

GOVERNANCE AND HUMAN RIGHTS IN THE SADC REGION*

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ABSTRACT

Central to the process of the institutionalisation of democratic governance in Southern Africa is the extent to which a human rights culture and practice are embedded within the current political landscape. There are numerous international human rights instruments to which Southern African states are party. But it is one thing to sign and ratify these international conventions and quite another to domesticate them and translate them into the living experience of the peoples of the region. This is the area in which the centrality of a parliament in inculcating a democratic culture and practice is useful. The institutionalisation and entrenchment of a culture of human rights obviously demands, among other things, that political tolerance exists and that institutions of democracy such as the parliament play their rightful role. It is essentially within the legislature that ruling and opposition parties engage closely and such engagement may provide a measure of whether or not democracy in a given country is vibrant and robust enough to ensure a human rights culture and practice. This paper teases out this complex problem and other related issues such as gender equality, the role of the youth and the place of the media and civil society, with a special focus on the Southern African experience.

INTRODUCTION

This paper addresses a series of questions on the broad theme of human rights and democracy in the Southern African Development Community (SADC).

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It argues that the identification of applicable human rights standards and their strategic application must be a vital part of the continuing efforts to build democracy, democratic institutions and processes aimed at enhancing the role of parliament and that of the ruling and opposition parties, gender equality and equity and participation by women, young persons, the media and civil society. It offers practical strategies by which human rights can be built into the democratic process on these matters. In doing so, it is necessary first to sketch the broader context of the theme of human rights and democracy.

THE BROADER CONTEXT

The broader context of this workshop serves to tease out the connections between human rights and democracy, with particular emphasis on SADC. It is difficult to build human rights into democratic processes unless there is a broad consciousness of what these rights are and how they apply to the democratic process. This requires a brief delineation of what the relevant human rights prescriptions are in the democratic process.

The twentieth century bequeathed human rights as a legitimate means of determining the way in which the existence, duration, and functioning of governments, including public bodies such as parliament, ought to be based on the popular will of the people. Human rights have also ushered in benchmarks underlining the terms of acceptable forms of behaviour by governments towards those in their power and within territories under their control. These terms entail responsibility for the appropriate treatment of human beings; they also entail transparency and accountability as essential attributes of the process of governance.

It is in this sense that human rights and democracy, as a system of government based on the will of the people and for the people, go hand in hand (see Franck 1992, pp 46-91). This is evident in the following international provisions of human rights: Article 1(2) of the Charter of the United Nations 1945 established the principle of respect for equal rights and self-determination of peoples (Crawford 2001, chapter 2). Article 1 of the International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights 1966 amplifies the virtue of self-determination¹ in these words:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

A key aspect of self-determination concerns the insurmountable right of a people or peoples living within a state to freely determine by their own will the type of

1 See further, Human Rights Committee, General Comment 12 1984 Art 20, *African Charter on Human and Peoples' Rights* 1981.

government, the character of constitutional and institutional arrangements, and the individuals by whom they desire to be represented and governed (General Assembly Resolution 1514 1960). Historically speaking, self-determination provided the impetus for the initial awareness of the importance of human rights to the SADC states and underlined the formation of SADC in the first place. It is this experience that influences the mindset of the majority of the states in SADC towards democracy and human rights.

After gaining independence in the mid-1960s, Tanzania and Zambia constituted the original 'Frontline States' in the liberation struggle against the Unilateral Declaration of Independence by colonial settlers in Southern Rhodesia (now Zimbabwe), Portuguese colonialism in Angola and Mozambique, apartheid South Africa and its administration of South West Africa (now Namibia)(ICJ Rep 1971), Thus Angola, Mozambique, Namibia, South Africa and Zimbabwe were born out of liberation movements that actively waged armed liberation struggles and remain bound by this alliance. Although the liberation struggle was itself a pursuit of the principle of self-determination it is regrettable that in several of the SADC states today the pursuit of that principle fell short of building democratic processes, with the outcome that self-determination came to an end with the granting of formal independence. The exceptions are Botswana and South Africa. For the rest, discontinuity in the internal implementation of self-determination based on the expression of the will of the people about how they wish to be governed, the methods and institutions of governance appropriate for representative democracy became notable, in varying degrees, after independence.

