Schriftenreihe zum Wirtschaftsrecht Lateinamerikas

Parallelimportregelungen im Patent- und Markenrecht in Lateinamerika
Von Patricia Bohn
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Das Recht der Verwertungs gesellschaften in Lateinamerika
Eine Untersuchung der kollektiven Wahrnehmung von Musikrechten in Chile, Argentinien, Kolumbien und Mexiko unter urheberrechtlichen und kartellrechtlichen Gesichtspunkten
Von Dr. Stefan Alich

Im vorliegenden Werk wird das Recht der lateinamerikanischen Verwertungs gesellschaften erst mals wissenschaftlich erläutert. Neben allgemeinen Informationen bietet das Buch eine fundierte Analyse der Systeme in Chile, Argentinien, Kolumbien und Mexiko.

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Inhalt

Abstracts ........................................................................................................................................ 289

Abhandlungen / Articles

Shizhou Wang
On Development of Criminal Law in the People’s Republic of China ........................................ 292

Dieter Welz
Democracy and the rule of law in South Africa: Observations on significant legislative and other developments after Polokwane ................................................................. 304

Andreas Baumer
Späte Sehnsucht nach la madre patria: Formen lateinamerikanischer Migration in Spanien ................................................................. 328

Kennedy Gastorn
Squatters’ Rights and the Land Laws in Tanzania ........................................................................ 349

Berichte / Reports

Stefanie Djidonou
Cornelia Glinz
The International Centre for Settlement of Investment Disputes 369

Julia Sattelberger
Der Europäische Auswärtige Dienst – Chance oder Risiko für die europäische Entwicklungszusammenarbeit? 381

Bibliographie / Bibliography 386
On Development of Criminal Law in the People's Republic of China

By Shizhou Wang, Beijing

This paper is trying to illustrate the main achievements of Chinese criminal law and explain the main problems in the development of Chinese criminal law. In historical review, this paper explains the significance of promulgating Chinese Criminal Code of 1979 in ending the revolutionary criminal law, building up a state ruled of law and summarizing the experience of the Planned Economy. With open and reform policy, Chinese criminal legislation adopted individual supplementary decision to resolve the problem of stability against further development. The Chinese Criminal Code of 1997 integrated 23 supplementary decisions promulgated between 1979 and 1997 as well as other criminal provisions into a complete and systematical code. In the new development after 1997, Chinese criminal law adopted new legislative methods of criminal amendment and criminal legislative explanation instead of supplementary decision according to the Legislation Law of 2000. This paper illustrates the new development and points out the Chinese criminal law is in the tendency of expansion. According to the requirement of human rights protection in the Amendment of Constitution in 2004, Chinese criminal law provides more and more protection for daily life and occupies the indispensible position, though civil law and other laws have gained much more significance in legal life.

According to the Author’s opinion, there are two serious problems in Chinese criminal law. One is high guilty line and the other is too many death penalty. The Author argues that Chinese criminal law should lower down the guilty line in order to resolve these problems. By lowering down the guilty line, Chinese society could improve the level of social safety, which would provide a good condition for abolishing death penalty, at least a de facto one. Although the principles of modesty and last method (Subsidiaritätsprinzip und ultima ratio-Prinzip) should be observed, the problem in China is not yet the over-regulated but still the less-regulated. The Author believes that it shall be allright as long as criminal provisions are clearly stipulated, the principle of proportionality is followed and the purpose of a criminal provision is to provide and not to deprive people of freedom. With further development, Chinese criminal law shall also pay more attention to its accurate stipulation and enforcement of criminal law.
Democracy and the rule of law in South Africa: Observations on significant legislative and other developments after Polokwane

By Dieter Welz, Fort Hare / RSA

The 52nd Conference of the African National Congress (ANC) held at Polokwane in December 2007 affirmed the ruling party as the key strategic centre of power in South Africa exercising leadership over state and society in pursuit of the objectives of the National Democratic Revolution. Specific Polokwane resolutions impact on the independence of the courts, law-enforcement agencies and the mass media. Aspects of the measures proposed for urgent implementation or already in place do not suit the requirements of the new Constitution. They either brazenly violate or seek to change these requirements – apparently for no principled reason and not inadvertently. These measures are widely seen as a potential threat to constitutional democracy in South Africa. They are discussed here with reference to the country’s complex political realities and its evolving patterns of constitutional development.

Late Nostalgia for la madre patria: Forms of Latin American Migration in Spain

By Andreas Baumer, Rostock

In the last two decades, Spain has undergone dramatic changes. The classic emigration country converted itself into one of the most important migrant-receiving countries in the European Union. Especially since the mid-nineties of the last century, migration to Spain experienced a massive acceleration, only curbed by the economic crisis starting in 2008. The percentage of citizens from foreign countries among the Spanish population increased from 1.3 percent in 1996 to 12.08 percent in 2009, exceeding the average figure of the traditional immigration countries in Europe.

Migrants from Latin America had a big share in this boom. At the turn of the century, Latin Americans, especially from countries of the Andean Region, became the predominant group among the migrant population in Spain – to an extent that led scholars to speak of a “Latin-Americanization” of the migration to the Iberian country.

