore, political leaders are not interested in constitutional reforms. For instance, the present regime was elected when the current Constitution was not even enacted; they did not even know the provisions for their positions. Political leaders were interested in grabbing power, and the lack of a constitution during elections was not even raised as an issue in the campaigns. Even when the public wants changes, its concerns are difficult to address and unlikely to be incorporated.

Abdoulaye Sékou Sow (Mali): In Mali, the government needed a transitional constitution and had to have a *de facto* power to create it. However, this was not necessarily a democratic power. Thus, a special constitution was made for transition. It included fundamental rights and democratic rights, present until the adoption of a permanent Constitution, promulgated in 1992, that abrogated the Fundamental Act, No. 1, that preceded it.

Patrick Matibini (Zambia): On the question regarding the concentration of power in the presidency: the Zambian experience shows that no matter how well-designed the balance of powers system, these

powers are open to abuse. African leaders tend to exercise these powers in bad faith. The institutions that should ensure checks and balances are weak, and the only means to impose limitations is to ensure that powers are held in other branches and institutions.

THE AFRICAN EXPERIENCE: GLOBAL VIEW

Moderator: **Harold Dampier, Jr. (USA)**
Presenters: **Karthy Govender (South Africa)**
Gerard Niyungeko (Burundi)

Gerard Niyungeko (Burundi): For us in Burundi, the last ten years cannot be forgotten. We need to hear testimony on the issue of the relationship between laws and the constitution in relation to human rights.

The first question for us to consider is in relation to the experience of Burundi. We must distinguish in post-colonial Burundi between the periods when we had no constitution and when we had a constitution. For about thirty out of the forty years that Burundi has been independent, the country had no constitution. The new leaders would just promulgate decrees; they would say that executive power was sufficient for putting in place the act in question. Those brief constitutional texts had nothing about human rights.

There were also periods when we had constitutional texts. Under the 1962 Constitution, Burundi was a monarchy. All of the subsequent constitutions gave some importance to the proclamation of human rights. The Arusha Accords, of course, speak of the importance of human rights. The new Constitution of Burundi shows respect for human rights in two ways. First, those who wrote the Constitution borrowed from Universal Declaration of Human Rights. Second, articles of the Constitution provide for international law norms. During the years that the Constitution was operational, citizens did not hesitate to rely on it. Judges in Burundi did not refer to international documents but to the Constitution.

Let us turn now to laws regulating the behavior of political parties. After the crisis of 1996, political parties were not able to meet, except to nominate their leaders. The government, for reasons of public order, said it was not possible for meetings to occur. The Transition Act of 1998 included these restrictions on fundamental liberties.

The Burundian experience in this sense does not reveal particulars on the relationship between the Constitution and laws, except to say that during the experience of the constitutional coup, the citizens participated in the protection of their laws and liberties.

Karthy Govender (South Africa): When we started the drafting process of the new South African Constitution in 1990, there were many conflicts in the world — in Angola, Sri Lanka, Middle-East, Northern Ireland. Of all of these, South Africa was considered the most intractable and the most directly headed to racial war. Ten years later, South Africa has a functional constitutional democracy. In my presentation I will look at how we avoided this terrible conclusion that had been predicted. I will also assess the strengths and challenges facing South Africa in next few years.

In South Africa, parties came to negotiating table for several reasons. Whites had been subject to several limitations, and came to the negotiating table thinking it was a strategic time, as the African National Congress (ANC) was not too strong. The ANC also thought it was good time to negotiate. Good sense and good luck conspired to make settlement possible.

The settlement was made possible by three main compromises:

1. Agreement on a two-stage constitutional drafting process;
2. Agreement on the process of the Truth and Reconciliation Commission, based on confession and amnesty; and
3. The formation of a national unity government so as to avoid an immediate transfer or power.

Despite these compromises, the parties were divided on the issue of who would draft the new constitution. There had been neither a revolutionary victory nor a revolutionary defeat, but rather a transfer of power from one regime to another. It was therefore unclear who should draft the constitution. It was argued that process should reflect the actual situation. Smaller parties argued that unelected leaders should draft the constitution to protect their interests.

The ANC argued that it should draft the constitution, for its own control and good position. The compromise reached was that unelected leaders would draft a transitional constitution, lasting for two years, during which time elected leaders could draft a final version. This process gave time to think and decide about constitutional dispensation. At the end of the day, the Constitutional Court had to certify that the constitution respected certain core principles. While the Court initially refused certification, after revisions and a second presentation to the Court, the new Constitution was ratified. Granted, South Africa had better economic resources to propagate constitutional issues, and we consulted other nations extensively, including the US, India, Canada, and various African states. In the final analysis, the South African Constitution was written by and for South Africans. This Constitution becomes the will of the people and must be respected as such. The core elements of the Constitution are human dignity, the achievement of multiparty democracy, the rule of law and human rights.

Section 2 of the Constitution states that the Constitution is the supreme law of the land. Any violation of the Constitution is invalid to the extent of its inconsistency therewith. The Constitution also indicates that the judicial authority of the state shall be vested in the Courts. This provision helps ensure that the Courts function effectively.

The Bill of Rights comes in section two of the text. The Bill of Rights is based on the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights. The goal was to amalgamate the two visions, and the Constitution sought to bring together the two documents into one. The international community was divided over this approach, as social economic rights are often treated differently than civil and political rights.

The constitutional drafters had a mandate to protect universally accepted human rights. Most universal civil and political rights are included in the South African Constitution. The enforcement mechanisms created in South Africa work to ensure that these rights are respected. The Constitution also enshrined a further principle: under particular circumstances, certain provisions of the right may be binding on private individuals as well as on the state. This is the principle of horizontality, meaning that civil and political rights may be claimed against a private individual.

Laws of defamation in the media have also been addressed. Courts have rejected the *New York Times v. Sullivan* standard. The new test for defamation asks whether the newspapers can demonstrate that the statements printed in the publication were reasonable, as opposed to true.

The South African Constitution also seeks to protect all persons and prohibit unfair discrimination on the basis of gender, pregnancy, sexual orientation and other grounds. As a result of this, South Africa has moved forward in terms of greater tolerance. The Constitution has truly led people's thinking in these areas.

Now let me turn to the consideration of a more difficult problem--the enforcement of socioeconomic rights. South Africa protects these rights at various levels: at the level of directly enforceable rights, including the right to education, and at the level of access rights, including access to housing, water, and medical care. Then the Constitution goes on to say that the country will take reasonable legislative and other measures within available resources to achieve progressive procurement of these rights. Early on, a well-known case demonstrated the challenges presented by access to socioeconomic rights. A patient suffering from chronic renal failure went to a hospital where resources were already stretched. The hospital had a policy of providing dialysis only to patients whose kidneys could be revived or who were on a transplant list. Had the patient been rich, he would have gotten dialysis. So the question really was whether the hospital could let him die, given that he could not afford dialysis. The patient took the case to court, under the constitutional provisions. The court refused to rule that he should be provided with dialysis. If they had made an order directing the hospital to provide assistance, the Court would have turned the health budget upside-down. The judiciary would not interfere in these essentially non-judicial budget questions. The case reveals monumental disparities in society and indicates that if nothing is done in real terms, the present government will suffer. The people will lose confidence in the constitutional order because it is not working for them.

Let me turn now to the question of land issues. This is still a significant problem in South Africa. In another important judicial case, one group of squatters moved onto private land, from being squatters elsewhere. They were then forced off the private land. When they returned to their original homes, they found other squatters on their plots. They then went to court, arguing that they had a

constitutional right to housing. The government said they were working toward formal housing provisions, and it is true that the South African government had built about 1,000,000 homes in past six years. The Constitutional Court said that this right to housing is not only an aspiration or a vision. Taking its cue from the International Covenant on Social and Economic Rights, the Court said that these rights have a core minimum standard. In this case, the government has to provide an interim plan for people waiting for housing. The government can not just keep them on the waiting list. In this instance, the government had failed to take reasonable measures to provide interim housing. These rights, such as the right to housing, are therefore directly enforceable, not through an equality clause. The courts are following a path of determining over time what the minimum core content of the rights is and, over time, allow that minimum core to increase. Social and economic rights clearly represent the challenge now.

QUESTION AND ANSWER SESSION:

Patrick Matimbi (Zambia): To what extent has the Constitutional Court been successful in promoting constitutionalism in general?

Karthy Govender (South Africa): The Constitutional Court has been vital in South Africa. The new court represented a new beginning. From the perspective of having a legitimate institution, we needed the Constitutional Court. The final Constitution allows the values of the Constitution to percolate through the society. The jurisprudence of the Court has been outstanding. I believe you need to see a Constitution like an oak tree – tall and powerful and covering the entire land. It is imperative that one expend resources on this oak tree.

Aloys Hakizimana (Rwanda): Given that the Constitution in South Africa provides or includes provisions for promoting unity and reconciliation, was there such a thing in the interim Constitution?

Karthy Govender (South Africa): Yes—the interim Constitution required that an act be passed. The act allowed for people to apply for amnesty. The Constitutional Court sanctioned this act in the *Azanian People's Organization* case.

Theodore Holo (Benin): In South Africa, can you at the Human Rights Commission summon a Minister to your office and ask questions? Can you tell us how effective this process has been? And a question to my brother from Burundi, what is the effectiveness of the constitutional control in Burundi?

Gerard Niyungeko (Burundi): From 1992 to 1996, there was an effective control of constitutionalism in Burundi. Since 1998 the Constitutional Court has been reinstated, but people do not refer to the Court as they did in the previous period. In the beginning, it is true, there was a positive response from the public. Thereafter it disappeared for a number of reasons, due perhaps to the political circumstances of the country or to a lack of public understanding.

Karthy Govender (South Africa): We have subpoenaed ministers and premiers. For example, we subpoenaed the Minister of Health who was not responding to letters, during a case regarding a law preventing single women from being artificially inseminated. The woman who lodged the complaint was arguing that time was of the essence in her circumstance. Eventually the Minister changed the regulation. The government departments have been very tardy in the submission of socioeconomic rights reports; most of the subpoenas have gone to departments that have failed to provide reports.

The white minority government originally made certain assumptions. They felt that they would be able to write a constitution that had a white minority veto. But that reality changed over time. The United States said it would refuse to support a constitution that included a white minority veto. This pressure may have changed the outcome.

Joy Ezeilo (Nigeria): What is the relation of laws to the constitution, for instance, *shari'a* law or customary law? In Nigeria, the *shari'a* court was unclear, and customary law is generally recognized. How do South Africa and Burundi deal with these types of problems, especially as they relate to the horizontal application of the rights? We need to draw good examples from South Africa, in terms of the enforcement of economic, social and cultural rights. Burundi is also in the process of reviewing the constitution. How will it deal with social and economic rights?

Gerard Niyungeko (Burundi): Let me offer some examples regarding the difference in the application of laws versus the role of the constitution. In Burundi, institutions recently noted the supremacy of the Constitution over all other laws. Thus, if the interested person sees that any law, internal or external to the Constitution, violates the Constitution, then the interested person has the Constitutional Court to which to appeal.

In the protection of certain rights, the Constitutional Court censured some laws regarding the powers of prosecutors and discrimination in the application of amnesty. In the1992 Constitution, Burundi took up the catalogue of international human rights documents and integrated them into the Constitution that is currently in place. Burundi has not yet had the possibility of parsing the problem of economic and social rights, so they might stay fairly theoretical at the moment.

Karthy Govender (South Africa): The Constitution in South Africa is supreme. That means that any law, customary law or otherwise, is subservient to the Constitution. Customary law must comply with the Constitution. The courts try to leave the law when it is consistent with the Constitution. If there is a discrepancy, the Court will provide a period of six months or a year to bring the law into conformity with the Constitution. No law is superior to the Constitution. Some laws, rights, and duties may be horizontal, but one must make a positive argument that a particular provision is horizontally enforceable.

Kebreab Habte Michael (Eritrea): How do you handle certain examples of socioeconomic rights? For instance, what are the minimum standards for economic and social rights, and what is the minimum expectation of the government in terms of feeding its people? Also, how do you address the language issue in South Africa?

Karthy Govender (South Africa): You can not have human rights in the most divided society in the world if no socioeconomic rights are included. The dilemma in the coming period is the issue of enforcement and what the Courts will say. If the right is phrased in broad terms, the Court might enforce a minimum content, and will have to determine what that minimum is, case by case. For instance, in an urban area, the government may provide sewage and running water, but the minimum content for a rural area may be different. So, there is no concrete way of determining minimum content *a priori*. The Human Rights Commission presently wants to litigate against the government, because the government is not providing a drug that prevents mother-to-child transmission of HIV. We want to have a minimum determined by the Court on this issue.

On the language issue, South Africa has eleven official languages. In practice, each region has two or three official languages, based on the area. The *lingua franca* is becoming English currently, so there is a divide between the vision and the reality of the Constitution.

THE DIFFICULTY OF ACHIEVING DEMOCRACY IN AFRICA

Moderator: Laurent Kagimbi (Burundi)
Participants: Uganda, South Africa, Zambia, Mali, Benin

George Mugwanya (Uganda): Let me begin by discussing developments in Uganda. Uganda has been displayed as a success story by many countries. So today I will not delve too much into the successes, but rather explore the challenges.

The difficulties of implementing constitutions might be traceable to the drafting processes. Some of the problems that governments implementing constitutions currently face may be found in the drafting history. In Uganda the constitutional drafting process began in 1988. There were, in fact, two processes. The Constitutional Commission gathered people's views and then made a report in the form of a draft Constitution. The draft was considered by the Constitutional Assembly, which debated the draft Constitution to produce the final Constitution. Many Ugandans participated in the processes that produced the final Constitution. Some governments may deem the public contribution small, but it was significant. There is a very strong need to educate people in the constitution-making process.

There are three issues that need to be emphasized. The Constitutional Commission was appointed by the President without any consultation with the people's representatives. This process was problematic, as the Commission has itself pointed out. For several months the commission was trying to establish itself. People felt the commission was just an institution to perpetuate the "no-party movement" system of government in Uganda. However, the Commission did its work and provided recommendations. The final work was left to another organization, the Constituent Assembly.

So-called Resistance Councils also participated in the constitution-making exercise and submitted memoranda to the Constitutional Commission. For the first time in Uganda, it was during the no-party movement system of government that grassroots organizations in the form of Resistance Councils were established to engender popular participation, stemming from the people, right from the smallest level, the village. It was important to engage local councils, but this contribution had to be managed carefully. However, the involvement of Resistance Councils received mixed reactions from analysts. Some argued that since these councils were more or less functioning as organs of the state, the memoranda they submitted to the Commission were those of the no-party movement system.

In essence and in a very substantive way, political parties in Uganda have been banned. They cannot open branch offices. The law proscribes political party activity. People were supposed to stand as individuals rather than representatives of political parties. Even during the constitution-making processes, political parties were forbidden, thereby denying parties an opportunity to make their input in the crafting of the Constitution.

Let me turn now to the second organization, the Constitutional Assembly, that actually drafted the Constitution. At this stage, the Parliament was in place, but, rather than having the Parliament write the Constitution, the people elected an assembly to debate the document. There were, however, limits on the Assembly's work. For instance, the banning and criminalization of political party activities during the election of the Assembly undercut the parties' participation and produced an Assembly dominated by the "no-party movement" supporters. During the debates in the Assembly, the movement supporters were unwilling to reach consensus on the political system, forcing supporters of pluralism to walk out of the Assembly.

Problematic elements remain in the Constitution. Political parties are still banned under Article 269, such that the no-party movement political system remains exclusive, rather than inclusive and broad-based. The movement cannot be inclusive when it excludes those who oppose it. I see a positive development in the installation of a constitutional review commission.

Karthy Govender (South Africa): When you draft a constitution, you have to make sure that you give the rulers enough power to carry out whatever mandate they have to complete, but you must also ensure that there are enough checks and balances in place so that they will not abuse that power. Then you have to convince the people exercising the power that they can only exercise that power in accordance with the checks and balances. Those in power often see the checks and balances as a nuisance. In South Africa, we are trying to get all those who exercise power to do so constitutionally,

and we have institutions dedicated to performing certain functions. One cannot simply leave a constitutional democracy on its own and assume it will develop well. The South African Constitution sets up in chapter nine a series of bodies whose goal is to encourage democracy. For instance the South African Human Rights Commission is charged with protecting, promoting and monitoring human rights. The Commission is independent of the state and has a broad mandate and independent resources. Other bodies include the Commission for Gender Equality and the Public Protector, whose role it is to investigate the government administration, such as the South African arms deal, to determine if there is impropriety. We also have an Auditor General, and an independent electoral commission that ensures that elections are properly carried out.

Furthermore, we entrench in our Constitution the idea of division of powers, while the separation of powers is also protected. Major separations come between the executive, legislative and judicial branches. Any attempt to undermine the influence of the judiciary will be considered a violation of the separation of powers. In addition, South Africa is probably the first country in Africa to enact the promotion of access to information, an act which requires all government departments to disclose information, unless they can justify withholding information under the exceptions of the act. The promotion of administrative justice act ensures that the government acts fairly. The view is that access to information is key.

Patrick Matimbi (Zambia): The people did not write Zambia's Constitution; the agenda was set by the politicians. As a result, the nation's basic values are not properly reflected, rather the interests of the political élites are represented in the Constitution. The most progressive recommendation in the report is aimed at reducing the powers of the executive and introducing checks and balances. The 1996 recommendation suggested that the government put in place strong investigative organs and an enhanced bill of rights. In practice, one party has dominated the Parliament since 1973. We do have the jewels of the Parliamentary system; nevertheless one party has dominated Parliament. One recent development has been the strengthening of civil society, which has played a critical role in defining the agenda. One particularly productive innovation in the Constitution has focused on implementing checks and balance. This act allows any citizen to lodge a complaint, and in fact there has been one such complaint that has led to the investigation by a tribunal. Let me thus stress the need to provide checks and balances.

Fatoumata Siré Diakité (Mali): Democracy is a project that perhaps we can never fulfill, a never-ending process. I will talk about the reinforcement of democracy, how to strive for democracy, and about backlashes on the road to democracy. One of the first difficulties in Africa is the absence of a democratic culture, in a general sense. This morning we already noted that we need an African democracy, and we say that it is achieved through popular consultation. At one point, there was a culture of consultation by age groups. Furthermore, in a general sense, political parties have not done their part to educate their members, a point that was noticed by the NGOs who have now largely assumed this educational role. There is also the problem of generalized poverty. Francophone countries, especially, were told they needed democracy first. Are you supposed to develop first and then have democracy, or at the same time, or vice-versa? It is difficult to bring lessons on voting and elections to people who have severe poverty and health issues, and then instill democratic institutions. Then of course there are religious problems, income disparities, women's rights issues and others. We cannot talk about genital mutilation, because the Church does not want to talk about it. Then there is the problem of multipartyism: in Mali, a country with ten million inhabitants, we have a huge number of parties, around ninety. Every one says the same thing, promising development and progress, but these parties are not coordinated. Additionally, we witness discrimination against women and against the handicapped, which leads to regression and the undermining of democracy. We see the problem of confiscation of power by one group or person, social and economic troubles, and the issue of buying votes through aid, particularly the votes of women and the vulnerable.

In addition, the media does not understand its role very well. The media seems to change its position with the change of power. The media always seems to please one political party and to destroy the adversary. So there needs to be a control over the media. Furthermore, civil society is badly organized and manipulated, so that it weakens the democracy. Civil society actors need to know

who they really are and what they want. The public is not interested in politics; the public thinks politics is always ugly, and does not have faith in politics.

In the African context, there have been some successes, despite our problems. The people create democracy, not a single wise person. International institutions, whose money we need, often oblige us to push towards democracy. The people now have the understanding to know what's going on around them and what democracy means. The World Bank and the IMF force African countries toward democracy. But there is also vitality in the NGO community. NGOs in some countries now have the possibility of denouncing human rights violations and taking violators to court.

Théodore Holo (Benin): The rights of the minority are part and parcel of the constitution drafting process. I speak on behalf of the 52% of women and the 48% of men who also need protection. The first difficulty is sharing power; we are in an environment hostile to power sharing. From independence until 1990, we tried to restore a single-party system and strengthen the role of the President. Consequently, division of power was impossible. In 1974, the President had legislative, executive, and judicial powers. We cannot insist solely on the horizontal separation of powers, but must advocate for a vertical division of powers as well. At the community level as well as at the national level, the same debates regarding political parties and separation of powers are necessary. In Benin, which has only 6 million inhabitants, we chose to have only two parties. The goal of this decision was to avoid risking the disintegration of national unity if political parties were manipulated by the urban elite.

Now let me mention the power of money. We tend toward a plutocracy, in which the rich can ensure their conquest of power. Of course they invest to gain power, and then they want the return on their investment. The logic of politics is therefore quite like business logic. We need to place limits on the amount of resources used in politics to prevent these problems. The supreme court now can require parties to provide accounts of their expenditures. We should ensure that no community is excluded from political life simply because it lacks access to money and power.

I also want to mention the importance of good governance. In a young democracy we tend to consider power as an end in and of itself. But power is really a tool for the common good. The winner of an election may claim that he is not answerable to anyone. Therefore, we must infuse the constitution with the principles of good governance – transparency, efficiency, the need for responsibility and national accountability. Otherwise we will find ourselves with a kleptocracy, leading to the criminalization of the political system.

QUESTION AND ANSWER SESSION:

Kebreab Habte Michael (Eritrea): We've been talking about democracy in general terms. I can identify problems in the context of this debate, in terms of both procedural and substantive aspects, and in what was identified as the western approach. In these talks, we posit elections as the standards for democracy, but I think we need to think of the broader issues.

Zam Zam Nagujja Kasujja (Uganda): One of the difficulties of achieving democracy in Africa is that politics is always about winners and losers. But in South Africa there were no winners and losers when the constitution was being drafted. When constitutions are drafted after a coup, there is typically a governing body of winners that rules a body of losers. One group of people is already alienated from the democratic process. The foundation on which some of our democracies are being built is flawed from the start.

We must think of politics as a service. In most African countries politics are a life and death job. This condition makes constitutionalism very difficult.

Henry Richardson (USA): South Africa illustrates the near certainty of international intervention into the Constitution making process. For South Africa, President George H.W. Bush's former Assistant Secretary of State for Africa, Herb Cohen, expressed the international displeasure over a white South African veto of democratic principles. But the real movement was from US civil society. Civil society produced federal legislation, which changed the US policy towards South Africa from

minor chastisement to economic sanctions. So intervention of civil society is needed. Constitution making is truly an interdependent process now between the state and civil society. Additionally, the media played a very important role in the South African constitutional process. The media deliberately saw to it that the people were educated about the Constitution in eight languages. In doing so, the dominant place of the Afrikaans language was equalized, thereby changing the culture of South Africa.

Jean Gatera (Rwanda): The issue that to me seems very important is the establishment and implementation of democracy. We lack the continuous creation of political awareness. When there is a political crisis in our country, immediately people resort to training, but that type of training doesn't last long. When peace is restored to the country, the whole process stops. Usually constitution writers prepare the draft constitution too quickly. Could we not prepare the education plans with the help of some NGOs that have experience working with national human rights committees? In order to achieve democracy, would it not be possible for the government itself to provide this kind of planning?

Aloys Hakizimana (Rwanda): Let me follow up on the issue brought up by my colleague from Uganda. After listening to some of the presentations here by the panelists, I kept asking myself a question: Why should we develop a constitution without being assured that there is a mechanism for ensuring the enforcement of such a constitution? At times we have seen the clique of leaders in power decide on their own to change the constitution to meet the aspiration of the leaders involved. We could think of having some sort of guarantee mechanism. We could come up with measures that could provide solutions, sustainable solutions.

Bernadette Mukarutabana (Rwanda): I would like to mention a few words on the challenges to civil society in Africa. For Africa to be able to assert itself and resist political exploitation, we must build up civil society. We need a civil society that can actually carry out activities and is financially independent. What are the actions that such a civil society could perform?

George Mugwanya (Uganda): Eritrea raised a frank question about democracy. When you see a democracy, you know it is a democracy; but there is a lack of consensus on the notion. I believe that over time you can point to some important elements that a democratic state must incorporate. For instance, in a democratic government all people should be protected.

On the point of a constitution leading to winners and losers, it is true that in Uganda the general perception is one of being losers. Of course, this viewpoint leads to difficulties. We need to present all views equally – minority and majority. We also lack a culture of building consensus. As long as we fail to build consensus and fail to evolve a culture that respects divergent views, we will suffer.

Karthy Govender (South Africa): The issue about substantive democracy is important. What we have tried to do at various levels is to ensure a participatory democracy. The constitution requires that local governments consult with local communities affected by a given regulation. So at various levels we are trying to solicit people's participation. If this input does not occur, democracy is in trouble.

On the issue of winners and losers, one of the problems in Africa is that the winners stay in power forever. There is not a tradition of another election coming up to allow the losers to try again. The Government of National Unity in South Africa was very important in bringing other groups into the government.

In answer to Henry Richardson, the pressure on South Africa in 1990 was like no other country had ever seen. International protests led to a smothering pressure on South Africa, which eventually yielded results. It is absolutely vital to keep the international community involved in South Africa. As a final point, if we mess up economically we will then mess up constitutionally. Constitutional democracy is expensive to maintain. If you have a sound economy you can have one, if not you cannot.

Patrick Matibini (Zambia): If we go back to our original discussion, the constitution requires legitimacy to gain respect. The separation of powers and the observance of the rule of law is essential in this regard. There is also a need for a strong and independent judiciary. Respect of the constitution and mechanisms for its protection are essential.

Fatoumata Siré Diakité (Mali): When discussing democracy in the African context, we are not talking just about democracy, but also about poverty. Democracy in the way it is approached in Africa now also has to be considered in a larger international context. Our colleague from Uganda was correct when she described politics as a life and death job; too often the goal is to get rich in government and then return to being an ordinary citizen. This mentality is a clear abuse of power by politicians.

Our Rwandan colleague had a question regarding civic education being implemented by the government. I support political and civic education being implemented by the government, because civil society cannot replace the state and fill the voids in governmental responsibility. Civil society does not have the means to do so. Civil society can only supplement the government's efforts, and as such is an important component of governance. The mere fact of organizing civil society arises to fill in the gaps left by the government. Do we have sufficient resources to do this? What we have depends on who and where we are. All organizations of civil society have to come together and pool their resources. We cannot afford competition. We also have to come up with programs that are in line with the needs of the people.

Théodore Holo (Benin): I will respond to three questions. First, we should not reduce the concept of democracy merely to the exercise of holding elections. Today democracy is seen as a state of the rule of law. People should respect the right to be different. The mood and tenor of designating the people in power can vary significantly. Second, on the question of civic education: it is true that the Constitution of Benin provides that human rights should be taught in schools. We have also made attempts to translate the Constitution into our local languages. Third, we need to avoid the terms winners and losers. We should not regard power as a confrontation or a life or death fight. I am happy as a member of the opposition today, and I will fight to go back into government, but I will not kill myself because we have enough power in the opposition. The difficulty of power changing hands is the real dilemma.

THE CONSULTATION PROCESS — PART II

Moderator : Henry Richardson (USA)
Presenter: Kebreab Habte Michael (Eritrea)

Kebreab Habte Michael (Eritrea): The constitution proposal circulated for public debate came as a summary translated into local languages. We addressed several issues, for instance, why should we have a constitution at this stage? What will it do for us? Will we cherish it, and will the government respect it? We wanted a philosophy and a national charter so that a basic political system could be established, including general principles of constitutionalism. We needed to identify the major institutions or agents of state, namely the three branches of government, and a methodology for making decisions.

Eritrea consists of nine nationalities, so we strove for unity in diversity, being different but also the same. The topics of diversity and of social justice were very prominent. Individuals at this conference have talked about basic rights, such as social and economic rights, but we coined these rights social justice. The main aim of the constitution drafting was to lay the legal and political foundation for a worthy political system, not just for the sake of having elections and political parties, but for founding a meaningful political system. This was the first time Eritrea had drafted a constitution, so the participants were very serious about their functions.

We laid the groundwork for certain basic issues. We thought it important to establish a political system based on democracy, nationalism (building a strong, inclusive nation with national sentiment) and secularism (to separate religion from the political arena, not to prevent religion). Furthermore, we strove to create a system that could ensure equality in spite of differences, and would promote a respect for basic human rights, freedom of opinion, political organizations, strong democratic principles, and a strong democratic government. A strong government does not mean one that is oppressive, but a government that can easily implement its publicly-supported policies and can defend the country. Another issue was how flexible and how long the constitution should be. We in Eritrea chose a brief constitution, with fifty-nine articles, that nevertheless contains the basic elements for a constitution. We did not opt for a code, unlike South Africa with its particular situation.
What, then, should the constitution contain? It needs to be comprehensive and sketch out the organizations of the state, the rights and duties of citizens, a framework of government, and an outline of the state structure, among others. It must provide a legal method for amendment, for peaceful and orderly change, and must have a strong yet flexible amendment mechanism. Legal and political systems should coincide.

These are characteristics deemed necessary for a good constitution. We cannot re-invent the wheel each time, so we need to consider other countries' experiences when we draft our own constitutions.

QUESTION AND ANSWER SESSION:

Ergibe Boyd (USA): You mentioned that you have fifty members in the Constitution Commission. How many were civilian, as in non-government?

Fatoumata Siré Diakité (Mali): You spoke in your presentation about strong government, but what is your position about the status of opposition in the government? By strengthening the government, are you not stifling the opposition and creating a lifetime governing body? Do you have a specific mechanism to include women in the drafting process, and provisions for women and children in the constitution itself?

Kebreab Habte Michael (Eritrea): To answer the first question, there are ten executive members appointed by Parliament, and the Constitutional Commission also includes some ex-fighters and women who were already in the government. The Constitutional Commission was established by proclamation and is autonomous, with its own budget. This process takes a lot of money, particularly

for translation and publications. We received support from the United Nations and foreign countries, whose financial sponsorship granted us some of the possibilities that we had.

As for the executive, the Eritrean President has a limit of two five-year terms. Parliament has five-year terms, and members can be reelected. Now we are in the process of coming up with a law establishing political parties, and the debates and participation in this domain are on-going. Some sticking points remain, but not based on ethnicity or religion—there must be multi-ethnic parties. As for women's participation, women were fighters in our case, and they earned their rights without excessive opposition. We used affirmative action in putting women in Parliament without demanding prerequisites.

Otive Igbuzor (Nigeria): In Nigeria, we learned much from Eritrean process. What are the questions relevant to Rwanda? First we can identify the problem of elitist arrogance. How did you conduct the popular consultation and get the people to contribute to the process? When you engaged in the constitution making, there must have been deadlock; what was the mechanism to break it? Did you have a referendum, and how useful was it? What role did civil society play?

Joy Ezeilo (Nigeria): Constitution making in Africa has become a strategy of deconstructing a legislative regime or reconstructing it in a way that will reflect the needs of the people. In Eritrea the first Constitution after the right to self-determination was recognized sought to consolidate the gains of self-determination. Nigeria feels it can gain from the Eritrean example. I am surprised, however, that you took an escapist approach and did not address language issues directly in the Constitution. Since Eritrea has only nine languages, one would imagine that it would be very easy to translate the Constitution into all the local languages. In the Nigerian situation, where there are 250 local languages, translation would not be possible. We decided instead to employ the three main languages, a decision that has become a source of criticism for us. If we had followed the Eritrean example and completed translation into all 250 languages, the result would be unworkable. Additionally, what happened in the process of ratification?

Kebreab Habte Michael (Eritrea): In Eritrea, the struggle for liberation occurred in the countryside, led by peasants. Given our history, the elitist attitude had to be subdued, and there is an interaction between classes. People realize that education is a question of chance, and in some senses this war gave us strength. Furthermore, there was a deliberate attempt to address issues from the level of the people, and not to impose decisions on them. For example, the President generally addresses issues brought to him by the public. There are many practical things you learn from the public, because the people know what they want, what their ambitions are, what they need, how the government could assist them, and so forth. Education is needed, but the elite should not impose, but rather serve.

To the question of deadlock, we did have some examples. For instance, I was a long-time member of Amnesty International, but there were only five in the drafting group who opposed the death penalty, out of fifty. So far, the government has not used capital punishment, but we five accepted that we had been outvoted, and so had to accept the adoption of capital punishment.

We had a referendum to determine the independence of Eritrea, but not for acceptance of Constitution. Instead, five hundred members of Parliament ratified the Constitution on May 27, 1997, though many subsidiary issues were left behind. For instance, there was no time framework for the implementation of the Constitution; some of us wanted a time-frame included, but we were outvoted. However, everything was determined by vote, so there was no real deadlock.

Regarding language, the liberation movement expected people to learn their mother tongue, and then have one or two other languages. Language was meant to enrich us by supporting the diversity of the country. The problem will arise when there is a constitutional issue based on language, and we shall see then how the Courts determine it. For instance, only five percent of the population spoke Arabic originally, but now fifty percent of the Muslims know the language because of their religion. There is some compulsory education to learn the mother tongue until the fifth grade, and thereafter we have adopted English as the language of higher education.

The ratification process took three or four days to debate, then the draft constitution was circulated. It was ratified on the basis of a vote, based on popular consultation.

Zam Zam Nagujja Kasujja (Uganda): One of the criticisms of Uganda's Constitution is that it is too detailed. The danger of having too much detail is that it will create too much litigation, and the Courts might not retain the Constitution. In light of this dilemma, how long should the constitution be, or how short?

Charles Uwiragiye (Rwanda): I have a question regarding minority groups within the country. When your Constitution was being created, the process did not ignore these minority groups. What kind of legal policy considerations did your government observe so that minorities could contribute to the constitution-making process? How can the Batwa also benefit positively from this process?

Burundi: You said that in elaborating the Constitution, you tried to adapt international principles or forms of government to the realities of the Eritrean nation. How did you do that? And could you synthesize the contents of the Constitution?

Judith Kanakuze (Rwanda): What kind of mandate did the drafters have, and how long was it?

Kebreab Habte Michael (Eritrea): There was one philosophical aspect we took into consideration. We wanted the drafting to be a growing process. We chose deliberately to make the Constitution short. We did not want to include anything we could not implement. The actual implementation of the Constitution will come after the elections, probably next year.

As for the second question, regarding the nationalities. I think it is more of a political statement than a legal right. Throughout the struggle, all the nine nationalities were involved in the struggle. So I think a constitution that would exclude the minorities would not be democratic. So we talk about democracy and justice and I think it should provide democracy for everybody whether small or large—that is the approach we took. And I think for the sanity of Rwanda, it should not exclude but be inclusive of every nationality if it is going to have the strength.

The first question is a loaded question, but I will try to answer it by virtue of the Constitution. For example, if you go to the Preamble, we give the due respect to our martyrs, we have lost over 65,000 people during the struggle. This is only in the fighting, not in prisons. For example, I personally lost nine friends when I was in jail. We acknowledge such things, that's the history of the nation. So that's part of it. Then what are the aspirations that we want to create. That's a constitutional government. We talk about national unity and democratic principles. For example, "The State shall create conditions necessary for developing a democratic political culture, defined by free and critical thinking, total and national consensus, the organization and repression of political parties, public administrations and movements shall be guided by the principles of national unity and democracy. The conduct and affairs of government and organizations and decisions shall be accountable. We have tried to establish a national culture in the Eritrean context, meaning respecting the nine cultures. There is also an article, for example, on administrative conduct, indicating the right to make the administration accountable. Any person whose rights have been violated shall have the right to due administrative redress. And also in cases of inequality, we have affirmative action in cases of inequality, and the Constitution mentions the equality of women specifically. The Parliament can take action.

As for the other question, indeed we did not reinvent the Constitution. What I meant is that there are other constitutions that were already written, and we did consult them. It was not an invention on our part. We identified the people with some background who could actually organize public debates and could also understand the issues. So we gave them an intensive training and also the materials. So they will actually cooperate with members of the Constitutional Commission and will do the follow-up with members of the Constitutional Commission, after the Constitutional Commission members met, because we wanted it to be a continuous process. If they had questions, then a Constitutional Commission member would go and explain. That was the process that we followed.

DAY TWO: Tuesday, August 21, 2001

THE RWANDAN CONTEXT: POLITICAL POWER AND THE ETHNIC QUESTION SINCE INDEPENDENCE

Moderator: **Alfred Mukezamfura (Rwanda)**
Specialist: **Professor Faustin Rutembesa (Rwanda)**
Presenters: **Rwanda, Nigeria, South Africa, USA**

Alfred Mukezamfura (Rwanda): I hope you all had an enjoyable night and are ready to start the second day. Yesterday we covered many subjects and we also received information about the experiences of many countries' constitutional experiences. We now proceed to the Rwandan context, including questions of ethnicity. I believe this is the right time to discuss this subject. I would like to introduce myself, I am Mr. Alfred Mr. Mukezamfura, the Vice Chair of the Legal and Constitutional Commission. Before this position I was an MP in the transitional government.

Mr. Faustin Rutembesa, just next to me, is a historian, as you could see on his résumé, and a Professor of History at the National University of Rwanda since 1995. He is also the President of the research commission and is the chief of research in the region and the nature of conflict in Rwanda at the National Center for Reconciliation at the University. Clearly, he is an individual who is very qualified to speak with us about the question of ethnicity in Rwanda since independence. Without further ado, I present to you Mr. Faustin Rutembesa.

Faustin Rutembesa (Rwanda): Thank you Mr. President. I would like to clarify the misuse of the term "ethnic" regarding Rwanda. Let me clarify a few points for my friends who have not had the opportunity to know about Rwanda. In Rwanda we commonly talk about three ethnic groups, but if we follow the criteria of how we define ethnic groups in classical ethnography, only one ethnicity exists in Rwanda. Those criteria include common ancestry, common language, culture backgrounds, religion, and specific organization within a geographic space. In Rwanda, the Hutu, Tutsi, and Twa all have common backgrounds— they belong to one common ancestor, they speak exactly the same language, and share the same culture and there are no particularities among the three components of the population. This is why one must say that, if you want to talk about ethnic groups, all Rwandans form one ethnicity. However, in the absence of a term that will translate a particular Rwandan phrase, I will risk using the word ethnicity, without agreeing with it and without implying the English connotations thereof.

This morning we will very briefly review the situation in Rwanda before the country's independence. This type of exercise consists of revisiting the past so that we may understand the context in which the new constitution of Rwanda will be implemented. Ethnicity does not just exist as a problem for the Constitutional Commission. It exists in other nations, in other contexts. We study it simply in order to understand the context in which we are creating the new Constitution of Rwanda. We must start with the solid foundation of the history of Rwanda—its political history—in order to have a strong basis for our discussion and to form a solid foundation to understand the future.

Sometimes it seems that we know the political history of our country has been predominated by the ethnic question since 1959. I know that it seems inarguable that the ethnic question was not seen until the years of independence. However, it germinated during the pre-colonial period, and was formed by the profound cleavages between those who held power and those who did not.

Before colonization, it appears the terms Tutsi and Hutu corresponded to the positions individuals held in society. The term "Tutsi" designated the small aristocracy, and those who gravitated towards them. The term "Hutu" designated the mass of simple subjects. The term "Twa" itself connoted those who had the advantage of being seen as professionals. During the end of February of last year, the Legal and Constitutional Commission and the National University of Rwanda organized a colloquium about the identity of citizens. One of the questions of the research was the understanding of the significance of the semantic meanings of the terms Hutu, Tutsi and Twa. These terms, which existed and were not fabricated by the colonizers, these terms held a pre-colonial

significance. These meanings held earlier significance, which opposed the meanings later adopted during the colonial period.

Once the colonizers arrived, Rwandan society was subjected to a philosophy of colonization imported from Europe at the end of the nineteenth century. In Europe, race theory was in vogue, and was used as a way of interpreting Rwandan society. This understanding permeated all of the ways Rwandans perceived themselves, under the influence of these racial premises, and the introduction of religious missionaries, meant that the Rwandan population of Hutu and Tutsi became defined under racial or ethnic terms. And it was also under these terms that the auxiliaries of the colonial administration became defined as Tutsi, under the theories in vogue in Europe at the end of the nineteenth century. This irrationalization of race was operational in Rwanda, and the Tutsi who worked closely with the Europeans benefited from their vision. In the 1930s, administrative structures were implemented under these racial definitions. Those close to the administration benefited from the racial distinctions because of their position in the pre-colonial society. Thus, ethnicity became a significant component of the national identity in Rwanda. All problems, and even discussions of economic development, became defined in terms of ethnic superiority. Crimes were perpetrated by people on behalf of ethnic identity. Subsequent events show the clear role of the role of ethnicity, including the development of ethnic leaders. It was essentially between the hands of the faction which took the name Tutsi. From the year 1957, all of the problems – economic problems and social problems – can be traced to the use of the *monopole* based on race.

The year 1959, which serves as the point of departure for our discussion this morning, was a very important year for many reasons. It is very important to remember that it was then that, for the first time in the history of Rwanda, crimes perpetrated by persons in the name of their ethnic identity occurred. This is absolutely important in the construction of the history of the modern Rwanda. I propose to quickly review three stages in the development of Rwanda; the political history of Rwanda. We will see clearly the role of politics in the administration of society, in the communications, the political power and the ethnic question in Rwanda. The first stage concerns the years from 1959 to 1962.

From 1959 through 1962, (for those from outside of Rwanda, Rwanda became independent on July 1, 1962), during the struggle for independence, the capacity for violence became a factor. This is the shortest period in Rwandan history, but also its most decisive. These three years prior to independence were characterized by violence and defined by a radical explosion in the importance of ethnic identification. The most important actor in this period was not a Rwandan, it was a Belgian. This official, named Guy Logiest, arrived from the Congo to establish public order in Rwanda. In effect, from the first day of November 1959, Rwanda was swallowed up by violence. It descended into massacres and pillaging, undertaken by Hutu elements, which led to a reaction by the Tutsi elements. When he arrived in Rwanda, then, the Colonel Logiest dictated the texts of two ordinances: the first was the creation of a resident military in Rwanda, while the second created a state of emergency. Logiest made these two declarations based on what he personally felt was necessary. It seemed that these situated the introduction of ethnicity in Rwanda. He benefited from these ordinances, which changed the political order of Rwanda drastically. In their attempt to reestablish control of the country, the Belgians replaced the Tutsi chiefs, sub-chiefs and professionals with Hutu elements.

Why did Logiest do this? It was clear that the Logiest was an agent of Belgium; he was acting for Belgium and his actions were attributable to the government. He conducted one mission in Rwanda, and that was of the Belgian government. When he came to Rwanda, he knew nothing about the country. He did not know Rwanda. The only information he had came from an ethnology by a missionary, Father Parjeste. Thus, the elements which formed his determinations were what he learned from Monseigneur Perodat, from the Missionary Kabgayi, and from then-President of the Paramahutu Kayibanda. Logiest had meetings with these individuals, which led to two convictions: first, he had to promote the Hutu and disfavor the Tutsi, because, according to his explanation, the Hutu would be obeyed and the others would not. Second, he needed to give power to the Hutu party, particularly the MDR Parmehutu. Why? Because only they, the Parmehutu, represented the majority and the parties other than they would create enormous trouble. This led to two important consequences. First, the terms "Hutu" and "power" came to mean the same thing, and were often used interchangeably. The procedure of the biologization of power, and through this, one finds the

legal equation of the ethnic majority with the majority political. The use of ethnicity thus became operational.

For the other part, it was believed that because the Hutu Power party represented the majority it was considered a unique stabilizing factor in that would facilitate the creation of the democracy. It was within this context, the resolutions voted in by the General Assembly of the UN were not followed. These resolutions recommended, notably, the return of refugees, the release of political prisoners, the reintegration of the society, and proceeding with national reconciliation. At the end of the process, these would have required force to be put into effect. The principle of these, which Rwandans know as the Congress of Gitarama. This Congress was comprised of all Bourgemestres, (for those from outside of Francophone Africa, it is a position somewhat like mayors). These Bourgemestres and the communal councils were invited by the Minister of the Interior to hear the military's complicity with none other than the Colonel Logiest. One of the other decisions they offered was abolition of the monarchy and the proclamation of the Republic of Rwanda. It seemed that this symbolized the debut of the dissolution of ethnicism in Rwanda. The resolution they offered resembled that offered by the protagonists of Rwanda, previewing the conditions they would find acceptable in Rwanda, but this was not allowed to be enacted.

The second stage of Rwandan governance was between 1962 to 1973. This second act was constituted by the Parmehutu regime, which were the winners of the legislative elections. They called this period the called the Age of Independence, which started the first of July of 1962. They used ethnicity as an instrument of mobilization and political building. This administration began one year after independence, that is to say, in 1963. Two million Tutsi were in the nation. Other Tutsi refugees forced their way into the country. The reaction of those in power was atrocious. Those Tutsi that remained in the country were massacred. The President himself ordered that the nation be cleansed of its fifth column. This is to say that the government itself undertook in the physical elimination of a portion of its own population.

Like in this decree, the use of ethnicity is often, if not always, a sign for other things. It is a mask for the social conflicts, problems of economics, politics, and the loss of a sense of control among a large portion of the population. It is often a sign of the incapacitates of managing the historic contradictions, and the incapacity to manage the tensions inherent in significant moment of social change. I think that ethnicity usually substitutes for other things, those tensions that change all social aspects of life.

In 1968, the divisions in the ethnic communities became intense. Unfortunately, this meant that influential members of the southern part of the country and later, populations from the north, were displaced. The regime re-launched the theories that had brought them to power: this was the logic of violence. Thousands of Tutsi were chased away from the nation in 1973.