Three broad strategies can be employed to extend self-determination to democracy:

- Building legitimate 'people driven' and 'people based consensus' constitutional frameworks of governance such as constituent assemblies or constitutional conferences representing all strands of society in constitution making. These processes are distinguished from 'top-down' constitution making and reform processes. Where 'people driven' processes exist, or existed, there is a visible executive tendency to circumvent them, thus subverting constitutional democracy and democracy in constitution making. The way the one-party state model of democracy was imposed in the 1960s and 1970s is a case in point; the other is the 'Third Term' debate raised by attempts by sitting presidents to go against the two-term constitutional limitation of the tenure of presidential office.
- Guaranteeing and enabling potential or actual democratic representative institutions to function as such, and as avenues for

transparency and a means of ensuring accountability in the process of governance, in keeping with the democratic will of the people. The one-party state parliament functioned in this way as did those parliaments that were dominated by ruling parties and where the opposition parties collectively were minorities in parliament. These relics continue to hamper the democratic functioning of a good number of parliaments in SADC today;

- There is a genuine need to design, and not to manipulate, effective, transparent and verifiable electoral systems anchored in secret ballots that periodically provide the practical means of detecting, as well as determining, the will of the people with respect to who represents or leads them at various levels of government, including parliament. Article 25 of the International Covenant on Civil and Political Rights 1966 provides, in part², that 'Every citizen shall have the right and the opportunity to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.' By virtue of this provision it is worth noting that the principle of electoral observation by local and international observers, including the Commonwealth, has a basis in human rights and in democracy.

Implementation of these strategies requires political will and commitment to democracy. The strategies are important to consummate the truncated process of self-determination in several SADC states. Independence and completion of the liberation struggle were considered, in many cases, as an end in themselves; in reality they should have marked the beginning of the process of building up legitimate constitutional systems and solid administrative and judicial structures, the consolidation of political parties, putting in place effective electoral processes and representative institutions, including parliament, within which good and transparent governance, the ethics of human rights and the rule of law would reside.

It should not come as a surprise that this is the challenge that still faces most SADC states in the twenty-first century. It is a challenge that the ruling parties, the opposition and parliament must face squarely. The challenge is earmarked by the process of democratic transition from colonialism to independence, and from independence to democracy, and the erection of democratic states and institutions based on human rights and its tenets of self-determination, the rule of law, independence of the judiciary, fairness, transparency and accountability.

A further perspective to the applicable standards of human rights and democracy in SADC derives from the membership of these states of the

2 The full text of Article 25 is reproduced below under the discussion on participation.

Commonwealth, the African Union and the United Nations. Membership of these organisations carries specific international obligations in the sphere of human rights and democracy. These obligations are duties deriving from the essential qualities of membership required and determined by fundamental political and social values commonly aspired to and accepted by all the member states. That is why these values are expressed in the language of law – in fact of international law, which applies commonly to all states.

The Charter of the United Nations (1945, Articles 1(3), 55 & 56) obliges member states, including those in SADC, to abide by the principle of self-determination, respect for and observance of human rights without discrimination. An array of international agreements concluded under the auspices of the United Nations, and by which almost all SADC states have agreed to be bound, enumerate in more detail human rights obligations, providing for machinery for accountability in the form of periodic reporting by states and, in some cases, the right of individuals to lodge official complaints against ill-treatment by their own governments, or governments in whose territories they reside.

For the Commonwealth and the Commonwealth Parliamentary Association, human rights and democracy are accepted as fundamental political values. The key text concerning human rights and democracy in the Commonwealth is to be found in the Harare Commonwealth Declaration of 1991. Adoption of the Harare Declaration earmarked major political changes in the world. The Cold War had broken down; one-party regimes were being dismantled by popular will in favour of democratic constitutional transitions and pluralism; opposition parties emerged in Africa, Eastern Europe, and in the former Soviet Union.

Once the democratic genie was out of the bottle the ensuing political tide swept away long-standing regimes that had been insulated from the realities of competitive multiparty politics. The promise of the advent of constitutional mechanisms for the peaceful, instead of violent, transfer of power had dawned first in Commonwealth Africa in 1991. Dr Kenneth Kaunda conceded electoral defeat in Zambia and handed over power peacefully to the victorious Movement for Multi Party Democracy.