Migration from Latin America to Spain became more dynamic more or less because of the same push- and pull-factors which determined migration processes originating from other regions: Poverty, unemployment and a general lack of perspectives on the one hand, and an apparently insatiable demand for work force in the booming Spanish economy on the other. But beyond that, some aspects rooted in the common history of la madre patria and their former colonies had a heavy influence on the development of these migration flows. A common language, the same religion and some kind of cultural vicinity provided to the Latin Americans some benefits compared to other groups, i.e. to Muslim migrants from Northern Africa. A great majority of the Spanish population prefers Latino migrants to immigrants from other regions.
Are migrants from Latin America indeed the “preferred of the 21st century”, as migration scholar Antonio Izquierdo Escribano stated? Are there public policies privileging migration flows out of this area against those from former migrant sending regions? Can we even identify elements of a new hispanidad in the public discourse on migration in Spain?

The article focuses on these questions. First, a concise account of the migration processes to Spain and the migration policies of the Spanish Governments in the past two decades will be given. Then, forms and dynamics of Latin American migration will be explored. Finally, the political, social and juridical framework of Latin American migration to Spain will be analysed and debated.

Squatters' Rights and the Land Laws in Tanzania

By Kennedy Gastorn, Dar es Salaam

This paper discusses the position of land law in mainland Tanzania in relation to those who hold land outside the formal legal regime, in particular squatters, also referred to as informal landholders. It traces the concept of squatting and its evolution in the Tanzanian land legal regime. The paper analyses the land tenure position of squatters in the courts of law, the National Land Policy and the new land laws. It discusses the schemes of validation and regularization of interests in land under the Land Act, 1999 as the squatters’ main options to formalize their title to land. The future of squatter’s land rights is also discussed. In this paper Tanzania means Tanzania mainland (Tanganyika) because although Tanzania is a union, land is not among the articles of union and therefore each part of the United Republic of Tanzania (Tanganyika and Zanzibar) retains sovereignty as far as land administration and management are concerned.
ABHANDLUNGEN / ARTICLES

On Development of Criminal Law in the People’s Republic of China

By Shizhou Wang, Beijing

I. Introduction

Even in the modern legal system, criminal law is still occupying the indispensable position, if we do not say that it is the most important position. In China, this is particularly true. With social and economic development, civil law and other laws have gained much more significance in legal life. However, criminal law has still provided legal protection of the highest standard for society. The role of criminal law has never been ignored. Criminal law shall be cautiously stipulated and implemented, due to its natures in depriving people’s property, freedom and even life. The principles of modesty (Subsidiarität) and last method (ultima ratio-) shall be seriously observed. How to correctly use criminal protection is an eternal topic not only for criminal law science but also for the legal science at large.

If we make a brief review of legal history, people shall agree with the reality of expansion of criminal law. On one hand, criminal law provides legal protection for more and more areas in order to meet the social demands. It no longer limits itself in the traditional legal interests (Rechtsgüter) of life, body and property. Rather, the forefield (Vorfeld) of criminal law protection has been expanded to trust, credit, information, environment, as

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1. According to China’s Efforts and Achievements in Promoting the Rule of Law, the White Paper published by the Information Office of the State Council of the People’s Republic of China on February 28, 2008, there were 229 laws promulgated by the National People’s Congress and its Standing Committee by then, of which, 32 were civil and business law, 54 were economic law, 79 were administrative law, and criminal law had only 1.

2. In China, for example, Emperor Bang Liu of Han Dynasty (in about 207 BC) made his first agreement with the people by only three provisions: any one who kills shall be executed and any one who injures or steals shall be expiated. However, the famous Tang Code promulgated by Emperor Shimin Li of Tang Dynasty (in about 637 AC) has reached 12 Titles with 30 Volumes and 502 articles already. See: The Compilatory Group for History of Chinese Legal History in the Editorial Division of Legal Textbook, Chinese Legal History, Press of the Masses, 1982, pp. 129, 205.
well as to attempt and preparation. On the other hand, the minimum criminal punishment stipulated in a criminal provision keeps lowering down while the areas under the protection of criminal law are moved further into the forefield. This is a world-wide tendency for criminal law development. China is also going in this direction. However, it is a serious question for Chinese academia of criminal law to consider how to avoid a misuse of criminal law and how to keep the protection of criminal law conforming to the requirements of rule of law.

In this paper, I would like to illustrate the main achievements of Chinese criminal law and explain the main problems in the development of Chinese criminal law. I would like also very much to welcome any comments and critiques upon the solutions I suggested to the direction of further development of Chinese criminal law.

1. Historical Overview

Current Chinese Criminal Law (hereafter the CCC) was promulgated in 1997. It is a revision of the Chinese Criminal Law of 1979 (hereafter the CCC 1979). In structure and theoretical basis, both of the codes share many similarities. However, the difference between each code rests not only on the degree of delicacy and comprehensiveness but also on its basic attitude towards the spirits of rule of law, if we can observe them with a viewpoint of historical development. There are some characteristics worthy to mention on the CCC 1979.

Firstly, it began to end the practice of the so-called revolutionary criminal law in China. The most distinct nature of the revolutionary criminal law is its ignorance to the principle of legality. After the People’s Republic was founded in 1949, criminal law in China was mainly composed of three parts. The first part was individual regulations such as those concerning the crimes of counter-revolution and corruption, which were enacted in the beginning of 1950s. The second part was the policy of the ruling party of Chinese Communist Party (hereafter the CCP) and the governmental regulations. The third part was the 22nd draft of the Chinese criminal code. The legislation of the Chinese criminal code actually began in as early as 1952. In 1957, the National People’s Congress (hereafter the NPC) distributed the 22nd draft to law faculties, governmental organs, people’s courts and procuratorates, in order to collect suggestion, comments and criticism for a final bill. However, the process of this legislation was interrupted by the so-called anti-rightists movement and other political unrests until the late of 1970s. But the 22nd draft of the criminal code had been used as the guidance in legal practice since then. The promulgation of the CCC 1979 means an ending of this situation.