The third period of history, the Second Republic, was in 1973-1994. Unfortunately, in opposition to his first promises for inclusion, the President Habyarimana continued to operate on the logic of exclusion. Ethnic groups and the regions had to work or go to school—public or private—based on their ethnicity and, practically, based on their relationships with those the north, who maintained the apparatus of power. These were hardly simple relationships. In effect, ethnicism and regionalism became fundamental to this regime. As the participants know, when they came to Kibuye, they went through Gitarama. This is the central region of the country. Closer to Burundi is the southern region, around Butare. Then, in the 1970s, in the southern region of Gitarama, the Hutu of the south were alleged to hold more ethnic similarities to Tutsi than the Hutu of the Northern region. This declaration of the philosophy of racism fed into the new government. In 1990, the country was engulfed in violence. The race-based logic of 1959 was used again to define two categories of citizens: those who should be protected by the law, and those who were state enemies. Those who merited the protection of law were certainly Hutu. However, Hutu who opposed the regime were classified as enemies. This was why thousands of Hutu were killed during the massacres of 1994. When Tutsi were placed in the category of enemies, another explanation is necessary. An important distinction must be made. In the vocabulary of the Rwandans, the "adversary" is someone who must be weakened and the "enemy" someone who must be eliminated. This is an extremely important distinction. From 1992, the concept of an "enemy" was solidified in the public opinion. They understood the ferocity, and this aided the genocide.

In conclusion, these three periods which we have briefly covered demonstrate that the historical and political development of Rwanda was defined by ethnicity, and that ethnicity served as a pretextual basis for building a monolithic consolidation of power by an élite that abolished diversity and opposition. There were distinctions in access to power and ethnic belonging. The correction of this form of power relies on the abolition of emphasis on ethnicity. A reintegration of the ethnic groups of the country must occur in order to establish a unified national identity. The Commission must discover a mechanism which ensures the disassociation of access to power and the role of ethnicity. One of the means of accomplishing this is the institutionalization of the collective personality through political power. This depends on the weakening of allegiances and the insurance that all citizens have the same rights and the same access to power within the republic. The institutionalization of power can be through agency, through the collection of power should not be strengthened. The same conditions for acceptance of public employment must exist, and the sense of illegalities of rights must not be allowed to increase to promote the new sentiment of citizenship among all. The sense of an effective, if not formal, equality among all citizens will lead to new attitudes and the new citizen identity.

Question and Answer Session:

Kebreab Habte Michael (Eritrea): In this presentation, it was stated that ethnicity is more artificial, and that the real problems are more political in this country. One of the political problems in the country is a concentration of power in the government and ethnic domination such that there was insufficient allocation of resources among groups. If resources are so limited, do you not think that economics, for example, could be a source of much conflict?

Fatoumata Siré Diakité (Mali): I think the objectives of the conference have been to bring our brothers and sisters of Rwanda to forge ahead in preparing a constitution. I followed the history revealed by the report of Mr. Faustin Rutembesa. The presentation he has just made worries me a great deal in terms of this exercise and the future of the country.

It is an appeal I am making to you that we reconcile the history. There are so many different versions of Rwandan history, with huge differences. In order to move forward, we must not forget history, but must make a profound commitment not to repeat it and seek forgiveness. This should come from Rwandans themselves.

Question (Rwanda): I have an important question. The speaker touched on the developments following 1959 without a discussion of the root causes of violence that we have observed in the lives of a population that shares the same language and religion. These are core factors of unity that are rarely found in many other African countries. There is no consensus on the rules society should follow to make an effort toward consolidation. We have the perception that from 1959 Rwanda has been built on exclusion. We must have participation and we must get all types of advice, from those countries such as South Africa. In South Africa the motto is “No future without forgiveness.” Is there more concrete advice on how to make such a future a reality? Our reflections should look for means of achieving this forgiveness. There have been efforts used by some élites to divide those who aspire to live in harmony and to this we should give our attention.

Faustin Rutembesa (Rwanda): Thank You. In response to the question from our friend from Eritrea, on aspects of economic dominance. I entirely agree; I could not agree more. The factor of domination must be removed in order to lead to ethnic consolidation. The dominant factors for the killings, the ability of a person to kill, depend on economics and power structures. A person says, “I will kill because the authorities have encouraged me to do so and I can take the wealth of my enemy.” I will reveal the first results of a study undertaken by the university, which is interested in knowing why people killed others. It seems the determinant factor was economic: people would say, “I killed because on one hand, the authorities encouraged me to do so and especially because I could take the wealth of the enemy.” The economics of this country make this possible. In the study we have one

consistent answer: "I wanted to eat their cow." The cow represents wealth and status. The goal of many of the killers was to take over the cow.

As to the second question, or rather comment that was made, I thank you for it. But while the questioner expressed an emotion of worry that it is worrisome that that the massacres occurred, it is understandable to have such a reaction.

As to the third question, of my colleague from Butare, one question and two comments. The question, perhaps I will give it back to him because we share the same position as lecturers at the University. Thus we have the habit of focussing on one term in our presentations. I just wanted to use the term political power to focus on the issues.

The terms "political power" and ethnic issues are significant factors of the period he referred to. In the beginning, we saw that the period was divided into two parts. The pre-colonial era was marked by the rule of the monarchy. The colonial system did not correct the injustices; rather they exacerbated them. There was the problem of land, controlling population growth, schooling, and taxes, as many Rwandans were exiled in the colonial period to Tanganyika, and to Uganda to work in plantations just to earn sufficient money to pay taxes.

Finally, there is manipulation and the problem of political parties. The mindset of the colonial worker was to find the colonial chiefs; those who were the chiefs were not the ones who created this oppression, but they did implement it. They were the go-betweens and thus the population attributes their actions to the local leaders. There is a remarkable book by Jacques Lombard, which describes this pattern. It was not only in Rwanda where this existed, it happened in most colonial contexts. The colonial context, economic factors, and social constraints: these are the problems that existed and actually created the problems in our society.

The emergence of political parties in Rwanda began in the last quarter in 1959. Three years later, the country had become independent. In 1959, the élite practically existed in Belgium. In the Belgian tradition, if you have no élites, you have no problems. In other African nations, there were already huge networks of primary schools and many secondary schools. In Uganda, the University of Makere was founded in 1927. In 1931, some African countries like Senegal, Mali and Guinea, had students abroad, and involved in international institutions. For example, when the Governors of Rwandan and Burundi visited colonials in Belgium, they asked how they would help prepare the countries for their futures, they replied that they have never heard of the issues facing those countries. This explains some of the huge problems of independence and the multiparty system in Rwanda.

Yet Rwanda had yet to begin conceptualizing and advocating toward its practical independence. Only in 1991, when President Habyarimana agreed to review the Constitution of 1978. This process led to the Constitution of 1991, which in turn, led to the recent violence. Did we see an attempt to integrate exclusive political parties as a component of a democratic national political structure? No. Thus remarkably from 1959 - 1962 through to 1991, political life was virtually inaccessible to the majority of the population. It is important that this Commission has the power to continue the work of democratization of politics and increasing economic access so as to find a mechanism of inclusion.

It is the role of this Commission to look critically at what is important. I hope the Commission will have the courage to invent a mechanism based on what the country went through and what the country hopes for the future.

Yes, people like to speak about forgiveness as a precondition for moving forward, but we must not ignore the reality that there can be no peace without justice. Following the previous massacres in Rwanda, in 1959-63 the selective massacres, some would call it a small genocide, there was no justice, no punishment of crimes, instead there was impunity. Today, we focus on justice; we must focus on dispensing justice in order to ensure that the society may move forward in a way in which it can achieve forgiveness.

Inherent with all of these differences we should add to what Desmond Tutu said: "There is no peace without forgiveness." I would also add that there is no peace without justice.

Joy Ezeilo (Nigeria): You posed an important question in terms of dissociating power from ethnicity. I perceive this as a major challenge not only in Rwanda, but also in most African countries. We must engage in it. I would like to give an insight into how Nigeria has dealt with the problem.

I see significant comparisons to Nigeria, for example of the genocide of the Ibos in the North. One distinction between Rwanda and Nigeria is that there are numerous ethnic groups that were not

consolidated or empowered. I also did not hear any discussion of religion or language, because of course in Nigeria there are several languages. In Nigeria, the cultures were essentially the same and ethnicity was not associated with power until the colonial regime. Today, people are fighting and killing each other over ethnicity and religion.

In terms of power sharing, our Constitution has a federal character. The government's affairs, and the composition of governmental agencies, must reflect the character of the Nigerian population such that there is no predominance of any one or a few ethnic groups. Nor can there be emphasis on the regional division of people. The goal is to develop a sense of unified belonging into a national identity. In practice, this translates into a big challenge because power shifts, such as the shift in 1993 to the South in elections of Mr. Abiola. Immediately, the elections were abolished because power was always concentrated in the North. The Yorubas insisted that they should possess power because they were seen as the dominant component of society. There had to be international intervention. Eventually, there was the development of shar'ia law. Now the government must be representative and power must be balanced. There are many with multiple ethnic identities and others who want to eliminate ethnic divisions. For example they advocate the election of a representative leader who can represent everyone, who will create national unity. But that is simply not a reality given the history of our national identity.

Charles Uwiragiye (Rwanda): My question is about power sharing. We saw this with the discussion of Hutu and Tutsi from last night. In 1973 there was a war by Habyarimana and then in 1990, yet another war occurred to remove the regime. In all this civil strife, Hutu, Tutsi and Batwa all shed blood. It was very important when these regimes happened to be in place. As for power sharing, the people alone bring this to the discussion. There is no discussion of Hutu or Batwa at all in this talk of power or sharing; there is no real discussion so far of the sharing of the fruits of power among those who have been victimized or exiled. Even in this government of unity, exiled Hutu and Tutsi alignment, you may see how the Hutu and Tutsi came, even today in the question of Hutu and Tutsi power sharing, to find the beginning of a democratic regime. I ask you kindly to think about the Batwa; we too are part of this country and we need to be recognized.

Question (Burundi): Representation has to be spoken about more inclusively. For example, next door in Burundi, in the Parliament there is a representation of all of the ethnic groups, not merely the majority. There is a step being taken by the government in the development of the social structure, but there has not been taken into account the populations outside of the Tutsi and the Hutu. Let us not forget the Batwa people and the other smaller populations of ethnic groups who are equally impacted by the strife and bloodshed.

Question (Rwanda): How do we achieve reconciliation between the conflicting aims of justice and of forgiveness?

Abdoulaye Sékou Sow (Mali): My comment is in line with the question that has just been asked. When one has come from as far away as I have, emotions are powerful. Rwanda, central Africa for that matter, countries such as Sierra Leone are all part of Africa, our Africa. There must be progress in the field of solidarity. In Mali, we have experienced similar massacres twice. People used knives to cut each other's throats. With the support of the economic community, we were able to suppress the rebellions, people laid down their arms and we had the start of peace. We share with you a common experience that has run throughout the nations of Africa. In Mali, I was leading negotiations because the Party of Independence was having difficulty.

A Constitution is not merely created and then enacted. It has to resolve problems, including the important problem of ethnic conflict. This should not be hidden. Thus we have to develop a programmatic Constitution that acknowledges all of the problems that we are confronting today. What has the transitional Rwandan government done toward ensuring that these issues are confronted? Has there been any progress toward ethnic integration? We should not forget that a constitution on its own does not solve the problems of a society. What principles and goals must we develop to anchor a new

constitution? Our discussions here must be able to identify the core principles, such as absolute equality of all citizens, in the face of all problems.

Faustin Rutembesa (Rwanda): The first question discussed disassociating power from ethnic belonging. I agree that the principle of power sharing is an absolute necessity, but it has to be well thought out. You mentioned the federal character as one way of approaching the problem. I often ask myself what are the defining characteristics of the various ethnic groups in Rwanda, and unfortunately, I have not found any. Thus I have reservations about starting with the principle of federalism in Rwanda. Rwanda is a small country compared to Nigeria, and has far fewer ethnic divisions. The diversity that exists in Rwanda is in how power is distributed, including access to jobs, resources, education, etc. Thus federalism may be a false start for Rwanda.

The next question addressed the issues of the role of smaller ethnic groups of the country. I think someone else may have addressed this topic, but I would like to say that there has been an important movement toward the recognition of the Batwa. This, however, is problematic because even if we had Batwa in all the key organs of the government, this might be a dangerous approach, one that reinforces the divisions that define the society. I think we should have an economic common denominator that recognizes the rights of all individuals. Otherwise, today we talk about Batwa as a special interest group, then tomorrow we talk about people living with AIDS, for example, as a special interest group to protect.

The next question regarding justice and reconciliation, is a vital question. Such a process has many stages that cannot be crossed at the same time. We all know that in Rwanda we have a Commission that has been assigned and encouraged to promote reconciliation and which organized a big conference last year. Thus someone form the Commission should address this. The National Assembly for Human Rights is also working on these issues. All of these Commissions are working on these issues of reconciliation. However, as an academic, I would have to ask the Commissioners to give you the practical solutions as requested.

The question from Mali, regarding just how much progress toward reconciliation has been accomplished, likewise should be addressed by the representatives of the Commissions who can give you the specifics of the process in more concrete terms.

I would like to address the issue of terms that can lead to polemics, such as the experience of Burundi. We are clearly operating from different theories. I have lived in Burundi for many years, and I have significant concerns about how ethnicity is dealt with in that country. Principally, they are brining back the very divisions that created the problems in the first place. We can bring about reconciliation without atomizing the population. The sentiment should be national unity. We come back to the same points of departure, and to the same challenges that have confronted the country for centuries. Montesquieu wrote in his book, "The Spirit of Laws," that it would be strange that the experiences of one country could be readily applied to another country because the laws should inherently address the complex situations of the country itself. Burundi has problems that are similar, but there is not a ready-made model because we do not have the same size, economic development, and industrial development. That is like applying the experiences of a young man to those of an old one. The Rwandan government must build upon its own experiences and must have the ability to use its imagination to reinvent new solutions.

Alfred Mukezamfura (Rwanda): The ethnic problem in Rwanda, as has been noted, is a passionate and incredibly sad one. People who have the same language, culture, and religion have found artificial ways of dividing themselves. We must learn a great deal from that experience throughout Africa. Let us pay serious attention to what the professor has shared with us.

THE EVOLUTION OF POWERS IN RWANDA: DISTORTIONS BETWEEN CONSTITUTIONAL PROVISIONS AND INSTITUTIONAL PRACTICE

Moderator: Alfred Mukezamfura (Rwanda)
Specialist: Faustin Rutembesa (Rwanda)

Faustin Rutembesa (Rwanda): As I said a few minutes ago, when I gave you the historical background of political life in Rwanda, in this second session I will try to be as brief as possible.

This second paper aims at showing how the various powers have functioned since independence to this date. Before I go into the crux of this matter, I would like to point out something never before stated, namely, the discomfort that has characterized the political and social evolution of Rwanda. This discomfort is linked to the circumstances that surrounded the birth of Rwanda's modern state and the beginnings. Among these circumstances were the violence — you heard about the Congress of Gitarama and what emanated from it. There was also a spirit of unease that led to the various decisions after it. I am told that the UN provision could have been the framework for the stability. There were various ways the legislature wanted to align themselves with reference to the past.

In my paper, I summarized the Gitarama Constitution, let me tell you about it. The dual constitution – there is a technique of internal transfer of skills, the appropriation by an ethnic party of the political space, and from that political space to manage the country, and on that space to determine the future.

In the transition to a constitutional government, there was an affirmation of consolidated power in one ethnic state. Article 45, for example, concerns the cooperation of legislative, executive and judiciary. There were three listed organs, the legislature, the executive, and the judiciary. However, while it consecrates the division of these powers, it also exemplifies the incorporation of a powerful executive entity. The separation of the powers was very narrow, and the legislative and judicial powers did not have any means to prevent the excesses of the executive.

The legislative branch did not have the authority to limit the actions of the executive. Article 56, which determines the general powers of government, points out that the Constitution granted the President extensive powers. A President has the power to establish the composition of the government, s/he determines the general rights, s/he can even demand the legislature read the bill a second time. These powers are common to many African countries, and appear in many of the second constitutions formed after 1965. According to this Constitution, there should have been a vice Presidential position, which was never filled. In 1962 the power of the President was extended and the judiciary was even more constrained. So the issue of trust became even more important and the motion of censure was practically impossible – those of you who have the text can look at these issues within it.

Furthermore, the powers contained in Article 68 were blocked by the powers held by the Constitutional Court. The Constitutional Court, which was attached to the Supreme Court, never managed to exert any control over the Constitution of Rwanda. This shows that despite the existence of a liberal Constitution, the President can use such a Constitution to legitimize the means to his own ends.

Things became much clearer after 1963. In 1963, after the attack of Rwandan refugees from neighboring countries, the reaction was harsh. Unlike before there was a stronger reaction from the National Assembly and from the Parliament to address the inequities. This shows that there were many people complaining about the abuses in their sectors. The authority gave Prefects and Prefectures powers over Members of Parliament. Irregularities were witnessed. There were new obligations imposed, such that if you were moving from one commune to another you had to have a movement pass. Al these things we discussed in the National Assembly and led to the national commission of July 1964.

Some members of Parliament were members of a commission. In 1964, the report of the Commission painted a dark picture of relations in the country, the management of public funds, etc. This report was written down and given to the President, who never gave it back to the National Assembly or to the people so that it can be debated openly. The dominance of the President led to the

paralysis and led to the creation of mistrust and conflict. Even before, this had changed with a decisive step had been taken by the refugees, the Tutsi.

The Hutu became the dominant party. Even if it was not provided for by the Constitution, this de facto situation caused the President of the Republic to become automatically the President of the party, the head of country, the head of state and the head of government — no matter that the head of state had all the powers in his hand. In 1968, the discontent of the members of Parliament reached an unprecedented level. The head of Parliament gave way to the sentiments of his cronies. Some of you are aware of the problems of these times. The newspapers showed the cartoons of the President as dominant and working only for his friends.

The National Commission of inquiry was given a mandate to write on politics, justice, prisons, farms and the development of a budget. This mandate covered the same areas that were covered in 1964. The 1968 report of the commission was read in a plenary of the National Assembly. Irregularities were pointed out at all levels of political life, and corruption was addressed. The President and some Members of Parliament were cited in the report. Several days later the report was attacked by many members close to the President and there was a motion to reject the report by some powerful political leaders and the President. This shows the manner in which the executive consistently paralyzed the Parliament as an instrument capable of channeling its own will.

From 1963-4 the process of the management of power became even harder. Two elements characterized politics between 1978 and 1991, which we will review. The Constitution was blocking any political mechanisms for challenging the executive's authority; this was aimed at stopping any future questioning of the leaderships' doings. One way was to interrupt organized political life. The preamble of the Constitution shows that the MRND was the only and single party that was recognized in our country. The only way to exercise leadership was to tighten control over the population. Here we must remember that from the bottom to the top all the activities were decided and subject to control of the party. It was the party that gave all the references and held all the means to assimilate the ideas. There was communal work, which had social or ideological objectives and the country was under the full control of the party from the bottom level to the top, the party was omnipresent. This pervasive presence of the party has some close correlation with the speed with which the genocide was implemented. The party also had mechanism of allegiance; the 1978 Constitution also put the government under the control of the party. In Article 40, the Chairman of the party was the sole candidate for President of the Republic; Article 10 says the President was Head of State and Head of Government. Thus, the President's office became consolidated as a representative of the party itself rather than of the people in general. All institutions in the country were subjected to power of the President and the party.

The formation of a new constitution provides the opportunity to come to two conclusions. The first conclusion is that the concept of devolution of power is not developed in Rwanda. Indeed, since 1965 the concentration of powers was gradually increased into the hands of the President. Clan solidarities, ethnic solidarities, played a crucial role by promoting personal relationships instead of institutional relationships, which led to the entrenchment of power.

Since 1967 the powers were influenced by the need to remove any possibility of opponents. Social categories were said to be the causes of many problems. The scapegoat logic was used in this manner during the crises of 1973-1974 and 1990-1994 when there was a need to weaken or eliminate potential competitors. The formulation of a new constitution is therefore being developed in a special context today. The special nature if the context derives from the cultural problems. Here we have the important modification of the way people relate, the ways they know each other and the way they establish relationships.

It is important here, how we alluded to the Constitution of the Rwandan nation, which benefited as a result of the cultural references and through which the people identified themselves and defined their relationships with one another. Despite differences in status and wealth, the Rwandans ended up feeling that they shared something common and something permanent, I could call it "Rwandeseness." To believe that this country, Rwanda, was the fruit of all the efforts of the people, means that the country belongs to all Rwandans and not to one person. This was an important achievement, which all Rwanda realized. Today we must admit that something is broken and the Rwandans have not been able to fix it. The government of 1994 was the most terrible manifestation of

that thing that was broken. Therefore the commission must devise scenarios to move beyond this terrible history and to lay down new principles for the construction of this new constitution.

Yesterday Mr. Aucoin talked about hierarchy. I think that it would be a good thing to revisit the Rwandan culture and to find in this culture elements which could contribute to a new social construct. I have in mind a duty; we will instill a new value, which will put in place a new social construct. The second factor is expressed in the mistrust that permeates our society. The current process of institutional reform brings questions to of our minds and even clarifies particular instances. In this process you see a deep disturbance of our old habits and some may feel threatened in their identity. Why? This is because in the perspective of institutional reforms the ethnic type will provide reassuring perspectives. Some other Rwandans use the low level of education of the majority of our population to excuse the opportunistic nature of our élites. Some people feel the wide population of our country should be the basis of our democracy and we should not limit ourselves to issues of status as many constitutions do. This is because ethnic identities will not yield economic opportunities. There is concern regarding the elitist monopoly. The issues in our society, for example, the level of education, the equitable shares of the national cake, factors that contribute to the national state must be discussed, while changeovers of power should receive special attention.

Question and Answer Session:

Jean Mutsinzi (Rwanda): I want to ask the Professor what he thinks of this type of colonization, which was practiced by Belgium. Do you think the form of de-colonization practiced here could help explain the ethnic conflict and rivalry in Rwanda?

Fatoumata Siré Diakité (Mali): I would like to start by saying the Professor ended his discussion on a note of hope and made some proposals. If you will allow me, I would also like to make some proposals by someone who was outside the conflicts but someone who is well aware of them. My first comment is that the information on the conflicts should not be given in terms of criminalizing one group against the other. We must not place all the responsibility on one group as compared to another. Second, the leadership of Rwanda should engage this process again with African leadership. The entire people of Rwanda should meet again with the help of African mediation so that the groups could talk to each other frankly and openly. You know a pardon is mandatory for the new generation so that five, twenty years from now we do not get back to square one. It is not a question of the elite in Rwanda—the elite should not hijack the reconstruction. Élites must not benefit from the suffering of the grassroots, and we must protect those mostly impacted by the genocide, mostly women and children. The current leaders should not give the impression that they want to repeat what happened before 1994, that is to seize all the property of one group. Resource sharing needs to be encouraged. Finally, nothing was said about the Rwandan army, which plays an important economic and political role in the country and I would like to know how you intend to involve the army.

Laurent Kagimbi, (Burundi): It was said earlier on that it is the peoples' duty to establish political management mechanisms, which correspond to their needs, and I would also say to their aspirations and visions of the future. I will share with you a short story from my country. One day a teacher in my area went around and tried to show the important role colonization was playing back in my country, talking to many students, saying what a poisoned gift the government was. One of the students stood up and said if you politicians are aware the colonizers left you with a poisoned gift, why would you want to use it yourselves?

Rwanda and Burundi have a specific, shared history. The elite monopoly, which prevailed after the colonialism in both countries, is a paradigm of power consolidation. Belgium wanted to preserve power—this will of seizing power from among the elite—they blame the responsibility of their plight on their leaders. There is a paradigm we can establish, which leads to ethnic exclusions. From 1925 to 1932 the Belgians excluded from power all that we called Bantu. They did it in Rwanda 30 years later, that is pitching the Hutu over the Tutsi, one group over the other at a time. The elite did not know how to get rid of their poisoned gift. Burundi went through tragedies, since 1961, at the time we

became independent. We have gone through tragedies during virtually the same periods, so we have had the same problems in these two countries. In 1959 Rwanda had a genocide, Burundi a year later.

When the next ethnic war broke out both inside and outside the borders, Burundi chose to negotiate. Burundi went to Arusha with all the political forces in the country. I will not delve into this, as to the peace among the Burundians and the support of our national community. Like any agreement, the peace agreement was not perfect. I think it was up to the Burundians to redefine the terms of reconciliation based on the common will to construct and rebuild our country as an assembly of ethnic groups.

Burundi noted that whether it wanted to deal with it or not, the ethnic issue was an important endeavor and any initiative had to ensure that the ethnic groups are represented, including the Twa, who were here since the beginning.

Faustin Rutembesa (Rwanda): With regard to the Rwandan army, I must confess here that I do not know much about the army. The Army is a government institution, which served the government. During the colonial period there was no Rwandan army because the country was under trusteeships, so the security was ensured by a police force, a law and order force, which came from the Congo. Under the First Republic, the young army was established with the aim of defending the first republic and the second republic. Now we know that the role of the Army has been redefined by the leadership, in the course of our history there have been many redefinitions, many of our governments have been overthrown. In 1967 there was a coup attempt and there was also a coup attempt in 1973, by Major General Habyarimana.

I think these were the important points in which the tasks of the army were defined. The army has never been involved in administration, so I think this is what I can say about the army. As to the ethnic problem, under the first regime the army was monoethnic but still there were soldiers of officers who were not Hutu, but today the army is multiethnic. Without accessible facts and figures we do not have a way of tracking the ethnic composition of the military. But I am not saying I am the appropriate person to talk about these things in the past, I do not think this would be of any major interest.

Tito Rutaremara (Rwanda): As concerns the army, I think we could provide more details as one of the representatives of the army is right here with us. Although I have the information, I would prefer the soldier tell us the information himself.

Jean Baptiste Muhirwa (Rwanda): Let me attempt to briefly respond the issue raised. What I can say is that the Rwanda Patriotic Army, following the Genocide, has undergone a reintegration program, which aims at reintegrating the former army, which participated in the Genocide. The army has been able to reintegrate about 6,000 soldiers who belonged to the former government's army.

The army should be the peoples' army because it ensures national sovereignty. The current policy is that the army should be a productive force. We would like this gathering to provide some ideas on how to involve the army. We know that in Africa the army has been involved in the countries political futures. We know the army has been involved in some coups, but now we have been moving towards reconciliation.

Let me try to answer the questions, what would be the role of the Army? The Army is a well-structured organization in our country and it will have a role in stabilizing the political nature of our country to ensure a democratic process. The army has more benefits that the other sectors, in the army you will see a lot of people with various types of training, highly qualified officers. What role should these Armies play in the future? What should they do for stabilizing the political process in Africa? The Rwandan Presidential Army now is involved in the management of the transitional period. This is something necessary to understand, because it is that army which freed the country and it is appropriate for them to manage the transition.

It will be important for us to know the possibilities for the army's continued involvement. You know the traditional role of the army is not to get involved in politics. Now it is involved in many situations. We are still wondering what this army can do after the transition: should we keep the army with the same status as now or should we consider something else? Our army is also involved in the

National Assembly, and an economic role because it is involved in the entire development process of our country.

Gerard Niyungeko (Burundi): I want to return to the ethnic issue for a moment. In Rwanda, there is resistance to speaking of ethnicity. There are two issues. First there are divisions that are natural, and then there are divisions that are subjective. Thus people with commonalties can transform themselves into "ethnic" subgroups. Second, in Burundi's experience, following the crisis of 1993, Burundi moved to an approach that recognized ethnic differences.

Article Two of the Arusha Accords of the Burundi negotiations recognized this ethnic imbalance. For example, the President was to be from one group and the vice President from another. The duty for this process of ethnic inclusion is not that of your commission alone, but of all the Rwandese.

When we speak of a concern born out of genocide, the issue of rivalry between ethnic groups was identified in the Arusha Accord explicitly. When the issue itself was institutionalized, then disagreements emerged. The Arusha Peace agreements called for a commission to address the issue. When the Committee was established, the national debate raised the education of the people. We must address what people are told at the political rallies of the parties and in our children's schools. The people were told that the Tutsi were to be destroyed because they led to the demise of the country. The children were taught hostility. Another significant factor is the establishment of the rule of law. If you do no give the people their rights, there will always be problems.

It is difficult to think of going backward to regional balance between the ethnic groups. I am totally against the idea of striking a balance between the ethnic groups. We need to establish equal rights and then a period of transition to evaluate their impact. We need to have a charismatic government that can mediate the conflicts and perceptions of the people. We must also not forget about poverty.

Faustin Rutembesa (Rwanda): Out of all the statements, two questions emerged. First, in regards to comparisons between Burundi and Rwanda, the Belgian decolonization was a failure. The assassination of the leaders following the debate of the 1960's removed leaders with a shared vision. A review of the files illustrates this.

As to Mr. Aucoin, I'm surprised at the development of the Rwandan totalitarianism between 1973-93. There were clear indications of totalitarianism. We must be vigilant to avoid establishing a similar structure and must make sure to pay closer attention to the warning signs thereof.

CONSTITUTIONAL PRACTICES IN RWANDA: WHAT CAN RWANDA LEARN FROM THE BIG PICTURE?

Moderator: **Alfred Mukezamfura (Rwanda)**
Specialist: **Jean Mutsinzi (Rwanda)**

Jean Mutsinzi (Rwanda): I am going to be a spare tire: I am just going to go through the main themes of my presentation, the title of which was the Rwandan Constitution from 1962-the present day, its prospects and achievements. I had asked for the photocopies of my presentation that was done so could you please help us in distributing the text. We will look at the different constitutions since independence and the Constitution from 1962. The second part, very very briefly, includes the function of the legislative, the judiciary and the executive powers. Finally, of course, we will draw a short conclusion.

Let me start with a short introduction. A French constitutional expert has claimed that only after a nation has a constitution, has it been returned to the international community. A government without a constitution is like going to a party in a bathing suit.

Rwanda got its independence on the first of July with the 1962 Constitution. If you look at the Gitarama Constitution of January 20, 1961, the legal nature was recognized later by Belgium. They decided to legislate the public powers from Rwanda, which was started by Article 19(A) that the Republic of Rwanda recognized the provisional guardianship by the UN, the power which was given by the status of Trusteeships, the status of tutelage, and so forth. The Constitution does not mention the Gitarama Constitution.

The Gitarama Constitution was the first Constitution after the independence of the country but there is not reference to that infamous Constitution of Gitarama. A constitutional meeting was held in Kigali on the fourth of October 1961, so on and so forth give the powers of national sovereignty in order to abrogate the colonial power and the tutelage of 1962. It does not talk about the introduction of that Constitution, about the preamble.

We must confirm the result of that legislative motion, which recognized *de facto* only those laws pending resolution in accordance with the UN resolution. Officially this Constitution was not recognized by the administrative powers, but it is the administrative power that convened the counsels, provincial government, brought them to Gitarama even the microphones, speakers and the guards were Belgian, saying this is a matter for Rwandans, so they proclaimed the Republic. As a result of all this, I can say that Rwanda was governed by four constitutions, the Constitution of 24 November 1962, 20 December 1978, June 1991 and 4 August 1993. I will focus on the major features of one of those constitutions. Beyond an analysis of the text itself, the study of a constitution must be aligned with the political context. It must be situated historically. The two presentations of the professor have covered more of the things I am going to cover now.

The November 1962 Constitution covers the victory of the social revolution of 1959 and the rise of the Paramehutu party and the military parties which were recognized in Article 10 of the Constitution. This Constitution covered a conquering victorious single party and, as requested by the leaders of that party, many leaders of that party were then made leaders of the step organs.

This Constitution officially established the Republic. Politically they openly practiced national violence with in the framework of ethnic identities against the Tutsi ethnic group, and many of them were forced into exile and many of them were killed. The national Rwandan party was one of the major parties. Many of the leaders were summarily executed, while APROSIMA was founded. In 1965 all the other political parties except MNDR were completely militant.

Another feature of this Constitution is the role of the Catholic Church. The description of the role played by Monsignor Bearding is especially significant. In 1959, he warned the people against the offenses one of the major nationalistic parties of this country, which he warned was like a Nazi or Communist party. This is to say that the members were good for elimination in this country with the blessing of the Church.

The Church played a powerful role, with too powerful control. In the preamble, it is stipulated by the National Assembly by Article 28 that, in a country where polygamy was rampant, marriage would be civil or religious. Under the church, it was enough. Polygamy was prohibited. Article 47

includes that the President swears in the Members of Parliament and ministers on behalf of God Almighty. This is a clear manifestation of the Catholic control of the state. Other examples of the provisions were recognized. Article 20 stipulated that laws directed against the public order were proscribed, or prohibited. These objectives would be – you can understand the conditional use – as a huge problem that political parties had to face. Article 39 stipulates that any activities that are political in nature are proscribed.

Then you can see in Article 32, that there is a total confusion of legislative powers, executive powers and judicial powers. The President of the Republic coordinates the three branches of the Republic. In another clear manifestation towards the political party, only to the communal candidates can be candidates for the presidency and those candidates can only be from the Paramehutu party. Article 27 requires the resignation of the President of the Republic if the President of the Republic does not come from the ruling party.

The 1978 Constitution soon followed. After military coup of 5 July 1973, and like the Constitution of 20 November 1962, the 1978 Constitution is characterized by the ideology of invoking God Almighty. Under this Constitution, the de facto single party becomes institutionalized; it is not a single party it is the name of the party of the single state: the MNRD. This is a single political party, beyond which no political power can be exercised. Every Rwandan is a de facto member of the MNRD and the MNRD is the only candidate for the President of the Republic.

The President of the Republic is the Head of Government, and his ministers carry out roles only given by him and they give out laws when called upon to do so. The Parliament became the nation council, which shares power with the National Republic. The President also has the power to fire the ministers.

In June of 1991, after 26 years, of single party rule, Rwanda began to adopt rules to very specific conditions marked by war and genocide. This multiparty system was encouraged by many factors, local as well as foreign. The powers, the corruption, the economic crisis and political situation, were exacerbated by external factors. Among the foreign factors, the movement of democratization, which occurred in Eastern Europe and the war, which was launched by the RPF in October of 1990, was recognized on the Tenth of June 1991. Negotiations had been started on this date, which led to the Arusha Peace Agreement. This article was part and parcel of it.

Now let me turn to the fundamental laws of 1993. Only two years after the 1991 Constitution in Arusha, this agreement was signed between the Government of Rwanda and the RPF. On the 30th July, the National Development Council and the Parliament adopted the new Constitution. Article I stipulated the Court regard the peace accord to be signed under the RPF as the fundamental law governing the nation during this period. Provisions of the agreement were then implemented. After defeating the genocidal forces, the RPF published a declaration, which changed institutional negotiations in the peace agreement. After these forces, the political parties were excluded from the government.

On the Twentieth of November, the RPF adopted a rule on the establishment of national organizations. These two texts were introduced through a text, which was called the Fundamental Law of 4 August 1993. They added the above texts, which came into force on the seventeenth of July in 1994. What is remarkable to add, in the fundamental law were the arrangements for the balance among the powers. Between the Executive, itself and whose major role goes from the President to the Cabinet of the Republic. The President has powers, those powers enshrined in the Cabinet. It is the bedrock. The President of the Republic indeed exercised control over the cabinet. The President of the Republic is not a member of the cabinet; it is the guarantor of the sovereignty and national unity.

Article VII states that if the Cabinet unable to make a decision, the President will make a decision for the Cabinet. These laws were recognized as necessary to our situation. The fundamental law, even in its current form, is not entirely applicable. This is especially important concerning the resettlement of displaced people. Uncertainty is still present; individuals want to know the provisions of law. Because no stock has been taken, we must also point out the logic of having a hierarchy of different laws, and accord which counts from June 1991, which arguments come before the RPF declaration. Therefore, Article II sanctioned the parties in the fundamental laws.

Let me present the second part of my presentation. There is clear dysfunction of the three powers—legislative, judicial, executive—in the transitory and constitutional governments. The following facts support this assertion: the establishment of the single party (Parmehutu) which

designates all the candidates; and the provision of Article I, which permits the power to coordinate the three branches of the Republic, and between the National Assembly and the Supreme Court. Let me give you an example of some of the conflicts.

Under Article VI of the Constitution, the President must give to the National Assembly all the powers given to him. On the other hand it appears the ministers clearly report to the President. The members of Parliament who dared to control Kayabanda were immediately removed from the National Assembly and the Supreme Court, on 20th November 1966.

Therefore, when I spoke of the 26 April 1966, I spoke of the constitutionality of the law on national education. Although the Court had decided that the law was unconstitutional, the National Assembly did not take into account the ruling of the Supreme Court. The President of the Republic declared the result to rest largely in the Constitutional Court

The second example is the law on the election of Bourgemestres. The National Assembly had allowed the law to be decreed by the Supreme Court. I think it is interesting here to note the Members of Parliament in the Assembly, who said the personnel of the Supreme Court were not adhering to the spirit of the party. This sort of attitude led to the illegal firing of members of the Supreme Court by the President. Likewise, four vice Presidents were fired without informing the National Assembly, which was required by the National Constitution.

The designation of the MNRD as the state party of 1978 brought about serious dysfunction in the system. The legislative and executive powers were under the party. The Constitution was in the hands of the President of the Republic, which made quite clear the legislative and the executive functions. In 1972, it was the presidency, which was to be the organ to manage the government. From thereafter, the judiciary was kept in a state of limited power due largely to limited qualifications. According to the bureau of statistics, the chair of the Appeals Court had not even gone to law school. Of the twenty Presidents of magistrates' courts, eight had not studied law. In the Court of Cassation the advisors had not studied law; they generally did not have secondary qualifications. There was no bar association. Anyone could become a lawyer before the Court.

The transitional period that started 19 July 1994 and should come to an end in 2003 is the government by law. Characterized by the sharing of power, the executive power and legislative power. The judicial power is not included on the basis of politics, so as to guarantee the independence of magistrates.

It is not too early to measure the achievements, but there are dysfunctions already evident in the system. For example, there are the refusals to promulgate the law of passing information and the law of control by the National Assembly of national action. Of course, this is specifically provided for by Article XX. The fact that this happened shows that the President of the Republic was acting independently.

Let me now conclude, looking ahead with a few questions. What is going to happen with Constitutionalism in Rwanda? A constitution is only worthy when it is applied. One cannot have a democracy without Democrats. Then you must have constitutionalism if the constitution is to be respected by the population and the leadership. My presentation, which was short and very fast, had no other objective than to draw the participants' attention to the problems the Constitution has had since colonialism so that the new constitution may be better adapted to the country. Thank you for you attention.

THE NEW RWANDAN CONSTITUTION: ITS CONTENTS

Moderator: **Fatoumata Siré Diakité (Mali)**
Presenters: **Mali, Eritrea, Zambia, Nigeria**
Specialist: **Henry Richardson (USA)**

Henry Richardson (USA): In the next ten minutes I will put forward a list of points on problems and trends of African constitutionalism after decolonization. While leaders of states and colonial authorities are largely responsible for many of these problems, the responsibility for meeting them lies with the constitutional process in each state.

The following problems did not occur in all African constitutions, but they occurred frequently and are therefore worthy of our consideration:

1. The executive fails to give the country the gift of his successor under a prepared legitimate process. There are exceptions to this, of course, such as Mandela, Nyerere, and Senghor. But part of the problem may continue when, whether or not there is a transition process, the former President often fails to completely step back from state power to support the authority of the successor.
2. Failure of the executive to give the judiciary the power it needs to instill the rule of law in the country. The executive may substitute criticism of a particular judicial decision with an attack on the judiciary itself.
3. Failure by the executive to understand the inherent weaknesses of minority rule government. This problem is applicable even when convincing rationales for such a government – state or personal security – may exist. Minority governments are now in an eroding, defensive position after 1994, constitutionally and otherwise.
4. Failure by the executive to understand the slippery slope caused by putting emergency clauses in constitutions. Executives often overemphasize and misuse security threats so as to justify such an emergency clause in the constitution. This problem is particularly dangerous when the emergency can be declared, and terminated, by the same person as who can exercise power under the emergency clause.
5. The constitution fails to provide a workable basis for the inclusion of traditional authority in the country. Either the traditional authority is suppressed, or the traditional authority is given such wide latitude that it is not responsible to the constitution and creates a parallel system of courts.
6. Making bills of rights in the constitution unduly conditional on the executive or on the government's decisions on policies of "development." This problem can worsen when the government has authority under the constitution to balance those rights out of existence by claiming a compelling governmental interest.
7. The constitution becomes a statute from the ease with which it can be amended, or is in practice amended by the ruling party driven by the executive to stay in power. For example, if the constitution is drafted in too much detail in an effort to direct day-to-day government activities, that can undermine the constitution's longevity.
8. The assumption that several reserved seats in the legislature plus a women's auxiliary in the ruling party was sufficient to reflect women's participation in the liberation struggle and to begin the process of moving toward women's equality in the country without further institutional support.

Abdoulaye Sékou Sow (Mali): I would like to start with the preliminary comment that this topic was given to us at the last minute. The topic concerns the specific issues which African countries may face and that will have an impact on the constitution.

Most countries in Africa are undergoing a structural adjustment. The first consequence of this adjustment is that it affects national sovereignty. A new African country is free to carry out an independent policy. But the West continues to dictate to African countries what their policies should be. For example, foreign donors required that French speaking countries in Africa take certain steps if they wanted to continue receiving funding. As another example, the WTO is making things worse in

Africa. We have only 2% of world trade but are being forced into an economic transition. Under such conditions African countries face certain difficult situations that effect constitution making.

The first speaker mentioned eight major issues and challenges facing African countries. I had also listed some points relating to constitutional review that are important to me. Constitutional review has become a big issue in West Africa. Today constitutional review is being used as a political tool. It could happen in our country any time. All our neighboring countries have reviewed their constitutions either to extend the time of office of the leader or to increase the number of terms of the President. A number of countries have wanted to change this because the head of state did not want to leave power. This is a very dangerous phenomenon.

There are a variety of means of reviewing the constitution: referendum and Parliamentary review are the most common. Parliamentary review works best where there is a democratic culture as in France. But in our case, the government has taken advantage of this facility to change the constitution without going through the people. What characterizes our Constitution is its rigidity. This rigidity makes it very hard to change the Constitution through review processes.

So I want to move on to the experience of Mali in constitution making. We followed the consultation process in our country. We started at the commune level, then moved up to the local level and finally to the national level. We had to ensure that that consultation process is not manipulated. We know the President wanted a third term. He has done a good job and wanted to stay. He took the question to the grass roots level across the whole country. The majority of the opposition boycotted the election, as they did not want to get involved in such consultations.

Kebreab Habte Michael (Eritrea): I will try to give a summary of what I think are the main causes of the failures of African constitutions. These causes include:

1. During the colonial period the constitution process was merely to copy the European constitution of the colonial state. So the constitution had no local roots.
2. Not knowing what the constitution can do.
3. Lack of sincerity by the government in constitutional issues.
4. Not allowing constitutionalism and democracy to take root in the country.
5. The lack of the right of the people to participate.
6. The political parties that come into existence do not solve the issues of the people.
7. Lack of transparency and meritocracy in civil society.
8. Lack of respect for the rule of law.
9. Lack of independent institutions.

Solving these problems will not be easy. Unfortunately, history cannot simply be learned, it may have to be lived as well. The solutions to these problems can only become a tradition if they become part of the shared history of the people.

Patrick Matibini (Zambia): The issue of constitutionalism aims principally at limiting the powers of executive. To the extent that constitutionalism limits these powers, the executive will tend to avoid circumscription of the Constitution. Let us address this question of succession. A recent example of an illegal extension of tenure is exhibited in Zambia, where the President attempted unsuccessfully to gain a third term of office. He was, however, opposed by a vibrant civil society. The lesson learned is that the executive has the means to manipulate population in order to justify the illicit extension of his tenure of office, however, amidst widespread opposition.

Let us then turn to the issue of the judiciary, which can act as a form of checks and balances. However, the effective functioning of this mechanism of judicial review depends on the independence of the judiciary. This independence presupposes de-linkage between the executive and the judiciary. In the Zambian experience, there is a strong nexus between the executive and the judiciary, in terms of appointments, which are difficult to divorce from the executive branch. However, because of poor conditions of service, the judiciary is unable to attract competent individuals, a fact which can further undermine the independence and power of the judiciary. In the Zambian Constitution, the executive offers a contract after a specified period of service (65 days); this condition also undermines the power of the judiciary. Until 1991, the President could exercise emergency powers, but in 1991 an amendment stated that a state of emergency could be declared only after consulting with the cabinet. Furthermore, this status could last only for seven days, after which time the President must proceed to

Parliament and seek ratification for an extension. This arrangement has largely checked the possibility for abuse by the President.

Traditional authority has been clipped by constitutional developments, and in fact traditional leaders are barred by the Constitution from participating in politics. Additionally, there has long been an elitist approach toward traditional leadership, which is perceived as not being attuned to a modern system of government. I agree with the proposition that the Constitution has been reduced to just another statute, because it is so easy to change the Constitution, as is evidenced in the third-term presidency issue in Zambia. In this example, if civil society had not intervened, our President would have continued on to a third term. A single party even dominates Parliament; nevertheless, civil society was successful in swaying majority of Parliament. However, it is necessary to entrench the Constitution, such that government of the day cannot change it to suit its own needs.

Regarding the bill of rights: Zambia needs to make some progress. On one hand, the Constitution does confer civil rights and liberties, but in next breath, these are taken away by derogations for reasons of public security and public health. We need to enhance the bill of rights and remove the derogations that are in Constitution. Finally, the Constitution has not yet addressed the gender issue, though the women's movement has been trying to champion these issues.

Otive Igbuzor (Nigeria): Let me address for a moment the current issues challenging the development of meaningful constitutionalism. I want to believe that such constitutions are made by people and reflect their wishes and aspirations.

Some of the challenges and problems for the development of such constitutions are the following:

1. The nature of politicians: most people see politics as a dirty game, and do not want to be involved. This leaves room for mediocrity and charlatans to be in politics.
2. The political and military classes are not interested in developing a meaningful constitution.
3. The lack of emergence of dynamic and committed leadership. Most leaders in Africa—in Nigeria for instance—are excluded from politics if they have a university degree.
4. The rise of ethnic nationalism is on the increase in all parts of world, leading to ethno-religious crises.
5. The problem of huge national debt. In the development of meaningful constitutions, people will demand an expansion of government services.
6. Corruption is of course a problem.
7. The militarization of society.
8. The lack of a vibrant opposition.