These are the political circumstances that the adoption of the Harare Declaration encapsulated and which bear out the political merits of that Declaration. Under the Declaration, Commonwealth heads of government pledged ‘to work with renewed vigour’ for:

democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government; fundamental human rights.

The significance of that commitment has been reinforced at every subsequent Commonwealth Heads of Government meeting. The accountability of Commonwealth states in respect of the commitment was set forth in 1995 in New Zealand,

where it was agreed to establish a special committee of foreign ministers known as the Commonwealth Ministerial Action Group (CMAG) to recommend or itself take action when Commonwealth countries are in serious or persistent violation of the fundamental political values set out in Harare in 1991 (Beyani 2001).

Fiji, Nigeria, Pakistan, and Zimbabwe are among the members of the Commonwealth whose conduct in human rights has raised such concern as to engage the services of CMAG. The real import of CMAG must be to ensure that Commonwealth states do not retrogress from their commitment to build democracy and uphold human rights, the rule of law, independence of the judiciary, and honest government.

Commitment to these rights is not confined to the Commonwealth. The recent transformation of the Organisation of African Unity (OAU) into the African Union (AU) ushered in new principles of conduct based on democracy and human rights for the member states of the AU. Amongst the mandatory objectives of the Union (Constitutive Act of the African Union, 2002, Article 1(g), (e), (h)) are to:

- promote democratic principles and institutions, popular participation and good governance;
- encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights; and to
- promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.

It is of grave importance that the objectives of the African Union do not remain lofty ideals. The birth of the AU after thirty years of the OAU and its experience of the problems of government in African states has brought about a new vision, which is reflected in its objectives. SADC states are included in its purview. Although the AU does not have a supervisory body such as CMAG, it is, nevertheless, the individual and collective responsibility of its members to implement its objectives.³

Turning to SADC's legal texts, one finds explicit requirements on the part of member states on the issue of human rights and democracy, which are similar to those of the Commonwealth. In terms of Article 4(c) of the Consolidated Text of the Treaty of the Southern African Development Community 1992, SADC and its member states shall act, *inter alia*, in accordance with the following principles: human rights, democracy, and the rule of law. The objectives of SADC as contained in Article 5 of the treaty include consolidating, defending, and maintaining democracy,

3 In so far as the objectives of the AU make reference to the African Charter on Human and Peoples' Rights it is feasible that the African Commission could extend its competence under that Charter to specific breaches of human rights when these arise from a failure to implement the objectives of the AU in relation to human rights.

peace, security and stability; the promotion of common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective.

What the broader context shows is that there has emerged a recognition and acceptance of international commitments and obligations to human rights and democracy. Democracy has always been an inherent component of the right to self-determination. More specific references to democracy in that regard may have been skewed by the Cold War, the end of which has witnessed, since the start of the 1990s, the crystallisation of the international obligation to uphold democracy specifically alongside human rights and the rule of law.

The Harare Declaration for the Commonwealth, in 1991, was followed in Africa by SADC's Consolidated Treaty in 1992, consummated by the African Union Constitutive Treaty in 2002. For good measure, Latin American states have also recently adopted a Charter on Democracy and Human Rights. The abiding challenge now, as mentioned earlier, is the effective implementation of these principles. Parliament has a critical role to play in this regard.

BUILDING HUMAN RIGHTS INTO THE DEMOCRATIC PROCESS

The question of how human rights considerations can be built into every stage of the democratic process so that they run right through the work of government, parliament and opposition invites more strategic thinking on the use of human rights. Attention must be drawn to the preliminary drawbacks. Bills of human rights in the majority of the SADC states remain isolated from the general purview of government, governmental institutions, parliament, ruling and opposition parties. The general political position is that these Bills are only relevant when invoked before the courts by individuals alleging violations of human rights in specific cases. Rather than performing that role alone Bills of human rights must be the basis for an inbuilt democratic culture. To achieve this:

- human rights, as contained in SADC constitutions, must percolate from the constitution into the administrative and decision-making apparatus of government;
- human rights should be key guidelines in ministerial and presidential conduct as well as in the codes and guidelines for the conduct of civil servants and the police.