For the English texts of the Chinese laws mentioned in this paper, please see http://www.lawinfochina.com/.
The text of this 22nd draft can be found in Mingxuan Gao & Bingzhi Zhao (Ed.), General Collection of the Documents and Materials of the Criminal Legislation in the new People’s Republic of China, Press of China People’s Public Security University, 1998, pp. 252-281.
Secondly, it was an important step in building up a state of rule of law. The most pain-
ful lesson China got from the so-called Cultural Revolution was that a state without law
would eventually fall into terrible chaos. The death of the President of the People’s Repub-
lic, Mr. Liu Shaoqi, and the exile of the General Secretary of the CCP, Mr. Deng Xiaoping,
was good examples. After China survived from the disorder of the Cultural Revolution, it
became the common understanding in the Chinese leadership to promulgate laws and to
build up a state of rule of law. In the CCC 1979, the most notorious acts rampant during the
Cultural Revolution were provided as a crime, such as the so-called “beating, smashing and
looting”, which means to assemble a crowd and to cause a person’s injury, disability or
death or the public or private property destroyed or taken away. It was proved that the CCC
1979 became one of the key footstones for the Chinese legal system to move towards rule
of law.

Thirdly, it was the summary of the experience of the Planned Economy. Before 1979,
the term of “market” was negatively deemed as a bourgeois or petty bourgeois one. The
practice of the Planned Economy had ever been guaranteed by the Constitution until 1993.
Under the model of the Planned Economy, the State needs to build up a huge administra-
tive system to guarantee the implementation of the state’s plan. This administrative system
could suppress the occurrence of crime and petty illegalities. However, the effectiveness of
the Planned Economy was at the expenses of economic development and the individual’s
initiatives. In the CCC 1979, for example, the crime of the so-called “speculation” in Arti-
cles 117 and 118 prohibited, with the maximum punishment of death penalty, trading with-
out authorization between two places far away from each other.

Almost at the same time when the CCC 1979 was promulgated, great changes took
place in China, too. With open and reform policy, economic model and social life changed
significantly. The old system was being reformed, however, the new system was still being
constructed. As the first criminal code with limited experiences from the Cultural Revolu-
tion and the Planned Economy, the CCC 1979 found itself difficult in dealing with social
problems. But the newly established legal system need stability and could not start all over
again immediately. A new type of criminal legislation was adopted: individual supplemen-
tary decision. From 1979 to 1997, there were 23 supplementary decisions adopted.5 These
23 supplementary decisions revised the CCC 1979 significantly, some of which were
necessary and correct but some were problematic. The notable revision could be obviously
seen in the Specific Part. The total number of the provisions in the Specific Part was
greatly increased. A large amount of new crimes was added into the Specific Part, most of
which were economic or business related crimes, such as financial fraud, crimes by violat-
ing corporation law, taxation violation (including the crime against the special invoices for

5 There was another decision on exercising criminal jurisdiction over the crimes prescribed in the
international treaties where the People’s Republic of China is a party or has acceded, which was
promulgated by the Standing Committee of the National People’s Congress on June 23, 1987. If
this Decision was calculated, the number of the Supplementary Decisions shall be 24.
Wang, *On Development of Criminal Law in the People’s Republic of China*

Value-added Tax), but also other crimes such as aircraft hijacking, copyright and trademark violations. Some of existing crimes were revised by enhancing severe degree of punishment, unfortunately, even to death penalty. The examples of these types of crime were crimes of seriously endangering public security, smuggling, and corruption (embezzlement and bribery). Revisions in the General Part were also significant. However, some of the revisions were necessary and appreciated while some were problematic, too. The most important revisions were followings: *As to the jurisdiction*, universal principle was added to the crimes which China should undertake its obligation of jurisdiction according to the international treaties. Retroactivity was even possible for economic crimes in some cases when the accused failed to surrender himself in a required period of time. *As to the criminal subject*, unit crime (corporate crime) was now introduced into the criminal law. *As to the criminal punishment*, aggravating punishment was possible for the cases in which a convicted criminal escaped from the custody and attacked the witness or victim or the person who reported his criminal activity. The regulations for the application of monetary punishment like fine became much more complicated. Revisions on the rules for joint crime and probation were also made.

Since some of the principles in the General Part of the CCC 1979 were revised or supplemented, the problems in these newly promulgated decisions could not be ignored, because they were inappropriate and conflicted with other provision. Particularly, the problem of too many provisions with death penalty has been under sharp critique. However, it is fair to say that these newly promulgated decisions provided an urgent protection of criminal law for the Chinese society and supported the proceedings of the reform undertaken in China. In order to resolve problems in the criminal law, a reform was advocated even in the end of 1980s. Theoretical circle began their works even earlier. The legislative revision began in the middle of 1990s and was accomplished with the CCC 1997. The CCC 1997 has great significance in the development of Chinese criminal law. *Firstly*, the principle of legality was statutorily established finally. Art 3 of the CCC 1997 stipulated that any act deemed by explicit stipulations of law as a crime is to be convicted and given punishment. The provision of analogy in the CCC 1979 was deleted. The promulgation of the principle of legality indicated that the Chinese process of rule of law was irreversible. *Secondly*, the whole Chinese criminal law was completely integrated. Previously, there had been more than 130 provisions in the Chinese economic law, civil law or administrative law, which stipulated that any violation thereof might undertake criminal liability “in comparison with” or “in accordance with” the relevant stipulations of