Now let us apply these challenges to the situation of our Rwandan brothers and sisters. You must make sure constitution making is an all-inclusive process. Ethnic groups cannot be washed away; they are there and we need to humbly recognize these groups and share power so everyone feels part of the country.

QUESTION AND ANSWER SESSION:

Théodore Holo (Benin): According to the experience in my country, I think we can afford to be optimistic. In the 1970s states felt they could survive without a constitution. Then the military thought the constitution should be used to strengthen the executive. Today, constitutionalism implies that human rights are recognized, the rights of the person are supreme. There must be mechanisms to protect these rights. Now government has to take into account a larger perspective, thanks to the dynamism of civil society. Civil society should raise the awareness of the government. A second reason for optimism is that, while in the 1970s political parties would call for a coup when they wanted to change power, today there is a consensus that power change should occur only at the ballot box. This can help us achieve a better respect for the constitution. My last point is that governments should give the opposition a status so that the opposition will be recognized by the government. Government should not refer to the opposition as "disturbing elements." Engagement with a legitimate opposition is necessary for the dialogue toward social peace.

Adrien Wing (USA): I wonder if anyone in the audience has given any thought to the impact that the devastating AIDS crisis has had or will have toward constitution making and building as it will affect the populations that will be building the future of your country.

Karthy Govender (South Africa): The free media plays an absolutely crucial role in ensuring the government exercises power responsibly. The media plays a very important role in South Africa and often leads to significant changes in thinking. For example, our President has made some unfortunate statements on AIDS and the media has been able to change that. So could the participants comment on the protection of the media in their countries?

George Mugwanya (Uganda): I do not know what emphasis or role to give to the military. We heard that there are cases where the military has played a positive role. The military is still strong. How can the military be positively used rather than misused? Essentially the militaries in Africa are the personal armies of the leaders. How can we create national armies that serve national purposes?

Emmanuel Rushingabigwi (Rwanda): I have the opportunity to talk more tomorrow about the role of the media. We are going through a special situation due to our history. In Rwanda the press played such a destructive role in 1993 and 1994. Right now we are suffering from the repercussions thereof as we try to create a free press. There is a suspicion of the press and from the side of the press there is a self-censorship. Worse still, up to this day there is no law on the books that could help regulate or solve the problems that may arise at press level. The press doesn't have any mechanisms for self-regulation, for example an ethical code. Today there are very many young people who have gone into the profession as an adventure and they do not know what ethics are. This leads to many problems and we need to ensure that Rwanda develops a professional press. The profession may change a lot and we need a law on the press.

Abdoulaye Sékou Sow (Mali): What is necessary is the reform of the Presidential mandate. If you have this in the constitution, then civil society will fight to protect its constitution, if politicians do not. There are some politicians that have cars and take everything. For instance, if a President wants a third mandate, and this is a reason for resistance, and the people in power choose to domesticate civil society. There is no real democracy without strong and independent civil society, expressing itself freely, and this is analogous to the role of the media and justice system. So, there is the problem of coup d'état, where it is condemned by the powerful, even if their leader came to power through a coup d'état. Coups are dangerous for the people, because they undermine the constitution and justice, and it is a crime and has to be addressed as such. That will not stop coups, often supported from outside, but this problem has to be underlined.

Kebreab Habte Michael (Eritrea): On the question of AIDS: this problem should be thought of in terms of a human rights issue, where health factors are implicated. A solution here requires many things: education, medical treatment and others, and should broadly come under a bill of rights.

Patrick Matibini (Zambia): From the Zambian experience, I can comment on the importance of a credible and professional civil society. This development comes in to compensate for weakness of opposition. We have a very fragmented and weak opposition in Zambia, lacking a clear vision. Talking about the question of constitutionalism and promotion, civil society is better placed to promote this, through general civic education and awareness.

Otive Igbuzor (Nigeria): I will just respond to two issue: the role of the military and HIV/AIDS. In Nigeria the military has played a very negative role. Today the military is under civil authority. I also believe we should criminalize coups. We must go beyond the standard criminalization of coups in most constitutions and put it in the constitution that it is the responsibility of the citizens of the country to resist the overthrow of the government. Likewise the government should pay for citizens who do defend the government from a coup. We also should make it clear in the constitution that when the provisions of the constitution are suspended, the constitution will not lose its effect and that

those who commit crimes during the suspension of the constitution will still be tried when the constitution is restored.

On HIV/AIDS: The statistics coming out are very troubling. HIV effects not just the constitution but also democracy and development. In Africa, it is those in active sexual life, who are the productive parts of society, which are most at risk. So this disease affects those who are most crucial to the process of development. Programs are being put in place to stop this, but behaviors are not changing.

Joy Ezeilo (Nigeria): Amongst all the problems that confront post-colonial Africa, I think the problem of military rule has given us more than our fair share of problems. And I want to say that in many countries we have to address civil-military relations. In Nigeria our current President is a general. In the National Assembly we have quite a number of military officers. So it is a real problem even in Nigeria. We can not wish these problems away.

Briefly I want to raise two points made by Professor Richardson. First, in terms of dealing with traditional institutions: in Nigeria the military has seriously misused traditional institutions. Finally, on the issue of gender, you mentioned that the assumption that reservation of seats in Parliament would create gender equality. But what we really need to do is to fully understand affirmative action and how we are going to implement affirmative action.

Zam Zam Nagujja Kasujja (Uganda): There is vast absence of political awareness amongst the population of Africa as to what constitutionalism is about. This makes the population very susceptible. If the President announces that the constitution has been suspended, many people do not know what that means or how serious the situation is.

Robin Palmer (South Africa): One must be very careful in criminalizing coups. It is very dangerous to punish coups generally, as there may be liberation coups as well as overthrow coups. If it is going to be criminalized, then it needs to be defined very carefully.

Question (Rwanda): I have two points to raise. My first point is that equality between man and woman should cut across all aspects of the constitution. We need to speed up the advancement of women. As a second point, a lot of emphasis has been laid on role that the opposition should play. Could I have clarification of the role of the opposition? What are the ethics of dealing with the opposition? I am seeking clarification on the role of the opposition and if there is a country that has a model of what the opposition should look like.

Henry Richardson (USA): The last two speakers have raised the question of what is constitutionalism. Let me actually mention the US a little. I am stimulated in this regard by the statements of the Prime Minister of Mali who has brought forward the trend of constitutional review as a frequent political tactic in West Africa. This trend throws the understanding of constitutionalism into much confusion.

I can give you some thoughts from the vantage point of the US, the longest lived constitutional democracy. In the US the Constitution defines a constitutional culture. But look at some of the prerequisites for such a constitutional culture. The US is a young country. There are many arguments that the Constitution is really the culture of the US. Whereas other countries have an older history that predates the Constitution. The long-lived US Constitution has served as a reference point of commonality in the US, but 200 years ago the process was messy and several states had their own constitutions before there was a federal Constitution. The Union almost broke up. At least one state had to be pressured to ratify the federal Constitution. So, the beginning of the US process was actually fairly messy.

I think that there is really a crisis of concept that this session has brought out as to how we would define constitutionalism in Africa. But to the extent that there is now a trend toward using constitutional review as an immediate political strategy, then the whole question of constitutionalism is up in the air. Rather than remaining with that concept, maybe we should focus on the advantages of obeying the Constitution, its connection with the culture, its connection with the people. We should

know that in order to be successful in the creation of a constitutional culture, the country has to have some, and hopefully all, of those prerequisites. I think the definition of constitionalism in Africa is up in the air at the moment.

FORMS OF GOVERNMENT: POWERS ON GOVERNMENT, LIMITS ON GOVERNMENT
Moderator: Adrien Wing (USA)
Specialist: Louis Aucoin (USA)

Louis Aucoin (USA): I will discuss the models of the big systems, namely the Germanic-Roman and common-law juridical traditions. Forms of government are not necessarily connected to these traditions, but there is a relationship. The French and German systems are the classic examples of the Germanic-Roman tradition, while the United States and Great Britain exemplify the common law tradition.

I realize that one cannot blindly adopt a model, nor do I propose that, but I offer some thoughts about elements that might be applicable to the Rwandan context. In addition, there are no pure models anymore — every system currently is a hybrid of several systems, and each country was influenced by different traditions.

First I will discuss forms of government, then the powers of government in these forms, and then offer the historical perspective and present limits, including the evolution of the classical models. Finally, I will discuss judicial power, which is rather particular, in that there is the most convergence around the world.

To begin, there are three classic forms of government — Parliamentary, Presidential and semi-Presidential. The Parliamentary system is based on the philosophy of Parliamentary supremacy, and arises from the French Revolution. In this case, Parliament is in center of system, so that even the existence of the executive is linked to the Parliament. The executive depends on the existence of a majority of one party in Parliament, and the executive is chosen by this majority. Great Britain is the classic example of this system.

In the Presidential system, of which the United States of America is the classic example, there is no official link between the legislative and executive, and the President is elected either directly by the people or by the Electoral College. However, the President has a determined mandate and does not depend on the majority of a certain party in the legislature. Furthermore, the President is the only central figure in the executive, though he or she has no legislative power, meaning that he or she cannot make laws — the legislative branch is completely separated. In the United States, there is the tendency that the judicial system gains much importance, because it is not based upon the supremacy of the Parliament. I will also describe the semi-Presidential system later.

As for the powers of the Presidential system, let me first eliminate the myth that the President is the most powerful person in the government, particularly in the United States. In fact, the Constitution limits the power of the President: he cannot, for instance, initiate laws in the legislature. The United States observes the limitations of Presidential power, because the Constitution limits his or her mandate to a four-year term, renewable only once; it is clear to the people that this is the limit. This limited term provision exists in many countries, but is a great problem for Africa. Furthermore, Presidential power is limited by impeachment, analogous to the French system in which the Prime Minister can be called before the high court. In the US, we have conducted this process several times, most recently in the case of President Clinton, but the impeachment process has never succeeded in revoking the power of the President. Perhaps this failure indicates a limitation on the process, but impeachment remains a unique provision. In addition, the Senate has control over the President in several instances: a two-thirds majority of the Senate can veto Presidential nominations, for example. The media plays an important role, because Senate hearings are televised, such that professional and, particularly in the United States, private issues are often exposed to the public. Nominations for Supreme Court justices are also submitted to the control of the Senate. In the domain of foreign affairs, the President is obliged to submit international accords and treaties to the Senate, which exercises control by needing a two-thirds majority for ratification.

The limits on legislative power include the President's veto power. When, in the US, the President opposes a law, the Senate has to muster a two-thirds majority to push the law through in spite of the President's veto. Perhaps this veto power could be considered a legislative power, but the President has no role in the legislature per se.

Judicial power, particularly the judicial power of Constitution, is extremely important in USA. The US is no longer unique in the world in this respect. The US is federal system, even with federal

states grouped as a federation of states, each of which is like a nation unto itself. However, these states are all subject to a constitutional law. The judiciary holds considerable power against the legislature, thus ensuring that the legislature will rest within the powers accorded it in the Constitution.

In the classic Parliamentary system, the President is absent as executive. Instead, there is a Prime Minister or chancellor, who fill approximately the same role, not only of the executive but also of the head of the legislature. There are a variety of limits on the power of the majority; most famous among them is the motion of censure against the executive. There is also the power of interpellation. This is the power of the legislative to convoke ministers to Parliament to respond to their questions, and there is a relation between the motion of censure and the convocation, because the latter often is a forerunner to the former. In a classic Parliamentary system, we can distinguish between Exacerbated and Rationalized Parliament. In Great Britain, for instance, the executive has the exclusive power to initiate laws, which is shocking for Americans, in which the situation is the opposite. Initiating laws is exclusively a legislative function.

We have noticed the evolution of Parliamentary systems in the world, which French call "exacerbated", namely that they can provoke instability, because there is the possibility for censure motion. In such a system, checks and balances exist, but are different. Exacerbated Parliamentary systems have the possibility of the censure motion and the possibility of dissolving Parliament entirely. The executive has a counter-power to the censure motion; namely that he or she can dissolve the Parliament. During history, these balances can be quite unstable. The Third Republic of France or contemporary Italy are examples of this instability. The French, for instance, with the Fifth Republic, established a semi-Presidential system. It was a mix of the Presidential and Parliamentary systems, in that there are all the Parliamentary elements with a President imposed on top. The President is elected, and his position doesn't depend on a majority in Parliament. There is also a censure motion in such a system, and it is the Prime Minister here who has to leave, while the President stays in place if the censure motion passes. This mechanism can enhance the stability of the system. The French also limited the checks and balances by requiring a vote to have at least one-tenth of the Parliament in order to initiate a censure motion. Additionally, a deputy cannot sign more than three censure motions in one term, and cannot have more than one censure motion per year. The German system is not semi-Presidential (it has a President), but like the Israeli system, the President does not really have power. The presidency is an honorific role. The real power is divided in France between the President and Parliament; the Chancellor in Germany, like Prime Ministers elsewhere, has the power. Germans have gone further to protect their system: dissolution happens rarely, when they are not able to elect chancellor by a majority. In this case, the President can exercise his or her one significant power, namely to dissolve Parliament.

Let us turn now to the question of judicial review. Judicial review was a creation of the US constitutional system in the famous case of *Marbury vs. Madison*. In this case, the US Supreme Court agreed that a judge can eliminate a law if it violates the Constitution. This concept took hold around the world, and there are many examples now, some of which go much farther than that of the USA.

On the one hand we have the US model. In the US model a law cannot be challenged unless there is a case before the Courts. Even the Supreme Court does not have the power to nullify a law outside the context of a case. That is because it is only within the judicial responsibility of the Court that this power should be exercised. Under the French system of constitutional control, the Parliament was supreme. It was not until the Constitution of the Fifth Republic that France created a form of constitutional control. In France, the members of the Constitutional Court are not necessarily judges and some are appointed by the legislature. So that gave some supremacy to Parliament. There is also the German system that falls somewhere between the American and French models.

There is one thing I should have told you about the US: a single person can question the validity of a law through a judicial case. This is also true in Germany. Some people in the German system have the opportunity to question a law either before or after the law is promulgated. We must note that this occurs through a specialized chamber with a particular role.

Question and Answer Session

Question (Rwanda): How do you define the constitutional system and do you include the political system? How do you define civil society, especially its political role?

Henry Richardson (USA): What strategies would you recommend for a state making a new constitution that is searching widely in a borrowing process? What strategies would you recommend for borrowing or considering the borrowing of single features of each system? Second, what role does subsequent practice under a given constitution play in the thinking of the potential borrowing state as they consider borrowing ideas from that constitution?

Patrick Matibini (Zambia): The Presidential system in Africa was justified for its potential to contribute to national unity and its potential to expedite economic development. Today there is a movement toward the distribution of executive power amongst other organs. How do these calls for the distribution of power effect constitutionalism?

Fatoumata Siré Diakité (Mali): I want to know if a minority that imposes itself on a majority can be a democracy. In the US there is an Electoral College, which elects the President as a minority imposing its will on the majority. Or is this some other kind of democracy? As a second question, what would be your proposal to my brothers and sisters in Rwanda as to the best type of government, taking into account the history of the country?

Abdoulaye Sékou Sow (Mali): You have mentioned that during the initial period it was the Presidential system that was most popular and that now there is a trend toward rationalized Parliamentarianism. In fact, some people even try to combine both systems and I would like to know your feelings about this. What would you advise Rwanda, which has gone through specific events? Secondly, the Presidential system has some good qualities, but there are some negative aspects, especially in relation the budgetary procedure, which could be a source of problems in Africa. So could there be a possibility of increasing the flexibility of the separation of powers? Would it be possible to do away with the tension between the President and Parliament with respect to the budget?

I would also like to draw attention to the presidency. The American system may be very effective because the President knows that if they do anything wrong they cannot escape the people. Recently you saw the case of Clinton who was virtually impeached. Is it possible to think of a system that would not organize the impunity of the President? There should be a court for high treason, but there is not even a law that defines what high treason should be. There is no clear definition of high treason. So I am drawing attention to the fact that Rwanda should not establish a system with protected Presidents. There should be a system to get rid of bad Presidents.

Karthy Govender (South Africa): One thing I find interesting in the South African Constitution is that opposition parties are given the right to challenge legislation if they believe the legislation is unconstitutional and can garner one third of the votes of Parliament in favor of a challenge. The other point I want to make is that the South African President is given power either to approve legislation or send legislation to the Constitutional Court to decide whether it is constitutional.

Kebreab Habte Michael (Eritrea): For the sake of our Rwandan brothers, it is advantageous for us to show the pros and cons of the various political systems, so they can make a wise choice. For instance, in the US system, there are two separate mandates for politicians—the President is elected by an electorate, and the Senate and Congress are elected by the public directly.

Elisabeth Pognon (Benin): Benin continues to operate under a system of judicial review, and the choice we have made resembles the German system, though there are nuances. In the case of judicial review, what is the effect of a decision by a federal court? Does the censure of a law at that level have an effect on the whole system, or does it only benefit the person who challenged the law?

Gerard Niyungeko (Burundi): In the US, the President cannot initiate laws, but sometimes we say that President takes advantage of his right to have a message sent to the Senate. He might annex his own legal projects to other bills. How does that work in practice?

Théodore Holo (Benin): It is useful to note that common experience reveals the problem of excessive executive power. There are two problems specifically. First, that judicial review has to allow the possibility of annulling laws that violate fundamental rights guaranteed by Constitution. Second is the desire to divide Presidential power.

Joy Ezeilo (Nigeria): I have a question on the constitutionality of laws. Should the law only be challenged by the person adversely affected by it? Additionally, what is role of the US Vice-President in Congress?

Louis Aucoin (USA): Professor Richardson wanted to know what strategy I would advocate for Rwanda. For this reason, I will again go back over the issue of values. In trying to make choices from all the models that we have gone through, you have to look into the values of the society from which your choice will come. Your choices will be based on the dominant values of your society. For example, I can see a difference in the traditions of the Germanic-Roman and the common-law system. This examination will require you to delve into the values and philosophy of your society. If you believe that in a democracy the Parliament should be more important than anything else, this will affect your choice. If you believe in judicial power, that too will affect your choice.

Somebody wanted to know what I would advise with respect to the practice that is followed after the constitution is adopted. In the Germanic-Roman system, people are more at ease with everything being set down in the law, leaving less room for tradition. But I noted that when I was doing my own comparative work, the common law system leaves a lot of room for interpretation by the judge, because we trust the judge to defend us and protect our rights. But you need not follow this example. If your values are different, and if you think that the judge should not have so much power, that should influence your decision.

Patrick talked about the Presidential system. You are right in saying that in Africa very often people choose the so-called Presidential system, but they give too much power to the President. What I would advise is that you should think of limiting Presidential power.

Mr. Holo suggested that there should be some limits on Presidential power. I do not have the right to judge, coming from far away. But, if you Africans feel that the main problem is executive power, then you could pick and choose from limits on executive power from the US, French and German systems. These could offer give you a very strong check on executive power.

Madame Diakité asked about the balance between the power of the majority and the rights of the minority. This is a fascinating subject, but Professor Wing will talk about it tomorrow. And when we talk about the American system I have a lot to criticize, but I think a strong point of our system is the protection of minorities. I do not think that the Electoral College is a minority. I'm not proud of the Electoral College, especially if you look at the results of the last election. Nobody wants to change anything in the US, as we are very conservative and very proud of our Constitution. But I think the Electoral College is something of the past. But you know that in the Fifth Republic in France an Electoral College elected the President. But the President amended the Constitution to avoid this and to enhance the legitimacy of the presidency. But, at the end of the day, the Electoral College does not affect anything in our system because the result of the Electoral College is the same as the result would be without the college.

I agree with the Prime Minister of Mali that the budgetary system is a weak point of our system. We give too much power to the President in dealing with the budget. Those who come from a Parliamentary system expect to solve all problems with the law. The problem we had recently with our budget could never occur in France because there are ready-made solutions and you could borrow those aspects if you chose to.

I thank South Africa for its comments. It shows it is possible to combine several traditions to come up with one's own solution.

I wanted to explain some of the weak points of the various systems. I think that during the discussions we have had here I have already mentioned the lack of stability in the Parliamentary system. Maybe I should underline some of the weaknesses of the US system as well. One weakness is the judicial power. I personally am happy with this aspect of the US Constitution. You will see in presentations tomorrow how the judicial system has protected us in the US. In any stage, each time I explain this in the Germanic-Roman countries people do not accept this because they have different values. They say that maybe your judges have too much power. After the last elections in my country I think that maybe this comment has some value.

I also wanted to talk about the nature of judicial review. It is not easy to explain. It is not as broad as I implied in my statements. It is true that any judge in the US has the possibility of annulling a law. But our tradition and our legal system limit a judge's discretion and geographic reach. So the scope of his/her decision cannot go beyond his/her geographical area of competence. This means that for a judge in a small city the decision will only apply in that small city. But if it is the federal court that finds a law invalid, then the law will be totally repealed. In the US we also do not make distinctions between regulations and laws. In the US we do not have any separation between the ordinary law and administrative law. So if there is an order by the executive that is against the Constitution, it does not go to a specialized court. Any court can find that order unconstitutional.

With regard to the individual in the US, it is true that any individual can initiate a procedure to question a law. This is only possible if the individual has standing. In Germany the situation is different. An individual can go straight to the Constitutional Court and say that s/he believes the law is against the Constitution. In the US the power of the individual is linked to the competence of the tribunal, and the tribunal will not have any power if there is no litigation.

Now there is another question on the role of the US Vice President. The US President doesn't have the power to introduce a bill in the legislature. But the President has friends in Congress who can do so. Neither the President nor the Vice President can go to Congress and explain the proposed legislation. They go to the Congress only to present their agenda. The Vice President does not play a major role in the legislative arm, but the Vice President has the possibility to break a tie.

ELECTIONS AND POLITICAL PARTIES

Moderator: **Patrick Matibini (Zambia)**
Presenters: **Benin, Mali, Uganda**
Specialist: **Harold Dampier, Jr. (USA)**

Patrick Matibini (Zambia): Next in the conference we will consider how elections should be conducted, how often and under what guarantees. We will also examine the establishment and maintenance of political parties and terms of office.

Harold Dampier, Jr. (USA): I'm going to focus on elections and political parties. Why do we have elections? They are part of the checks and balances system, the essence of democracy, and permit people to remove parties or individuals from office if they cease to represent the people's interests. Elections are thus both the keystone and cornerstone of democracy. However, one might as well not have elections if they are not legitimized, by being free and fair. In the US, we say that you can never let the fox guard the hen house; in this case, the elected officials should not be responsible for monitoring or administering their own elections. Otherwise, opportunities for corruption present themselves, and/or the public perception is that the elections are invalid and corrupt. Instead, there should be a group that monitors and administers elections. In Eastern Europe, we see this trend, as we do in Eritrea and South Africa; this concept is not foreign to Africa by any means. How, then, do we establish a commission to monitor and administer elections? There are several articles in the Albanian Constitution, which are not how I would necessarily suggest it should be written here, but give good guidelines for drafting and they summarize how an election commission should be established. In this case, the election commission organizes, monitors and administers all aspects of the election; they work full-time, and are elected by various political bodies (Executive, Judicial and Parliamentary). Articles in the Constitution describe the mission of the commission and lay out its foundation as an independent commission, yet without bogging down the Constitution with details. Once these commission members are appointed, they must renounce all party affiliations to ensure the independence of the commission. Furthermore, the commission has an independent budget, and commission members do not even have the right to vote, so they assert their independence from the electoral process.

Does this system work? Recently, Albania experienced two sets of elections in its post-Constitution era, first for mayors and then for control of Parliament. There was significant objection by the political parties to how the electoral commission was run, in terms of election-day abuses and vote counting. The international community monitored the first election and also identified problems, so the objectors suggested to the electoral commission that the problems be remedied. However, the commission was reluctant to make changes. Significant pressure from the international community was required, to the point that new members were appointed to the electoral commission, members who took their job very seriously. Subsequently, after parliamentary elections, the minority party did not present the same objections as they had after mayoral elections, such as voter fraud; the legitimacy of election process was improved.

Furthermore, the government cannot be the one to administer elections, because this set-up allows for corruption. To avoid giving this perception in eyes of voters, the country must ensure an independent election body. Additionally, education is important to indicate to the public why they should vote, why the vote is important, and how the voting process functions. Furthermore, a secret ballot is fundamental. What is the use of voting if you subject yourself to ridicule or intimidation if your selection during elections can be identified? On the other hand, the election has to be transparent in the manner in which it is administered. The international community is certainly keen on monitoring elections. Albania went so far as to have party members monitor elections. Did this promote intimidation? In fact, the ballots were all identical and secret, and there were only limited instances of intimidation or fraud.

When we talk about political parties, there are two possibilities: inclusion or exclusion. My suggestion is to think of exclusion or inclusion in terms of your political process. Think of one-party system—is this exclusion or inclusion? This scenario has one political party in control, with

domination, with no accountability of its party's actions to public. With one party, no checks system exists because no alternative exists; there has to be a threat to that party that it can be voted out of power by the public, a threat that it needs to heed the people's interests. In this case, we also have to be vigilant about the suppression of rights of assembly, free speech and others.

The United States has an unlimited party system but has two major parties. Such a system by definition has limited exclusion and inclusion. Such a party system may also protect the solidarity of the country and might possibly prevent corruption and violence.

In a multi-party system, there is certainly an opportunity for exclusion and abuse, and the hardest part is to decide whom to include and to exclude. How do you choose? The unlimited party-system has unlimited free speech, a pure checks and balances system; the risk is that chaos might ensue. A multi-party system is certainly legitimate in eyes of individuals, as long as their interests are represented.

There is a middle ground, namely to have a multi-party system, to avoid exclusion, yet to use education to teach about the horrors of ethnic issues, genocide, and political manipulation of ethnic groups. Furthermore, this education should help citizens understand what a political party is, and what the code of ethics is that they should follow. Finally, parties should be allowed to consolidate, and should be educated about how to identify and foster shared interests and shared parties. Finally, education requires assistance from donors; it is impossible otherwise for countries in transition to pay for this grassroots education.

Question and Answer Session

Elisabeth Pognon (Benin): The goal of creating a political party it is to conquer power. Benin chose democracy because it is only possible way to conquer power through elections. So we condemned the coup. The party that has to conquer power; it can only do so through the ballot. Now what is the ballot? The exercise of the right to vote. During the national conference in Benin we chose to exercise in all legality this right to be elected or to be eligible for election.

We therefore chose to give the management of the elections to the CENA (National Election Commission) which is autonomous and appeared for the first time in our legal system in 1995. We invoked the high jurisdiction of the Constitutional Court to serve as a limit of last resort to hear any electoral litigation. Now in 1991, that is, just before the National Conference, free elections were held for the legislature and presidency. The elections were fair to the extent that the high court did not receive any litigation about it. But in the 1995 legislative elections, things were less rosy. So we had to organize something so that the 1995 elections would not be catastrophic. Therefore we created CENA.

When we set up the law for CENA it was not easy. We had some terrible discussions because the government wanted to keep control of the electoral process. But there was a second reading of the law. After that second reading, the law was voted and sent through to the Constitutional Court. The Constitutional Court found that the creation of CENA was in conformity with the Constitution. CENA can fix electoral regulations and go as far as it desires in organizing the electoral process. Those who are against this law feel that the law removed some of the executive's powers. The conclusion is that we should have an organization independent from the executive power to monitor the election. CENA worked perfectly and the Constitutional Court oversaw the procedures very well. And I can assure you that from 1995 the Constitutional Court saw a great deal of litigation and handed down about 400 decisions on electoral issues. Let me point out that out of the 400 of the decisions of the Court, two-thirds or three-quarters were found inadmissible. That means that many citizens did not know the proper process for submitting a complaint to the Court. And this issue still must be addressed.

George Mugwanya (Uganda): To judge whether elections are free or fair one has to judge it within the context of the political system. The Ugandan Constitution labors to create a framework for free and fair elections. The Constitution establishes an electoral body. Several provisions under Chapter 5 of the Constitution are devoted to the electoral commission. The commission has extensive powers to control all aspects of the elections. This includes hearing election petitions arising before and during polling, ascertaining, demarcating constituencies, and declaring results of elections. So it has a very

wide mandate. The Constitution gives a right to go to the Courts and we have had so many petitions in Uganda. For the first time a Presidential candidate contested the results of the Presidential election in the Supreme Court.

The electoral system is also tied very closely to the political system. In Uganda we have a system of political governance known as the "no-party movement system" that has some problems. Political parties are curtailed in their ability to be involved in the vote. In Uganda, candidates run as individuals and can not identify themselves as members of political parties. Because of the ban against them, political parties are very limited in their power and are not able to sponsor any candidate. The system of governance in Uganda seriously undermines the fairness of elections.

Let me turn to the question of political parties. We are required to talk about how political parties are maintained and established. In Uganda we have the no-party movement system of government and political parties are not allowed to operate until the system is changed by vote or referendum. However, the Constitution defines the principles with which the multi-party system must conform. For example, political party membership must be national in character. In fact you can not establish a party based on race or geography. The Constitution also says that political parties must be democratic. Parties must also account for their resources. And no one can be compelled to join a political party.

Finally I want to make a few comments on what can be drawn from Uganda's experience:

1. The nature of elections is tied to the nature of the country's political system.
2. Parties should be internally democratic.
3. The government finances all candidates, but supporters of the multi-party system are severely under-funded as compared to those of the incumbent no-party system who also exploit the advantages of incumbency including use of government resource and vehicles to campaign under the guise of performing official state duties
4. Timing. When do you allow people to begin canvassing for the vote? In Uganda it is a few months.
5. While states may draw lessons from their history and cultures, they should also be inspired by universal norms and values, including the incorporation of fundamental rights and freedoms in their electoral processes, and the culture of tolerance to divergent views.

Fatoumata Siré Diakité (Mali): Let me point out that Mali has had three successive constitutions. We had a *de facto* single party system from 1960-1968. Under the second Constitution, from 26 March 1991, we had a multiparty system. From April 1991 to September 1991, forty-seven parties were created in Mali. In 1996, through an NGO, we carried out a survey to probe the role of women in political parties and to know which political parties existed. We noted that out of forty-seven, there were more parties that had no headquarters than parties that did have headquarters. These parties had no address and no constituent assembly, while some parties did not even exist and engage in activities. This result suggests that the notion of political parties was not well understood in many African countries. In Mali we had a single party for more than thirty years, and Malians thirsted for the opportunity to organize associations of a political nature.

Now with regard to texts, we have the Constitution and the electoral code. These are the fundamental texts that govern the life of our political parties. Parties cannot be created on gender, regional, or religious bases; the conditions are well defined.

After ten years of a multiparty system, we encountered the problem of financing political parties. When you create a political party, the party leaders become the financiers, or the people who become members of the political party may ask the leader to finance their activities. When these members have a problem at home, they may go ask the head of the party for help. The head of the party wants to retain party loyalty, so the head of the party must pay some money to the party membership. This situation posed serious problems.

With respect to the status of the opposition in Mali, the situation is very fluid. When a minister loses a position in government, she goes immediately to the opposition. Therefore, all the big political parties are divided and completely atomized.

Otive Igbuzor (Nigeria): I agree with the need for an independent body to monitor elections, but in Africa, these individuals should not be elected, or else they will be politicians, and will not be able to abandon their allegiance to political parties. We also need to develop a mechanism to ensure the independence of their appointments, and independent sources of funding.

Furthermore, even with the secret ballot in Nigeria, there has been fraud: people in collusion with election officials might stuff the ballot boxes. Instead, we have an open secret ballot system: it is open to extent that ballot box is in public, so the voters do not go into a secret room to cast ballot, but the ballot is at the same time secret.

It is important for Rwanda to improve conditions so that political parties are not rooted in ethnic identifications. The Nigerian Constitution prohibits the establishment of political parties based on religious and ethnic groups, and the executive members of the parties must reflect the ethnic diversity of the country.

Zam Zam Nagujja Kasujja (Uganda): How does one deal with post-election litigation? Uganda devotes significant time and money to this litigation in the aftermath of every election. Can you comment on the relation among laws, elections, and post-election litigation?

Henry Richardson (USA): What is the difference between calling an election to determine the voter's choice and calling an election to garner the consent of the voter? Technology is fast approaching, in terms of voting via computers and internet; how do we keep this question in mind in wise constitution making? How important is the quality of campaigning as in relation to preserving the integrality of the right to vote? What is the role of NGOs in monitoring elections?

Harold Dampier, Jr. (USA): I agree with the secret open ballot approach. Albania for example has clear ballot boxes, so hopefully monitors can catch the differences in size and number in the event of false ballots. In regards to the multi-party system for Rwanda, one must maintain consideration of genocide and the ethnic system in light of Rwanda's history, but one must not forget about who is being excluded. If you make a mistake, make it in the direction of inclusion, not exclusion.

On the issue of NGOs, their participation is essential in a country in transition, in terms of getting people accustomed to holding free and fair elections. This concept takes time to inculcate in the population. Karthy Govender said you have to cultivate a democracy, and indeed the first attempts at free and fair elections will not be perfect.

The election commission in Albania has an election code, approved by Parliament. One cannot argue that Parliament might limit the electoral commission by statute. There are basic guarantees in the Constitution: for instance, if the election code were to violate the Constitution, you could appeal to the Constitutional Court and have certain elements ruled unconstitutional.

Elisabeth Pognon (Benin): In Benin, the independent role of the electoral committee is determined by four organizations that select the national electoral committee members (by the Human Rights Commission, Parliament and others). The committee is independent and has a very short mandate, beginning its work ninety days before the elections. Because its mandate is short, there is little time for corruption or for corrupting others. In my view, the brief period of the mandate is a guarantee of independence, and has been very successful for us.

As for election monitors, we have to be very careful in listening to the claims of the monitors, who sometimes do not know the country well and may be eager to proclaim the elections a success. The Constitutional Court of Benin had enough courage to cancel elections in two regions of Benin where observers were saying elections were fair.

George Mugwanya (Uganda): In Uganda, I must say that elections are about political participation. At the local level, we have the local council elections, and then the Parliamentary and Presidential elections. On the question of alliances, political parties are not allowed to associate. Any alliance among the non-functioning political parties is bound to have limited effect.

As for opposition, must there be an opposition? We should address this question against the backdrop of the notions of pluralism and human rights. In my view, the existence of an opposition touches on some important rights, such as the right to dissent, the right to oppose. The opposition

should be examined in light of these fundamental norms and international human rights standards. How can one enjoy the right to political participation if one cannot exercise the right to dissent or a right to divergent views? And without opposition there will be but a one party system.

Fatoumata Siré Diakité (Mali): With regard to the questions that were asked about the electoral system, I will not be able to touch on this. With regard to the draft constitution there are several types of ballot. For Parliament there is a winning list system. The election of councilors is a proportional system, so women may be included on the list.

With regard to political nomadism, this is a real problem in Africa. Politicians often get elected to represent one party and then switch to another party during your term. Rwanda might want to think about having safeguards to keep people from switching parties. In Mali we also have the possibility of having independent candidates. This is an asset for people who do not want to come on a party ticket.

DAY THREE: Wednesday, August 22, 2001

THE RWANDAN CONSTITUTION: ITS CONTENTS (II)
FREEDOM OF SPEECH, PRESS, AND INFORMATION

Moderator: **Zam Zam Nagujja Kasujja**
Specialist: **Louis Aucoin (USA)**
Presenters: **South Africa, Rwanda, Benin, Mali, Nigeria**

Louis Aucoin (USA): There is hardly sufficient time to meet the challenge of addressing such enormous topics, but I will attempt to address what I believe are the most critical issues likely to affect Rwanda today. I will integrate the topics into some of the themes that have emerged during the Conference, including the theme of identifying "core values" of a Constitution, the hierarchies of these values, their translation from one tradition to another, and the convergence occurring in the rest of the world over the precise issue of conflicting values. Since my task is limited by time, I will only briefly give you the example of France and the United States of America for comparison, a review of international law, and of the African Charter.

One of the ways in which we can discern how the hierarchy of values differs from one system to another is to examine how particular rights are limited in each system. As I will explain, there are very few limits on freedom of speech in the US because it is considered to be at the summit of the hierarchy of human rights. As we examine the subject of the limits on human rights, you may notice that the limitations on rights in the US are largely determined by the judiciary, and particularly by the Supreme Court of the United States. This arrangement is different from the situation in countries of the Romano-Germanic tradition where limits are typically determined by the statutory law.

We begin our discussion of limitations on free speech with the issue of censorship of freedom of the press. Specifically, in the United States "prior restraints" on speech or communication are prohibited. This is especially important in the area of defamation, which we will address later. For an example of how the prohibition on prior restraints functions, a newspaper has the right to print controversial material without having to get the approval of the state prior to publishing the material. If the newspaper did need approval, then the government would be able to censor the free press. Only after the information has been published may those who are directly affected by the controversy challenge the publication in the Courts. This system safeguards the value of free discourse and the right to have individual opinions expressed in the United States.

Another fundamental value is that of freedom of expression. The essence of this right lies in the fact that, in general, our government is not allowed to the limit the "content" of expression. This means that there are no taboo subjects in the United States. One can discuss absolutely anything. As a practical example of the way in which this works, there was a law in Virginia that regulated the labels of prescription drugs and that further limited the information that drug companies could provide to the public about the drug. The law was trying to limit the promotion of poor quality cheap drugs in an attempt to protect the general public. The Court ruled that the law was unconstitutional since it was an attempt to limit the content of speech in contravention of the principle mentioned above. Nevertheless, the Court has decided in other cases that authorities may regulate the "time, place, and manner" of communication. In these cases, the Supreme Court has attempted to strike a balance between the public interest in public order and the fundamental rights of the individual. As an example of this principle, there was a case in which a state passed a law prohibiting the distribution of brochures in the streets. The purpose of the law was to prevent the accumulation of trash. The Supreme Court upheld that law. Thus, as you can see, the Supreme Court will allow the government to limit the manner in which an expression is made, but it will not allow authorities to dictate the content of speech.

However, there are important exceptions to these general rules relating to the limitations that can be placed on the freedom of expression. One significant exception to the broad freedoms of speech and of the press is the regulations imposed against obscenity. The Court has decided that some material is simply too offensive and therefore inappropriate for open public expression, especially as it concerns children. Another important exception is fraud. The government can protect the public from speech by individuals that make the people lose their rights.

Yet another significant exception is that of public speech that incites violence or hatred. When we talk of prohibiting speech that incites violence, the threat of violence must be "immediate" or else there can be no limits even on that type of expression. If the Court or the government wants to prohibit a type of speech as presenting a "danger" of promoting violence, then the risk that the speech will create violence must be a "clear and immediate danger". The American tradition asserts that people have an important right to say what they believe, even when they state that they hate one group or another. Individuals have the right to speak on any subject, including racial prejudice, because the theory of the Courts is that the content of speech cannot be limited unless its harm is immediate.

The text of the First Amendment states that Congress is prohibited from adopting laws to limit the freedoms of speech and of the press. The analysis is focused on the constitutionality of laws, because the First Amendment is the most important.

Thus, the Court has had a difficult time of defining what type of speech can be regulated under these standards. For example, laws regulating obscenity are difficult for the government to draft because they tend to be vague. If a law limits the freedom of speech and the freedom of the press, the analysis is focused on the constitutional values of the Courts. If a law is unclear or vague, then the law will be considered unconstitutional because the people will not understand the original intent of the law or the requirements, rights, or responsibilities that the law confers. If the law can be seen as open to an interpretation that would broadly limit freedom of speech, then the law would be overruled as unconstitutional.

The Declaration of the Rights of Man and of the Citizen and the preambles of the 1946 and 1958 Constitutions of France dealt with freedom of speech. Since the beginning of the constitutional history of France, the laws of Parliament have been the main source of protection of free speech. Consistently, in 1881, France adopted a law on the freedom of the press. The weakness in the French system is that once a law is promulgated, it cannot be challenged by the Courts. In France, there is the opportunity to contest the constitutionality of a law at the moment it is adopted. If the Constitutional Council at that point finds the law to be unconstitutional, then it cannot be promulgated. By comparison, in the United States, the Court will not rule on the law until the law is implemented. Only then will the Court decide whether there is a problem in how the law will affect the people's rights.

In a country where we consider that international law takes precedence, you can declare the law entirely against the international laws. Now, importantly, we are seeing a slightly similar process in the United States.

If we look at various international legal texts, such as the European Convention of Human Rights, the International Convention of Human Rights, and the African Charter, in a country where international law takes precedence, courts can then say that a domestic statute violates international law. In those texts, the limits of rights and of state responsibility are clearly indicated. In a country such as France, the limits of the law must be specifically enshrined in the legal codes of the nation. In France, the value of human life and dignity are more important than the freedom speech and press. While the rights to life and to human dignity are the greatest of all values in countries as diverse as the United States, South Africa and Germany, freedom of the press is also among the fundamental values embedded in the Constitution. We see a clear difference in the hierarchy of values across nations, a fact that explains the differences in how countries regulate hate speech.

Karthy Govender (South Africa): Prior to the current order, the South African regime had little tolerance for freedom of expression. For instance, the government banned the book *Black Beauty*, a children's book about a black horse, because it was thought to have possibly subversive connotations for the black population. The government had great power to censor articles. For example, newspapers were writing controversial articles about the "freedom of the children". The government banned the printing of the term in any newspaper publication. The newspapers then used black pens to strike out the term whenever they printed it in their articles. Then the government banned any

newspaper text with black pen-marks. Next the newspapers simply began leaving a blank space wherever the term was to be placed in an article. Thus there would be full articles with notable spaces that spoke volumes even in the absence of print.

Parliamentary members would use the laws to sue the newspapers whenever they had opposing opinions, and they would usually win. South Africa was immensely divided. The entire order was based on segregation. In the new constitutional order, we aimed to establish equality in society, by creating rights that would not only acknowledge the realities of the past, but would present opportunities for the future. We took a very different approach from that of the Americans, because the content of speech may be regulated in South Africa. There is a two-stage process by which this may occur. First, an individual has to demonstrate that a right has been infringed. Second, there is a rights-analysis as applied to a limitation clause. A right may be limited if reasonably justifiable. Essentially what the Court does is to ask the questions of how important is the right that is being infringed, how effective is the law in achieving its purpose, and whether the purpose can be achieved through less intrusive means.

Freedom of expression protects the press, the capacity for scientific research, and so forth. However, the government still may prohibit and limit speech that entails propaganda for war or incitement for imminent violence, as well as the advocacy of hatred based on ethnicity, gender, or religion, that may incite others to cause harm. Now, when the South African Bill of Rights was introduced, the first thing the media did was to challenge a whole series of laws. In the early stages of our courts, South Africa attempted to establish the *New York Times v. Sullivan* standard, which requires that a newspaper cannot be held liable for having published an article that harms an individual's reputation unless its intent was malicious. In South Africa instead, the newspaper may publish anything that it wants, even if the report is untrue, so long as the newspaper can demonstrate that it used reasonable means to discover the information reported.

The South African Constitution balances the rights of freedom of expression with other rights in the Constitution. We determined that the U.S. approach valued the freedom of expression over all others. The South African Court instead used the Australian model of settlement, which affords a more balanced approach. I will give an example. We had complaints against the newspapers that black people in South Africa were being labeled as incompetent, lazy, and inefficient. A case was brought to the Commission, which gave a very controversial report. The Commission decided that the best approach was to have a meeting with all of the newspapers and those who had registered the complaints to have a conversation about the issue. The newspapers took the position that this scrutiny offended their freedom of expression, and they stormed out. The Commission then issued subpoenas to all of the editors of the prominent newspapers requiring their attendance at a meeting. Most of the editors attended, and we attempted to demonstrate to them the issues at stake.

For example, when discussing the conflict in Rwanda, the South African newspapers published a whole page commentary on the death of a white soldier, his family, his background, and so on. Yet they merely listed the names of some of the black soldiers who had died. We showed them that they were exhibiting a difference in how they approached the issues of blacks and those of whites in their reporting.

In one significant South African case, a matter regarding *Mbolo*, one Justice on the Court asserted that the right to freedom of expression is fundamental to a constitutional democracy. But in the South African context, it has been determined that there is no reason why the freedom of expression should supercede other fundamental rights. Therefore South Africa balances the freedom of expression with other rights and values, such as equality. We are engaged in a process of trying to balance multiple interests of a diverse society.

Emmanuel Rushingabigwi (Rwanda): In Rwanda there were many constitutions that were developed. We have had four constitutions expressing the freedom of expression and numerous other values for a long time. Yet also for a long time, such freedoms existed only on paper. I will give the example of the press. Before 1991 we only had one radio station, a publication of the official governmental press, and a small publication by the Catholic Church. There was no freedom of speech because there was no opportunity for debate; only the perspective of the government was communicated.

In 1991, things changed significantly. With opposition to the government and international pressure growing, there was a demand for a freer press and for an opportunity for expression. The news media that emerged still could not express itself freely, and there soon arose other issues, such as the poor quality of the reporting. There were literally shoemakers who would transform themselves into journalists. This is not to say that shoemakers cannot become journalists, but there must at least be some professional training to ensure effective communication and an active, responsible press.

Still, the politicians did not want a balanced discussion of issues. The government station had very proper and officious discussions that did not express a variety of views or interests. Eventually, there developed a radical element in the press that expressed great opposition to the government and began expressing calls for violent changes in power. Radio Rwanda, RTLM, and Kangura were all used in this way to further the genocide.

After 1994, there were serious sanctions for journalists who expressed such calls to violence and disorder. Sanctions even included the possibility of the death sentence. Such sanctions clearly worsen the problem. We are hoping in Rwanda to develop a system of democracy where the media has freedom of expression and can foster national unity.

Théodore Holo (Benin): Let me begin with the year 1989. Prior to that time, Benin was a political monopoly regime, under the rule of a government that believed that the unity of a state depended on the unity of thought and action. The individual was sacrificed. In 1989, this monopoly was contested by a courageous few who decided to establish newspapers for the people. The courage of such journalists was audacious, and they played a significant role in maturing the process of democratic development.

