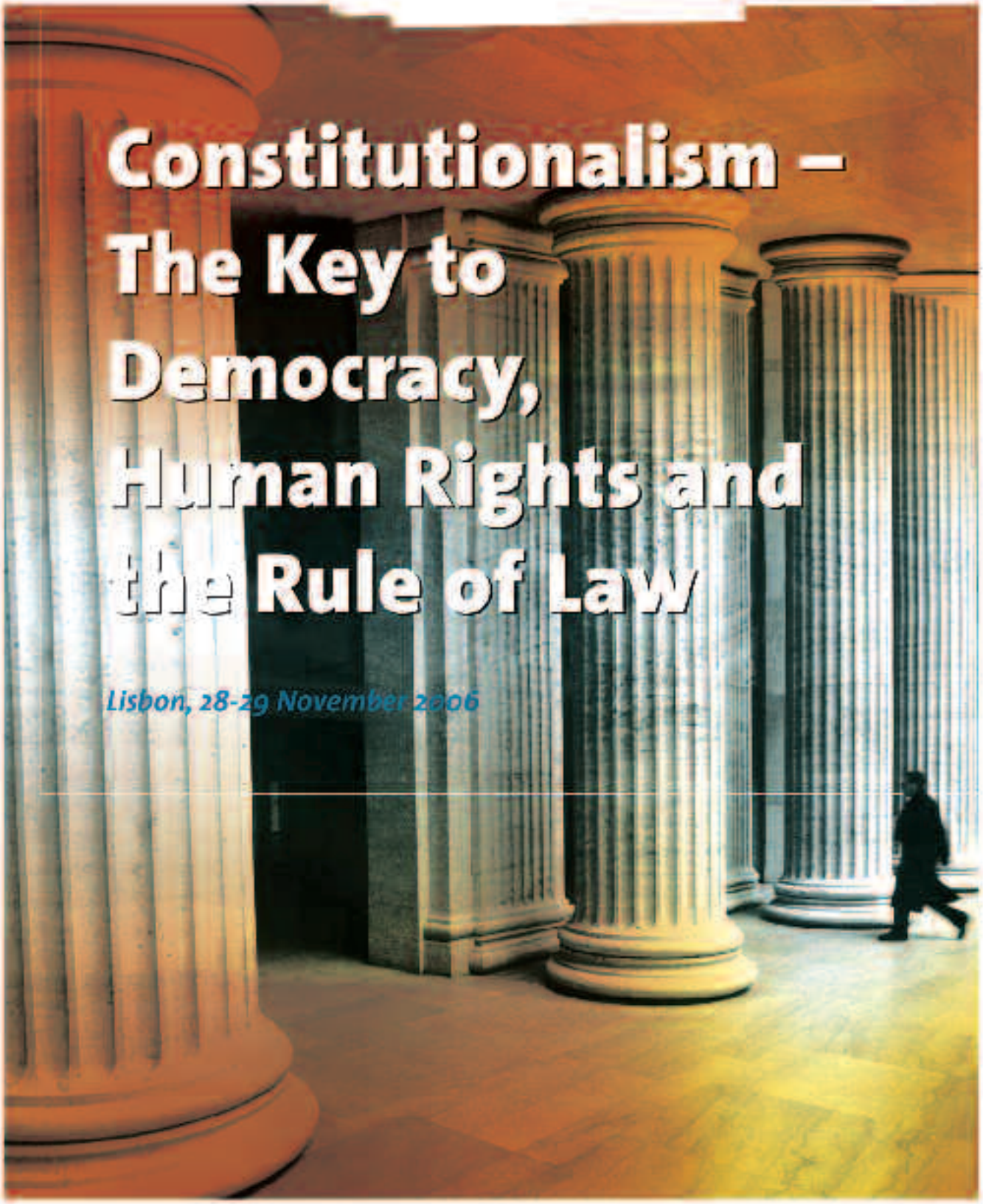
LISBON FORUM 2006



Constitutionalism – The Key to Democracy, Human Rights and the Rule of Law

Lisbon, 28-29 November 2006

North-South Centre
of the Council of Europe

LISBON FORUM 2006

Annual forum of the North-South Centre *in co-operation with the Venice Commission of the Council of Europe*

Under the patronage
of the San Marino Presidency of the Committee of Ministers of the Council of Europe

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I
Summary of debates

1. The Lisbon Forum 2006 was jointly organised by the North-South Centre and the Venice Commission of the Council of Europe and took place on 28 and 29 November 2006 at the Portuguese Parliament in Lisbon.

2. The Forum's title was "Constitutionalism: The Key to Democracy, Human Rights and the Rule of Law" and it brought together around one hundred participants from the north and south, members of constitutional and similar courts, parliaments, non-governmental organisations and the media.

3. The Forum discussed the nature and development of constitutional democracies in the north and south in a context of globalisation. The debates focused on the challenges of consolidating democratic processes, the roles of the different players and the promotion of democratic values.

The challenges of democracy

4. The following points regarding democratic processes were stressed:

- Democracy is the only form of government that can help find sustainable solutions to the political, economic and social problems in societies in the north and south;

- However, democratic practices sometimes come up against certain difficulties in both old and new democracies;

- There is a universal, ready-made model of democracy, but every democratic system must respect the minimum principles and standards, like the separation of power, an independent judiciary system, a legislative branch with sufficient prerogatives and means of controlling the executive branch, respect for individual and collective freedoms and the universal values of human rights;

- While the efficacy of any democratic system depends on the existence of well-structured, smoothly running institutions, democracy in everyday life depends on the promotion of a democratic culture.

» Stable, progressive constitutions

5. The Forum drew attention to the importance of a constitution as the fundamental framework for the consolidation of democracy and social transformation. The following considerations were set forth on this point:

» The existence of a constitution is not a guarantee of the existence of democracy;

» A constitution should be both stable and progressive in nature;

» The legitimacy of a constitution depends to a great extent:

- on the way in which it was drawn up;
- on the mechanisms in place for ensuring that its principles are put into practice;
- on the real powers and the role of the constitutional courts and actual relations between constitutional justice and political power.

6. The Forum underscored the importance of an independent judiciary branch as a fundamental factor in safeguarding constitutional democracy. Ensuring respect for the principles of judiciary independence is not, however, an easy task. An independent judiciary pre-supposes the existence of impartial judges and the protection of its sphere of influence.

» The role of parliaments

7. The Forum confirmed the crucial importance of parliaments in the consolidation of constitutional democracies.

The following points were discussed:

» The major role played by parliaments in democratic governance in controlling the executive;

» The impact of the way in which parliaments use this responsibility to affect the course of democratic life;

» The constraints to which parliaments and parliamentarians are subject in certain countries, where the following obstacles were identified:

- political structures that favour the executive over the legislative power;
- an under-developed democratic culture;
- lack of resources;
- inadequate technical competences;
- limited experience of political pluralism.

8. The question of the role of the political parties in the smooth running of democratic processes was also addressed. The Forum pointed out that democracy cannot be organised without political parties, as they are the main link between the state and civil society.

It was noted, however, that the parties have lost the people's trust in some countries.

» Civil society

7. The Forum pointed out that democracy and civil society form an indissociable pair. Democratisation requires a favourable environment for the development of civil society.

10. Civil society organisations are not only the channels for the voices and demands of marginalised categories but also places for learning citizenship and promoting human rights and democracy. They help extend citizenship and increase participation.

11. It is necessary to recognise, however, that the concept of civil society is very broad and is used to designate diverse organisations in terms of type, generation, social and geographical origin, etc.

» The media

12. The question of the media's role was also addressed. The participants stressed that, to a certain extent, the quality of democracy depends on that of its information. The degree of citizens' participation in civic life is in proportion to the quality of information.

13. While no democracy is possible without a free system of information, technological advances and concentrations in the sector raise certain issues. In fact, the advent of digital and multimedia technologies is deeply changing the media. Increasingly, competition for scoops, imitation, sensationalism and emotional shock are taking over from accuracy, analysis, facts and research. In some cases, the slot for short news items takes precedence over the media's fundamental mission, which is to throw light on the democratic debate.

14. Pluralism of information is also weakened by the formation of media groups. The media industry has to answer important questions today, such as the role played by the interaction between the media and advertising markets, the effect of this interaction on the diversity of media contents and the mergers in the sector and their effect on the pluralism of the media.

15. The Forum considered that broadcasters are largely responsible for these developments in the news system and it is the people's obligation to be active and not passive in the search for information.

»

» Strengthening democratic values through dialogue

16. The Forum stressed the importance of intercultural dialogue in the development of democracy. Intercultural dialogue is not only an effective instrument for preventing and settling conflicts but also a way of guaranteeing inclusion in the globalisation of human rights and democracy.

17. Some suggestions were made during the Forum as to topics for this dialogue:

- The pursuit and strengthening of the legal dialogue between constitutional courts in the north and south;
- The promotion of co-operation between institutions from the north and south in charge of promoting human rights;
- Support for initiatives promoting education in democratic values;
- Formal and informal education of young people in the values of democratic and intercultural values;
- The reinforcement of north-south dialogue between civil societies on the one hand and between local authorities on the other in order to favour networks and the convergence of synergies and actions;
- The association of civil society organisations and the media in education on democracy;
- The extension to Africa of the framework of intercultural dialogue.

II
Interventions

Opening Session

Peter Schieder
Member of Parliament (Austria)
Member of the Parliamentary Assembly of the Council of Europe
Chairman of the Lisbon Forum

Mrs Director General Battaini-Dragoni,
Mr Vice-President of the Venice Commission Bonnici,
Mr Secretary of the Venice Commission Buquicchio,
Mr Executive Director of the North-South Centre Correia Nunes,
Distinguished Personalities from Africa and Europe,
Ambassadors, ***Judges***, ***Parliamentarians***,
and all other equally important participants,

Let me welcome you in the name of my Co-Chairman Ben Turok and in my own.

The Lisbon Forum 2006 is here renewed, vivid and with a promising programme.

Our thanks have to go to the Council of Europe, the North South Centre, especially the Commission for Democracy through Law, known as – should I say with the nom de guerre – Venice Commission, the San Marino Chairmanship of the Council of Europe, our African partners, and last but not least the extremely helpful Portuguese authorities.

I do not know what an average person on the street would answer if we interviewed him or her about constitutionalism. But even if he or she were politically aware, s/he would not start with John Locke. If s/he has "access", s/he will "surf the net", open Wikipedia and find an answer consisting of six sentences.

"***Constitutionalism*** is the limitation of ***government*** by ***law***. Constitutionalism also implies a balance between the power of the government on the one hand and the rights of individuals on the other.

Typically, a government can be considered constitutional if it possesses the following four limitations:

- The legislature can convene and cannot be dismissed by parties other than itself;
- Courts, once appointed, are independent from the legislative branch;
- The executive branch cannot appoint ministers unilaterally without the approval of the legislative branch;
- Only the legislature can make laws although a veto power might be delegated to an executive official.

And at least they will know that constitutionalism is about democracy.

The programme you have in front of you starts by describing very clearly our tasks for these two days.

Constitutionalism – the Key to Democracy, Human Rights and the Rule of Law

Constitutional democracy today is recognised, more and more, as a transnational norm. The Lisbon Forum 2006 will facilitate the debate on the character and the evolution of the constitutional and political systems of the north and south in a context of globalisation.

The Forum will devote its discussions to the guarantees for the respect of the constitution by the branches of government as well as civil society and the media (often referred to as the fourth estate). The presentations by the panellists and the discussions should highlight how the powers interact, influence and control each other in order to further the global values of democracy, human rights and the rule of law, the foundation of good governance.

Representing the Parliamentary Assembly of the Council of Europe in the North-South Centre, this agenda is of utmost interest to me as to other parliamentarians.

In the Council of Europe it is the fulfilling of democratic constitutional standards, it is the question of human rights and the rule of law which allow a country to become a member. The mere fact that it exists as a state is not sufficient.

But even once accepted, a new member cannot rest on its laurels. There are commitments and they are monitored by a special committee of the Assembly. The Human Rights Commissioner looks at the human rights situation in the member countries. There is the important Court of Human Rights, the Anti-Torture Committee checking police stations and prisons, the Sub-Committee on the Media dealing with freedom of the media and rights of journalists. The Secretary General of the Council of Europe has the right to interrogate member countries on special cases, as last year concerning alleged secret CIA overflights and detention facilities in Europe. Elections may be monitored – and if a new constitution, electoral law or regulation for a referendum is prepared by a country, the draft can be sent to the Venice Commission for constitutional expertise – which then quite often changes the proposed act of legislation for the better.

Ladies and Gentlemen,

The theme of the Lisbon Forum 2006 is of common interest to Africa and Europe, even if some differences may exist.

In Africa and Europe the vast majority of states have chosen democratic constitutionalism as their form of governance. It was – in some cases – in Africa not easy to adapt and indigenise the concept of a nation-state. And it has also not been easy to cope with the lingering effects of colonialism in that respect.

And we have to see the problems in European states too, even in functioning democracies. I do mean presidents presiding too strongly or Prime ministers being too prime – no, I mean the trend in almost all countries - in the media, politics and public opinion - towards clear structures and simpler, faster solutions.

Henry Kissinger once summed up the problem, as he saw it, of multiple responsibilities within the EU by asking what number he should ring to get Europe.

Parliaments cannot be "rung" in this sense. They are complex, many-layered and need time, all of which conflicts with the tabloid mentality.

We should not expect this problem to disappear through the integration processes on our two continents, on the contrary.

The European Union has not succeeded in getting the international treaty called the European Constitution ratified in all its member states and the African Union is far from a similar attempt. But the democratic questions connected with it have already come to the fore. What does separation of power mean on a continental level? What does it mean in the intergovernmental sector? Who is the legislator there? How will the judiciary work? In what ways will the media, NGO´s and citizens control and participate?

Yes, the European Parliament has succeeded in getting more rights; but what is with the Parliamentary Assembly in the Council of Europe? What is with the Pan-African Parliament in the African Union?

Two months ago I presented to the Parliamentary Assembly of the Council of Europe a report on Constitutional Balance, which was adopted with a large majority. (To our African friends I should explain that in Europe "constitutional balance" is a "coding" for more rights to the parliamentary sector).

We should not accept that decisions which cannot be reached at national level without the full involvement of parliaments largely continue to be left to governments alone at international level.

In conclusion, I would like to mention the biggest problem for democratic constitutionalism, and this is not the distribution of powers, not the balance of power, but the shift of power, of the power to plan and to act.

In our globalised world, power is increasingly being transferred (sometimes unnoticed and surreptitiously) from the democratic and political arena, from the constitutional sector to other sectors - companies, banks and other global players. In brackets I could make the joke that our countries in the future will not open embassies in other countries but at important "places" like Microsoft and others.

Even improved parliamentary, legal or public supervision of government means, at best, that a declining sector is being watched more closely.

The Lisbon Forum 2006 is devoted to that question and to the discussion of how democracy must develop, to remain democracy.

Claude Frey
Chairman of the Executive Council of
the North-South Centre of the Council of Europe

Mr President,
Ambassadors,
Distinguished guests,

First, I would like, on behalf of the Executive Council of the North-South Centre, to add my voice to that of the President of the Lisbon Forum and welcome you to Lisbon, a city opening onto Europe and the world, just like our Forum.

This session of the Lisbon Forum is special for two reasons. First because it has been organised in partnership with the Venice Commission, a partnership I welcome warmly. Also because this session will be dealing with issues that concern us regardless of our geographical, political or cultural origins: the question of law, the rule of law and the consolidation of the universal values of democracy and human rights.

Ladies and Gentlemen,

What is law? When asked one day to answer this question, a jurist replied, "I don't really know what the law is. On the other hand, I know what a society without law would be like".

Ladies and Gentlemen, we all know. The law is against the law of the survival of the fittest, against all that is arbitrary. The law is opposed to violence. It upholds that everyone is born free under the law and that power should be limited by power.

This is the central challenge, in fact, which defines not only everyone's rights and obligations but also the rules on how political power works in respect for individual and collective liberties. The question of limiting political power, limiting public authority naturally brings us to the need for a state limited by the law, and therefore acting within the law, thanks to impersonal general rules.

Ladies and Gentlemen,

The affirmation of the rule of law, through the balance of power and the protection of freedom, means embracing democratic values. These values are at the heart of human rights and shore up and bring together our societies and they remind us that the guarantee of everyone's rights should act as a beacon and guide our choices. These values say loud and clear that democracy is the only system that can create the right conditions for fair, humane societies to flourish. This is because democracy is quite simply the regime of freedoms; because democracy is quite simply an open, dynamic system that allows humankind to be human with its contradictions; democracy is quite simply a system that permits and guarantees liberty, a system that ensures free expression of opinions, allows public debate and the existence of counter-powers.

Ladies and Gentlemen,

While democracy has made huge progress everywhere on our planet in recent years, the practice of democracy is sometimes accompanied by questions or even a lack of confidence. Increasingly low citizens' participations in political consultations and activities, less trust in public powers and social institutions are worrying signs in certain parts of our world.

How can we meet these challenges? How can we help the progress not only of democratic theory but also practice? What strategies can be used to better anchor democratic values in our societies? What can we do to reinforce legislative bodies and the players who perform in the democratic game?

What can our own role be? We, who have been elected by the people? We, the members of civil society? We the media professionals?

Ladies and Gentlemen,

The existence of well-structured institutions is fundamental for democracy to work properly. I am thinking in particular of strengthening parliamentary structures. But how can we reinforce parliaments in their role of controlling what the governments do? How can we foster, here and now, the creation of an institutional environment favourable to the parliamentarians' work?

You will agree with me that, in order to anchor democracy in the reality of daily life, it is also essential to strengthen the ties between parliaments and citizen by reinforcing civil society organisations. What mechanisms must be put in place to build the capacities of civil societies?

Ladies and Gentlemen,

The role of the media is also crucial in strengthening democratic processes. It is no exaggeration to say that good-quality information depends on good participation in civic life on the part of citizens. The quality of a democracy also depends on the quality of information.

We are all aware of the impact of the media on public opinion. We all know that the way in which events are presented helps to mould and guide public opinion. In this age of global information, how can we regulate the influence of the media in order to reinforce democratic values and civic involvement?

Ladies and Gentlemen,

I hope that your exchanges during this session will help find answers to these questions. I hope that your exchanges will help you draw up courses of action that will instil the Council of Europe's most cherished values in our everyday values.

Thank you very much.

Gabriella Battaini-Dragoni
Director General of Education, Culture and Heritage, Youth and Sport
Co-ordinator for Intercultural Dialogue
Council of Europe

Mr President,
Ambassadors,
Distinguished guests,

It is a great pleasure for me to participate, on behalf of the Secretary General of the Council of Europe, Mr Terry Davis, in the opening of this new session of the Lisbon Forum jointly organised by the North-South Centre and the Venice Commission.

I would like to take the opportunity to thank the San Marino presidency of the Committee of Ministers for its kind patronage of this event.

Intercultural dialogue is the central theme of the San Marino presidency.

Ladies and Gentlemen,

As you know, the Third Summit of Heads of State and of Government of the Council of Europe in Warsaw, Poland on 16 and 17 May 2005 established intercultural dialogue as a priority field of action for the Council of Europe. The summit was followed by a major meeting on intercultural dialogue in Faro, which adopted a declaration on the strategy of the Council of Europe for the development of intercultural dialogue. As a result, the Council of Europe has already begun several activities and signed co-operation agreements in this area with the Anna Lindh Foundation, ALECSO and UNESCO.

Ladies and Gentlemen,

In recent years, the issue of interculturality has become extremely important, with the growth of interdependence between societies and constant, rapid developments in our lives. In our fast-changing world, diversity has become a characteristic of our everyday lives. And one of the greatest challenges of our age is to convert this diversity into active plurality.

Ladies and Gentlemen,

You will certainly agree with me that the response to this challenge is quite complex. First of all, it obviously involves positive recognition of the multiplicity of our world. Because, even if sometimes, here and there, when people lose their bearings, differences in culture, language, religion or tradition can cause misunderstandings or even friction, the multicultural nature of our world and our societies is still a treasure.

This recognition is essential, as denied, ignored, scorned identities can sometimes exude violence and act as a vector for conflicts. However, this

recognition must not be confused with acceptance of identity dynamics that sometimes seek to enclose societies and individuals in sealed cultural compartments. Withdrawal into oneself and contempt for others do not safeguard a culture or a society; indeed they only impoverish them.

Ladies and Gentlemen,

In addition to our geographical and cultural origins, we share not only our condition as human beings but also the founding values of our humanity. I am talking about human rights, the human rights that make up the common heritage of all humanity. The human rights that, because they enshrine the dignity of each and every one of us, because they proclaim the untouchable nature of human beings, constitute the main condition of living together and the cornerstone of true intercultural dialogue.

Ladies and Gentlemen,

The path to this dialogue is complex and demanding. It calls on us to listen to each other and pushes us to go beyond mere cohabitation and the juxtaposition of our identities to find roads to convergence. It calls on us to find tools, strategies and mechanisms not only to topple prejudice and cultural stereotypes but also to invent political and institutional frameworks to protect diversity and everyone's rights. Intercultural dialogue cannot be limited to cultural aspects alone. It must embrace other dimensions. I am thinking of institutional issues in general and legal dialogue in particular.

While our world is rich in varied legal configurations, the experience of the Venice Commission has shown that convergences and complementarities in our different legal cultures are possible. If, of course, we each make an effort to open our eyes and embrace the complexity of our realities, the diversity of our situations and the pluralism of our sources of law.

Intercultural imperatives require us to make this effort at opening up. These imperatives are calling on us to welcome legal pluralism so that, together, we can reinvent the dialogue of common rules based on shared values. Shared values unite our humanity in its diversity.

Ladies and Gentlemen,

Erasing misunderstandings, improving mutual understanding to favour the emergence of ways of living together today, making room for all, while preserving the spirit of our differences, and favouring awareness of our own identity while opening up to that of others, to otherness - these are the challenges of intercultural dialogue.

But this dialogue cannot be an end unto itself. It must lead to common action to face up to the challenges of today and tomorrow. I am talking about the challenge of development here. Let us not forget that one quarter of the population of our planet still lives on less than one dollar a day. Let us not forget the drama of poverty that continues to ravage human lives every day.

Globalisation of economies is far from bringing convergence of standards of living. There is still a lot to be done in this field and we have a duty of solidarity, a duty of humanity towards those living on the fringes of the development of our planet.

Ladies and Gentlemen,

Beyond our differences and the jolts we have suffered recently, it is up to us to share our experiences and good practices. It is up to us, aware of interdependence, eager to open up and to share, to invent forms of convergence and complementarity in our dialogue so that, together, we can build an open world rich in diversity - a world based on the rights of one and all, a world founded on respect for human rights.

Thank you very much.

Gianni Buquicchio
Secretary of the Venice Commission
Council of Europe

Mr President,
Presidents,
Ladies and Gentlemen,

Mr President, as a regular representative of the Parliamentary Assembly of the Council of Europe at the Plenary Sessions of the Venice Commission, you know us very well and I am glad to be able to meet you here in our common endeavour. I do hope that this occasion will allow us to build a strong relationship between the North-South Centre and the Venice Commission.

The topic chosen for our gathering is indeed an integrative one. Constitutionalism concerns constitutional lawyers primarily but the Constitution is pertinent to every citizen. Constitutionalism relates to North and South alike. Indeed, we have seen most valuable contributions to modern constitutionalism coming from Africa, such as public participation in the drafting of the constitution or the protection of minority groups.

As you may know, the Venice Commission is a consultative body of the Council of Europe composed of independent experts providing advice in the field of constitutional law in the broad sense. Two of these members are present here today and I am glad to welcome the Vice-President of the Commission, Mr Mifsud-Bonnici and our Portuguese member, Mr Cardoso da Costa. The Venice Commission promotes the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law. In fact, they are not only European values but are also truly universal ones.

Like the North-South Centre, the Venice Commission reaches out from Europe to other parts of the world. As the only enlarged agreement of the Council of Europe, the Venice Commission comprises 47 European states but, in addition, we are proud to have full members and observers from Africa, the Americas and Asia. Independent of membership, we co-operate with nearly the whole African continent in the field of constitutional justice.

Mr President,

Our topic, constitutionalism, refers to the idea that constitutions must not remain written on paper, nicely bound in leather and forgotten under the dust of time. We have seen such constitutions, merely declaratory in nature, which had no effect in real life. A sad example was the Constitution of the Soviet Union, which proclaimed an impressive list of human rights, which were, however, disregarded by the state each and every day.

A 'real' constitution has to be normative. It shapes the country and steers it on its complex path towards democracy, the protection of human rights and the rule of law. Such normative constitutions have to be known to all, they have to

be applied every day and they serve as the yardstick for the interpretation of any other legal text.

We have seen that democracy is not a static state of affairs. It cannot be ticked off as simply being achieved; democracy is a continuously moving process. Democracy has to be conceived, reflected upon, tried, retried and constantly improved. Democracy needs a sound framework. This framework is the country's constitution, which provides for human rights, the state's democratic institutions and their inter-relation.

During our Forum, we will address four major areas of constitutionalism: parliamentary control of the executive, constitutional justice, civil society and the media.

We will talk about the relationship between the executive and legislative powers. Constitutional thinking has moved from a strict separation of powers to questions of co-operation of powers, co-operation however, which has to be accompanied by appropriate control mechanisms or checks and balances as they are often referred to.

If parliament controls the executive, constitutional justice is fundamental in controlling parliament, keeping it within the boundaries set by the constitution. The role of constitutional courts is to ensure that a constitutional text becomes a real normative constitution. In transforming the constitution into a "living" law for society, constitutional justice, with a clearly established role in the institutional setting, is fundamental.

It is my firm belief that regional co-operation between constitutional courts is the appropriate tool to identify issues of common concern for the courts. Exchange between these regional centres on a wider level helps to identify questions of interest to all.

In Europe, our natural partner is the Conference of European Constitutional Courts represented today by Judge Staciokas from Lithuania. However, we also co-operate with constitutional courts using the French language, constitutional courts in the CIS, in Asia and in Latin America.

On the African continent, we are proud to have participated in the creation of the Southern African Judges Commission and I welcome Chief Justices Lehohla and Pillay who represent this body. Recently, we have started to further develop strong ties on the southern bank of the Mediterranean - with Arab constitutional courts and councils. I am most pleased to welcome President Bessaïh and Secretary General Abdalla.

Mr President,

Democracy cannot thrive without a vivid civil society. I have seen countries where philatelist associations were active but citizens' participation in public life was all but excluded. [I have much sympathy for philatelists – I collect stamps myself] but a sound civil society needs people who feed discussion, act as watchdogs and help to shape the life of a country. Sometimes, they can even develop specialised expertise, which can usefully be drawn upon by state institutions.

Finally, the media are keystones in any democracy. The sovereign people depend on information on public affairs transmitted through the media. Only this information - but also opinions conveyed - will allow the citizens to form an opinion, to participate in public life and to make a reasoned choice in elections. The pluralism of the media and their balance are essential to real democracy.

All these elements belong together; they are intertwined and cannot be separated from each other. A democracy needs functioning institutions but it also needs control between institutions and by the public.

I look forward to our discussions, which will help us to discern some key issues of constitutionalism.

Thank you Mr President.

João Bosco Mota Amaral
Vice-Chair
Portuguese Delegation to the Parliamentary Assembly
of the Council of Europe

Mr President,
Distinguished panel,
Ladies and gentlemen;

It is a great pleasure to welcome you to the Portuguese Parliament.

Our relationship with the North-South Centre of the Council of Europe has been very close since before it was founded. We have followed all its activities with great interest. And whenever asked to do so, we welcome it here in Parliament.

The 2006 Lisbon Forum is addressing a very important, highly topical issue. Generally, each country's constitution is the key to democracy, human rights and the rule of law.

These realities are the hard core of the Council of Europe's mission. And today, as an organisation, we can be proud to have collaborated actively in disseminating and consolidating them throughout Europe.

The results can be seen in the Council of Europe member countries, where they reflect peace, progress and freedom. In no period of history and nowhere else has it been possible to go so far in these fields. For Europeans, these realities are the founding values of the society in which they wish to live. It is natural for us to want to spread these values beyond our borders.

The north-south dialogue will be enriched by this theme.

The expansion throughout Africa of constitutionalism, democracy, human rights and the rule of law will directly benefit the African peoples. Extending freedom and progress to the south will reinforce Europe's security.

Different experiences will be compared at this Forum and there will be lessons to learn from all of them. Indeed, our formulas are not definitive and can always be improved.

While talking about Europe, Africa and human rights, we cannot ignore the drama of illegal immigrants. It is a top-priority issue requiring more intense north-south co-operation.

In the name of the Portuguese Delegation to the Parliamentary Assembly of the Council of Europe and its President, José Vera Jardim, I wish you success in your work at the Lisbon Forum 2006.

SESSION I

Parliamentary control of the executive in presidential and parliamentary systems

Ugo Mifsud Bonnici
Former President of Malta
Vice-President of the Venice Commission

» The Mace

Many assemblies exercising some power have chosen to demonstrate this collective authority by carrying a mace. The symbol is sometimes as contested as the institution itself. One recalls Oliver Cromwell referring to the mace of the House of Commons on 20th April 1653 as "A fool's bauble" which he ordered removed when dissolving the Rump parliament. Paradoxically it was through him and his successful rebellion against the King that parliament in Britain achieved the supremacy it now has. parliament in Britain is not merely the legislative organ as distinguished from the executive and the judicial powers, it is the real depositary of sovereign power. The famous constitutionalist A.V. Dicey, writing in 1886 was able to begin Chapter I of his book on the Law of the Constitution with the simple sentence: The Sovereignty of parliament is (from a legal point of view) the dominant characteristic of our political institutions. He follows that with a denial of any legal limitation of that sovereignty. Constitutionalists today might qualify the generality of that statement, but there is no question that legal sovereignty lies with parliament, and is most decidedly vested in the House of Commons. Dicey calls his first chapter "Of the nature of parliamentary government". That this legal sovereignty translates into real sovereignty is due mainly to the rule of law, of constitutional law. Whilst physical, military power, might be at the disposal of the executive, the Mace of parliament is supreme because of its legal, constitutional power, to which other organs give due deference. Under Britain's unwritten constitution, it was thought that parliament's sovereignty meant the power even to change the constitution itself. Even though Britain has joined the European Union, parliament has not probably lost sovereignty even though it has seemingly relinquished the supremacy of its laws.

This pre-eminence of parliament is the result of evolution. Parliament was originally summoned to provide the king with money through the imposition of taxes, and was of great importance during the Tudor period as the supreme legislative body which could change the law of the land and could, additionally, after the Wars of the Roses, and then the break with Rome, give the King the seal of legitimacy. It later increased its ascendancy, not only through armed rebellion but also, after the Restoration, because it became evident, through the control of the purse strings, that the king's ministers could not run the affairs of the country without the backing and confidence of that body. This established parliament's power of control over the executive. Even today when a government suffers defeat on a money bill, it is considered to have lost the trust of the parliamentary majority. The United States declared its

independence because it was being taxed without being represented in parliament. In Britain, though originally by no means required or the rule, it became essential for the king's ministers to sit in one of the houses of parliament, so as to reply to questions and to react to criticism of the government's actions.

» President versus King

When the fledgling United States moulded its own constitution, ostensibly on the lines of the British constitution's separation of powers, as interpreted through the eyes of the French philosophers of the Enlightenment, the framers applied the principle of consistency and separated the executive completely from the legislative body. Britain's monarchy evolved into a representative arbiter of stability and continuity with no exercise of government power and a narrow margin of discretion. The President of the United States from the beginning was conferred and continues to wield great real executive powers in all realms of government. In the United States the constitutional structure, as written down originally and as amended through its own constitutional process, has withstood the test of time. In the United Kingdom there has been further evolution and adaptation, always within the conventions and long accepted customs of the unwritten constitution. The two systems have served as models for innumerable variations on the presidential or parliamentary forms of democratic government.

» The executive under scrutiny

I have served in my country as a member of parliament, on the government side as private member for five years, as well as on the opposition side for 16 years, as a minister for seven years, and was also President of the Republic under a Constitution modelled very closely on that of Great Britain, with the notable difference that our head of state is elected for a limited term. I am therefore familiar with the strengths of the system of parliamentary government. The fact is that with parliamentary government, especially where, as in Britain and Malta, ministers have to be members of parliament and the Cabinet of Ministers is entrusted with the actual government of the country, the control of the executive in the house, is both direct, indeed immediate and confrontational. On the other hand, in some countries with a parliamentary system, in deference to a more clear-cut separation of powers, ministers are precluded from membership of the legislative organs. This incompatibility exists in some European countries such as Belgium, France, Latvia, the Netherlands, Norway, Portugal and Sweden, which have either parliamentary or presidential systems. With the Cabinet shouldering the sole responsibility for government action or inaction, in a parliamentary system, the monarch or in our case the president, is exempt from criticism for government policies and conduct. With ministers present personally in the parliamentary chamber, control by members of the houses of parliament is particularly effective. Ministers have to answer questions, face to face with their questioners, at daily

question time. When the presiding officer is more liberal, the surprises of supplementary questions sprung on unsuspecting ministers extract partially hidden information and inadequacies. A motion on adjournment provides a space within each sitting for focused criticism or defence. Ample coverage by radio and the press ensures that these exchanges have some resultant political fallout. Indeed these exchanges are the daily illustration of a lively political life. The Budget debates or those on separate tax measures attract general public attention. When, some decades ago, it was seen that congestion of business in the house could mean less scrutiny, some of the monitoring in detail was delegated to a number of parliamentary permanent committees, with more time available, albeit with less public exposure.