In these ways, the strategy would be to build a culture of human rights that permeates the entire spectrum of government, parliament, and the rule of law.

A related issue is the duty, neglected so far, to follow up on the incorporation into domestic law, and the application of ratified international treaties concerning human rights and related obligations underlining democracy, which flow from SADC and the AU in particular. Ideally:

- parliaments in the SADC region should establish two additional select committees; one on constitutional affairs to monitor constitutional democracy and compliance with international obligations relating to human rights; another on human rights, which would specifically examine internal compliance with human rights, and the extent to which human rights are infused into the structures of government. Members of parliament from both ruling and opposition parties would sit on these committees.
- parliament must live up to its status as the major democratic, legitimate and effective institution in which common political values are shared and monitored transparently. A central aspect of modern democratic processes is the representative role of the machinery of parliament as the practical embodiment of plural democracy, the political theatre in which competing ideas about governance and corresponding legislative programmes are debated and agreed or disagreed, and as a focal point for constitutional democracy.

Clearly then, parliament is more than a legislative body or 'talk shop'; it is the operative forum for plural democracy; it is also the custodian of constitutional democracy. In the final analysis, parliament must be regarded as the barometer, bearer, and representative of the people's will at all times. It must therefore be legally and institutionally strengthened to ensure the democratic behaviour of the political parties, and the conduct of its individual members in the discharge of their parliamentary duties in and out of parliament.

A member of parliament who is intimidated or harassed either by the ruling party or the opposition in the course of her or his constituency duties must have sufficient recourse to parliament. The rationale for the involvement of parliament here is that political parties must be accountable for their behaviour towards the peoples' elected representatives and an undemocratic political party, whether in government or in opposition, is unlikely to run a democratic system of government, let alone enable parliament to function as a democratic institution.

So far, political parties remain outside any realm of external, or even internal, accountability. As a matter of transparency and accountability, constitutions of political parties must contain principles of human rights and democracy. Only when they function as democratic entities will there be the expectation that they can run government democratically. Those with different views must be heard and their freedom of political opinion and freedom of expression respected without being penalised on political grounds.

Ruling parties must accept the role of the opposition without political irritation; this means according the opposition their rightful status in parliament, something that parliaments, orchestrated by parties in government in most SADC states, are reluctant to do. A change of political fortunes will mean that when in opposition

the former ruling parties will suffer the same fate as that which they now inflict on the opposition. This attitude replicates an undemocratic culture and can be remedied by according the opposition its full status, rights and responsibilities.

Political responsibility is key to the opposition in democracies emerging from one-party states or states dominated by single parties. In reality, the opposition is an alternative government in waiting and should perform the role of opposing the party in government by taking it to task over the propriety of its policies, programmes, and conduct. Crucially, opposition parties must:

- concentrate on formulating alternative policies and programmes democratically, argue their case, and campaign for it. Sadly, most opposition parties in SADC negate this role and give the impression that they are intent on obtaining political power without knowing or preparing for what to do with it once they are in power. Building a responsible and democratic opposition is a precondition for democracy and political pluralism;
- strive to get their political leaders into parliament by running concurrently as presidential candidates and as members of parliament, so that if they lose the presidency they can continue to lead their parties in parliament when elected as members of parliament; alternatively, parliament may be reformed to give an automatic seat to the leader of the opposition by virtue of the seats secured by her or his party.

PARTICIPATION AND GENDER EQUALITY

Human rights and the process of democracy are inclusive in their application and entail respect for gender equality. Yet, there are, in practice, outstanding issues about how government, opposition and parliament ensure that all their activities are characterised by gender sensitivity, full and equal participation of both women and men in the democratic process and a genuine and effective partnership between them. An issue equally deserving of concern is the ways in which the institutions of democracy bring young people into the process so that they are not just heard but are fully involved in the formulation and implementation of policy.

To deal with these issues it is necessary to identify the applicable standards of human rights and then to suggest strategies by which these can be implemented to ensure gender equality and participation, including by young people, in the democratic process. Let's take the issue of gender equality first.