Until 1990, Benin had a minister governing national orientation. There was a minister of information that had to check the expression of thought, and then, in 1991, there was a minister of information. During a transitional period, a change was brought such that the press was no longer under the control of the government, and a tripartite commission developed to permit debate. The commission was a center of power that was not controlled by the executive. Its existence made possible debates about different ideas and the democratic participation of the general public, essential to effective government.

Now in the Constitution of Benin, the freedom of the press is the final word in the issue of expression. We also implemented measures to ensure that the training of the journalists be impartial and independent, rather than relying on the government for their information. We have also established subsidies to the private press. We must also act to ensure that more of the population has the possibility and access to become lawyers and journalists.

Abdoulaye Sékou Sow (Mali): I will first acknowledge the critical importance of freedom of the press. In my country in Mali, we once had numerous newspapers. Only one survived independence. As in Benin, we had a single party system and one paper, the national daily. When the struggle against the dictatorship was established, clandestine newspapers were exchanged hand-to-hand, and everyone knew that they were a danger to the dictatorship. There was one such paper that showed independence of expression, but was moderate enough not to be crushed. Some of us also wanted to start a magazine to disseminate the idea of human rights. We created such a magazine, of which I have given some samples to you. This magazine fights for democracy, for the protection of human rights, and creates a foundation for free expression.

The next regime in Mali, the third republic, inherited many problems regarding the press. Because the press had actively contributed to the fall of the previous regime, the government was committed to resolving many media-related issues. The government placed the rights of the press and of free expression into the Constitution. Article 4 discussed the right to free assembly and of peaceful demonstration. The government set up a committee for equal access to information from state organs. There were even published newspaper articles attacking governmental corruption.

There are other examples of going through international agencies. The human rights organizations of the United States and France, for example, have expressed many concerns about the way in which Mali administers its control over the press. Although there have been some problems with slander, attacks on the head of state, and so on, no journalists have gone to jail.

As regards the freedom of peaceful demonstration, the political parties in Mali are in actuality very harsh against demonstrators. In 1997 there were nine Presidential candidates that boycotted elections in protest of the poor coordination of the electoral process. These candidates ended up in prison. These sanctions demonstrate the serious problem of restricting free association and expression, which can often lead to the significant harm of inciting resistance.

Joy Ezeilo (Nigeria): In Nigeria, the bill of rights has always been the most significant component of our Constitution. It was modeled on the 1951 United Nations Convention on Human Rights. The Convention determined that human rights include the rights to life, dignity, and personal property, and also includes the important rights we are discussing today, such as the right to free speech and expression. In some countries, we have seen that free expression and speech take precedence even over the essential right to life. In others, such as South Africa and Nigeria, we see that it is balanced against other rights.

In Nigeria, freedom of expression cannot be limited unless the governmental regulation is "reasonably justifiable." This standard requires evaluating important governmental goals of protecting public health, public safety, and so on. We also have the right of the press not to be summoned by Parliament or to be compelled to disclose their sources by the police.

There was a case in Nigeria where some senators in the government were accused by the press of spending their time chasing girls and playing cards. The newspaper was summoned by the government to explain where they got their information. The Court intervened, stating that the Parliament has no such right to summon the editors, and that the press is protected from disclosure of information. There are also provisions of the Constitution that limit the government's control of the mass media. With the present bill in front of the assembly, for the Freedom of Access to Information Act, there are significant safeguards in the Constitution to protect the freedom of the press.

Free speech takes many forms, as do its limitations. For example, licensing from the government before you can speak, limitations on publication, and prior censorship are such limitations. In Nigeria, in defamation cases, truth is not a defense. If you publish anything embarrassing to the government, it is a violation of the law.

I thus end my presentation with a few of the questions that the Nigerian example raises:

Does a free press require special protection, or do we restrict ourselves to only serving as protectors of access to information? Does the press have a constitutional right not to disclose the sources of the information that it publishes? What are the constitutional limits on the government's ability to curb the press's right to disseminate information? These are some of the issues that we hope the Rwandan Constitutional Commission will address.

Question and Answer Session

Faustin Rutembesa (Rwanda): What are the guarantees on the right of communication, and what are the limitations on the monopoly over the media? We see that the media tend to be monopolized, or on the other hand, we find situations in which you have to go to court all of the time when national life becomes burdensome and the press becomes most critical. What are the procedures for the people to resolve this conflict?

Patrick Matibini (Zambia): Most of the media in Africa is state-owned; this arrangement is a byproduct of the one-party system. Now that we are transforming the system of government, ruling parties nevertheless tend to retain their control over the media and the opinions of the people. What models can be put forth to ensure that there is democratization of the press? The other issue I would like to raise is the appropriate sanctions for violations of the freedom of the press. Should laws that penalize the press with criminal sanctions be constitutional? If so, should the defense of justification be readmitted as a defense within the criminal system?

Henry Richardson (USA): My first question relates to the issue of commercial speech. There are some in the United States who think that the freedom of commercial speech should be as wide as

freedom of private speech, for the development of the economy. Do you agree with that assessment? Should corporations have similar rights as natural persons?

My second question addresses hate speech. The argument in the United States is that a prohibition creates a slippery slope if it were enacted as an exception to freedom of speech and expression. In international human rights law, however, there is the principle that hate speech should be banned when based on the specific grounds of race or other categories of identity. Constitutions in some other countries, which prohibit hate speech, have not experienced a slippery slope. Yet the United States has not adopted this principle. Please comment on this.

Lastly, I have a comment of my own. A major historical issue in the United States was that defamation was criminalized in the Alien and Sedition Acts. There was the belief that the only resource that a person had in public life was his or her reputation. Then, the public began to value talent and ability, leading to an expansion of the notion of freedom of the press, and a retreat of the notion of criminalization of defamatory statements. Reputation was no longer the sole worth of the value of public officials, and the press was therefore allowed more flexibility to criticize public officials. We should consider this factor in the Rwandan context in assessing the development of a free press.

Louis Aucoin (USA): Two people asked about the public media. In France, the monopoly of the media is unconstitutional, and there is a constitutional requirement for pluralism in the media.

The South African presenter raised the *New York v. Sullivan* case, which established the freedom of the media and of the press as a broad protection that applies in situations where public officials want to sue a newspaper for defamation. The official has to prove that the statements were not true and that there was "actual malice" in the reason for the publication. Otherwise, the press can say anything with impunity, even discussing the private life of public officials. This goes beyond public officials, because even film actors and media stars can have details of their private lives revealed in the press.

Finally, I would like to come back to the handling of hate speech in the US. As I explained, there is generally the freedom to express hatred, even racial hatred, in public speech. However, if there are violent crimes, and it can be proven that the motivation for the crime was hatred arising from prejudice, then the penalty for the offence can be increased. In that case, if the Court finds that the violence was the result of malice based upon the race, religion, or sexual preference of the victim, then it can impose a harsher sentence.

Karthy Govender (South Africa): In regards to the ownership of the media, South Africa has considerable ownership of the private sector. The government complained that the media is in the hands of the white minority and therefore it often reveals an anti-government sentiment. The Human Rights Commission disagreed, instead finding that the system is running effectively. South Africa also has a board that asserts policy for SABC and communication to the general public. Public access to information removes secrecy and opportunities for abuse of power. But it also has some limitations, because it may allow those who oppose a law to simply use public access as a means for constantly challenging the government.

The type of speech that is being assessed is also important. If the speech is personal, political or commercial, they each get a different type of analysis, similar to the United States. As to the slippery slope argument regarding hate crimes, we primarily follow our responsibility and international obligations to the Hate Convention.

Jean Mutsinzi (Rwanda): I was reading the various constitutions of the representative countries here and their provisions on human rights. I noticed that some countries put express rights and obligations from the various international conventions into their constitutions, while others only selected a few such provisions. My question is who makes that choice of what is incorporated into a constitution as a fundamental right? I believe the legal and human rights communities of each country should do so. What will be the role of such communities in Rwanda for writing the constitution? And how do we involve the provisions of international documents into the constitutional process?

Secondly, in today's program we will talk about the rights of minorities, women and children, and equal treatment before the law. All of these special rights of people reflect many special

problems. For instance, regarding the equitable treatment before the law and fair trials, the Commission for Human Rights encountered many problems. For example, there are people in prison with no files. I am asking for the experts to give us a more practical approach, to suggest programmatic steps for solving the obligations that arose from the genocide.

Rwanda: In the United States, France, and in other countries, does the possibility of life imprisonment for abuses of the freedom of expression by the press exist? I would like to hear the personal opinions of the presenters regarding the imposition of such strict penalties, and whether these sanctions should be abolished. As some have stated, both an irresponsible press and the manner in which the government proceeds to control the press can cause great harm to the democratic process and to the people. How do we strike a balance?

Rwanda: We are in a country that has never experienced freedom of the press. Just when we were about to experience free public expression, the newspapers and the media then participated in furthering the violence of genocide. This is why the government and many of the people mistrust the media and its ability to be independent, impartial, and fair. Some in the media will even say that the genocide never even took place. Yet in our country where most of the population is poor, the public depends on the media for information. Can you put yourselves in the position of the Rwandan people and tell us how to craft provisions of the constitution when officials say they do not want those who promoted genocide now to have the important responsibility of reporting news?

Kebreab Habte Michael (Eritrea): We have to discuss the funding issue. When we talk about a private press without sufficient funds and resources, then we are talking about a press that will simply fail. For example, the BBC has public funds as well as private funding. We must be able to discuss the allocation of funds for the development of a viable independent media.

Louis Aucoin (USA): Because of the limited time, I would first like to answer the question of the Executive Secretary of the Constitution Commission of Rwanda. I think it is obvious that today's problem of incitement and hatred in Rwanda is a special problem and that the government has both a right and a responsibility to adopt specific measures to address the situation. Still, due care must be taken to avoid destroying the freedoms of the press and the freedoms of speech. Providing more resources to journalists, especially education and training, is essential.

Governments may be scared of the press, but this reaction is unhealthy because it could block the development of the government. As for sanctions, in many countries the penal codes do not govern abuses by the press. When determining whether you want the penal code to do so in Rwanda, I would recommend that you state specifically in the Constitution how you are going to apply and limit the rights in question, what the most important values are in your country, and what type of democracy you want to encourage for the future.

IMPOSITION OF STATE OF EMERGENCY: CONSTITUTIONAL SAFEGUARDS AND THE SUSPENSION OF RIGHTS

Moderator: Gerard Niyungeko (Burundi)
Specialist: Robin Palmer (South Africa)

Robin Palmer (South Africa): The sequence of the presentation will be as follows. First we will define what a state of emergency is in international law. Second we will place the state of emergency within the context of constitutional legitimacy as expressed in international constitutions, and finally we will discuss the application of these issues to the Rwandan Constitution.

The declaration of a state of emergency is essentially a political act. Any attempt to enforce a state of emergency is an attempt to limit political and civil action. A well-known lawyer-philosopher classified a state of siege as a short-term dictatorship that allows the members of a government to deal with a short-term crisis. All actions taken in a state of emergency are taken in the name of the law. The essential justification for the state of emergency is the need to protect against extra-constitutional action, to prevent the authorities from ignoring the law. Those countries with express and deeply entrenched rights still allow the departure from the full protection of these rights in a state of emergency. States of emergency are recognized in public international law because the safety of the state is the ultimate law. The need for a government to protect itself and its citizens is a need that overrides that of protecting individuals. The agencies, such as the police and the military, that the government uses to provide protection against abuse are the precise organs of society that are used to establish a state of emergency. This creates a dilemma. How do you protect the very people that are keeping you in power? This can be resolved by delegating the disciplinary function to the Courts. In that context, before we look at the provisions of the South African Constitution that deal with the regulation of such abuses, we must first address the role of the state of emergency in constitutional law, and the role of public.

The state must decide whether it will incorporate the requirements into the constitution itself or keep them as separate regulations. Article 48 of the Rwandan Constitution states that the government may, when the situation requires, proceed to call a state of emergency. In other words, the discretion for when to call a state of emergency in Rwanda is determined by the government itself, which obviously has some significant contradictions. I will highlight some points regarding why leaving the discretion in the hands of the executive is inherently dangerous.

If there are no guidelines, then it is guaranteed that the use of discretion will be abused. One must seriously consider the following question: if there had not been improper regulation of the state of emergency prior to the genocide, would the genocide have occurred at all? Second, we must again remember that the state of emergency is a political act. If it is not handled in a manner that is constitutional and in conformity with international rights, the country runs the risk of suffering international sanctions. These may include the removal of aid or international investment, both of which have significant economic impact on the development of the society. Economic instability coupled with restricted rights during a state of emergency is a dangerous combination that threatens the legitimacy, and the stability, of the government.

Having listened to the debate regarding the definition of legitimacy, I believe the ordinary citizen will abide by the constitution if the citizen first understands and then accepts the provisions of the constitution as the governing law of the land. The citizen must further determine that the defense of the constitution is essentially a defense of his or her individual and personal rights. From the government's point of view, legitimacy is slightly different. The government must not simply pass laws to appease political pressure. The government must actively apply the laws and accept the determinations of the Courts.

The dilemma now is to ensure that the authorities who have the police and the military under their control respect the constitution. What power do the people have to make the government respect the responsibilities of power? One method is to persuade government actors that it is in their interest to abide by the Constitution. That can be done, for example, by demonstrating that compliance with international mandates is in their interests. We shall consider two examples. First, in situations of war, there is always internal government dissent concerning the administration of the state of emergency. If

there are rules created in times of peace and order, then in times of emergency the process will be more effective, and there will be less dissent. The international community should have accepted the regulations that the government has implemented. Once there is international support for the measures that are taken, then it is unlikely that in the situation of a state of emergency, the international community will remove aid or financial investment.

Various international conventions on human rights contain essential justification that a state of emergency is a form of self-defense. Just as in the instance of determining when self-defense is justified, the measures of the state of emergency must be proportionate to the events that gave rise to the state of emergency. There must be a public emergency that threatens the life of the whole nation and therefore makes the state of emergency a necessity. Although the emergency may be contained in one part of the country, there must be effective enactment of the state of emergency by the majority of the legislature and subject to the advice of or review by the judiciary.

In regards to human rights, a number of fundamental rights should not be derogated from at all, even in a state of emergency. Identification of which rights qualify for such absolute protection is controversial. They include the right to life, prohibitions against torture, prohibitions against slavery, and prohibitions against retroactive laws.

Section 37.1 of the Constitution of South Africa declares that a state of emergency may be declared in instances of war, invasion, disorder, natural disaster, and other public emergencies. The last category, "other public emergencies," is a catch-all provision that must be read very narrowly, because otherwise the government can say that just about anything, including legitimate opposition from some sectors of society, is a "public emergency". Therefore the first requirement is that a state of emergency be legitimate.

The second international provision is that there must be onerous obligations on the government to have the constitutional provisions suspended, and the government must be required to show justification for suspension of various human rights provisions. However, requiring a government to show that detention is "necessary" in order to detain may be too high a standard. I would suggest that there be a lowered standard of "reasonableness", namely to require the government to demonstrate a reasonable link between the detention and the objective of resolving a legitimate state of emergency. There are a number of rights that apply to the detainees in emergency situations. I suggest that the key protective rights that are needed include the right to life, the prohibition against torture, the right to be healthy, freedom against bodily harm, and so on. Resources to deal with the effects of restricted rights, such as greater requirements for medical attention and assistance to those who are detained, among others, should be provided by independent bodies, such as the national human rights community and the international community.

In conclusion therefore, I would say that the purpose of a state of emergency framework is to give the authorities the latitude to respond to circumstances of violence and war. If you limit too strictly the ability of the authority to regulate during an emergency, the authorities may simply return to abusing power under the notion that "might is right". I believe that there is a twofold key to regulating the state of emergency: first, to make sure that the regulations comply with international law and second, that the regulations are not too onerous on the authoritative parties concerned.

Question and Answer Session

Henry Richardson (USA): I was pleased to see Professor Palmer discuss the role of international law in crafting constitutional provisions that regulate a state of emergency. The guarantees of the international law of human rights are very important, and the trend of preferring one's own Constitution to that of the laws of the international community is declining. I would like to emphasize the importance of the international *jus cogens* (for example, the right to life, no slavery, no retroactive laws, no torture) as core values for regulating the state of emergency.

Rwanda: Professor Palmer, you mentioned that the executive must take measures to declare a state of emergency. What is the legislative value of such measures? You state that there is some value in those measures, but can the Courts themselves even function properly during short-term states of emergency? Additionally, what is the average length of the state of emergency? For example, in the

province of KwaZulu-Natal, there have been various periods of state of emergency that did not apply to the remainder of South Africa. Should we consider regional declaration of the state of emergency, and what potential does this have for abuses of state power?

Karthy Govender (South Africa): In South Africa, we come from a period of repeated state emergencies, as in the period of the 1980s. The government learned that you cannot use a state of emergency as a way to suppress internal political dissent. That has also been the lesson from India.

Robin Palmer (South Africa): In the current South African Constitution, Parliament has to agree within twenty-one days by a majority vote to affirm the call for a state of emergency. The court has the power to decide on the validity of the declaration by the Executive and any extension of the period of the state of emergency. The court can also review for constitutionality any government action taken during a state of emergency and set aside any law enacted by the government and any action of the government. The Supremacy Clause is very broad in this respect.

The South African Constitution does not preclude declaring a state of emergency in merely one part of the country, even if it as small a locality as a city. In terms of the Kwazulu-Natal upheavals, the number of instances of violence in the last five years meant that the Richmond district could almost be deemed an area of civil war.

The government could have called a state of emergency in a variety of circumstances, such as the AIDS crisis in South Africa. The government could justify a state of emergency in the country on that basis. However, the government decided that using the state of emergency in that manner would have created a far greater diminution of rights than it would have provided safeguards for the public safety. The risks were too great.

Kebreab Habte Michael (Eritrea): I believe that there are some rights that should not be derogated from, even during the state of emergency. I will give some examples. In Article 27.5 of our Constitution, in a state of emergency, there cannot be a removal of the protection against equal protection, or segregation on the basis of race or gender, and so on. Other articles of the Constitution state that no person shall be tried without certain important elements of fair process and that persons have the freedom of opinion and belief. Also, there can be no pardon of authorities accused of the abuse of power.

Théodore Holo (Benin): In Benin we have two articles dealing with this issue. We have provided for preventative measures before a state of emergency is declared. This means that the two other branches of power must be consulted, including the Chief Justice of the High Court. Once the state of emergency is imposed, it is not left to the President to manage the way it is implemented. If the leaders of the other branches of government are not in accordance with the decision of the President, the President then makes the final decision.

There is also some risk in placing in the constitution the specific rights that should not be derogated during a state of emergency. In Benin we decided simply to state that all rights provided for in the constitution cannot be derogated from, without making distinctions or prioritizing among them.

Fatoumata Siré Diakité (Mali): The problem in Africa is not merely one of rights, but the issue of implementation. Who are the people responsible for implementing the state of emergency? What means should be available to the public such that the public can ensure compliance to appropriate procedures during a state of emergency?

We are always wondering if, in the Constitution, we are not providing the government with the legal ability to suppress its people. We should therefore distinguish between “the state of siege” and “the state of emergency”. State of emergency leads to the suspension of some rights as reasonably required to protect essential state interests; whereas during a state of siege, there is a suspension of all rights. In the state of siege, the army is the principle body for enforcement, whereas the civil police manage a state of emergency. The question is whether all upheavals can be managed by a state of emergency. Is it possible that the people can engage in demonstrations or even a grassroots

revolution? In Rwanda, constitution-makers have to think deeply on this issue, because it is both important and dangerous.

Therefore I would suggest that we propose to our Rwandan brothers and sisters to carry out an in-depth assessment of the concept of state of emergency, and not to jump in without a serious analysis of the consequences. For example, the South African example is a unique case that should not be applied to Rwandan circumstances. The same holds for the western countries.

Moreover, democrats do not always behave as democrats. The government may suppress its people in the name of democracy. What we referred to previously regarding international law is problematic, because international law is not binding. There are, in addition, significant issues of sovereignty and particular histories that must be addressed. The international community does not always have the means itself to react against a coup.

Joy Ezeilo (Nigeria): I would suggest to my Rwandan colleagues that the procedure for the state of emergency should be carefully drafted. The mechanisms should be watertight in order for them not to be used as a sword by the government. To the extent that international law plays a role, there are customized international laws that are so essential that they should not be derogated from. Even if these rights are not expressly named in the Constitution, and the nation does not bind itself to the international conventions, one can still bring a claim in the international court. The state is subject to the determinations agreed upon by the international community.

Robin Palmer (South Africa): The first issue is whether there should be an incorporation of international law into the Constitution regarding the state of emergency. The formal *jus cogens* of international law should be protected absolutely, but other fundamental rights may be reasonably curtailed. For example, as concerns the right to dignity, we may have a provision that males may not search women, but during the state of emergency, one may be forced to engage in such a practice.

The second question is whether there should be consultation with detainees regarding whether the government can declare a state of emergency. The checks and balances must be preserved. The legislature should have the ability to evaluate whether the state of emergency should be called and continued, and the high courts should be able to review the actions of the state in implementing the state of emergency.

There is also the important consideration of the implementation of the state of emergency. The police and the military get paid, no matter what, and they express the will of the state. A nation may need the military and the police to take an oath to uphold the Constitution, and not merely to support the President. I believe it is imperative to have specific details regarding the regulation of the implementation process of the state of emergency.

Abdoulaye Sékou Sow (Mali): It may be worthwhile to think about those rights that have not been suspended. But are we also saying that we can allow the authorities to violate other rights? It is imperative to define the circumstances and preconditions under which the state of emergency may be imposed. Then, the government may request the opinion of the Parliament and the Supreme Court regarding the imposition of the state of emergency. These safeguards may help limit the discretionary powers that are given to the state. The government must not be able to use the state of emergency as a method for suppressing the opposition, and the Court should be able to determine whether some conditions are first met.

PROPERTY RIGHTS

Moderator: Théodore Holo (Benin)
Specialist: Henry Richardson (USA)

Henry Richardson (USA): I want to take a few minutes to discuss today some of the value choices that must be discussed regarding the constitutional right to property before the Constitution is even drafted. The fundamental nature of property means that it will affect allocation of authority in other areas as well. Property is a major element in organizing communities, including the economic development of the community, the allocation of resources to individuals, and the nation's economic role in the international community. The allocation of authority in the state to control and protect property is a primary point where the legal assumptions in the Constitution about the growth and viability of the economy are confronted. They also affect the incorporation of the international provisions into the state Constitution.

There is some question whether national law should be governed in part by international human rights. However, the international law is inconsistent. The right of equal protection under the law extends to the right to own property. In new African Constitutions explore the treatment of property under international human rights provisions. The Universal Declaration of Human Rights (UDHR) does proscribe certain human right guidelines. Therefore in the United States the protections for the right to property are not arbitrary. African states have gone beyond customary and regional distinctions to protect these rights. There are some suggestions that corporations and institutions should have protected property rights to the same extent as individuals. The extent to which full access to the land is an option for the power in an economy with few restrictions will immediately be brought into play in laying the foundation of a Constitution.

We have expectations in two parts:

First, property rights must be administered under a theory of equal protection. Second, the notion of property should include anything of value that advances individual autonomy and self-determination. Thus more and more types of property are part of the definition of what is property.

One of the most important determinations is who will be allowed to buy and maintain property and who should be excluded. If 70% of the population cannot, then 30% of the population has property rights that they can use to restrict the autonomy and rights of the majority of the population. There must be some consideration of what role the judiciary and other organs of the government will safeguard against the development of such suppression.

In this era of globalization and demand for foreign access, we ask the important question of whether there should be allowed access to property to all within the bounds of the state, such as citizens and non-citizens, or whether it is restricted to nations. The Namibian example is instructive. The international community acknowledges that nearly all states deem property rights as very important.

The conditions of property ownership rested assumption rested on the condition that the right to property depended on the state. There was a pre-existing culture that property rights should be protected from government interference, including international interference. This includes the constitutional values of due process of law, no taking of property without adequate compensation, etc. At the onset, the United States took an approach of dominance whereby European men had dominance over property interest to ensure that the European monopoly of property continued. So far, that condition has changed, but has not changed completely. There have been some groups, such as Native Americans, granted special rights to property. As to other sectors of the public, property rights have developed mostly from interpretations of other provisions of the constitution.

All citizens must be able to live above a subsistence level and must be empowered to do so. The authority of accumulating property should be determined by the particular needs of the nation, rather than importing the provisions from other countries and countries.

In the interest of time, I will simply address now a checklist of issues and questions that the Rwandan Constitutional Commission may want to address. As an American, I am an outsider and do not have answers for these questions because they require an assessment based on the particular

circumstances of this nation. Review of the issues and questions among the Rwandan people can provide such answers.

1. To what extent can the Constitution permit everyone of the people to obtain access to property? The absence of housing for a large sector of the population raises such an issue.
2. How do we address the issue of rural land tenure? What basic rights of existing landowners must be constitutionally protected and what rights of land users must be protected? Provisions must be made as to what statement of general constitutional principle should be established by the right to property? What discretionary authority should be allowed and to whom?
3. Is there a regulatory body that can oversee the administration of property rights?

Question and Answer Session

Rwanda: We have no provisions so far for determining the appropriation of property. What is the ways of avoiding expropriation and the acquisition of property?

Adrien Wing (USA): Can some of the Rwandans tell us about the current conditions of property ownership? Is it by group or clan? What percentage of the population even owns property, and what is the position of corporate property?

Fatoumata Siré Diakité (Mali): We must address the role of property in relation to women. If we look at the text in Mali, there are guarantees to the right of property for all. The reality is that women do not own property and they do not have the opportunity to own land in their traditional communities, and if their husbands die, they are dispossessed of their property. What should be done to the new Constitution to ensure that there are measures enshrined in the Constitution to ensure that there is safety of property rights for all?

Henry Richardson (USA): The right of a government to take property for a public purpose, provided that it gives compensation and does so with due process, is a feature of all constitutions around the world. The occurrence of issues and complaints that this power is being abused, especially on a local basis, is also a feature of political life among many constitutions around the world. The "taking" must be for a genuine public purpose and must be "fairly" compensated. The definitions of these standards can be litigated in court. For example, does a taking include just depriving the person of possession or does it include prohibiting the person from using their land, or government action diminish the value of the land to the point where it is absolutely unusable. Thus, although the state does not simply take the land, it may still have accomplished a "taking." The interpretation of the Constitution requires a definition of at what point the rights to property are protected. These are also policy judgements by the governments when they decide what limits they will place on themselves. It seems to me also seriously important that customary property has to be situated within a framework of equal property rights, rather than be set aside as a separate arena with its own conflicting set of property rights.

Drafting a Constitution also requires the formation of priorities in deciding which aspects of property rights will be preserved. As to human rights, especially the protection of women, there are some international provisions that deal with the role of property rights on the equality of women. The reality of women not being able to own property is significant in Rwanda. If the people believe this is an issue, then an express provision in the Constitution may be the most effective method of establishing equal property rights.

Jean Gatera (Rwanda): I am going to discuss the issue of land. In the history of our country, there is a sector of our population that fled the political violence of the country and abandoned their property as they fled to safety. When they returned, they did not have access to their property. Those who came back and who were repatriated were required to share the property with those who had taken over the property. Today, there are many who believe that because the property was divided in two, there was

a violation of Constitutional rights because the previous owners were divested of their property value. There are articles form people outside this country who produced a report that showed a violation of human rights in the provinces where there was such a sharing of property. My question is what would you advise us to place in the constitution to address the refugee and property issue?

Kebreab Habte Michael (Eritrea): Likewise in Eritrea there were those who left there property because of war and conflict. When the person returned, they had to be reimbursed the price of their property if someone else was living there. There was a lot of litigation as to what the appropriate measure of compensation were.

Question: The problem of the property of land in Rwanda is a critical one. We use to have two views on the rights of property. We had the traditional view, of village landholders, and then there were others, such as the Catholic Church, who had protected specific rights. We developed a problem in 1959. In Rwanda the property belonged to the clan, or the family. After 1959, the possession of the property went through the individual and the family had to divide the possession of property at times among numerous family members. The population expansion further caused more division of property.

In 1970, the state still could not develop a way of determining how the issue of ownership and inheritance should be handled. In 1994, there were refugees as well disputing land claims and we still have to determine who had the right to that property. I will give you a personal example. My family also fled the violence and when they returned there were five families settled on the property. The international laws did not permit us to demand the removal of these people from the land. Thus, the Arusha Accords process developed a compromise. The international community offered to give money to the repatriated refugees as compensation for dispossession of their land and for them to be able to acquire other sectors of land. The money was never delivered and refugees received nothing.

Therefore we then developed the solution of trying to get the people to subdivide the land among the old and the new residents. The problem is that with the patterns of inheritance, there were so many small individual units of land that the compromise forced new and old residents to have even smaller plots, which only exacerbated bad relations and reduced the property interests of all the parties.

Henry Richardson (USA): International law allows the sovereign state to establish its own land regulatory system under its own law. That is of course not an absolute right, especially when dealing with the property of aliens and those dealing with the property of international landholders. Taking of such property must also be under law.

In regards to returnees, one suggestion I would make is to consult the South African Constitution experience of drafting the constitution, of provision making, and the various methods of compensation. This must of course be driven by the identified national core value. The question often involved the reallocation of land to those who had been deprived of property by the apartheid system. The question was whether the right to property against subsequent titleholders can be defined and regulated through the powers of the National Assembly. This problem is not limited to one particular district, but rather appears to be a national Rwandan problem. The state has the right, however, to determine these issues and unless there is an abuse of the rights of returnees, the international community must respect the sovereignty of the state. Is it possible to address this issue by specific constitutional principles and express core constitutional values? Or do you, as I would suggest allow the legislature and the assembly to develop guidelines and to deal with the intricacies of the question in a more dynamic situation where all of the interested parties have an opportunity to state their interest and to contribute to a solution. Also, there must be some review of what remain from the Belgium laws regarding property rights and what elements of these laws should be revised or amended to reflect the new reality that has developed post 1994.

Rwanda: I will address property in Rwanda. Prior to 1999, there was no right to property for women to property. After 1999, there was a law that determines property rights, of men and women, according to marriage systems. Today, there is an effort to amend existing land ownership and it has

been decided recently that women should have equal rights to land. The biggest remaining problem is the applicability of the Rwandan law. It may be that the law is neutral, but because f the traditional culture and women's role within it, women may not have the ability to access the rights that they have. There are many who are in opposition to the transformation of customary law. How do we deal with the issue of changing customary law in order to support the development of new property rights?

Benin: The right to property is fundamental, and must not be reduced to merely property. We must look at the global principle of the right to property. Also such rights, while dealing with more than property, cannot be absolute. We must frame the right of property and then determine under which circumstances the property can be removed. For example, one condition may be when there are significant ethnic issues at play and compensation must be given.

Mali: I must support the statement that property entails a great deal more than land. But the history of Africa demonstrates that it is the ownership of land that is the significant issue at the onset. As in Mali, there is protection of landed property, but we must not forget that the concept of property is a bourgeois definition of property and that prior to colonialism there was a collective notion of property ownership rather than the Western notion of individual property ownership. There are also other types of property, such as intellectual property, industrial property, and artistic property. All over Africa, there are those who are claiming that their property has been pirated and that their artistic integrity has been compromised.

In Mali, the conflict over land has led to death. Even as our delegates left for this Conference, there were two communities fighting over swamps and grazing land. We have to be able to bridge the conflicts over modernity and individualism, and the conflicts between traditionalism and collective interests.

Question: I do not understand how we can discuss property in such a manner without discussing inequities in a country where there are some with huge tracts of land and a disproportionate number of those who have neither land nor subsistence. These issues have to be dealt with before there can be a discussion of allocation of land that many people simply do not have.

Henry Richardson (USA): There are admittedly some issues that judicial law making will not resolve. One practical requirement of a right to property is to ensure that the Constitution otherwise enabled people to have some property. Access to the opportunity to own land has been a critical question. In the United States, the right to property is governed to two standards--due process and equal protection. This does not solve all problems but it is a tool. Secondly, the right to property has been tied to the right of free travel, because people have to be able to move across the country. Generally, the right to property merely ensures against the interference of the state. The question of access and economic disparity as you make a new Constitution is a broader issue than that of state interference and is absolutely and fundamentally critical.

As to how property should be defined, the definition must absolutely consist of far more than merely land. However, as regards land, you are correct that the role of the colonial and international laws in affecting the structures of land ownership throughout the colonized nations must be confronted and resolved. Parts of these issues were addressed in the UN's address of the issue of the right to natural resources and of sovereignty in allocating natural resources. There is a similar opportunity here therefore for the local governments to make a decision about how land should be allocated within the nation.

The question of international property is significant. In South Africa the issue of the right to health, including access to medicine against HIV/AIDS, is in conflict with the issue of the right to commercial property. South Africa is at the forefront of attempting to solve the conflicting core values behind these different rights. The importance of dealing with intellectual property in Rwanda is quite necessary.

I agree that the right to property is a corollary to other rights, such as Mali's making the right to property a component of the right to economic participation.

I would suggest consulting the two human rights conventions dealing with the right for property among women, and the Beijing provisions. Begin with the premise that these provisions will be binding on Rwanda and tailor them then accordingly. Also, the issue of customary law deals with issues of equal protection. Since the right to equal protection is a part of international law, and has been made a part of national law, then the question is: what are the bounds of equal protection and of the supremacy of the laws.

RIGHTS OF MINORITIES, DISADVANTAGED, WOMEN AND CHILDREN

Moderator: **Karthy Govender (South Africa)**
Specialist: **Adrien Wing (USA)**
Panelists: **Benin, Mali, Nigeria**

Adrien Wing (USA): I believe that Rwanda has the opportunity to become a human rights state. A human rights state is defined by putting human rights at the center of the agenda. South Africa is attempting to do that I am hopeful that Rwanda will join them. A measure that will determine whether Rwanda will become a human rights state is whether it treats the minorities, the disadvantaged, the women, and the children well.

I will first give a brief overview, then turn to international law lessons that Rwanda can glean, and then I will conclude with comparative law lessons.

First, in terms of overview. These groups of disadvantaged people are in every country of the world and are subject to discrimination and These are not merely discrete groups of people. They are overlapping and intersecting groups. You can come under all of the groups simultaneously. So when we look at discrimination and eliminating it through a constitution, we must be aware that the discrimination is multiplicative – it happens simultaneously. However, the law – international law and the law of different countries – does not sufficiently provide for protection for all of these categories simultaneously.

In addition to the actual injuries and death and discrimination that people in these categories have, they face another problem that I have termed "sprit injury" and "spirit murder". Spirit injury is having a psychological assault to you on the basis of some status. Spirit injuries may add up together to create spirit murder, where you are alive but your spirit is dead. Spirit murder is affecting entire countries. When you have spirit injuries leading to spirit murder, you are likely to engage in activities that result in physical death—murder, suicide, alcohol abuse, promiscuous sexual activity – to drown the pain of your spirit injuries. When you have people facing multiplicative discrimination they may be more likely to suffer spirit murder.

Turning now to the other disadvantaged groups. We have to look at the experiences of the aged and elderly. I am shocked that the median age of death is declining. In Rwanda it is now 40 something. We also have to look at the rights of people with disabilities – including HIV/AIDS, who have been recognized as a disabled group. We have to look at the rights of sexual minorities. South Africa has decided to protect these groups – gays, lesbians, transgendered people, bisexual people. Needless to say in Africa we have not had as open discussions about this category. This should be put on the table.

Looking toward the situation of children. We have heard world wide of the reports of increased child labor, child soldiers, orphans, children who are heads of households, sex slaves, etc. These are all affecting children, not to mention HIV/AIDS.

Minorities. This is a big issue here. I want to mention with respect to my own group of people – African Americans. We are experiencing a profound attack on us in the US. Many of our men are in prison or dead. And it is eviscerating our culture but nothing is being done. As a tiny example of what is being done to my own group is Charlene Morriseau, a new lawyer from Harvard Law School. In the class of 1996 there were 90 blacks of whom 16 were male. In her Harvard Law School class of 2001 there were 500 people – 44 black students, but only 11 males. This is what we are facing nationally with respect to my group. It is affecting us to such a large degree that I have just written an article on polygamy in black America.

With respect to women. We know the South African saying – you strike the woman, you strike a rock. The Chinese have a saying: women hold up more than ½ the sky. Nonetheless, women are at the bottom of the socioeconomic ladder. Women are often the victims of assault, rape, prostitution, and lack of equal pay for their outside the house paid labor. We know that under both custom and religious practices world wide, women are not given equal rights. With respect to their immigration status, women often cannot give their husband their nationality. Women are limited in their ability to control their sexuality, which has resulted in the inability to use devices such as condoms, which would limit the transmission of AIDS. The AIDS rate in Rwanda is 11% of the population. In Kigali it

is 33% among 18-44 year olds. The bottom line is that women cannot fully participate in social and economic life. Without men being personally willing to take up the traditional women's work of childcare, cooking, cleaning, agriculture, etc.

With respect to the lessons from international law for the protection of these groups, I have a suggestion. Rwanda must thoroughly review all of the international conventions it has signed and ratified and be sure that the relevant provisions of any new constitution are in conformity with these treaties. In fact you can look at the wording of these conventions to borrow from in drafting the constitution. Rwanda should also look at those conventions it has not signed to see if there are relevant provisions for its new constitution. Rwanda may also want to sign those international conventions it has not yet signed.

To give some examples of the conventions Rwanda has signed: the Universal Declaration of Human Rights has been incorporated into domestic law through the 1993 Arusha Accord. Rwanda has ratified the International Covenant on Civil and Political Rights, and the Conventions on the Rights of the Child. Rwanda has ratified the Genocide Convention, the Banjul Charter, the Women's Convention, and the Race Discrimination Convention. So Rwanda has taken all the steps in ratifying the basic international law convents. What I do not know is whether Rwanda made any reservations that may limit what Rwanda is agreeing to. But you need to look at that and see if you did make any reservations. Rwanda has not yet ratified the International Covenant on Economic and Social Rights. I know they are looking at this convention and that they will ratify it a long time before the USA ever does. In addition to these binding agreements on Rwanda, there are a variety of nonbonding international law documents – declarations – that can be helpful. These include the Declaration on Rights of Persons belonging to National, Religious and Ethnic Minorities, and the non-binding Declaration on Violence Against Women.

I do not have time to discuss these conventions in any detail. But the Convention on the Rights of the Child provides for protection and participation in society decisions for those under 18. It discusses the best interest of the child, the prevention of abuse, and safeguards for adoption. It has provisions for the elimination of female sexual surgery. With respect to penal matters, children must be detained separately from adults. I do not know if that is the case here. It forbids the death penalty for people under the age of 18. There is one exception in that children of age 15 can be soldiers.

Now that I have given you a little taste of what international law covenants can provide for you I would like to switch to my last topic. What experiences can we get from comparative law, from the actual experiences of other countries? My suggestions in this area are:

1. That you look systematically at as many constitutions as you can with respect to these four groups of people – actually I would suggest that for every topic we are considering – to systematically canvas the constitutions of the world – and glean from them things that might be helpful to you.
2. You should consider holding a follow up conference that deals with specific drafting and specific detailed language issues. The South Africans went to a number of countries to consult on these issues. You might consider doing the same.

In terms of countries, I can tell you there are 3 basic models for protecting these disadvantaged groups:

1. The silent constitution (US). The US Constitution does not mention women. It is only in the last 30 years that constitutions have specifically put in the gender word. For instance, sexual orientation may or may not be one of the areas you will put in the Rwandan Constitution. For instance clones are not something the society is thinking about and so today it is not in constitutions. But, in 20 years it might be.
2. Constitution that mentions specific categories of people and makes clear that the constitution covers these people and the constitution trumps any other type of law. South Africa has followed this model.
3. Constitution that provides protections for certain groups but has limits on the coverage. A lot of constitutions will say that protections are fine except where they conflict with religious customs, etc. There are a number of countries where the protections do not extend where there is a conflict with a traditional law. This means that the rights of women will continue to be deprioritized because of the continuation of these types of practices.

I will mention a few countries in specific. In terms of the US, we have heard how the system of checks and balances was set up to protect minorities. We have heard about the 14th Amendment to the US Constitution only being added after the fact. In the US we are not the ideal role model and most of these protections have come through statutes.

Another group of countries has developed the consociational model – for example Switzerland. I'm not saying you should follow that. It has been criticized, for example as in Apartheid South Africa. There is also the model of Lebanon. In Lebanon the President is from one ethnic group and Prime Minister is from another. There are countries that give quotas in Parliament. The Palestinians gave 5 Parliamentary seats to the Christians, for example. In South Africa, the ANC reserves one in four seats in Parliament for women. South Africa has the most developed protection. It has 17 grounds – including sexual orientation – for protection. The Constitution protects affirmative action and children's rights. The Constitution makes clear that the South African courts may use foreign and international law. And anyone with a public interest can seek to enforce the laws, even if s/he is not an otherwise interested party.

I do not have time to go into the different countries here to look at how they expand on these protections. Uganda and Zambia have the word "tribe" in their protection. Others provide for the protection of the family. This can be problematic, as often it becomes a way of keeping women restricted. Rwanda, I was interested, has a provision under which only monogamous marriages are recognized.

I hope this is but the first of my interactions with the Rwandan people. I am willing to work with you in this process either by phone or here in Rwanda or by inviting you to the US.

I'm going to end by quoting Amaqar Kabal, assassinated leader of Guinea-Bissau. He had a notion that élites must commit class suicide. It is necessary for us to commit class suicide and fully identify with the most oppressed in each of our countries. We are going to commit ourselves to the human rights state that Rwanda will become as a beacon of light to the rest of the world and that can help heal the spirit injuries of the Rwandan people.

Karthy Govender (South Africa): To add to the idea of spirit injuries, the apartheid regime constituted a direct attack on the spirit. The way for us to deal with it was to infuse the constitution with a respect for dignity.

Claudine Gasarabwe (Rwanda): I will address the rights of women and children. In Rwanda, our Constitution consecrates everyone's rights before the law, though not with particular language for women and children, as there is in some nations. The Constitution specifies the rights of children, and delineates the rights and duties of parents, including the need for procuring primary education, which is free and compulsory under Rwandan law. However, this condition is not universally observed: Rwanda does not have the financial means for free, universal primary education.

Legislation was passed in 1988 that consecrates the recognition of children and their rights, against sexual violence and forced marriage, and provides repercussions for the abuses they suffer.

Women were traditionally viewed as a side-person, incapable, minor. In the example of commerce, women needed spousal approval to begin her activities. In written law, married woman became automatically incapable under the law. In the 1998 law, we saw the "incapacity" of the woman disappear, although some discrimination remained in this law. We find a kind of parental authority, or paternal authority, in that the husband is recognized legally as the head of the household. In a conjugal household, the life of the husband predominates over the interests of the wife. Furthermore, women and men may encounter different punishments: in the case of adultery, for instance, the 1998 law represents an evolution, but this crime is still more severely punished for women than men. Also in the matter of acquisition of nationality, a foreign spouse does not necessarily receive Rwandan citizenship: Rwandan men who take a foreign wife can easily obtain citizenship, while this is not true for women who take foreign husbands. I urge Rwandan women to push for their rights, and urge them and the current government to consider the rights and role of women.

Fatoumata Siré Diakité (Mali): In the Malian Constitution, the rights of women and children are mentioned and protected. One topic we have missed is the phenomenon of sexual traffic and

exploitation of women and children in Africa. Particularly in West Africa, women and children are trafficked to work in plantations, or trafficked for sexual use in Europe or elsewhere. I am President of the coalition against the trafficking of women, with nine African countries represented, and we are trying to develop a plan of action to counteract this trafficking. As for international protection for women's rights, there is a treaty and protocol that Mali ratified, and it is important for Rwandan women also to sign, in addition to the rights of Humans and Peoples convention.

Rwandan women are on the right track, by sitting on various commissions, even if they are not so numerous. Women in Rwanda need to begin, if they have not yet, a review of the associations in Rwanda, and to do comparative work on rights of women in African nations. In addition, you have to work to overcome your weaknesses together, rather than to follow the divisions engendered, often by men. Women Parliamentarians and women's NGOs should join to form a caucus, in order to have more weight, so that they might propose and push through laws in Parliament, and to improve their advocacy. Furthermore, Rwandan women should do an inventory on domestic laws and international treaties, including those that Rwanda has not yet signed. Finally, my Rwandan sisters also require the gender-sensitivity and assistance of male Parliamentarians and others if they are to meet these challenges.

Joy Ezeilo (Nigeria): Since we are talking about constitutional development, I will focus my paper on gender and constitution making in Nigeria. There is little acknowledgement that gender is an important element of defining substantive aspects of rights. In Nigeria, the absence of women's rights and representation was notable, particularly in 1979 when fifty men and no women sat together to write the Constitution. The women protested, but the military leaders were insensitive to their requests. We find that, in fact, the women's role in the nationalist movement did not translate to adequate representation in constitution-making, nor inclusion of women in government or decision-making. The bill of rights did not specifically include women, but it did limit discrimination based on sex. There is no visible mention in the current Constitution of women, despite its being the most recent in Africa (1999).

What do women really want to change in constitution-making? Even though sex discrimination is prohibited, there are other blatant aspects of discrimination: for instance, women cannot bestow citizenship on their husbands, whereas men can have citizenship for their foreign wives. Also, women's socioeconomic rights (health, prenatal care, economic equality) are consigned to a non-justiciable section of the Constitution. We women in Nigeria have been organizing to change this, and have recently been reevaluating our strategies, because we realize that without drastic measures, women will not be included, nor will they make specific recommendations of what they want to see changed. Women have been part and parcel of the Citizens Forum for Constitutional Reform, and in the organization for which I work. We are trying to create awareness of the Constitution and educate grassroots women, by organizing rallies, IC materials, and using media to educate both men and women to bring their views to bear. We will collect their views and present them to the National Assembly, which is considering this issue as an amendment to the Constitution.