» Legitimacy bestows authority

Of course one has to distinguish between the theoretical control structure and its concrete implementation. There are two points which are to be considered under both the parliamentary and the presidential system. One is the matter of legitimacy which confers authority on the executive or the legislature. The moral authority of any organ of the state defines the scale of its real control over the other organs. The next point is the power to dismiss or impeach and the power to dissolve. In a presidential system the legislature cannot remove the executive by vote of censure or an expression of no confidence. It can only impeach. In a parliamentary system, removal of confidence by direct vote of no confidence or on an important money bill can mean the end of a particular administration. On the other hand, when the Prime Minister can decide on the dissolution of the legislature (even if, in most cases, with the agreement of the president or monarch) this gives the executive considerable leverage and restrains parliament's freedom of manoeuvre in its controlling function. Similar and untrammelled right of dissolution in the hands of an executive president considerably increases this leverage. Linked to this issue is the extent of immunity constitutionally sanctioned in the case of heads of state and the immunity allowed to members of parliament. In most constitutional arrangements the head of State, and this includes, more relevantly to the issue, executive presidents, are immune from criminal proceedings in respect of actions performed during the exercise of their functions. In the case of parliamentarians, this immunity varies from the minimum space of immunity with respect to what is said and done in the house and the maximum of full immunity, with the house itself possessing the sole power to lift such a general immunity. It is safe to say that whilst there is universal agreement as to the need for immunity with respect to what is said in the house, it would seem that the tendency to restrict immunity as much as possible has gathered some ground.

» The purse strings

Parliament, still performing the original role of provider of funds for government, controls expenditure, through questions and criticism on the floor of the house or in the permanent committees. Parliament can also appoint special investigative commissions to delve deeper. The Auditor General in many countries has been made directly responsible to parliament and chosen by parliament, so that the reports of the auditor's review of the working of the administration are not influenced by any undue pressure from within the executive itself. In the Dutch General Administrative Code, the Ministry of Finance, in its exercise of surveillance and control over expenditure in all ministries, has the right to exact information without being impeded under the right to silence principle (nemo tenetur prodere seipsum) and there is no doubt that parliament's investigations with the political repercussions following on reticence, in fact are not inhibited by any squeamish reluctance to probe further.

» Parliament as guardian of the common good

Parliament in any democratic system is, by obvious, intuitive definition, the guardian of the common good. Its very multiplicity and representativity urge upon it the role of watch dog, lest an executive which, also by definition is an elite, may pursue different interests from those of the commonwealth or of the common citizen. This is not to say that having a parliament suffices for the good of democracy. The key to the democratic success in any system lies in the proper distribution of functions and the balance of powers between the separate bodies of the state.

» Re-starting the democratic process

The former communist countries have been passing through a phase of constitution making and revision, with a variety of dosage in the separation, distribution and balance of duties and responsibilities, and some indecision in the choice of forms between presidentialism, semi-presidentialism and parliamentarism or semi-parliamentarism. It might seem difficult to apply the lessons of experience learnt in the long history of parliamentarism in Europe and of presidentialism in the United States to the new democracies, but deviation from the standards soon demonstrates, in resultant political situations, the need to adhere to the norms established in the evolution of the modern constitutional state with its rule of law, respect for human rights and freedoms, and the democratic way of conducting governance. This is not to deny that it is vital for the sustainability of constitutions, that they should be native. Indeed one should distinguish between adherence to standards and the slavish adoption of foreign models. In the history of any country one can find the endemic seeds of democracy and good government.

» The Venice Commission and democratic standards

The Venice Commission of the Council of Europe has, in the course of attending to its tasks, been attempting to compile codes of practice and common levels or standards. When asked to review new constitutions, the Commission invariably recalls the historical lessons imparted by the development of democracy. Thus, in most parliamentary systems, legislative initiative lies principally, though not exclusively, as the private member can and occasionally does propose bills, with an executive ensconced within parliament itself. Law is also an instrument of politics, and essential to governance, so it has been found appropriate that the executive should be involved in legislation: in its drafting, and after its approval or amendment by the appointed organ, in its implementation and enforcement. There are, understandably matters for legislation, which it would be useful to treat as not directly linked to the government though relevant to governance, especially matters of private law. In the parliamentary form of government the constitutional president's role is that of giving assent. Even this assent can involve a full gamut of powers. It may be merely formal without any exercise of discretion, or it can also mean a review of a law's conformity to the constitution, or imply the power to send it back for reconsideration. Veto power given to an executive president without a provision for the resolution of a possible impasse could give rise to a serious constitutional crisis. Certain constitutions reserve powers of legislation by decrees or ordinances for the president in emergency situations, whilst others leave it to parliament to delegate limited powers of legislation to the executive (Prime Minister or other ministers, usually with the concurrence of the Prime Minister).

» The formation of a Cabinet

The initiative of forming a cabinet is taken in both the parliamentary and the presidential forms of democracy by the head of state. In most constitutions there are provisions for this, but whilst in parliamentary democracies, the cabinet, once formed, has to receive the sanction of parliament through a direct or virtual vote of confidence to assume the fullness of its powers, in presidential constitutions, the cabinet remains accountable to the president. In semi-presidential forms, the choice of the president has to obtain parliamentary support, which entails the possibility that the Prime Minister and his cabinet might be an expression of political forces not in agreement with the president, "co-habitation".

» The Courts and their control function

The rule of law and the respect for fundamental human rights need a healthy relationship between the executive and the courts as well as between the legislators and those who will be asked to interpret and enforce their laws. The executive and parliament should refrain from commenting on matters still sub judice. Even criticism of judgements once delivered should be subdued and respectful, as nothing undermines the rule of law more than political overshadowing of the courts. On the other hand both the executive and parliament are called upon to oversee the workings of the courts, whilst scrupulously refraining from any interference in the exercise of judicial judgement. The Constitutional Court, established in most European countries, which had a history of subjection to dictatorship, has been found to be a useful democratic tool so as to guarantee fundamental human rights, the rule of law and faithful conformity to a written constitution.

» Appointments to high office

In the matter of appointments to the highest official positions such as that of judges of the Constitutional Court, other judges or controllers of semi-autonomous authorities, the discretion of the executive is subject to parliamentary criticism, and rightly so, but the wisest course is that of prior consultation with the opposition so as to limit as much as possible putting in doubt and thereby lessening the moral stature of the persons appointed. With regard to certain offices such as that of ombudsman or auditor general, it appears best to have these positions of trust filled by parliamentary nomination after consultation between the various political factions.

» Constitutions must be cherished and owned

It is surely not enough to formulate a good constitution. It should be known, receive a wide consensus, and be seen as a guarantee of ordered government, respect for human rights and the rule of law and as an instrument of practised democracy. Constitutionalism means democracy according to a law perceived as the key to the solution of political problems.

"Parliamentary Control of the Executive in Presidential Parliamentary Systems"

Ana Catarina Mendonça Mendes
Member of Parliament (Portugal)
Member of the Parliamentary Assembly of the Council of Europe

Mr President,
Ladies and Gentlemen,

I would like to begin by welcoming the choice of such an important theme for the annual Forum of the North-South Centre in co-operation with the Venice Commission of the Council of Europe, the 2006 Lisbon Forum. To speak of constitutionalism is to speak of the principles and rules that structure a state in its fundamental law, its constitution. It represents a social movement that sustains the limitation of power, preventing governments from imposing their own interests and rules in governing the country. According to Professor Gomes Canotilho, constitutionalism is the theory that sustains the principle of limited government essential to guaranteeing rights as a structural dimension of the socio-political organisation of a community. Modern constitutionalism is a specific technique for limiting power with a view to establishing guarantees.

We must not only regard the subject in the context of contemporary societies but also look at and contemplate the challenges that we face today and to which a response is required from those in power. Very simple and very complex questions are raised today with regard to the human rights of migrant communities and their integration into the societies where they go to seek a better life, how to find out what kind of sustainable development we want, how to guarantee security in such a global employment market, and how to understand the religious aspect and fit it into our daily lives. There are many challenges.

Ladies and Gentlemen,

In Portugal, as in any other country, there is a constant relationship between political history and constitutional history. On the one hand, here, just like everywhere else, it is the decisive events in political history that directly or indirectly cause the appearance, amendment or fall of constitutions. On the other hand, however, constitutions, to the extent that they consubstantiate or condition certain political systems and to the extent that they affect the legal and social system are also the generators of new political facts.

If we look at the history of the last 200 years, we recognise three main periods: that of the liberal constitutions, the 1933 Constitution and the 1976 Constitution.

There was the liberal age from 1820 to 1926, with four constitutions (those of 1822, 1826, 1838 and 1911) in very different circumstances. There were two ephemeral restorations of the former regime and a transition from a monarchy to a republic. At first glance, the main differences between these constitutions

(in the reciprocal powers of the monarch or president and parliament and how parliament was elected) seem much smaller than what they have in common (the separation of powers and individual rights).

There followed the period between 1926 and 1974, characterised by the desire for a different kind of constitutionalism, a Estado Novo (New State), corporative, authoritarian constitutionalism. This was the time of the 1933 Constitution (though there was still a Constitution, unlike in Italy, Germany and Spain).

With the 1974 coup, we entered the present period, which is very recent but already rich in events, ideologies and social and political contrasts, in which the country was on the way to a democratic, pluralistic regime (or political liberalism) with tendencies towards decentralisation on the one hand and socialisation on the other. The 1976 Constitution that resulted from the revolution meant the end of 48 years of dictatorship and then an opening of horizons and aspirations of being a social state with the democratic rule of law. It is from here onwards that we can talk of democratic constitutionalism, because only now was there universal suffrage.

The 1976 Constitution was the largest and most complex of all the Portuguese constitutions, as it underwent the effects of the dense, heterogeneous political process at the time, as it received contributions from opposing parties and social forces and as it came from different international ideologues and naturally reflected the country's previous constitutional experience.

It is a constitution of guarantees and prospects. Because of the authoritarian regime overthrown in 1974 and actual or possible deviations in 1975, this constitution is deeply concerned with the fundamental rights of citizens and workers and with the division of power. As it appeared in an atmosphere of repudiation of the recent past in which everything seemed possible, it sought to enrich the contents of democracy, and was full of manifestations of real equality, participation, intervention and socialisation in a broad vision not without some utopian ingredients.

Some of the original or relatively original features of the Constitution were:

- The complex dualism of freedoms and guarantees and economic, social and cultural rights and the ties between them, as set forth in Article 17;
- The inclusion of new rights and the binding of private entities by rights, freedom and guarantees;
- Formal acceptance of the Universal Declaration of Human Rights as a criterion for interpreting and integrating fundamental rights;
- The universalistic outlook reflected in the principle of equal rights for Portuguese and foreign nationals, the guarantees of extradition and deportation, the status of political refugee and, after 1982, the assumption of respect for human rights as a general principle of international relations;
- An appeal to citizens, associations and different groups to participate in legislative and administrative procedures;

- The systematic treatment given to elections, parties, parliamentary groups and the right of opposition;
- An increased concern for mutual control mechanisms of the powers and the introduction of an ombudsman;
- The co-existence of semi-presidentialism at state level, a parliamentary government system in the self-governing regions and a directorial system at municipal level;
- A comprehensive system of supervision of constitutionality that is concrete and abstract, by action or omission, preventive and successive, and the hybrid nature of actual supervision, with decision-making powers for all courts and possible or necessary appeal to the Constitutional Commission first and then the Constitutional Court.

But, Ladies and Gentlemen,

I am addressing you today as a member of the Portuguese Parliament and, as such, I am calling on my experience of the last nine years to meet the challenge of being one of the speakers on this panel. What limitations do parliamentarians have to face in exercising control? How can these obstacles be overcome?

If we look at recent political history in Portugal, it is easy to answer that we are better off today than we were 33 years ago. We have freed ourselves from a dictatorship and have a democratic regime. We live under the rule of law. We have a democracy. The separation of powers is respected today. Today, each power - executive, legislative and judicial - has its own duties. We have gone from a system of disregard to an attitude of respect for parliament, with its own functions, as set forth in articles of the Portuguese Constitution.

Deputies have broad supervisory powers under Article 162 of the Portuguese Constitution, which says that parliament has supervisory powers and "ensures compliance with the Constitution and the law and analyses the acts of the government and administration".

The powers of the Portuguese Parliament as a governing body, as opposed to other supervisory bodies and powers in the relationship between opposition and government, and those linked to the powers of the parties and parliamentary groups for information about the main political matters, for opening debates, questioning the government and submitting motions to reject its programme or motions of censure are set forth in Articles 114.3, 180.2c, 180.2d, 192 and 194 of the Portuguese Constitution.

It also has the power to supervise acts by the administration, through enquiry committees set up for the purpose. The law on these is currently being reviewed.

But, while it is true that these powers are bestowed on the Portuguese Parliament by the Constitution, it is also true that there is an urgent need to reform parliament, so that it uses these powers more. I may sound defeatist when I say that it is necessary to find the true essence of this power again. There is too much "reverence" for prime ministers by parliamentary majorities, which weakens parliament's job of supervision, and this may be an obstacle.

At the monthly debates attended by the Prime Minister, he answers to parliament for the work he is doing, though the way this is done may be somewhat outdated.

Today, it is not just the Prime Minister who addresses Parliament. Ministers are also often called upon to speak of options taken. They are often summoned by the specialised parliamentary committees.

The opposition plays an important role and has its own status allowing it to participate, as is right and fitting in a democratic society.

Even with its faults, this model guarantees transparent political decisions, clarification for parliamentarians and co-operation in matters of the greatest importance to changes that need to be made in society.

I also regard parliament as the seat of democracy and the ultimate expression of the voters' wishes at any time, when they choose their representatives. This is why representative democracy cannot be limited to the idea that those elected replace the electorate and think for them. Representative democracy is much better if it keeps an eye on social movements, which are increasingly important in modern societies. Participative democracy is a reality today. Participating means not only voting for or against a particular ideological programme, but also taking the initiative, proposing, debating and contributing.

Today there are new ways of participating individually or collectively in political life. Internet forums reflect this. There are countless debates on current events. Faceless people have discussions and suggest new ways of meeting the challenges that face us all, elected and voters, in our everyday lives. This is a reality that we cannot ignore, because speaking about control and supervision of the executive power also means knowing that the first ones to supervise are those who elect us, the citizens who confirm political projects.

Finally, I continue to believe that a constitution is the cornerstone of societies. It is a democratic constitution that ensures greater respect for human rights and the rule of democratic law. The rule of law means basic rules on the functions of each power.

The rule of law is not only the existence of universal laws, but also laws that cannot be amended without the people's consent, given as required by constitutional law, the fundamental law that regulates amendments to any laws, including to itself, as Eric Weil has said. This brings us to a discussion of the limits of revising the constitution.

The rule of law is not reflected by the maxim that the state is sovereign but in the maxim "The state is all of us", each and every one of us, as those who participate in the decisions, those who are governed because they can govern. The law is for all, those who make it, those who enforce it and those who do not participate in the legislative process.

A strong, modern parliament is one that really supervises and knows how to listen and accept suggestions from those wishing to participate beyond the political parties.

"The legislature in constitution building: Some constraints and responses"

Winluck Wahiu
Programme Officer
Constitution Building Processes, IDEA

About IDEA

Founded in 1995, International IDEA is a multilateral organisation whose member states are all committed to democracy building and are drawn from all regions in the world. International IDEA has the main objective of improving the design and effectiveness of democratic institutions and processes and offers its expertise in a number of focused areas. Under the New Strategy 2007 – 2011, our work prioritises institutional building through knowledge resources and tools, through policy development and through support to democratic reform at regional and country level.

Constitution Building Processes (CBP) Programme

The work of IDEA related to constitutions and constitutional democracy is implemented programmatically. Although all our key programmes implement activities that strengthen constitutional democracy, there is a specialised Constitution Building Processes programme. Within that programme, IDEA starts from two basic rationales: that the constitution forms a core agreement between citizen and state, and is the central framework for institutionalised power. Secondly, that how a constitution is made matters as much as what it says. This is the main lesson of recent constitution building processes. Democratic constitution-making holds the promise of a constitution that enjoys greater legitimacy for many post-conflict and fragmented societies. In turn, legitimacy is more likely to catalyse and sustain the institutionalisation of power in common institutions for the common interest and welfare, and away from factionalism and violence.

New mechanics of constitution-making in Asia, Africa and Latin America have moved away from the elite-only processes that dominated de-colonisation, elevating instead the participation of ordinary people in deliberating and endorsing their constitution. Democratic legitimacy is usually the goal: that permitting the greatest number of conflicting views to be heard, while allowing common values and norms to emerge, achieves richer democratic legitimacy. Moreover, popular processes have an educational role for all sections of the population on the importance of their constitution and their constitutional democracy. If continued after adoption of new constitutions, public education can enhance the sustainability of a nascent constitutional democracy.

Today, more than a half of all member states of the United Nations have undergone a constitution-building process since 1974. Bolivia and Nepal are the latest additions to this list and IDEA is fully committed to supporting both processes.

IDEA is developing knowledge networks and policy guidelines to support constitution- building processes that are planned and carried out in a participatory and inclusive manner, resulting in legitimate and sustainable constitutions. IDEA additionally enhances the cross-cutting importance of gender, conflict management and national ownership in its support. Our intention is to support national actors involved in developing new constitutions with our knowledge and policy tools. We do not work alone, but in partnership with other organisations and in close co-operation with our member states. We anticipate that other international and regional actors and institutions can sharpen the relevance and utility of our tools through review and endorsement. In their own way, international and regional actors who support individual country processes can find our knowledge tools as an added value in their work.

» Legislature in constitution building

Today's discussion on legislative oversight over the executive begins with the recognition of a fundamental principle of democracy. The participation of the people in their own governance is a critical role exercised through constitutional delegation to elected and representative legislatures. Both principle and role are re-emphasised in newly adopted constitutions, while at the same time benefiting from refreshingly new views of them. The result has been renewed public expectation in the role of the legislature, accompanied by new and more visible roles for the legislature, within a framework of constitutional democracy. One of these new, highly visible roles has been the fulfilment of constitutional norms by erecting a legislative framework in support of the new constitution.

In some cases, the legislature has also functioned as the constituent assembly that negotiated a new constitution, for instance in Ghana and South Africa. In various European countries, the constitution was reformed by qualified majorities in parliament, on the basis of political party consensus or on the basis of a report of a constitutional committee. Finland is an example of the latter (2000). In Switzerland, parliamentary consensus was strengthened by a referendum allowing direct participation of the people (1999). The legislature in Eastern European countries such as Hungary did most of the work of transforming the constitutions of post communist states. Serbia's proposals from 2005 were to change the constitution through parliamentary consensus.

In other cases, parliamentary consensus was rejected on grounds that it only redistributed power between political parties and elites, rather than rejuvenating constitutionalism. The legislature was circumvented in favour of a separately elected and constituted constituent assembly. However, and with few exceptions, elected members of the legislature were allowed automatic

eligibility as delegates in the constituent assembly. Legislatures have therefore not only been key actors in organic constitution-making, but also the sites where the exercise of the first principles of democratic decision making has been carried out. It also needs to be remembered that future constitutional changes remain directed through new legislatures.

» Legislating "framework laws"

Not only have legislatures assumed a role of negotiating constitutional norms, and setting the agenda for constitutionalism, many are now tasked with the fulfilment of new constitutions by enacting framework laws – the laws needed to make the new constitution work. Legislatures have borne the primary responsibility of setting up the laws needed to sustain a new constitution. Many new constitutions even stipulate calendars for the complete performance of the assignment. Such primacy has therefore come with new conditions and led in turn to a more critical focus on the legislature as an organ fulfilling a constitutional pact above its ordinary democracy functions of oversight and legislation.

» Cohesion needed to sustain constitutional impetus

One condition and perhaps a constraint is in consideration of the difference in partisan configuration in the makeup of the constitution-making assembly and the legislature enacting framework laws. It may be for instance that a strong cohesion in favour of a particular issue during the constitution-making phase was diluted following elections to the legislature which will then be required to enact the laws to implement the original position. That partisanship is itself a constraint. In the complicated case of Bosnia, despite a consensus among the major political parties, failure to win the requisite two-thirds majority support in April this year has now stalled a major package of reforms to the Dayton Constitution of 1995.

Related to it is that the framework laws require statutes responding to concrete problems, for instance to give effect to new citizenship provisions or provide for the framework of decentralisation. At the constitution-making level, definition of the problem tended to be abstract or highly theorised. Framework lawmaking however required specificity, and legislative willingness to adopt specific measures in response to a theorised issue tended to split up support for the issue, and willingness to legislate. For instance, while Kenya's constitutional conference adopted a scheme for devolution of power, the country's legislature could not agree on the number of new regional authorities, and support for abolition of provincial administration diminished once some of the pro-abolition political actors attained power. On the other hand, it could not be expected that specific framework issues could be agreed upon during the constitution-making phase, hence the persistent alternative remains sustaining cohesion around key issues as understood during the negotiation.

» Problem of political parties

That leads to another condition and constraint – the sustenance of party cohesion in the legislature. Party cohesion is relevant beyond constitutional fulfilment. An IDEA comparative case study of democracy practices found political parties to be a weak link in modern democracy demands. Trust in democracy was consistently lowest in political parties. In many countries, political parties merely existed to serve the interests of party leaders seeking a route to power, and were unresponsive to rank and file members and to supporters. In order for legislatures to serve their envisaged role as the implementers of the framework needed to support a new constitution, party cohesion needed to demonstrate that it could pursue and implement certain policies, and do so in a collective approach. Partisan, ideological and demagogic power-seeking party leadership did the most to subvert the pursuit of post-constitution-making constituent interests. In doing so, many party leaders elevated authoritarian and undemocratic views of the constitution, while shutting off contending views of the same.

Hence, many new constitutions could not be sustained from a position of power (Thailand). In recognising political party mismanagement of constitutional democracy as a risk, many new constitutions provide for a party bureaucracy and have elevated the management of parties to a constitutional level. Others have assigned legislative responsibilities to parliamentary committees whose proceedings must be open to the public and be consultative (South Africa). The intention is to institutionalise and centralise party organisation, and to compel parties to co-operate in bi-partisan committees. IDEA also reveals the experience of other countries to be that a proportional system of voting in plural societies, backed by political party financing laws was more likely to enhance the representational quality of all sections of the population including women and minorities at the legislature.

» Integrity of legislatures

Integrity of legislatures is another condition and constraint. Integrity requires legislature to serve the public interest in a transparent manner and to refrain from abuse of office for corrupt or self-interested gain. Many constitution-making processes discussed the two realities of rubber stamp legislatures in authoritarian systems and legislative dictatorship. A majority settled for devices aimed at countering the emergence of both, such as parliamentary-based coalition executives and two chamber legislatures. Many also devolved decision making to autonomous or semi-autonomous regional assemblies.

An interesting feature replicated a lot has been the establishment of legislating criteria where the first principle is that legislatures must fulfil and be guided by constitutional norms. The criteria are for the avoidance of doubt, settled as norms and expressed in increasingly popular sections of constitutions referred to as "directive principles". In Canada, the legislature has been characterised by the constitutional court as legitimising constitutional norms

in ongoing institutional dialogues with other organs of the constitution. In South Africa, the constitution is seen as mandating the legislature to "transform" society. By adopting a theory of a "basic structure" of the constitution, India's Supreme Court has on occasion delimited the lawmaking power of the legislature. Beyond policing and guidance, such schools of thought or philosophical traditions permit citizens to assess the integrity of statutes in the overall constitutional framework, and to see that new statutes are infused by the constitution.

» Maintaining citizen participation

In the eyes of ordinary citizens, sustained legitimacy of the constitution is also the legitimacy of all institutions set up under the constitution, and none more so than the legislature, which in many divided and plural societies has become the locus of sovereignty and legitimacy. Citizens' support is therefore a critical condition and constraint. Citizens must not only support legislatures by voting during electoral cycles, but their participation must also be strengthened in between such cycles. Many constitution-making processes have grappled with the question of citizen participation in between electoral cycles. In Kenya and Uganda, radical provisions for clauses in the new constitution, allowing voters to recall a member of the legislature before election term, were discussed.

Less radical were proposals for legislative committees to hold public consultation on new legislative proposals. In South Africa, the constitutional court recently invalidated the enactment of new laws extending access to certain medical services, due to failure to hold the required open and public consultations. The regime of judicial review of enactments is also construed in terms of a citizen's right to participation in lawmaking at all times, not merely by voting in new legislatures periodically. After all judicial oversight is only possible on account of citizens seeking redress against unconstitutional laws. In Canada, such judicial review of the validity of enactments is accepted in a context of parliamentary supremacy, as a dialogue by the courts addressed at the enrichment of the democratic law making process.

Besides possibilities of citizen challenges to enactments using the power of judicial review, citizen engagement with the legislature has been addressed through new possibilities of civil society and interest groups to submit petitions for legislation. Already, legislatures are becoming increasingly accessible to the advocacy and lobbying efforts of civil society actors, but the accessibility of legislatures to the people is still underdeveloped in many respects, in particular where legislative proposes deal with complex proposals. In order to enhance its engagement with the public on the adoption of the single transferable vote system of voting, the legislature in Canada's British Columbia experimented with deliberative public surveys with mixed results. What needs to be also emphasised is that even basic public hearings and the advocacy efforts of civil society are not possible without a free and independent national media.

» Institutional capacity

In conclusion, the new public expectations of modern legislatures, especially following the adoption of a new constitution, ultimately require conditions of institutional capacity. Weak or absent legislative institution capacity is therefore a significant constraint. It is a capacity that needs to be developed outside the constitutional fulfilment sphere because it is needed for an effective engagement with public hearing by committees, or even to deal with complex taxation of expanding industrial societies.

It is also needed to deal with another observable feature of modern constitution-making that is also increasing in ordinary legislating – the use of comparative law. Cross fertilization of ideas and institutions when making new constitutions is readily observed for instance in making a choice between parliamentary or presidential systems, or in the design of a proportional voting electoral system. This context of internationalisations is also presently observed with national legislatures working in closer co-operation with others, for instance on a specific collaboration such as combating corruption and human trafficking. Networks of parliaments also support information exchanges on a wide range of issues. Finally, individual legislatures have of their own volition borrowed laws from other countries, or based their laws substantially on pre-existing legislation models, with mixed results. In many African countries, freedom or access to information statutes tended to be based on Commonwealth or United Nations models. Of importance is not the borrowing or copying, but that lawmaking is preceded by significant comparative legal research as happens in Germany. Legislatures however need strong and sustainable institutional capacities to take advantage of comparative law.

"The role of Parliament in the national democratic revolution"

Professor Ben Turok
Member of Parliament (South Africa)

» Introduction

The ANC became a powerful movement by building a mass base among the most oppressed and exploited people of South Africa. Its long history of struggle brought about the defeat of the apartheid regime, but in conditions of much continuity. The parliamentary system is a major feature of that continuity, but it is also a site of struggle and a platform for change. How parliament is used for further transformation is one of the most important issues of the day.

» 1. The problem

While there has been a great deal of attention in parliament to the work of parliament and its relation to the executive, this has been largely done from a constitutional-legal perspective with particular focus on matters dealt with in the South African Constitution. Much of the work has focused on technical matters such as amending legislation and oversight, with little impact on the way parliament actually functions politically. Also, most members have felt that this is a matter for lawyers and experts. The result is a gap in the political understanding of the role of parliament and how MP's should conduct themselves. Yet parliament remains a critical institution of our democracy; its main functions are political, and if the ANC component is not clear about that political role we shall not function optimally.

» 2. Phases of our struggle

The creation of the African National Congress in 1912 may well be considered as a revolutionary event given the political economy context. The ANC may not have expressed itself in revolutionary terms, preferring to be tactical in the sense of being seen as consisting of "reasonable" people articulating reforms which could be met without serious disruption. Indeed this tradition of engaging with authority with "reasonable" proposals continued for many decades and was a way of gaining legitimacy at home and abroad. Over the years, these "reasonable" demands took different forms, representing a different understanding of the political changes required.

Some aspects of the proposed reforms were the extension of the franchise to all, the abolition of unjust laws, etc all of which could arguably have been achieved by major reforms within the existing system.

It was with the establishment of *Umkhonto We Sizwe* that the ANC set out the clear perspective of system overthrow by the armed seizure of power.

Yet history determined otherwise and the negotiated settlement, which we rather modestly called a "democratic breakthrough" and which led to the installation of democracy in the form of a multi-party parliamentary system, effectively establishing Black majority rule led by the ANC. This has been referred to as a "beach-head to fundamentally transform society" (Strategy and Tactics 1977). But a "beach-head" implies a major assault is to follow. What form is this meant to take?

In other words, the ANC came to exercise effective power in a system not of our choosing, and which reflected the traditions of Western parliamentary democracy which gives much recognition to the role of the ruling party, but also the opposition.

Has the ANC fully analysed that system and how it impacts on its immediate and long term agenda?

It is vital that we do so, since our official policy states that the "defining reality of our society is the continuing legacy of colonialism and white minority rule" (Umrabulo No 3 p 3). And the task of the ANC is the total transformation of that society. So what role does a parliamentary system of the Western type play in such an agenda?

We must take into account that Western political parties evolved out of the mass trade union movements in the second half of the 19th century and modern parliaments gave representation to those parties. These parties, especially the centre-left parties became narrowly focused on elections. "The party leadership, when not in power, gravitates to the parliamentary caucus and shadow cabinet. When in power, it is the cabinet itself which dominates the party. The party is not really the leader of a broad movement." (Umrabulo No.3, p.8)

Yet, this cannot be the perspective of the ANC which remains a mass movement with a revolutionary agenda. Indeed, Umrabulo argues that "the constitutional structures of the ANC must assume an overall, political, strategic primacy over the legislative and governmental institutions in which we are located." "In all centres of power, particularly parliament and the executive, ANC representatives must fulfil the mandate of the organisation." (Strategy and Tactics, 1997 p 23) In practice, the NEC and the NWC do generally lead, perhaps not in all matters, but the principle is well established.

However there is clearly a contradiction between ANC hegemony and multi-party democracy located in a parliamentary system of the Western type, albeit the contradiction is not necessarily antagonistic. Indeed it might well be creatively constructive!

» 3. The tradition of parliamentary democracy

When the labour movement in Western Europe first gained space in parliament, Marx was critical of their performance. He felt that they were drifting away from their mass constituency in the working class and becoming engaged in what he called "parliamentary cretinism."

In 1917, the Bolsheviks adopted a bivalent attitude to the Dumas set up by the social democrats but then opted for Peoples Assemblies or Soviets once they took power. But these institutions were mechanisms for the Communist Party rule without a great deal of autonomous power.

In present day China, there is a Peoples Congress which contains representatives of non-Communist parties, but it is quite different to the Western parliament.

But in most of the rest of the world the parliamentary has become the norm and this model is now almost universal.

As we have seen, in South Africa this model was part of the negotiated settlement and we are committed to parliamentary democracy for the foreseeable future, perhaps for all time. Certainly one party rule is not on the agenda, instead the ANC is rapidly beginning to look like a "normal political party" (Umrabulo p.9) and party politics increasingly look like that of Western systems.

» 4. Contradictions of parliamentary democracy - in principle and in practice

The Western justification of the parliamentary system is based on the notion that power corrupts and absolute power corrupts absolutely. Hence the need for checks and balances. Hence also, the emphasis on the separation of powers between the legislature, the executive and the judiciary, and on the rule of law.

Our constitution endorses this system and the ANC frequently defends it.

At the same time the ANC is a powerful political actor in the system with a majority giving it the power to almost rule alone politically. Yet we frequently affirm the importance of having opposition political parties to challenge government policies and performance.

The ANC component in parliament is frequently reminded of the importance of debating government policies and exercising oversight over performance. But we do not always put political issues first. The agenda of the National Democratic Revolution are too often in the background and not at the centre of tasks at hand. For instance, it would be difficult to argue that each policy document from a particular Department or piece of legislation is scrutinised from a political rather than a technocratic perspective as ANC.

Yet the ANC MP's and ministers meet in weekly caucus with the leadership of

the ANC as members of a single movement with a single programme and set of objectives determined by National Conference. At these meetings MP's are free to raise questions on policy or anything but it is emphasised repeatedly that MP's are there by the grace of the movement and not as individuals pursuing their own careers and articulating their own views.