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6 For example, Art. 2 of the Decision Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy in 1982 stipulates: if the offender voluntarily surrenders before May 1, 1982 or if he truthfully confesses all his crimes and brings truthful accusations with respect to the facts of crimes of other criminals before May 1, 1982, he shall be dealt with in accordance with the provisions of the old law. If the offender refuses to surrender voluntarily, he shall be taken as continuing to commit crimes and shall be dealt with in accordance with this Decision.
the criminal law. All of them were completely integrated into this Criminal Code after careful consideration. Even the military crimes were included into this Code. Substantively, all of the criminal provisions were systematically arranged into one consecutive body. Supplementary decision is still possible. According to the Chinese Legislature Law of 2000, however, any supplement shall not conflict against the principles of the Code itself any more. Thirdly, the definitions of crimes were much better specified. Some of them were revised, e.g., the so-called crime of counter-revolution was revised as the crime of endangering national security (Art. 102 - 113). Some were refined, e.g., the crime of dereliction of duty was increased from 7 articles in the CCC 1979 (Art. 185 ff) to 22 in 1997 (Art. 397 ff) plus many relative ones in other chapters. Some of the articles were abolished. For example, the crime of speculation was originally for violation of the laws and regulations on the control of monetary affairs, foreign exchange, gold and silver, or on the administration of industrial and commercial affairs. Now, it was replaced by the crime of manufacturing and selling counterfeit goods (Ch. 3) and the crime of disrupting market order (Ch. 6) in the new law. The crime of hooligan, which was used to be a catch-all provision for engaging in affrays with an assembled crowd, creating disturbances, humiliating women in public place, was criticized as unclear and too broad. In the CCC of 1997, it was broken as the crime of affrays with an assembled crowd (Art. 292), the crime of disturbances (Art. 293) and others. Fourthly, there were plenty of new crimes added into the new laws. The increasing numbers in economic crime and in crime against social administration were so many that this Criminal Code had to adopt a new legislative skill, i.e., to create sections under Chapter III Crimes of Undermining the Order of Socialist Market Economy and Chapter VI Crimes of Disrupting the Order of Social Administration. Of these revisions, the most important crimes newly added are the crime of underground society (Art. 294), the terrorist crime (Art. 120 ff), the crime of inciting national enmity or discrimination (Art. 249), money laundering (Art. 191), computer crimes (Art. 285 ff), security fraud (Art. 180 ff), crime against land resource (Art. 228), the crimes against business secrets (Art. 219), the crimes of unlawfully depriving personal freedom in order to get payment of a debt (Art. 238) or to compel people to work (Art. 244), the crime against witness (Art. 307), the crimes against environment and resources (Art. 338 ff), the crimes against the national defence (Art. 368) and more.

With the CCC 1997, we can say that China has successfully built up a framework of a modern criminal justice system in the field of substantive criminal law. It is modern

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See Mr. Hanbin Wang, Vice-President of the Standing Committee of the National People’s Congress, Illumination on the Criminal Code of the People’s Republic of China (Bill of Revision) in the Fifth Session of the Eighth National People’s Congress on March 6, 1997, in The Gazette of the Standing Committee of the National People’s Congress, No. 2, 1997, pp. 219, 220.

The 23 Supplementary Decision were also integrated into the Code, part of which was totally integrated and no longer applicable (as listed in Appendix I of the Code), others were integrated with the part of criminal liability and no the part of administrative punishment (as listed in Appendix II of the Code).
because it recognizes the principle of legality. It is still a framework because there are still many details to be filled in.

2. New Developments

After the CCC 1997, the development of the Chinese criminal law went into a new stage. The CCC 1997 really remains stable. Since then, there was only one decision supplemented to it. That was the Decision on Suppression of Fraudulently Purchasing, Evading and Illegally Trafficking Foreign Exchange promulgated in 1998. After this decision, the Chinese legislature abandoned this type of legislative skill and adopted amendments and legislative explanations as its main methods to keep the Code up to date. The adoption of new legislative methods shows the sincere efforts of the Standing Committee of the National People’s Congress, who holds the constitutional privilege to amend and explain the Constitution and laws, to follow the requirements of rule of law. With the social and economic development in China, criminal law needs developing, too. Besides that decision, there were 7 amendments and 9 legislative explanations made to the CCC 1997 by April of 2010. A brief introduction to these supplements can be summarized as followings:

As to the Decision on Suppression of Fraudulently Purchasing, Evading and Illegally Trafficking Foreign Exchange, the purpose was to improve the protection of foreign exchanges in China. If we can still remember the Asian financial storm in the end of 1990s, this Decision will be highly appreciated. The key point of this Decision was to create a new type of crime, i.e., fraudulently purchasing foreign exchange. In addition, the prohibition for the state-owned company was expanded to all kinds of company and institute to deposit foreign exchange abroad without authorization or to illegally transfer foreign exchange abroad. The managements related to foreign exchange such as Customs and foreign exchange administration were also under the cover of criminal law now. The First Amendment to the CCC was promulgated in 1999 with the purpose to strengthen the protection of the order of market economy. New criminalization was made to protect document of account such as financial invoices, books and reports, etc.. The bankruptcy of the state-owned company was under supervision of criminal law now. Punishments for illegally establishing banks, stock or futures exchanges, insurances, and other financial institutes, as well as the inside trading, were increased. Protection of stock and futures exchanges from rigging price or false information was strengthened by detailed definition and severer punishments. Almost at the same time, the first legislative explanation was issued in 2000, clarifying the meaning of “the other persons who perform public service according to law” as a state functionary in Art 93 of the CCL 1997. Accordingly, the personnel working in the rural grassroots organization, such as the member of a village’s committee, should be regarded as state functionaries when they assisted the governments to do the administrative management, such as to relieve the victim from a disaster, to deal with emergency, or to collect taxes, and so on. The Second Amendment was promulgated in August of 2001 with the purpose to strengthen the protection of cultivated land and woodland. Accordingly, the
illegal land development should be strictly prohibited. Meanwhile, the second legislative explanation was issued in 2001 to unifying the meaning of “land” in the criminal law with the law of land administration, the forest law, the grassland law and other administrative regulations. The Third Amendment was promulgated in December of 2001 in order to strengthen the struggle against terrorist activities. Punishments for organizing, leading and participating in a terror group were significantly enhanced. Financing terrorist activities was incriminalized. The suppression to terror-related crimes such as explosion, poisoning and arson, money laundering or spreading false terrorist information were improved. The crime of poisoning was expanded to producing or trading any kinds of substances of poisonous, radioactive and pathogen of infectious diseases. Somewhat related, the third legislative explanation of April of 2002 clarified the meaning of “the organization in the nature of criminal syndicate” in Art. 294. To be a criminal organization, accordingly, it should be relatively stabilized in organization, rather strong in economic capacity, several times in committing crime and illegal activities, and strongly influential by connivance or shield of a state functionary.

In 2002, there were two other legislative explanations. The one in April of 2002 provided the meaning of “for his own use” for the crime of misappropriation in Art 384, which was referred to a State personnel who takes advantage of his office and misappropriates public funds for his own use. Accordingly, any circumstances shall be included, as long as it was the perpetrator who made the decision to provide the public funds for a private use or it was he who attempted to gain personal benefits. The one in August of 2002 provided the meaning of “disobeying judgment or order made by a people’s court with capacity” for the crime of refusing to obey the decision of a court in Art 313. Accordingly, any acts of hiding, transferring, intentionally damaging the property or selling the property in an obviously low price should be covered in the meaning.

On December 28 of 2002, the Fourth Amendment was promulgated. The purpose of this Amendment was to strengthen the protection of the order of medical administration and Customs as well as natural resource and labor conditions. Punishments were enhanced in order to protect medical apparatus and instruments, medical hygiene materials. Illegally importing waste materials was now completely prohibited, not matter they were in forms of gas, liquid or solid. Employing people under 16 years old to do hard or dangerous work was incriminalized. Illegally lumbering was under heavier punishment than before. Judicial officials were facing more severe punishment for the misconduct in bending the law for selfish ends or twisting the law for a favour. On the same day, the sixth legislative explanation clarified that the crimes of dereliction of duty in Chapter 9 of the CCC 1997 should apply to any person who exercised the authority on behalf of the state, no matter he did so was according to law or upon the trust of a governmental office or because he was performing a public service in a governmental office without formally listed as a state functionary. The Fifth Amendment was promulgated in 2005 to improve the protection on credit card management and the crime of sabotaging military weapon, equipments, facilities and communication. Accordingly, knowingly possessing or transporting large amount of coun-
terfeited credit card or illegally possessing large amount of other’s credit card would be a
crime. Before and around that time, the criminal legislative explanations of 2004 explained
the meaning of credit card and included all types of cards issued by a bank or financial
institute with the function of paying, transferring, depositing or withdrawing. The explana-
tion of 2005 explained the meaning of the invoices to refund the tax for exports or to offset
tax money. Another explanation of 2005 stipulated that the provision on protecting cultural
relics should apply to the protection on fossils of paleoanthropoids or paleovertebrates of
scientific value. The Sixth Amendment was promulgated in 2006. Although this Amend-
ment emphasized the protection of financial administrative order and interests of listed
company and investor, it provided also several new provisions for social and economic
safety. Punishments for violation of safety regulations concerning production, operation,
installing safety facility and organizing event of large mass of people were clearly
enhanced. Failure to report accident should undertake criminal liability for those who had a
duty to do so. The definition of crime for failure to provide report of financial account in an
exchange-listed company was improved. False bankruptcy, commercial bribery and
breaching faithful duty by senior official of a listed company were newly incriminated.
Fraudulently obtaining the guaranty from a bank or a financial institute was added into the
category of financial fraud. Provision on rigging price of stock and future exchanges was
improved. Breaching trust duty and misappropriating client’s fund in stock and futures
market as well as bank and financial institute were incriminated. Crime of money launder-
ing was revised to cover all types of predicate offences. Organizing disable persons or those
under 14 years old with means of violence or coercion was incriminalized. The punishment
for running a gambling house was significantly increased. Criminal liability of intentionally
bending or twisting the law was expanded to arbitrator. The Seventh Amendment was
promulgated in 2009 in order to strengthen the struggle against corruption and economic
crimes and improve the protection of citizen’s rights. Goods and articles prohibited by the
state for ex- and importation were all under the protection of anti-smuggling provision.
Insider trading was also extended to all undisclosed information obtained by taking the
advantage of position. Multi-level marketing and the any commercial activities without
authority in banking, futures, insurance and financial settlements were completely incriminal-
ized. Selling or illegally giving out the personal data received in the process of perform-
ance or service should undertake criminal liability now. The prohibition of invasion into a
computer system was no longer limited to the fields of State affairs, national defense con-
struction or sophisticated science and technology, however, the criminal liability need the
purpose such as obtaining the data or controlling the system. Organizing minor people to
commit administrative violation such as petty stealing, fraud or seizing and so on was
incriminalized. The crime of harboring plunder was extended to a unit (legal person), so a
unit could commit such a crime now. The criminal liability for the crime of violating the
law on the entry and exit of animal and plant quarantine was no longer limited to the fact
that actual result of a serious animal or plant epidemic, a danger of such epidemic should
be enough. The special symbols of the armed forces such as the number plates of vehicles
were better protected with heavier punishment. The people who were not a state functionary could become the subject of bribery now, if they accepted bribe by using the advantage of that state functionary. This is required by trading in influence in the UN Convention against Corruption. Punishment was increased from 5 to 10 years imprisonment if a state functionary whose property or expenditure obviously enormously exceeded his lawful income failed to explain the sources of his property were legitimate. Very significantly, the crime of taxation would receive a lighter punishment, if the perpetrator had paid the due tax and overdue fine and got an administrative sanction, and the crime of kidnapping would also receive a lighter punishment, if the circumstance was not serious. Generally speaking, the new development of Chinese criminal law after the CCC 1997 can be divided into two stages by 2005, mainly taking the Constitutional Amendment of 2004 on “respect and ensure of human right” as an indicator.