There are different models, but even an equal opportunity act or a specific mention of men's and women's equality in the Constitution is important. We are also moving toward the criminalization of domestic violence, and some states in Nigeria have adopted laws to address this problem. The law is gender-blind, but gender bias is demonstrated in recent constitutions, as a maintainer of distinctions and of categories of rights that tend to marginalize women. Most important rights that apply to women and that are included in the Constitution are, again, non-justiciable.

Théodore Holo (Benin): I would like to react to the issue that is being discussed. First the principles, then the realities, and finally the activities to be undertaken.

From the principled point of view, the Constitution of Benin has rules that can protect minorities and vulnerable groups. In Benin you also have the principles of interregional equilibrium. So all communities according to our Constitution have the right to speak their language. And education for children is compulsory and in principle free. Article 6 of our Constitution ensures the equality of all before the law and the state protects the family and takes care of all people. So in terms of principles, we have made progress.

But the reality is that in many areas of life women have not conquered economic power. Those who know Benin, women are integrating areas of trade – pharmacy, the bar, teaching –women are strongly represented. In the political realm, the third Personality of the State has been a woman. Today the chairman of the Constitutional Court is a woman. In the National Assembly, out of five Parliamentary groups, two are headed by women. There is a strong resistance to the status of women. Since 1994, the code establishing the status of women has been under discussion in the National Assembly, but has not been enacted due to lack of political will. There is also a negative aspect of the trafficking of children – an issue on which I will not spend any more time.

Now for the actions that should be taken. In any society, freedoms have had to be conquered through effort. Beyond stating constitutional principles, we should think out the mechanisms to deal with these problems and help everyone enjoy the rights enshrined in the Constitution. In the future, girls shall have access to free education. Because it was noticed that there were more boys than girls in schools, parents have been paying fees for the boys but girls can now have access to free education in rural areas.

My second comment is on the steps that civil society should take to alleviate the problems women face. Women do not exist legally in certain areas. In fact, men were called upon to vote on behalf of women. But since 1990 we've seen some progress in this area.

My third comment is that we should take into account traditions that promote solidarity. But this must be based on the principle of inclusive, not exclusive democracy.

Question and Answer Session

Abdoulaye Sékou Sow (Mali): This is a very serious topic indeed. One can say that all the ideas we have heard are very important indeed. But I am going to make the situation even more serious. When it comes to minorities I did not hear about one particular group — the opposition. The opposition is a minority, because the opposition defines itself in reference to the majority. Minority parties are mishandled. The opposition parties are often arrested and even eliminated. In our country we had this problem, which is why we decided to give legal status to the opposition. This is the suggestion I am making to our brothers in Rwanda.

Zam Zam Nagujja Kasujja (Uganda): We in Uganda have a Constitution that is very elaborate on the issue of the rights of women and children. There will be a lot to say about that but I invite my sisters in Rwanda to read those provisions. The thing I wanted to comment on is that the women here should focus on how women are to be incorporated in decision-making levels. In Uganda we have women's representatives on the local level. One third of the local level representatives must by law be women. And we have a provision for the fair representation of women on all bodies. That is the only way that women will be able to fill in the gap. So my sisters in Rwanda make sure you are on the table.

Aloys Hakizimana (Rwanda): Thank you for the opportunity to talk about the protection of handicapped and women's rights. I want to say things that will not be pleasant to women. One must admit that Rwanda, like many countries in the world, women's rights are trampled on. However, I am worried that Rwanda might start in the 4th gear. When you look at the law on elections you see that women are given important roles. There is room for women so that they can have access to leadership roles. In some cases there is a chance that we may be led by women alone. You may have all women representatives. So, according to the Constitution we should have provisions that protect women's rights, but I would like to request that there should be a break once the protection is assured, once we reach a certain level of protection. Then we do not go on giving all these favors to women.

Marie-Thérèse Mukamulisa (Rwanda): I would like to answer the questions that were asked by Professor Wing regarding the ratification of the convention on Economic, Social and Cultural rights. I think that Rwanda ratified that convention in 1975. As for the reservations expressed with regard to the conventions, the major one is in relation to the crime of genocide. But this reservation was lifted after the genocide in Rwanda.

And we should congratulate Rwandan women on their lobbying. Today, people who committed rape during genocide or sexual violence have been included in the first category of genocide, alongside the planners of genocide. So, I would like to say that it is not enough to enumerate the principles or laws that have been enacted. But what is important here is to maximize the efficiency of the laws. Furthermore, it will be important to see what sort of measures we could have in our constitution so that gender will be covered by the implementation of the laws.

Rwanda: Let me add to what my sister has just said. I would like to say that women in this country played an important role for civil society and in political organs where they managed to be. Let me mention some things women have done. They have organized a seminar in May in order to see what women can contribute. Recommendations from this conference were made on gender mainstreaming in the life of the nation. To have women in important organs, we need more education. Female human resources in Rwanda are limited. We laid emphasis on the education of the girl child so that more girls are sent to school. Another point I would like to mention is that of women in Parliament. We have a National Council of Women, just like the youth have a National Council of Youth. We shall continue in this direction to ensure that women are respected everywhere. I would like to answer the question raised by the representative of Rwanda on children's rights and the prevention of sexual exploitation. This law was adopted in March of this year. It was in response to problems experienced by orphans. There are children who have no news of their parents. We have orphans heading households and there are problems that were experienced in this country such as small girls who are forced into marriage. And that law is in keeping with the convention on children's rights.

Adrien Wing (USA): I agree with the Prime Minister of Mali that political oppositions are minorities as well. In many constitutions, one of the grounds of protection will be on the basis of political opinion and belief; adding these words to the Constitution can help on this count. Forms of government and checks and balances can help to take minorities into account.

Once protection based on gender and minority status is reached, one person said, how do we end this protection? You're right, once it is reached, you will not need it. But I think that it will take many centuries to eliminate these kinds of "–isms" and discrimination. In my country after 200 years, we have not yet handled the issue of race. So perhaps, in the 22nd or 23rd centuries, we might need to remove these protections.

Théodore Holo (Benin): Equality should not only be theoretical, but there have to be mechanisms to enforce these protections every day. On another point, in the last elections, a woman was running for President for the first time, but she was not able to benefit from the concerted support of the women in the country.

Claudine Gasarabwe (Rwanda): Rwanda has a women's collective called Pro Femme Twese Hamwe, in which thirty-eight women's groups are joined in coalition. They are an advocacy group in political life, and able to lend their weight to plead their cases. This group has pressured to be included in constitutional process, for instance, and encouraged sensitivity training for women to have a part in the drafting of the constitution.

Fatoumata Siré Diakité (Mali): The law on paper is often well written, but it is the application that is problematic. The language in which laws are written is not accessible to women. If the women do not know about the laws that affect and support them, then the women might as well not have laws.

The correct application of laws for the benefit of women is dependent on political will for them to have an effect. There is also a problem of mentality, among both men and women, some of whom think they are born to cook and say 'yes'. Some women fail to understand why some women want to fight for their right, and there is a deficit of information for women to know about their rights. Finally, some information: the UN has provisions, institutions, networks and publications that can support women's groups. The special rapporteur for women is important for women associations to send information and receive information about conferences, or the plans of actions drawn up, as in the Vienna conference of 1993 or the Istanbul document about housing.

Joy Ezeilo (Nigeria): Let me advise my sisters here to try to speak with one voice. The problem is that the lack of concerted action has made it impossible for us women to lobby, demand and agitate for recognition under the law and to implement laws that already recognize women's rights. We need to engage in cross-border networking, across Africa and with western feminists and other activists. For instance, in the issues of women's rights to land, inheritance, property and housing—in which I have been personally involved—our northern and international sisters are a crucial source of support. Last year, for the first time, we pushed through a resolution on land issues, which was upheld this year, with forty-nine co-sponsors and promoted by Mexico.

Karthy Govender (South Africa): Let me add another example. Botswana is a very patriarchal society, but one woman challenged the system, particularly to make claims for children's rights. Today she is senior judge on the high court, and Botswana has changed considerably since then, thanks in part to her.

RIGHT TO A FAIR TRIAL
Moderator: Joy Ezeilo (Nigeria)
Specialist: Robin Palmer (South Africa)

Robin Palmer (South Africa): This paper is concerned with the constitutional incorporation of fair trial rights in the criminal courts of the country. The way I am going to approach this paper is to consider general issues about fair trial rights in nine separate points. Those points will cover issues based on South African and international experience for possible adaptation into the Rwandan Constitution, keeping in mind that no single country can ever serve as a model.

The first point I want to mention is that we are now talking only about criminal trials. We are not taking about civil trials. I mention this because the concept of procedural fairness in civil trials has become quite a big issue in South Africa.

My second point is that when we talk about rights, we have to recognize that the rights contained in the Constitution are not different from rights that are found outside of the Constitution. You can get criminal trial rights in the common law, in various statutes, and in various practices of the Court. The point of "constitutionalizing" these rights is that you are raising them to a level where they cannot be overridden.

Let me begin with an example by referring to the way these rights are strengthened in the South African Constitution. The supremacy clause of the South African Constitution reads at Section 2: "Supremacy of the Constitution: 'This Constitution is the supreme law of the Republic. Law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.'" This supremacy clause has important consequences for the criminal justice system. Any law and any written rule of law must comply with the right contained in the Constitution. If the law or rule does not, it is invalid. Not only must the laws comply, but so too must the conduct of the magistrate or judge. The South African Constitution furthermore provides that this clause binds the executive, the judiciary, and the legislature. A brief example: There is a rule of criminal procedure that you cannot disclose a person's previous convictions to the Court before he or she is convicted. I was appearing at a trial in Johannesburg, in which a prisoner wearing green prison clothes was brought before the Court. The lesson we took away from this experience was that by standing trial in this green prison outfit, the prisoner is in effect signaling to the Court that he is a criminal. So the conduct of dressing him in green affects his right to a fair trail and is unconstitutional. At the time that decision was made, the Constitution was not yet in effect, but the Court relied on the common law right to a fair trial. I wish to emphasize the supremacy clause because that permeates the way our civil procedure has been affected by the Constitution.

My third point is to analyze what we mean by the concept of a fair trial. When we speak about a fair trial, we are speaking about procedural fairness. The goal here is not to solve poverty or the problem of a lack of resources; the point is that the procedures must be fair. What, then, is meant by fair procedures? Let us take for example the right to call a witness. Preventing an accused person from calling a witness is unfair. If you stop someone from cross-examining a witness, that is unfair. I emphasize these points because it is not merely the accused who has a right to a fair trial, but the society as a whole also has a right to a fair trial. The procedures must be fair for the State (the prosecution) as well, because the prosecution represents the people—and the people also share the right to a fair trial.

However, in our system, in most adversarial systems, and even in inquisitorial systems, there is an inequality of resources. The state has policemen, investigators, time, and so forth, and it is in recognition of that inequality of resources that we give the presumption of innocence. This presumption requires the state to prove guilt, and this levels the playing field.

My fourth point is that having dealt with what constitutes a fair trail, we are now able to define fair trial rights—the rights we are going to give to people to ensure procedural fairness. You will note that I have not defined who the individual is. That is because the confusion of the terms for individual—accused, suspect, convicted, and so on—has caused problems in many jurisdictions.

As a fifth point, we have to keep in mind that when we put fair trail rights (due process rights) in the Constitution, we have to consider other rights in the bill of rights that may affect the criminal justice process. Let me give you a few examples. Section 14 of the South African Constitution

establishes a right to privacy. Section 35 contains the due process rights. These rights apply only to arrested, accused, and detained persons. But under Section 14, everyone has a right to privacy, including the right not to be subject to searches and seizures. But Section 14 rights may conflict with rights under Section 35. So we cannot consider these rights in isolation; instead we must look at the interrelations between these rights.

Another right, which may have a bearing on criminal process, is the right to dignity, which includes the right to information. Under this right, based on Section 32 of the South African Constitution, defense lawyers have a right to all witness statements in the State's files.

As a sixth point, we have to consider the fairness of the trial in the context of the various trial stages. Every trial has a pretrial stage, a trial stage, and a post-trial stage. The pretrial stage is the period of investigation leading up to the trial. The trial stage is where one is charged in court and has to lead witnesses. The post-trial stage relates to one's rights after conviction, for instance whether appeals are allowed. We have to keep in mind that, while certain rights are limited to the trial stage, what happened pretrial could affect what happens in the trial stage. In that sense, all the trial stages are interrelated.

Point seven: There are **six steps** that one should follow when deciding what constitutional due process provisions should be contained in the Constitution.

First, ask yourself what level of protection you need for each type of criminal court in your system. In South Africa we have four types of courts: high courts, regional courts (which can administer seven to fifteen-year sentences), magistrate courts (two-year sentences), and community courts, similar in principle to the proposed *gacaca* courts, where lay-people decide minor criminal cases, and have limited power to punish. The idea is that these community courts are more compensatory than penal. One notion is that these courts should have all the protections of the Constitution. Alternatively, you may decide that in *gacaca* you may not provide the same protections, depending on the types of cases that will be tried there and other considerations. My suggestion, when it comes to the level of protection, is that the concept of a fair trial is inherent in African jurisprudence, going back to courts under the tree; fairness was the overriding principle of this conversation, when the elders listened to both sides, and everyone could complete his or her full submission without being interrupted. The constitutional protection of due process can be contained in each court, yet there is nothing stopping you from having a clause delineating the level of protection depending on the level of sophistication of the various courts.

The **second step** is to determine which parties are entitled to claim these protections. Who in the criminal justice system should be protected? In South Africa, only arrested persons, accused persons and detained persons have protection. The question, then, is what about suspects? This absence has led to creative jurisprudence, where some courts assert that suspects have all the rights of detained persons, while other courts say that the suspect has none. Be careful in drafting, to weigh whether or not suspects need to have these same rights. I think you need to separate the label for each person in each stage of the process, and decide what protections the person needs at that stage.

Step three is to decide how terms or words should be defined, and to decide which terms or words should indeed be defined, and which should terms or words should be left open. One example from South Africa is that much constitutional litigation arises from bad drafting. For instance, the Constitution does not define what a detained person is, a fact that has led to claims that he or she is the same as an arrested person, and other debates. Also, criminal procedure gives arrested persons the right to be informed about the consequences if they waive their right to remain silent. However, there is no specification of what these consequences should be described as. Additionally, we cannot predict what a fair trial is, so we should keep this term undefined, because we cannot predict the kinds of unfairness that may arise.

Step four, after deciding what to define and not to define, is to compare the content of the initial draft of the Constitution to the other clauses for bills of rights that may affect criminal procedure, in order to clarify ambiguities. For instance, we have contradictions or debates within our Constitution between different clauses that mention similar items. Furthermore, in Section 14, everyone has a stated right to privacy, including the right not to endure search and seizure. Other constitutions, however, specify "no unwarranted search and seizure", with a qualifying term, whereas in South Africa, there is no qualification.

Step five: compare your draft due process clauses to the ICCPR and other international treaties to ensure compliance with international law obligations.

Step six: compare the due process clauses to relevant rights contained in other laws and statutes, such as the criminal code, to identify and modify the necessary elements. Particularly when your lower court judges are not so sophisticated, they need to know how to apply the Constitution on a daily basis. In South Africa, there are annually 2000 criminal matters in the high courts; regional courts see 64,000 criminal court cases annually, and the magistrates' courts have 3.2 million criminal cases annually. Community courts are in the preliminary phases.

Another step is that once the Constitutional Court makes a decision, or the Constitution delineates a provision, then you must ensure that the criminal codes correspond to and adopt these new provisions. Once a Constitutional Court decision is made, the ruling should be immediately effective in lower courts. There is also a question of interpretation: we have not dealt with interpretation as such, including its methods, internal modifiers and qualifications, the relation of the limitation clause of the state of emergency, and others. Once you find a law unconstitutional, you cannot first cut down the law in terms of the limitation clause; the final option may be to declare a state of emergency. Issues and methods of interpretation need to be addressed prior to the final drafting of Constitution.

A final point, Section 35-5 of South African Constitution regards the treatment of unconstitutionally obtained evidence. To simplify, the American approach is to exclude all unconstitutionally obtained evidence. A second approach is that all evidence be included, and that the Courts should decide what weight to give the evidence. The South African approach has sought a middle ground: evidence must be excluded if it would lead to an unfair trial or undermine the administration of justice.

Kebreab Habte Michael (Eritrea): I will deal with a few points that Professor Palmer has not had time to raise. First, let me say that some other countries have opted for small and brief constitutions unlike the very detailed South African Constitution.

Professor Palmer has defined what a fair trial means, but I think he has left out some points. When does a fair trial start? The pretrial period runs up to the time the person has been brought to court. Professor Palmer has told us that illegal means of obtaining evidence are not recognizable. He has tried also to address the presumption of innocence. I think one of the cardinal principles is the presumption of innocence. This is a very important concept.

The other points that were not raised relate to types of courts. When we talk about special courts, they too should follow normal procedures. This is different than kangaroo courts, such as in the USSR, in which decisions are rendered without any fair trial. A court of law is a court which is constitutionally established and must follow constitutional rules.

We also have to consider the independence of the judges and the right to a fair trial. Another point to remember is the right to a speedy trial. Justice delayed is justice denied. The right to present evidence must also be upheld. Professor Palmer has mentioned some of the international documents relating thereto. These documents include the Universal Declaration of Human Rights, Article 10; Article 18 of the International Covenant on Civil and Political Rights; Article 26 of the American Declaration; and Articles 7(1) and 7(6) of the African Charter. Also, we must remember that that the right to a fair trial cannot be revoked, even under an emergency clause.

Fair trials also have another meaning—namely that justice can not be about wealth. The poor cannot afford to buy justice and should not have to. A person charged with a criminal offense must have the right to a lawyer. Each lawyer in my country has an obligation to give legal services to those charged with crimes subject to sentences of ten years or more. If a person cannot be defended by a lawyer, the possibility of conviction is much higher. The accused must also have the right to talk privately with the lawyer.

In 1996, Eritrea opened special courts on corruption and embezzlement. These courts are mostly composed by the army and report directly to the President. Hopefully with the new constitution this court will be abolished.

The other insight from the Eritrean experience is that during independence there were some people who collaborated with the enemy. We had to face the question of how to deal with these people. Should they be brought to court? In Eritrea we classified them into two groups—serious

criminals and minor criminals. Serious criminals had to be brought to trial. Minor criminals were given six months community service. Even those who committed serious crimes could get a reduced sentence if they reconciled with the family of the victim. This process was not about procedural fairness, but about social reconciliation.

Question and Answer Session

Patrick Matibini (Zambia): How does the trial of the press relate to the discussion? A second question is about the tribunals. How do you impart the concept of a fair trial in a tribunal, considering that by definition tribunals tend to flexible in terms of rules of evidence? Is this admissible?

Gerard Niyungeko (Burundi): I would like to underline that the right to a fair trial is a synthesis and convergence of several other rights, notably the access to a judge, the right to an independent judge, the right to a defense, the right to appeal, the presumption of innocence, and others. Secondly, since we are sharing experiences, in Burundi last year we revised the penal procedure code to accord accused persons a fair trial. Secondly, for the first time we recognized the right to have a lawyer even before the trial.

Henry Richardson (USA): Let us assume that the trials of génocidaires will take so long that this situation should be addressed by the Constitution. In this context, I wonder what approach you might suggest constitutionally to the adjustment and flexibility of due process principles regarding alternative approaches to completely disposing of these genocide defendants? How do you do this without derogating from the fundamental rights of due process, especially for other defendants, with respect to other crimes and other trials?

Fatoumata Siré Diakité (Mali): In Mali, in articles 9 and 10 of the Constitution afford the accused the right to the defense attorney of his or her choice. Otherwise, if the accused does not have the financial means, a defense attorney will be appointed by the Court. The length of detention cannot exceed forty-eight hours, as written in the text of the Malian Constitution. My first question relates to the Truth and Reconciliation Commission in South Africa. Did that process really permit deliberation, and did it base itself on any international and domestic laws?

Secondly, is *gacaca* based on legal texts, and in the *gacaca* rulings will the presumption of innocence be respected? Will the accused have access to a legal defense?

Robin Palmer (South Africa): I have a few comments in relation to the questions asked. There are various offences that the media can be charged with in South Africa when it reveals too much information about an ongoing trial. Secondly, in answer to Burundi's question, I did not deal with specific rights included in the free trial. In a country like Rwanda, it might make sense to decide that the right to a fair trial should generally apply to all courts. In relation to *gacaca*, maybe it makes sense to leave the right to a fair trial in a general sense, as there is an inherent notion of fairness that can be understood even without a specific legal education. This general right to fairness could still be achieved through *gacaca*.

The third question, from the USA, regards how to deal with the genocide question and what can be done to clear the huge backlog that exists. I do not have enough specific background on how to address the problem here. The South African model provides one possibility, namely to have special provisions in the Constitution that deal with that problem through an amnesty program. Another alternative is through the *gacaca* courts.

On the question from Mali, in relation to the Truth and Reconciliation Commission, the procedure has been controversial, but largely successful and accepted. This is in part due to the personality of Archbishop Desmond Tutu.

As for the question on fair trial rights in non-criminal tribunals, I can say that in South Africa we have Section 33 of the Constitution, which gives everyone in administrative hearings the rights to procedural fairness. This right is almost identical to the terminology for fair trials. So, fair trial rights apply in both types of tribunals in South Africa.

Kebreab Habte Michael (Eritrea): In relation to the press, Eritrea has a specific provision on the rules that the media must apply. I think that courts must abide by their code of ethics – the law – and the general demands of society. Under our Constitution, the alleged criminal must be brought to court within forty-eight hours unless there is an indictment in place. This is generally provided for in the country's criminal procedures. The Eritrean Constitution only provides broad policy guidelines, while the rules of criminal procedure provide the specific rules. As for dealing with reconciliation and genocide in Rwanda, South Africa can be a model. There is a choice between justice and truth. It is very difficult to prescribe certain things while sitting here. But we can not allow a vicious cycle to take hold. The essence of forgiveness is key. One Parliamentarian in South Africa has said that as a nation we must forgive. The whole world has to help you in such reconstruction and forgiveness.

Rwanda: I would like to respond to the question about the *gacaca* jurisdiction. I was involved in the development of the *gacaca* concept, so I would like to take this opportunity to explain the *gacaca* concept. The question is whether the *gacaca* jurisdictions are based on a law, and the answer is yes. There are two laws. The first is a law that concerns genocide acts committed between October 1, 1990 and December 1994. This law was promulgated in 1996 and is very specific. We also have a penal code according to which any murder can be punished by death. But this law has not been implemented. Why? Because a lot of people were involved in the genocide acts. There were some genocide authors that involved as many people as they could in the crime for political reasons.

This law distinguishes between four categories of criminals: first, the planners of the genocide. The second category covers the people that actually killed under the instructions of others. The third category is those people who caused injury to others without killing. Finally, the fourth group are those who caused damage to property. There are different sanctions which the tribunals can apply to each level of crime. The maximum penalty for crimes in the first category is death, while for crimes in the second category it is life imprisonment.

The law provides a mechanism for people to take responsibility for the crimes they committed and also allows for detailing the circumstances of the crime. Those who admit what they did will seek pardon, and their penalty may be reduced. This is the spirit of the law. In traditional courts, trials have been going on since 1996. We have realized that more than 100,000 people committed acts of genocide, and many more were involved. We realized that it might not be possible for the traditional courts to solve the issue. We thought, then, that those involved in genocide should be involved in reparation. Therefore these laws were passed.

We have four levels of *gacaca* court: the cellule level, the district level, the sector level, and the provincial level. At the first level, they identify criminals and explain what happened. This happens in the community where everyone knows each other. The first task is to come up with a list of those involved and then submit the list to a higher level. At the second level, the accused is sent to the district, and the fourth category criminals go to the traditional courts.

The question was whether or not *gacaca* was based on law, and the answer is yes. These two laws have been adopted by the Parliament after community debate. We have launched a dialogue with the community.

Are there lawyers in the *gacaca* program? The *gacaca* program has nineteen judges involved, including a committee of five who write the reports. One judge explains the files to the communities. Let me point out that genocide occurred in daylight. These were not hidden acts. They were massive crimes committed openly, so the community knew about these crimes.

Tito Rutaremara (Rwanda): I would like to talk about the concept of pardon. When we introduced the *gacaca* jurisdiction, we examined other models. We went to South Africa and looked at the Truth and Reconciliation Commission model. But the Rwandan people did not accept amnesty. Throughout the history of Rwanda, the government of the day has granted amnesty, and throughout history, the government has been involved in the massacres and then granted amnesty. This occurred in 1962 and in 1963. Each time the government caused a genocide, it made sure there was a decree that granted amnesty. Amnesty encouraged impunity. For these reasons, we wanted to try something else in Rwanda. There were so many people involved in genocide. We looked to the *gacaca* concept, an idea that was first introduced in 1995. The lawyers, however, did not accept that the people could provide

for their own justice, and it took years to convince the jurists. Now we need to convince the victims. Then we need to convince the other side, and then we have to convince the prisoners in jail. But we had to develop something other than the amnesty granted in the past, which encouraged impunity.

Aloys Hakizimana (Rwanda): The fact that we want to expedite the trials is very important to reconciliation. Once the trials are carried out, we hope that there will be no further problems, because the truth will have been unearthed. The children and the future generations will no longer regard themselves as victimized persons because the truth will have been unearthed.

Otive Igbuzor (Nigeria): The Nigerian Constitution, section 36, provides elaborate provisions for the right to a fair trial. These are beautiful provisions in the Constitution, but the practice is quite different. Even as the Rwandans are engaged in the process of crafting the constitution, civil society must hold the government accountable and bring about the reorientation of the police, and other issues. Also, civil society must form coalitions to ensure their strength and ensure that their views are incorporated.

Elisabeth Pognon (Benin): The right to a fair trial does, as already mentioned, depend on several rights. One aspect we did not address is the right to be tried in a reasonable period of time. The accused might be waiting for years for a verdict that might never arrive. The Constitutional Court has to intervene and mention that the procedure developed for trials is itself too long, and that this delay is itself not in line with the constitution.

Bernadette Mukartabana (Rwanda): Among other things, I have been a member of the Kigali Bar Association since 1997. I have been a member of the Commission that studied how to address the problem of genocide and put the *gacaca* process in place — a system inspired by traditional *gacaca*, which permitted local people to address crimes and mediate conflict in their communities. During the procedures we followed to adopt the *gacaca* process, we considered all of the rights addressed thus far, but we needed a solution relevant to Rwanda. We saw that the traditional courts might offer a solution, since we did not have enough judges or lawyers to accommodate the usual justice system. We needed to give verdicts to the perpetrators of the genocide in a reasonable period of time. Furthermore, if the society is implicated in designing and participating in justice, we thought the verdicts and justice would be more useful and lasting. We considered the Truth and Reconciliation Commission model. But in the usual justice system, victims are required to provide evidence, and in the genocide context, they would not be able to provide all the proof. If all the society is together to seek justice, then perhaps we can arrive at the truth as a community. A majority of the population, pushed by authority figures, committed the crimes; we thought this would be a good method to help the people to escape from this cycle of violence. This fall, the "persons of integrity" will be elected from the hills, to be judges in this process.

Louis Aucoin (USA): The United States Institute of Peace has worked with the Rwandan Attorney General (*Procureur Général*) on this topic. Here are some clarifications: first, the *gacaca* law is a useful and perhaps only solution for the practical problem given the quantity of prisoners. On the other hand, the *gacaca* process is a violation of international human rights law. However, the law allows for exceptions in unique circumstances. While it is not an easy question, one can suggest that the circumstances in Rwanda currently merit a state of emergency to constitute an exception to international fair trial laws. It is not the first time that a country has used this exception. For example, Northern Ireland, because of the violence that threatened the area, went before the European Court of Human Rights, which agreed that Northern Ireland could except some of these rights. Personally, I agree with this exceptionalism, since there is a huge practical problem of the genocide prisoners who will stay in prison without any rights at all.

Karthy Govender (South Africa): I want to reflect on our reconciliation issues. I want to say that the perpetrators in South Africa were few, but the beneficiaries were many. We wanted to put certain leaders on trial and did, in fact, try the former Minister of Defense. The South African government

shredded documents and made it impossible to prove that the Minister of Defense was actually linked to the killings. What we were able to do was to link some of the killings to junior officers. The trials took many months and cost millions and millions of Rand.

In South Africa we opted for a process of amnesty. It was not a blanket grant of amnesty. There were three committees that looked through the situation: the gross violations of human rights committee, the reparations committee, and the amnesty committee. Individuals had to apply to the committee and demonstrate that the offense was committed with a political motive in order to get amnesty. Some of the people granted amnesty were really bad people. One person infiltrated the African National Congress, found out who the chief operatives were, and sent bombs to them. The details are gruesome, and yet he received amnesty. People have been quoting Archbishop Tutu here, who said "once you make the decision for amnesty, you must know that you will not grant amnesty to nice people." You have to grant amnesty to these people to close the process. Unlike the Argentines and the Chileans, I think we have closed this process. There is a strong body of opinion in South Africa that the Truth and Reconciliation Committee process may have been in violation of the Geneva Convention. But it was felt that this was the only solution available, and the drafters opted for it.

George Mugwanya (Uganda): I want to point out one issue, without sounding overly academic. We still may not be able to say that one system is right or wrong, though I believe that the notion of amnesty seems to conflict with international law. In the mid-1990s, a case was heard in South Africa that found amnesty to be constitutional. Amnesty may not be reconcilable with international law. But with regard to Rwanda's approach, we have to appreciate that justice is an important part of reconciliation. But how do we achieve this justice?

Robin Palmer (South Africa): The point made by George Mugwanya is very valid. Amnesty is in conflict with international law. Now that we have heard about the *gacaca* court system, I am sorry we did not follow you in South Africa, as the *gacaca* appears to be a more satisfying system than that which we adopted. The level of responsibility in *gacaca* may be higher than in the South African amnesty.

On the point raised by Nigeria, I agree that NGOs can become very useful in such circumstances. In terms of our standing provisions of the Constitution, virtually anyone can bring a test case.

As for Benin's question about including specific rights, I think the point made about the speedy trial is good. But too rapid a trial can also lead to an unfair trial.

Kebreab Habte Michael (Eritrea): Justice is a very good concept. People say there is no justice in this world, because the bigger fish eat the smaller fish, and so forth. But justice should not be a source of revenge.

DAY FOUR: Thursday, August 23, 2001

AFTER RATIFICATION: PROTECTING, ABIDING BY, RESPECTING, & AMENDING THE CONSTITUTIONAL PROCESS IN OTHER COUNTRIES

Moderator: Abdoulaye Sékou Sow (Mali)
Specialist: Harold Dampier, Jr. (USA)

Harold Dampier (USA): Today's topic is about post constitutional ratification and implementation. When I thought about this topic, I thought of two themes: that the objective is both to *defend* the Constitution, and to legitimately *amend* the Constitution. The United States does not have such an experience, because the President is prevented from amending the Constitution unilaterally and does not remain in power for long periods of time. We can compare this with Yugoslavia where former President Milosevic attempted to continue his term indefinitely, resulting in political instability.

We will review some provisions found in constitutions internationally. Three features of international constitutions come to mind regarding the constitutional amendment process: first is the public's will to amend the Constitution. Second is the transparency necessary to amend the Constitution. The final factor is legitimacy, that the amendment reflects not merely one person's will, but that of the majority. Most constitutions allow the assembly to amend the constitution and other countries allow amendments through public initiation, such as petitions, and lobbying the assembly for a revision.

Among the constitutions that I have reviewed, the criteria for initiating an amendment range from a two-thirds vote to a one-fifth vote. The first step is initiation of an amendment by resolution in an assembly and the establishment of a commission. The second step is the transparency of the process, and the third is the production of a draft amendment that is then opened to public debate. There are multiple ways of opening up the public debate. It can be done by a process of consultation with leaders of the civil sector of society and grassroots education about the amendment. This requires funding and the support of the international community. After this process, the assembly must submit the amendments for a final vote. Most constitutions range from two-thirds and one-fourth for a constitutional amendment to pass. Yet in some countries such as Eritrea, an even higher majority of votes is required, in part because a President may seek to extend power for longer stretches of time.

If, after an amendment is presented to the assembly through all of these processes, the amendment fails, I would recommend to the Constitutional Commission that the amendment not be allowed to be brought to the Assembly for another year so as to prevent the President from pursuing his agenda.

As long as there is transparency and legitimacy in a final vote, there are safeguards in place that will protect the government from a politician seeking to extend his term from a short period of time to an extended period of time.

Once the Constitution is drafted, it does not have to be written to help establish institutions that will help sustain the legitimacy of the Constitution, such as the Supreme Court and a Human Rights Commission. This is where the most conflict will occur as each organ of the government attempts to define the scope of their power. The authority of the Constitutional Court will be challenged by proposed executive statutes, judicial opinions, and other sectors of society. There must be great support for the Constitutional Court as well. As you build the Constitution, you should consider what strength you will give to its authority, such that the members are trained enough, independent enough, and supported enough to pursue the legitimacy of the constitutional process and to establish democracy will require some support from the international community.

When you draft the Constitution, consider not only about what issues that are presented today, but also consider the critical issue of how the Constitutional Court can help to define the separation of powers and any other fundamental powers that may accompany it.

Abdoulaye Sékou Sow (Mali): From my perspective, the Constitutional Court is a regulatory body and should be strictly an independent body. Mali opted for the French system, whereby the legislature appoints three judges, the judiciary selects three others, and the executive selects the last three.

Unfortunately, this means that the ruling party selects six of the members of the Committee. This is something that Rwanda should consider quite seriously and avoid.

Karthy Govender (South Africa): Let me start by saying that the South African Constitution was a compromise. One of the main issues was the division of power between the provinces and the central government.

When one is amending what we may consider to be a solemn pact, one must understand that the amendments must not change the fundamental elements of the deal that was originally struck. The first principle is that most provisions can be amended by a two-thirds majority in the Assembly. The ANC has already a two-thirds seat in the assembly, and many allies that can support them in lobbying to have legislation passed through. Significantly, however, in addition to the two-thirds majority of the legislature, voting is required in the provinces. We also have provisions that provide detailed guidelines if there are amendments to Section One, which contains the fundamental provision of the Constitution. What I have argued in another context is that these provisions are fairly wide. What I am suggesting to the Constitutional Commission here is that when amending fundamental civil rights, a seventy-five percent majority should be required. We are advocating that any change to a Bill of Rights requires a seventy-five percent majority.

The last provision that is relevant to our discussion is the identification of which components of the Constitution will remain immune to amendment. We may consider the example of India, where Ms. Gandhi's efforts to alter laws that she found unfavorable to her agenda led to the enactment of the Basic Structures doctrine of India. This doctrine states that there are certain core values, such as the independence of the judiciary, that, if amended, fundamentally destroy the Constitution regardless of what governmental majority you have effect the change. Therefore, you have to balance the need for a fairly rigid Constitution that prevents changes with the need for one that is adaptive to changed social realities.

When you decide to pick and choose values there will be conflicts that should be resolved by impartial judges, acting as referees. If you analyze the role of the Court in South Africa, it has been pivotal in this regard. It has helped to decide which human rights are fundamental, crucial issues about the separation of powers, etc. When the Court is so integral to the process, it is required that it is properly resourced; otherwise, it will cease to function effectively. Today we have a Court that is sufficiently financed with adequate supporting resources. There is a debate now in South Africa regarding whether the funding of the Court should continue at its current levels. I believe it would be harmful for the resources of the Court to be diminished.

One measure we inherited from the previous regime is that the legislature would not depart from the judgements of the Court. The history we have is one of courts being respected and we take that as our point of departure.

The other important point that I believe is vital is that there must be regular access to the Courts. Some courts have inherited from the English a requirement for standing, such that if everyone does not have it, then everyone would litigate over that point. This idea is implemented principally in the United States. The approach that we have taken is to have debate about the case based upon the merits rather than to engage in technical debates about whether or not the proponent has the right to bring the case in the first place.

In addition to adherence to international conventions, we have enforcement mechanisms at the regional level. We have the Organization of African Unity, working less well, and then we have further enforcement at the domestic level, provided by a collaboration of the Courts and national Human Rights Commissions. These Commissions must be independent, well financed, and empowered to carry out their mandates. The idea is that if any one Commission is not functioning effectively, then another one will step in and balance the insufficiency. The South African Human Rights Commission is functioning fairly well, and has been active for the past five years. New commissioners will be elected next year. The commissioners who are retiring from the Commission, including myself, would be available to assist the Rwandan Court in their constitution-making process if the [Legal and Constitutional] Commission deems it helpful.

Kebreab Habte Michael (Eritrea): This topic is one of the most challenging ones that we are facing. Writing the Constitution, while it certainly requires thought, diligence, and commitment, it most importantly requires that the State to be bound by the Constitution.

I will begin with a theoretical overview. If this is the beginning of the process, it must begin with the people. In the African case, it is not merely the government that does not respect the laws; it is the people who do not understand their right to ownership of the Constitution. Rather, the public views the Constitution as an instrument that is just for the government officials.

In Eritrea, people are elected for a short period of time at the village level. This type of simple structure is not advisable because it allows a localized approach to law and interests. In the past, we had the "village of justice and the village of the law." Local leaders made rulings on disputes, and there were no written judgements. During the time when customary laws were made, there were no typewriters in the local language, therefore the drafters made two or three copies in long hand. One copy was maintained in the hands of the village leader or trusted person and the document was open for everyone's review or observation. Anyone among the concerned parties who disagreed with the interpretation or content of the law can demand for the law to be read to him. The traditional laws were advanced for their time period and contained modern concepts such as torts and contracts.

Leaders or chiefs were elected by the people and were made to serve for a limited period unless re-elected by their peers. In the modern sense this is a constructive relationship because they are given a mandate for a certain period of time and then there is a transition. It is said that power corrupts and absolute power corrupts absolutely. There is also a personal, psychological aspect of this phenomenon whereby individuals simply want to hold onto their power for as long as possible.

People must be ready to strive continuously to hold on to the Constitution. It was once said that a Constitution is viable enough of the time, if enough of the people can rise above their selfish interests and not merely view a Constitution as an instrument by which people fight with tooth and claw for their share of the booty. This is a domestic approach whereby a peaceful, nonviolent approach to struggle can be of help.

Another consideration is the recognition that the international community is an important factor, because departure from international laws can lead to insufficient foreign economic investment, and international political pressure for peace. The bloody war between Eritrea and Ethiopia was eventually stopped in large part by the pressure of the international community for a peace settlement.

We also need wisdom from our leadership. We need a political culture that is willing to accept change. As to change, the Constitution should be permanent and possess enduring values. In Eritrea we had amendment provision placed into the Constitution limiting the Presidential period to five years. A Constitution should have specific procedures in place for when the public will not accept amendments. For example, in Africa, we have a culture of kings. We have to break away from that restrictive culture because there are many in the country who can lead.

Elisabeth Pognon (Benin): Let me just say that the provision governing amendments to the Constitution requires such a strong majority that there is a need for real consensus in the country for such revisions to occur. Otherwise, why would a country establish grand provisions of a Constitution if they were intended to be trampled upon? This is the choice that Benin made by establishing a Constitutional Court that is competent to manage the exercise of the three powers, each of which are distinct from the other. This means also that the Constitutional Court is the privileged guardian of the fundamental rights and liberties that the people have embodied in the Constitution. This Court was established as a separate and independent body. It is composed of nine members appointed by the National Assembly and by the President of the Republic. Among these nine members there are three magistrates, three highly qualified jurists, and three legal professionals. All are required to have at least had fifteen years of experience in their field before serving on the Commission. We have given a high level of independence to the Court to counter a tradition that we have in Africa of personalizing the institutions of the government. We did not want the members to be appointed or removed by the exercise of power by the President.

Therefore, it is not enough for the Court to be appointed by the twin powers of the President and the Assembly. In order for there to be balance, the members must be given enough powers and duties to allow them to accomplish the goal of unbiased and reasoned adjudication. The members are also given both immunity and the security of tenure for the job so that whatever mistakes they may make,

they cannot be removed from their post. This gives them total independence to carry out the duties that have been given out to them.

I will discuss later the guarantees that the Court has been granted by the Constitution. But the nature of the process of decision-making is somewhat contradictory, depending on the nature of the request before the Court. We have one text that is reviewed for plain meaning without calling upon the legislature to explain their original intent or rationale, until after the Court has first reviewed the text.

As to what type of plaintiff can bring a case to the Court, this is the most original feature of the Constitutional Court of Benin. All citizens can go to the Court and they do not have to give any justifications for questioning the law. We have this system because we had just emerged from a Marxist regime, and we wanted to inform the people that the new constitutional order allowed them to emerge protected by the fundamental core values and guarantees of the Constitution itself. Regarding the elections, the President and the members of Parliament can approach the Court before promulgating the laws.

We also have a special duty for the Constitutional Court to control the regularity, procedure, implementation, and security of elections. Regulating electoral procedure is very important. In the public institutions or organs of the old system, those challenging elections were required to provide much evidence, and often could not acquire all the proof.

The legislature could not organize a second round and so the Constitutional Court added a few days to the deadline. If this had not happened, we would have had a deadlock, and those running the elections would not have had enough time to bring the ballots back to be counted. The legitimacy of the process was a stake. The candidates could create problems and say nothing and then on the last day of elections say that they will not take part in the elections.

The Constitutional Court has a budget that the Court prepares itself and manages on its own. We have not had too many problems and everybody agrees that the Constitutional Court should be given the means to ensure a democracy. We have to ensure that the various rights and freedoms of the Constitution are respected.

As regards to the management of democracy, the separation of powers is the foundation of our system. This does not exist in a vacuum, because the national government is dependent on the power of all three branches. Still the Constitutional Court seeks to prevent the abuse of power by the branches or the encroachment of power by one branch against another. For example, in the early 1990s we had the budget war of Benin whereby the two powers were fighting to determine which branch would manage the budget and tensions were becoming widespread. If the Court had not stepped in, then the tension would have been very high. Finally, the Court's decisions are binding and final, to be respected by all.

We believe that there should be clear-cut powers such that each branch may properly exercise its duties. For example, we had a period where some ministers were attempting to influence the judges' opinions. We then declared such improper influence unconstitutional. We declared any orders by the Minister of Justice to set free a prisoner, the Court ruled that it was the Attorney General and not the Minister that had the right to interfere. At one time, we even required the President of the country to come to be sworn into office again in order to reaffirm his duties and his commitment to the Constitution. There was an issue of legitimacy. Whether by accident or not, he skipped one line of text when taking the oath. That was on a Thursday morning. By that same Friday morning, there were at least three people who came to the Court to challenge that the swearing in was not constitutional. We had to act quickly to prevent the state not having a President for 24 hours. So we had the President come in again and had him swear in again in order to preserve the legitimacy of his position. It was essential that it was the people who came to the Court and that the President accordingly abided by the rulings of the Court.

The National Assembly cannot do exclusively what it wants. For example, the Court has even reviewed elections and determined that the Assembly had to abide by its own internal regulations. The content and the form or presentation was erroneous even if the goal itself was achieved. No power can say it can do what it wants. Even within the judiciary, rulings of the Constitutional Court must be adhered to by the lower courts. In one instance, because of the way in which the Court was dealing with a very simple matter concerning a very simple crime, the Court took ten years to rule. The Court

in one instance took *fourteen years* to render a judgement. Such a delay is a violation of the individual's right to be given a fair trial.

I would advise our Rwandan brothers to be very careful in putting into place the body that is going to oversee the Constitution and to ensure that it is long-lasting and legitimate. Thank you.

Question and Answer Session

Abdoulaye Sékou Sow (Mali): As Madam has just indicated, there can be a problem in the Constitution if there is a crisis of legitimacy. In Mali for example, there was a budget problem that led to a three-year crisis in the financial functioning of the government. It was the Constitutional Court that then determined the issue. This is critical for the viability of the Constitution.

Louis Aucoin (USA): In the German Constitution, we have the same phenomenon as in the Indian situation where there are provisions that could not be amended. These provisions involve, for example, basic fundamental values in the Constitution, including the aspects of human dignity, protection of minorities and women, etc. In addition, I would like to call upon Eritrea to explain to us the problems that it has had in implementing its Constitution.

Rwanda: I would like to make a comment and then ask a question. If a President is to respect the provisions of the Constitution, the President must believe that the people will respect the elements of the Constitution. Therefore it is critical that we educate the citizens to challenge the Constitution non-violently and through proper, effective, and accessible procedures. The second point is that a Constitution must be able to adapt and to evolve in order to respond to the needs of a society. Even the fundamental values must evolve as the society evolves, and the Constitution should be able to be revised to reflect changing social needs.

Rwanda: If the President or National Assembly appoints the Constitutional Court, does this not threaten the independence of the Court and threaten the functioning of the process? How do you resolve such a process?

Gerard Niyungeko (Burundi): Regarding Constitutional review, you mentioned that there were some things that are unconstitutional. In Burundi we had a constitutional provision called the National Unity Charter, which established collective unity as an intrinsic component. We have realized that as time goes by, this value has been reduced in strength. How can you then make this element a core value that no one may tamper with, even as the value itself becomes less important?

Otive Igbuzor (Nigeria): The protection of the Constitution and the respect for it is the most important thing for any Constitution. Such attitudes depend largely on the process of making the Constitution. I would like to advise that whatever suggestions are made at this conference should not be sacrosanct, with a crossing of the T's and a dotting of the I's, without an agreement that the constitution-making process begins with a real education of the people. There is a need for the education of the people, through town hall meetings, newspapers, radio, and even translation locally of the major themes that are in the process to educate the people about the already existing laws. Then there should be a collaborative process whereby everyone has a contribution to the process and there is transparency and legitimacy. The question of land use, truth and reconciliation, etc., should be addressed to the people, because unless the people participate in the Constitution, then it is worthless. The people should be able to claim ownership of the Constitution and be able to use it in defense of their rights and obligations.

Rwanda: I would like to ask the Representative of Benin more information regarding the Constitutional Court. Who is allowed to go to this Court, and what is the role of arbitration in this Court?