The applicable standards are to be found in the International Covenant on Civil and Political Rights 1966, the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (Cook 1995, chapters 1, 2, 3 & 4), the African Charter on Human and People's Rights 1981 (Beyani 1995, pp 285-306) and its recently adopted Protocol on the Rights of Women in Africa 2003. Within SADC,

the SADC Treaty, the Protocol on Culture, Information and Sport 2000, and the Declaration on Gender and Development all contain obligations and commitments assumed by SADC states to ensure gender equality.

The preamble to the Declaration on Gender and Development establishes the principle of 'gender equality' as a fundamental human right in SADC, thus bestowing on it a special status from which there should be no derogation by any SADC state. In this context, Article 1 of the Protocol on Culture, Information and Sport defines gender to mean 'the socially and culturally constructed roles, privileges, responsibilities, power and influence, social relations, expectations and value of men and women, girls and boys'. Taken together, all these instruments legally commit and oblige the SADC states to treat women equally with men, to eliminate discrimination against women in public and private spheres, to remove stereotypes and traditional attitudes that treat women as inferior to men, and to ensure the participation of women in public affairs.

Practical strategies required to implement these obligations include:

- Constitutional provision of gender equality as a fundamental human right in the Bills of human rights of SADC states; some constitutions, eg, that of Zambia 1991, unlawfully exclude the application of traditional customary law from non-discrimination on grounds of sex. In such cases advantage should be taken of the constitutional reform process to bring the constitutional provisions in line with those of SADC and international obligations on gender protection. This requires the effective representation and participation of women in legislative and constitutional reform processes (this point is amplified below under the theme of participation).
- Enactment of new legislation to repeal or amend existing legislation that discriminates against women. In Zambia, women's groups carried out a survey in 1987-88 to establish the case for the necessity of enacting the Succession and Inheritance Act and used the survey to lobby members of parliament to support the enactment of the Act. They then mounted a separate project to identify discriminatory laws with a view to campaigning for their repeal, but the project lacked sustained financial support. In a case of direct intervention by the state, Zimbabwe passed the Age of Majority Act in Zimbabwe in the 1980s, which restored the independent capacity of women. The Harare based organisation Women and Law in Southern Africa (WLSA) has undertaken several studies on discriminatory laws against women in Southern Africa and its recommendations should be used by SADC to change such laws.
- Involvement of the constitutional and human rights select committees of parliament (suggested above) in the scrutiny of constitutional

provisions, including bills of rights, and all legislation to ensure compliance with the UN, the Commonwealth, AU and SADC instruments on gender and human rights and to bring to the attention of parliament the need to pass legislation on gender and human rights where necessary.

- Creation of ministries of gender or women's affairs, as in the case of Uganda, as well as focal administrative points for gender affairs within influential areas of government. For example, the Gender Affairs Office in South Africa falls directly under the Office of the Presidency.
- Mainstreaming gender throughout the legal, administrative, budgetary and development apparatuses of SADC states. This requires collaboration between ministries of gender or women's affairs (where they exist), the UN's Division for the Advancement of Women, the Commonwealth Secretariat's Gender Division, the AU's Gender Division, and the Gender Unit of SADC itself. There exists between these bodies sufficient expertise on and capacity for mainstreaming gender. The Commonwealth Secretariat has developed a successful model for mainstreaming gender in the Secretariat and in Commonwealth states, such as Uganda.
- Integration of gender equality and equity in sectoral programmes and development projects, with participation by women.

Participation in the democratic process is also the subject of human rights. The most categorical statement on equality and participation in relation to human rights is to be found in Article 25 of the International Covenant on Civil and Political Rights, which provides that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2⁴ and without unreasonable restrictions:

- a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c) to have access, on general terms of equality, to public service in his country.

⁴ According to Article 2, 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

The terms of this provision are quite clear. Participation in public affairs directly, or through freely chosen representatives such as parliament or political parties, is a human right. Participation includes the right to vote and to stand for elections; these must be genuine and periodic and be held on the basis of universal and equal suffrage and by secret ballot as a means of guaranteeing the free expression of the will of the electors. The right to participate also includes access, on general terms of equality, to the public service. The right covers men, women and young people.

Practical strategies for implementing the right to participate and for ensuring the participation of women and young people require the creation of means and avenues for participation in the democratic process. There are three major means.