Similarly in the ANC Study Groups, ministers may insist that they are pursuing Cabinet policies and decisions and require endorsement and support from MP's.

This system is not unique to South Africa and is the rule in most parliamentary democracies.

Yet it may not always be the case that (a) Cabinet is fully pursuing the mandate from National Conference, or (b) the minister is fully interpreting Cabinet decisions accurately, or, (c) that the state lawyers are carrying through the intensions of Cabinet in the final draft legislation.

This places MPs in a difficult position as they are supposed to defend Conference positions while the policies and /or legislation placed before them may deviate from this.

Furthermore, conditions change between conferences and MP's must allow for a degree of flexibility to Cabinet, ministers and officials, and this is particularly true in the drafting of Regulations under particular laws. These regulations are not subject to parliamentary approval and may introduce serious distortions in the implementation of laws. Yet the ultimate criterion must remain that National Conference objectives are met.

» 5. The ANC and the parliamentary oppostion

The official opposition in parliament is the Democratic Alliance whose philosophy is fundamentally different to the ANC. Yet they are committed to the parliamentary system and accept the legitimacy of ANC rule. The ANC ought to be able to engage with the opposition on policy differences without difficulty and without unnecessary tension.

The problem often arises when the opposition is seen to be insulting our leaders or arrogantly racist. Yet a mature cohort of ANC MP's ought to be able to handle such issues with dignity and decorum. Another problem arises when the opposition raises very sharply perceived deficiencies in the performance of government or particular ministers. This arouses the anger of the affected ministers and of MP's. Yet it has to be conceded that some of this criticism has at least some validity and that government is not perfect in every respect. Given the enormous dominance of the ANC in the House, we ought to be able to handle these contradictions with ease. This is particularly important since the work of parliament is carried out in full public view.

In a sense, our democratic aspirations as ANC find considerable reflection in what happens in parliament, which is screened on TV.

» 6. Parliament and the people

6.1 ANC Policy

ANC policy on the relation between parliament and the people is clear. "The new South Africa state is one in which formal expressions of democracy and human rights should be backed up by mass involvement in policy formulation and implementation." "The ANC needs to use those centres of power in which it has a foothold to widen and deepen popular power." It must have a "proper balance in its day-to-day activities between narrow governmental work and organisational tasks." (Strategy and Tactics 1977, pps. 11, 15 and 23).

6.2 Public hearings

The most common mechanisms for parliamentary committees to interact with the people formally is through public hearings organised by portfolio committees. Notices are placed in various newspapers, individual experts are invited and relevant organisations are notified. At the hearings, officials of the relevant department are present and generally respond to the various representations made. Political parties are not invited as separate entities, which may be a serious deficiency, since most committees tend to work in a relatively non-partisan manner. Cosatu and Business often make presentations. The Portfolio Committee prepares a report which is tabled in a plenary session and "noted." These reports are not generally debated and are most often lost from view.

6.3 Visits

Portfolio committees do visit particular areas or projects on fact-finding missions. These are invaluable, providing opportunities for actual oversight on the ground, and for interactions with ordinary people as well as officials at local level. However visits are costly and are the exception, not the norm.

6.4 Other representations

MP's who are relatively well known frequently receive representations from businesses, communities, or NGOs and this provides opportunities for engagement.

6.5 Constituency work

The most important opportunities to relate to the people come through the constituency system, through the Constituency Office and through the numerous opportunities for contacts of all kinds. However, since parliament is in session a great deal of the year, these opportunities are not as frequent or in-depth as might seem. As a result many do not know who their MP is nor what rights of access they have.

6.6 The proportional representation system

There can be little doubt that the proportional representation system does not create an equally intimate relationship between a particular electorate as a direct representation system. Perhaps more analysis is needed on this issue.

6.7 MPs and other ANC structures

There are clear guidelines on the required relationship between MPs and the local ANC Branch and the higher levels of the organisation. The effectiveness of this relationship is highly variable, depending on the MP and on the Branch.

6.8 MPs and public controversies

MPs are meant to be tribunes of the people, speaking on their behalf, defending their interests. In practice far greater weight is given to ANC campaigns, to electioneering, and to defending government policies and actions. From time to time, MPs are expected to debate controversial issues where they may express a personal view but always in the context of ANC national policy.

6.9 MPs and civil society movements

As our political system settles down, civil society movements and NGOs are finding a place in the system. Some are particularly keen on advocacy and these find their way to parliament, especially in public hearings. But it cannot be said that we have a systematic link to these movements or that we practice satisfactory accountability and transparency processes with them.

While the ANC tradition supports public protests and even rolling mass action, the circumstances where MP's are expected to join such actions are quite sensitive. A great deal of individual discretion is required as the line between what is a positive and a negative action can be quite fine. Too often decisions have to be made at short notice without time to seek guidance elsewhere. These decisions often reflect the contradictions of a party in power but facing obstruction within that same structure.

6.10 MPs and the media

From time to time the press seizes on some controversy and sensationalises it. ANC spokespeople try to represent our positions but the story runs on and on. Editorials open up the guns and lowbrow and tired old journalists who normally struggle to generate a regular column reach deep into their moral consciences to berate MPs for failing to stand up and be counted among the government's critics. Most of us remain silent, giving even more grounds for the assault.

Is it correct for ANC MP's whose duty it is to uphold the values and dignity of public life to remain silent during such controversies? Opposition MPs do not hesitate to join the fray, yet they have little to say! Do MPs not have a mandate from the organisation to represent and defend the organisation – and to accept criticism if appropriate? Does silence not diminish their status and credibility in the eyes of the public?

Also, there is an extensive Code of Conduct for the press and a Press Ombudsman. There is also a Broadcasting Commission. Why is it that the ANC in parliament does not have a team of MPs who regularly take up biased reporting with these bodies? Do these bodies not have responsibilities for the proper conduct of our public life?

6.11 MPs and job insecurity

Recently a considerable controversy has arisen about MPs salaries, pensions and participation in private business. Some ANC members have argued that salaries etc have to take into account the lack of security of employment. This is a specious argument. Very few employers provide long term security, which is generally based on good performance anyway. In any case, in principle, an MP is chosen because of personal qualities and these ought to enable that person to find employment and/or income once they have left parliament.

6.12 MPs and ethics

Similar considerations apply to MPs who enter private business. While there is no rule against such activity, there is a moral/ethical consideration that people in a position to wield influence on government agencies should not be involved where they are beneficiaries.

6.13 MPs and party discipline

ANC discipline over MPs is exercised by the Political Committee and by the Chief Whip. This is no easy task as MPs require a substantial degree of freedom of operation to be effective. They have to be able to communicate with ministers, officials, business-people, labour and a whole host of institutions and individuals in the course of pursuing some enquiry or other.

MPs may have to challenge officials and ask awkward questions of people in high authority and they must feel free to do so with vigour. Yet some of these people may be senior to the MP in status within ANC structures and resent being challenged. Sometimes the MP may be seen to be stepping out of line, or linking up with civil society structures in a challenging way. The path of exercising oversight is rarely smooth.

Is it possible to draw up some kind of code to guide MPs? Or should their main yardstick be the fundamental position that their task is to assist the people in advancing their needs and ensuring their right to be actors in building the new society?

» 7. How do we open the door to further fundamental transformation?

It would seem to be a basic rule of any system that it gradually creates self-defence mechanisms. Certainly when it comes to bureaucracies and political institutions there is a tendency to perpetuate itself and insulate itself from external pressure. Yet, as we have seen above, the ANC is committed to change, even fundamental transformation of our inherited system.

Parliament is certainly one of the principle arenas for such pressure and should be leading this transformation, not only in its internal processes, but also in society at large. We are meant to be a "people's parliament" and our presence in our constituencies is meant to reflect the role of the ANC as the people's

power in action. How do we do this in practice without running into the sorts of obstacles listed above?

We clearly need an examination of the role of MP's in the public domain so that they are seen to be leaders in their communities in their daily efforts for a better life. And that includes the poorest of the poor and the most disadvantaged historically and otherwise. That way the ANC will achieve its vision and be certain of maintaining its wonderful reputation as a liberation movement without parallel.

For further reference see: New Agenda, South African Journal of Social and Economic Policy, Issue 24

Fayka Al Refaie
Former Member of Parliament
People's Assembly of Egypt

Mr President,
Distinguished participants,

Permit me first to express my deep thanks to the sponsors of this distinguished forum for inviting me to participate.

I believe that no one will disagree with the fact that political governance and economic governance should go together on a parallel road if we wish to achieve new, balanced, overall development and attain sustainability.

Good political governance means applying democracy and maintaining justice and respect for human rights.

Let me refer to two main actions that have been taken recently by the Egyptian government to strengthen democracy and human rights in Egypt.

First the change in the constitution that took place in 2005 in order to allow for the choice of the president by election among several candidates instead of a nomination by the parliament.

In response to criticisms, however, another change was felt necessary as the changes made in 2005 dictated quite a large number of requirements for the candidates for presidency elections to fulfil before being accepted for enrolment in elections, and because these requirements are only met by members of the National Democratic Party (the ruling party). Criticisms appeared and the president announced that further changes in the constitution would be made during the current parliamentary session, which ends in July 2007.

There is a wide range of differences in the views of the opposition parties, the media, the court judges etc and the National Democratic Party on these requirements. That needs to be changed in the constitution.

I hope that these differences will be solved to reach a reasonable consensus.

The second action that the government has taken is the establishment of a National Council of Human Rights. The council has issued two annual reports, with quite a number of recommendations. Explanations by the government on certain issues or promises to do whatever is necessary to settle issues and complaints are the outcome in parliament meetings and discussions at committee level but not at a plenary session. Another problem is apparent for the National Council of Human Rights: the identification of economic human rights and social human rights.

Identifying these will guide our social policies.

The Council is lacking clear definitions and regular transparency.

From my experience in parliament, I wish to refer to the lack of co-ordination and regular relationships between civil society organisations on human rights. Strengthening these relations is needed.

Another issue here is media personnel capacity-building and enhancement, and also parliamentarians' capacity-building.

I feel there is a need for a fully independent institution for capacity-building in political democracy and human rights. The institution could serve both parliamentarians and media personnel.

Rules on how political powers act with regard to oversight of government actions are needed.

There is also a need to change the internal rules and procedures of the parliament in Egypt concerning the oversight function.

Thank you.

Veda Baloomody
Lawyer (Mauritius)

» Oversight function is one of the essential duties of parliament and a fundamental element of the democratic process. What are the constraints and limitations facing parliaments in the performance of this duty?

"Legislatures are the people's branch of government, the institution where citizens' interests and preferences are expressed and transformed into policy. While the legislatures are central to democracy, they tend to inherit a position of weakness relative to the executive. Legislatures fulfil a number of important functions in democracy. They represent people and groups, reflecting and bringing their needs, aspirations, problems, concerns and priorities to the policy-making and policy amending process. They make laws, the rules that govern the nation, and they practice oversight, assuring that laws and programmes are carried out legally, effectively, transparently and according to legislative interest. The representation function is fundamental, for it shapes the democratic character of the other two functions. Legislatures can legislate and conduct oversight, but without effective mechanisms of representation, they cannot be democratic, and are not likely to act in the interest of society as a whole. When a legislature is ineffective in carrying out those functions, society suffers".[1]

» What is parliamentary oversight?

Parliamentary oversight is the monitoring of executive activities for efficiency, probity, transparency and fidelity, to ensure that funds appropriated by parliament are used legally, economically, effectively and efficiently for the purposes for which they were appropriated at the budgeting stage. During the passing of the budget by parliament, normally parliamentarians should be involved in helping to set spending priorities, and approving methods of collecting revenue to cover these expenses. However, in practice, very little consultation is done between parliamentarians and the executive in the preparation of the annual budget. One can only question ministers on past expenses at the committee stage with very little or no power to influence the actual budget.

Oversight, in contrast, is what we may call the "after stage", that is, looking back on government spending and activities to determine whether there was waste or corruption and asking what one may call "value for money" questions and queries.

[1] *USAID Handbook on legislative strengthening and governance*

» How is oversight practised?

One of the main factors that influence parliamentary oversight is what may be described as the "regime type":

- Parliamentary systems – where the chief executive and cabinet are also elected members of parliament, selected from the majority party or coalition within the legislature (this is what is often referred to as the Westminster system, which most of the former British colonies inherited);
- Presidential system – here legislatures are elected separately from the executive. The two branches of government are independent of each other, especially where the president appoints cabinet ministers from outside the legislature. Here, when it comes to oversight, the centre of conflict is usually between the executive and the legislature;
- Hybrid system – this is the one which shares the characteristics of both the parliamentary and presidential systems. The most common one is where the president is directly elected through a nationwide vote, but appoints cabinet ministers from the elected members of parliament.

In most of the Commonwealth nations, including Mauritius, which has inherited the Westminster system, parliamentary oversight is practiced through what is known as the Public Accounts Committee (PAC). Most of these countries will have a National Director of Audit or Auditor General, who reviews the government's accounts and presents the findings of the audit to the PAC. Usually the Director of Audit is a constitutional post, thus independent from government. The PAC will consist of members of both sides of the house, i.e., backbenchers of the government and members of the opposition, and is normally presided over by a member of the opposition. The PAC studies the results of the reports of the Director of Audit, invites permanent secretaries or other ministry officials to the committee for questioning about the audit report and will subsequently issue its own report, commenting on findings of the audit and government performance. This PAC report is then laid on the table of parliament and, in the case of Mauritius, there will be no parliamentary debate on the report.

Although PAC is the main agency through which oversight is done, a number of nations have established other standing and specialised parliamentary committees to practise oversight. For example, in Kenya, there is the Public Investment Committee that oversees para-state organisations and their spending. In Mozambique it is the Planning and Budget Committee that oversees government, public institutions and para-state spending. On some occasions, ad hoc select committees are set up to investigate government spending on a specific project. However, this would only arise when there was a public outcry and the legislature believed that it was in the interest of one and all to set up such a committee. The most common tool for parliamentary oversight is the use of the time allocated by parliament for Prime Minister's question time and question time to other ministers. In the case of Mauritius, one very important means of parliamentary oversight is the use of what is known as the "private notice question (PNQ)". This is when on each day that parliament is sitting only the leader of the opposition can come up with a PNQ

addressed to any member of the executive, including the Prime Minister. Once the question is addressed, as to the standing orders, thirty minutes are allocated for supplementary questions on the same issue by any member of parliament.

» Constraints and limitations facing parliamentarians in Mauritius in the performance of their duties of oversight

Ever since its independence from British colonial power in 1968, Mauritius has been governed by freely democratically elected governments, with the Westminster parliamentary system. Elections are carried out using the first-past-the-post electoral system. Parliament consists of 60 elected MPs in Mauritius, two from Rodrigues Island and eight nominated best losers. Since 1968 there have been eight general elections in Mauritius and four Prime Ministers. However, in view of the first-past-the-post electoral system, out of the eight general elections, there has been in Mauritius, on two occasions, coalition party winning all the 60 seats and on two other occasions coalition party has won, respectively, 59 and 54 out of the 60 elected seats, thus leaving a very weak opposition. As mentioned above, parliamentary oversight is carried out by both opposition members and government backbenchers.

With regard to the Auditor's Report, very often due to lack of funds and staff, the report inevitably comes at a late stage, thus making any valuable follow-up by the PAC difficult. The Auditor's Report is only for consultation purpose and has no enforcing power whatsoever.

Coming to the PAC, to understand, examine and investigate financial and auditing reports is both time consuming and complex and, very often, parliamentarians, who are only part-time, lack both time and professionalism. Independent experts and professionals are therefore needed to assist them; yet these are not frequently available. In some specific cases, due to the "party system" parliamentarians may not wish to embarrass their colleague ministers, and do not go deep in their queries.

Regarding questioning the executive in parliament, ministers are very often vague, evasive, brief and non-responsive to questions. During question time, ministers may even refuse to answer questions and, as per the standing orders, the Speaker of the House has neither control on the answer nor can he force the minister to reply. As for the backbenchers, questioning the government is made even more cumbersome, as their questions have first to be vetted by the Chief Whip and by the parliamentary caucus, so as not to embarrass and put awkward questions to his colleague ministers.

With regard to international affairs generally, parliaments are very often kept in the dark. International treaties and covenants are being signed, binding the states, without the knowledge or approval of parliament, thus making it impossible to exercise any kind of oversight.

» How to overcome the constraints and the limitations

- Parliamentary committees should be given professional assistance and status. Their reports should be debated in parliament and voted upon, thereby giving enforceable power to their recommendations;
- Other permanent parliamentary committees should be set up with regard to high spending ministries;
- Departmental, sectoral or portfolio committees should be set up, with the requirement that issues be referred to them early, before action is taken;
- Public hearings should be allowed in committees, the benefits of which may include:
  - ***a)*** providing the legislatures with outside expertise;
  - ***b)*** providing a forum for more accountability;
  - ***c)*** increasing public confidence in the transparency of the legislature;
- Standing orders should be amended so as to ensure:
  - ***a)*** consultation with parliamentarians prior to the presentation of the budget;
  - ***b)*** more latitude for backbenchers and opposition members to question ministers;
  - ***c)*** ministers are more accountable by insisting that they give clear, precise and comprehensive replies to questions put to them;
  - ***d)*** debate of international treaties and covenants in parliament prior to signing.

SESSION II

Constitutional justice – an effective guarantee of constitutionalism

(Lithuanian experience)

Stasys Stačiokas

Judge, Constitutional Court of the Republic of Lithuania, representing the Presidency of the Conference of European Consitutional Courts

» Introduction

The Constitution of the Republic of Lithuania was adopted by referendum — the vote of the entire nation — on 25 October 1992. The referendum in which the Constitution was adopted was organised according to the democratic legal traditions of the State of Lithuania (Constitutional Court ruling of 22 July 1994). The source of the Constitution is the national community, the civil nation, itself.

The Constitution is an act of the supreme legal power. The Constitution reflects a social agreement — a democratically accepted obligation by all citizens of the Republic of Lithuania to the current and future generations to live according to the fundamental rules entrenched in the Constitution and to obey them in order to ensure the legitimacy of the governing power and the legitimacy of its decisions and guarantee human rights and freedoms, so that concord would exist in society. As an act of the supreme legal power and a social agreement, the Constitution is based on universal, unquestionable values belonging to the sovereignty of the nation, democracy, recognition of human rights and freedoms and respect for them, respect for law and the rule of law, limitation of the scope of powers, the duty of state institutions to serve the people and their responsibility to the society, public spirit, justice, striving for an open, just, and harmonious civil society and state under the rule of law. The Constitution provides the basis of relationships between a person and the state, formation and functioning of public government, the national economy, local self-government, other major relationships of the life of society and the state. Having adopted the Constitution, the civil nation formed the standardised basis for the common life of its own, as the state community, and consolidated the state as the common good of the entire society. The nation usually amends the Constitution directly or through its democratically elected representatives and only according to the rules established in the Constitution itself. The Constitution is the supreme law. It provides the guidelines for the entire legal system — the entire legal system is created on the basis of the Constitution (Constitutional Court rulings of 25 May 2004 and 13 December 2004).

Article 1 of the Constitution of the Republic of Lithuania provides: "The State of Lithuania shall be an independent and democratic republic."

The Constitutional Court in its ruling of 23 February 2000 noted that "in this article of the Constitution the fundamental principles of the Lithuanian State are established: the Lithuanian State is free and independent; the republic is

the form of governance of the Lithuanian State; the state power must be organised in a democratic way, and there must be a democratic political regime in this country."

The provisions of Article 1 of the Constitution and the principle of the state under the rule of law established in the Preamble to the Constitution and in other provisions of the Constitution determine the main principles of the organisation and activities of the state power of the State of Lithuania.

Paragraph 1 of Article 5 of the Constitution provides that in Lithuania, the powers of the state shall be exercised by the Seimas, the President of the Republic, the government, and the judiciary. This constitutional norm established the principle of separation of powers. This is a fundamental principle of the organisation and activities of a democratic state under the rule of law. In its rulings the Constitutional Court has noted many times that this principle means that the legislative, executive and judicial powers must be separated and sufficiently independent, and that there must be a balance between them. Every power is exercised through its institutions, which are granted the competence corresponding to their purpose.

Justice, an open and harmonious civil society, a state under the rule of law would never be possible if whole state power became concentrated in a certain single institution of state power. The Constitution consolidates the organisation of the institutions executing state power and procedure of their formation, which ensures a balance between the institutions of state power, the counterbalance of the authority of certain institutions of state power to the authority of other institutions of state power, the harmonious activity of all the institutions executing state power and execution of their constitutional duty to serve the people, the settlement by the Constitutional Court of disputes related to the authority vested by the Constitution in the institutions of state power, the formation of all the institutions executing state power, the Seimas, the President of the Republic, the government, the judiciary, as well as other state institutions only from the citizens, who without reservations obey the Constitution adopted by the nation and who, while in office, unconditionally follow the Constitution, law, the interests of the nation and the State of Lithuania.

» What is the role of constitutional justice in the balance of power (legislature, executive power, judiciary)?

The Constitutional Court of the Republic of Lithuania, according to the Constitution, is empowered to make decisions which cannot be appealed against and it is the last instance for constitutional cases. Under Paragraph 1 of Article 102 of the Constitution, the Constitutional Court shall decide whether the laws and other acts of the Seimas are in conflict with the Constitution and whether the acts of the President of the Republic and the government are in conflict with the Constitution or laws. Moreover, in Paragraph 1 of Article 107 of the Constitution it is established that a law (or part thereof) of the Republic of

Lithuania or other act (or part thereof) of the Seimas, act of the President of the Republic, act (or part thereof) of the government may not be applied from the day of official promulgation of the decision of the Constitutional Court that the act in question (or part thereof) is in conflict with the Constitution. Thus, the erga omnes model of constitutional control is consolidated in the Constitution (Constitutional Court ruling of 28 March 2006). Therefore, the formal powers of the Lithuanian Constitutional Court are strong enough to exercise judicial review of inter alia legislature.

A certain danger may arise when the authority of the state is split in several bodies and then none of them is strong enough to act constitutionally in a possible conflict. The logic of parliamentarism would suggest that the representative body should be recognised as supreme. Then it will be the last instance in discussion of constitutional matters. However, there are some arguments supporting the position that the Constitutional Court should be the final stage among the state authorities in countries with written constitutions.

Despite some tendencies towards a non-positivistic concept of the rule of law, Lithuania has always had positivistic orientation in legal tradition. The Constitution of the Republic clarifies in detail the main constitutional principles of society and state. Hence, the function of the Constitutional Court is to interpret the Constitution. Of course, there is no clear distinction between interpretation of the Constitution and making new rules. It is rather clear that a certain degree of judicial law-making exists even in a society where the legislator is working really well. General rules of the parliament are not able to cover every particular question in detail. Otherwise, the danger of formal legality would arise, and that would be a step away from justice. In Lithuania the judicial interpretation of the Constitution will involve the Constitutional Court to the wide extent of the law-making and does not cause sufficient danger of concentration of too much authority in one body.

The allocation of this function to parliament is not appropriate for several reasons. Political interests may facilitate unconstitutional decisions by parliament. Being non-competent in particular constitutional matters, the members of the parliament may obey the order of their party and vote for a law or other legal act which does not correspond to the basic law of the state. Then it might be difficult to avoid the collision of laws and to stabilise the legal system. In any case the parliament always has the final word in these discussions. It has the power to amend the Constitution. But then meeting egoistic political interests becomes more complicated.

The next question I will discuss is to what extent the Constitutional Court is a political and to what extent a judicial institution. Without any doubt, the body has a hybrid nature. On the one hand, the Constitutional Court interprets laws, passes judgments and therefore it can be described as a judicial body. On the other hand, this judicial body is also involved in the system of separation of powers; it participates in the system of "checks and balances". Nevertheless, its function in the political arena is exercised through the judicial function - by interpreting laws and passing judgments.

It is worth looking at the Constitutional Court ruling of 6 June 2006 in this context. In this case a group of members of the Seimas (parliament of Lithu-

ania), the petitioner, applied to the Constitutional Court with a petition, asking it to investigate whether some norms of the law on the Constitutional Court was not in conflict with Paragraphs 1 and 2 of Article 5, Paragraph 1 of Article 111, Chapters VIII and IX of the Constitution. The petition requesting investigation as to whether the title "The Constitutional Court - a Judicial Institution" and Paragraph 3 of Article 1 of the Republic of Lithuania Law on the Constitutional Court, under which the Constitutional Court shall be a free and independent court that implements judicial power according to the procedure established by the Constitution and this law, were not in conflict with Paragraphs 1 and 2 of Article 5 and Paragraph 1 of Article 111 of the Constitution was based on the following arguments. In Paragraph 1 of Article 5 of the Constitution it is established that, in Lithuania, state power shall be executed by the Seimas, the President of the Republic, the government, and the judiciary. Under Paragraph 1 of Article 111 of the Constitution, the courts of the Republic of Lithuania shall be the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional courts and local courts. According to the petitioner, the Constitutional Court is not included in this "final list", while separate Chapter VIII of the Constitution is devoted to it. According to the petitioner, under Paragraph 2 of Article 5, the scope of power shall be limited by the Constitution. The fact that Chapter IX of the Constitution is devoted to the Court, which executes state power, and separate Chapter VIII of the Constitution - to the Constitutional Court, certifies that under the Constitution, the Constitutional Court is not a court and it does not execute state power.

The Constitutional Court held that the courts that, under the Constitution, implement judicial power in Lithuania are to be attributed not to one, but to two or more (if that, taking account of the Constitution, is established in certain laws) systems of the courts. Under the Constitution and laws, at present in Lithuania there are three systems of courts: (1) the Constitutional Court executes constitutional judicial control; (2) the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional courts and local courts, specified in Paragraph 1 of Article 111 of the Constitution, constitute the system of courts of general jurisdiction; (3) under Paragraph 2 of Article 111 of the Constitution, for the consideration of administrative, labour, family and cases of other categories, specialised courts may be established; one system of specialised courts, namely, administrative ones, which is composed of the Supreme Administrative Court of Lithuania and regional administrative courts, is established and is functioning at present.

The Constitutional Court provided that under the Constitution, the Constitutional Court is the institution of constitutional justice, which implements constitutional judicial control. The Constitutional Court has held in its acts more than once that when deciding, under its competence, on the compliance of legal acts of lower power (parts thereof) with legal acts of greater power, inter alia (and, first of all) with the Constitution, as well as when executing its other constitutional powers, the Constitutional Court - an individual and independent court - administers constitutional justice and guarantees the supremacy of the Constitution in the legal system and constitutional legitimacy. The title - the Constitutional Court - of the constitutional justice institution which is ascribed to execute constitutional judicial control is expressis verbis entrenched in the Constitution itself. Thus a state power institution, which is

named as a court in the Constitution itself, in its constitutional nature may not be considered not to be a court, i.e. not a judicial institution.

According to the Constitutional Court the mere fact that there are separate Chapters "The Court" and "The Constitutional Court" in the Constitution, is not and may not be a basis to construe that, allegedly, as it seems to the petitioner, the Constitutional Court is not a court - part of the judicial power and is somewhere out of the limits of the judicial system. On the contrary, the fact that there are two separate chapters "The Court" and "The Constitutional Court" in the Constitution does not deny the fact that the Constitutional Court which, under the Constitution, executes constitutional judicial control, is a part of the system of courts, but it emphasises its particular status in the system of judicial power as well as in the system of all the state institutions executing state power. In this way, the peculiarities of the constitutional purpose and competence of the Constitutional Court are emphasised.

The Constitutional Court emphasised that the presumption made by the petitioner that the Constitutional Court was not a court and did not implement state power was not in line with the concept of power and the powers of the Constitutional Court established in the Constitution at all. The fact that, under the Constitution, the Constitutional Court has the powers to recognise legal acts of other institutions that implement state power - the Seimas, the President of the Republic, the government - as being in conflict with legal acts of greater power, first of all, with the Constitution, and, thus, to abolish the legal power of these acts and to remove these legal acts from the Lithuanian legal system for good, the fact that only the Constitutional Court has the constitutional powers to construe the Constitution officially - to provide with the concept of the provisions of the Constitution which is binding on all the law-making and law-applying institutions as well as on the Seimas, the representation of the nation, obviously testify that the Constitutional Court may not be an institution not implementing state power. The presumption made by the petitioner that the Constitutional Court is not a court and does not implement state power is utterly irrational. Not only is it not in line with the constitutional concept of state-power implementing institutions—it strikes the raison d'être of the petitioner himself in this constitutional justice case, since, as the petitioner says, if the Constitutional Court is not a court and does not implement state power, it is not comprehensible why the petitioner applies namely to this court, asking it to investigate whether a legal act, passed by the Seimas - one of the institutions implementing state power (in this case—legislative power) is not in conflict with the Constitution.

» The stability of the Constitution and the possibility of its evolution

It is universally recognised that one of the most important features of a stable democracy and a state under the rule of law is a stable constitution and the legal order which is based on its constitution. It is often emphasised that guarantees of the constitution's stability are fixed in its text while establishing

the complicated procedure of its amendment (Chapter 14 of the Constitution of the Republic of Lithuania). This fact is noted even by the initiator of the constitutional doctrine Albert Venn Dicey. However, it is urgent to stress that this is only formal characterisation of the Constitution's stability. But it is more important to understand the notional, valuable stability of the Constitution that means that the Constitution is the system of permanent values of law. This is an evident fact because of the priority of contemporary constitutional and international law and its main institution – the protection of human rights. The evolution of the institution of constitutional human rights also stimulates the formation and establishment of other constitutional institutions and principles (for example, the limitation of powers and the separation of powers, the independence of courts, the rule of law and others) in democratic states and their international policy and law. This notional or valuable stability of the constitution is guaranteed differently i.e. not only establishing the complicated procedure of its amendment. At first, the stability of the Constitution is guaranteed by the interpretation of the valid Constitution: this interpretation is done by the Constitutional Court, which formulates the constitutional doctrine of Lithuania. However, the powers of the Constitutional Court are limited by the text of the Constitution itself if this text allows only limited guarantee of one or the other value (from the standpoint of comparative constitutional or international law).

The valuable stability of the Constitution is also guaranteed by the measures of the legislative power, but with such a condition that they don't overstep formal and notional limits of the Constitution. Besides, the stability of the Constitution is guaranteed by proper, legal activities of courts of general competence or administrative courts, but with such a condition that courts and the other institutions are active and really defend constitutional human rights. While estimating that fact, it can be said that the stability of the Constitution is its reality at the same time – it must be realised, but not be formal or even fictitious. Can the constitutional provision, which guarantees human rights in less proportion than the European Convention for the Protection of Human Rights and fundamental freedoms and the jurisprudence of the European Court for human rights do, be real and proper? Of course, it cannot be. So it is an evident fact that the constitutional provisions must be amended and improved so that they (and the Constitution itself) are real and at the same time stable when some constitutional provisions are not notionally correct.

Democracy and law are not only universal values; they are also social values of every nation based on the historical experience of the state's self-dependence and constitutional traditions. Thus, the universal experience of the nations of the world and Europe must be harmonized with traditions of every nation and perspectives of democracy and development of constitutionalism. It can and must be done through comparative constitutionalism or through comparative constitutional law and its relationship with international law. Thus, the conclusion can be drawn that the amendments of the Constitution are possible and even necessary sometimes because of a change in the system of internal and international values of democracy and constitutionalism.

The formation of a constitution is not a single act. A constitution is only adopted by a single act. The development of the Lithuanian Constitution did not finish

with its adoption. Every step of constitutional development is significant for the protection and defence of human liberty and welfare.

Thus, it is to be emphasised that the formulation of the official constitutional doctrine (both as a whole and on every individual issue of legal constitutional regulation) is not a one-time act but a gradual, consecutive process. This process is uninterrupted and is never fully finished because, since the nature of the Constitution as the act of the supreme legal power itself and the idea of constitutionality imply that the Constitution may not have, nor does it have any gaps or internal contradictions (Constitutional Court rulings of 25 May 2004 and 13 December 2004) - while construing the norms and principles of the Constitution, which are explicitly and implicitly entrenched in the text of the Constitution and which constitute a harmonious system, the possibility, if it is necessary because of the logic of the considered constitutional justice case, to formulate the official constitutional doctrinal provisions (i.e. to reveal such aspects of constitutional legal regulation) which have not been formulated in the acts of the Constitutional Court adopted in previous constitutional justice cases, never disappears. When the Constitutional Court considers new constitutional justice cases every time subsequent to petitions of petitioners, the official constitutional doctrine formulated in the previous acts of the Constitutional Court (on every individual issue on the constitutional legal regulation which is important to a corresponding case) is always supplemented by new fragments. Thus, by formulating new official constitutional doctrinal provisions the diversity and completeness of the legal regulation entrenched in the Constitution - the supreme legal act - is revealed (Constitutional Court ruling of 28 March 2006).