Henry Richardson (USA): I have a question and then a comment. I was wondering if Mr. Dampier could address whether there are two basic kinds or categories for amendment procedures. One requires the legislature to formulate the amendment and bring it into force. In the other category, although the legislature may not initiate the amendment, the people or their direct representatives are involved in approving it. By way of comments, I was wondering if there is useful precedent in the law of Ghana during a past constitutional crisis when the Ghanaian Supreme Court upheld the notion that there are fundamental constitutional principles that survive the abrogation of the Constitution itself or the overthrow of the constitutional order by a military regime. Part of the process for establishing the legitimacy of the Constitution among the people rests on this basic underlying notion that their constitution is reflecting larger, enduring principles. Similarly, what do the presenters think about the suggestion of drafting a set of constitutional principles to discuss among the people prior to attempting to draft the document itself?

Fatoumata Siré Diakité (Mali): The issue of constitutional review in Mali is empowered by the President of the Republic or two-thirds of the members of the Parliament. I have two questions for the representative of Benin. There was an issue of approaching the Constitutional Court, but I was wondering if there were any limits to which people, how many people, etc. can come to the Court on every problem or dispute? How do we ensure the executive power in such a case and that the National Assembly does not remain just a shadow of the executive?

Question: Courts have a very big role to play, yet among the biggest problems is the issue of primary sovereignty. There must be some guidelines by which the Court itself is restrained and when the Court must respect the democratic laws established by the representatives of the people.

Gerard Niyungeko (Burundi): In Burundi, we adopted a provision whereby four-fifths (4/5) of the legislature has to approve an amendment. In regards to the provisions of the Arusha Accord, we require a nine-tenths (9/10) majority. Thus, we have a very rigid constitutional structure. Political guardianship of the Constitution is the work of the people. Regardless of what we say, we have to recognize a fundamental requirement that even the leaders should be submitted to the law. We have a law in Burundi that subjects government officials to the authority of the Constitutional Court. We are fascinated by the Constitutional Court of Benin and I would like to know whether in Benin there is a risk of a government by the judges?

Harold Dampier, Jr. (USA): I have three comments. There are alternatives to legislative voting on an amendment. In the Albanian context, there are two options. First, there can be a two-thirds majority adoption of a proposed constitutional amendment. However, a proposed constitutional amendment can not be entered into force until 60 days after ratification by the government. Second, the Albanian Constitution then says an amendment may also be approved by referendum of the assembly when one-fifth of the assembly agrees that the vote of the legislature, so it forces implementation of the proceeding by putting a title on it.

Another question is that of training and selection of members of the Court in order to ensure the best quality. In the Hungarian Constitution, the Constitutional Court consists of eleven members elected by a majority of two-thirds of the Parliament, but the members of the Court shall be nominated by a nominating committee.

The final point is regarding legitimacy. My Nigerian colleague is exactly right that the Constitution must be accepted by the people, else it is not worthy of being a Constitution. The way to achieve this is through education in the drafting, the initiation, and the final approval processes. The significance of informing the public throughout the process of constitution making, and allowing the public to give feedback throughout various phases of the process cannot be underestimated.

Karthy Govender (South Africa): I think we did have to grapple in South Africa with the issue of the power of the judges At a theoretical level, the judges are there to check the balance of power, and that power ends where the creation of public policy begins. We try to maintain that balance. The Court cannot enact laws. In respect to the Constitutional Court, we have chosen instead in South Africa is a judicial service Commission comprised of politicians, academics, and so forth. They

determine after interviewing the candidates who should be nominated. Then the President makes a selection of the nominees and the President is required to nominate at least three more nominations than the position requires. The hope is that you get some political and some legal input into the process.

Kebreab Habte Michael (Eritrea): Eritrea ratified its Constitution in May 1997, and it was in the process of creating the judicial service commission that the war came in 1998. This has stalled everything for the last three years. We have now begun again, and hopefully by 2002 we will have a constitutional government. It is not a lack of willingness on the part of the government that has prevented ratification of our Constitution. Another issue is that we left open in the Constitution the period for its implementation. Do not leave such important things out. I was part of the commission, and we wanted something from six months to a year. Another thing that should be addressed is whether a Constitutional Court is necessary or whether there should be simply one court, such as the Supreme Court, in the United States. Are Constitutional Courts really necessary? This should also be addressed by our Rwandan brothers and sisters

Théodore Holo (Benin): In terms of who may bring a matter before the Court, this right belongs to every citizen so long as they have a personal interest at stake.

Concerning the domination of or the allegiance of the members of the Court to the legislative or executive parties, we are often told that it is our official duty to say to our friends: “when we are elected, we no longer know you.” On the other side, we are bound to respect the law and not to follow our personal feelings in making decisions.

Tensions within the Court itself are inevitable because any human endeavor has conflicting values and also because decisions are taken by five members of the Constitutional Court. Given that we do not have the right to demand that the Court’s deliberations are made public. So other than the issued opinion, no one knows what happened in the deliberation of the Court, and the position of one member of the Court cannot be easily ascertained.

In terms of the appointment of the judges by the executive powers, the Constitution has declared the executive power independent and the same Constitution has established independence of the judiciary. How do we protect the ability of the judges to have independent thought and jurisprudence?

DELIBERATIONS OF THE WORKING GROUPS

Following the morning session on Thursday, the Conference Committee broke into six working groups. The working groups drew on the first three days of informed discussions to develop concrete suggestions and recommendations for the elaboration of a new Rwandan Constitution. Each group was assigned specific topics to consider as follows:

Group A:	The Consultation Process Forms, Powers, and Limits of Government
Group B:	Elections and Equitable Representation of Political Parties The Maintenance, Respect, and Amendment of the Constitution
Group C:	Property Rights The Incorporation of International Law into Rwandan Law
Group D:	The Rights of Minorities and the Disadvantaged The Rights of Women and Children
Group E:	The Right to a Fair Trial The Imposition of a State of Emergency
Group F:	Freedom of Expression and the Media

Each group was charged with developing specific, concrete recommendations to guide the Constitutional Commission through future preparations for drafting the Rwandan Constitution. Groups consisted of at least two members of the Rwandan Legal and Constitutional Commission, representatives from Rwandan society, and international experts and specialists. Through a day of discussion, ideas were generated, issues deliberated and recommendations enumerated for presentation and review by the plenary session on Friday.

DAY FIVE: FRIDAY, AUGUST 24, 2001

Recommendations of the Working Groups

Report of Group A: Forms of Government

The Executive

- The President will be the head of State, and the Prime Minister will be the head of the government.
- The executive power is shared.
- The President of the Republic will be elected by universal indirect suffrage, for one term that can be renewed only once.
- The President defines the policy of the State
- The Prime Minister and the government will organize, execute and coordinate the policy of the State.
- A Council of Ministers will be named by the President, upon proposal by the Prime Minister.
- The President will appoint the Prime Minister.
- The Prime Minister and Council of Ministers have the authority to make decisions and issue ministerial regulations.
- The Prime Minister and the Ministers are individually responsible before Parliament.
- The President is relieved of office by a vote of a qualified majority of the Parliament, for reasons delineated by the Constitution.
- There will be time for inquiry.
- The motion of censure will be limited.
- The power to initiate laws is shared jointly between Parliament and the executive.
- The legislative power rests exclusively with Parliament.
- The President and the government can issue regulations strictly within the limit of the laws.
- The President of the Parliament will assume the interim Presidency of the Republic.
- The length of the interim will be determined according to differing circumstances.
- Regarding the executive's nomination powers, two options are presented:
  - augment the power of the Parliament to control the nominations of high functionaries (officials)
  - maintain the status quo (the Arusha Accords)
- Situations in which the agreement of Parliament is required:
  - Treaties and international agreements
  - Declaration of war
  - Amnesty
  - State of emergency

Legislative

- Unicameral, with representatives elected from two lists: local and national.
- At the national level, the vote will be proportional.
- At the local level, the vote will be majoritarian.
- The following will have a certain number of seats reserved:
  - Women
  - Youth
  - Military
- A Minister cannot simultaneously serve as a Member of Parliament.
- The President of the Republic will have the right to a suspending veto requiring a second reading of the proposed law.
- The mandates of the President of the Republic and of the Legislature each will be five years.

- The President will have a limited power to dissolve Parliament.
- The President, with the agreement of a majority of the Council of Ministers, can dissolve the Parliament once during his or her mandate.
- The exceptional circumstances leading to the dissolution of Parliament will be defined.
- Legislative power will be unlimited.

The Judiciary

- Judicial review will be exercised by the chamber of the Supreme Court that currently constitutes the Constitutional Court.
- The President of the Republic, the Prime Minister, the President of the National Assembly and a limited number of representatives can invoke the jurisdiction of the Court on the constitutionality of a law before its promulgation.
- Once the Court determines a law to be unconstitutional, it may not enter into force.
- Every citizen can appeal to the Constitutional Court when he or she feels injured by the application of the law and when he or she claims that there is a problem with the constitutionality of an application of the law.

Report of Group B: Elections and Equitable Representation of Political Parties

I. PARTY SYSTEM
- A. Limit on Ethnicity
- B. Election Code will define
  - i) The criteria for parities which will not limit standing of individuals
  - ii) Code of Conduct
  - iii) Percentage of participation
- C. Supplemented by Education
  - i) Grass Roots
  - ii) Associations
  - iii) Political Parties

II. AMENDMENT
- A. Initiate
  - i) President and Parliament
  - ii) Consider Public reflections (suggestions)
- B. Approve
  - i) Parliament
  - ii) Consider Public reflections (suggestions)
- C. Debate
  - i) Public
  - ii) Transparency

III. ELECTIONS
- A. Free – Fair Election through:
  Independent Electoral Commission
  Transparent Organization: The Central Election Commission is a permanent organ that prepares, supervises, manages, verifies all aspects of elections and referenda and announces their results.
- B. Proportional system of representation
- C. Type of Ballot
  - i) Universal suffrage (direct – indirect)

IV. RESPECT AND MAINTAIN CONSTITUTION
- A. Respect comes with education
- B. Drafting, ratifying and amending
- C. Mission of Constitution Commission is to do these things
  - i) By listening to the people
  - ii) Simple language
  - iii) Inclusion

V. PROVIDING GUARANTEES WITHIN THE CONSTITUTION
- A. Establishment of Constitution Court
  - i) Key Independence
  - ii) Standing – who can bring case to Courts: Citizen – Company – Association (who has an interest to challenge the unconstitutionality of any law).
- B. Establishment of Ombudsman
  - i) Key Independence
  - ii) Nomination – Appointment of the members should be subjected to an impartial process, that is open, transparent and with specific criteria. This should include consultations with Women's Associations, Judicial, minority groups, etc… so that these decisions are not the executives alone

Report of Group C: Property Rights

PROPERTY RIGHTS

- At the level of principle, the new constitution should make clear the equal rights of men and women regarding land, succession, and other forms of property.
- Regulatory authority should be in the assembly with a recommendation that the legislature may wish to consider guidance regarding the resolution of conflicts between equality and customary law, with the understanding that equality trumps custom.
- With respect to property interests, attention must be paid to ensuring that minority interests are not discriminated against.
- Easier access to courts on land and property issues should be available.
- Appropriate arrangements should be made to harmonize the treatment of land and land interests throughout Rwanda.

RECEPTION OF INTERNATIONAL LAW INTO RWANDAN LAW

- The preamble of the constitution should mention the commitment of the Rwandan state to principles of international human rights. It may be appropriate for there to be special mention of the commitment to the rights of women and children.
- The constitution should state that upon ratification all treaties, including human rights treaties, are automatically incorporated into Rwandan law and that courts are obliged to apply such treaties as part of Rwandan law.
- The Constitution states that Rwandan judges are obligated to consult international law generally in their deliberations.
- Rwandan judges should receive further education and training in international law.

Report of Group D: The Rights of Minorities, Disadvantaged, Women and Children

I. DISADVANTAGED

- Place disabilities and elderly into equality clause. (People living with HIV/AIDS are included in the definition of disability).

II. CHILDREN

- Consider specific provisions on children's rights. Consult international documents, which mention orphans, homeless children, and child-headed households.

III. MINORITIES

- Place ethnic or social origin, race, color, belief, conscience, culture, clan and class into equality clause.
- Consider inserting a sentence concerning the rights of minorities to participate in decision making.
- Consider whether you want to insert a specific clause on minorities.
- Consider inserting some language about minorities in the preamble of the constitution.
- Consider whether you want to reserve any seats in Parliament for minorities (i.e. Batwa).
- Insert a clause on Affirmative Action in all areas including education, politics, the workplace and economy.
- Consider whether you want to specifically mention the Batwa by name in the constitution.

IV. WOMEN

- Insert sex, gender, birth, pregnancy, martial status in the equality clause.
- Insert Affirmative Action clause in all areas including education, politics, the workplace and economy.
- Consider whether there should be quotas for women in Parliament and in all levels of government.
- Consider whether there should be a creation of a gender commission.
- Concerning the right to health, be sure to include pregnant women.
- Consider whether to insert a clause concerning the right to create and protect the family.
- Keep the clause on monogamy.
- Insert a clause concerning the right of women to own property.
- Insert a clause that the constitution is supreme over customs, culture, traditions, and religion. See e.g. Uganda Constitution article 33(6).
- Insert a clause forbidding all forms of public and private violence. See, e.g., South African Constitution Article 12(i).
- Women should have the right to confer citizenship to foreign spouse and children.
- Consider inserting some language about women in the preamble of the constitution.

Report of Group E: The Right to a Fair Trial

I. STATES OF EMERGENCY

Recommendation 1. That the Constitution expressly incorporate detailed provisions governing the imposition of a state of emergency [and state of siege, if so decided], and that these provisions provide for effective control of executive action and government agencies by Parliament and the Courts during a state of emergency.

Recommendation 2. That both the concepts of a "state of emergency," and a "state of siege" be considered for inclusion in the Constitution.

Recommendation 3. That the Constitutional Commission should consider the emergency provisions in international and national instruments, including:

- The Universal Declaration of Human Rights [UDHR];
- The International Convention of Civil and Political Rights [ICPR] - including the Syracuse Principles;
- The African Charter on Human and People's Rights [African Charter];
- The European Convention on Human Rights [ECHR]
- Selected national Constitutions of African countries, including those of:
  - Benin
  - Burundi
  - Eritrea
  - Mali
  - Nigeria
  - South Africa
  - Uganda
  - Zambia;
  - and Section 48 of the current Rwandan Constitution.

Recommendation 4. That the drafting of constitutional provisions regarding states of emergency [and states of siege, if so decided] be done according to the following topic headers;

- The Declaration and Duration of a State of Emergency;
- The Role of Parliament in a State of Emergency;
- The Role of the Courts in a State of Emergency;
- The Protection of the Rights of Individuals, including the scope of derogation and suspension of Constitutional rights, during a State of Emergency.

Recommendation 5. All human rights should be respected and upheld, as far as possible, during a State of Emergency [or State of Siege]. However, at the very least the following core human rights should not be abrogated under any circumstances:

- The right to life;
- The prohibitions against slavery;
- The prohibition against torture;
- The prohibition against retroactive penal laws.

Recommendation 6. That provisions incorporated into the Constitution to control the behavior of Executive and government agencies immediately following the ending a State of Emergency [or a State of Siege], and further that the actions of the Executive and government agencies during a State of Emergency [and a State of Siege] be subjected to compulsory judicial review immediately following the ending of the State of Emergency [or State of Siege].

II. **FAIR TRIALS**

- The Constitution should contain a general provision in terms of which the right to a fair trial in all courts and tribunals-criminal, civil, and administrative is entrenched. A recommended definition is as follows: "Every person is entitled to a fair trial in all courts and tribunals, whether criminal, civil, or administrative, which shall include fair pre-trial, trial, and post trial procedures."

- Recommendations for Criminal Fair-Trial Provisions in the Constitution:

- The following definitions are recommended for adoption: A "fair trial" shall mean a trial with fair pre-trial, trial, and post trial procedures, and "fair trial rights" shall mean rights in the Constitution that are granted to individuals during the criminal process in order to ensure procedural fairness.
- The Constitutional Commission should consider the following issues when deciding which criminal fair trial rights should be incorporated in the Constitution:

  Issue 1: Consider all types of criminal courts operating in Rwanda in order to decide on the level of fair trial protection an individual facing trial in each of these courts should be accorded.

  Issue 2: Identify *who* in the criminal justice process is entitled to these rights, and *which* fair trial rights such identified individuals should be entitled to. For example, these distinctions can be made according to the status of persons involved in each of the three phases of the criminal process, as follows:
  - Pre-trial Phase: "Suspects," "Arrestees," "Detained Persons;"
  - Trial Phase: "Accused (Defendants);"
  - Post-Trial Phase: "Convicted Persons."

  Issue 3: Each category of persons included in each phase of the criminal trial should be expressly defined, and decisions should be made which other terms should be defined, and which terms should remain undefined.

  Issue 4: Compare the criminal trial rights with other rights in the Bill of Rights of the Constitution to prevent inconsistencies, ambiguities, and contradictions. In this regard, the fair trial provisions of other African Constitutions, and also the amendments to the United States Constitution, should be considered for guidance.

  Issue 5: Compare the draft criminal trial rights with rights identified in international law documents such as the:
  - Universal Declaration of Human Rights (UDHR);
  - International Covenant of Civil and Political Rights [ICCPR];
  - African Charter of Human Rights [African Charter];

  Issue 6: Compare the completed constitutional draft with domestic statutes in order to ensure that all domestic laws are in accordance with the Constitution.

- It is further proposed that the Constitutional Commission consider it imperative that the Constitution contain a Supremacy Clause [i.e., all laws or statutes inconsistent with the Constitution shall not be enforceable].

- The Constitutional Commission must consider to which extent the criminal fair trial rights identified for incorporation in the Constitution should also be applicable to non-criminal trials. In this regard, consideration should be given to expressly incorporating fair trial rights for individuals in civil trials and administrative tribunals in the Constitution.

Report of Group F: Freedom of Expression and the Media

- The supremacy of the constitution over all other laws has to be a reality. A right recognized by the constitution should not be refuted by a specific law.
- The laws in force, relating to freedom of expression should be harmonized with the new constitution in a brief span of time.
- The laws put into effect (texts for application) of the fundamental liberties must be promulgated within a determined time-span.
- The different components of freedom of expression and their limitations should in and of themselves be clearly established.
- The constitution should clearly define the speech to prohibit, considering the Rwandan historical and sociocultural context
- The Constitution should clearly designate an organ in charge of the promotion of fundamental liberties and define its mission.

CLOSING CEREMONIES

PRESENTATION OF RECOMMENDATIONS TO THE MINISTER OF JUSTICE

Ergibe Boyd (USA): I think this is the last day of the conference, but I do not think it is the last day for us to work together. We have become a group of friends, a family, during these days together, and I am sure we will continue to work together. I thank those who came from afar to share their experiences and share their failures and successes.

Tito Rutaremara (Rwanda): We have the recommendations and resolutions promoted during these last days. Let me also thank the experts who came from far away, with their enthusiasm, seriousness and intelligence, and we would like them to return to Rwanda. We thank the former Prime Minister of Mali, Abdoulaye Sékou Sow, and his compatriot, Fatoumata Siré Diakité, who almost convinced all of us men that we would prefer to be women. We also thank our colleagues from Benin, for their contribution, and their particularly their progressive ideas, who gave all the Beninese the possibility to go to school and other progressive policies, and are helping Africa to develop its democracy. Our friend from Eritrea, whose country is rich in gray matter, whose progressive ideas also enriched us here. Nearer to us, in South Africa, we respect and know the wisdom and intelligence of Mandela, and the wisdom of the young professors who are here, inspired by these ideas. In South Africa, there are political parties engaged in politics and presenting a new vision and idea of Africa, presenting a positive view, with vibrant ideas growing among the young people. And now to turn to Zambia, we will never forget the struggle that Zambia waged in order to bring democracy, to refuse the third term of the young President who was a trade unionist who wanted to stay more than twenty years. Patrick Matibini you have given us a lot of things to think about from Southern Africa and we thank you very much. Now let me remember Nigeria. Nigeria is a big country with a lot of problems and a lot of hope. Nigeria was represented by two remarkable people doing fabulous work to mobilize the grass roots. We could think it is Nigeria that will give us huge ideas because it is such a big country. Now let me come to Uganda, a country that I love so much because I stayed in Uganda as a refugee. The two representatives of Ugandan society gave us a great deal and a unique understanding. In Uganda, things are moving and they are helping things move. Now let me come to my brothers from Burundi, the honorable Laurent Kagimbi and my brother from the constitutional committee. We are the same people as the Burundians, and we are trying to find the means of resolving the same quagmire. We understand each other.

Now I thank all the Rwandans that are here.

But I also want to thank the young people from Harvard. They were born typing on computers and have mastered them. So we thank you very much for having come and played with your computers here.

I do not know if you have opened the doors behind you but there is a computer industry there. There are the people who did the work you saw here. Please tell them a big thanks on our behalf.

Now let me come to the interpreters. Thank you for understanding my Rwandan accent.

I wish also to thank my comrades, the commissioners. They are the people who are going to do this work when you are gone. Thank you also to the staff and friends who are helping us.

And of course, I must turn to my dear Ergibe Boyd, a very dynamic lady. She is always running. She is talking all the time. She has initiatives the likes of which we have never had. She has Eritrean wisdom, with the dynamism from America. It is that hybrid of intelligence that help us progress.

If you have noticed, when a European or American comes here, he or she will look at our countryside for hours on end, whereas for us we see the hills as impediments on our road. We have to travel ourselves to get a new perspective on the world, and to learn the appreciation for nature that other nationalities have internalized.

Ergibe Boyd (USA): Thank you for the warm words, and I would like to thank the Steering Commission as well. I would like to offer certificates to the participants so they can remember this conference, and return to the work they have begun.

Angeline Allen-Mpyisi (USA): A vote of thanks! We, the organizers, wish to express our profound gratitude for your important contribution to the Constitution-building process of the Rwandan people. We appreciate your dedication, expertise and willingness to participate in the formation of this historic document. The ideas and experiences you have shared will help to shape the political and legal landscape of the nation. Through your participation, the Rwandan people will be better capable of considering the role of individual rights and liberties, the obligations of the government and the legal framework for Rwandan society.

We thank you personally for your time this week, but more importantly for the profound stories, wisdom and experiences you have shared with us. Your ideas and opinions have made an invaluable contribution. By your involvement this week, you have helped promote the adoption of a lasting, equitable and inclusive constitution for Rwanda.

Again, we thank you most sincerely. We hope you will continue to engage in this process with us in the future.

Ergibe Boyd (USA): Thank you to my children from Harvard, whom I have adopted.

Tito Rutaremara (Rwanda): *(Distributes participation certificates and vote of thanks to all participants.)*

Thank you to the organizers, the funders of the conference, in particular Mr. Stephen Giddings, and to the United States Ambassador, Mr. George Staples.

Laurent Kagimbi (Burundi): *(Reads a thank-you from the participants)*

Minister of Justice, the Honorable Dr. Gerald Gahima (Rwanda): It is an honor to be here for the closing of this conference on the development of a constitution. This program fits into a larger program of the Legal and Constitutional Commission. As you all know, Rwanda is preparing to leave a period of transition, after genocide and war. The transition period will have permitted us to bring security and peace to the country, to lay solid foundations for national unity and ensure equitable justice for all. The constitution is an opportunity to ensure the rights and liberties of all citizens. Rwanda's situation is rather unique, because the legal documents have always been in place, since colonial times, but it has not prevented massacres and abuses from occurring. I would like to remind us of an important responsibility of the Commission, namely to encourage the active participation of the population. These proceedings have been useful for the development of the constitution, and have addressed important themes as noted in the program. I do not doubt that your contributions have been fruitful and your work useful. The government of National Unity will do what it can to support the Commission, and the recommendations today will certainly serve as a frame of reference in the development of the constitution. I will end by thanking everyone who supported the conference technically, financially and intellectually, particularly those who came from afar to participate in this conference.

Louis Aucoin (USA): I have had the privilege to participate in this conference, to meet all the members of the Legal and Constitutional Commission and to work with them. To quote Humphrey Bogart in his famous role in the film *Casablanca*, "I think this is the beginning of a beautiful friendship." It is in the spirit of friendship that I present our recommendations for a Rwandan constitution that will be created in the spirit of peace and justice.

PART II: CONFERENCE PAPERS

THE 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA AND THE WOMAN QUESTION

Author: Joy Ngozi Ezeilo

Introduction

This important and timely Regional Conference on Constitution Development comes in the wake of attempts by some African countries in transition to restore constitutional democracy. I speak on an often-contested issue: "the inclusion of women in constitution-making." Constitutions and the processes of constitution making are often not gendered. In Nigeria, and elsewhere in Africa, this process excludes female legitimacy. Why is this so? Is it that women – constituting about half the population of the African continent – are inactive, irrelevant, and therefore inconsequential in Constitution making, in the democracy project, and indeed in our entire quest for development? In Nigeria, women were part of the pro-democracy struggle in modern state building and also in colonial times were part of the nationalist movement for independence. However, that has not translated into visible participation of women in constitutional development or into their inclusion in power and decision-making positions. This paper briefly attempts to examine how and why women have been constitutionally marginalized. It explains the role gender played in the making of these constitutions and the extent, if any, to which they addressed the many concerns of women in Nigeria.

The Gender Question And Constitution-Making In Nigeria

Gender and constitutional development in Nigeria has been a contentious issue that has assumed importance since 1978, when an all-male Constitution Drafting Committee (CDC) was mandated to draft the 1979 Constitution of Nigeria.

It is an incontrovertible fact that constitution making in Nigeria, from the Clifford Constitution of 1922 to Abubakar's Constitution of 1999, has excluded much of women's experiences. Claims that the Constitution is gender-neutral ("he" means "she") are now being challenged. Further, it is sad to observe that women's involvement in the Nationalist Movement has not guaranteed them adequate representation in constitution-making or even translated to inclusion of women in power and decision-making. Few women (namely, Janet Mokelu, Margaret Ekpo and Mrs. Ransome Kuti) participated in any of the constitutional conferences held in London prior to independence.

While the minority problem posed enough of a threat to newly-independent Nigeria to merit a Commission of Inquiry and to entrench a mechanism for their protection and freedoms in the Constitution, the gender issue was seen as posing no such threat and the woman question was left unanswered. It was therefore not surprising that there was no provision guaranteeing equality or prohibiting sex discrimination. Women were indeed not the reason for inclusion of the fundamental human rights provisions in the Constitution. Therefore, unlike the developments in international human rights norms, development of fundamental rights and freedoms in Nigeria did not run parallel to protection of women's rights. Before the 1979 Constitution, sex was not one of the grounds for which discrimination was prohibited.

There is little acknowledgement that gender is an important dimension in defining the substantive content of rights – in particular those rights that do not refer specifically to women or embody a guarantee of non-discrimination. Enjoyment of rights is defined in terms of a male-centered model. "The fact that most African political constitutions were negotiated overtime provided opportunities for political rivals to seek to control and unite the state by redefining constitutional principles to exclude female legitimacy." Constitution making in Nigeria has persistently excluded female legitimacy. If not, how could one explain the fact that the Constitution Drafting Committee appointed to draft the 1979 Constitution had no female representation? Fifty wise men were appointed to draft a Constitution that extended its application to women—nearly half of the Nigerian population. How can we address the needs of women under such a framework? How can women hold themselves to such laws that they have no hand in making? Women's protest and demands to be included have yet to yield any meaningful results.

The purportedly broad-based Constitutional Conference constituted by the military Abacha Regime had 361 representatives, out of which only eight were females. Again, no meaningful change

in the status of women was achieved by that conference, which made the aborted 1995 Constitution. No specific constitutional provisions were made for women. It merely retained section 39 of the 1979 Constitution of Federal Republic of Nigeria that, *inter alia*, prohibited sex discrimination.

1999 Constitution And The Woman Question

The 1999 Constitution promulgated by the Abubakar Military Regime has nothing to offer women in terms of constitutional advancement, though they constitute at least 49.5% of the Nigerian population. It continued the political assault of female exclusion and marginalization. Even the participation of women in the process that culminated in the transition to democracy had little or no effect in improving women's position under the 1999 Constitution.

As we shall see, the Constitution that was adopted at the dawn of a new millennium effectively put women back to the position where they were 50 years or more ago. It is an old sour wine in a new skin. The bulging questions are: First, why have women been marginalized in the constitution-making processes? Second, why have feminists and women activists not been very prominent in debates about a Nigerian Constitution?

We shall attempt to answer these questions, but first we need to consider specific provisions of concern to women under the 1999 Constitution.

Preamble Of 1999 Constitution

The preamble of this Constitution told a lie about its republican character when it stated:

> *We the people of the Federal Republic of Nigeria:*
> *Having firmly and solemnly resolved: live in unity and harmony: and to provide for a constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equality and Justice…Do hereby Make, Enact and Give Ourselves the following constitution.*

Who are the people – "we"? Genderless beings? Undoubtedly the Nigerian females are not part of that "we." No woman was a member of the Provisional Ruling Council of the Military Regime of General Abubakar that eventually promulgated the 1999 Constitution that ushered in the "fourth republic." It had 26 military officers, all males. Consequently, women were not part of the deliberation that resulted in the making of the 1999 Constitution. As has been rightly observed, the principles of constitution-making were completely disregarded in the process leading to the 1999 Constitution.

These principles are: inclusivity, openness and transparency, due process, and publication of the law. The lack of observation of these desiderata of law making raised troubling questions about the legitimacy and legality of the 1999 Constitution. We need to engender the language of the preamble and substitute the word 'we' with specific mention of "men" and "women." This will not only be gender specific but also will accord with universal human rights norms that have unequivocally entrenched the principles of equality and non-discrimination.

Chapter II, "Fundamental Objectives and Directive Principles of State Policy," deals with those aspects of the Constitution outlining the political, economic, social, educational, foreign policy, and environmental objectives of the Nigerian nation. It contains also the obligations of the mass media and a directive on Nigerian culture, national ethics, and the duties of the citizen. According to Section 13:

It shall be the duty and responsibility of all organs of government and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution. Section 14(1) stated that the Federal Republic of Nigeria shall be a state based on the principles of democracy and justice; and also recognize the fact that sovereignty belongs to the people, whereas section 14(3) entrenched what is now known as federal character.

A careful perusal of all the sections of this chapter reveals total gender blindness. Most of these provisions presented an ideal opportunity to be gender specific by adopting "men and women" or to be genderless by using gender-neutral terms like "everyone," "all persons," etc. For example, Section 14(2)(b), which stipulated that "the security and welfare of the people shall be the primary purpose of

government," could have used a gendered language that would read: " the security and welfare of men and women shall be…."

Further, the federal character entrenched in the Nigerian Constitution is, in effect, an affirmative action provision and therefore ought to have extended its application based on gender. The most disappointing is the fact that the lofty ideals contained in this part are non-justiciable: "The Judicial Powers vested in accordance with the foregoing provisions of this Section (c) shall not, except as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter 11 of this Constitution." The rights recognized under this Chapter of the Constitution are basically socioeconomic rights considered to be of paramount importance to women. Therefore, making these important provisions unenforceable has enormous implications for women's human rights.

The resource argument is the one most often advanced for making the ECOSOC rights non-justiciable. I submit that these arguments no longer hold true. What it cost Nigeria to democratize (including all the aborted transitions) would have been enough to eradicate poverty in all its forms in Nigeria. Further, the indivisibility, interdependence, and inter-relatedness of these rights – civil, political, economic, social, and cultural rights have now crystallized. For example, right to education falls within civil and political as well as socioeconomic rights. What lack of education means for women is early marriage, harmful traditional practices, and lack of self-determination; all leading to socioeconomic underdevelopment of women and girls. The trend in most recent constitutions is to recognize these ESC rights and make them justiciable. Further, there is a need to expand the content of substantive rights in Chapter II to include pre- and post-natal medical care for women, the right to work, and the right to social security, amongst others.

Citizenship

The 1999 Constitution has failed to solve the problems associated with citizenship in a democratic Nigeria. The 1999 Constitution recognizes only one class of nationals; namely citizens of Nigeria, of whom there are three categories:

Citizens by birth:

The following persons are citizens of Nigeria by birth:

(a) Every person born in Nigeria before the date of Independence, either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria.
(b) Every person born in Nigeria after the date of Independence either of whose parents or any of whose grandparents is a citizen of Nigeria; and
(c) Every person born outside Nigeria either of whose parents is a citizen of Nigeria.

As Nwabueze noted, citizenship by birth is used in the Constitution not in its generally accepted sense of citizenship derived from the circumstances of birth in a country (*jus soli*) but rather in a special sense of citizenship acquired automatically at birth. Birth in Nigeria by itself alone confers no citizenship; unlike in the United States and elsewhere, where anybody born in the country is a citizen whether or not the parents are themselves citizens. Therefore, descent from Nigerian parents carries greater importance than birth within the country.

A parent or grandparent of a person is deemed to be a citizen of Nigeria if at the time of the birth of that person such parent or grandparent would have possessed that status by birth if he had been alive on October 1, 1960.

Citizens by registration:

This second category of citizenship is provided for under section 26 and subject to the provisions of section 28.

According to the provision a person may be registered as a citizen of Nigeria, if the President is satisfied that

(a) he is a person of good character
(b) he has shown a clear intention of his desire to be domiciled in Nigeria and
(c) he has taken the oath of allegiance prescribed in the seventh schedule to this Constitution.

Importantly, it stated in sub section (2) that the provisions of this section shall apply to:

(a) any woman who is or has been married to a citizen of Nigeria; or
(b) every person of full age and capacity born outside Nigeria any of whose grandparents is a citizen of Nigeria.

The provisions of Section 26 (2)(a) clearly exclude its application to husbands of female Nigerian citizens. This is blatant sex discrimination that cannot be justified in any democratic society such as ours. It even contradicts the constitutional provision in section 42 that prohibits sex discrimination. This provision ought to be expunged from our Constitution so that Nigerian men and women can confer full residency rights to their foreign spouses.

The third category is citizenship by naturalization covered by Section 27 and made subject to section 28 on dual citizenship. This need not detain us except to say that the conditions for grant of citizenship by naturalization are too stringent and need to be liberalized. The required compulsory period of residence needs to be reduced from 15 years to 10 years. Additionally further reduction for a period not exceeding 5 years should be allowed for foreign spouses of female Nigerians, as naturalization is now the only option for them to become citizens of Nigeria.

Furthermore, section 28 on dual citizenship should be amended so that persons who acquired Nigerian citizenship by birth should not be required to forfeit their original nationality. Since citizenship by naturalization is also conditional upon good behavior and could be revoked by the President, it appears incongruous to ask the person on naturalization to forfeit original citizenship.

The most obnoxious part of this Constitution dealing with citizenship is Section 29, which concerns renunciation of citizenship. Section 29(4) stipulates that, for purposes of denunciation,

(a) "full age" means the age of eighteen years and above"
(b) any woman who is married shall be deemed to be of full age

One wonders how this very obnoxious and discriminatory provision found its way into the new Constitution. It is the first time such a provision appeared in a Nigerian Constitution. It is highly retrogressive, incompatible with modern sociology and a legalization of child marriage with its attendant consequences. This provision should be expunged forthwith from the 1999 Constitution.

Finally on citizenship, I would like to suggest that we should use gender specific words, such as the prepositions "he" or "she" to ensure that provisions apply equally to all without distinctions on grounds of sex or gender.

Again the issue of indignity – an identified problem especially for women — must be clarified in the Constitution. Specific provisions should be entrenched outlining conditions and circumstances when a person not originally from a particular state should become or be regarded as an indigene of the place. This could be based on grounds of residence and/or marriage. Also, state citizenship/ indignity could be based on the individual's site of labor or place of work.

We should also address the issue of federal centralism, which disempowers the citizens and exacerbates the indignity problem. The Constitution needs to explicitly define "state of origin" and empower women disadvantaged by indignity policies to be an indigene of two states simultaneously; that is, their state of origin at birth and their husband's state in cases where the wife's state is different from that of the husband.

Fundamental Rights

This part of the Constitution, also called the bill of rights, contains classical provisions on civil and political rights: the so-called first generation of rights only. Sections 33–44 deal with substantive rights, namely:

(a) Right to life – § 33
(b) Right of dignity of the human person – §34
(c) Right to personal liberty – §35
(d) Right of fair hearing – §36
(e) Right to private and family life – §37
(f) Right to freedom of thought, conscience, and religion – §38
(g) Right to freedom of expression and the press – §39
(h) Right to peaceful assembly and association – §40

(i) Right to freedom of movement – §41
(j) Right to freedom from discrimination – §42
(k) Right to acquire and own immovable properly anywhere in Nigeria – §43
(l) Payment of compensation in case of compulsory acquisition of property – §44

Section 45 deals with restriction and derogation from fundamental rights and freedoms, while section 46 made provisions for its enforcement and for granting of financial or legal aid to indigent citizens whose rights recognized under this Chapter have been violated.

Section 42 of the 1999 Constitution seems to be the most relevant provision through which women can fight against discrimination. Although it is not a right that can be exercised on its own, it can be linked to violation of other substantive rights recognized in the bill of rights.

Even though section 42 may prove very useful to women, it is still not adequate. In commentary on similar provisions under the 1979 (section 39) Constitution, I concluded that the provisions are inadequate as they preserve equal status for women and men only in relation to laws; as far as practices, customs, or other actions are concerned, there is no protection from discrimination.

In fact, item 61 on the exclusive list reinforces that thought as it excludes the federal government from making laws relating to the formation, annulment, and dissolution of marriages under Islamic law. Of course, this area poses the greatest challenge to realization of women's human rights. Nigeria should adopt the trend in modern constitutions of enacting an equal opportunity clause or provision that clearly embodies the equality and non-discrimination principles, mentions specifically men and women, and does not just lump "sex" as one of the prohibited grounds for discrimination. The language of the Constitution that is supposed to advocate for equality and non-discrimination is far from being gender sensitive. The word "he" is used and, given the content of that right, it is arguable whether "he" here could be said to mean "she".

There is a need to enlarge the content of Chapter IV, which, unlike Chapter II, is enforceable. Some of the provisions in the fundamental objectives and directive principles of state policy should be transferred to this Chapter. Economic and social rights, including the right to work, free choice of employment, just and favorable remuneration and trade union rights; rights to rest and leisure, the right to a standard of living adequate for health and well being including the right to food and shelter, should be part of the fundamental rights and freedoms contained in Chapter IV. Sexual and reproductive health rights of women should be specifically recognized. Also, the right of women and girls to inherit and succeed to their husbands' or fathers' property should be recognized. The 1992 Ghana Constitution recognizes this right and other specific rights for women and children.

Furthermore, we need to expand the definition of those who can bring an action to enforce the fundamental rights provision. As it stands, it may be difficult based on the application of *locus standi* for persons other than those directly affected to seek redress.

Implementation Of Treaties

Section 12(1) provides for implementation of treaties ratified by Nigeria; in particular, the domestic enforcement of treaties entered into by Nigeria.

According to section 12:

> *"No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted by the National Assembly.*
>
> *The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.*
>
> *A bill for an Act of the National Assembly passed pursuant to the provisions of this subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by majority of all the Houses of Assembly in the Federation."*

As I have argued elsewhere, ratified human rights treaties will be of little importance to an individual if not applied by national judges and administrators. Nigeria adheres to the common law legal system, which adopts a dualistic approach with regard to treaty interpretations and applications. Thus, an additional Act of Parliament is required to incorporate the treaty and make it a domestic law.

The processes outlined in section 12(3) for incorporation of treaties are rigorous, and it may be extremely difficult to domesticate human rights treaties – particularly those dealing with contentious issues like women's rights and children's rights. The provisions of the 1979 Constitution are relatively easier and should be readopted.

Causes of Constitutional Exclusion of Women in Nigeria

I want to go back to the question I raised earlier: Why is the female gender excluded from the Constitution and constitution-making processes in Nigeria? Why was it impossible for us to get specific provisions for women in the Constitution despite the seeming gender consciousness of Nigerian society, the work of women's rights organizations, and the numerical strength of women? What really went wrong?

Feminists, women's rights activists, and groups before now have not participated actively in debates about a Nigerian Constitution. It is only now that we are organizing and demanding inclusion and representation in constitution making. But as the Igbos say: tabugbuo, meaning that today is still early if we can begin to make the desired impact. Females who were involved in the nationalist movement were more concerned with the survival of the Nigerian nation than with getting specific rights for women. They would not have predicted, though, that an independent Nigeria would abandon its women and adopt a very retrogressive approach to women's human rights.

The conceptualized dichotomy of public and private sphere distinctions also made it very difficult for women to feature in the political space where constitutions are debated and negotiated. The experiences of women who made an incursion into the so-called men's space served to discourage others from making similar attempts. Related to this is the fact that women are not in power or decision-making positions where they can influence the political process and change the law and policies. Women's political powerlessness means that they always have to beg, shout, fight, and even cry to be included. Lack of concerted action by women's groups have also made it impossible for women to speak with one voice in lobbying and agitating for their rights – particularly the right to participate in determination of issues concerning them. Customs, culture, religion, and tradition are constantly used to deny women equal status in law and practice. The same Constitution that prohibits sex discrimination accords recognition to customs and tradition that discriminate against women by reason of their sex and gender. The 1999 Constitution and other legal standards in Nigeria are heavily weighted against women.

Conclusions

Gender-blindness and gender bias are truly reflected in the previous constitutions of Nigeria, and particularly in the 1999 Constitution. These constitutions have shown virtually no recognition that sex or gender can be a significant dimension in defining the substantive contents of individual rights or that they can affect the choice of methods that must be adopted by states to ensure that all individuals within their jurisdiction enjoy these rights equally.

Maintenance of distinctions and categorization of rights in the 1999 Constitution is a major set back to women's rights in Nigeria. The most important rights – if we are to prioritize – are made non-justiciable. Yet poverty and violence of all sorts are the most pervasive violations of women's rights. Civilized sociology requires that in a democratic society, democratic values must hold sway. We should recognize gender issues, which have assumed the same importance as ethnicity and religion and therefore play a major role. They impact, whether negatively or positively, on the democratization process.

However, the woman or gender questions, if addressed, will play an important role in the peace and unity of this country. As a Nigerian woman, for example, I have multiple identities – an Igbo, a woman, a Christian, and a southerner. But my gender identity is of more important consideration to me than my ethnic identity. The reason is that no ethnic group has been found to be most benevolent to women in the sense of according them rights and privileges deserved. Therefore, that a (very gender sensitive) woman becomes President of Nigeria holds a better prospect for me as a woman – and I think the majority of women would support such candidature, irrespective of whether she is Hausa, Tiv, Ijaw, Yoruba, Efik, Urhobo, Ogoni, Igala, or Igbo. I see women as the only group that can

come together across party, ethnic, and religious divide: not because they belong to the same gender but because they are able to see a commonality of purpose that transcends their differences.

For sustainability of our nascent democracy, a peaceful Nigeria, we need to take into account gender matters. Modern constitutions of other African countries, namely, South Africa, Ghana, Uganda, Eritrea, and Malawi (to mention but a few) have specific provisions on women and children. This simply recognizes the fact that motherhood and childhood deserve special protection. Colonialism, imperialism, debt crises, food crises, water crises and environmental issues impact especially and differently on women and their children.

Nigeria is very much part of the globalized world and cannot afford to be going backward when sister countries are forward-looking. Its constitution needs to reflect the international obligations it has undertaken: particularly, the obligation to eliminate all forms of discrimination against women. A consultative process to broaden and deepen the contributions of Nigerian women to constitutional reform and constitution-making should be initiated and sustained by all those concerned with the promotion and protection of women. The civil society organizations should take the lead in creating awareness, educating, and mobilizing support for women's participation.

In conclusion, I wish to posit that the 1999 Constitution should be taken as a transitional constitution (an interim constitution). The ongoing review processes initiated by both the executive and the legislature affirms to this assertion. The review has presented an ideal opportunity to give visibility to women's concerns for both participation and adequate protection in proposed constitutional amendments. Nigerians should work towards giving themselves a new ground norm with full participation of women and all stakeholders to make a constitution that will come into force before the next general election in 2003.

Gender democracy, evidenced by the balanced participation of women and men, is considered a cornerstone of democratic development. The empowerment and autonomy of women and the improvement of women's social, economic, and political status is essential for the achievement of transparent and accountable government as well as sustainable constitutional democracy and development in all areas of life. Although Nigeria has finally transitioned from military rule to civil rule, it has to take steps to ensure participation of all stakeholders – especially women who will, in collaboration with men, work towards a sustainable democracy.

CONSTITUTION MAKING IN NIGERIA: LESSONS FOR MAKING A PEOPLE'S CONSTITUTION

Author: Otive Igbuzor

Introduction

Nigeria, situated in West Africa, has the largest population of any African nation (Cutter, 2000:79), with an estimated 120 million inhabitants. For every four black people in the world, one is a Nigerian. Nigeria is endowed with a great deal of human and natural resources: the country contains 22.5 billion barrels of oil reserves and, through extensive offshore exploration, has the potential to increase its reserves to 40 billion barrels by 2010 (Cutter, 2000:83). It is ironic that despite its size, population and resources, Nigeria is today classified as a poor nation. In fact, when compared with the world's other oil-producing countries, such as Saudi Arabia, Libya, Iraq or Iran, Nigeria ranks among the poorest in terms of gross national product per capita income (Allen and Thomas, 2000). The Nigerian reality today includes a high level of unemployment, ethnic and communal conflicts, a huge external debt burden, a chaotic transport system, an epileptic power supply, the poor health status of its people, a widening gap between the rich and the poor, and a high level of poverty.

In this paper, we shall give a brief history of modern Nigeria and then situate the process of constitution making in Nigeria within that historical context. We shall then focus on the on-going review of the 1999 Constitution of the Federal Republic of Nigeria. We shall conclude the paper by deriving lessons for the making of a people's constitution.