Political Parties

- Both ruling and opposition parties should be constitutionally obliged to create special bodies or committees for the participation of women and young persons in the affairs of the parties as a means of articulating their own policies within the parties and as a way of contributing to the formulation of the policies of the parties themselves.
- A proportionate number of seats on the executive bodies or committees of political parties must be set aside for women, on the one hand, and young people, on the other.
- Annual conferences or meetings of the parties should have corresponding special themes and sessions on gender equality and equity, and participation by women and young people.

Although some of the political parties in SADC do have similar or related bodies, many of them are merely instruments for mobilising women and 'party cadres' to attend political rallies, sing songs in praise of the leadership, and engage in violent confrontation with other political parties. That does not constitute real and effective participation; it denigrates women and inculcates in the young a culture of violent political conduct inimical to democracy.

Parliament

- A proportionate number of electoral constituencies and seats in parliament must be set aside exclusively for women to stand for election on the basis of gender equality and equity.
- Half the seats available for nominated members of parliament must be reserved for women and the nominees must represent various interests of women and women's civil society movements. The power to choose

who to nominate should be exercisable with the agreement of women's civil society and professional bodies to ensure that the nominees truly represent women.

- Young people should be official observers in parliament in order to cultivate their participation and to encourage them to take an active interest in the democratic process.
- Special procedures should be established for young people, women and civil society to petition parliament and to speak before it on any issue of democracy, governance, transparency and accountability.

Other Fora

- The establishment of a national women's forum to be held by women every year and from which specific policy recommendations concerning the rights of women may be made to government.
- The establishment of a national young persons' forum to discuss democracy, human rights, governance, development and participation by young persons.
- The establishment, at SADC level, of a women's forum, including women members of parliament, to discuss matters of gender, human rights and the participation of women in the democratic process.
- The establishment of a SADC young persons' forum to raise awareness about SADC among young persons.
- The promotion of joint activities and educational programmes for the young between SADC and the Commonwealth Youth Centre in Lusaka.

SADC

- The implementation of the objective of SADC 'to ensure the equal representation of women and men in the decision making of member states and SADC structures at all levels, and the achievement of at least thirty percent target of women in political and decision making structures by year 2005', as stated in the *SADC Declaration on Gender and Development*.

THE MEDIA

How can the media be assured of access to information, media freedom and a 'level playing field' so they may make their full contribution to the success of the democratic process?

In considering this question, it is worth establishing the legal connection between the legitimacy of the media and human rights in the democratic process. This connection is anchored in freedom of expression in accordance with international human rights law (*Handyside v UK* 1979-80; *Compulsory Membership of Journalists' Association Case* 1986; *Media Rights Agenda & Constitutional Rights Agenda v Nigeria*, Communication 105/95, 128/94, 152/96).⁵ Freedom of expression includes the freedom of the press to receive information and to impart information and ideas to the public.

This right is protected by pertinent international human rights conventions under which it may be restricted only by a law enacted by parliament and consistent with human rights obligations in a democratic society. That means there must be a legitimate justification for such restrictions and the restrictions themselves must be proportionate or reasonably related to the preservation of national security, public order, and public health (*Sunday Times v UK* 1979).⁶ However, permissible restrictions on freedom of expression do not extend to prohibiting or penalising the media for propagating information, news or ideas that oppose or criticise, cause shock to the public, or mock public figures, including political leaders (*Lingens vs Austria*).⁷

It is essential for the media and civil society to invoke the special obligations that bind SADC member states on the question of media freedom and access to information. These obligations must inform the formulation of strategies that can be used to protect the freedom of the media and its access to information and guarantee its ability to contribute to the success of the democratic process.

Obligations assumed pertinently by SADC states in this respect arise from the SADC Protocol on Culture, Information and Sport. Under Article 20 of this Protocol, 'State Parties shall take necessary measures to ensure the freedom and independence of the media' and cooperate, in fulfilment of the principles of the Protocol, in the promotion, establishment and growth of independent media, as well as free flow of information. 'Media freedom' is defined in the Protocol to mean 'an environment in which the media operate without restraint and in accordance with the law'.