The Constitutional Court has held that the Constitution, as supreme law, must be a stable act (Constitutional Court rulings of 16 January 2006 and 14 March 2006). The stability of the Constitution is a feature which, together with its other features (inter alia and first of all with the special, supreme legal power of the Constitution) makes constitutional legal regulation different from the legal (ordinary) regulation established by legal acts of lower legal powers (Constitutional Court ruling of 14 March 2006) and the Constitution different from all other legal acts. The stability of the Constitution is a great constitutional value.

One of the conditions ensuring the stability of a constitution as a legal reality is the stability of its text. It was mentioned that the nature of a constitution, the idea of constitutionality implies that the constitution may not have and has no gaps or internal contradictions. Thus, the text of a constitution should not be corrected, for example, only after the terminology, inter alia legal terminology, has changed (Constitutional Court ruling of 16 January 2006). The meaning of the constitution as an extremely stable legal act would also be ignored if its text were amended every time certain social relations regulated by law undergo changes (for example, technological possibilities of certain kinds of activity expand so much, though they were impossible to predict at the time when the text of the Constitution was created).

In this context it must be emphasised that the further construction and development of official constitutional doctrine, inter alia the reinterpretation of official constitutional doctrinal provisions, when the official constitutional

doctrine is corrected in the acts of the Constitutional Court adopted in new constitutional justice cases, reveal the deep potential of the Constitution without changing its text and in this aspect to apply the Constitution to the changes of social life, to constantly changing living conditions of society and the state and to ensure the viability of the Constitution as the fundamental of life of society and the state. The formation and development of official constitutional doctrine is a function of constitutional justice. In the acts of the Constitutional Court adopted in new constitutional justice cases, by further construing and developing, inter alia reinterpreting, the official constitutional doctrinal provisions, also so that the official constitutional doctrine is corrected, it is prompted not to make any amendments to the text of the Constitution when such intervention is not legally necessary. Thus one also contributes to ensuring the stability of the text of the constitution and constitutional order.

» Legislative omission as a problem of constitutional control

There can be no doubt that legislative omission is one of the most problematic issues in modern constitutional jurisprudence. Probably no one will argue that each constitutional court or other relevant institution executing the function of constitutional control has faced in one or another way the difficulties of solving the question of compliance of a legal act with the constitution or another legal act of higher power than the legal act which is argued with regard to legislative omission. It should be noted that usually there are no special, explicit legal provisions (at least in Lithuania) which constitutional courts could follow in such cases. That is why in many cases it is up to these courts to construe (interpret) norms and principles of the constitution and other legal documents, to formulate legal doctrine of legislative omission executing constitutional control.

Exchange of experience between constitutional courts in this particular question is of great importance and relevance. This fact can be proved just by saying that the Circle of Presidents of the Conference of European Constitutional Courts on 7 September 2006 (in Vilnius) inter alia established that the topic for discussion in the 14th Congress of the Conference of European Constitutional Courts will be "Problems of Legislative Omission in Constitutional Jurisprudence".

I would like to share the experience of the Constitutional Court of the Republic of Lithuania, which from my point of view has already made important steps for clarity of constitutional control in the view of legislative omission.

In the jurisprudence of the Constitutional Court of the Republic of Lithuania (inter alia the ruling of 25 January 2001, the decisions of 6 May 2003, 13 May 2003, 16 April 2004, the ruling of 13 December 2004) there is the provision that the Constitutional Court enjoys the constitutional powers not only to hold that there is a legal gap, inter alia legislative omission, in the investigated legal act of lower power (part thereof), but also by its ruling adopted in the constitutional justice case it can recognise such legal regulation as being in conflict

with legal acts of higher power, inter alia the Constitution.

One of the latest decisions of the Constitutional Court of the Republic of Lithuania concerned with the topic being analysed here was adopted on 8 August, 2006. Therein the Constitutional Court precisely formulated a definition (the concept) of legislative omission. It also expressed a very clear position on how to distinguish between legal gaps as legislative omissions and other legal gaps. The criteria of this distinction should encourage courts of general jurisdiction and specialised courts to solve cases concerned with legal gaps which are not recognised as legislative omissions directly ad hoc when administering justice. It is also a practical means for other petitioners (not less than one fifth of the members of the parliament, the government and the President of the Republic of Lithuania) who, according to the Constitution, can raise the issue of the constitutionality of a legal act. Identifying non-legislative omissions in legal regulation they should not apply to the Constitutional Court with petitions but take necessary legislative measures themselves to improve legal regulation (legislation) first. It should be particularly noted that this question is solved even in the scope of such legal gaps which may appear because the Constitutional Court, when executing its functions, excludes unconstitutional legal regulations from the legal system. So I would like to present some ideas in a more detailed way, using some quotes from the aforementioned decision where necessary.

Concerning the constitutional definition of legislative omission the Constitutional Court held that "a legal gap, inter alia legislative omission, always means that the legal regulation of corresponding social relations is established neither explicitly nor implicitly, neither in the said legal act (part thereof) nor in any other legal acts, even though there exists a need for legal regulation of these social relations, while the said legal regulation, in case of legislative omission, must be established, while heeding the imperatives of the consistency and inner uniformity of the legal system stemming from the Constitution and taking account of the content of these social relations, precisely in that legal act (precisely in that part thereof), since this is required by a certain legal act of higher power, inter alia the Constitution itself. <...> Legislative omission means that the corresponding legal regulation is not established in that legal act (part thereof), although, under the Constitution (or some other act of legal act of higher power, the compliance of the investigated legal act (part thereof) of lower power with which is assessed), it must be established precisely in that legal act (or precisely in that part thereof)."

So holding that, the Constitutional Court notes that "it is necessary to distinguish legislative omission, as a consequence of an action by the law-making subject that issued a corresponding legal act, from the legal gaps that appeared due to the fact that the necessary law-making actions were not undertaken at all: neither one nor another law-making subject issued a legal act designated for regulation of certain social relations and, due to this, these social relations remained legally unregulated".

The Constitutional Court is able to recognise corresponding legal regulation as being in conflict with legal acts of higher power, inter alia the Constitution, but it is necessary to follow certain conditions, which are defined in the jurispru-

dence of the Constitutional Court (inter alia in the aforesaid Constitutional Court rulings and decisions), namely:

1. ***If the laws*** and other legal acts (or parts thereof) of lower powers do not establish certain legal regulation, the Constitutional Court has constitutional powers to recognise these laws or other legal acts (parts thereof) as being in conflict with the Constitution or other legal acts of higher power in cases when, due to the fact that the said legal regulation is not established in precisely the investigated laws or other legal acts (precisely in the investigated parts thereof), the principles and/or norms of the Constitution, the provisions of other legal acts of higher power might be violated;

2. ***In cases when*** the law or other legal act (or part thereof), which is disputed by the petitioner and investigated by the Constitutional Court, does not establish certain legal regulation which, under the Constitution (and if a sub-statutory act (or part thereof) of the Seimas, and act (part thereof) of the President of the Republic or the government is disputed - also under the laws) need not be established precisely in the disputed legal act (precisely in that part thereof), the Constitutional Court holds that the matter of investigation is absent in the case of the petition - this is the basis to dismiss the instituted legal proceedings/ case.

The Constitutional Court held that it was also necessary to take account of how the said legal gap appeared: whether it is a legislative omission, created by a law-making action of the subject who passed a corresponding legal act *(i.e. due to the fact that, in the course of passing this legal act, the legal relations that should have been regulated precisely in that legal act (precisely in that part thereof)*, were not regulated precisely in that legal act (precisely in that part thereof)), whether this legal gap appeared due to other circumstances, for example, due to the fact that by its ruling the Constitutional Court had recognised that the legal regulation in a certain legal act (or part thereof) of lower power was in conflict with the Constitution or other legal act of higher power. In the latter case there are no grounds to state the presence of legislative omission. On the contrary, in this situation, under the Constitution, a corresponding subject of law-making (provided corresponding legal relations have to be legally regulated) is under obligation to change the no-longer valid legal regulation so that the newly established legal regulation would not be in conflict with a corresponding legal act of higher power, inter alia (and, first of all) with the Constitution.

The Constitutional Court does not investigate *inter* alia such legal gaps or other indeterminacies, which could appear after the Constitutional Court recognised by its ruling that a certain legal act (or part thereof) is in conflict with a legal act of higher power, inter alia the Constitution, otherwise the essence of legislative omission as the consequence of an action of the law-making subject that issued the corresponding legal act would be denied. The essence and meaning of constitutional review and constitutional justice would also be distorted in essence or denied, because it would mean that the Constitutional Court, while acting within its constitutional competence, created the legal situation (i.e. that it virtually created new legal regulation instead

of that recognised as conflicting with a legal act of higher power, inter alia the Constitution), which is incompatible with the Constitution or other legal act of a higher power.

» What are the difficulties encountered by the Constitutional Court in its functioning and the fulfilment of its mission – administration of constitutional justice?

It is necessary to emphasise that the acts of the Constitutional Court, which recognise that certain legal acts are not contrary to the Constitution, do not require any specific implementation. They can be taken as feasible. Such an interpretation is especially valid if judicial power and influence of the decisions of the Constitutional Court are associated only with their resolution. On the other hand, it was mentioned that all the subjects have to follow not only the resolution of the acts of the Constitutional Court, but also the motives and arguments of the acts of the Constitutional Court. The Constitutional Court sometimes allows, understanding parliament and the other subjects of the legislation, that it is necessary to change legal regulation that is "incorrect" or even "without constitutional background", which is not recognised as unconstitutional or just allows itself "to menace (somebody) softly".

It is a more difficult situation when it is necessary to implement the acts of the Constitutional Court that have recognised legal acts as unconstitutional. Usually unconstitutional legal acts have to be eliminated from the legal system (they are eliminated by the institutions that adopted these legal acts), although there are some opinions (K. Lapinskas and etc.) that judgment of the Constitutional Court actually terminates legal power of the unconstitutional legal act and, considering the legal consequences of such a decision, this is equal to abolition of such a legal act. On the other hand, in this case there emerge gaps in legal regulation, even vacuums, therefore the judgments of the Constitutional Court recognising questionable legal acts as unconstitutional have to be implemented, enacting new legal acts that are not contrary to the Constitution. So sometimes the Constitutional Court postpones the publication of its rulings (see Constitutional Court ruling of 24 December 2002). Under the Constitution, the Constitutional Court, having inter alia assessed what legal situation might appear after a Constitutional Court ruling becomes effective, may establish the date when this Constitutional Court ruling is to be officially published. The Constitutional Court may postpone the official publishing of its ruling if it is necessary to give the legislator a certain time to remove the lacunae legis which would appear if the relevant Constitutional Court ruling was officially published immediately after it had been publicly announced at the hearing of the Constitutional Court and if they constituted preconditions to basically deny certain values protected by the Constitution. The said postponement of official publishing of a Constitutional Court ruling (inter alia a ruling by which a certain law (or part thereof) is recognised as contradicting the Constitution) is a presumption arising from the Constitution

in order to avoid certain effects unfavourable to society and the state, as well as human rights and freedoms, which might appear if a relevant Cons-titutional Court ruling was officially published immediately after its official announcement at the hearing of the Constitutional Court and if it became effective on the same day after it had been officially published.

Besides, the great problem is not that it is necessary to adjust legal regulation that has been recognised as unconstitutional, but that sometimes decisions of the Constitutional Court may "require" financial resources in the state budget in order to fulfil obligations of the state towards its citizens.

» Conclusions

The influence of acts of the Constitutional Court on the legal system is significant. These legal acts cleanse the legal system from unconstitutional legal acts and the Constitution also becomes "alive". Moreover, acts of the Constitutional Court have the judicial power of the Constitution, they have the erga omnes effect, which integrates the whole legal system and, thanks to the values established in the Constitution, all of society and the state. Moreover, the acts of the Constitutional Court sometimes intervene into the area of accomplished legal relations (*ex tunc effect*). It is most often related with the aim to guarantee legal values, of which the most important are human rights.

José Cardoso da Costa
Former President of the Constitutional Court of Portugal
Member of the Venice Commission

Mr President of the Lisbon Forum,
Mr Chairman of the Executive Council of the North-South Centre,
Mr Secretary of the Venice Commission,
Mr Chairman of the session,

Dear Colleagues,
Ladies and Gentlemen,

It is a great honour for me, as a Portuguese, that this meeting is being held in Lisbon. It is also an honour to participate in this Forum and I am delighted that you are able to enjoy the fine weather that our capital has to offer to you, and also to me, as I do not live here.

I will begin with a comment before giving you an insight into what is happening in Portugal.

This initial comment is that constitutional justice is an achievement of contemporary European constitutionalism. Unlike America, for example, where the concept was accepted from the start, the process in Europe lasted more than a century.

I will not analyse the reasons here; I will just point out that the discovery of the importance of constitutional justice has to do with the fact that the importance of the constitution was also discovered as a set of legal rules. In modern democracies, this regulatory role of the constitution has become clear and has produced a need, everywhere, to ensure that it is guaranteed by an appropriate court.

Portugal has naturally followed this movement and was, in certain aspects, a precursor of the movement. Since the introduction of the republican constitution, which was approved in this very building in 1911, judges have the right to refuse to apply legal rules, such as acts of parliament, if they feel that they go against the constitution.

This was expressly provided for in the 1911 constitution, well before the change to democracy in 1974. We must, however, admit that the power invested in Portuguese judges played a very small role in the 64 years between the first republican constitution and the present one introduced in 1976. It is only in the present constitution that constitutional justice is solidly anchored in Portuguese institutions and wields a real influence on Portuguese legal and political life.

Our constitutional court consists of 13 independent judges. There is no problem at this level in Portugal. The court is truly independent and has no difficulty in playing its role.

The court's main duty is to check that all laws abide by the constitution. It follows three different procedures:

» ***preventive*** analysis of international treaties, laws passed by parliament and government decrees;

» ***There*** are provisions by which analyses can be made by certain public authorities that may result in the court declaring a law, bill, decree or regulation unconstitutional. This control has a general effect;

» ***Finally,*** there is actual control of constitutionality of laws belonging first to the ordinary, administrative and tax courts. The judges thereby maintain their power to refuse to apply a law if they deem it unconstitutional.

Nevertheless, if, for example, a judge refuses to apply an act of parliament, the public prosecutor is obliged to appeal to the constitutional court, which makes the final decision.

On the other hand, any party in a procedure raising a question of unconstitutionality before a judge may appeal to the constitutional court if the judge does not accept these arguments. The court is a kind of direct court of appeal for constitutionality, but may only deal with laws.

In Portugal, there is also a recognised possibility of control of constitutionality by omission, i.e. the possibility that the court can check whether a certain law fails to abide by a principle of the constitution.

This system has developed harmoniously for over 30 years and has proved to be an effective guarantee of the Portuguese constitution. It has also made an important contribution to the normal running of the political process.

I would like to draw your attention to three important aspects to be taken into consideration when taking stock of the role of the Portuguese court:

1. ***The way*** in which it ensures the balance between the legislative, parliamentary and executive powers when it comes to the legislative competences shared by the government and parliament as, in Portugal, the government can issue decrees. On another level, we must consider the power of the republic and the self-governing regions (Madeira and the Azores), which have independent legislative powers. The court's role in establishing the limitations on each centre of power has been important;

2. ***The Portuguese*** constitution has a highly developed social programme. There might have been difficulties in ensuring alternating interpretations of the social principles in the Portuguese constitution. The court has played a guiding role in deciding on the acceptability of different laws with different interpretations of the constitution. The guarantee of political alternation has been important;

3. ***Finally,*** the court plays a vital role in the efficacy of fundamental laws through appeals lodged by private citizens.

Thank you.

"Considerations on the competence of the Romanian Constitutional Court to settle legal disputes between public institutions"

Antonie Iorgovan
Member of the Senate (Romania)

1. Introduction on the initial attributes of the Constitutional Court of Romania

After the fall in December 1989 of the totalitarian undemocratic regime, Romania also adopted a new Constitution, approved by national referendum on December 8, 1991. Following the European pattern[2], the Romanian Constitution not only regulated a Constitutional Court, having the authority to determine the constitutional character of the laws, both prior to and after their promulgation (exceptions of unconstitutionality raised before the courts of law), but contained other attributions as well: in respect of the constitutional character of parliamentary regulations, the election of the President of Romania, suspension of the President of Romania, the exercise by the citizens of legislative initiative, organising and carrying out referendums, the constitutional character of a political party.

It needs to be mentioned that the initial text of the 1991 Constitution did not expressly regulate the principle of separation of powers, but the substance of such was noticeable in the content of Title III of the Constitution regarding public authorities, which, in separate chapters, regulated the bodies of the legislative, executive and, judicial powers, respectively. This solution was also preserved in the revising law no. 429/2003[3] regarding the Constitution, as follows: Chapter I –Parliament, Chapter II – The President of Romania, Chapter III – the Government, Chapter IV – Reports between parliament and the government, Chapter V – Public Administration, Chapter VI – Judicial authority.

As a step forward, in article 1 (4) of the Constitution, the revising law expressly referred to the fact that the state was organised according to the principle of the separation and balance of powers – legislative, executive and judicial – within a constitutional democracy.

The court of constitutional contentious law represents a "body" which is constituted by the fundamental law of 1991, representing one of the defining elements of the constitutional regime of Romania, despite the fact that the decision regarding the necessity of the institution in itself and its powers was not easy to make[4].

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[2] *See Louis Favoreu, Les Cours Constitutionnelles, Paris, P.U.F., 1996.*

[3] *Published in the Official Gazette no. 758/29.10.2003*

[4] *Antonie Iorgovan, Odiseea elaborarii Constitutiei (The Odyssey of the Making of the Constitution), Editura Uniunii Vatra Romaneasca, Targu-Mures, p.619-620*

As a matter of fact, it is the essence of "constitutional justice" itself that its institution be established by a fundamental law[5].

As specified in the doctrine[6], the sum of the Court's powers represents its competency. The entire Title V of the Constitution of 1991 is dedicated to the Constitutional Court, and regulates its structure, the conditions regarding the appointment of the judges and the judges' condition, the powers of the court as well as the regime of its acts.

The settlement of legal disputes of a constitutional nature was not within the initial competencies of the Court, which were expressly and limitatively described in article 144 of the Constitution[7].

» 2. Functions of constitutional justice:

As generally accepted in the doctrine[8] , the functions of constitutional justice are:

- ***Reconciliation*** of political life, by settling political conflicts in legal terms;
- ***Regularisation*** and authentication of political changes or of the alternations to government, and more so if such changes and alternations take place against a tense background or as revenge;
- ***Consolidation*** of political society's cohesion;
- ***Enforcement*** of the Constitution;
- ***Protection of*** fundamental rights and liberties, as well as of minority groups;

[5] *Ion Deleanu, Institutii si proceduri constitu_ionale– Tratat (Handbook on Constitutional Institutions and Procedures), vol.II, Editura Europa Nova Lugoj, 2000, p.384*

[6] *Mihai Constantinescu, Contencios constitutional (Constitutional Contentious Law), IInd edition, Editura Augusta, Timisoara, 1997, p.29*

[7] *Thus, according to art.144 of the Constitution of Romania, in its initial form, the Constitutional Court had the following attributions:*

- *To give a verdict on the constitutional character of laws before their promulgation, upon the intimation by the President of Romania, by any of the Presidents of the two Chambers, by the Government, by the Supreme Court of Justice by minimum 50 deputies or by minimum 25 senators, as well as, ex oficio, on the initiatives regarding the revision of the Constitution;*
- *To give a verdict on the constitutional character of the Parliament rules, upon the intimation by any of the Presidents of the two Chambers, by a parliamentary group or by minimum 50 deputies or by minimum 25 senators;*
- *To decide on the exceptions raised in the courts regarding the unconstitutionality of laws and ordinances;*
- *To see that the procedure for the election of the President of Romania is complied with and to confirm the election results;*
- *To ascertain the circumstances justifying for the interim situation in exercising the quality of President of Romania and to convey the findings to the Parliament and the Government;*
- *To give consultative approval regarding the proposal to suspend the President of Romania;*
- *To see that the procedure for the organizing and performance of the referendum is complied with and to confirm its results;*
- *To verify the compliance with the conditions for the exercise of the legislative initiative by the citizens;*
- *To decide on the contestations regarding the constitutional character of a political party*

[8] *See Ion Deleanu, Institutii si proceduri constitutionale – in dreptul roman si in dreptul comparat (Constitutional Institutions and Procedures – in Romanian and Compared Law)- , Editura C.H.Beck, Bucuresti, 2006, p.242, and opinions presented therein.*

» ***Customisation*** of the Constitution and stimulation of its evolution, according to the changes in the social-political system, by progressive and coherent control of the constitutional character.

In 1991 the Constitution legislator considered that the first function of constitutional justice was also attained by the cited powers of the Constitutional Court, taking into consideration, especially, the court's involvement in the procedure of suspension of the President of Romania.

On the other hand, it has to be noticed that, right from the beginning, Article 80(2) of the Constitution included mediation between the duties of the President of Romania; the text, which remained unchanged after the revision of 2003, has the following content: "the President of Romania sees that the Constitution is complied with and the public authorities operate in good order. In this respect, the President acts as mediator between the state powers, as well as between the state and the society."

Reality demonstrated that it was precisely a president in function, namely the one between 1996-2000, who acted abusively, contrary to the principles of the Constitution, which made the Parliamentary Commission for the Revision of the Constitution also take into account the necessity to introduce new attributes of the Court, including attributions regarding the settlement of conflicts between public authorities.

» 3. The Competence of the Romanian Constitutional Court following the issue of Revising Law no. 429/2003 :

The amendment of the Constitutional Court's competence, after more than ten years from the issue of the Constitution of Romania, came as a natural consequence of a decade of activity of this authority.

In Article 142(1) of the revised Constitution the principle was introduced according to which the Constitutional Court is the warranty of the supremacy of the Constitution. This amendment emphasises the legal nature of the Court, as an authority designed to ensure the equilibrium between the state powers[9].

Presently, the attributions of the Court, according to Article 146 of the revised Constitution are as follows:

a) ***It gives*** a verdict on the constitutional character of laws prior to their promulgation, upon the request of the President of Romania, of either of the speakers of the two chambers, of the government, of the High Court

[9] *See Ion Deleanu, Institutii si proceduri constitutionale – in dreptul roman si in dreptul comparat (Constitutional Institutions and Procedures – in Romanian and Compared Law)- , Editura C.H.Beck, Bucuresti, 2006, p.242, and opinions presented therein.*

of Cassation and Justice, of the People's Advocate, of at least 50 deputies or 25 senators, as well as, ex oficio, on the initiatives regarding the revision of the Constitution;

b) ***It gives*** a verdict on the constitutional character of treaties or other international agreement, upon the request of either of the speakers of the two chambers, of at least 50 deputies or 25 senators;

c) ***It gives*** a verdict on the constitutional character of the parliament rules, upon the request of either of the speakers of the two chambers, of a parliamentary group or of at least 50 deputies or 25 senators;

d) ***It decides*** on the exceptions of unconstitutionality regarding laws and ordinances, raised in the courts of law or the courts of commercial arbitration. The exception of unconstitutionality may be raised directly by the People's Advocate also;

e) ***It settles*** the legal disputes of a constitutional nature between public authorities, upon the request of the President of Romania, of either of the speakers of the two chambers, of the Prime Minister, or of the President of the Superior Council of Magistrates;

f) ***It sees*** that the procedure for the election of the President of Romania is complied with and confirms the election results;

g) ***It ascertains*** the circumstances justifying the interim situation in exercising the quality of President of Romania and conveys the findings to parliament and the government;

h) ***It gives*** consultative approval regarding the proposal to suspend the President of Romania;

i) ***It sees*** that the procedure for organising and carrying out the referendum is complied with and confirms its results;

j) ***It verifies*** compliance with the conditions for the exercise by the citizens of the legislative initiative;

k) ***It decides*** on contestations regarding the constitutional character of political parties;

l) ***It also*** fulfils other attributes provided by the organic law of the Court.

The main novelties brought by the revising law, in this respect, refer to:

a) The broadening of the range of entities/persons that may intimate the Constitutional Court within a priori control, by adding the People's Advocate:

The reason behind this "insertion" consists of the direct contact that the People's Advocate, as an authority with attribute of control of the executive's activity, maintains with civil society, with the citizens and, last but not least, with the legislation.

Thus, it was considered that the People's Advocate had the competence to intimate the Court on the unconstitutionality-related aspects of a law that was not yet promulgated by the President of Romania, - the President of Ro-

mania, the speakers of the two chambers of parliament, the High Court of Cassation and Justice, respectively at least 50 deputies or 25 senators.

b) Analysis of the constitutional character of treaties or other international agreements:

The Court exercises this new attribute upon the request of either of the speakers of the two chambers, of at least 50 deputies or 25 senators.

c) Change of the regime of the exceptions of unconstitutionality:

In this respect, there are two relevant new aspects: possibility of raising the exception in the courts of commercial arbitration also, and not only in the courts of law, and, second, the authority awarded to the People's Advocate to raise this exception directly, without the requirement of a dispute pre-existing in court.

d) Settlement of the legal disputes of a constitutional nature between public authorities:

This is, perhaps, the main substantial change made in respect of the competence of the Constitutional Court, the scope of which is, undoubtedly, to strengthen the role and the "power" of this authority so that it can warrant the supremacy of fundamental law.

The existence of such a dispute, closely related to the escalation of the legal reports of a constitutional nature between various public authorities, may be intimated only by the President of Romania, the speakers of the two chambers of parliament, the Prime Minister or the President of the Superior Council of Magistrates.

According to the doctrine, the exercise of this attribute causes, almost inevitably, some enmities between the constitutional "tribunals" and the authorities involved in the legal dispute of a constitutional nature, given that such disputes touch delicate areas, governed by egos that are difficult to satisfy. This is a strong reason why it is deemed more necessary to warrant the independence of the judges of the Constitutional Court, their total impartiality and their demonstration of prudence, constitutional spirit and distinctive diplomacy (M.Constantinescu, A.Iorgovan, I.Muraru, E.S.Tanasescu, op cit, p.323).

In Romania, insertion of this attribute of the Constitutional Court was justified by the judicial and political reality of the end of the 1990s, namely the clearly unconstitutional initiatives of the president elected in the 1996 elections.

It is no secret for anyone that the President of Romania at that time ignored inconceivably the constitutional provisions that regulated the reports between the president and the head of the government, by dismissing no less than two Prime Ministers, who had been lawfully invested by the vote of confidence of the supreme representative body of the people – the parliament of Romania.

Thus, by Decree no. 426 of December 13, 1999, the dismissal of Prime Minister Radu Vasile was ordered, invoking the provisions of Article 105 and Article 106(2) of the Constitution of Romania.

Yet, this was not the President's first "feat" of this kind, as by Decree no. 108 of March 30, 1998, another Prime Minister – Victor Ciorbea, had been given the same "treatment", obviously, on the grounds of the same constitutional provisions.

Still, the President's abuse in both situations was undeniable.

At that time, the provisions of the fundamental law, invoked as lawful grounds of the above-mentioned decrees, did not allow the exercise by the President in relation to the Prime Minister of some prerogatives that are, within the executive area, related to hierarchical subordination.

As pointed out in the specific literature, considering that the vote investing the government belongs to parliament, and the government answers politically to the legislative body only, the President of Romania did not have the constitutional right to dismiss the head of the government, because the right provided by articles 105 and 106 of the Constitution of 1991 referred exclusively to other government members, and not to the Prime Minister (M.Constantinescu, A.Iorgovan, I.Muraru, E.S.Tanasescu, cited book, p.180).

This conclusion is so much more unavoidable as we take into consideration that the discharge of the Prime Minister equals, in fact, the discharge of the entire government, and, from the constitutional reasoning perspective, this operation implies the withdrawal of the vote of confidence awarded by the parliament, by means of a motion of censure.

Clearly these precedents in the President-Prime Minister relationship, qualified by the specialists in public law as "dangerous", constituted serious enough grounds both for the insertion of a special provision in Article 107 of the Constitution (namely the 2nd paragraph, inserted by the revising law), that is, explicit interdiction to the President to dismiss the head of the government, and for the establishment of a new attribute of the Constitutional Court to settle legal disputes of a constitutional nature between public authorities, in which category the "incendiary" situation provoked by the two unconstitutional decrees issued by the President could be definitely included.

e) Other attributes provided by the organic law of the Constitutional Court:

In the doctrine it is considered that such a provision is a tradition in the Roman-German legal system, allowing the legislator to intervene in new situations, thus acknowledging the court's competence, without having to go through the difficult procedure of revising the Constitution.

» 4. The Romanian Constitutional Court's practice regarding the settlement of legal disputes of a constitutional nature between public authorities:

The Constitutional Court's practice in respect of the exercise of its attribute provided by Article 146 e) is not particularly rich, but, given the circumstances and the "force" reports in the Romanian political arena, it definitely promises a spectacular development.

From this point of view, it is relevant that the "defendant" that was accused of an unconstitutional attitude was, in all the cases analysed by the Court, the President of Romania, .i.e. the one person that, according to the fundamental law, was supposed to see that the Constitution is thoroughly observed and the public authorities operate in good order.

4.1 First step – Decision no. 53 of 25 January 2005:

By its Decision no. 53 of 25 January 2005 (published in the Official Gazette no. 144 of 17.02.2005), the Constitutional Court gave its verdict in respect of the requests for settlement of the legal disputes of a constitutional nature between the President of Romania and the Parliament, made by the speaker of the Chamber of Deputies and the speaker of the Senate.

In supporting his request, as resulting from the content of the decision, the speaker of the Chamber of Deputies explained: *"The conflict was created by the statements of the President of Romania, Traian Basescu, in his interview for "Adevarul" newspaper, published in the newspaper's edition no. 4,513 of 6 January 2005, under the heading "I'm in favour of immediate early elections in order to elude an immoral solution represented by PUR (Romanian Humanist Party)". These allegations regarding the parliament and parliamentary parties are outside the constitutional attributes of the President of Romania, indicating also behaviours that are contrary to the Constitution. Thus, the Romanian Humanist Party, a governing party, was qualified as an "immoral solution", the management of the Social-Democratic Party was characterised as having "limits in understanding the future of Romania" and as being a mechanism whereby "the governing system of a mafia-type was brought up to the position of state policy", and in the case of other political parties the necessity of a merge was suggested, with ideas for specific actions to be taken in this respect in future congresses. With regard to his interference in parliament's attributes, the President of Romania requested, in the same interview, a parliamentary inquiry regarding the manner in which the general elections of November 2004 took place, as well as the commencement of a parliamentary procedure for the replacement of the two speakers of the Chambers, explaining, also, the need for early parliamentary elections."*

With regard to whether this situation can or cannot be subject to Article 146 e) of the Constitution of Romania, revised, the author of the summons emphasises to the Court that *"the phrase "legal disputes of a constitutional nature" contained in Article 146 e) of the Constitution refers to "the fulfilment of the attributes specific to each government", provided by the fundamental law, which is a legal document. The legal status of the public authorities is of a constitutional nature, and the violation of such "represents precisely the grounds for the requests provided by Article 146 e) of the Constitution"*.

The speaker of the Chamber of Deputies also outlined that such statements whereby a certain behaviour and a certain vote for the parliamentary groups and for the parties, which are entities subject to public law, are requested, are in violation of Article 1 (4), Article 8, Article 61, Article 64, Article 89 of the Constitution, and the President of Romania, by this behaviour, violated Article 80 (2) and Article 82 (2) of the Constitution[10].

As a consequence, it was proved such behaviour of the President of Romania generates states of conflict within the public authorities and between them, and is contrary to the spirit of the Constitution, and the President's indication to initiate early elections is contrary to his statutes, regulated by Article 80 (2) and Article 82 (2) of the Constitution - "According to Article 89 of the Constitution, early elections are only acceptable as a result of the dissolution of

[10] *The constitutional texts the violation of which was demonstrated are the following:*

Art.1(4): "The State is organized according to the principle of separation and equilibrium of powers – legislative, executive, and judicial – within a constitutional democracy.";

Art.8: "(1) Pluralism in the Romanian society is a prerequisite and a warranty for the constitutional democracy.

(2) Political parties are organized and exist pursuant to the law. They contribute to defining and expressing the citizens' political will, by observing national sovereignty, territorial integrity, rule of law and principles of democracy.";

Art.61: "(1) The Parliament is the supreme representative body of the Romanian people and the country's only legislative authority.

(2) The Parliament consists of the Chamber of Deputies and the Senate ";

Art.64: "(1) Each Chamber is organized and exists according to its own regulation. The financial resources of the Chambers are stipulated in the budgets they approve.

(2) Each Chamber selects a standing bureau. The President of the Chamber of Deputies and the President of the Senate are elected for the period of the Chambers' mandate. The other members of the standing bureaus are elected at the beginning of each session. The members of the standing bureaus may be revoked before the expiry of the mandate.

(3) Deputies and senators may organize into parliamentary groups, pursuant to each Chamber's regulation.