The development of Chinese criminal law before 2005 mainly showed the expansion of the definition of the existing crime. The expansion could be seen by terms of conduct. For example, the crime of causing bankruptcy of the state-owned company in Art 168 was no longer only through the practice of favoritism but by now also by abusing power or neglecting duties. It could also be seen by subject. For example, the crime against liquidation in Art 162 was expanded from the natural person to legal person. It could still be seen in criminal target. For example, the crime of insider trading in Art 180 was available not only to stock exchange but also to the futures exchange. These expansions provided a better protection of criminal law horizontally, which was necessary for a new country with rapid development of economy. These expansions also refined definitions of crimes in the criminal law, which were also necessary to fulfill the requirement of rule of law.

The development of Chinese criminal law after 2005 might be more significant. The topics of each amendment were not as centralized as they were before. However, the protection provided by criminal law got more deeply involved in daily social and economic activities. Very compellingly, many of these requirements of protection of criminal law were raised by people’s representatives of the National People’s Congress. The Seventh Amendment was even published before adoption in order to collect comments, suggestions and critiques from the public. From credit card fraud, military facilities protection, labor safety, safety of financial report and due diligences of senior officials in listed company, safety of banks and financial institutes as well as stock and futures exchanges, to money laundering, gambling house, royalty of arbitrator, computer crime, personal data safety, minor people’s protection, people can be convinced that criminal law in China begins to play its role in an even broader area.

Very significantly, people can also see in the Seventh Amendment in 2009 that the Chinese criminal law was for the first time not to enhance punishment, rather, to lower down the minimum punishment for a crime. For the crime of kidnapping in Art 239 and the crime of tax evasion, the amendment provided a lighter punishment for light circumstance. This is also an important indicator that the Chinese criminal law began to move to the forefield of its traditional protection area.
3. Deficit and Solution

Indeed, China has made great achievements in term of substantive criminal law on the way towards rule of law. However, there are still problems. According to my viewpoint, there are two most serious problems in Chinese criminal law. One is high guilty line and the other is too many death penalty.

Guilty line, or threshold of criminal liability, is stipulated in both CCC 1979, Art 10, and 1997, Art 13. It says:

All acts that endanger the sovereignty, territorial integrity, and security of the state; split the state; subvert the political power of the people's democratic dictatorship and overthrow the socialist system; undermine social and economic order; violate property owned by the state or property collectively owned by the labouring masses; violate citizens' privately owned property; infringe upon citizens' rights of the person, democratic rights and other rights; and other acts that endanger society, are crimes if according to law they should be criminally punished. However, if the circumstances are clearly minor and the harm is not great, they are not to be deemed crimes.

Because the stipulation in the last sentence of this provision, the Chinese enforcement authorities have to draw a line to separate the guilty and the innocent. Let’s take the crime of theft for example. In the area of Beijing, this guilty line is 1,000 ¥ (about 100 €). Those who steal less than 1,000 ¥ shall not be deemed as a crime, rather, only an administrative violation. This structure in Chinese criminal law represents a remnant of the Planned Economy. During that time, it was clever to make use of the administrative machinery to deal with petty violations. The stigma brought by an administrative sanction was by no means less than a criminal sanction. This system worked well in the time of the Planned Economy. However, it began to have problems, when China has moved forward.

First of all, the administrative sanction contains the punishment of depriving people of personal freedom. In the usual case, the administrative sanction might be 20 days detention as maximum. In the most serious cases, the administrative sanction can be education through labour for as long as 3 years with the possibility of one year’s extension.

Secondly, the administrative sanction shall be decided by the public security organ above the county level or the committee headed by the public security organ.

Thirdly, there is no defense lawyer possible in the administrative proceedings. However, the people can raise an administrative lawsuit against the administrative decision they were inflicted, when they can be able to have a help from a lawyer.

This system of administrative sanction has been under sharp critiques from all sides for the natures against modern principles of human rights such as fair trial. The legal basis of this system is also very old. It can be traced back to as early as 1957. The works in drawing such guilty line just like building a China Wall within the justice system and they are never

completed. In those crimes and at those points where the guilty line are not clear, implementation will always have difficulty and problems. This statutory guilty line is also not good for a unified legal system. It not only weakens the efficient protection of criminal law but also restricts the authority of people’s court!