On the question of the availability of information member states agree, in Article 19, to encourage news agencies in the region to establish a SADC News Agency Pool connected by computer so as to ensure the efficient and effective exchange of news and information. In addition, member states agree to give more financial and editorial autonomy to the news pool to enhance the professional

5 *Handyside v UK* (1979-80) 1 EHRR 737 (European Court Case); *Compulsory Membership of Journalists' Association Case* (1986) 8 EHRR 165 (Inter-American Commission Case); and *Media Rights Agenda & Constitutional Rights Agenda v Nigeria*, Communication 105/95, 128/94, 152/96 (African Commission Case).

6 2 EHRR 245

7 8 EHRR 103

competence and credibility of media practitioners. There is a further obligation to ensure that the media are adequately sensitised about gender issues so as to promote gender equality and equity in information dissemination under Article 17.⁸

This is an impressive range of obligations by any standards. But, inevitably, the question arises: what measures have the SADC states taken individually and collectively to ensure the freedom and independence of the media and the free flow and availability of information (ie, access to information)? The answer to this question is neither clear nor assured. While South Africa has the most progressive measures on the freedom of the press, Zimbabwe has the most retrogressive; others have no clear measures and are content with constitutional provisions on freedom of expression in Bills of human rights, criminal libel in criminal law codes, and defamation in civil proceedings.

There must, therefore, be deliberate strategies to implement SADC obligations in relation to freedom of the media and access to information. Appropriate strategies could be:

- Incorporating into national constitutions the provisions of the SADC Protocol on freedom of the Media and guaranteeing access by the media to information. For example, the Ethiopian Constitution has direct provisions about freedom of the media and the prohibition of censorship.
- Enactment of enabling legislation for the protection and self-regulation of freedom of the media and the flow of information in accordance with the SADC Protocol and international human rights standards. The media and civil society should participate actively in the formulation of such legislation. Ethiopia held a week long workshop in December 2003 involving the government, the media, and international participants, to discuss proposals concerning freedom of the media.
- Repeal of draconian laws relating to criminal libel and defamation to the extent that they are incompatible with human rights while

⁸ See also Article 18 on Information Policies:

1. Member States agree to formulate and harmonise information policies after thorough consultations involving appropriate stakeholders and civic society.
2. Member States agree to establish, publicise widely and implement information policies which are in line with the SADC Declaration on the Role of Information in Building the Community.
3. Member States agree to establish and strengthen the institutional framework for the implementation of information policies.
4. Member States agree to create political and economic environment conducive to the growth of pluralistic media.
5. Member States agree to promote specialised training of journalists in the areas of culture and sports to improve the coverage of these.

maintaining appropriate safe guards against hate speech and incitement in accordance with human rights requirements.

- Establishment of self-regulating institutions for the media and the preparation by such institutions of codes of ethics for the media and for individual journalists and others working in the media.
- Capacity building for the media and its capacity for self-regulation in particular. This could involve training people, particularly journalists, in the role of the media in democratic processes.
- Technical and administrative support to enable self-regulation; to gain expertise in human rights and media law, gender equality and equity; and to facilitate the efficient exchange and flow of information by electronic, audio visual, radio, and news print throughout the state and at SADC and international levels. Specific support should be given to the Media Institute of Southern Africa as the focal point for training and a centre for the flow of the exchange of information between and within SADC states – the Institute has a chapter in each SADC state.
- Regular briefings for the press, followed by dialogue between the media and government, parliament, political parties, and civil society as a form of access to information and accountability through the media.
- Promotion by the media of investigative and analytical reporting, documentaries and satire.
- Equal treatment of state-owned and private media and the establishment of an environment that promotes all aspects of the creation, existence and work of the private media; not just newspapers, but also radio and television. Although SADC states have embraced the privatisation of state-owned enterprises many have not privatised the media, with the result that there is a lopsided monopoly of the media by the state. Privatisation of the media, or at least the state relinquishing its monopoly of radio and television through legislation would go a long way towards 'levelling the playing field'. At present, the state media in the majority of SADC country enjoy preferential treatment from their states and the monopoly of state media, particularly local television, is legally protected. It should be realised that competition in the propagation of ideas by competitive plural media is as vital to democracy as competition between political parties and economic entities – that is the very essence of democracy.