(4) Each Chamber organizes its standing commissions and may establish inquiry commissions or other special commissions. The Chambers may also organize joint commissions.

(5) The standing bureaus and the parliamentary commissions are constituted according to the political configuration of each Chamber";

Art.80 (2): "The President of Romania sees that Constitution is observed and the public authorities work properly. In this respect, the President exercises his function of mediation between the state powers and between the state and the society.";

Art.82 (2): "The candidate whose election was validated makes the following vowel before the Chamber of Deputies and the Senate: «I hereby swear to use all my strength and capability for the material and spiritual progress of the Romanian people, to observe the country's Constitution and laws, to defend the democracy, the fundamental rights and liberties of its citizens, the sovereignty, independence, the territorial unity and integrity of Romania. So help me God!».";

Art.84 (1): "During his mandate, the President of Romania may not be a member of a party and may not hold any other public or private position."

Art.89: "(1) Subject to consulting the presidents of the two Chambers and the leaders of the parliamentary groups, the President of Romania may dissolve the Parliament, if it did not award its vote of confidence for the forming of the Government within 60 days from the first request in this respect, and only after minimum two investing requests were dismissed. (2) Within one year, the Parliament may only be dissolves once.(3) The Parliament may not be dissolved in the last 6 months of the mandate of the President of Romania or during a state of mobilization, war, assault, or emergency."

parliament, and parliament can only be dissolved following a government crisis repeated and lasting more than 60 days".

Subsequently, on 10 January 2005, pursuant to the same Article 146 e), the ***speaker of the Senate*** also intimated the Court by a request for settlement of a legal dispute of a constitutional nature between public authorities, registered under no. 122 of the same date. By this request the same grounds as in the request of the speaker of the Chamber of Deputies were invoked. Moreover, the speaker of the Senate requested the Constitutional Court to issue *"a decision whereby the President of Romania should be warned about his uncons-titutional behaviour, and be compelled to apologise in public to the speakers of the two chambers and to all the parliamentary structures that were affected by his unconstitutional behaviour*".

We must note, by reference to this notification, the solution proposed by the speaker of the Senate to the legal dispute referred to, solution which could hardly be actually accepted as being able to give a legal settlement. It was obvious that, beyond the arguments used to justify the investing of the Court, the objective pursued by the subject of seizing – the speaker of the Senate – was more of an exercise of political civilisation rather than an action with precise legal punitive objectives ("claims").

Considering that the requests made by the speaker of the Chamber of Deputies and by the speaker of the Senate had the same object, as both requests asked for the settlement of the dispute between the President of Romania and the chambers of parliament, a dispute was caused by the same statements of the President of Romania, the Constitutional Court, by its resolution of 26 January 2005, ordered the association of the two cases, and passed a common decision for both cases.

The main element of this first decision of the Court was the ***setting of the exact meaning of the phrase "legal dispute of a constitutional nature between public authorities", namely:***

- ***The public*** authorities referred to are only those mentioned in Title III of the Constitution, and this category does not include political parties, as legal entities of public law, which, pursuant to Article 8 (2) of the Constitution, "[...] contribute to defining and expressing the citizens' political will [...]". Also, the parliamentary groups are not public authorities, but structures of the chambers of the parliament;
- ***A possible*** dispute between a political party or parliamentary group and a public authority is not included in the category of disputes the settlement of which is within the competence of the Constitutional Court, granted by Article 146 e) of the Constitution;
- ***A legal*** dispute of a constitutional nature between public authorities involves actual acts or actions whereby an authority or more authorities assume powers, attributes or competencies which, pursuant to the Constitution, belong to other public authorities, or the omission by some public authorities consisting in the decline of their competence or their refusal to fulfil certain actions included in their duties;

In the case, by analysing the actual situation, ***the Constitutional Court determined that:***

- ***No legal*** dispute of a constitutional nature was created by the analysed statements, which did not produce any legal effect;
- ***Opinions,*** judgments or statements of a public title holder – such as the President of Romania is, a single-person public authority, or such as the leader of a public authority is – regarding other public authorities do not represent in themselves legal disputes between public authorities. Opinions or proposals regarding the way a certain public authority or its structures act or should act, even if critical, do not cause institutional blockages, if not followed by actions or lack of actions likely to prevent those public authorities from fulfilling their constitutional attributes. Such opinions or proposals remain within the limits of the freedom of expression of political opinions, subject to the restrictions provided in Article 30 (6) and (7) of the Constitution;
- ***Any candidate*** for the presidency proposes to its electorate a political doctrine, a programme for the implementation of which he will act, if elected, during his mandate. Article 84 (1) of the Constitution provides that, "during his mandate, the President of Romania may not be a member of a political party and may not hold any other public or private position". Still, these interdictions do not exclude the possibility of expressing political opinions, commitments and scopes presented in the political platform or of supporting and taking actions for their accomplishment, subject to observance of the constitutional prerogatives;
- ***The function*** of mediation between the state's bodies, as well as between the state and society, provided by Article 80 (2) of the second edition of the Constitution, requires impartiality from the President of Romania, but does not exclude the possibility of expressing his opinion regarding the optimal solution for the settlement of disputes;
- ***Article 84*** (2) of the Constitution also grants the President of Romania the right to express his political opinion and it provides for the President of Romania the same immunity as for deputies and senators. Article 72 (1) of the Constitution applies accordingly;
- ***Pursuant to*** Article 1 (4) of the fundamental law, within the organic structure of the Romanian state the public authorities are organised according to "the principle of separation and equilibrium of powers – legislative, executive and judicial". That is why the constitution legislator provides the right of the President of Romania to criticize the laws adopted by parliament and to act against them. Hence, according to Article 77 (2), "Prior to the promulgation of a law, the President may ask the parliament, only once, to re-examine that law", and Article 146 (a) provides the President's right to intimate the Constitutional Court regarding its exercising the a priori control of the constitutional character of the laws adopted by the parliament, prior to their promulgation. These attributes of the President of Romania count for a counterbalance to the legislative power, in order to obtain equilibrium of powers in the state of law, according to the provisions of Article 1 (3) of the Consti-

tution. The President's right to ask the Constitutional Court to settle legal disputes of a constitutional nature between public authorities has the same significance, according to Article 146 e) of the Constitution, because this right is exercised subject to expressing the point of view regarding the possible means of settlement of the dispute, and implicitly regarding the grounds or lack of grounds of the attitude or support of the public authorities involved in the dispute."

Hence, the solution offered by the Constitutional Court was based on the theory that *"the statements of the President of Romania have the character of political opinions, expressed according to Article 84 (2) associated to Article 72 (1) of the Constitution, which did not cause a legal dispute of a constitutional nature between public authorities – the President of Romania and the two chambers of the parliament of Romania – within the meaning of the provisions of Article 146 e) of the Constitution."*

Moreover, the Court showed that *"the public statements of the representatives of various pubic authorities, subject to their context and their actual content, can create confusion, ambiguity, or tensions, which, subsequently, can degenerate into disputes between public authorities, even legal ones", but "the Constitutional Court has the competence to intervene only in cases where an actual legal dispute of a constitutional nature has been created between two or more public authorities."*

Therefore, the Court determined that the statements of the President of Romania did not create any legal dispute of a constitutional nature.

4.2. Decision no. 435 of 26 May 2006 regarding the request made by the President of the Superior Council of Magistrates

for settlement of a legal dispute of a constitutional nature between the judicial authority, on the one hand, and the President of Romania, on the other hand.

The request underlines that "the President of Romania, on several occasions, made repeated generalised declarations regarding justice and the magistrates, referring, in general, to "incompetence", "independence from the law" and a "high level of corruption".

It was considered that this legal dispute of a constitutional nature did not reside in "the existence of these serious allegations, but in their legal effects, because they represent factors that are likely to generate an imbalance between the state powers and even an institutional blockage". And the conflict-generating standpoints of the President of Romania were intensely made known and discussed in the media having a "strong impact on internal and international public opinion".

As an example, the President of the Superior Council of Magistrates mentioned the following unconstitutional attitudes[11] of the President of Romania:

- ***In May 2005***, the President of Romania declared that justice is "independent in respect of corruption and inefficiency", and the state institution system shows "opposition to reform in order not to lose its privileges";
- ***In January 2006***, when attending a session of the Superior Council of Magistrates, the President of Romania stated: "This (the release from prison of some criminals – editor's note) is happening either because the paper representing the subpoena had one corner folded, or because the judge is corrupt";
- ***In February 2006***, on the occasion of the performance evaluation meeting of the Public Ministry, the President of Romania stated, among other things: "It is not us that the citizen is facing when addressing justice, but the judges. It was not us that made illegal granting of land ownership by court decisions. It was not us that issued decisions such as when a bank, like "Bancorex", was vandalised everybody was found "not guilty". It is not you - the district attorneys- that find the defendants in great cases of corruption "not guilty". It is true. And I know that you were always on the other side of the barricade in the big cases the outcome of which was negative and the results of which (in the court) were not the expected and rightful ones... The level of corruption in the courts is still pretty high. I know that sometimes the district attorneys do not have the solutions although they know that they have a case. I know that you often have to face some unfair blows, but I'm asking you to pass over them, I'm asking you to confront the realities of the justice system you are part of";
- ***In the session*** of the Superior Council of the Magistrates of March 2006, the President of Romania declared: "Unless the number of claims to the Presidency is lower, the number of claims to CEDO will not diminish, and unless the justice starts working properly, no one shall stop me from acting this way".

[11] *The legal provisions supposed to have been infringed by the standpoints of the President of Romania and of the Prime-Minister were the following:*

Art. 1(4):"the state is organized according to the principle of separation and equilibrium of powers – legislative, executive and judicial – within a constitutional democracy."

Art. 80(2): "The President of Romania sees that Constitution is observed and the public authorities work properly. In this respect, the President exercises his function of mediation between the state powers and between the state and the society.";

Art. 124(3): " Judges are independent and only abide by the law";

Art. 133(1): "The Superior Council of Magistrates is the warranty of the independence of justice.";

The provisions of the international legal acts supposed to have been infringed by the same standpoints were the following:
- the 4th issue of the first principle contained in the Fundamental Principles of the United Nations regarding the independence of the judges, adopted by the VIIth Congress of the United Nationals held in Milan, in 1985, and approved by resolutions of the General Assembly no. 40/32 of November 29, 1985, and no. 40/146 of December 13, 1985, according to which: "Justice is implemented protected from any unjustified intervention or interference, and the court decisions may not be subject to revision. This principle does not impair on the right of the judicial power to act in view of revision [...] pursuant to the law.";

- the second sentence of art. 2 of the Universal Charter of Judges, approved by the International Association of Judges in the meeting of the Central council in Taipei, in 1999, which provides that "[...] the judge as holder of a judicial position, must have the ability to exercise his judicial competence without being subject to social, economic and political pressures [...]";

- the first principle, paragraph 2(d) of the Recommendation no. R(94) 12 of the Ministers' Committee of the European Council to the member states regarding the judges' independence, efficiency and role, which provides that "Judges have to issue their decision in complete independence and to be able to act without restrictions, and he must not be subject to influences, instigations, pressures, threats, or direct or indirect interventions from anybody and for any reason.";

- art. 6(1) of the Convention for the protection of the human fundamental rights and liberties, the part regarding the right of any person "to a fair, public trial, within reasonable term, by an independent and equidistant court, set by the law".

Regarding the Prime Minister, it was shown that, he "repeatedly" (April, May, October, and November 2005, February and March 2006) made statements during official meetings and press conferences, such as: "the legal system is corrupt", "the level of corruption in courts is alarmingly high", or "justice just doesn't work in Romania", "justice is a altered system" – and these kinds of statements were largely reflected in the mass media.

There were also some statements and allegations against the justice provided by the Minister of Justice, who stated that 70% of the magistrates were corrupt.

The President of Romania made his point of view public in note no. 1162 of 17 April 2006, registered with the Constitutional Court under no. 3876 of April 17, 2006, whereby he asked that the request made by the President of the Superior Council of Magistrates be dismissed as inadmissible, considering that the statements of the President of Romania were political statements and, as such, fell under the constitutional immunity that the president benefits from during his mandate, and these statements, by their nature, could cause a legal dispute of a constitutional nature.

He also asked that the request be deemed as lacking grounds, because in the case there was no legal dispute of a constitutional nature between the public authorities of the executive power and the judicial power.

Hence, the head of state further showed, the President of Romania did not assume and did not exercise attributes of the judicial power, did not instigate anyone to disregard any court decisions and did not instigate to resort to private justice, so that the dispute invoked by the President of the Superior Council of Magistrates could be deemed as of a legal nature, as it was merely a divergence of opinions.

The Prime Minister expressed a point of view similar to that of the President of Romania.

After analysing the request, the Constitutional Court considered that it had the competence to determine whether there or not there was a legal dispute of a constitutional nature between the judicial authority on the one hand, and the President of Romania and the Prime Minister, on the other hand, and that there were no grounds for inadmissibility.

On the merits of the case, the Court referred to its previous decision – decision no. 53/2005, showing once more that *"the opinions, judgments of value, or allegations of the holder of a public dignity mandate regarding other public authorities do not represent in themselves legal disputes between public authorities. Any opinions or proposals regarding the way a certain public authority or its structures act should act, even if critical, do not cause institutional blockages, if not followed by actions, or lack of action likely to prevent those public authorities from fulfilling their constitutional attributes. Such opinions or proposals remain within the limits of the freedom of expression of political opinions, subject to the restrictions provided by Article 30 (6) and (7) of the Constitution."*

Although the tension between the mentioned authorities did not generate a legal dispute of a constitutional nature, the Constitutional Court noted the

fact that the claim of the President of the Superior Council of Magistrates, that both the President of Romania and the Prime Minister repeatedly criticised some aspects of the justice-making activity, was genuine.

Still, in the Court's opinion, the judicial authority was not pointed toward as a whole, as one of the state powers, but only some of the courts or some of the judges, as representatives of this power.

It was considered that there were no definite elements indicating that the verbal conflict between the President of Romania and the judicial authority produced any legal effects likely to lead to an institutional blockage or to prevent the exercise of the constitutional prerogatives of any public authority, the remedy of which could be attained solely by the issue by the Constitutional Court of an enforceable settlement.

Ultimately, ***the Court also noted that***, *"evidently, freedom of expression and criticism is indispensable in a constitutional democracy, but it must be respectful, even when it is the expression of a firm critical attitude. As the independence of the judicial authority is warranted by the Constitution, the Court considers as vital effective constitutional protection of magistrates against attacks and denigration, of any nature, and the more so as the magistrates, who do not benefit from any right to reply regarding their activity for restoration of legal order, should be able to count on the support of the other state powers – legislative and executive."*

The Court's solution was similar to that previously examined, as it ascertained the inexistence of a legal dispute of a constitutional nature between the President of Romania and the Prime Minister on the one hand, and the judicial authority, on the other hand.

» 5. The criticism on the solutions adopted by by the Constitutional Court pursuant to Article 146 e) of the Constitution of Romania

As can be seen from the reasons given for the two decisions discussed above, the Constitutional Court adopted an extremely prudent attitude towards the "defendant" in the claims filed by the two Chambers and the President of the Superior Council of Magistrates.

Considering the theory of total freedom of expression of political opinions of the President, the Court considered it satisfactory only to forewarn him with almost parental gentleness, that freedom of expression must be exercised in a respectful manner which is not to be taken for denigration.

At the same time, the Court decided in both cases described that it could consider the existence of a conflict generating legal effects between the public authorities involved, as they concerned actions and statements with political implications, and not legal ones.

Unfortunately, by its way of interpreting things, the Constitutional Court practically emptied the constitutional text that it was supposed to implement of its substance.

After all, the reason for the insertion of the new attribute of the Court was to stop the perpetuation of actions and attitudes that could be considered strictly political, regardless of the nature of the "corrective" measure the Court ordered.

It is unquestionably a fact that the balance between a political attitude and an action with legal implications, taken by the public authorities, especially when legal effects on the level of constitutional law (which has political implications by excellence) are involved, is very thin.

Particularly, in the case of the President of Romania, as an authority of a political nature, it is implicit that any action he takes also has powerful political motivation. Nonetheless, the theory according to which no matter what the President does or says, there can be no conflict of a constitutional nature between the President and other public authorities, cannot be accepted.

This theory cannot be adopted in cases where the President pushes the means and ways offered to him by the fundamental law, not in order to fulfil his duty to see that the Constitution is observed and the public authorities operate properly, but precisely to disregard such duties, with the sole motivation that he wishes to be a "player" president, one who wants to be involved as much as possible in the other authorities' activity.

From this perspective, it is of relevance to mention the recent episode of the suspension by the President of the Minster of Defence, on the grounds of a request by the President himself that a criminal investigation be initiated against the minister.

Thus, by President's Decree no. 1098/2006, published in Official Gazette no. 774/13.09.2006, he ordered the suspension of the Minister of Defence at the time, by invoking the provisions of Article 100 (1) and Article 109 (2) of the Constitution, and of Article 21 of Law no. 115/1999 regarding ministerial responsibility[12], respectively.

Of course, the political connotations are obvious in this case, as it is publicly known that the criminal complaint that generated the scandal was signed by one of the President's main advisers.

[12] *The invoked texts have the following phrasing:*

Art.100 (1) of the Constitution– "In exercising his attributions, the President of Romania issues decrees, which are published in the Official Gazette of Romania. If they are not published they are deemed non existent."

Art.109 (2) of the Constitution – "It is only the Chamber of Deputies, the Senate and the President of Romania that have the right to ask criminal investigation of the Government members for theirs acts during their mandate. If a criminal investigation was requested, the President of Romania may order their suspension. Sending a Government member to trial causes his suspension. The trial is in the competence of the High Court of Cassation and Justice."

Art.21 of Law no. 115/1999, revised and amended – "In case a criminal investigation was requested against a member of the Government, the President of Romania may order his suspension."

Yet, what can be qualified as abuse by the President, from the legal perspective, is the fact that the President refused to revoke the suspension decree, in spite of the fact that the Military Council decided the criminal investigation not to be pursued.

From this point on, maintaining the suspension measure, in the form of an administrative act issued – namely the presidential decree, represents a severe illegality, as neither Article 109 (2) of the Constitution nor Law no. 115/1999 regarding ministry responsibility allows such an attitude.

In this case a legal conflict is certainly involved also, as well as a direct infringement of the constitutional and legal texts regarding the suspension of the government's members, and the mere classification of the case as of an exclusively political nature is not possible.

By the President's express refusal to reinstate a minister, given that the reason for his suspension ceased to exist, a dispute was created not only between the President and the minister involved, but also between the President and the government, the activity of which was clearly seriously perturbed. Moreover, if we refer to the fact the government, as a whole is appointed as a result of the vote of confidence granted by the parliament, such an attitude also leads to a conflict between the President of Romania and the legislative body.

Anyway, the Prime Minister had the obligation, as head of the government, to determine the unconstitutional nature of the President's legal actions with political implications and to react accordingly, by intimating the Constitutional Court pursuant to Article 146 e).

In respect of the two summons settled by the Court, since it was obvious that the equilibrium between the state powers and the operation in good order of the public authorities was damaged by the actions of the President of Romania, and, in the second case, even by the actions of the government's members, and the president's constitutional duties were severely and willingly disregarded, the Constitutional Court – which was itself the warranty of the supremacy of the Constitution – had the obligation to intervene and issue a decision whereby to "correct" the deviating attitudes.

As to the actual solutions that the court could have offered, this is, indeed, a delicate matter, we will discuss later on.

» 6. Other possible legal disputes of a constitutional nature

In November 2006, the Superior Council of Magistrates criticised the motivation offered for the pardon ordered by President Traian Basescu as unconstitutional, considering the grounds offered for this gesture.

Thus, on 6 November, the President signed the decrees granting individual pardons to two drug dealers, who were thereby pardoned the rest of their prison sentence .

According to the press release of the Superior Council of Magistrates of 8 November 2006, among the grounds invoked for the granting of the pardon presented in the press release by the presidential administration of 6 November 2006, the SCM considered "disturbing" those allegations regarding the merits of the criminal case and the legitimacy of the court decision issued in the appeal, i.e. supposedly there was not enough evidence for the sentence to prison of the defendants.

Although the Superior Council of Magistrates acknowledged, in principle, as legal and constitutional the pardon granted by the President of Romania to some persons, it considered that this actual case involved a deviation from the constitutional prerogatives, by exceeding its attributes, as related to the motivation of the pardon granting act.

In fact, by reference to the above statements, based on the report coming from the Ministry of Justice, the SCM highlighted the fact that an attempt was made to repeat the trial of the case by re-evaluating the evidence submitted, a procedure which is obviously unconstitutional and impairs on the principle of separation of state powers.

Hence, we note a new conflict involving the President of Romania. Apart from the constitutional right of the President to order individual pardons, the significance of this measure is one that has no constitutional coverage.

Indeed, as indicated in the press releases of the presidential administration, as well as of the Ministry of Justice, the pardon did not represent an act of clemency, of "forgiveness" on behalf of society, but could be considered some sort of an "extraordinary form of appeal", whereby the President, upon the initiative of the Ministry of Justice, reassessed the evidence submitted in the criminal case and "issued" a decision other than conviction, which was unacceptable from the legal perspective.

Even if, from a formal point of view, the President is "covered" by the constitutional texts (Article 94 d)), the pardon decree issued in the case, as an administrative act, can be deemed, in the case of first instance, as an act of violation of the fundamental law, as it distorts the meaning and sense of the pardoning institution as mere measure of clemency.

For these reasons, we consider that the Constitutional Court should be intimated in view of the settlement of this legal dispute of a constitutional nature between the judicial authority, represented by the Superior Council of Magistrates, on the one hand, and the President of Romania and the Ministry of Justice, on the other hand.

The solution that the Court might offer in this case could go as far as the determination of the unconstitutionality of the presidential pardon, which would have led, from the administrative law point of view, to annulment of its existence as a legal act.

7. Possible solutions that the Constitutional Court may issue in exercising its attribute provided by Article 146 e)

The constitutional text is pretty elliptical, in that it only provides the Constitutional Court's prerogative to settle legal disputes of a constitutional nature between public authorities, upon the request of the President of Romania, one of the speakers of the two chambers, the Prime Minister, or the President of the Superior Council of Magistrates.

The law of the Constitutional Court, republished, does not bring specific references regarding the purpose of such an action, either, but is limited to briefly regulating the procedure of filing the summons, throughout three articles (arts.34-36).

Hence, the settlement of such summons follows these stages:

- ***The request*** for the settlement of the dispute shall mention the public authorities involved in the conflict, the legal texts the conflict is referring to, the parties' position and the opinion of the request's author;
- ***Upon receipt*** of the request, the President of the Constitutional Court shall bring it to the attention of the parties involved, and ask them to express, in writing, within the established term, their point of view on the content of the dispute, and on the possible legal actions to be taken for its settlement, and shall appoint the judge in charge of the legal inquiry;
- ***On the date*** of receipt of the last point of view, but no later than 20 days upon the receipt of the request, the President of the Constitutional Court sets the hearing and cites the parties involved in the dispute;
- ***The debate*** shall take place on the date established by the President of the Constitutional Court, even if any of the public authorities involved fails to meet the deadline for expressing their point of view;
- ***The debate*** takes place based on the report of the judge in charge of the inquiry, on the summons request, on the points of view presented, on the evidence submitted and the parties' pleadings.

As to the solution adopted by the Court, Article 36 of the law provides that it be given as a final decision which is to be conveyed to the author of the summons, as well as to the parties involved in the dispute, before its publication in the Official Gazette of Romania, Part I.

The Court's practice to date does not help us in clarifying the way such a summons is settled favourably.

Yet, it is certain, as Article 11 A) e) of the law indicates, that the Court's solution shall be given in the form of a "decision"; this kind of act is also provided by the law for cases in which the Court:

a) ***gives its*** verdict on the constitutional character of laws, before they are promulgated, upon the summons by the President of Romania, by one of the presidents by the two chambers, by the government, by the High Court of Cassation and Justice, of the People's Advocate, by at least 50 deputies or 25 senators, as well as ex oficio, on initiatives for the revision of the Constitution;

b) ***gives its*** verdict on the constitutional character of treaties or other international agreements, before their ratification by parliament, upon the summons by either of the speakers of the two chambers, by at least 50 deputies or 25 senators;

c) ***gives its*** verdict on the constitutional character of parliament's regulations, upon the summons by either of the speakers of the two chambers, by a parliamentary group or by at least 50 deputies or 25 senators.

Because a decision is involved, it shall observe the legal regime provided by Article 147 (4) of the Constitution, i.e. it shall be published in the Official Gazette, and from that moment it becomes generally mandatory and applies only to future cases.

Hence, a first conclusion can be drawn: the decision issued by the court, given that the Court settles such a dispute, shall depend on the specific elements of such a dispute.

Of course, the first thing to be determined by the court is the admissibility of the request filed, by reference to the legal and natural person that filed it (it must be covered by the provisions of Article 146 e) of the Constitution) and the nature of the entities involved in the "dispute", which have to lead to the conclusion that public authorities are involved, and not other legal or natural persons.

Furthermore, it has to be determined whether the facts presented to the court contain the elements of a legal dispute of a constitutional nature, in other words whether there are violations of the provisions regarding the constitutional reports between various public authorities.

Obviously, it is not necessary that the authorities involved in the conflict be part of different areas of the state power, but there may be cases (see the dispute between the government and the President, related to the suspension of the Minister of Defence) where the "parties" come from the same area, usually the executive.

Because the law has no specifications in this respect, nor does it provide limitations in respect of the area covered by the "power" granted to the court in settling such disputes, we have to accept the fact that, by its decision, should it determine the actual existence of the conflict referred to by the Constitution, the court may determine the unconstitutionality of any acts issued by the public authorities involved, may compel these authorities to take the necessary measures to end conflict, it may even cancel certain acts, as a jurisdiction court, and, in general, it may order any measure deemed necessary for the reinstatement of normality between the legal or natural persons subject to the "arbitration", with a view to achieving the ultimate objective – the guarantee of the supremacy of the Constitution.

In any case, it is certain that, if there is a real legal dispute of a constitutional nature, there will have to be also an effective solution from the court, which cannot contain a mere opinion, appreciation, approval, recommendation or request.

Regardless of the form of the "enacting terms" of the court's decision, it shall be endowed with the authority to be implemented, observed, and enforced by all the public authorities involved.

Yet of course, given the "silence" of the law, we can also accept the possibility of a mere warning of the "faulty" authority, no matter whether it is the president, the Prime Minister, or anyone else.

After all, it is all about the final result being in accordance with the spirit and content of the fundamental law.

» 8. General conclusions

The process of consolidation of the constitutional democracy and of the rule of law in Romania is irreversible, and the Constitutional Court, by its prerogatives, both in its unrevised form and its revised form, after 2003, played an essential role in this respect.

The existence of a similarity between the duties of the President of Romania, as mediator between the state powers, as well as between the state and the society on one hand, and the new attribute of the Constitution, newly introduced by the revising law (settlement of legal disputes of a constitutional nature between public authorities), represents an additional difficulty in determining the kind of conflicts which, in the spirit of the Constitution, are within the competence of the Constitutional Court.

The Constitutional Court, by its issued decisions, as well as part of the doctrine[13], offered a restrictive interpretation, and acquiesced in the theory that we are in a conflictive situation, in the meaning of Article 146 e) of the Constitution, only when an authority refuses to fulfil its prerogatives provided by the Constitution.

It is only an early stage in the practice of the court and it is our belief that in time it will cover more "tones", particularly in respect of the actions of the President of Romania.

It is beyond any doubt that the constitution legislator did not aim at transforming the Constitutional Court into an arbitrator of political conflicts, but it is no less true that the attribute provided by art 146 e) of the Constitution was the precise result of some abuses of the President of Romania in function in the period 1996-2000, i.e. the discharge of the Prime Minister at the time, while the present President, also contrary to the Constitution, refused to revoke the decree for suspension of a minister, although the council decided against initiation of a criminal investigation.

It can be said that, in this respect, the practice of the Romanian Constitutional Court is far from being shaped.

The experience of the other countries of the European Union, as well as Romania's European experience, will be able to bring the necessary clarifications.

In our opinion, the President of Romania should have been warned by the Constitutional Court about his unconstitutional behaviour, when he expressly requested certain decisions of the parliament, among which the replacement of the speakers of the two chambers of the parliament.

[13] *See I.Deleanu, cited book, 2006, p. 865-867.*

"Constitutional Justice – an effective guarantee of constitutionalism: experience in Algeria"

Boualem Bessaïh
President of the Constitutional Council of Algeria

Mr President of the Lisbon Forum,
Mr President of the Executive Council of the North-South Centre of the Council of Europe,
Mr Secretary of the Venice Commission,

I would first like to thank the organisers of this important event for their kind invitation to participate in the Lisbon Forum 2006 on "Constitutionalism – The Key to Democracy, Human Rights and the Rule of Law".

I must also say that it is very gratifying for the Algerian Constitutional Council to be invited by the Lisbon Forum to join the debate on Constitutional Justice – an effective guarantee of constitutionalism, a debate that will certainly be rich and fruitful for us all, thanks to the topicality of the subject and the brilliant gathering here today.

Ladies and Gentlemen,

Since the late 1980s, most countries that were indifferent or hostile to adding the missing level to Kelsen's pyramid finally completed it by creating a jurisdictional mechanism to guarantee the primacy of fundamental law over all other rules. The creation of this instrument is, in itself, one of the fundamental guarantees of constitutionalism.

In Algeria, it was in the important constitutional revision of 1989 that the constituent parliament adopted the principle of the separation of powers as an "essential element of the organisation of public powers"[14] and pluralism as a matrix of the new political organisation of Algerian society and extended the scope of public freedoms.

In order to guarantee the supremacy of this new fundamental law in the internal legal system and ensure respect for the values and principles it contains, the Algerian constituent parliament, on the basis of its particular political history, set up a control mechanism of laws and regulations and assigned it to a constitutional council inspired, to a certain extent, by the European model of constitutional justice.

Right from the start, the Constitutional Council's important functions were recognised by the constituent parliament. I would like to mention two that I think are essential: that of verifying the constitutionality of laws passed by the legislative and executive powers and that of ensuring the regularity of major national political elections and announcing their results. The Constitutional

[14] *Notice no. 1 of 28 August 1989 on internal regulations of the People's National Assembly*

Council thus verifies not only the constitutionality of legislative and regulatory acts (treaties, laws, regulations and the internal rules of the two chambers of parliament) but also the regularity of the process of electing the institutions responsible for producing them. As a result, it is true to say that this new institution responsible for dictating the law with the absolute authority of a final judgement is a prime example of the rule of law.

In view of the limited amount of time I have, I will not address the dispute-settling powers of the Constitutional Council in electoral matters or its consultative powers in certain situations. I will examine only one constitutional justice function, that of verifying constitutionality, which I think is one of the essential guarantees of constitutionalism. I will, of course, give some examples of problems inherent in this control and say a few words about the Constitutional Council's future prospects.

Ladies and Gentlemen,

The Constitutional Council is responsible for ensuring respect for the Constitution in both its political and its social dimension. An analysis of these two dimensions, so dear to Maurice Hauriou, will help me show how constitutional justice in Algeria was and is an effective guarantee of constitutionalism, even if there is still some way to go.

You will agree with me that the control of the constitutionality of laws and other legal documents is a gargantuan task for the Constitutional Council and that constitutional justice in Algeria would be useless without substantial guarantees of independence and impartiality of the institution and its members. These guarantees are set forth in the Constitution and the law.

At a constitutional level, the constitutional status of the institution protects it from all changes outside constitutional procedures. The Constitutional Council has the power to fix its own rules of operation. Finally, its members have a single, non-renewable mandate of six years and they can occupy no other position or function at the same time.

At a legislative level, the basic law on political parties forbids members from belonging to any political party for the duration of their mandate. Anyone who is already a member must immediately cease all political activities.

While the constituent parliament provided for the essential guarantees, all the rest will depend, as pointed out by Dean Vedel, on "the mental health of the constitutional judges".

By exercising this control, the Constitutional Council has progressively become a regulator of the legislative and executive powers and a defender of individual and collective rights and freedoms. Its jurisprudence shows this to a fault.

As it first had to regulate the activities of the established powers, the Constitutional Council took on the task of implementing the principle of the separation of powers and demarcating the boundaries that each power must respect.

Within this framework, the Constitutional Council had to impugn legislative provisions that "went against the principle of the separation of powers and the necessary independence of the executive body"[15]. It also invalidated provisions that went beyond the sovereign domain of regulation of parliament and affected the competences of the other powers[16]. The Constitutional Council ensures that, when drawing up its internal regulations, each chamber of parliament respects its own area of intervention and excludes those that require the intervention of other powers.

It also impugned provisions in which the legislators assigned themselves competences falling within the regulatory domain of the President of the Republic or the head of government.