As to death penalty, it is a big problem in the Chinese criminal law. The number of the provisions with death penalty was increased from 15 in the CCC 1979 to 44 in 1997. The most important critique upon the CCC 1997 has been too much death penalty. In judicial practice, the real execution has been limited only to the crimes of murder, seriously injury, kidnapping, robbery, and drug trafficking. Besides drug trafficking, the other crimes subjected themselves to death penalty normally need the result of losing a life. Drug trafficking as an exception to this “rule” is because of the historical lesson of Opium War in 1840, which got China into her darkest times for about one hundred years until 1949. The “death line” for drug trafficking is stipulated in Art 347 of the CCC 1997: opium of more than 1,000 grams, heroin or methyl aniline of more than 50 grams or other narcotics with a large quantify.

The policy China carries out for death penalty is to maintain but strictly restrict death penalty. However, too many death penalties will not only trigger the issues of human rights protection but also have negative influence upon the process of rule of law. There are too many lessons in the Chinese history that misusing death penalty led a dynasty to collapse so soon. And China would not be able to verify the International Covenant on Civil and Political Rights (ICCPR) which it signed in 1998, if the execution number is still very high. The efforts in restricting or abolishing death penalty shall be strengthened.

Facing these two problems, I advocate that Chinese criminal law shall lower down the guilty line. By lowering down the guilty line, Chinese society could improve the level of social safety, which would provide a good condition for abolishing death penalty, at least a de facto one.

My argument is actually following the general tendency of criminal law development in the world: to strengthen the social security by the protection of criminal law and to restrict death penalty to the strictest level, i.e., de facto abolition. I find out that the current Chinese situation on criminal law just has some significant difference with the common understanding of criminal law in the world. For example, what the international human rights treaties allow is still believed by the Chinese criminal law as not allowed (lower guilty


line), and what the Chinese criminal law allows is already provided by the international human rights treaties as not allowed (too many death penalty).  

Now, the new development of Chinese criminal law has showed a sign of good direction. From the criminal amendments and explanation, we can see that criminal liability covered more areas and got more involved in the daily economic and social life. From the judicial practice, we can see that the Supreme People’s Court has strengthened the control on approving capital sentence and that the execution number keeps going down, although the total number is still a “state secret”. More reforms have been also going on. A system of community correction has been introduced for those who were convicted of light crime. The administrative sanction of depriving person of freedom is considered to be reformed, part of which shall be shifted into criminal law and other will remain in the law without the nature of depriving personal freedom any more. However, there are still disputes within the Chinese law circle. Is this direction against the principles of modesty and last method (Subsidiaritätsprinzip und ultima ratio-Prinzip)? Does the Chinese criminal law expand itself too much? My answers to both questions are no! According to my research, the principle of modesty is a legal principle without binding legal power in all jurisdictions, though it is universally observed by law circles. This principle stresses on a humanistic nature of self-responsibility: the assistance of a state can only be provided when and where an individual person is unable to protect himself in his own power. Accordingly, however, this principle is also a policy principle or a legislative principle. Obviously, the criminal law protection shall be provided according to the needs of the weakest in a society, although the strongest might think it unnecessary! For the question of too much expansion of criminal law, there are two sides to be considered. On one hand, China is a country going from a state without law towards a state rule of law. So, the problem for China is not yet the over-regulated but still the less-regulated. I believe, on the other hand, it shall be alright if criminal provisions are clearly stipulated and if the principle of proportionality is followed. If the Chinese criminal law keeps developing in this direction, the understanding of international human rights will play an important role. Without ending, the Chinese criminal law shall also pay more attention to its accurate stipulation of criminal law. In this direction, the German science of criminal law and other laws is the best resource for China to study. Chinese scholars shall learn more from Germany and Sino-German relations shall be further strengthened.


Democracy and the rule of law in South Africa:
Observations on significant legislative and other developments
after Polokwane

By Dieter Welz, Fort Hare / RSA*

A. Introduction

For the first time since the mid-90’s more adult South Africans feel that the country is
going in the wrong direction (42%) than in the right direction (38%). Satisfaction with the
performance of the national government is on a steady decline since the previous election,
with a decrease of 5% between November 2007 and November 2008. These are findings of
a biannual study conducted by Ipsos Markinor in October and November 2008, released on
13 February 2009. The then President of South Africa in 2008 accordingly stated: ‘I am
aware of the fact that many in our society are troubled by a deep sense of unease about
where our country will be tomorrow… They are worried about whether we have the
capacity to defend the democratic rights and the democratic Constitution which were born
of enormous sacrifices.’

Policy areas of democracy and political governance, such as maintaining transparency
and accountability, fighting corruption in the government, appointing the right people to
lead government departments and agencies, attracted performance scores of lower than 50%
(red lights). A follow-up survey conducted by Ipsos Markinor in October 2008 was
released on 13 March 2009. It measures public confidence in the legal system, the police,
parliament, local government, the constitutional court, the mass media and the ANC (as the
governing party and the custodian of democracy). Its key findings are compatible with the
results of the assessment of government performance. Recent developments in South Africa
and the attendant allegations about abuse of state power for political purposes have created
a public perception that the principles of the rule of law and the administration of justice
are under threat, Parliament’s role has been relegated to rubber-stamping the ruling party’s
resolutions and media freedom is in decline.2 Therefore, it has been argued, ‘South Afri-
cans might well come to the conclusion that there is a deliberate and sustained attack on
important institutions involved in upholding the Rule of Law and in protecting the admini-

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1 State of the Nation Address of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament

2 Law Society Council Comment on Disbandment of ‘Scorpions’ and Related Events. Press
The question remains whether such a conclusion is justifiable, and if so, to what extent.