The final issues to consider are: how should democratic societies deal with pressure groups and lobbyists? How should civil society be involved in the formulation of policy and the work of bodies such as select committees, and how can they help with implementation? Well, pressure groups, lobbyists, and civil society are an indispensable part of democratic societies. They often represent different interest groups and non-political constituencies or stakeholders that do not have a voice in the political parties, in parliament and in government.

Their civic role should be welcomed and appreciated instead of being regarded as an irritant. A major weapon in the hands of pressure groups and lobbyists is their ability to cause electoral liabilities for political parties, members of parliament and governments that do not listen to them directly or through their constituents.

Ideal strategies suggested for dealing with pressure groups and lobbyists are as follows:

- institutionalised policy channels through which lobbyists and pressure groups can express their views and proposals officially as a means of exerting pressure on political parties, parliament and government;
- with regard to political parties and parliament, such channels could be in the form of constituency platforms for lobbying individual candidates sponsored by political parties, and constituency members of parliament;
- with regard to parliament, there could be a parliamentary lobby forum for lobbying parliament as a whole and parliamentary workshops between members of parliament and pressure groups and lobbyists;
- in respect of government, policy channels could be through individual ministries, and collectively through a Cabinet lobby forum with pressure groups and lobbyists;
- lobby and pressure groups should learn the art of specialised lobbying and how to maximise their impact by organising themselves into separate groups by reference to ability and expertise so that, in accordance with placement and ability, some can specialise in lobbying individual members of parliament, while others can specialise in lobbying parliament as a whole, including the Cabinet.

It is fundamentally important that civil society be pro-actively involved in the regular formulation of policy to ensure that government policy is democratic, non-partisan, and represents stakeholders who do not participate directly in politics. In this regard:

- the involvement of civil society could either be by constituting a 'policy think tank' acting in partnership with government, or through regular policy consultative channels established between civil society and government;
- civil society could also establish its own policy forum for projecting policy views and proposals to parliament and government: the model of the Oasis Forum in Zambia comes to mind here;
- it should be an acceptable democratic practice of modern parliament that civil society should be involved in the work of the select committees by holding special sessions between civil society and parliament and by calling on members of civil society to testify before them as experts in given areas of government policy and operations;
- civil society should not always be seen to be 'on the other side' of government policy; it can help with implementation of government policy but only when its members have been party to the formulation of such policy and, as a result, support the ensuing policy;
- civil society can help implement government policy through advocacy and, where possible, by being independent implementing partners. A non-political civil society carries great moral force in explaining the merits of government policy and lending support to the implementation of such policy, as is the case currently in Kenya. However, although civil society can undertake this role, it should guard against the dangers of co-option; civil society should retain its independent status as 'civil society'.

CONCLUSION

The framework of human rights in international law underlines the process of democracy. It is vital to appreciate that democracy is built into human rights, starting with the right to self-determination as the basis of the will of the people in determining the form of the state, its constitutional structures and representative institutions, inclusive of parliament, and the holding of genuine periodic elections as a means of expressing the will of the people. This is a continuous process which does not end with formal independence or liberation for that matter. The baselines of plural democracy, namely, the existence of political parties, freedom of the media and access to information, gender equality and equity, and participation in the political process, including by the young, are protected respectively under human rights through freedom of association which is inclusive of political association, freedom of expression, gender equality and the elimination of discrimination against

women, and the right to participate in public affairs directly or through freely chosen representatives.

The SADC states are parties to an impressive array of international human rights instruments concluded by the United Nations, the African Union, and SADC itself. However, ratification of these instruments is not enough. A primary task is to bring about awareness of what obligations these instruments entail in the sphere of human rights and democracy. Knowledge of human rights in relation to democracy in general, or at the specific level of SADC, should neither be assumed nor taken for granted. But such knowledge is a pre-requisite for the strategic implementation of human rights obligations applicable to democracy. The starting point is to ensure that the democratic process is based on, and guided by, the application of the relevant standards of human rights. For most of the states in SADC the major difficulty lies in the application as well as in the implementation of human rights obligations in general and in connection with democracy in particular. The modest suggestions presented in this paper are only a skeletal outline intended to pave the way for the implementation of the requisite standards of human rights in the budding democratic processes in SADC.

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