Therefore, by ensuring that "each power acts within the limits of its constitutional competences"[17] and does not exceed or fail in its constitutional competences, the Constitutional Council saw fit to submit the actions of the established powers to fundamental law and to preserve the necessary balance of powers and institutions as set forth in the Constitution.

As it is necessary to protect the people's rights and freedoms, the Constitutional Council has at its disposal a jurisprudence that may not be abundant but is intransigent as to respect for these rights when laws are being drawn up, and does not hesitate to sanction any violations. This was why, on the basis of the principle of equality of citizens before the law, it was obliged to impugn laws that were discriminatory not only from the point of view of the Constitution but also of international laws like the United Nations Pacts of 1966 and the African Charter on Human and People's Rights, which forbid discrimination of any kind[18].

In order to fulfil its role of distributor of powers and protector of people's rights and freedoms, without affecting its credibility, the Constitutional Council has always refused to go down the road of confrontation with its different partners. When called upon to exercise its power of interpretation, it prefers to use constructive, directive or neutralising reserves of interpretation rather than systematic invalidations, which can cause tension or even conflicts. This didactic attitude dictated by a concern for pacifying political life and helping the emergence of a culture of constitutionality, contributes effectively to the establishment of a climate of trust and dialogue between the council and the powers controlled, and also increases its credibility.

The Constitutional Council has proven its courage and does not hesitate to create law. This was how, to guarantee the authority of its decisions, the Constitutional Council created the basis of a constitutional provision, the principle of the authority of the final decision, in an interpretative, creative

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15 *Decision no. 3 of 18 December 1989 regarding the resolution of the People's National Assembly of 29 October 1989*

16 *Notice no. 1 op. cit.*

17 *Notice no. 7 of 24 May 1998 on control of conformity with the Constitution of the basic law on the powers, organisation and functioning of the Dispute Tribunal*

18 *Decision no. 1 of 20 August 1989 on the electoral code*

measure. Reacting to an attempt by the legislators to reintroduce a provision that had already been declared unconstitutional in an amended law, it stuck to its previous jurisprudence, saying that its decisions "are effective until the Constitution is revised and for as long as the reasons for their institution still exists"[19]. We must, however, place the creative power of the constitutional judges in perspective, as everything that they have built can be dismantled by the constituent parliament, which is still the master of the game.

I must stress that the legislators, who represent the people's sovereign will, do not like any competition in their lawmaking function. Following the example of most constitutional courts, interventions by the Constitutional Council in the legislative process, one that has long been dominated by parliament, thus by the law, are not always consensual. Its jurisprudence sometimes causes criticism and protests from different audiences, which accuse it of abusing its power and acting as a legislator by means of "government of judges" to quote Edouard Lambert and many others.

This criticism is unfounded, in my opinion. The basis of the Constitutional Council's competences is still the Constitution as the fundamental rules of reference. It is the main source of inspiration, action, explanation and justification of its work. As a result, by exercising its control, therefore necessarily using the power of interpretation that it has by the will of the people, it must impugn any provision that goes against constitutional rules or principles. To go against this will is to call into question the raison d'être of the Constitutional Council.

Although the work of the Constitutional Council is dictated by the sole concern of ensuring that the lawmaking authorities respect the will of the constituent parliament and thus guaranteeing the primacy of the Constitution in the country's laws, it is sometimes misunderstood by its different audiences.

The Constitutional Council does not usurp any of the power of the constituent parliament, which is still the ultimate sovereign, as it can undo what it has done and not replace its appreciation by those of the lawmaking authorities, which still have freedom of action in respect for the Constitution. Who better than Dean Vedel, who was able to show with great pertinence that the Constitutional Council did not make up the initial rules and did not create a rule without first finding a written basis for it. If we must speak of government it is that of the Constitution and not that of the judges, as Dean Vedel points out.

I cannot end my modest address without noting that parliamentarians, political parties and a part of the Algerian constitutionalist doctrine agree on the need to extend the Constitutional Council's jurisdiction to new players. This extension would further improve pluralistic democracy, speed up the construction of the rule of law and reinforce the efficacy of constitutionalism

The path towards peace and national reconciliation embarked upon by the President of the Republic has helped the country to turn the page on a painful

[19] *Decision no. 01 of 6 August 1995 on the constitutionality of Article 108.6 of the electoral law*

period in its history and return to progress and modernity. As the right conditions now exist, we can go forward in the process of constructing democracy and the rule of law.

In this framework, positive developments are expected following the announcement by the President of the Republic on 4 July 2006 that there would be a revision of the constitution, which would tend to strengthen constitutional control and enlarge the scope of public freedoms.

Thank you for your attention.

"The role of the Union of Arab Constitutional Courts and Councils in the field of Constitutionalism"

Hanafy Aly Gebaly
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Vice President of the Supreme Constitutional Court of Egypt

» 1. Establishment and Organisation of the Union

The Union of Arab Constitutional Courts & Councils was established at the preparatory meeting held in Cairo, Egypt on 25-26 February 1997 and its fundamental system was ratified in the meeting held in Algeria on 26 June of the same year by the founder members; namely the organisations that assume the constitutionality control of laws and regulations in the following member states:

1. The Republic of Tunisia;
2. The Democratic and Popular Republic of Algeria;
3. The Republic of Sudan;
4. The State of Palestine;
5. The State of Kuwait;
6. The Republic of Lebanon;
7. The Socialist People's Libyan Arab Jamahiriya (Republic);
8. The Arab Republic of Egypt;
9. The Kingdom of Morocco;
10. The Islamic Republic of Mauritania;
11. The Republic of Yemen;

In 1998, the Kingdom of Jordan joined the Union, followed by the Kingdom of Bahrain in 2003.

The aim of the Union is to establish the concept of constitutionalism in the Arab Nation, enhance the role of the constitutional control of laws, decree-laws and regulations for protecting individual rights and public freedoms, facilitate the exchange of experiences and enrich constitutional knowledge between those specialised in the constitutionality control.

The Union has an independent legal personality and is represented by the President of the Union or by his substitute. The permanent seat of the Union is in Cairo, Egypt.

The presidency of the Union alternates for two years for the head of the members' constitutional courts and councils according to the alphabetical order of their states. The president of the session that follows is the vice-president of the Union.

The Union seeks to achieve its aim by many ways such as:

- ***Organising and*** developing co-operation between its members and strengthening relations between them;
- ***Exchanging ideas***, experiences and information in the field of constitutionality control;
- ***Encouraging research*** and legal studies concerning constitutional control in general and specially the protection of human rights;
- ***Organising and*** developing co-operation between the Union and similar organisations in other states;
- ***Participating in*** international conferences concerning constitutional control.

In order to enhance the role played by the Union in the field of constitutionalism, it undertakes to achieve its aim by several practical steps, as follows:

- ***Publishing a*** periodical that includes research, constitutional legal studies and all judgments and decisions issued by the members' constitutional courts and councils;
- ***Exchanging judgments*** and decisions rendered by the institutions responsible for constitutional control;
- ***Convening conferences*** and seminars to discuss research and constitutional studies;
- ***Exchanging visits*** among the members' constitutional courts and councils and between the Union and similar institutions or organisations in other states;
- ***Encouraging writing***, translation and publishing in the field of constitutional control;
- ***Establishing a*** legal library in the Union's seat, provided with Arabic comparative legal publications and bulletins especially those concerning the constitutional control.

Membership of the Union is open to any Arab court or council competent in the constitutional control to join the Union. Meanwhile, the constitutional courts and councils in other Arab states may ask to attend the meetings of the Union as observers without having the right to vote.

The Union consists of the following three bodies:

1. ***The General*** Assembly, which is composed of the constitutional courts and councils that are members of the Union;
2. ***The Council*** of the Union which is composed of the president of the Union, the vice-president and the heads of the constitutional courts and councils that are members of the Union;

3. ***The General*** Secretariat which is the executive device of the Union, managed by the secretary-general elected for four years by the General Assembly by the majority of members.

» 2. Achieving constitutionalism in the member states of the Union

In general, present–day Arab constitutions provide for the duty of the state to protect all human rights and freedoms that prevail in the modern world. No one can deny that protection of human rights and freedoms constitutes the subject of today and the future.

One can see that all of the Arab constitutions, without exception, give paramount attention to protecting the exercise of democracy as a natural, direct way to bring about the achievement and protection of all human rights and freedoms.

The common aspects of such an exercise include the main features of modern democracy mentioned in the Arab constitutions as follows:

- ***The right*** of every individual to express his opinion and to publicise it verbally or in writing or by other means;
- ***The freedom*** of faith and the freedom to practice religious rites;
- ***The freedom*** to criticise;
- ***The freedom*** of the press, printing, publication and mass media;
- ***The freedom*** of scientific research and literary, artistic and cultural invention;
- ***The right*** of citizens to peaceable and unarmed private assembly without the need for prior notice;
- ***The right*** to hold public meetings, processions and gatherings within the limits of law;
- ***The right*** of citizens to form societies within the limits prescribed by both the constitution and law, taking into consideration that forming political parties falls within such a right, as the political systems of many Arab states are multi-party ones;
- ***The right*** to create unions on a democratic basis;
- ***The rights*** of citizens to vote, nominate and express their opinions in referendums;
- ***The right*** of individuals to address public authorities in writing.

Violations of human rights everywhere will never come to an end, nor do they ever stop the struggle to protect these rights. Constitutional provisions have nothing to do in this concern unless there is an effective system of constitutional control over laws, decree-laws and regulations, in order to give human rights and freedoms real effect by exercising strict scrutiny.

In the member states of the Union of Arab Constitutional Courts and Councils, constitutional control to achieve constitutionalism is brought about by two kinds of institutions:

i. Constitutional courts;
ii. Constitutional councils.

The first approach exists in Egypt, Sudan, Palestine, Kuwait, Libya, Yemen, Jordan and Bahrain, while the second exists in Tunisia, Algeria, Lebanon, Morocco and Mauritania.

Although the two approaches differ from the point of view of procedure to be followed in order to examine the issue of constitutionality, both of them are similar in following the same strategy and in applying typical criteria to find out whether the attacked provision of a certain law, decree-law or regulation agrees with the principles adopted by the constitution or not. Meanwhile, constitutional control in Arab constitutional systems is not typical in all Arab states. Each Arab constitutional court and council deals with its constitutional review questions according to the social, historic, cultural and economic circumstances contained, explicitly or implicitly, in its constitution.

In case the attacked legislative or regulatory statutes are found in contradiction with one or more of the provisions of the constitution, the institution competent to examine the constitutionality of such statutes, regardless of whether it is a constitutional court or council, will strike down the examined statutes and declare them unconstitutional.

In fact, each of the constitutional courts and councils that are members of the Arab Union (AUCCC) which have the exclusive right of constitutional review plays a major role in this arena and consequently presents an effective guarantee of constitutionalism that is deemed the safe haven of the protection of human rights and the rule of law.

The oldest centralised constitutional judicial review system known in the Arab arena was established in Egypt in 1969, when the Supreme Court was born according to Law no. 81 of 1969, to be the first window for the establishment of the centralised constitutional judiciary system in Egypt. Afterwards, when the Constitution of 1971 was adopted, the same trend of centralised judicial review was preserved. Chapter V of the Constitution provides for the Supreme Constitutional Court to have the same exclusive jurisdiction over the question of examining the constitutionality of laws, decree-laws and regulations.

Since its establishment, the Supreme Constitutional Court has endeavoured to preserve what is generally acknowledged as a safe haven for the effective protection of inalienable human rights, because it has played a very important role in the political, economic and social life of Egypt. This role can be explained by a brief discussion of some examples of the main decisions declared by the Court in order to see their broad lines in the field of constitutionalism.

In case no. 37 of the 11th judicial year, on 6 February 1993, the court had to decide on the constitutionality of Article 123 (Para 2) of the law on criminal

procedure, which provided that whoever was accused of the crime of libel in the press or any other form of publication had to present before the investigator at his first interrogation within the following five days at most a statement indicating the evidence of every fact he ascribed either to a person charged with the duties of a public office or service, or having a public representative assignment, otherwise the production of that evidence would be inadmissible. The court struck down the challenged time limit as provided for in the said provision on the grounds that, according to Article 47 of the Constitution, freedom of expression is granted in all domains and the two aspects of this freedom had been expressly mentioned therein, namely the right of self-criticism and that of constructive criticism, both being envisaged as paramount to the safety of the national structure. Subsequently, due account has to be given to the fact that survival of freedom of expression depends on ensuring its breathing space and that the required constitutional protection for its core must not be shaken or waived even upon a finding that the challenged opinions have gone beyond their rational limits. Hence, rendering the people's control of the public services inoperative or burdensome would bring to an end or largely weaken the critical approach in public affairs.

In the case no. 47 of the 3rd judicial year, the court invalidated the challenged statutes of law no. 125 of 1981 which provides for the termination of the mandate of the elected Council of the Bar Association and the delegation to the Minister of Justice to form a temporarily appointed council as a substitute for the legitimate one. The court stated that under Article 56 of the Constitution, the democratic foundation of trade unions and federations is a right to be guaranteed by law and the same article has enshrined the principle of democratic trade-unionism, which is deemed the corner-stone of other constitutional safeguards that ensure the people's supremacy, secure their participation in the exercise of power and recognise their enjoyment of fundamental rights and freedoms including freedom of expression and, by inference, the right to choose freely their own representatives in the administration of governmental affairs and the preservation of public interest through national or local elections. On these grounds, the court abolished the challenged law as it denied the members of the Bar the right to voluntarily choose their leaders acting as their legal representatives in conducting the work of the Bar.

In another judgment declared on 7 May 1988, the court invalidated Article 40 (sub-para 7) of law no. 40 of 1977 entitling a designated committee the right to turn down applications submitted to it for the creation of any political party if proven upon sound grounds that any of its founders or leaders had advocated, encouraged, instigated or advanced principles or practiced inconsistency with the peace treaty between Egypt and Israel. The court, in striking down the said statute, noted that the freedom of expression on which repose all features of democratic regime, had been enshrined by all Egyptian constitutions, including the current one which confers on every individual in Article 47 the right to express and disseminate his personal opinions whether by utterance or print or photograph or publication or by any other means within the limits prescribed by law. Such freedom extends to all forms of expression and encompasses all opinions of whatever nature with special emphasis on the exchange of political views, besides the constitutional duty of constructive participation in political life. In view of the aforementioned, the Court pointed out that the

challenged statute which forbids the advocacy or the promotion or the publication of ideas incompatible with the peace treaty between Egypt and the State of Israel, unequivocally barred the right to form political parties entitled to all citizens, the impairment of which contradicts Articles 5 and 7 of the Constitution.

In so many other judgments, the Supreme Constitutional Court of Egypt has guaranteed the protection of civil, political, social, economic and cultural rights. The decisions of the court have covered several aspects of constitutionalism in almost all fields of human rights and freedoms such as the principles of the sanctity of the home, equal protection, the right to private property, the right to vote and to be elected, the right of defence, the right to work, the right to receive a pension and the right to establish and join trade unions.

In the last state to join the Union, the Kingdom of Bahrain, the Constitutional Court, which is also the last established one, has declared several judgments in which it emphasises the importance of protecting the principles contained in the Constitution as the only way to achieve constitutionalism.

In case no. 1/03 of the 1st judicial year, on 26 April 2004, the court had to decide on the constitutionality of Article 6 (Para 6) of law no. 26 lf 1980 concerning legal practice. The petitioner alleged that the attacked provision deprived him, as an applicant for enrolment as a lawyer in the Bar Association, to resort to a higher stage of litigation in spite of the fact that the laws, in general, adopted the principle of dual tier litigation, and particularly since the same abovementioned law provided two tiers for complaints against disciplinary decisions and was entitled to this right. The court dismissed the case and pointed out the rule that the power of the legislator to regulate rights; including the right to litigate, is discretionary, unless the constitution imposes specific limitations on the exercise of such power, because the essence of this power is the choice by the legislator between the alternatives which relate to the subject matter of regulation and the balance thereof in order to give preponderance to what it considers to be the most favourable to the interests of society and the nearest to securing the weightiest of those interests. There is no contradiction between the deep-rooted constitutional right of litigation and the legislative regulation thereof, provided that the legislator does not use regulation as a means to ban the right or nullify it. Because of this, the legislator, in securing the right of litigation, does not confine itself to specific forms that represent fixed, unalterable patterns. It may choose, for the enforcement of this right, forms and procedures which are, in its objective view, more suitable to the nature of the dispute that a court is charged with adjudicating upon without breach of the main guarantees thereof which secure the enjoyment of rights according to definite rules which are fair in themselves. The Constitution of the Kingdom of Bahrain made the principle of equality one of the foundations of society which are guaranteed by the state. This principle is regarded as a means of establishing equal protection, without discrimination, between similar legal positions. Consequently, the law is within the ambit of discretionary power of the legislator whenever it differentiates between legal situations or positions or persons who are not in fact united as between themselves, so long as such differentiation is on objective basis seeking undisputedly legitimate aims and maintaining the unity of the legal rule in dealing

with persons whose circumstances are similar within the prerequisite of those aims. If it is true that the attacked provision is inconsistent with the trend of multistage litigation in the other enactments in the Kingdom of Bahrain, as alleged by the petitioner, the allegation is no more than a criticism of the inconsistency of the provision with a prevailing trend in legislation. Such inconsistency is not, in itself, a constitutional defect. The test of constitutionality or otherwise of a legislative text is whether or not it is consistent with the provisions of the Constitution which this court is charged with preserving and protecting. In view of the aforementioned, the court stated that, as the attacked provision was intended to expedite the decision of the dispute between the applicant for admission to the bar and the decision to refuse the application, on an objective basis and without affecting the equality between applicants for admission who were within the framework of the same legal position, particularly since the attacked provision aimed for the legitimate interest of saving time and avoiding wasted effort in looking into the complaint, which involves mere ascertainment of satisfaction of the conditions of enrolment in the general roll of advocates without impinging on the right of litigation, affecting the independence of the judicial authority or nullifying the principles of equality and equal opportunities of persons of similar circumstances.

In case no. 2/03 of the 1st judicial year, on 27 December 2004, the Consti-tutional Court of Bahrain adopted some other important principles, as follows:

- ***The purpose*** of the constitutional legitimacy (constitutionalism) which is monitored by the court is to ensure the conformity of legislative texts with the Constitution. This legitimacy is at the apex of the legal structure of the state. It is a facet of the submission of the state to the rule of law;
- ***No court*** or body entrusted with judicial adjudication over disputes is to apply a legislative text that is necessary for the adjudication on the dispute if is appears to it that the text is contrary to the constitution. If it suspects the existence of such contrariety it must resolve the doubt by referring the matter to the Constitutional Court which has sole competence on the question of constitutionality to adjudicate upon the matter or it must enable the litigant who genuinely pleaded unconstitutionality to put his case before the Constitutional Court by allowing him the right to institute his suit within the period specified by Article 18 of the Constitutional Court Law;
- ***All courts,*** in principle, must stick to the order of referral or the permission to institute the constitutional suit; otherwise the courts would be in contravention of Article 106 of the Constitution and Article 16 of the Constitutional Court Law which conferred on the Constitutional Court sole competence for judicial review of the constitutionality of laws and regulations;
- ***Direct personal*** interest relates to the party who raised the constitutional question not to the question itself as viewed in abstraction. Consequently, litigation by persons other than those to whom the text caused direct injury, either imminent or already caused, will not be entertained. The damage alleged must always be other than mere contravention of the text of the Constitution;

» ***The rejection*** by the Constitutional Court of the formal objections does not constitute a bar to raising any substantive objections to any of the texts of the three legislative decrees objected against.

Nevertheless, in all other Arab states, whether or not they are members of the Union of Arab Constitutional Courts and Councils, their constitutions as mentioned above contain and admit the protection of human rights and freedoms, which is the leading way to achieve democracy and to highlight the rule of law.

Accordingly, the Constitutional Courts and Councils that are members of the Union have endeavoured to preserve the effective protection of inalienable human rights. Below, we can see examples of the main decisions declared by these constitutional institutions in order to find out the trend followed by them in the current matter of constitutionalism.

In decision no. 01/02 on 3 April 2002, the Constitutional Council of Algeria examined the draft law submitted by the President of the Republic to modify the constitution by adding a new provision to Article (3) of the constitution aiming at considering "Tamazight" as a national language in addition to Arabic, which is considered the national, formal language of Algeria. The Constitutional Council declared that the draft law agreed with the general principles that govern the Algerian Community and adopted by the Preface of the constitution. Such principles, which are considered the cornerstone of the main components of the national entity, acknowledge "the Amazighi", whose language is Tamazight, to be side by side with "the Orooba" whose language is Arabic. Hence, the Constitutional Council decided that the said draft law did not contravene the main principles of the constitution.

In another decision, no. 13/02 on 16 November 2002, the Constitutional Council of Algeria had to decide the constitutionality of the draft organic law concerning the judiciary. The Constitutional Council struck down the draft law on the grounds that Article 180 of the Constitution provides that any change of laws concerning subjects falling within the domain of organic laws should be postponed until the competent constitutional institutions provided for in the constitution have been established. On the other hand, Article 157 of the Constitution provides that the establishment of the Supreme Judiciary Council, its mission and powers should be organised by a separate organic law. Hence; the Constitutional Council invalidated the sub mentioned draft organic law concerning the judiciary on the basis that it went against the procedures implied by the constitution as the said draft organic law had been modified before the aforementioned competent constitutional institutions were established and the legislative authority had accumulated the two draft organic laws in one draft law; while the constitution organized the subject matters of both laws separately, which meant that it adopted a strict distribution of the field of each organic law.

In case no. 8/2000 on 10 December 2000, the Constitutional Court of Sudan had to examine the constitutional petition against the Public Elections Authority aiming at freezing its present and future activities concerning the presidential and parliamentary elections. The Constitutional Court dismissed

the case on the grounds that the petitioners did not build their allegations on any constitutional base, but were just aiming at showing off by founding their petition on mere theoretical ground by saying that the absence of the National Assembly (the parliament), as a result of the Sudanese revolution, should automatically imply the non-existence of the Public Elections Authority, while revolution does not mean abolishing state constitutional authorities or institutions, but rather substituting the absent authority by another existing one in assuming its constitutional responsibilities.

In case no. 1/2003 on 30 October 2003, the Constitutional Court of Palestine had to decide the constitutionality of Decision no. 120/1997 issued by the President of the National Palestinian Authority modifying Law no. 11/1996 on the Bar Association. The Constitutional Court dismissed the case on the grounds that the petitioner failed to prove any unfavourable legal effect on his side, as litigation by persons other than those to whom the attacked legal provision caused direct injury would not be entertained.

In interpretation petition no. 9/2001 on 30 January 2002, the Constitutional Court of Kuwait was requested by means of a Cabinet decision to interpret Article 145 of the Constitution in light of Articles 97 and 179 of the same, in order to indicate if the state budget laws, promulgated and put into effect after the beginning of the financial year, were deemed retroactive and, as such, implied the agreement of the majority of all members of the National Assembly (the parliament) in accordance with Article 179 of the Constitution. The Constitutional Court decided that the state budget law was a formal one which did not contain any legal objective rules, so it did not have any retroactive effect. Accordingly, as the Court stated, putting the said law into effect just required the absolute majority of members attending the voting session of the National Assembly.

In decision no. 1/2005 on 6 August 2005, the Constitutional Council of Lebanon had to decide on the constitutionality of Law no. 679 of 19 July 2005 concerning postponement of reviews by the Constitutional Council. The latter invalidated the law on the grounds that it was unclear, baseless and partly inapplicable as the present constitution of the council was still a proper one until all substitutes were elected or nominated and after taking the oath, in accordance with the constitutional principle of continuity of public authorities.

In case no. 1/1919, the Supreme Court (Chamber of Constitutional Judiciary) of Libya invalidated Article 65 of Law no. 20/1968 concerning the Libyan University, on the grounds that the attacked provision contradicted Article 30 of the Constitutional Declaration of Libya, as it prevented the petitioner from resorting to any court in order to annul or to suspend the execution of decisions issued by the university authorities on its students affairs, as the said constitutional provision secures the right of litigation to any individual in accordance with the law.

In decision no. 583/04 on 11 August 2004, the Constitutional Council of Morocco invalidated Article 11 of Organic Law no. 63/00 on the grounds that it contravened the constitutional principle of independence of the judiciary, as the said article contained a baseless exception from adherence to prosecution

procedure, in favour of the President of the Supreme Court and the President of the Investigation Commission, while both of them practiced the same judicial job compared to that of their colleagues who abided by the said procedure.

In another decision, no. 586/04 on 12 August 2004, the Constitutional Council of Morocco had to decide the constitutionality of Para (1) of Article 2 of Law no. 17-01 concerning parliamentary immunity annulations, which provided that in case of criminal prosecution of any deputy the General Agent of the King should notify the accused deputy orally of the subject before he received the deputy's statement which he could not refuse to declare. The Constitutional Council invalidated the last sentence: " .... which he cannot refuse to declare" as part of the said paragraph, on the grounds that it contravened the constitutional principles of both freedom of expression and presumption of innocence.

In decision no. 007/EM on 21 July 1993, the Constitutional Council of Mauritania examined some provisions of the law on the judiciary. In this decision, the Constitutional Council adopted several important principles as follows:

- ***Appointment of*** some judges by decision of the Minister of Justice, after consultation with the President of the Supreme Court, contravenes the constitutional principle of independence of the judiciary, even though that appointment is interim and time-limited;
- ***Moving judges*** by a decree, upon submission of a justified report by the Minister of Justice, denies the constitutional principle of independence of the judiciary;
- ***Obstructing any*** judge from being appointed to an electoral position ignores the constitutional principle of equal access to public obs and positions;
- ***Preventing judges*** from attacking the decisions of the Supreme Judiciary Council contradicts the constitutional principles of independence of the judiciary and right to litigation;
- ***The appointmen***t of two judges by the President of the Supreme Court as members of the Supreme Judiciary Council creates an imbalance in the constitution of said council, as these two members should be appointed by the judiciary itself in accordance with the constitutional requisites. On the other hand, the appointment of two other members by the Senate Bureau and the National Assembly Bureau contravene the constitutional principle of separation of authorities.

In case no. 2/2000 on 2 October 2001, the Supreme Court of Yemen (the Constitutional Chamber) had to decide on the constitutionality of paragraph (B) of Article 78 of Law no. 31 of 1991 on Income Tax which provided that both the Tax Department and taxpayer could attack the decisions issued by the competent tax committee, in the tribunal of income tax litigations, on the condition that the petition made by taxpayer would not be formally deemed acceptable unless the petitioner had paid 50% of the tax. The Supreme Court invalidated the attacked provision on the grounds that it put obstacles in the way of attaining justice by the taxpayer, which contravened the right to litiga-

tion and denied the constitutional principle of equal protection as it discriminated between litigants in exercising their constitutional right to resort to their natural judge.

Last but not least, it is very important to refer to some parts of a speech by the Secretary of Venice Commission in the Opening Ceremony of the Constitutional Court of Bahrain.

The Venice Commission promotes the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law. In fact they are not European values but truly universal ones. While each country is different and follows a different path at a different speed, these common goals apply to all of them. In the pursuit of these common goals, we can rely on a source, which is an accumulated wealth of legal reasoning: the judge-made law of our constitutions, that is to say, the jurisprudence of constitutional courts. Differ as it may from one country to another, this great corpus of judicial decisions does not fail to highlight the salient trends of modern democracy. In fact, the critical questions under review by constitutional and supreme courts often seem to arise at the same time, across national boundaries. The reason is that they reflect some of the current pressing needs of society and they have to be answered and accommodated by the judge who makes the constitution work in the ordering of social life. In transforming the constitution into a "living" law for society, constitutional justice, with a clearly established role in the institutional setting, is fundamental.

The purpose of our co-operation with constitutional courts is therefore to promote 'cross-fertilization' between the courts. In their exchange, constitutional judges can find common ground and draw inspiration from each other, thus furthering democracy.

We have seen that democracy is not a static state of affairs. It cannot be ticked off once it has been achieved; democracy is a continuously moving process. Democracy has to be conceived, reflected upon, tried, retried and constantly improved. Democracy needs a sound framework. This framework is the country's constitution, which provides for human rights, the state's democratic institutions and their inter-relation. In those countries where a constitution court has been established, this important institution plays a key role in safeguarding democracy, human rights and the rule of law.

Constitutional review varies from country to country and this is a positive element. Each country has its historic and cultural background and deals with its own problems accordingly. What is important though, is that the basic standards of democracy are adhered to.

Thank you and may God bless you.

Ariranga G. Pillay
Chief Justice (Mauritius)
Representing the Southern African Judges Commission

1. Legal mechanisms to guarantee the supremacy of the Constitution in the legal order

In most of the jurisdictions of the Southern African Region, including Mauritius, the Constitution itself provides that it *is the supreme law* of the land and that any law inconsistent with the Constitution is invalid. I shall now examine briefly the salient features of the Constitution of Mauritius.

Chapter I provides that Mauritius *shall* be a sovereign *democratic* state: section 1. This section is deeply entrenched in that it can only be amended after a proposed Bill has been approved by three quarters of the voters in a referendum and supported by a unanimous vote of all the members of the *National Assembly – section 47(3) of the Constitution*. Mauritius is a parliamentary democracy based on the Westminster model. Chapter II outlines various provisions for the protection of fundamental rights and freedoms of the individual derived from the European Convention of Human Rights, namely protection of the right to life, freedom of conscience, freedom of expression and freedom of assembly and association, protection of the right to personal liberty, protection from slavery and forced labour, protection from inhuman treatment, deprivation of property and discrimination and provisions to secure protection of the law, notably fair hearing within a reasonable time by an independent and impartial court established by law.

Chapter V deals with parliament which may, *subject to the provisions of the Constitution*, make laws for the peace, order and good government of Mauritius – *section 45(1)*. The Constitution in Chapter VI provides for the powers of the executive. Chapter VII deals with the third arm of government, namely the judiciary. The Constitution provides for the establishment of the Supreme Court with unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law other than a disciplinary law – section 76. It entrusts the Supreme Court with supervisory jurisdiction over all lower courts in order to ensure that justice is duly administered by any interpretation of the Constitution and the enforcement of fundamental rights and freedoms. In that respect, the Supreme Court may make such orders, issue such writs and gives such directions as it deems appropriate – sections *3, 17, 82, 83 and 84*.

The Constitution also provides for a power of constitutional and judicial review over all persons and authorities exercising functions under the Constitution – *section 119*. The independence of the Supreme Court is protected by the provisions dealing with the appointment and tenure of the judges – *sections 76 to 78*. Moreover, the Supreme Court is entrusted with appellate jurisdiction from subordinate courts where there is no other form of appeal – *section 82(2)*. The Courts of Civil and Criminal Appeal are made divisions of the Supreme Court – *section 80*.

» 2. What is the role of constitutional justice in the balance of power (legislative, executive and judicial)?

Three propositions flow from the above provisions of the Constitution of Mauritius. First, Mauritius is a democratic state constitutionally based on the rule of law. Second, subject to its specific provisions, the Constitution of Mauritius entrenches the principle of the separation of powers between the legislature, the executive and the judiciary. Under the Constitution, one arm of government may not trespass upon the province of any other. Third, the Constitution gives to each branch of government such powers as are deemed necessary to discharge the functions of a legislature, an executive and a judiciary respectively. Each organ of the state has a distinct role to play and acts as a check or balancing mechanism upon the other. To reconcile the inevitable tensions that might arise between the three organs of the state, constitutional justice requires that a separation of powers between the legislature, the executive and the judiciary is essential. Thus, the function of an independent judiciary is to interpret and apply the law. Decisions on bail are intrinsically within the province of the judiciary. The power to determine responsibility for a crime and appropriate punishment for its commission is a function which belongs exclusively to the courts.

Indeed, the Commonwealth Principles on the Accountability of, and the Relationship between the Three Branches of Government ("The Commonwealth Principles") endorsed by Commonwealth Heads of Government, including Heads of Government of the Southern African Region, state as follows –

(I) The Three Branches of Government

Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

(II) Parliament and the Judiciary

a) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law-making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.

b) Judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner".

Moreover, whatever overlap there might exist under the Constitution of Mauritius between the exercise of executive and legislative powers, the separation between the exercise of judicial power, on the one hand, and legislative and executive powers, on the other, is a clear-cut distinction. Such

concept of the separation of powers founded on the rule of law is a characteristic feature of democracies, like Mauritius and other jurisdictions of the Southern African region.

Consequently, even a constitutional provision that seeks to abolish the right to bail of detainees for certain offences related to terrorism or drugs will be struck down as invalid and unconstitutional since *"it amounts to interference by the legislature into functions which are intrinsically within the domain of the judiciary"* and transgresses section 1 of the Constitution which proclaims that Mauritius shall be a democratic state and has not been amended pursuant to section 47(3) of the Constitution – vide *The State v Abdool Rachid Khoyratty [Privy Council Appeal No. 59 of 2004]*.