Brief History of Nigeria

The history of modern-day Nigeria can be traced to the annexation of Lagos by the British government on 6 August 1861. British control was consolidated at the Berlin conference on the partition of Africa in 1885, when Britain's rights of supervision over the territory were officially recognized. It has been documented that between 1861 and 1914, through a combination of force and cunning, the British subdued the different nationalities in the Nigerian region and brought them into one political fold—modern Nigeria (Political Bureau, 1987:26). In 1914, the southern and northern protectorates were amalgamated. It has been argued that, from the British perspective, this amalgamation was motivated by the desire to pool resources so that the relatively rich territories of the South could assist their poorer neighbours in the North, under the overall control of the British (Political Bureau, 1987:27). The British ruled the territory that later became known as Nigeria for ninety-nine years (1861-1960).

Nigeria gained her independence from British colonial rule on 1 October 1960. A civilian regime was established with the 1960 Independence Constitution. In 1963, the Republication Constitution was created. On 15 January 1966, the military overthrew the civilian regime. The military handed over its power to civilians for a brief four-year period (1979-83) and then returned to rule for another sixteen years (1983-1999). Thus, out of forty-one years of independence, the military has ruled Nigeria for about twenty-nine years.

Process of Constitution Making in Nigeria

The importance of the constitution in the governance of any nation cannot be overemphasized. The constitution is a collection of norms and standards according to which a country is governed (Anifowose, 1999:157). The link between democracy and constitutional government is well established. It has been pointed out that although democracy is not dependent on the existence of a written set of rules in a constitution, without a constitution, practices conducive to efficiency, well-being and social justice may not exist (1-IDEA, 2000:16) Constitution making and/or review is therefore of paramount importance in any country.

It has been argued that the process of making a constitution is as important as the final product (CFCR, 2001:2). In Nigeria, there have been at least ten attempts to make or review the Constitution of the country. We shall divide the attempts in constitution making in Nigeria into two major phases: colonial era (1861-1960) and postcolonial era (1960-2001).

Colonial Era (1861-1960)

During the period of the ninety-nine years of British rule in Nigeria, there were at least six major constitution-making experiences. These include the amalgamation Constitution of 1914, the Clifford Constitution of 1922, the Richards Constitution of 1946, the Macpherson Constitution of 1951, the Lyttleton Constitution of 1954 and the Independence Constitution of 1960. According to Momoh, the amalgamation of 1914 was executed through three different constitutional instruments, all of which fell under the authority of the colonial office in London (Momoh, 200:41). In 1917 in the former Gold Coast (now Ghana), some intellectuals came together under the leadership of the lawyer Mr. Casely Hayford and formed the National Congress of British West Africa to struggle for the independence of the Gambia, Sierra Leone, the Gold Coast and Nigeria. In 1920, they sent a delegation to London asking for, among other things, legislative councils in all British West African territories and a West African House of Assembly. This delegation and other pressures led to the enactment of the Clifford Constitution of 1922 by Sir Hugh Clifford, who was Governor at the time. The Clifford Constitution created a legislative council of forty-six members, out of which only four were elected. This council, however, marks the first time that Nigerians elected their representatives.

During the Second World War, the struggle for independence and self-determination increased in tempo. In Nigeria, nationalists advocated for a new Constitution. As a result, on 6 March 1945, Governor Sir Arthur Richards presented the legislative council with his proposals for a new Constitution, which became known as the Richards Constitution of 1946. The promulgation of the Richards Constitution angered many Nigerians because the Governor did not consult with the people before the Constitution was enacted. This omission caused the people to reject the Constitution; opposition to the Constitution was immediate and total. Meanwhile, Governor Sir Arthur Richards left the country a year after the Constitution was enacted. The new Governor, Sir John Macpherson, had no option but to initiate fresh constitutional reforms. Learning from the experience of his predecessor, Macpherson conducted extensive consultations from the ward through the village, and at district, regional and national levels prior to drafting. A national conference was held on 9 January 1950 at Ibadan to discuss the draft before it became operative in 1951.

In spite of the broad consultations that contributed to the Macpherson Constitution, the document had a major defect. According to the provisions of the Constitution, central ministers were to be selected from among the members of regional legislatures. This arrangement made the ministers feel loyalty to their regions rather than to the central government, thereby leading to inter-regional frictions. These circumstances led to the constitutional conferences in London (1953) and Lagos (1954), and informed the enactment of the Lyttleton Constitution of 1954, under Governor Oliver Lyttleton. In preparation for independence, two constitutional conferences were held, first in London (1957) and then in Lagos (1958). This input collectively shaped the 1960 Independence Constitution.

From the history above, it becomes clear that agitation from nationalists motivated constitution making or review during the colonial era in Nigeria; indeed, nationalists were the driving forces for constitutional reform during this period. However, they did not participate in the actual drafting or approval of the constitutions.

Post Colonial Era (1960-2001)

The Independence Constitution of 1960 retained most of the provisions of the Lyttleton Constitution. The Queen of England remained Nigeria's constitutional monarch, represented by the Governor General. The final court of appeal for Nigeria was the Judicial Committee of the British Privy Council. These provisions, which were still applicable in "independent" Nigeria, provoked agitation for change. This campaigning culminated in a constitutional conference held in Lagos from 25–26 July 1963, at which time Nigerian political leaders resolved that Nigeria should become a Federal Republic. The Federal Parliament therefore passed the Republican Constitution of 1963 into law on 19 September 1963. The Constitution came into force on 1 October 1963. Under the Republican Constitution, the Queen of England ceased to be Head of State of Nigeria, and the Supreme Court of Nigeria became the final court of appeal.

On 15 January 1966, the military took charge of the government. In September 1975, the military government of General Murtala Mohammed set up a constitution-drafting committee composed of fifty appointed members, all of whom were men. One of the appointed members, Chief Obafemi Awolowo, declined to serve on the committee, and so only forty-nine "wise men" produced

the draft constitution. The draft was debated by a constituent assembly of elected and nominated members. The government appointed the Chairman, Deputy Chairman and Secretary of the Constituent Assembly. The draft of the 1989 Constitution was debated by the Constituent Assembly, one-third of whose membership was appointed by the military regime. The 1995 draft constitution was debated by a constitutional conference, with over one-third of the membership appointed by the military regime. Meanwhile, the election of the Constituent Assembly was widely boycotted.

The Constituent Assembly has been described as the most unpopular assembly in Nigeria's history. Out of a voting population estimated at 30 million, less than 350 people bothered to vote. The rest either stayed away in protest or were completely indifferent. Not only that, one third of the total membership of the conference were hand-picked nominees of the Abacha junta--most of whom were economic vampires and political charlatans… (Quoted in Obayuwana, 2000:74)

On 11 November 1998, General Abdulsalami Abubakar inaugurated the Constitution Debate Coordinating Committee headed by Justice Niki Tobi. The Committee was asked to submit its report by 31 December 1998.

From the above, it can be seen that constitution making in postcolonial Nigeria has been dominated almost entirely by the military. Apart from a minor amendment to the 1960 Constitution in 1963, all constitution drafting and review activities in Nigeria have been conducted by the military. It has been argued that there is an "intrinsically contradictory relationship between the military and democracy" (Momoh and Said, 1999: 288). The military is therefore not capable of engineering a constitution that will ensure a durable democracy.

Problems with the 1999 Constitution

Both the process of making the 1999 Constitution and its content are problematic. First, the Constitution was created during a military regime. Furthermore, the Armed Forces Ruling Council, made up of twenty-six persons (all males), approved the Constitution. The people did not participate in the process of making the 1999 Constitution. For this reason, the preamble that begins with "WE THE PEOPLE of the Federal Republic of Nigeria... do hereby make, enact and give to ourselves the following constitution" has been severely criticised in Nigeria as being a false claim (Kuye, 2001:XV). Hence we can say that, while the 1999 Constitution is a legal document, it is certainly not legitimate.

The content of the 1999 Constitution does not take into account the political history of the country. It incorporates inconsistencies and provisions that do not represent the wishes and aspirations of the people. A few examples will illustrate this point. First and foremost, the history of Nigeria shows that it is a federal system. However, the Constitution is very unitary, with an over-concentration of powers at the centre. For instance, the Constitution establishes a judicial council to control the appointment, promotion and discipline of both state and federal judicial officers.

Secondly, the language of the Constitution is problematic in several respects. It is written in the masculine gender, as if there were no women in Nigeria. Additionally, the legal jargon in which it is written is very difficult to understand. The trend today is to write constitutions in simple language that the average person can understand. Thirdly, the Constitution does not guarantee economic, social and cultural rights. Provisions for adequate shelter, suitable food, reasonable national minimum living wage, old age care and pensions, unemployment and sick benefits and welfare of the disabled are provided for under Chapter Two, titled "Fundamental objectives and directive principles of state policy". These provisions are not justicible under the 1999 Constitution and cannot be enforced. Meanwhile, these are the issues for which a majority of Nigerians demand priority attention.

Fourth, the Constitution suffers from inelegant drafting. For instance, Section 222, dealing with the registration of political parties, gives the impression that political parties only need register with the Independent National Electoral Commission (INEC), whereas Section 40 gives the proviso that INEC will have to accord recognition to the parties. Another example of inelegant drafting is Section 156, which prescribes that the same qualifications are necessary for both members of federal executive bodies, of which INEC is one, and for members of the House of Representatives. Meanwhile, Section 65 lists membership of a political party as one of the qualifications for becoming a member of the House of Representatives. The result is that the members of INEC, responsible for organising and supervising elections in the country, must be members of political parties. We do not think that this outcome is the intention of the Constitution.

Moreover, the 1999 Constitution not only continues the marginalization of women but also discriminates against women. It contains neither a specific equality clause nor an affirmative action clause. Whereas Section 26 makes it possible for any man to confer citizenship on his foreign spouse by registration, the same right is not extended to women.

In addition, the Constitution does not provide a liberal regime for political parties in which to operate. Finally, the Constitution vests all the resources in the country in the federal government. There is no doubt that this arrangement is a negation of the principles of fiscal federalism. We cannot but agree with Ihonvbere when he argued that "the 1999 Constitution failed to address in its entirety the character of the state; the nature of the custodians of state power; the critical issue of hegemony and the inability of the elite to initiate a national project; the national question, production and exchange relations; and other primordially determined or constructed identity questions"(Ihonvbere, 2000a:8).

Review of the 1999 Constitution

The 1999 Constitution ushered in the civilian regime after about sixteen years of uninterrupted military rule (1984-1999). The civilian regime was inaugurated on 29 May 1999. Barely one month later, the Centre for Democracy and Development, a leading non-governmental organisation in the West African sub-region organised a conference on the 1999 Constitution and the Future of Democracy in Nigeria, from June 30 to July 2, 1999. At the conference, the Citizens' Forum for Constitutional Reform was established. The Forum is a coalition of civil society organisations committed to a participatory and process-led approach to constitution making in Nigeria. At present, the coalition has over seventy members. At that same conference, the Honourable Attorney General of the Federation and Minister of Justice, Mr. Kanu Agabi made a commitment that "we will do what we can to set in motion the process to amend the constitution" (CDD, 1999:6). Barely two weeks after the conference, the President, General Olusegun Obasanjo (Rtd) announced the establishment of an eighteen-member party technical committee to review the Constitution. Each of the three registered political parties (Peoples Democratic Party, All Peoples Party and Alliance for Democracy) was expected to nominate six members. When the parties sent in their nominations, they did not include women. The membership was therefore increased to eight to accommodate women. In the year 2001, the National Assembly formed a Joint Committee on the review of the 1999 Constitution. It must be noted that this is the first time in the history of Nigeria that the people have an opportunity to make a constitution for themselves under a civilian regime.

The Making of a People's Constitution

We have argued elsewhere that the constitution-making experience in Africa exhibits two distinct strategies, an old approach and a new approach. In the new approach, the government appoints or stage-manages the election of a constituent assembly, Parliamentary committee, technical committee, special task force or select committee of conservative lawyers and politicians to write a constitution for the country. The process of the old approach ensures that there is little or no debate, no consultation with ordinary people and no referendum on the draft constitution before it is decreed or passed into law. Even if the process allows some limited debate the result is predetermined and manipulated and not informed by the logic and content of the debate. The new approach is a process led and participatory approach that puts a lot of premium on dialogue, debate, consultation and participation. It is guided by principles, which include among others diversity, inclusivity, participation, transparency and openness, autonomy, accountability and legitimacy. Inclusivity means that all voices and opinions including those of minority groups should be heard and reflected. Efforts must be made to bring in the views and concerns of people from all works of life. Every identifiable community should be invited, assisted and encouraged to participate in the review process. Nationality groups, women, students, the armed forces, the illiterate, the disabled, the poor, the rural dwellers, the youth, professions, trade unions, religious groups, traditional rulers, community organisations, prisoners, human rights organisations, pro-democracy groups, political parties, cultural organisations etc. should be involved to say what they will like to see in the constitution.

Diversity entails that the Committee charged with the review process and the process itself must reflect existing diversity in terms of ethnic identity, language, religion and gender. It is the responsibility of the country's leadership and those leading the process to ensure that this diversity is

reflected. If this diversity is not reflected, the final document cannot claim to be democratic, legitimate and reflective of popular view. The principle of Participation requires that the process must take on board the involvement of people at all levels in debating freely the content of the constitution. Every effort must be made to ensure that people participate in the process. Participation by the people is crucial because if the people do not participate, both the process and the final document will be useless and irrelevant to democratic renewal that is so badly needed in the country. It is necessary that the people not only participate in the process but also should have easy access to the process and the final constitution, understand it and use it in the defence of their individual and collective rights.

The principle of participation is pivotal because the centrality of constitution to the democratic process is increasingly being recognised by scholars, activists and governments all over the world. Transparency and Openness requires that the process must be transparent and open and must be seen by all to be so. To ensure transparency and openness, all submission made to the review panel; analysis of the submissions and the draft constitution should be filed, annotated, published and circulated widely. Furthermore, anyone who submits a memorandum should be acknowledged and drafts and final copy of the constitution sent to him/her. Another basic principle is autonomy. The body charged with leading the review process must be autonomous and independent from government control. It should not be tied to the whims and caprices of any arm of government. Furthermore, the final document to emerge from the process must not be tampered with by the government, and the process must be seen to be free from government control. In addition, the body charged with the responsibility of reviewing the constitution must be accountable to Parliament and the people. There should be periodic publication of report and progress of work in an open and transparent manner. Finally, the process should be guided by the principle of legitimacy. A national referendum should be conducted to test the popularity of the draft constitution. The minimum vote for approval should be 51 percent of "yes" votes. The referendum will further popularise the contents of the constitution and give the people the opportunity to review the draft constitution and be sure that politicians have not eliminated their collective views. Apart from the principles outlined above, the new approach utilises diverse mechanisms such as appointment of an independent commission to direct the process, elaborate public enlightenment and civic education and in built mechanism for making the people of the country to claim ownership and authorship of the constitution (Igbuzor, 2001:3).

From the above, it is clear that the making of a people's constitution can be brought about only by the new approach. However, the history of constitution making in Nigeria shows that the old approach is always utilised. During the colonial era, the colonialists formally initiated and drafted a constitution for the country. In postcolonial Nigeria, only the military has created constitutions (1979, 1989, 1995 and 1999).

The current review exercise being undertaken in Nigeria represents the first attempt by a civilian regime to review the constitution. This process would have offered Nigerians an opportunity to lay the foundation for a constitutional democracy. Unfortunately, the ongoing exercise is beset by problems. First, the committee set up by the President was made up of party representatives. Meanwhile, it has been documented that political parties in Africa are either incapable of or unwilling to push for constitutions that will promote just and equitable societies, being instead distracted by a chance to exercise power (CDD, 2000:34). Secondly, the Presidential Committee lacks the courage to make the necessary recommendations for amendments based on the submissions of the people. The Committee claimed in its report to have received about two million written memoranda and one and a half million oral presentations.

The Committee gave an analysis of the submissions in its report. Meanwhile, the recommendations of the Committee for constitutional amendment were not in accord with their own analysis. For instance, the report recognised that one of the contentious issues raised regarding the Constitution is "that it does not fully establish without contradictions the secularity of the Nigerian state" (Report of the Presidential Committee, Vol. 1 p.4). But in its recommendation, the Committee recommended that Sections 10 and 38, which deal with religion, should be retained in the Constitution as they are (Report of the Presidential Committee, Vol. 1 p.51). Thirdly, there is no coordination of the various efforts to review the 1999 Constitution. The Presidential Committee has submitted its report to the President with a draft-amended Constitution. The National Assembly has just started to collect another round of memoranda. Civil society is organising conferences, conducting research and collating opinions. However, there is no coordination among these actors. This situation is

compounded by the lack of a timetable or carefully planned programme for the review process. Finally, the review process by the government is utilising the old approach, which cannot produce a people's constitution.

Lessons for Making a People's Constitution

A people's constitution is a constitution made by the people utilising the new approach. The people should not only participate in the process of making a people's constitution, but the contents should reflect the history, wishes and aspirations of the people. Many lessons can be learned from the experience of constitution making in Nigeria. First, the process has shown that political leaders rarely decide to bring about fundamental constitutional reforms of their own volition. In colonial Nigeria, the driving forces for constitutional reform were the nationalists. In postcolonial Nigeria, the driving forces are civil society and pro-democracy activists. Secondly, political parties and the political class are not interested in fundamental constitutional reforms. They are more interested in capturing and exercising political power. In Nigeria, the 1999 elections were conducted without enactment of the law authorising the Constitution. It was after the elections, just before the swearing-in ceremony that the Constitution was released. Politicians vied for positions without knowing the constitutional provisions for the positions they were seeking. Meanwhile, the absence of a constitution was not an issue during the campaigns for election. Thirdly, constitution making in Nigeria is always based on the old approach: the people do not participate and so cannot relate to the final document as their own. The people are alienated from the political process, and the end result is corruption, conflict and a lack of respect for the rule of law.

Fourth, the leadership of a country has a substantial role to play in initiating the process for creating a people's constitution. If the leadership is honest and committed to constitutional reform, then the process can advance significantly. But, as Ihonvbere has argued, "when leadership is resistant to reform and openly engages in repressive practices to prevent a public discussion of reforms, no matter when reform is eventually initiated, such a leadership has already squandered the good will for genuine constitutional reform" (Ihonvbere, 2000b:94). Finally, civil society has a great role to play in constitutional reform. Civil society in Nigeria, led by the Citizens' Forum, has been able to isolate the fundamental issues of the 1999 Constitution and placed them in the public domain. They have X-rayed the 1999 Constitution and shared experiences from other parts of the world with Nigerians. They have led the debate on the review of the 1999 Constitution and made far-reaching recommendations for a fundamental review of the Constitution. Whether these recommendations will find their way into the reviewed constitution will depend on the balance of forces between agents of change and those who want to preserve the status quo.

From the above, it is obvious that any nation that wants to make a people's constitution must avoid the pitfalls of the Nigerian process. In any case, there is no alternative to the making of a people's constitution in any African country that is interested in bringing about the democratic renewal that is so badly needed in the continent.

THE AFRICAN EXPERIENCE, A GLOBAL VIEW: CONSTITUTIONALISM IN TRANSITION IN UGANDA

Author: Zam Zam Nagujja Kasujja

Historical Perspective

Uganda has since 1995 enjoyed constitutional governance under what is generally accepted as a people's constitution. The path to constitutional development and adherence has not been smooth. While most people accept that there is today a modicum of constitutionalism in Uganda's governance, there are areas that have remained sticking points and are now the subject of a Constitutional Review Commission.

Political and constitutional instability has been the principle characteristic of Uganda's postcolonial history to the extent that by 1985 the very existence of Uganda as a state was threatened. Systems of governance have oscillated from a West Minister Parliamentary system (1962–1966) into civilian and military dictatorship (1970-1979), coalition arrangements (1980-1984) and the present broad based movement (1986 to present).

Uganda obtained independence in 1962 with all the trappings of constitutionalism. The 1962 independence constitution (Lancaster) provided a cocktail for political governance with some kingdoms having a federal status, others semi-federal and a third part of the country under unitary governance. This period was short-lived. In 1966, the monster of African politics, the army, abrogated the Constitution. A one-man "pigeon-hole" Constitution was made which abolished all federal kingdoms and granted an executive President immense powers under a unitary system of governance.

Until 1986, Ugandans had never had a say in the governance of their country. The 1962 and 1967 constitutions were imposed on the people. The Uganda public had participated in the struggle for liberation and had withstood gross violations of their fundamental rights. By 1986, when the National Resistance Movement (NRM) took power, the people were ready to use legal means to map out a democratic and constitutional path for the country's governance.

The Making Of the 1995 Constitution

After the 1986 liberation war, the leadership of the NRM and the people of Uganda generally were in agreement that constitutionalism was the only worthy alternative to military coups, rebel activities, civil wars and seizure of state power through illegal and unconstitutional means. Having promised a fundamental change, the leadership of the NRM headed by President Yoweri Museveni was thus challenged to return constitutional order to Uganda's politics.

The Uganda Constitutional Commission, commonly known as the "Odoki commission" was set up in 1988. Its mandate was to try to achieve national consensus on the most suitable constitutional arrangement for the country. To dispel the fears of the public that the commission was a front for an already prepared NRM Constitution, the Commissioners had to be people of high integrity, intellectual capacity, special qualifications, experience and expertise. The social diversity of the country was taken into account during the selection of members. In the preamble to the statute, the drafters recognized the need to involve the people of Uganda in the determination and promulgation of a national Constitution that would be respected and upheld.

The Methodology Adopted

The Commission was mandated to do the following, *inter alia:*

- Guarantee national independence and integrity.
- Establish a free and democratic system of government that would guarantee fundamental rights and freedoms of the people.
- Develop a system that ensures the people's participation in their governance.

Faced with the above mandate, the Commission adopted a methodology that involved popular participation in a way unprecedented in the history of constitution making in Uganda, and perhaps in other parts of the world.

The methodology was premised on nine principles: fundamental change, consensus, participatory democracy, independence from government, fairness to all views, accurate analysis of views, utilizing people's views as a basis for the report, critical analysis of society and a comparative analysis of other Constitutions.

In a process that took close to five years, Ugandans were galvanized to participate fully in submitting oral and written views. A total of 25,547 written memoranda reports, position papers, essays and newspaper articles were received. Civil society formed caucuses to advance various interests. The multi-partyists, monarchists, landlords and federalists were organized as opposing political social and economic forces. Women's caucus, Movement Caucus and Buganda Caucuses were very active, while women's NGOs took up the cause of representing women and other marginalized groups. *Legitimacy issue* Seminars and workshops were held countrywide. In 1993, the Commission submitted a report on its findings.

Translation of Findings into a Constitution

The NRM government was profoundly aware of the importance of respecting the will of the people during the entire constitutional process. The Odoki Commission had proposed in its report a Constituent Assembly consisting of directly elected delegates and interest groups. A Constituent Assembly Statute was enacted in 1993. Under the Statute, a body of 288 delegates was constituted. Two hundred and fourteen delegates, the bulk of the assembly, were directly elected delegates; thirty-nine were women representing districts (one per district), ten for the NRM, two representing the trade unions, eight for the political parties, eight for youth, four for the disabled and ten delegates appointed by the President.

After over a year of sometimes heated debates, a new Constitution for Uganda was enacted on 22nd September 1995 and promulgated into Law on 8th October 1995.

Progressive Provisions and Points of Consensus:

Since its promulgation, some of the progressive provisions noted in the Constitution include the following:

(i) A set of "National Objectives and Directive Principles of State Policy" was established to assist in the application and interpretation of the Constitution. Though not part of the Constitution, these objectives and principles provide guidance for all organs and agencies of the state, all citizens, organized bodies and persons.

(ii) The Bill of Rights moves beyond the usual civil and political rights to include economic and social rights to education, family, women and children, workers' rights, the right to a clean and healthy environment and cultural rights.

(iii) The Constitution includes the right to information in the possession of the state or any of its organs.

(iv) Any limitation on the enjoyment of rights and freedoms must not exceed what is acceptable and demonstrably justifiable in a free and democratic society.

(v) The Constitution designates constitutional enforcement bodies such as the Human Rights Commission, an Electoral Commission and an independent Judiciary.

(vi) The Constitution offers affirmative action for representation of special interest groups, including youth, disabled persons, workers in Parliament, and makes provisions for one-third female participation in local governments. Parliamentary representation will however be reviewed after ten years.

(vii) The Constitution affords the army representation in Parliament.

Contentious Matters:

Have these matters been resolved? Where they contentious during the creation of the constitution, or are they contentious now because of the outcome? Was the outcome in accordance with public sentiment?

(i) National language Luganda/Swahili: settled for English as official language.

(ii) Form of government, Federal or Unitary. Unitary by majority – introduction of Decentralisation.

(iii) Electoral system whether first-past-the-post or proportional representation.

(iv) Political system, movement or multi-partyism, failed to reach a compromise, 60 multi-party delegates walked out of the assembly.
(v) By majority Movement System was given a new lease of five years and the matter left for resolution by a referendum.
(vi) Land: Landowners feel their property rights were taken away.

Shortcomings of The Process, Difficulty Of Achieving Democracy In Africa

The highly participatory approach to drafting the Constitution suffered setbacks that cast a shadow over some of the provisions in the document:

(i) Opposition was suppressed during the process. Political parties were barred from organizing themselves as parties and remain with minimal room for operation at national level even today. Even if a law were to be passed, the multi-party system would be subject to regulation.
(ii) Civil strife, particularly the armed conflicts in Teso and Acholi, limited the active participation of citizens in those areas throughout the process.
(iii) Previous constitutions had not been translated into local languages, and civic education did not reach every parish and village.
(iv) Fear of repression caused by years of suffering creates over protectionism as justification for denial of freedoms of association, assembly.
(v) Although power rests with the people, the public looks to the presidency as the source and guarantor of human rights.

Implementation of The Constitution: Protecting, Abiding, Respecting, Amending

In spite of the best efforts of the constitution-drafters, the implementation of the constitution itself requires continued vigilance and activity to ensure its consistent application and abiding meaning.

(i) A principle cause of instability arises because constitutions are not honored. Even the best-drafted constitution requires a conscious and dedicated political will to permit its implementation by all organs of the state.
(ii) A central paradox in constitutional law is that in order to enforce limitations on government power, it is necessary to create government power. If a prohibition on certain actions is to be legally enforceable, then some branch of government must be vested with power to put it into effect. This condition thus obligates the creation of constitutional bodies like the Human Rights Commission, Inspectorate of Government, Public Service Commission and Electoral Commission. Affordability has to be weighed against the need to have safeguards.
(iii) Establishment of a Constitutional Court.
(iv) Setting time frames for achieving some key provisions and kick-starting the implementation process.
(v) Procedures for amending the constitution have to strike a balance. Some provisions require a referendum that seems to contradict the principle of flexibility that constitutions ought to have.

Has Uganda Achieved Constitutionalism?

It is without doubt that the areas of consensus in drafting the Uganda Constitution far out-weigh the contentious matters. Nevertheless, those matters that remained contentious are fundamental to constitutional development. The rule of law has been restored, separation of powers largely respected, a functional Parliament installed, and elections for local government, Parliament[2] and President[2] have been held successfully under the new Constitution.

It is a positive step that the areas of dissatisfaction identified are now the subject of a Constitutional Review Commission where a dialogue and interaction can take place.

CONSTITUTIONAL DEVELOPMENT: THE ZAMBIAN EXPERIENCE

Author: Patrick Matibini

Introduction

African governance is still basically determined through trial and error; accession to political power is often accomplished by bullet rather than ballot; single party hegemony is by no means dead and buried; and governments continue to be unstable, political systems precarious and constitutions transient.[1]

Since the 1960s, when most countries in Africa achieved independence, there has been a remarkable output of national constitutions in almost every state in the continent. [2] The tragedy, though, is that most of these constitutions tend to be seriously deficient in quality and in meeting legitimate expectations of the people for which they are drafted. More often than not, they correspond to the particular taste of succeeding political regimes. Moreover, these constitutions, introduced at brief intervals, tend to be short-lived. The result is chronic instability on the continent.[3]

Many of these so-called constitutions are often a mere collection of rules of convenience administered by ephemeral regimes. Generally hurriedly drafted by a political coterie, (upon a calculation of exigencies) without meaningful public participation and without even consultation with other major stakeholders, they never really constitute the legal basis of the states themselves. Consequently, the basic law of many African states has become a precarious document that inevitably perishes with the particular regime that introduced it.

Constitutional Development in Zambia

(a) The First Republic 1964 – 1973

In 1964, Zambia's Constitution followed the Westminster model, bequeathed by Britain to all her former colonies at independence.[4] This Constitution contained the basic human rights provisions, which can be traced through the Universal Declaration of Human Rights back to the American Declaration of Independence and the French Declaration of the Rights of Man, which were inspired in part by Magna Carta and natural law doctrines. Zambia's 1964 Constitution was also fashioned around the usual governmental trinity, namely, the executive, the legislature and the judiciary.[5] This Constitution contained the classic Parliamentary system with a vice President responsible for Parliament, a system retained even through Zambia opted at Independence for an executive President. The 1964 Constitution also provided for a western style multiparty system, an entrenched bill of rights, an independent judiciary and a neutral civil service.[6] Save for changes in nomenclature, all laws enacted during the colonial period were continued (WC) into force by virtue of the Zambia independence Act and the Zambian Independence Order, both of 1964.[7]

(b) The Second Republic – The One Party State (1973 to 1990)

On 25 February, 1972, President Kenneth Kaunda announced the Cabinet decision to transform Zambia into a one-party state.[8] On 30 March, 1972, the Government appointed a Commission to consider and examine changes in the Republican and UNIP (what is this??) Constitutions and in the practices and procedures of government necessary to implement a one party state.[9]

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[1] *See generally* C. Anyangwe "The Zambian Constitution and the Principles of Autochthony and Supremacy" Zambia Law Journal Volume 29, 1997.
[2] *Id.* at 1.
[3] *Id.* at 2.
[4] D.G. Morgan "Zambia's one party state constitution" Public Law 42, 1976.
[5] C. Anyangwe op.cit., at 6.
[6] A.W. Chanda; "Zambia's Fledgling Democracy: Prospects for the Future" Zambia Law Journal Volume 25-28, 1993-1996.
[7] *Id.* at 127.
[8] Zambia Daily Mail, 26th February,1972.
[9] A.W. Chanda op cit., p. 28.

Specifically instructed not to entertain submissions on the desirability of the one party state but only on its form, the Chona Commission faced the resistance the main opposition party at that time.[10] The ANC (what does this stand for?) opposed the government's decision in the High Court of Zambia to no avail. Both the High Court and Court of Appeal held that the Government had the legal authority to introduce one party rule provided it followed all the procedures established for amending the Constitution.[11]The government then proceeded to amend the Constitution to provide for single party rule in December 1972.[12]

A new Constitution based on the recommendations of the Chona Commission was introduced in August 1973.[13] This one party Constitution enshrined the principle of party supremacy,[1914] giving decisions made by the UNIP's central committee precedence over any cabinet decision.[15] The President, as both head of state and commander in chief of the armed forces,[16] held enormous power under the party and Republican Constitutions. The executive power of the Republic was vested in him, while he was not obliged to follow the advice of any other person or authority.[17] He appointed all senior party and government officials, as well as the heads of parastatal companies.[18]

The President's position was also strengthened by the continuation of a state of emergency, which had been declared by the last British Governor of Northern Rhodesia on 28 July 1964.[19] Under emergency legislation, the President had the power, inter alia, to detain people without trial, to declare curfews, to control assemblies, among other powers.[20] The one party Constitution retained the bill of rights in a modified form,[21] and provided for an independent judiciary. The civil service was also politicized.[22]

(c) The Birth of the Third Republic - 1990

There is no doubt that the labor movement which provided the most potent threat to the one party state.[23] Under the leadership of then-Chair, General Fredrick Chiluba, the Zambia Congress of Trade Unions (ZCTU) resisted UNIP'S efforts to incorporate the Union into the ruling party structures. In March 1990, Chiluba urged President Kaunda to hold a national referendum on political pluralism.[24] Kaunda agreed to hold a referendum and stressed that UNIP would campaign against a return to political pluralism because multi-party electoral competition had previously led Zambia into the "stone age politics" of ethnic violence.[25]

However, before the referendum campaign could start in earnest, dramatic events intervened.[26] When the government doubled the price of the staple food, maize meal, in June 1990, three days of riots and looting occurred in Lusaka and nearby towns. Security forces killed twenty seven people;

[10] *See* Statutory Instrument Number 46 of 1972. The National Commission, set up under Section 2 of the Inquiries Act, was composed of representatives from UNIP, the trade unions, the Churches, business and industry, the University of Zambia, the Security forces, the House of Chiefs and the Government.
[11] *See* Harry M. Nkumbula Vs. Attorney-General HP/CONS/REF/1/1972. For the Judgment on appeal see Appeal Number 6 of 1972.
[12] A.W. Chanda op. cit. at 129.
[13] *Id.*
[14] Constitution of Zambia, 1973, Art. 4.
[15] *Ibid* Art. 47(C)2.
[16] *Ibid* Art. 37 & 54.
[17] Id. Art. 53(1) & (2).
[18] A.W. Chanda Op.cit at129.
[19] Government Notice Number 376 Proclamation Number 5 of 1964. The Governor invoked Section 4 of the Preservation of Public Security Ordinance 1960.
[20] *See* Section 3 (2) of the Preservation of Public Security Act CAP, 106; *see also* Regulations 46, 15, 16 and 33 of the Preservation of Public Security Regulations.
[21] Constitution of Zambia, 1973, Articles 13 to 20. The rights that were diminished were freedom of expression (Article 22), freedom of assembly and association (Article 23) and freedom from discrimination on the ground of political opinion (Article 25).
[22] A.W. Chanda Op. cit. at 130.
[23] *Id.* at131.
[24] *Id.* at132.
[25] Times of Zambia, 15th March, 1990.
[26] A.W. Chanda Op. cit. at.132.

arrested a thousand more and imposed a curfew. On the last day of that month, Army Lieutenant Mwamba Luchembe, took over the state television and radio station and announced that there had been a military coup.[27] Jubilant crowds surged into the streets to celebrate the coup, but these celebrations were cut short just hours later when the government announced that it had regained control of the state.[28] In July 1990, a National Interim Committee for Multi-Party Democracy was formed to prosecute the struggle for the reintroduction of political pluralism, with the rapid restoration of political pluralism as its mission. The committee argued that a referendum would be needlessly expensive and time consuming especially granted the widespread support for immediate change. Zambia's major cities were filled with huge crowds chanting the opposition slogan: "The hour has come." Kaunda was left with no choice but to accede to demands for the immediate restoration of political pluralism in September 1990.

A Constitutional Review Commission was appointed by Kaunda to draft a new Constitution, enshrining principles of political pluralism to guide the proposed Third Republic. In this spirit, Article 4 of the one party constitution of 1973 was repealed to allow the formation of independent political parties. In January 1991, the National Interim Committee registered itself as a political party under the name of the Movement for Multi-Party Democracy (MMD). Frederick Chiluba was elected as Party President in February.[29] In Presidential and Parliamentary elections held on the last day of October, Zambian voters gave the MMD an overwhelming victory. Chiluba became President with a stunning 76 per cent of the vote, while MMD candidates won 125 out of the 150 National Assembly seats.[30] The peaceful transfer of power in Zambia was a landmark event on a continent where electoral transfers of power are rare.[31]

(d) The 1996 Mwanakatwe Constitution Review Commission

When Zambia restored Multi-Party political competition in October, Zambia was held as a model for democratization in Africa. Since that date however, the record of the government has given analysts to rethink their earlier optimistic assessments.

One of the MMD's key promises during the election campaign of 1991 was that it would rewrite the national constitution to strengthen the protection of civil liberties and to ensure the disconnection of party and government.[32] However, the process of constitutional reform did not begin in earnest until two years after the transition.[33] In November, 1993, a twenty four member review commission was appointed to collect views from the general public and provide proposals for the content of a new constitution.[34] The Mwanakatwe Constitutional released its report in June, 1995, recommending that the Constitution be adopted by the Constituent Assembly.

Conceived as a sovereign body, the Constituent Assembly would have complete authority to deliberate upon and enact the Constitution.[35] The government responded with a white paper that agreed with some of the Commission's proposals but, in a manner reminiscent of the old one party regime, it unilaterally rejected several positions that did not reflect its agenda. Thus, in the midst of an vigorous debate about the provisions of the proposed Constitution, the MMD-controlled Parliament decided to go ahead and adopt a Constitutional Amendment, Act.[36] This decision, while constitutionally defensible, was a violation of the spirit of democratic discourse that President Chiluba claimed to champion. It prompted a fierce public outcry by opposition parties, civil society groups, and representatives of the donor community.[37] Not only did the decision contradict repeated promises by the government that the Constitution would only be revised following a period of wide public

[27] *Id.* at132.
[28] B. Chisela, "Lt Luchembe Coup Attempt", (1991).
[29] A.W. Chanda op.cit at 133.
[30] B.C. Chikulo, "Presidential and Parliamentary Elections in the Third Republic: 1991 – 1994," in DEMOCRACY IN ZAMBIA: CHALLENGES FOR THE THIRD REPUBLIC 25-51" (O.B. Sichone and B.E. Chikulo, eds., 1996).
[31] Michael Bratton Zambia Starts Over 3 Journal of Democracy 91, April 1992.
[32] R. Joseph "State Conflict and Democracy in Africa" Lynee Publishers Inc. 1999 London, at 377.
[33] *Id.* at.392.
[34] *Ibid.*
[35] C. Anyangwe Op. cit. at 13.
[36] R. Joseph Op.cit at.393.
[37] *Id.* at.393.

consultations, it also ignored the recommendation of the Commission and the demands of civil society groups and recommendations of key western donors that any new constitution should be ratified by a national referendum and a constituent assembly rather than by Parliament.[38] In the view of both international donors and domestic civil groups, such as human rights and pro-democracy NGOs, government efforts to steamroll the constitutional amendment act through Parliament represented a clear violation of the MMD's promise that major national decisions would only be made following an open dialogue and vigorous public debate.[39]

(e) 2001 Presidential and Parliamentary elections

Currently, the issue of constitutional reform is a major issue facing elections, which are scheduled for the end of 2001. It is generally acknowledged that the MMD government thwarted the progressive recommendations made by the Mwanakatwe Constitutional Review Commission. The Oasis Forum, (a strategic alliance of the Law Association of Zambia, the Non-Governmental Coordinating Committee, the Christian Council of Zambia, the Evangelical Fellowship of Zambia and the Zambia Episcopal Conference) is advocating for a thorough and genuine constitutional review to be undertaken with a least hundred days after the inauguration of the next government.

Conclusion

The MMD government inherited all the structures and laws of the Second Republic. Thus far, there has been no serious attempt by the MMD government to transform institutions and reform laws in order to bring them in line with the requirements of plural democracy.[40]

[38] *Id*. at 394.
[39] *Id.* at 393.
[40] A.W. Chanda Op. cit at136.

CONSTITUTION MAKING PROCESS IN ERITREA: CHALLENGES AND EXPERIENCE – POSSIBLE LESSONS FOR RWANDA

Author: Kebreab Habte Michael

I. HISTORICAL INTRODUCTION

Eritrea was an Italian Colony from 1889 up to 1941. In 1941 Italy was defeated by the Allied Forces. After the defeat of Italy, the British Military Administration (BMA) was established. The BMA introduced new training policies. Elementary education was established in many villages and local teachers were trained to assume this responsibility.

The British administered Eritrea until 1952. Following a United Nations General Assembly resolution in September 1952, Eritrea was formally federated with Ethiopia. The Federal Act (part of the UN resolution) provided Eritrea with broad legislative, executive, and judicial powers in all matters except foreign affairs, defense, external and interstate commerce, and currency. Eritrea had its own legislative Assembly with full powers to enact laws. The executive branch consisted of a Chief Executive assisted by department secretaries. The judicial branch consisted of a supreme court and other lower courts.

In November 1962, the federal status of Eritrea was terminated and Eritrea was annexed into the unitary system of Ethiopian Government as the fourteenth province. Eritrean institutions lost their law- and policy-making authority.

Eritreans attempted all peaceful means of re-establishing the status of Eritrea. However, the peaceful attempts failed. To counter Ethiopia's illegal actions, Eritreans established liberation fronts. The most successful front was the Eritrean People's Liberation Front (EPLF), which organized well- knit, centralized institutions to prosecute its war of liberation. After thirty years of bloody armed struggle, on Friday, May 24, 1991, EPLF's forces captured Asmara – thus liberating Eritrea from Ethiopian rule. Soon thereafter, EPLF organized the Provisional Government of Eritrea (PGE).

In April 1993, an internationally-supervised Referendum was carried out in which 99.8% voted for the independence of Eritrea, and on May 24, 1993, Eritrea was officially recognized as an independent state.

After independence, Eritrea had to embark on the ardorous task of institution-building, improving the economy, reconstructing the country, and establishing constitutional government. One of the main tasks was to draft a constitution for the nation so that a constitutional government could be formed. In 1994, the Government established, by Proclamation 55/1994, a Constitutional Commission entrusted to draft a constitution with the following specific mission: "to draft a constitution on the basis of which a democratic order would be established, and which, as the basic law, shall be the ultimate reference of all the laws of the country, and the final arbiter of all basic issues in dispute." (Article 4/1 of Procl. No 55/1994.)

The Commission consisted of 50 members, including Executive Committee, which was constituted of the chairperson, vice-chairperson, secretary, and seven other members. Twenty one members, or forty-two percent, were women. The Council members represented all section of Eritrean society. The Council had representatives from various ethnic groups, ex-fighters, social groups, persons with various political dispositions, intellectuals, and persons in the diaspora.

II. The Constitution-Making Process:

The Constitution Commission of Eritrea (CCE) was officially inaugurated on April 16, 1994. Even though it was initially mandated to finish its task within two years, the work took over three years.

The Commission, in order to finish its task, divided the work by phases. The First Phase centered around establishing its headquarters, setting up different committees, assigning tasks to committees, and conducting seminars to clarify tasks and responsibilities of CCE. Preliminary seminars were conducted by the CCE both inside and outside of Eritrea.

In July 1994, a Mini-International Conference was held for four days in Asmara with the aim of discussing important constitutional issues based upon research conducted by the four committees established for this purpose. The research projects conducted consisted of: a) Governmental institutions, b) Human rights and the rule of law, c) Social and cultural issues and the Constitution, d) Governance and the Constitution, and e) Economic issues and the Constitution. In addition to these papers, the Namibian and Swiss Ambassadors to Ethiopia, as well as the Chairperson of the Constitutional Commission of Ethiopia, submitted papers highlighting their own countries' experiences. During the same phase, a number of international conventions were translated into the main local languages and several papers were produced by commission members.

The Second Phase was from mid-November 1994 to May 1995. This Phase involved extensive public consultation consisting of seminars, lecturers, and an international symposium. In addition to these tasks, the CCE published a handbook entitled "An Introduction to Constitution" and a simplified "Cartoon about a Constitution." In December 1994, four hundred persons were trained to conduct civic education in towns and village meetings. To effectively carry out its mandate, the Commission established a network of centers in each of the country's ten (currently six) administrative regions. Seven provincial offices and seventy-three committees were established. The number of participants in the process was over half a million, out of which 40% were women.

In the diaspora, a number of Committees were established, particularly Europe, USA, Canada, the Middle East, Ethiopia, Kenya, and the Sudan. At the same time, a number of seminars and public debates were carried out. Towards the end of the Second Phase, major issues and questions were geared towards issue papers consisting of: a) the structure of the executive, b) legislative power and structure, c) the structure of the judiciary, d) electoral systems, e) centralization v. decentralization, f) fundamental rights and freedoms, g) social, economic and cultural rights, and h) equality guarantees. These issue papers greatly facilitated debate and consultation both at popular and at expert levels.

During January 7-12, 1995, an International Symposium was held, which greatly helped in examining these issue papers and other relevant comments regarding the contents of a modern constitution. After the International Symposium and debates, these issue papers were transformed into position papers or proposals. The following topics were recognized as essential: (1) Electoral system, (2) The Legislative Branch, (3) Woman and the Constitution, (4) Decentralization, (5) Fundamental Rights and Freedoms in the Constitution, (6) The Executive Branch and the structure of Government – which system is Appropriate for Eritrea, (7) The Judiciary, and (8) Defenses and the Security Institutions.

In August 1995, the Commission issued a booklet entitled "Constitutional Proposals for Public Debate." The proposals printed in this booklet are the reflections and outcomes of the public and expert consultations as well as the research and study of the CCE Committees. The purpose of these proposals was to raise public awareness and promote healthy debate on the most important constitutional issues before the drafting of the constitution.

III. Why a Constitution?

A constitution is a national charter expressing the philosophical, political, and legal bases on which government and society are grounded. It defines the national objectives, organization of powers, governmental legitimacy, and structure of political institutions. It is an important element of any political system because it acts as a descriptive statement of the guidelines which a government follows in carrying out the task of governing and establishes fundamental principles and procedures through which conflicts should be resolved. The constitution sets these general principles, but its application depends upon a constitutional system and constitutionalism. Successful constitutions have minimized open or flagrant clashes that arise within their societies. However, these successes depend on the government's acceptance of the constitution and the people's resoluteness to defend and use the constitution.

A constitution can be compared to the bylaws or charters of business organizations and consists of three main elements:

1. Statement of purpose and goals or philosophy;
2. Identification and establishment of the major institutions of the administration or state; and
3. The definition of procedures by which the state or its institutions make decisions.

If a Constitution is to have legitimacy and continuity, it should be based to the greatest extent possible upon the historical conditions of its provenance: the political and social forces that create it. It should address the present, look into the future, and take into consideration the development of the society it purports to serve.