Conversely, it would be wrong for the Supreme Court under the guise of interpretation or construction, however broad, generous or purposive, to usurp the functions of the legislature. Thus, the right of the individual to the protection of the law under sections 3 and 10 of the Constitution cannot be equated to the justifiable right to the equal protection of the law or the right to equality before the law. The provisions of the Constitution *"cannot be construed as creating rights which they do not contain" – vide D. Matadeen and another v M.G.C. Pointu and others and The Minister of Education and Science and another [Privy Council Appeal No. 14 of 1997]*.

The Supreme Court can, therefore, only give effect to the provisions of the Constitution, *as they exist*, even if these provisions are liberally construed in such a way as to conform to international conventions. The Commonwealth Principles state in this regard as follows –

"Independence of the Judiciary
An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country".

The important words to be stressed are *"to the extent permitted by the domestic law"*. In other words, as indicated already, provisions of the Constitution cannot be construed as containing rights when those rights are not to be found therein. It is the task of the legislator to amend the Constitution in order to provide for those rights.

For example, section 16 of the Constitution outlaws discrimination on limited enumerated grounds and is incompatible with the broad provisions of the discrimination principle enshrined in the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights, which Mauritius has ratified.

» 3. Difficulties encountered by the Supreme Court in its functioning and the fulfilment of its mission to ensure the respect of the Constitution as a fundamental norm and the defence of rights and freedoms

a) ***There is no*** systematic revision of the Constitution;

b) ***Lack of*** adequate and sustainable resources;

c) ***Procedural*** obstacles – restricted locus standi. An aggrieved individual must prove that his interest has been affected or is likely to be affected;

d) ***subtle, insidious*** and concealed avenues of attack against judicial integrity from political organisations, commercial entities and other power centres in society e.g. the media, religious, socio-cultural bodies and other interest groups

Thus, the Supreme Court may be criticised by certain interest groups not only for withholding relief as in the example given above, relating to sections 3 and 16 of the Constitution but also for granting redress to an aggrieved party. A case in point is *S. Tengur v The Minister of Education and another [2002 Mauritius Reports 116]* which was upheld on appeal by the Privy Council. The Supreme Court held that the admissions policy of Catholic colleges maintained very largely, if not wholly, at the expense of the state, which sanctioned or acquiesced in their policy, discriminated, contrary to section 16 of the Constitution, in favour of Catholic pupils who, unlike the pupils of other faiths admitted solely on merit, obtained their admission on account of their creed and was therefore unconstitutional.

Mahapela L. Lehohla
Chief Justice (Lesotho)

Mr President of the Lisbon Forum,
The Executive Committee of the North-South Centre,
The Secretary of the Venice Commission,
Fellow Participants,

Mr President, it is my esteemed honour and privilege to have this opportunity of giving my minuscule contribution in the important debate on the North-South Centre topic "Constitutional justice – an effective guarantee of constitutionalism". For that I must most heartily thank you.

May I in passing, mention that last month marked Lesotho's 40th anniversary of Independence yet only the last nine years thereof characterised a protracted period of what one might term political stability – thanks to the new electoral model namely a mixed-member parliament consisting of both the first past the post membership combined with proportional representative membership.

It is heart-warming to see that the Lesotho model is regarded as an object worth copying by many states in Africa.

When tackling the above topic it is important to observe that happily in most jurisdictions of the progressive world parliamentary supremacy has given way to constitutional supremacy.

Towards realisation of this healthy goal most constitutions have vested in the superior courts the paramount power to:

a) ***declare null*** and void any law or executive action or administrative action that is inconsistent with the Constitution;

b) ***review any*** executive or administrative action or decision:

c) ***determine*** any case involving violation of human rights.

With the passage of time, while applying the above functions, the courts have enabled administrative justice to emerge, develop and become the norm. This is as true of the jurisdictions of the UK, USA and Canada as it is of India, Australia and South Africa.

What is important to note is that in exercising their paramount constitutional function, the courts are actually dispensing "constitutional justice" properly so called. Performance of this function has in turn to be effected in accordance with the norms and dictates of the Constitution and the law.

The courts have, by repeatedly dealing with the Constitution, accorded it a special place of importance and regarded it as sui generic. Thus, in interpreting it, the courts feel obliged to do so purposively, generously and expansively in order to promote its true spirit and in the process promote the purport and objective of the Bill of Rights under the Constitution. This sentiment was

expressed in very clear terms in the ***Government of Namibia Vs Cultural 2000***: 1994 (1) SA 407.

An enormous quality of responsibility is imposed on the court seeking to dispense constitutional justice in that, while on the one hand the court should do so with independence and impartiality, it should on the other hand strike that fine balance between competing interests ever-present in the political, social, economic and cultural scenarios.

The difficulty in this admittedly uneasy task is compounded by the fact that whereas judicial activism is called upon to play a role in all this, there is a need to restrain it, because unbridled judicial activism can very easily overreach itself on the one hand while on the other hand experience has shown that judicial indolence or reticence is antithetical to constitutionalism.

An illustration of the conflict between judicial activism and judicial indolence came to the fore in Lesotho in the matter of *Tsĕpe Vs Independent Electoral Commission & 4 Ors CIV/APN/135/05*.

In that case Mr Tsĕpe, a male registered voter, wished to stand as a candidate in the country's first democratic local government elections. However, he was informed by the returning officer that the particular electoral division for which he intended to stand was reserved for women candidates in terms of the relevant section in the Local Government Elections Act of 1998 which allocated one third of the seats in every council to women for the first three elections. Mr Tsĕpe challenged the legality of the quota system as breaching his right to be free from discrimination and to participate in government in terms of the Constitution.

In particular he contended that other less restrictive alternatives to enhance political representation of women existed e.g. by providing two ballots – one for women and one for an open candidate. The IEC, i.e. the commission, conceded that the measures discriminated against men by reason of their sex but maintained that such positive discrimination was justified.

The High Court dismissed Mr Tsĕpe's petition on the grounds that the measures were justified given that only 12% of the seats in the National Assembly were held by women although women accounted for 51% of the population.

On appeal it was indicated that it was well established as a general principle that Bills of Rights provisions are to be purposively and generously interpreted. In relation to equality this means embracing a substantive approach to tackle systematic disadvantage and progressively eradicate socially constructed barriers.

This approach was held to be in line with the country's international treaty commitments in terms of the positive measures to be taken to address disadvantage including Articles 3 and 26 of the International Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee in its General Comment 18 paragraphs 8 and 10.

Of importance was the remark by the court that it should be borne in mind that the reservation system had a sunset clause with its remedial effect of not being permanent but lasting for only three elections, that the system had been devised in such a way so that no political party could benefit unduly and that the impact on Mr Tsĕpe was not that great since he was still able to stand in a neighbouring seat for the first election.

Inspired by the spirit of constitutionalism the courts in Lesotho have striven to give true meaning to independence of the judiciary.

For instance in the case of *the Law Society of Lesotho Vs the Prime Minister of Lesotho 1985 – 90 LLR 50* the Court of Appeal held that the acting appointment of a judge was inconsistent with the Human Rights Act which guaranteed the independence of the judiciary. The acting judge had not resigned his public office as Director of Public Prosecutions thus the court held that he was still under the control of public service laws and therefore not independent nor seen to be.

However, it need be noted that beneficence of constitutionalism survives under menacing threats imposed by limitations in many of our constitutions with the result that generous interpretation is necessarily hobbled and therefore the courts find themselves hamstrung and unable to give interpretation antithetical to the constitutional limitation without offending against the principle of separation of powers or arrogating to themselves the power to amend the Constitution.

In *Swissbourgh Diamond Mines (Pty) Ltd Vs Military Council of Lesotho 1991-96 (Vol 2) LLR* Cullinan CJ held the Military Council Order invalid because the order violated the property rights under the Human Rights Act 1983 to the effect that it unilaterally rendered the property rights under a mining contract null and void retrospectively. This decision was given before the advent of constitutionalism that was ushered in in 1993 in Lesotho. Otherwise the word "invalid" would properly have been replaced by the word unconstitutional.

I may, before concluding, indicate that in Lesotho like in her other sister ex-High Commission Territories i.e. Botswana and Swaziland and many other African countries there is no Special Constitutional Court as perceived in South Africa, Uganda and Mozambique where there are, so to speak, standing constitutional courts. However, the High Court has jurisdiction to decide on constitutional cases. Although hearing by a single judge in the High Court is not barred, conventional prudence has dictated that Constitutional cases be heard by a panel of judges. This has been the case from 1993 when constitutionalism came in. It seems to work quite well.

Another feature which is a welcome development as an off-shoot of constitutionalism is ease of accessibility to that court where petitioners are not scared from pursuing their perceived constitutional rights by threat of being saddled with swingeing costs in the event of losing their petitions or appeals. Usually in such cases each party is ordered to bear its own costs. This is a salutary practice which acknowledges that, because of the importance attached to constitutionalism, parties should not be kept at bay by fear of such extraneous factors as menace of costs in the event of loss suffered in a well perceived belief in the correctness of pursuit of a right.

SESSION III

Civil society and the safeguarding of constitutionalism

Annelise Oeschger
President
Conference of International Non-Governmental Organisations of the Council of Europe

My thanks go to Peter Schieder, President of the Lisbon Forum, and his Vice-President, Ben Turok, for having included this subject in the programme of the Forum on constitutionalism.

One thing can make us think when people are talking about civil society, if we compare the discussion panels. The composition of the panel on constitutional courts was different to that of the panel on civil society. This is certainly a sign of the need for civil society; but is it also a sign of its success?

This morning, you have already heard how, and to what extent, civil society enables this constitutionalism to govern public life. It assists state bodies all the time and does not stop until it wins, whether it is by a supreme court ruling, the introduction or change of a law or the drafting and ratification of an international convention. For those involved, constitutionalism means "we will keep them to their word" or "we will not accept double standards".

What I would like to reflect on with you is the constructive influence and the harmful influence of civil society organised by constitutionalism. And I'm talking about organised civil society from the north.

I would like to begin with the constructive role, as it can cause harmful effects. Organised civil society and especially trade unions and NGOs have been major players in development, the protection of human rights and the rule of law at national and international level. This commitment and these achievements go two ways.

In theory, it is up to governments to guarantee fundamental rights and the rule of law; but not only do they usually do nothing but they also actually violate these rights. NGOs and trade unions have set up very powerful networks that demand respect for the supreme rule of law, also at international level. We all know the outstanding role played in Europe by the European Court of Human Rights. NGOs, in collaboration with government experts, have also managed to introduce mechanisms for controlling government power, such as the joint complaint that NGOs and unions can lodge if a government violates economic or social rights. These mechanisms are very powerful and signify constitutionalism aimed at government bodies.

But there is a second direction in which NGOs are very active. Who has to respect the fundamental rights in national constitutions and international conventions? Is it only governments or is it also other, non-state players like companies? When I was studying law, people discussed the problem of the third effect of fundamental rights. I confess that I did not follow this theoretic discussion as I was too involved in people's actions and everyday life.

Everyone obviously wants their rights and dignity to be respected by all the authorities that have power over their lives. This is what leads NGOs to question each sector that has power over the lives of people and nations, which naturally include international organisations like the World Bank, the IMF and the WTO. These organisations sometimes do not wish to be subject to human rights when they come from states that are governed by their constitution.

I would very much like the constitutionalists to help us think about this and to conceptualise it in the sense of the protection of nations and people. NGOs not only influence these international organisations but also companies. A good instrument is public campaigns against companies that have not respected fundamental rights. It does not matter whether they are held legally responsible; we know that they are responsible. This has resulted in company codes of conduct, the most famous of which is the UN World Pact, under the aegis of Kofi Annan, and the OECD, which has the strictest guidelines for multinational companies. All these are rules that are created outside the state but which are fundamental rules inspired by the standards of states and international organisations like the ILO, among others.

The trade unions and NGOs work in many fields at a time. International agreements are encouraged and application of rights by all players is demanded. At present, companies, NGOs and state services are creating monitoring centres to check that codes of conduct are being respected.

What I am describing shows that there is a new balance to be found with states and their components, especially parliaments and the judiciary. Otherwise, constitutionalism will be overtaken by these players who, by nature, are freer and more flexible than state bodies and in their choice of partners.

NGOs and companies have been involved in many confrontations but they have spawned an understanding of each other's role and constraints, followed by respect and dialogue. No-one knows where the state has got to in all this.

Everyone follows their own agenda and this where the harmful effects of the actions and success of the northern NGOs come in. With all our machinery, we have almost crushed everything that might be born in countries where civil society is less developed. Large NGOs ought to rethink their presence, especially in African countries. Above all, we must not crush the democratic efforts and certainly not weaken the state bodies and their recognition when we bring major resources that, in some states, are greater than those of their parliaments or state agencies. We northern NGOs must make ourselves smaller and learn. For example, if we combined the efforts of migrant organisations in our northern countries, we would have a way of becoming smaller and more modest and be able to learn from them.

Force is only legitimate for NGOs if it is placed at the service of those who are weaker; otherwise it is our vocation that is lost.

Thanks to this year's and last year's Forums, we will be launching projects to this end with migrant organisations in northern countries.

Thank you.

"Global Civil Society and the pursuit of democratic global governance"

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This article explores some of the characteristics, meanings and debates surrounding global civil society in order to peel back the multi-layered nature of this contentious concept. In this way the challenge of answering the question posed above should become clear. The question presupposes that every actor in civil society – whether individual, organisation, movement, virtual network or faith group – is committed to promoting 'a democratic civic culture.' What about those who believe violence is a legitimate tool to achieve their ends? This is just one example of the challenge of defining global civil society, which is often perceived as embracing only 'progressive' groups. Of course, there are many actors interested in creating spaces for democratic debate and forging cross-border links to strengthen their campaigns. For some, the provision of 'policies and mechanisms' to support their efforts (which implies a top-down process by state authorities) may be of less interest than collaboration and connection within global civil society, particularly if the target is institutions of global governance, and the aim is greater transparency, accountability, representation and responsibility.

This discussion is divided into five points, elaborated below. For in-depth analysis and debate, please see the Global Civil Society Yearbook series, about which more can be found at *http://www.lse.ac.uk/Depts/global/researchgcspub.htm*

1. Contested: it is vital to unpick the meaning(s) of global civil society, which is neither a benign nor uncontested phrase and phenomenon. Otherwise, there is a risk of creating inappropriate and/or ineffective strategies and mechanisms.

2. Global: This discussion should be situated firmly in the global context of the 21st century. Global civil society cannot be considered in isolation from globalisation, of which it is a key part.

3. Sphere: It is useful to consider global civil society as a sphere – a space (whether virtual or physical) for debate and exchange among a myriad different actors, which may be characterised by dissent as much as agreement. The implications of that cacophony of voices need to be examined, as well as whose voice tends to dominate.

4. Flux: As continued debate contributes new understandings of the concept of global civil society and its expression around the world, it is useful to consider the changing relationships between various civil society actors and branches of government, sectors of business, the media and other powerful players in society.

5. Strategy: Instead of considering top-down policies and mechanisms to support civil society efforts, it may be useful to highlight the ways in which various global civil society actors are debating and devising new avenues of influence, strategies of change, and vehicles of impact on institutions of global governance.

» 1. Global civil society is a 'fuzzy and a contested concept'.

The boundaries are unclear; as Mary Kaldor has pointed out, it is a 'messy reality' (2005:23-24) that does not only include progressive, peaceful, civic-minded organisations and individuals but nationalists, religious extremists, racists...some of whom may use violence to further their ends. Ongoing debate about who is in/out of civil society questions whether, for example, business, those who use violence, academics, the media, and NGOs supported by government/engaged in service delivery, are part of global civil society. Global civil society is also 'fuzzy' because this relatively new concept goes beyond thinking rooted in 19th century notions of the nation state and the pre-eminence of state sovereignty. The continued dominance of this perspective makes it difficult to conceptualise and measure the new global realities of the 21st century – in particular the rise and influence of global civil society.

Global civil society means different things to different people. And those understandings and definitions are constantly changing. It might, for example, include any or all of the following:

- ***actions*** against globalisation – in particular global capitalism/transnational corporations;
- ***the spread*** of civil society around the world and across borders;
- ***the idea*** of global solidarity and 'global consciousness';
- ***increased*** interconnectedness of activists through new media;
- ***NGOs*** (eg. Amnesty International, Greenpeace, Oxfam etc).

Many definitions have been proposed and some question the validity of the concept. For example, Anderson and Rieff (2005) argue that the hotchpotch of environmental groups, feminist networks and human rights activists who call themselves 'global civil society', are no more than 'a collection of undemocratic and unaccountable 'social movement missionaries.'

» 2. Globalisation is not only an economic phenomenon

and means much more than the spread of capitalism around the world. The reality of globalisation is more complex. Globalisation is widening, deepening

and speeding up interconnectedness around the world in all aspects of contemporary social life. In so doing, it is altering notions of time and space, and challenging established identities and traditions, which are grounded in local communities and cultures, to create new, hybrid identities (Held 1999). Global civil society is intimately connected to globalization: it emerged in reaction to it, and continues to feed on and respond to it. It embodies a growing global consciousness and emerging sphere of shared ideas and values.

According to the *Oxford Dictionary*, the term global means '...comprehensive, all-inclusive, unified; total; spec. pertaining to or involving the whole world; world-wide; universal' (OED URL). A snapshot of recent use of the term indicates its broad appeal, from 'the global war on terror', the 'unprecedented, global catastrophe' of the 2004 tsunami' (Annan 2004), to the 'global international clients' of leading accountancy firms and even a 'global burger' on the menu of one north London restaurant.

» 3. Global civil society can be seen as a sphere or space

(whether physical or virtual) of activity, debate, exchange. The Global Civil Society Yearbook invites contributions from those with very different ideas and understandings of the concept, in the belief that debate about its meaning is part of what global civil society is all about. However, for reasons of data collection, Global Civil Society 2001 offered a simple working definition:

Global civil society is the sphere of ideas, values, institutions, organisations, networks, and individuals located between the family, the state, and the market, and operating beyond the confines of national societies, polities and economies. (Anheier et al 2001:17)

This sphere of activity and debate is characterised as much by dissent and friction as agreement and shared values – unsurprising given the diversity and un-boundedness of global civil society. This cacophony is often criticised for emasculating global civil society and there are frequent attempts both within particular campaigns and more broadly to create consensus or a united front, in the belief that this will strengthen global civil society and increase its impact on institutions of global governance. But many scholars have pointed out that global civil society is a process of negotiation, which is not reducible to a single voice or forum. Furthermore, the cacophony can be creative: the existence of an 'outsider', radical element can assist 'insider' actors by making their demands seem more reasonable and/or adding to the pressure.

Academics and practitioners attending a workshop in Canada in October 2006 discussed the possibility of creating an 'entity' that would aggregate the efforts of global civil society in order increase its impact on global decision making. The 1.5 day workshop, 'The Voice of Global Civil Society' was characterised by an enthusiasm to discuss the issue, discord, occasional confusion and difficulty reaching consensus - except to disagree with the premise of the

event, whose draft final report is entitled, 'The Voices of Global Civil Society' (CIGI forthcoming).

» 4. Global civil society is a sphere in flux

Not only are the boundaries of global civil society ill-defined, they keep changing. Politicians, government officials, business people, representatives of international financial institutions and journalists enter the sphere and interact in various ways with civil society practitioners. This interaction is a two-way conduit. For example, Brazilian politicians and incognito IMF staff have attended the World Social Forum; government officials and diplomats entered the debate over the Danish cartoon furore; and in 2005 the Global Call to Action Against Poverty (GCAP), in particular the UK campaign Make Poverty History, made clear the depth of connections between NGOs, political leaders, UN representatives, marketing specialists, academics, journalists and celebrities. What are the implications of these changing relationships for the boundaries of global civil society and the nature of campaigning?

» 5. Global civil society is strategic

Global civil society actors are constantly seeking new ways of extending their influence and enhancing their impact on decision making at local, regional and global levels. They are doing this in numerous ways, including:

- ***expanding*** spheres or realms of engagement, for example, through the social forums (world, regional and thematic), via the blogosphere, online forums and networks, youth web-based communication, and academic-civil society conferences;
- ***combining*** technical with experiential expertise to improve proposals and strengthen campaigning. One example is the bringing together of legal experts and those subjected to human rights abuses;
- ***working*** towards transparency of decision making – which research shows makes for more ethical decision-making (Glasius 2005);
- ***ensuring*** a range of voices are heard, not only large, well-resourced Northern NGOs but grassroots associations, movements and ordinary citizens, and that there is greater equity among those voices. This happening through various collaborations: for example, coalitions of community movements in the South, and via North-South campaigns, such as the Narmada Dam Movement (Dicke et al 2007);
- ***mobilising*** ordinary people to participate in and influence decision-making. Examples of recent mass mobilisations include GCAP, the worldwide protests against the Iraq war, and the Jubilee 2000 debt relief campaign;
- ***new/strengthened*** partnerships, for example, between civil society practitioners and academics. One such potential partnership, 'Demo-

cratizing Global Governance', arose from the Ontario meeting, 'The Voices of Global Civil Society'. There are plans for a civil society university that would provide professional development for a range of practitioners, and thereby strengthen the skills capacity and networked nature of global civil society.

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It is indeed a pleasure for me to be here at this important and distinguished Forum. I am especially pleased as I am kind of here by default: I was not actually David's first choice. My colleague and friend Yazini April of the Africa Institute should have been here. Unfortunately for you and fortunately for me she could not be here, so here I am. I guess you could call me David's number two Tutu.

Good governance, as you know, refers to exercising political, economic, social and administrative authority and the management of a country's affairs at all levels. It includes the complex mechanisms, processes and institutions through which people and groups articulate their interests, mediate their differences and exercise their legal rights and obligations. Good governance includes the state, private sector, judiciary, media and civil society as all these sectors are critical for deepening democracy, realising rights and eradicating poverty. It is commonly accepted that a vibrant civil society is necessary for democracy to flourish.

South Africa's civil society was most vibrant during the mass democratic movement in the country. There was a dynamic, broad-based movement of peoples' organisations ranging from religious organisations, youth and students, professional organisations, trade unions, civic associations, professional bodies, NGOs and a range of others.

It was focused on making the townships ungovernable and was characterised by civil disobedience, non-compliance, non-payment of rent and violence. It reduced the state to exercise repressive violence and ultimately to de-legitimise the government. These features were necessary in the struggle to end apartheid but not really conducive to building a culture of civic obligation, responsibility and democratic behaviour. These associations were critical as agents of the liberation struggle but it was easier to organise boycotts of council rents than to persuade residents to become responsible citizens.

South Africa does have the advantage of having a history of civil organisations that many emerging democracies do not. The struggle against apartheid and the resulting growth of organisations was essential to the emergence of civil society as it appears today. However, the dynamics of the struggle necessitated resistance, secrecy and violence and it often resulted in organisations with inadequate governance structures, a lack of accountability and a reluctance to co-operate and share information.

While these organisations were critical to the eventual demise of apartheid, the dynamics also created difficult challenges for the transition and development of organisations in the post-apartheid era. Many civic organisations, once focused on protest and civil disobedience, had difficulty in defining a clear role in the new South Africa. Also many leaders of the civic organisations left their communities to pursue posts in the public and private sector. So the loss of leadership, mission and international funding in the NGO sector in the years immediately after 1994 further weakened South Africa's civil society.

Much of the international funding that supported the NGOs during the struggles, on voter education and elections, diminished once there was a democratically elected government.

Two years ago, in 2004, South Africa celebrated 10 years of democracy so we are not even a teenager nation yet. Many changes have occurred since the end of apartheid and democratic elections in 1994. The feeling of optimism about the promise of democracy and a new system are prevalent throughout the country but there are also deep concerns and problems.

A high unemployment rate, HIV/Aids, high infant mortality rate, low life expectancy and high levels of criminal activity continue to plague the country. The system of apartheid has left deep scars and a legacy that has created deep divisions between the wealthy and the poor, educated and uneducated, skilled and unskilled. Radical reforms have been undertaken in nearly every sector but it will take years to repair the damages wrought.

For more than 40 years, a country's black majority population suffered under a system of racial separation that fostered white supremacy and denied blacks the right to vote, access to free basic education and freedom of movement. Under apartheid, as you know, South Africa maintained disparate education systems organised along racial lines with vastly inferior institutions catering to black students.

South Africa is still a country of great contrasts. One travels down modern highways to shopping malls that could be in any developed country, yet one also passes people living in abject poverty and disease. 50% of South Africa's 47 million people live below the poverty line. The blacks make up 75% of the population yet it appears that the wealthy areas are still mostly white enclaves.

While the conditions of poverty, unemployment, disease and crime are daunting, the optimism one hears from citizens about the prospects of democracy and reform are inspiring. South Africa has experienced an overhaul of government services, the creation of a democratic constitution grounded in human rights and a free press. It is also promising that legislation in just about every domain from policing and education to local government places particular emphasis on the importance of public participation. In fact, it is a constitutional requirement, without which no policy or legislation-making process can advance.

Despite this, citizen participation in governance is considered weak in South Africa from public meetings to voter participation. In 1996, three million fewer people voted than in 1994 in both government elections, and less than half the electorate participated.

People are still trying to make sense of democracy and the links between democracy and economic development. Many promises were made at the end of apartheid about what democracy would bring. Up to today, many still question those relationships. Democracy is not only equated with personal freedom but also economic freedom and justice.

The unique thing about South Africa and its inhabitants is that, even though the country is in its twelfth year of democracy, things do not look good for many in terms of service delivery. Yet people are still relatively patient, optimistic and hopeful. Many are still trying to make ends meet, believing and trusting that things will get better and that it is better now than in the past.

The lack of capacity in some of the civil service organisations could potentially threaten the success of democratic consolidation. While there is a vocal embrace of democracy, there is some confusion when it comes to people's responsibility and experience with institutions of democracy.

The unrealised hopes of participatory democracy pose long-term danger to the rooting of democracy in South Africa. Promoting citizen participation in the democratic process of the country through education, community empowerment, development of community leadership, particularly at the local level, and strengthening the capacity of our civil society organisations is vital in the sustaining of a fledgling democracy like ours.

Promotion of democracy must go hand in hand with the development of true socio-economic justice promised to all South Africans and enshrined in our constitution.

This can be done and indeed this must be done.

Thank you.

“Dynamic civil society in the south : realities and restrictions in the promotion of a constitutional culture and its values”

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“Forum pour une alternative citoyenne, Femmes, Solidarité et Développement” (Mauritania)

» Introduction

A dynamic civil society is an asset in the promotion and construction of a constitutional culture, which is why its participation has been an imperative of democracy and good governance since the beginning of this millennium.

In the south, civil society draws this vague space between the state and the political spheres. It often has the reputation of being the prolongation of primary solidarities and, above all, of being the expression of informal vertical networks (community, clientelistic ...).

However, this does not stop it from playing a vital role even under the most authoritarian regimes (Mali, Mauritania, etc), where civil society has never been neutralised and/or without expression, contrary to what one might think.

What is the dynamism of this civil society not only in the construction and consolidation but also in the safeguard of this constitutional culture? What policies and programmes does it need to be more dynamic?

» A. The role of a constitutional culture and its values in construction and consolidation

Like many countries in the south in general and West Africa in particular, Mauritania experienced a kind of initiation into democracy with its 1991 Constitution. This constitution was characterised by its authoritarian context and therefore failure to apply it, an imbalance of powers between the executive and legislative branches and constant attacks against public freedoms ...all against a backdrop of:

- ***Power of*** exception with ethnic threats and tyrannical tendencies in power (1984-1991);
- ***Democratic deception*** (1991-2000): fragmentation of the political scene and disaffection from politics, renewal of small groups and untimely incursion into the political game by traditional society;
- ***Permanent instability*** with repeated coup attempts, tougher authority, obstruction of politics, etc...

This situation is reflected by political blockages, economic bankruptcy and profound social rifts finally leading to the coup d'état of 3 August 2005.

In spite of the weakness (lack of human and financial resources, expertise, freedom of information, convergence, mobilisation, etc), Mauritanian civil society still remained on the scene, with human rights organisations (those most persecuted by the different regimes) and development and health organisations, which replaced the state in several areas of the country and in different fields (food aid, health protection, literacy, etc). Nevertheless, as soon as it arrived, the Military Committee for Justice and Democracy (CMJD / new military authorities) announced a political transition that would end in the implementation of a democratic power in early 2007 and a source of great promises:

- ***Concertation*** (in three national concertation days bringing together representatives of all socio-professional and politico-ethnic categories, where they reached a convergence of views and harmonised positions on the situation in the country);
- ***Neutrality*** (which aroused great controversy but is now being confirmed);
- ***Opening*** (the desire to respect all treaties and agreements linking Mauritania to the outside world and ensuring its presence in the international arena.
- ***To lend*** more credibility to these promises, the military implemented new mechanisms, most of them on the recommendation of the national concertation days:
- ***Reform of the Constitution*** (based on a referendum with participation of over 85%);
- ***An Inter-ministerial committee*** (as a concertation framework);
- ***New institutions*** (Independent National Electoral Commission, a department for the promotion of democracy);
- ***Several observatories*** (National Election Observatory, Press and Audiovisual Authority) etc...

Thanks to the new institutional framework favouring transparency and the participation of different players, Mauritanian civil society is naturally involved in the democratisation process as a player and counter-power. It is helping a democratic, participative culture to take root (civic information, awareness and education with a view to different elections (municipal, legislative and presidential)) and even aspires to citizens' control of public action (birth of several civil society organisations, including *Association mauritanienne pour le Suivi-Evaluation*, a member of the AfriEv network).

By getting involved as a social and political interface, Mauritanian civil society, inspired by its counterpart in Mali, wants to help manage the risks that accompany any transition.

This organised action has been reinforced by new civil society organisations *(Cyberforum de la société civile, forum pour une Alternative citoyenne and Initiative pour un changement citoyen*, etc) and will trigger new actions (radio and/or mere citizens' broadcasts, (information, education and communication campaigns) for the electorate, training of civil society observers and even a project for monitoring and evaluating government action and its own organisations.

The government and new military authorities seem to be in favour and consider it a legitimisation of their "status". It even has a strategy for building civil society's capacity.

Development partners support and fund these actions, in spite of the complexity of their procedures.

Consequences of this dynamism:

After more than a year and after the recent elections, Mauritanian civil society will have succeeded in:

- ***marking its presence and imposing its place*** as the third sector after the private and public sectors (Mauritanian civil society is highly diversified, its backbone being development, human rights, democratic and socio-professional organisations, independent press and communities);

- ***playing a decisive role*** in national concertation and observation of elections, transparency and certain bodies (national election observatory, National Commission for Transparency) as a full partner;

- ***demanding certain provisions,*** such as the 20% quota for women's participation in decision-making circles (such as different elections), pay increases and improvement in standard of living, liberation of opinion etc...

All this obviously assumes that civil society has the capacities it needs to play its role. We find that there are certainly a lot of NGOs, but not many of them have real operating capacities and the ability to mobilise communities in the field, for example.

In spite of this dynamism, this civil society has to face countless weaknesses that limit the impact of its action and its power as an essential player in this democracy learning game.

They include:

- ***lack of*** organisation, communication, concertation and convergence of opinion (contradictory interests in the same context) which limits its mobilisation capacity;
- ***lack of*** human resources, expertise, funding and/or difficulty in accessing finance, which have considerably slowed down its institutional development and affected its independence etc...

» B. Role in safeguarding (or rescuing) the Constitution and its values

Civil society in our southern countries has sometimes also come to the aid of the Constitution. Not often, but it has happened. In Mali, for example, civil society literally drove out the government after countless blockages caused by the trickery of the authoritarian regime and its refusal to give in to the imperatives of democracy and the will of the people.

In spite of its weaknesses and the hostility and persecution to which it has been subject from the regime, it used the silent, oppressed opposition of a dignified people subjugated by trickery and hungry for freedom. It managed to mobilise and achieved convergence of opinion on a situation that had lasted quite long enough (around 40 years!).

Its impact was incredible, as it got the better of one of the strictest regimes in our sub-region, that of Moussa Traoré.

In Senegal, civil society went into play with the advent of alternation after long controversy and painful political and social duels.

Civil society also intervened in Benin, when it refused to allow anyone to touch the Constitution with the famous slogan "Hands off my Constitution" in a movement run, in fact, by a young woman.

» C. Policies and mechanisms needed to revitalise civil society in the south in its civic role

Based on this case-by-case analysis of Mauritanian civil society, which, as we have seen, is more or less representative of civil society in southern countries, there is an urgent need for policies and programmes to revitalise it and make it more independent. These include:

(I) ***The reinforcement of constitutional achievements:***

Strict respect for the Constitution and values;

Spread of civic and political rights set forth in the Constitution;

Preparation of a legal framework governing relations between civil society (its different organisations) with the government;

Liberalisation of the media and access to all ICTs (information and communication technologies);

Promotion of the right to information and the setting up of free community radio stations as vectors for dialogue and civic education etc...

(II) ***Human and material capacity building:***

Allocating a percentage of available funding and/or development aid to civil society organisations and facilitating their access to it;

Subsidising start-up and installation expenses as most of them have no self-financing capacity;

Supporting the implementation of concertation, mobilisation, good conduct, etc mechanisms;

Forming civil society organisations for accompanying grass-roots dynamics;

Sponsoring the professionalisation of civil society organisations etc...

(III) ***Greater involvement on the part of civil society organisations:***

In observation, control and follow-up mechanisms (elections, transparency, control of public action, evaluation of associative action);

In monitoring the government's activities;

In strategies and programmes (citizenship, democracy, etc) etc...

Conclusion

Finally, I would like to thank the North-South Centre and through it, the Council of Europe and the Venice Commission, for giving us, from southern civil societies, the opportunity to bring ourselves up to date.

The Lisbon Forum is always a real summer school and an occasion to hear the latest on the theme in question.

The subject of this year's forum was a topical one for most of us and we have great hopes for constitutionalism and its values, which certainly enable us to taste justice, equality and progress and help us forget the spectres of insecurity, intolerance, famine, ignorance, sickness and hunger.

I would also like to welcome the support and solidarity of the northern networks and of the European Union with the cause of our civil society and the policies and mechanisms set up to better involve it and the efforts towards greater respect for our constitutional values (the remarkable role of the observers of the recent elections in Mauritania, for example and institutional and financial support).

Finally, allow me to express the wish for citizenship to become a speciality in the media, so that the message is more digestible and accessible to the grass-roots that we represent and whom we must inform, whose awareness we must raise and whom we must educate on the principle of an endlessly open, dynamic democracy, on citizenship in defiance of anarchy and injustice, and on human rights as universal values. This is even more important, as Mrs Battaini-Dragoni said in her opening speech, "information is an essential vector in forming and guiding opinions".

Thank you for your attention.

"Constitution in Action!"

Chairmane Estment
Programme Co-ordinator
Conflict and Governance Facility (CAGE)

The findings of this paper are based on a qualitative methodological approach, drawing from the insiders' perspectives and adopting a case study design. Data was collected through literature review, personal documents, unstructured interviews and participant observation.[20]

"An attempt by ordinary people to safeguard their liberty, democracy and free will" is a definition of the Constitution of South Africa that was offered by a civil society activist[21] on South African television.

Certainly, as definitions go, this explains in essential and lay person's terms what should lie at the heart of any democratic constitution. With regard to the South African viewpoint, which represents my "Perspective of the South", I would like to use this definition as a starting point.

One of my favourite stories of South African history is the story of the process of the Freedom Charter of 1955. For those of you who are conversant with South African history, I hope that you will forgive me as I dwell a little on a version of the formation of the Freedom Charter.[22] In August 1953, the Cape ANC Leader, Z. K. Matthews proposed that a national conference representing all groups be called "to draw up a freedom charter for the democratic South Africa on the future." What followed then was a vibrant grassroots process that elicited from cities, towns, villages, factories and farms throughout South Africa, submissions that were written on the back of match or cigarette boxes, on scraps of paper and well-formed documents. Amongst these were the oral submissions penned by comrades who could take down the heart-felt dictation of many who sought for their voices to be heard.... and this during a time of police harassment and few organisational resources that could support such a mass popular response. Thereafter, there was the journey to the Congress itself. "Simply getting there was a matter of high adventure; particularly for those travelling by road. Hundreds of delegates were stopped along the route by police who used every possible means to obstruct them". But still they came...

The account goes onto to say that the gathering was reported in a British newspaper: "Large grandmothers, wearing Congress skirts, Congress blouses or Congress doeks (scarves) on their heads traipsed around with bagging suitcases, there were young Indian wives with glistening saris and shawls embroidered in Congress colours; grey old men with walking sticks and

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[20] *Babble, E & Mouton, J et al: The Practices of Social Research: 2006: Oxford University Press: 321*

[21] *The definition was recorded at the time of the television show, but not the specific person to whom it may be attributed*

[22] *It is acknowledged that history is subjective and dependent on the recorder and historiography. To capture some of the spirit of the process of the Freedom Charter, I favour an account in The Reader's Digest: The Illustrated History of South Africa: 1989: Reader's Digest Association: Cape Town*

Congress arm bands; young city workers from Johannesburg, with broad hats, bright American ties and narrow trousers, smooth business men, moving confidently among the crowds in well-cut suits ..." The ubiquitous security police were also well represented, taking photographs of every white face on the platform or in the crowd. (Reader's Digest: 388)

Albert Luthuli was to note that "nothing in history of the liberatory (sic) movement in South Africa quite caught the popular imagination, not even the Defiance Campaign. Even remote rural areas were aware of the significance of what was going on" and also contributed to it as part of the popular groundswell, no doubt.

And out of this came The Freedom Charter, a ground-breaking, even revolutionary[23] document that propounded a non-racial society, liberty and individual rights, adopted by the Congress of the People, at Kliptown, Johannesburg in 1955. Naturally and logically, the Bill of Rights, Chapter 2, of the South African Constitution[24] went on to expresses the tenets of the Freedom Charter and certainly captures the spirit of it.

And therefore I return to my opening definition that the Constitution of South Africa that legislated on the Freedom Charter and so many more fundamental governance and political principles certainly contained the attempts of "ordinary people to safeguard their liberty, democracy and free will".

So what of today and today's topic of "Constitutionalism and Civil Society" – a view from the South...?

Essentially, through the Electoral process, as laid out in the Constitution, the voices of ordinary people are represented by voting or not voting for the principles of a democratic nation.

In addition to the electoral process are the parliamentary-driven mandates namely: the legislative processes, the facilitation of public participation and constituency presence promoted by all ten Legislatures of South Africa.

Further, there is local government, the arm of government closest to the people and the coalface of service delivery. At this sphere, there are District, Local and Ward Councillors to address hierarchical levels of needs.

There are also structured meetings and feedback sessions with the people, inter-governmental Imbizo's[25] (essentially government walking about within the community and eliciting on-the-ground viewpoints and seeing local conditions).

These are constitutionally supported and the active work of government in all its spheres. All of these need capacity, hard work, sound governance and political will to be effective.

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[23] *It is noted that the Charter was regarded by liberal and Marxist analysts as an essentially moderate document*

[24] *Constitution of the Republic of South Africa: 1996: No 108 of 1996.*

[25] *Isizulu word for "gathering" to discuss important community issues and to foster social ties*

Beyond these, for democracy to be vibrant and relevant there must be strong voices outside of government. Indeed, those voices are expressed by people living ordinary lives and by their using their freedom of expression. However, there is a huge diversity and variety of the issues that ordinary people want to and should raise in order "to safeguard their liberty, democracy and free will". Many of these issues are articulated through civil society interest groups. More importantly, they are largely heard and listened to through the collective civil society processes.

Thus, civil society does become an important expression of the Constitution "in Action"! Not surprisingly, civil society is often described as the third sector, forming a key component of the triad with government and business. At this juncture, many journalists would find me remiss if I did not extend that triad to a quadrant and highlight that the popular press is often singled out as a fourth sector. Certainly, the media are a very well developed voice both for government and outside of it.

What then of the organisation that I represent, the Conflict and Governance Facility, as a case study from the South that will add a dimension to the topic of "Constitutionalism and Civil Society"?

Before I explore that specific, I should just contextualise the Conflict and Governance Facility (or CAGE as it is more popularly known). CAGE is a grant maker, wholly funded by the European Union, under the European Union Programme of Reconstruction and Development and implemented by the South African Government through the National Treasury. It funds civil society organisations to undertake social science research in the conflict and governance sector. It supports research that will inform or critique the South African policy space. Its objective is to improve national policy, decision-making and implementation on issues related to foreign and domestic policy that mitigate or cause conflict.

Whereto then, the link to "Constitutionalism and Civil Society"?

Good robust social science research must be grounded in the people - ordinary people. Good robust social science research that informs policy must also be drawn together by civil society (academic institutions, non-governmental think tanks, emerging research organisations) and presented to the government so as to create, strengthen, inform and describe and even question policy. This does not mean that government itself should not undertake research. However, there must be the countervailing wisdom that should emerge from independent research. Thus for South Africans (and I am sure it holds good for many nations), a cherished notion around constitutional democracy is that of the ***"space"***.

Therefore good, robust social science research must have space to contribute to safeguarding liberty, democracy and free will of ordinary people. The ultimate safeguard of that space is the Constitution and a key element of the "troops" that guard that space is provided by civil society.

CAGE thus brings an important resource, money, to those in civil society who undertake good, robust social science research. And in SA, where money is desperately needed (and certainly ring-fenced) for basics such as health services, food, water and homes, research funding could be considered a luxury that should come later...Yet, it has been established that research has a strong, positive correlation to GDP and, of course, GDP is essential to address those very basic needs for food, water and health.

Beyond the money and equally importantly, a CAGE grant means that the grantee is the intellectual property holder of the research and, as such, may indeed use the research to feed into that space. Therefore, for me, the links between CAGE, constitutionalism (as living policy) and civil society are quite pronounced. And allow me to pronounce them...

The direct beneficiaries of the grant are civil society research organisations. The indirect beneficiary of the research is government who may or may not take up the findings of the research for policy ends. The ultimate beneficiaries are the ordinary people of South Africa who as the "consumers" of policy should have a better service delivery and lives based on well researched policies.

Indeed, in a recent independent review of CAGE,[26] it was found that "a unique niche of CAGE" in the research sector that is marked by fierce competition, damage limitation (should the research not be "popular") and conflicting points of departure, is that CAGE provides a "safer space" for inclusive stakeholder engagement. CAGE has tried to make this more explicit through fostering collaboration by calling together grantees at regular intervals in a gathering called the "CAGE community". This young initiative is to foster CAGE stakeholders to "co-operate and work synergistically within a community of often competing and often conflicting interests" so that a knowledge network in the sector is realized with ultimate benefits, we hope, for policy makers.

Further to this, "CAGE's potential is of placing independent policy research in the public policy arena and in a form that is useful to those active in implementing it".[27]

Certainly for a young democracy such as South Africa, but where the independent "space" is closely watched and guarded, and the civil society movement is organised and strong, CAGE's relationship with its grantees is watched carefully. The fact that intellectual property is vested in the beneficiary organisation is valued. Organisations have felt confident about the dissemination of research within the democratic "space". This is done in the knowledge that civil society is aware of their needs to be an additional "research voice" that is not directly commissioned by government with government as the client and the power to "shelve" the research. As CAGE's research reaches further and wider into the public domain, this independence of view will be reinforced.

[26] *Herman A & Mbokota G: Conflict and Governance Fund Mid Term Review: February/March 2006*

[27] *Herman A & Mbokota G: Conflict and Governance Fund Mid Term Review: February/March 2006*

Thus, in terms of the tenets of constitutionalism, it is hoped that CAGE does work towards realizing "the constitution in action" through providing civil society and government with research that enhance policies that give practical expression to the Bill of Rights and, in fact, all Chapters of the Constitution.

I should like to demonstrate with but one practical example of this – using CAGE funded research on intergovernmental relations (Chapter 3 of the Constitution) that undertaken by the University of Western Cape. In a recent well known (in South African and, even international, terms) challenge around the local governance of the Cape Town metro, inter-governmental relations were put to an important constitutional test. It is claimed that some of this research fed into the resolution of this conflict in Cape Town's local government. Certainly, civil society played its role in terms of raising awareness of this issue, but research also played its role, the letter and law of Chapter 3 played a role and, of course, politics played a role!

But one practical example of many where the interface between research, legislation, civil society activism, government and the lives of ordinary people play themselves out in a Constitutional democracy.

CAGE supports many more of these initiatives through a "package of support" that is offered. This includes individual, personalised response around CAGE issues, access to networks, technical assistance, platforms for peer review, a focal point for research dissemination, access to other funders as well as the rigorous due diligence and other reports that provide the recipient organisation with verifiable, well documented "track record" to apply for funding from other sources. So projects range from "The People shall Govern" – exploring public participation towards consensus for policy-making as undertaken by the Centre for the Study of Violence and Reconciliation to re-drawing the poverty line, based on an Asset vs an Income Approach as completed by Development Policy Research Unit and quoted in President Thabo Mbeki's State of the Nation Address of 2006.

South Africa, I would like to believe, is alive to the possibilities of mechanisms to promote civic culture, CAGE being one of them - and acknowledged as the first of its kind, a real experiment. However, the experiment has been noted internationally when unsolicited consultations were held with CAGE for it to share learning from this model with the United Nations "Dialogue with the Global South: Building UN Capacity through University Partnerships"; a potentially similar project planned for Vietnam within the ambit of the Department for International Development (DFID) as well as the Southern African Trust that sets out to widen participation in policy dialogue with a regional impact on poverty. It is a newly created independent, regional non-profit agency in South Africa.

My conclusion is thus: as a case study and endeavour of the co-operation between the North (European Union) and the South (South African government), CAGE indeed has played and will continue to play (until it closes in 2008), a role in strengthening civil society to work in the space that is held dear by constitutional democracy.

From the scraps of paper torn out of note books as people created the genesis for the constitution, to the grandmothers in colourful Congress clothes, adopting the Freedom Charter, under the watchful eye of the apartheid government, to the social science research of an increasingly stronger democratic nation, the Struggle goes on, although in a different shape and form...at the heart of it, ordinary people striving to ensure a better place for themselves, their families and the generations to come. People who must continue to believe that we indeed do have a South Africa that "belongs to all who live in it, united in our diversity"[28]

[28] *Preamble to the Constitution of South Africa: 1996: No 108 of 1996*

SESSION IV

Role of the media in the safeguarding of constitutionalism

Jim Baker
Director
Connections for Development

» "Role of the media in safeguarding the constitution: the creation of illusion"

In the United Kingdom, as in the rest of the world it would seem, the elderly are afraid of crime, they see themselves as the likely victims of an escalating crime rate. Parents all over the world are afraid to allow their children out of their sight in a public place because a paedophile might abduct their child. Women are nervous in night clubs because of the likelihood of someone putting a date rape drug in their drink and assaulting them.

Yet the facts show that elderly people are less likely to be attacked than younger people, children are much more likely to be attacked by a relative or close friend of the family; and alcohol is the most likely cause of date rape.

The problem is that facts are replaced by illusion. I was told by the editor of a regional newspaper in England a few months ago that facts and good news do not sell newspapers. So, and this is his example, quote "I don't care if 95% of immigrants in the South East of England are good citizens, if one commits a crime that is a story and if that crime involves an elderly person or a woman, then I have the beginnings of a campaign. Campaigns sell newspapers and if I can draw in local politicians all the better."

Once upon a time politicians were afraid of rumours, now the power of rumour to damage reputations has been replaced by the power of the media to create an illusion from a small number of facts. The illusion then feeds itself as each newspaper has to compete to be involved because the illusion sells newspapers. Then if the illusion is really truly effective it moves to television news and investigative journalism. It is a world where bad journalists can become the news rather than reveal the truth.

The power of the illusion to affect politicians

There is a movie that stars Alan Alda called `Canadian Bacon' in which the bungling President of the U.S. is facing an approval rating plummeting almost as fast as the economy. Desperate, he approves a ludicrous plan to create a new "evil empire"... Canada? The plan appears foolproof - that is, until one particular fool proves otherwise. Overzealous patriot Bud Boomer, the Sheriff of Niagara Falls, decides to take matters into his own hands and leads a rag-tag group of deputies on a daring and thoroughly misguided raid across the border.

This is ludicrous, just as ludicrous as the United States of America, that nation formed by migrants, being threatened by illegal migration from Mexico, as ludicrous as armed vigilante groups patrolling the USA/Mexico border. Yet real life presidential candidates met the vigilantes who patrol that border and the media made it into an issue of significant proportion, an issue that won or lost votes.

What is important is the illusion, and the vehicle for spreading the illusion. So President Bush can declare war against terrorism, Iraq, Canada it has no immediate effect upon the American people without the vehicle that spreads the message and that is the media, and the media can kill a message, change it through different emphasis just as easily as simply spread it. So politicians learn to speak to the media, and seek to avoid a message that will be negatively viewed by them. They talk to the electorate through the media (a translation service), always trying to double guess the way the message will be conveyed. Unfortunately this means we, the voters, rarely receive a true message.

The illusion and the power to corrupt democracy

I am sure you would expect me to comment on the veil and the way it has been portrayed by the media and the effect that it has had on politicians. I am not going to because I believe it is far too obvious an area of questioning that will feature within the debate.

I will comment, however, on the way migrants are seen across Europe, and the conflict this brings within the media themselves. A conflict that is most apparent between the tabloid press and the better quality press reflected here by the Times. The tabloid press states numbers of how many illegal migrants are hiding in a country, and attack the government because ministers cannot say how many people there are because no-one actually knows.

The nature of this press coverage is important because it shapes the debate. The debate becomes about illegal migration rather than about the contribution that migrants actually make to the economy. When people try to move the debate to the contribution that migrants make, the tabloid press shifts its argument to the number of jobs migrants are taking from people.

Once again the facts have no place, the illusion (illegal immigrant) becomes the issue and politicians react by formulating stronger and stronger laws to stop migration. Yet by 2020 the average age of the population of the UK will be 50 years of age, which means that the economy is not sustainable without migration. The reality is that pensions will not be paid and taxes will be insufficient without migration.

What should we want from the media?

This is the problem; we have the media we have bred. In the UK the media will do what ever it takes to sell newspapers so to a certain extent the answer lies with us. The reality is that we see everyone else through our own eyes. Possibly we do not have all of the facts but the media pampers our egos. Most of the

stories are based upon a criticism of another country, another set of values, another faith, another vision of the world. We buy into that because in a global world our country is becoming less significant and we need to be reassured and there is immense reassurance in being told others are less worthy or have less value than us.

So the problem with Islam is that its values seem to be getting stronger, whereas ours are not. The trouble with migration is that it is so full of ambition when we have become comfortable with our past success. The problem with Africa is it is so potentially powerful so we never portray its success, only its poverty and corruption.

So we are the problem. However the internet has created an alternative world where people can create their own media. They are and it is more radical and also more direct. It is also less about nations and more about people. It is fast becoming the vehicle for black people and migrants to express themselves.

Malick Diawara
Journalist
Tradecontinents

Mr President of the Lisbon Forum,
Ladies and Gentlemen of the North-South Centre,
Ladies and Gentlemen of the Venice Commission,
Ladies and Gentlemen,
Distinguished guests,

I would like to thank you for organising this Forum and for inviting me to speak on the role of the media in the safeguarding of constitutionalism.

I. Constitutionalism in question

Let us tell it like it is. In most countries of the south the most urgent issue requiring a solution is that of constitutionalism and constitutional democracy. So many developed countries, essentially in the north, have sufficiently established democratic institutions to be able to worry about constitutionalism as the last bastion against abuse of all kinds perpetrated by certain states against democracy and human rights.

So what is the situation in the southern countries?

A) The situation in southern countries

In my view, we must recognise the existence of different entities. There is the "institutional country" which is careful to ensure that, thanks to its discourse and the way it functions, it is understood and accepted abroad, the "real country", which has no perception of the sacred from the point of view of the " institutional country", and what I will call the "third country", which is all the people (and it's not always a minority) for whom the state, institutions and politics belong to a world with different codes.

We cannot therefore talk about constitutionalism without taking into account this cohabitation in the south between a formal and an informal universe. The explanation is simple. In order to anchor itself in the reality of countries in the south, progress towards constitutional democracy must be significant to their populations, otherwise it is only theory. The challenge is, above all, making constitutionalism concrete.

B) The need for a content that the people can identify

Here it is first a question of reaching an understanding on words. We know that the goal of this progress is to recognise the people's sovereignty over their rights and their duties, in a state that respects humankind, communities and the democratic way of transferring power. This sovereignty is either under the direct control of the people or exercised by the representatives of the people,

who embody the nation. The ideal terrain for constitutionalism is therefore that of a true state, i.e. a sovereign entity built around:

- ***laws*** recognised by all citizens and applicable without discrimination;
- ***a nation,*** i.e. populations with the common wish to live together;
- ***a clearly*** defined, delimited territory.

We can say that Africa, for example, is far from this pattern. I therefore feel that, if we are to lend constitutionalism a true sense, we must give it a content that the people can identify. Take constitutionalism as a means of regulating the transfer of power for example. Since the early 1990s, which witnessed the organisation of national conferences, i.e. people's constituent assemblies, Africa seems more at ease with regard to elections and their corollary – alternation. The opposition is fought ferociously but is more respected. The state is less and less a tool at the service of potentates and increasingly an entity in which everyone is recognised.

C) Beyond political constitutionalism, an economic, social and cultural constitutionalism

In countries that have come up against serious problems of development and outlets for their populations, political constitutionalism (separation and balance of powers) is not enough. Other kinds of constitutionalism are necessary.

- ***They are*** economic because the fight against poverty and for equity, equality and sustainable development is a priority for establishing true civil peace.
- ***They are*** social because tolerance of humankind and ethnic, religious, philosophical or other communities is an essential value in democracy.
- ***They are*** cultural because the time is no longer that of hegemony of one culture over another but of cultural diversity (according to Unesco).

I mean that, rather than words, it is on values that constitutionalism should be based in order to guarantee its continued existence. And this is where the media can come to the rescue.

II. The fundamental contributions of the media towards the establishment of constitutionalism

A) Demonstrating that democracy is not a political import

The greatest trap to be avoided, I think, is giving the impression that constitutional democracy is a political import. In other words, the message that the people get must not be "We're going to make democracy like..." but rather "We're going to build our own democracy". Democracy is not built from

nothing. Not all democratic countries are the same and Africa also has the right to be different. The source of this difference can be found, in my opinion, in the African kingdoms and empires of the pre-colonial period. Contrary to common belief, the African monarchies were not absolute. Through the Council of Elders and an extremely strict social organisation in which every person, every group had a role, the decisions were full of common sense, a common sense based on respect for the rules. Communication on constitutionalism should have a politico-cultural basis. This leads us to the question of the form and tools for transmitting the values and reality of constitutionalism.

B) Favouring national languages and ICTs

The gap in education between the different countries (institutional, real and third) requires real segmentation of communication. We are no longer just talking about the content of the message, but also the channel of access to political targets that have to be reached and seduced.

The use of international languages has its place but national languages have a larger one. This is why it is urgent to include the learning of local, non-maternal languages in basic education.

And there should be civic education broadcasts to make politics and institutions accessible to as many people as possible. The challenge is to instil true dynamics in order to achieve democratic awareness.

And new ICTs must have their say. Why? Because cyber-culture opens spaces that enrich access to knowledge with the possibility of checking information gathered.

C) Creating an environment of responsible media

Constitutional democracy cannot exist in a country without freedom or a variety of sources of information. And access for all to the media must be facilitated. The goal is to ensure freedom of expression and block all measures aimed at repressing opinions. This presupposes a sense of responsibility on the part of all and severe punishment for "troublemakers". In other words, constitutionalism is not possible in an environment where defamation is tolerated. Regulating the media does not have to kill freedom. On the contrary, it can help shed new light on the rules of the game.

The sense of responsibility and the challenges of constitutional democracy require the media to work with professional journalists, whose aim is not only to inform but also to teach the people with an awareness of quality at all times.

In one word or one hundred, the media can play a decisive role in establishing constitutional democracy in the south in general and in Africa in particular. There is, however, an unavoidable precondition. The features and advantages of constitutionalism must be clearly identifiable to the people. There can be no clear communication on a vague concept.

Thank you very much.

I
Appendix

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Agenda

Constitutional democracy today is recognised, more and more, as a transnational norm. The Lisbon Forum 2006 facilitates the debate on the character and the evolution of the constitutional and political systems of the North and South in a context of globalisation.

The Forum devotes its discussions to the guarantees for the respect of the constitution by the branches of government as well as civil society and the media (often referred to as the fourth power). The presentations by the panellists and the discussions highlight how the powers interact, influence and control each other in order to further the global values of democracy, human rights and the rule of law, foundation of good governance.

» 28 November 2006

8.00 – 9.00 Registration of participants

9.00 – 10.00 ***Opening Session***

- Mr Peter Schieder, President of the Lisbon Forum;
- Mr Claude Frey, President of the Executive Council of the North-South Centre, Council of Europe;
- Mrs Gabriella Battaini-Dragoni, Director General of Education, Culture and Heritage, Youth and Sport - Co-ordinator for Intercultural Dialogue, Council of Europe;
- Mr Gianni Buquicchio, Secretary of the Venice Commission, Council of Europe;
- Mr João Bosco Mota Amaral, Vice-Chair of the Portuguese Delegation to the Parliamentary Assembly of the Council of Europe, former President of the Assembly of the Portuguese Republic.

10h30-12h30 ***Session I : Parliamentary control of the Executive in presidential and parliamentary systems***

Oversight function is one of the essential duties of Parliament and a fundamental element of the democratic process. What are the constraints and limitations facing Parliaments in the performance of this duty? How can they be practically overcome?

Moderator: ***Mr Alfâ-Niaky Barry,*** Secretary General, African Parliamentarian's Forum for NEPAD

10h30-11h30 ***Introductions to exchanges and debate:***

Perspective of the North:

- Mr Ugo Mifsud Bonnici, Former President of Malta, Vice-President of the Venice Commission;
- Mrs Ana Catarina Mendonça, Member of Parliament, Portugal, Member of the Parliamentary Assembly of the Council of Europe;
- Mr Winluck Wahiu, IDEA International

Perspective of the South:

- Mr Ben Turok, Member of Parliament, South Africa, Vice-President of the Lisbon Forum;
- Mrs Fayka Al Refaie, Former Member of Parliament, Egypt;
- Mr Veda Baloomody, Lawyer, Mauritius

11h30-12h30 *Debate*

14h00-16h00 ***Session II: Constitutional justice – an effective guarantee of constitutionalism?***

Constitutional democracy implies the setting up of legal mechanisms to guarantee the supremacy of the Constitution in the legal order. What is the role of constitutional justice in the balance of power (legislative, executive, legal)? What are the difficulties encountered by the Constitutional Courts in their functioning and the fulfilment of their mission (to ensure the respect of the Constitution as a fundamental norm and the defence of rights and freedoms)?

Moderator: ***Mr Roger Vincent Calatayud,***
Lawyer, Commission Nationale Consultative des Droits de l'Homme de la République française

14h00-15h00 ***Introductions to exchanges and debate:***

Perspective of the North:

- Judge Stasis Staciokas, Constitutional Court of Lithuania, representing the the Presidency of the Conference of European Constitutional Courts;
- Mr José Cardoso da Costa, Former President of the Constitutional Court of Portugal, Member of the Venice Commission;
- Mr Antonie Iorgovan, Member of the Senate, Romania.

Perspective of the South:

- Mr Boualem Bessaïh, President, Constitutional Council of Algeria;
- Mr Hanafy Aly Gebaly, Union of Arab Constitutional Courts and Councils, Vice-President of the Supreme Constitutional Court of Egypt;
- Chief Justice Ariranga G. Pillay, Mauritius, representing the Southern African Judges Commission;
- Chief Justice L. Lehohla, Lesotho.

15h00-16h00 *Debate*

16h30-17h30 ***Session III: Civil society and the safeguarding of constitutionalism***

A dynamic civil society is an asset in the promotion and the building of a constitutional culture recognising the values of constitutionalism, democracy and the rule of the law. What policies and mechanisms should be set up to support the efforts of civil society aiming at reinforcing the promotion of a democratic civic culture?

Moderator: ***Mr Abdallah Zniber,***
Chairman, « Développement Démocratie »

Introductions to exchanges and debate:

Perspective of the North:

- Mrs Annelise Oeschger, President of the Conference of INGOs of the Council of Europe;
- Mr Filippo Addarii, Head of the International Programmes, Acevo;
- Mrs Fiona Holland, Editor, Global Civil Society Yearbook

Perspective of the South:

- Mrs Thandeka Tutu, Emory University;
- Mrs Fatma Bent Elkory, NGOs Platform, Mauritania;
- Mrs Charmaine Estment, Programme Coordinator, CAGE

17h30-18h30 *Debate*

» 28 November 2006

9h00-10h00 ***Session IV: Role of the media in the safeguarding of constitutionalism***

Constitutional democracy is inextricably linked to the freedom of press and the existence of responsible media. How can we guarantee freedom of the press and pluralism of the media (in light of political and commercial contexts) as well as an equal access to the media in order to strengthen democracy?

Moderator: ***Mr Michel Villan,***
CDMG member, Director of Directorate General of Social Action, Belgium

9h00-9h30 ***Introductions to exchanges and debate:***

- Mr Jim Baker, Director, Connections for Development
- Mrs Lois Acton, Journalist, ITV
- Mr Malick Diawara, Journalist, Tradecontinents

12h30-13h00 ***Closing Session :***

- Mr Peter Schieder, President of the Lisbon Forum;
- Representative of the Venice Commission;
- Mr José Carlos Correia Nunes, Executive Director of the North-South Centre, Council of Europe

II
Appendix

List of Participants

» *South Africa*

Ms Charmaine ESTMENT
Programme Co-ordinator
Conflict and Governance Facility (CAGE), Pretoria

Mrs Jessica LONGWE
Southern Africa Representative
European Parliamentarians for Africa (AWEPA)

Mrs Thandiwe PROFIT-MCLEAN
Ambassador
South Africa Embassy in Lisbon

Prof. Ben TUROK
MP
Parliament of South Africa

Ms Thandeka TUTU-GXASHE
Emory University
Atlanta
United States

» *Algeria*

Mr Boualem BESSAÏH
Chairman
Constitutional Council, Algiers

Mr BENZID
Director
Constitutional Council, Algiers

Mr Sabri BOUKADOUM
Ambassador
Embassy of Algeria, Lisbon

Mr Mohamed FEDEN
Member
Constitutional Council, Algiers

Mr Mohamed HABCHI
Member
Constitutional Council, Algiers

Mr Azzouz KERDOUN
Vice-Chairman of "DESC UN" Committe
Law Professor
University of Constantine

» Belgium

Mrs Diaka NDIAYE
Director
Sequoias Images

Mr. Michel VILLAN
Director
Directorate General for Social Affairs and Health
Ministry "Region Wallone"

» Benin

Mr. Alfâ-Niaky BARRY
Secretary General
African Parliamentarian's Forum for NEPAD

Mr André DASSOUNDO
Chairman of the "NEPAD" network
Parliament of Benin, Cotonou

» Burundi

Mr Schadrack NIYONKURU
Member of Pan-African Parliament
Bujumbura

» Cape Verde

Mr André Corsino TOLENTINO
Former MP and Member of Government

Mrs Nancy Curado TOLENTINO

» Cyprus

Mr Stelios GEORGIADES
Secretary
Embassy of the Republic of Cyprus in Lisbon

» Democratic Republic of Congo

Mr Léon MAKITU NZIUKI
Embassy of DRC in Lisbon

Mr Lokosu N'KULUFA
Embassy of DRC in Lisbon

» Egypt

Dr Faika EL-REFAIE
Former MP
Parliament ex Sub-Governor CBE

Ms Rania ELBANNA
1º Secretary
Embassy of Egypt in Lisbon

» France

Mrs Nadia BEY
Journalist
Radio Orient

Mr Roger-Vincent CALATAYUD
Lawyer; Expert-Consultant
"Commission Nationale Consultative des Droits de l'Homme de la République Française"

Mr Yacoubou DEMBELE
Chairman of RSCMF
Comité du 5 Décembre 2001

Mr Malick DIAWARA
Journalist
Tradecontinents

Mr Samir DJAIZ
Chairman
Platform "Migrants and European citizenship"

Mrs Brice MONNOU
Vice-President
"Forum des Organisations de Solidarité Internationale Issues des Migrations (FORIM)"

» Gambia

Mr Halifah SALLAH
Member
Pan-African Parliament, Banjul

» Germany

Mr Said CHARCHIRA
Director
European Centre for studies and analysis on migration

» Guinea

Mr Alhassan BARRY
Chairman
"Plateforme euro-africaine du codéveloppement (PEAC)"

» Kazakhstan

Mr Igor ROGOV
Chairman of the Constitutional Council of Kazakhstan

Mr Kanat SARSEMBAYEV
Head of the Legal Department
Constitutional Council of Kazakhstan

» Kenya

Hon. Mr Zaddock M. SYONG'OH
M.P.
Justice and Legal Affairs Committee
Kenya National Assembly

» *Lesotho*

Hon. Mr Mahapela L. LEHOHLA
Chief Justice of Lesotho
The Palace of Justice

» *Lithuania*

Mr. Egidijus VAREIKIS
Parliament of Lithuania

» *Mali*

Mr Yera DEMBELE
Director
"Liaison Franco-Africaine / FAFRAD"

Mr. Gaharo DOUCOURÉ
AFTAM (Mali)

Mr Hamadaou SYLLA
President of the NEPAD network
Parliament of Mali

» *Malta*

Mr Claude DEPASQUALE
Deputy Permanent Representative
Permanent Representation of Malta to the Council of Europe

» *Morocco*

Mr Boutayeb ABDESSLAM
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