In the Eritrean context, there was no doubt that the country needed a constitution to govern the relationship between the people and the government. Thus, the main aim of the drafting of the Eritrean Constitution was to lay the legal and political foundation on which a worthy political system can be based. It was believed that the following basic elements were an appropriate place to start:

1. a political system based on the principles of nationalism, secularism, and democracy;
2. the need to have structures and functions reflecting these principles;
3. a system with an ability to ensure equal participation and representation of all its citizens without any distinction in political outlook, religion, gender, or social status;
4. a political system which serves to strengthen unity in diversity;
5. respect for the basic human rights;
6. a system that accommodates diverse political views and guarantees freedom of opinion and freedom of political organizations;
7. creating a strong government based on strong democratic principles;
8. establishing a democratic government both in terms of process and substance (essential contents).

There were various debates regarding the nature of the constitution; that is, whether it should be flexible or rigid, comprehensive or brief, and how the amendment mechanism should be provided. It was resolved that the Constitution should be rigid because this requires special organs or more difficult procedures for amendment. Regarding the question of comprehensiveness or brevity, it was decided that it should contain concise, clear, and forward-looking principles and that it had to be written in general rather than in detailed terms to be responsive to development through the process of interpretation.

IV. Characteristics of a Good Constitution

A good constitution should contain at least the following characteristics:

1. Be definite – to avoid disputes and questions of interpretation;
2. Be comprehensive – cover the whole field of government and provide provisions for the exercise of all political power, sketch out the fundamental organization of the state, and specify the rights and duties of citizens;
3. Be brief – in an outline form to organize the state, even though there are new trends which suggest that a constitution should be detailed (South Africa, Namibia, Ethiopia, Uganda, and the former Soviet Union);
4. Provide a legal method of amendment so that it may be changed without revolution and in a peaceful and orderly manner;
5. Be stable and at the same time flexible;
6. Correspond to the actual conditions within a state. Sovereignty should be legally distributed in accordance with actual political power; that is, legal sovereignty should coincide with political sovereignty, otherwise there is constant danger of revolution.

V. Input from the Public.

Public debates and discussions were carried out both inside and outside Eritrea. A rough summary of the comments and questions raised at these has been prepared by the CCE under the following headings:

1. Government structure – 63 questions and suggestions were received
2. Basic Human Rights and Obligations – 15 comments were received
3. Administrative structure – 7 comments were received

4. Electoral Processes – 10 comments were for warded
5. Languages – 20 questions and comments were received
6. The Military and Security Forces – 12 comments were received
7. General Comments on various topics – 22 comments
8. Questions pertaining to the first draft constitution – 132 basic questions were asked

How effective the participation of the public had been, could be easily gauged by examining the discussions and questions that were put during the seminars, debates, and discussions. Taking into consideration the high rate of illiteracy, one would assume nominal and limited participation. However, the CCE was aware of this weakness and thus emphasized the use of face-to-face engagement with the public, radio, and television and attempted to simplify the concepts so as to be easily understood by the public. CCE took the constitution-making process as an opportunity to make it a learning experience for both the citizens and the Commission. Many valid points and clarifications were provided from members of the public who had no formal education but did have life experience.

The people of Eritrea have publicly supported the armed struggle whenever it was possible to do so. Therefore, the popular participation of the Eritrean people in such a historically-significant process was a continuation of the struggle. This was wise because the people should have a sense of ownership of the constitution if they are going to respect and defend it. It was agreed from the outset that the constitution is not something to be given as a gift from the top but something that belongs to the society.

The CCE has utilized the assistance of a) the 15-member International Advisory Board, which has diversified constitutional experience, and b) the Customary or Traditional Law Advisory Board, which was selected from members of the different ethnic groups who have good knowledge of the custom and law of their own locality. Both Boards have shared their experience and contributed greatly in clarifying certain issues.

VI. Some Suggestions to the Legal and Constitutional Commission of Rwanda.

It is essential that Rwandans recognize that the nation belongs to all Rwandese, whether Hutu or Tutsi. The sad history of genocide and other forms of killing is believed to have begun in 1959, just three years before independence. In 1959, the majority ethnic group, the Hutu, over threw the ruling Tutsi king. For many years, the killing of Tutsi continued and some 150,000 were driven into exile in neighboring counties. The children of these exiles later formed a rebel group, the Rwandan Patriotic Front (RPF), and began a civil war in 1990. The war, combined with several political and economic upheavals, exacerbated ethnic tensions, culminating in April 1994 in a genocide. This genocide is believed to have consumed roughly 800,000 Tutsi and moderate Hutu. The Tutsi rebels defeated the Hutu regime and ended the genocide in July 1994. Approximately two million Hutu refugees, fearing retribution, fled to neighboring Burundi, Tanzania, Uganda, and the Democratic Republic of the Congo.

From this background of political turmoil and intensive hatred, the constitution is expected to establish a pluralistic political system where the Rwandan people can live in peace and mutual respect. It should be a solemn act and a binding commitment. It should usher in an era of peace for all Rwandans.

The challenge of the Rwandan Constitution Commission is not the drafting of a constitution but the establishment of a political culture of tolerance through a constitution and constitutional system. The following are some suggestions to be taken into consideration:

1. Create a constitution that addresses Rwandan reality, history, and culture;
2. Establish a political system that includes everybody;
3. Prepare the public and the government to be ready to bring about a constitutional system;
4. Attempt to have a permanent constitution that looks into the future;
5. Give power to the persons elected by the people;
6. The constitution should be an expression of the identity of the people;
7. The constitution should specify the principles and purposes it wants to achieve;
8. It should be able to establish governmental administration that works;
9. Make sure that the constitution is not an instrument of the strong;
10. Attempt to creating conducive political atmosphere;

11. Establish fundamental principles and procedures of resolving conflicts and
12. Limit government power and provide for protection of basic human rights.

It should be borne in mind that having a document called a constitution is nothing. In the words of Walter Murphy, "a country having approved a document which it chooses to call a constitution and that document claiming precedent over all other political acts are not themselves proof of anything beyond the existence of stirring rhetoric." So, for a constitution to claim authority not merely on paper but to be put into practice as well, it must have an actual authority beyond rhetoric. It must be fully operative, not a sham meant to trick or delude the public with a semblance of validity.

Rwanda is at a crossroads. Drafting a constitution comes at a seminal moment in the nation's life and should reflect the triumphs, failures, and aspirations of the people in order to outline a bright future. Rwanda is being confronted by a terrible dilemma – what to do with the terrible past? How can peace be achieved without justice? It is a real dilemma that has no answer. These are serious questions that the Rwandan people, perpetrators, and victims must face squarely. No one can make a choice for Rwandans, but many may forward opinions.

Mahmood Mandani, in his book entitled *When Victims Becomes Killers: Colonialism, Nativism, and the Genocide in Rwanda,* makes comparisons between South Africa and Rwanda and the path each chose towards nation-building. In 1994, South Africans voted to form a democratic government – doing away with apartheid at the same time horror was erupting in Rwanda. "Both countries then faced a terrible dilemma: what to do about the past? Peace seemed to conflict with justice; the one saying delete the past, the other act on it." In such a dilemma, South Africa attempted to find a middle way: a dynamic process that tried neither to wipe away the past nor to prosecute the guilty. It sought "truth" and then "reconciliation." Politically, it established a government of national unity. On the other hand, the Tutsi-dominated government in Rwanda, which overthrew its genocidal Hutu predecessor, chased the perpetrators into Congo and killed them, and locked up 120,000 suspects at home. Rwanda, faced with the dilemma of finalizing the judicial process, is now attempting to experiment with the traditional local justice system to try the perpetrators of the horrible acts. The current government's policy seems to pretend that there is no difference between Hutu and Tutsi and attempts to prove that they can, with strict government guidance, live together in peace. According to Mamdani "in practice strict government means a Tutsi government that tolerates "good" Hutu."

If Rwanda is simply to follow democracy, then the majority Hutu will come to power and this is not a good political settlement. According to Mamdani, there should be an acceptance of the Hutu and Tutsi with political, not cultural or class affiliations. The solution, according to him, is to have "a broad-based constitutional settlement that includes everyone prepared to give up violence whatever their ideology."

Africa has a lot to teach the world about forgiveness. South Africa, Nigeria, Eritrea are some examples. South Africa was able to establish a "democratic government" despite all the years of apartheid. Nigeria, due to the civil war, was torn apart, but was successful in reintegrating the breakaway Biafra into the mainstream. Eritrea, after defeating Ethiopia, did not kill Ethiopian soldiers; it sent them home. The same people who were killing, maiming, raping, and essentially destroying everything moving were free to leave. Eritrea even went further and established a good relationship with Ethiopia, which has deteriorated since 1998.

Rwandans have suffered greatly. It is time that they can take this opportunity into their own hands. They must create an inclusive government, a peaceful and sober society, and make the past a lesson never to be repeated. They must not harbor grudges, which is not healthy at the individual or at the national level. Rwandans should remind themselves that "health is as contagious as disease, virtue as contagions as vice, cheer fullness as contagious as moroseness, freedom and democracy as contagious as oppression and totalitarianism, peace as contagions as war, love as contagious as hatred."

Peace-building is a very complex process. Peace does not mean cessation of hostilities. It does not come with the silencing of the guns. It does not come with a decisive military victory, nor with the overthrow of a government. Peace is a slow process and it comes with honesty, sincerity, wisdom, political will and commitment, and above all the readiness to forgive, which does not mean to forget.

The realization and understanding of its complexity, and the awareness of its very existence, is also one step forward to achieving it. Because the mind will be ready to look for solutions and future avoidance, I hope the constitution to be drafted in Rwanda will bring about all these values.

The culture of peace can be taught, and it should start from early age. How do we involve the youth, in particular, to help them to move away from a culture of war, guns, killing, and hatred to a culture of peace, tolerance, co-existence and reconciliation? If peace is to be sustainable, it must be people-owned and people-driven and has to start at the community level. Governments cannot reconcile; it is the people who do so. However, governments can be instrumental in accelerating the reconciliation.

The other essential element for peace is forgiveness. If we are not ready to forgive, there cannot be true reconciliation. Forgiveness does not mean to forget, but to be always vigilant that the past tragedy of genocide will never happen again. One South African Parliamentarian has this to say about forgiveness: “The future of my country will be dependent on our capability to forgive.” Forgiveness is a fundamental value for any society but more so for Rwandans at this historic juncture.

CONSTITUTIONAL DEVELOPMENTS AND THE POLITICS OF DEMOCRATIZATION IN UGANDA: ACCOMPLISHMENTS AND CHALLENGES

Author: George William Mugwanya

INTRODUCTION

This paper presents a brief but critical analysis of the Ugandan experience of constitution-making, constitutional review, and democratization. These lessons apply not only to Rwanda, but to the rest of Africa. The paper appraises these processes and then looks beyond them to assess whether the promulgation of Uganda's 1995 Constitution represented a new beginning or an end of a process. It questions whether a culture of constitutionalism and democratic governance has now evolved in Uganda, or whether such a culture is still a long way from crystallization. In a nutshell, this paper argues that despite its lamentable past under Yoweri Museveni, Uganda has pursued several remarkable transformations.

Uganda's constitution-making exercise attempted to redress the various lacunas and flaws that characterized the adoption of Uganda's past constitutions. Consequently, the 1995 Constitution as finally adopted contains a number of progressive provisions. However, certain aspects of Uganda's constitution-making exercise negatively affected the legitimacy and credibility of the process as well as the final document. Thus, this paper appraises the ongoing constitutional review process in Uganda, and argues that, although it constitutes an important attempt to deal specifically with issues that were inadequately handled in the Constituent Assembly (CA), the process contains some flaws which must be addressed if it is to have any viable result. Finally, this paper argues that while the government has generally been committed to the implementation of the positive aspects of the Constitution, the implementation of some negative aspects of the Constitution (especially the monolithic No-party Movement system of governance) continues to jeopardize the consolidation of a culture of constitutionalism, democratic governance, and respect for human rights. It is concluded that Uganda's constitutional, democratic, and human rights glasses are both half full and half empty.

UGANDA'S 1995 CONSTITUTION-MAKING PROCESS

The Uganda Constitutional Commission (UCC)

Uganda's 1995 constitution-making process made a significant break with past Constitutions, which were fundamentally mere impositions on the people by those holding political power. The 1995 constitution-making exercise involved a massive consultation throughout the country. The process was initiated with the enactment of the Constitutional Commission Statute and the appointment by the President of the Uganda Constitutional Commission (UCC). The UCC, composed of 21 members and chaired by a Supreme Court judge, was given a broad mandate to study and review the existing 1967 Constitution with a view to making proposals for the enactment of a new constitution; and to formulate and structure a draft of this new doecument. The Statute incorporated several guiding principles for a new constitution, which included numerous values indispensable to the creation of a democratic and accountable government. The Statute also emphasized a commitment to involving the people in the constitution-making exercise right from its preamble, a commitment so crucial in ensuring legitimacy of the constitution among the people. The Commission executing its mandate in about six phases.

Although the Constitutional Commission Statute originally required the UCC to submit its report to the Minister in twenty-four months, the UCC's work spanned four years. The UCC received a total of 25,547 submissions as a result of its efforts to collect people's views in a massive consultation exercise, and it endeavored to incorporate and reflect these views in its final report and Draft Constitution. It provided information to the public about the constitution-making process as well as the usual contents, role, and significance of constitutions with a view to enabling them to make informed choices and recommendations. People from different walks of life contributed enthusiastically to the debates, thereby giving the exercise credibility and legitimacy among the public.

Some factors, however, may have repudiated or compromised the free participation of the masses and in some way undermined the legitimacy and utility of the work of the UCC. First, the

members of the UCC were appointed by the President: in consultation with the Minister, but without any openly democratic process of consultation with the people's representatives. This created room to doubt the Commission's independence and impartiality, and provoked opposition from some sections of the population. These groups contended that the UCC was in the pockets of the government and that government had already made its Constitution and was using the UCC as a mere rubber-stump. In fact, the UCC itself alluded in its report to these very fears. The UCC tried to dispel those fears through the working methodologies described above. However, although those working methodologies are crucial, they cannot completely compensate for a weak foundational base.

Second, the UCC's over-reliance in the preparation of the Draft Constitution on the input of Resistance Councils (RC) created problems. Some critics have asserted that the RC memoranda were primarily those of the No-Party Movement government and not those of the "people." Although this critique is debatable, the fact that RC have been established as part of the framework of the No-Party Movement government and that they combine legislative, executive, and judicial powers, raise serious concerns.

Further, the government's suppression of organized, independent, and democratic political opposition/parties severely constrained the contribution of political parties to the debates and to the final report and Draft Constitution produced by the UCC. The suppression of political party activity (which continues to this date) appears to be difficult to justify. Both the UCC and the Constituent Assembly (discussed below) operated in a context where the No-Party Movement monoploized both governmental power and the political arena. Consequently, the regime was invested with the political means to disseminate the virtues of the No-Party Movement system and the patronage to demonstrate that indeed that system was best. Other opposition groups were denied opportunity to present their case and to influence the supreme law. Given these realities, some critics have alleged that the UCC was under pressure to conform to proposals that conformed to the No-Party system as prepared by the Ministry of Constitutional affairs and that adverse proposals were screened out by the UCC.

Finally, the UCC may be criticized for presenting issues touching fundamental human rights as "contentious" and to be determinable by the vote. Whether or not people should be allowed peacefully to assemble, associate and express themselves with a view to advancing political views (other than those of the incumbent regime) should not have been problematic since these issues touch fundamental rights and freedoms which are natural, inalienable, inviolable, and are not a preserve of the majority. The problem was created by the UCC in the questions it framed to be submitted to the people. The questions included whether Uganda should have a multi-party, one-party, or a non-party system, creating the impression that a Constitution could limit some human rights and freedoms to vote, and that some rights and freedoms could be suspended by a majority decision.

The Uganda Constituent Assembly (CA)

The UCC did not accomplish the whole constitution-making exercise but recommended the establishment of the CA, which would debate the Draft Constitution in order to produce a more definitive Constitution. The No-Party Movement regime must be credited for choosing to have an elected CA notwithstanding the fact that there was an elected Parliament. Some actions of the government prior to and during the elections, and the electoral law that was put in place, however, appear to have seriously compromised the working of the CA. It has been argued that when it became evident that the CA would be an elected body, the National Resistance regime took swift moves to manipulate the electoral process to its advantage. Among others, the regime restored the monarchies, the traditional rulers, and the "Ebyaffe" (particularly in Buganda) which had been abolished and appropriated by Obote in 1966. This move was calculated to sway the claimed "victims" of Obote's wrath to the Movement side during the CA elections. The regime succeeded in forging a marriage of convenience between the "Movementists" and "Monarchists" reminiscent of that between Obote and Edward Muteesa's Kabaka Yekka (KY) party in 1962 which was calculated to defeat the Democratic Party (DP). The regime may be saluted for restoring monarchies, since that is one way of appreciating unity in diversity and the promotion of the respect for group rights. In addition it is now generally clear that the institutions are participating in the development of their respective areas. On the other hand, the regime should have learned that the timing of its actions may have cast doubt on other important projects such as constitution-making.

To make matters even worse, the CA electoral law and the practice under it raised serious concern that the incumbent No-party Movement regime was not a dispassionate and independent overseer of the constitution-making and democratization exercise but was instead interested in perpetuating its stay in political power. The law outlawed and criminalized political party participation; most candidates were not permitted to identify themselves with any political party, and were to run on "individual merit." However, only multi-party advocates were not allowed to identify their political party affiliations; the candidates who supported the Movement system were free to do so. The electoral law unreasonably prevented political parties from advancing their positions as parties and to campaign for such positions. The Movement regime exploited all of the opportunities created by the dubious electoral laws as well as the benefits of incumbency to its advantage. The regime won the CA elections and secured massive representation in the Assembly. While the CA law may be credited for allowing groups such as the youth, the disabled, political parties, and women to be specially represented, the rest of the CA membership was meant to give the Movement regime an upper hand. Using its majority in the CA, the regime pushed various provisions into the Constitution, including those negating the fundamental freedoms of assembly, association and expression by individuals and groups opposed to the No-Party system of governance. Although it may be argued that deliberations in the CA over various issues went on smoothly, on few but important ones, the debates were characterized by a general unwillingness to reach compromise and consensus particularly on the question of the political system. Thus, although most of the provisions of the Constitution were adopted by consensus, few, but very important ones were very contentious/controversial and were adopted without consensus. In fact, deliberations over what kind of political system Uganda should have (the Movement-Political party dichotomy) attracted a move-out of the CA of over sixty delegates.

UGANDA'S 1995 CONSTITUTION: AN APPRAISAL

The 1995 Constitution as finally adopted contains a number of progressive provisions that address some lacunas in previous constitutions. For instance, the Constitution attempts to tame the executive; it entrenches an enriched bill of rights which gives explicit recognition to some economic and social rights; it guarantees the equality of men and women and the right to affirmative action of marginalized groups, including women, children, and the disabled. The Constitution protects the right to fair treatment in administrative decisions, a right with profound implications on the exercise of administrative powers. Also, it obligates the state and all its institutions to give effect to international law, especially international human rights law, an approach that should enrich Uganda's human rights protection. The Constitution establishes supportive institutions, including an Ombudsman, in the form of the Inspector General of Government (IGG), to check abuse of office and corruption, a permanent Human Rights Commission with a wide mandate, and an Electoral Commission. Also, it repudiates and punishes violent and unconstitutional assumption of power and amendment or destruction of the Constitution, which characterized previous dispensations.

On the other hand, however, in some areas, the Constitution is seriously flawed. For instance, it entrenches a "No-Party Movement" system of governance which negates the rights and freedoms of association, assembly, and expression of people and ideas opposed to the "Movement." It pursues an approach which views the "Movement" and "Multi-party" systems as diametrically opposed and mutually exclusive, and in some respects, it retains an executive-centered and autocratic philosophy widespread in past constitutions. Further, its bill of rights omits various economic and social rights guaranteed in various international human rights instruments to which Uganda is a party, such as the right to food and health. Ultimately, Uganda's constitutional, democratic, and human rights glasses may be viewed as half full and half empty.

AN ANALYSIS OF UGANDA'S CONSTITUTIONAL REVIEW PROCESS

At the height of the recently concluded Presidential elections, the Ugandan government appointed a Commission to review the Constitution. Since the adoption of the Constitution, controversial issues, especially regarding Uganda's political system, have remained and have created a polarized political situation. The interpretation and application of somewhat less contentious aspects, such as the separation of powers between the executive, legislature, and judiciary, have also

raised serious questions and tensions. It is against this background that the establishment of a Commission of Inquiry into the 1995 Constitution [hereinafter the CRC] may be supported.

However, the work of the CRC may be undermined by several factors, many of them similar to those that affected the 1988 UCC. The credibility, independence, and impartiality of the CRC may have been undermined by its mode of appointment. All members of the CRC were appointed by the Minister of Justice and Constitutional Affairs without any transparent or open democratic process of consultation with the peoples' representatives. In addition, the CRC's membership is not broad-based and does not incorporate other stakeholders such as political parties, human rights groups, women's groups, monarchists, the Bar, the media, or trade unions. Its narrow membership viewed against its mode of appointment raises doubt about its independence, and some sections of our population may be uninterested in tabling their views before it. Further, the CRC was created at a critical time during the canvassing of votes in the recently concluded Presidential elections. This may raise the fear that the CRC was created as a mere elections gimmick.

Finally, a critical look at the CRC's mandate shows that it is extremely extensive and in some cases ambiguous. It is debatable whether its is appropriate to engage in overhauling a Constitution that is only five years old and remains under the Movement patronage, or whether it would have been more appropriate to review the Constitution through a gradualist approach beginning with the more "contentious" issues and over the years deal with the less "contentious." It is also questionable whether the Commission will be able to effectively deal with each issue within the eighteen months assigned to it. Therefore, though the creation of the CRC provides a second chance to deal with issues that were not adequately dealt with in the CA, the CRC must confront several concerns surrounding its appointment, membership, and mandate if its work is to be viable. Even more important to the review process is that more is required beyond the production by the CRC of a comprehensive report. The report will have to confront a structured hierarchy of "Movement" power which can hold back or even veto any proposed reforms deemed antithetical to "Movement" interests. Ultimately, any viable reforms will depend on the goodwill of, and a substantial change of attitude by, the Movement-dominated Executive and Parliament. In addition, the results of any process of reform will remain in serious question unless the people are carried along with any proposed changes or rejection of change(s) in a genuinely informed manner.

CONCLUSION: IS THE GLASS HALF EMPTY OR HALF FULL?

The No-Party Movement has greatly contributed to the constitutional growth and democratization of Uganda. A critical look at Uganda's constitution-making process, from the appointment of the UCC to the election of the CA, points to some effort on the part of the regime to undertake the exercise as a shared effort in which different voices of the people were taken into account. However, the process also reveals some fundamental flaws, especially arising from the No-Party Movement government's intolerance to divergent views. This approach seriously undermined the utility of the Constitution as the basis for building consensus and the prevention of conflicts. It is pertinent to point out that there is need for a change of attitude on the part of the No-Party Movement regime if the ongoing constitutional review process is to succeed. The same approach is essential for the evolution of a culture of democratic governance and constitutionalism.

This paper has presented some of Uganda's experiences from which Rwanda may draw. Some aspects need emphasis. First, in drafting or reviewing constitutions, there is need for a popular consultation with the people. There is need for a culture of tolerance of divergent views in order to allow the opposition to participate. Institutions involved in the process need to be representative of the people and must be impartial and independent. Incumbent regimes have a pivotal role to play, but as much as possible they should act as independent and dispassionate overseers of the process. Also, although countries should examine their specific political, historical, cultural, and constitutional realities, they should also be guided and inspired by *universal* notions of democracy and human rights.

In some areas, particularly in structuring the political system, Uganda's constitution-making exercise was not inspired by universal norms, and this continues to cause problems. Impressive constitutions are of little use unless they are implemented. It is imperative that countries move beyond the adoption of impressive constitutions to the practice of constitutionalism, democratic governance, and respect for human rights.

THE DECLARATION OF A STATE OF EMERGENCY: SECTION 37 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

Author: Robin Palmer

INTRODUCTION

Rossiter describes a "state of emergency" as "a short-term dictatorship which frees the authorities of some of the restraints of the rule of law to enable them to deal with a temporary crisis." These "dictatorships" are nonetheless *constitutional* dictatorships that operate within a legal framework, although the constraints of law are considerably slackened. Virtually all legal systems of the world provide for derogation from constitutionally entrenched rights and guarantees in times of war or public emergency.

The essential justification for derogations such as the declaration of a State of Emergency is the necessity of preventing extra-constitutional action. History has shown a pattern of gross human rights abuses by authorities during public emergencies. As Ramcharan puts it:

> "It has been demonstrated repeatedly that some of the worst violations of human rights and humanitarian law occur during periods of emergency. Protective systems often break down; governments may wage war on their own subjects; countries ... are occupied by their own armies; and extremist groups of varying political complexions dispense terror with impunity."

This tendency is understandable when one considers that the jurisprudential basis for the suspension of fundamental rights is the maxim *"Salus republicae suprema lex"* ("The safety of the state is the supreme law").

The agencies used by the government to defend itself against perceived threats are the very agencies the general public relies on to enforce the law, namely, the police and the military. The fact that, in an emergency situation, the government is dependent on these agencies for its own survival makes it extremely difficult to discipline members of these forces for illegal or unconstitutional actions. This dilemma can, to some extent, be resolved by the delegation of this disciplinary function to the Courts.

The provisions contained in section 37 of the South African Constitution are justified by the recognition that there may be circumstances requiring society to consent to forego temporarily some fundamental rights in order ultimately to ensure its own survival.

Rules of International Law Applicable to Public Emergencies

The primary rules of international law applicable to public emergencies are the Universal Declaration of Human Rights (U.D.H.R.) and the International Covenant on Civil and Political Rights ("the Covenant").

Article 4(1) of the Covenant reads as follows:

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

Regional accords, such as the European Convention on Human Rights and the African Charter on Human and People's Rights also make provision for situations where a member state may, of necessity, have to derogate from both its domestic duty to protect and uphold civil and political rights, and its obligations in terms of international law to protect and uphold these rights.

However, the rules and norms of Public International Law do not give a state *carte blanche* to suspend or derogate from established rights. In the International Commission of Jurists' comparative survey of states of emergency, the underlying justification is stated as follows:

> "A state of emergency need not entail gross or excessive violations of human rights. The state of emergency is the counterpart in international law of self-defence in penal law ... The very concept of necessity, when respected, prevents excessive infringements of rights, just as the codification, in accordance with the principles of necessity and proportionality, of the list of non-derogable rights serves to prevent gross violations of human rights. The problem then is to prevent abuse of the states of emergency, and the formal declaration of an emergency is a step in this direction."

The requirements to be complied with in terms of International Law, in order to derogate lawfully from the adherence to universal human rights in times of public emergency, are the following:

(1) There must be a public emergency that threatens the "life of a nation";
(2) The state of emergency must be officially proclaimed in terms of domestic legislation;
(3) Measures taken must be strictly required by the exigencies of the situation (the Proportionality principle);
(4) The measures of derogation must be consistent with the state party's other international law obligations;
(5) Derogation measures must not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin;
(6) Other parties to the Covenant must be informed about a decision to derogate;
(7) Although the executive makes the decision to proclaim a state of emergency, this decision is subject to legislative control and judicial supervision; and
(8) A number of fundamental rights may not be derogated from.

The following four rights are considered non-derogable in all circumstances:

(1) The right to life;
(2) The prohibition on torture;
(3) The ban on slavery; and
(4) The principle of non-retroactivity of penal laws.

In both the First and Second Certification judgments, the Court accepted that the provisions of section 37 are generally consistent with international legal norms.

The Provisions Of Section 37:

Declaration of a State of Emergency: S37(1)

Section 37(1) requires that a state of emergency be *declared* in terms of an Act of Parliament. Section 37(2)(a) provides that a State of Emergency may only be effective prospectively. This requirement of *prospective* effect is to prevent the *ex post facto* validation of excessive executive actions, and also serves to prevent criminalizing past behaviour.

Section 37(1)(a) provides that a state of emergency may only be declared when the life of the nation is threatened by:

(1) war;
(2) invasion;
(3) general insurrection;
(4) disorder;
(5) natural disaster; or
(6) other public emergency;

In addition to the s37(1)(a) requirement, the declaration must be *necessary* to restore peace and order.

In terms of s1(1) of the State of Emergency Act, the President may, by proclamation in the Gazette, declare a state of emergency in the Republic or any part thereof.

Duration of a State of Emergency: S37(2)(b)

Section 37(2)(b) provides, *inter alia,* that a state of emergency shall be effective for no more than twenty-one days from the date of the declaration. This period may be extended for additional periods of not more than three months at a time by resolution of the National Assembly. Such a resolution may be adopted only following a public debate in the Assembly.

While the President may declare a state of emergency without reference to Parliament, the first extension of the period of the state of emergency beyond the initial twenty-one days must be adopted with a supporting vote of more than fifty percent of the members of the National Assembly. Any subsequent extensions must be by a resolution of the Assembly with a supporting vote of at least sixty percent of the members of the Assembly.

Judicial review of the declaration of a State of Emergency: S37(3)

Section 37(3) of the Constitution gives any competent court the power to:

(1) Decide on the validity of the declaration of a state of emergency;
(2) Decide on the validity of any extension of the state of emergency;
(3) Decide on the validity of any action taken or legislation enacted in consequence of the declaration of a state of emergency.

Derogation: S37(4)

This subsection provides that legislation enacted in consequence of the declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the derogation is *strictly* required, and the derogation must comply with the Republic's obligations in terms of international law applicable to states of emergency.

In addition, the proposed derogation cannot have the result of indemnifying the state or any person for unlawful acts; effecting derogation from s37 itself; or effecting derogations from a number of rights listed in a table of non-derogable rights.

In response to the criticisms of s37 in the First Certification judgment, the table of non-derogable rights was revised. Despite these amendments, objections were raised that more rights should have been included as non-derogable rights, and that the amended table of non-derogable rights should be expanded to include other rights such as the right not to be deprived of one's citizenship. The court conceded that these objections, "…were not without substance..." but rejected these objections on the basis that none of the objectors was able to point to any universally accepted principle regarding the protection of rights in states of emergency that had not been met by the provisions of section 37.

In the First Certification judgment, the Court specifically criticized the derogability of section 35(5) (the duty of the Court to exclude unconstitutionally obtained evidence). This specific criticism has now been partially addressed in that the duty to exclude unconstitutionally obtained evidence, if the admission of such evidence will render the trial *unfair,* has been made a non-derogable right.

However, the second ground for exclusion in section 35(5), the duty of the Court to exclude unconstitutionally obtained evidence if the admission of such evidence would be *detrimental to the administration of justice,* remains a derogable right.

Apart from this specific example, numerous other anomalies and inconsistencies remain. The effect of s37 on *each* right in the Bill of Rights needs to be carefully considered afresh.

The additional examples below may serve to illustrate other potential problem areas:

Human dignity:

The non-derogability of s10 (Right to Human Dignity) in its entirety could have unintended consequences, as the judicial interpretation of various facets of human dignity in peacetime may create precedents unenforceable in time of war or public emergency. For example, bodily searches by persons of the opposite sex may be held to be an impairment of dignity, but may be unavoidable in emergency situations.

Prohibition on torture or cruel and inhuman punishment:

Section 37(5)(c) renders s12(1)(d) and (e) non-suspendible.

A problem could arise here in that behaviours or actions that may be held by the Courts to be cruel, inhuman or degrading punishment in peacetime (for example, solitary confinement) may be unavoidable in time of war or public emergency.

Children's Rights:

Only certain sub-sections of section 28 are rendered non-derogable: one result is that children may be deprived of their names and nationalities, as section 28(1)(a) is capable of suspension. It appears that not much thought has gone into the rationale for suspension in this section, as s28(3) is also suspendible, which presumably enables the authorities to redefine a "child" for the purposes of s28.

Interpretation and Limitation of Rights:

Both s36 (Limitation of rights) and s39 (Interpretation of rights) form part of the Bill of Rights and are capable of being suspended. Although s37(5)(b) prohibits any derogation from section 37 itself, this does not necessarily preclude the application of s36 to the provisions of s37, which could cause interpretational difficulties. Also, should the interpretation clause itself be suspended, this may imply a reversion to the application of the traditional rules of statutory interpretation when interpreting the Constitution during a state of emergency.

The Death Penalty in a State of Emergency

The right to life (s11), the right to human dignity (s10), and the prohibition on cruel, inhuman and degrading punishment (s12(1)(d) and (e)), have been made non-derogable by s37(5)(c) of the Constitution. In *S v Makwanyane and Another*, the main *rationes decidendi* of the Court's judgment, and every one of the ten separate judgments, are to be found in one or a combination of these non-derogable rights.

It is nevertheless strongly arguable that, in terms of the law as it currently stands, the imposition of the death penalty remains as a lawful sentence, at least for certain crimes, and possibly for a number of serious crimes, during a State of Emergency. (Note also that Public International Law permits the imposition of the death penalty - see English and Stapleton: *The Human Rights Handbook* (Juta; 1997, pp.24-38)).

Section 37(6): A mini bill of rights?

One of the main purposes of declaring a State of Emergency is to enable the State to detain individuals suspected of organising and fomenting violence or insurrection, with the object of removing them from the community and to prevent them from communicating instructions to their followers.

A person detained without trial under a state of emergency has a number of rights, which are contained in sub-sections (6), (7) and (8) of s37.

The conditions of detention contained in s37(6) provide detainees with comprehensive protection and are, in general, in conformity with the norms of international humanitarian law. They reflect a determination to prevent a recurrence of the detainee abuse that occurred under the Draconian security legislation of the apartheid era.

The focus of the s37(6) protections should be to ensure that detainees are not physically or mentally mistreated whilst in detention; these constitutional protections should not have the result of unduly hampering the authorities in their attempts to restore order, as this will increase the likelihood of unconstitutional actions by the authorities charged with enforcing the State of Emergency. It seems, however, that many of the provisions of s37(6) could lead to precisely this result.

For example, as detainees have access to lawyers and *doctors of their choice*, they could continue to communicate orders to their followers via sympathetic lawyers and doctors. To make the authorities' task even more difficult, the state has the task of justifying the detentions in a court of law *every 10 days*, facing the severe onus of satisfying the Court that the continued detention of the detainee is *necessary*, failing which the Court is *obliged* to release the detainee.

In addition, the State has to present written reasons to the Court to justify the continued detention of a detainee, and must show "good cause" to the Court prior to redetaining a detainee released by the Court.

In addition to the rights set out in s37(6)(a) to (h) and s36(7), numerous due-process rights contained in s35 have been rendered non-derogable by s37(5)(c). (The Constitution surprisingly allows for derogation from s35(2)(e), which requires conditions of detention consistent with human dignity. This is in direct conflict with the right to human dignity (s10), which has been rendered *non-derogable* by s37(5)(c)).

Faced with this array of legal obstacles, the authorities may well be tempted to try and bypass or ignore these laws. To address these potential problems, detainees could be given access to the Public Protector or the Human Rights Commission to exercise their rights in terms of s37(6), rather than having the right of access to doctors and lawyers of their choice.

Also, consideration should be given to changing the difficult onus cast on the authorities by s37(6)(e) (i.e. to show that it is *necessary* to keep the detainee in detention to restore peace and order), to a less difficult onus, for example, the duty to demonstrate a *reasonable link* between the persons detained and the prevailing disorder.

The extensive protections given detained persons by s37(6) may prove to be unworkable in practice — this sub-section should be simplified and streamlined with the emphasis on protecting the four basic human rights recognised in International Humanitarian Law.

CONCLUSION

The purpose of s37 is to give the authorities a fair amount of latitude to restore peace and order in times of public emergency or in a state of war.

If the enforcement of the emergency provisions is made too onerous, it may merely result in the detainees' constitutional safeguards being disregarded, and lead to a reversion to the doctrine of "might is right".

To ensure adherence to the Rule of Law in circumstances where the forces of law and order face extraordinary situations, requires a fine balance between safeguarding basic human rights, and giving law enforcement officials sufficient leeway to act decisively to restore peace and order.

In general, the emergency provisions contained in s37 are cumbersome, and unfairly weighted against law enforcement officials. They require revision and streamlining to ensure that the progress we have made in fostering constitutional behaviour under the Rule of Law is not lost in the wake of our first public emergency.

ELECTIONS IN BENIN

Author: Elisabeth K. Pognon

The National conference held in Cotonou on February 19-20 has chosen to install a democratic regime in which the three powers of government would be separated and respect of public liberties and fundamental human rights would be guaranteed. This choice has a foundation in the Constitution of December 11, 1990, which proclaimed in its preamble the creation of the rule of law and of a pluralist democracy. The Constitution states in article 4 that "the people exercise their sovereignty through their representatives and through a referendum…".

The democratic process began some ten years ago. These changes to the legislative and executive powers were made through elections. To date, National Assembly elections have been organized three times: in 1991, 1995, and 1999. Three Presidential elections occurred in 1991, 1996, and 2001.

Two structures have organized and managed the elections since 1995. The first is an administrative structure, called the National Autonomous Electoral Commission (NAEC). It was created for the first time by the law 93-013 of January 17, 1995. The second structure, the Constitutional Court, is a legal entity.

During the democratic rebirth, the first elections, organized in 1991, received the highest enthusiastic consensus in the history of Benin. The process was successfully conducted so that the High Council of the Republic, acting as the Constitutional Court before the installation of the latter, did not receive a single appeal regarding the elections. As time passed, however, there was growing mistrust. Suspicions began to arise that the legislative elections of March 1995 were held in bad conditions. It became apparent that a formula which took away from the Ministry of the Interior its power of organizing elections was necessary. It is in that context that the idea of the NAEC was born.

This creation was not easy. After a verbal sparring match in the assembly, followed by a second reading before the vote, the debate was brought to the Constitutional Court where it was argued that there was non-conformity with the Constitution and the Law 94-013 of November 21, 1994, which stipulated the general rules for elections of the President of the Republic and members of the National Assembly. The contention was that the creation of the NAEC violated the principle of separation of powers. The Constitutional Court, through its decision of December 22-23, 1994, (DCC 34-94 of December 23, 1994) declared that the NAEC was in conformity with the Constitution. The Court stated that:

> … the electoral regime is an issue that must totally be given to the legislator; therefore, the National Assembly may, if it wishes so, in fixing electoral rules, go as far as it wishes, in the detail of the organization of the electoral process or let the government determine implementation measures.

The Constitutional Court further said that:

> … the creation of the NAEC, as an independent administrative authority, is related to the desire to find a way of identifying, in the state administration, one organ having real autonomy towards the government, ministerial departments and the Parliament for the exercise of mission concerning the sensitive area of public liberties, in particular fair, legitimate, free and transparent elections.

The National Autonomous Electoral Commission (NAEC)

For the first time in Benin, the NAEC was established in the legal and political background, and one was to be created for every election. The experience was repeated four times, and the forth NAEC terminated its works with the re-election of Kerekou in April 2001.

The NAEC has great independence from any power or institution such as the Constitutional Court. The duration of its mission is too brief to allow external interventions on its autonomy. In principle, it is installed three months before the elections (that period was never respected; it has always been shorter than that), and it stops its mission, after a general report of activities, forty-five days after the proclamation of definitive results (Law 2000-18 of January 3, 2001). That provision,

related to the duration of the mission of the NAEC, seems to be adequate. Even though there are some members who come in with agendas, they do not have time to corrupt the whole organ.

This short duration of the commission and its renewal for every election has some inconvenient aspects. Every NAEC must start from scratch as if the preceding one never existed. To remedy this inconvenience, a structure is created that serves as a bridge between two elections. This is the Permanent Administrative Secretariat (PAS-NAEC), whose members are elected by the National Assembly by secret ballot and nominated by the President of the Republic. Additionally, the NAEC autonomy would be a mere wish if it had not a real financial and managerial autonomy. It sets up a budget that it manages.

The composition of the NAEC tends to protect the commission from pressures from any specific group. In proportions that have more or less varied, members of the Commission included elected representatives of the Government, the National Assembly, magistrates, and the Benin Commission for Human Rights. The number of members has varied from one NAEC to another (seventeen in the first NAEC, and twenty-five in the fourth NAEC); the mode of designation of its members, however, has been constant. To demonstrate the autonomy of the organ, members of the Commission swear in the Constitutional Court, which install them in functions. Members of the NAEC and its branches (Departmental Electoral Commission: DEC; Local Electoral Commission, LEC) can not be candidates. Members of the NAEC elect amongst themselves a bureau and its President.

"The NAEC is in charge of preparing, organizing, monitoring and supervising electoral operations and result centralization. The Commission has all investigation power to ensure fair elections. It proclaims the final results of local elections. After centralization of legislative and Presidential election results, the NAEC send the results to the Constitutional Court for legitimacy verification, examine appeals and proclaiming final results…" Art.46 of the law 2000-18 of January 3, 2001. It would be hazardous to let the NAEC alone make the management of this heavy responsibility to organize fair and transparent elections. Elections present to the world the real situation of democracy in a country. The NAEC can involuntarily fall in some mistakes. Benin made the choice to implicate a high jurisdiction in the management of elections: this is the Constitutional Court.

The Constitutional Court

This jurisdiction was created by the Constitution of December 11, 1990. We had just come out from seventeen years of a Marxist-Leninist regime, so we installed a pluralist democratic regime to ensure the effective and true participation of the citizen in the management of the State. We were afraid that the old demons could wake up again. We needed to create counter-powers to ensure participate in the consolidation of democracy; one of these was the Constitutional Court.

At this time, we shall only talk about its attributions related to elections. It is important for its efficiency that the Court be reliable. Through the mode of designation as well as the status of its members, the Constitutional Court has total independence from legislative and executive powers. The Constitutional Court is composed of seven members: three magistrates, of whom two are nominated by the Bureau of the National Assembly and one by the President of the Republic; two highly experienced lawyers, one nominated by the National Assembly and one by the President of the Republic; and two persons of high professional reputation, one nominated by the National Assembly and the President of the Republic.

Before starting their duties, they swear in before the National Assembly and the President of the Republic. They meet and elect a President among the magistrates and lawyers. The duration of the mandate is five years, renewable once. Hence, an unlimited tenure could not be a reward for loyalty. For the independence and the dignity of his post, a constitutional judge in Benin has full protection founded on principles of non-mobility and immunity.

In electoral issues, the Constitutional Court plays an important role. The Court is present at all steps of the process: during preparatory operations, during the ballot, and during the final results and post-results phases. In fact, "the Constitutional Court job in terms of Presidential elections is determined by the Constitution in its articles 49 and 117" and completed by subsequent electoral laws. The respect of norms must conform with the Constitution. The Constitutional Court must ensure that the ballot for the President of the Republic is legitimate, examine appeals, decide on irregularities that the Court notices, and proclaim results.

Article 81 of the Constitution contains a provision concerning legislative elections as follows: "the Constitutional Court sovereignly decides on the validity of elections of members of Parliament." This provision is completed by article 54 of the Organic Law 91-009 of March 4, 1991, on the Constitutional Court and modified by the Law of June 17, 1997: "final results of legislative elections are stated and proclaimed by the Constitutional Court within seventy-two hours after receipt of the results from departmental electoral commissions."

The Constitutional Court stated in its decision DCC 34-94 of December 23, 1994 (the same decision which ruled on the conformity of NAEC with the Constitution) that the organic law on the Constitutional Court is part of the constitutionality bloc and that its respect is mandatory for all inferior norms on the same level as the Constitution.

A quick reading of the provisions related to the mission of the Constitutional Court regarding Presidential and legislative elections could leave the impression that both are the same. Regarding the Presidential election, the Court has the power to notice by itself irregularities on the ground and to examine them. In the second case, the Court decides only in case of appeal. It is evident that the Court installed in Cotonou would need to go around in order notice irregularities which would be committed in the countryside.

Thus, during Presidential elections of 1996 and 2001, the Constitutional Court has sent its representatives in all departments to monitor ballot operations. These representatives did not have the power to sanction irregularities, but could notice and make a report to be presented to the plenary session of the Court during the vote counting. This eventually limited fraud attempts insofar as potential cheaters knew that they would not benefit from their acts.

Due to its presence on the ground, we believe that the Constitutional Court, at a higher level than a mere observer, provided those elections with a measure of peace, especially the 2001 elections in which seventeen candidates were competing.

The Court decides on controversial issues during Presidential as well as legislative elections. Appeals sent to the Court must be written, free of charge and sometimes contradictory. Issues sent for consideration to the Court are diversified. The issues include objections related to the following:

1. Action by the government or an administrative authority transgressing on the area of competence of another authority (submission of a case to the Court by any citizen is possible).
2. Inscription on the electoral list (submission by any citizen).
3. Declaration of a candidacy such as refusal of listing or non-conforming listing with legal rules by the NAEC (submission by candidates and political parties).
4. Any violation of rules related to the electoral campaign (submission by any citizen).
5. Any action undermining the good progress of the ballot, such as illegitimate composition of voting bureau, absence of scrutinizers, or bad redaction of documents. Security organs can also be notified. However, these objections must be mentioned and annexed to the ballot progress report before signing it.
6. Results of the ballot (submission by candidates and listed electors of the constituency where there is an objection to the elections).

Before proclaiming the results, the Constitutional Court must consider objections to the reports and make appropriate decisions. The following list is not a synoptic presentation, but a short summary of all decisions of the Constitutional Court on electoral issues.

1991: no decision on the elections
1995: 134 decisions made in relation to legislative elections, including 112 on unacceptability
1996: 18 decisions on Presidential elections, including four on unacceptability; one decision on legislative elections
1999: 155 decisions were made in relation to legislative issues, including 139 on unacceptability
2000: nineteen decisions on legislative elections, including eight on unacceptability
2001: between January and June, 67 decisions were made on Presidential election issues

The management by the NAEC and the Constitutional Court of elections in Benin allowed for a smooth transition, but with some grinding of teeth. Some vigorous objections were raised, and

partisan positions were proclaimed. The impression was that, in the end, losing candidates make objections to the legitimacy of winning candidates in order to prove to their party members that they did the maximum.

Good governance requires that legal texts on electoral issues should be precise to facilitate interpretations both for people implementing the rules and for people to which the rules are applicable. This second category of people being the most important, the State must inform and educate citizens to enable them consciously to participate in elections and benefit from the results of their choice.