B. Constitutional Amendments and Judicial Independence

I. Threats to Judicial Independence

South Africa is a democratic state, founded on inalienable values, including constitutional democracy and the rule of law as stated in section 1 of the Constitution, 1996. The judicial system is a constituent component of this constitutional democracy. Attempts to undermine the independence or impartiality of the courts threaten the administration of justice and the democratic nature of the state.

Sporadic filibustering attacks on individual judges in South Africa by the ruling party and its allies do not pose genuine threats to the independence of the judiciary. The same applies to attempts to influence individual judges pending judgement in one or more cases. Genuine threats are rather found in persistent and deliberate attempts to diminish or regulate the powers of the judiciary as a whole. These attempts are hidden in resolutions on the Transformation of the Judiciary and the justice bills as highlighted in the debate around these bills. They take many forms. In general, interference in any shape or form with the independence of the judiciary is seen as a recipe for disaster both politically and economi-

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3 Ibid
5 The capacity of political leaders and demagogic politicians to mobilize popular sentiment against judges is present in any democratic government. But it remains fairly difficult to target judges with any precision. See the unwarranted attacks on the Chief Justice and his deputy. Deputy Chief Justice Dikgang Moseneke was attacked by the ANC National Executive Committee because having said (at his birthday party): ‘It’s not what the ANC wants or what the delegates want; it is about what is good for our people.’ Beyond Polokwane: Safeguarding South Africa’s Judicial Independence. An Internal Bar Association Human Rights Institute Report, 2008, para 3.129 (IBAHRI Report), available at <http://www.ibanet.org>.
6 Judges of the Constitutional Court were allegedly approached by the Judge President of the Cape High Court, Judge John Hlope, in an improper attempt to influence the court’s pending judgment in four Zuma related matters. They simply complained to the Judicial Service Commission (JSC), the constitutional body appointed to deal with complaints of judicial misconduct. The matter was controversially resolved by the JSC. See Statement by the Judges, note 4, para 1-2.
However, not every attempt to restrict the powers of the judiciary amounts to an objectionable intrusion on judicial independence.

Whether or not a proposed legislative interference with the judiciary is questionable depends on the form it takes. Other branches of government may legitimately interfere with the judiciary as a whole by regulating the administration of the courts, their jurisdiction and the appointment of judicial officers, even if this requires constitutional amendments. But any departure from the existing constitutional guarantees of judicial independence would require cogent justification. In other words, it cannot be or seen to be an unconstitutional, illegal or inappropriate attempt to undermine the independence or impartiality of the courts. Whether, for instance, a particular limitation of the judicial role in the appointment of certain judges constitutes objectionable interference depends on whether it is aimed at inducing judges to act partially in politically controversial cases. Partiality means that legally irrelevant factors influence how disputes are settled.

It has been persuasively argued that for political interference with judicial independence to occur there has to be ‘a concatenation of power, interest, and will’. In this view an organisation or person is a potential political threat to judicial independence if three conditions are satisfied. The entity or individual in question must have (1) reason to get a judge or court to reach a decision on grounds irrelevant in law; (2) sufficient resources – political, social and/or economic to influence or intimidate the judge; and (3) the capacity to form a will or intention to act in a way that interferes with judicial independence. The ruling party in South Africa demonstrably satisfies all three conditions.

II. Resolution on the Transformation of the Judiciary

The ANC 52nd National Conference 2007 resolution on the Transformation of the Judiciary notes that previous decisions of National Conferences and the National General Council regarding the transformation of the judiciary ‘have not yet been implemented’ and that their implementation is ‘long overdue’.

Submissions to the Portfolio Committee on Justice and Constitutional Development on behalf of the General Council of the Bar of South Africa, 19 May 2006, p. 22-23 (GCB Submissions).


Ferejohn, note 8, p. 370.

Ibid.

Transformation of the Judiciary, note 5. In his first state of the nation address, the current president of South Africa, Jacob Zuma, said he believed in the independence of the judiciary and freedom of the press, but was unhappy about the lack of transformation of both institutions. Remarks on Judiciary, Media Cause for Concern, The Herald (20 April 2009).
bills in 2006, the Constitution Fourteenth Amendment Bill (CAB) and the Superior Courts Bill (SCB). The implementation of the resolution seems a foregone conclusion. The concern is that these Bills might be reintroduced unchanged in spite of vocal opposition from the judiciary and the legal profession in the recent past which had led to their withdrawal. The Government’s failure to revise aspects of the proposed legislation which interfere fundamentally with the independence of the courts had been previously noted ‘with grave concern’. Increased executive and political involvement in matters of judicial independence is seen as a move in the wrong direction for this country.

III. General Observations on the Bills

The impact of specific provisions of the CAB and the SCB on the independence of the judiciary and its extent has been assessed in several submissions to the Ministry and to Parliament. These submissions reflect the concerns that animate the judicial bills debate.

13 According to the new Minister of Justice and Constitutional Development the Bills will be adopted in 2009. The Face of Legal Change, Mail&Guardian (12-18 June 2009).
14 IBAHRI Report (note 5 above) para 3.30.
In the view of legal commentators the independence of the judiciary is adequately protected by current provisions of the Constitution. A departure from the status quo requires cogent justification, but little has been offered. What has been tendered does not survive closer scrutiny. The amendments are not, as claimed, about resolving limited issues concerning the demarcation of governmental functions in line with best international practice. They demonstrably infringe objective standards that protect the judiciary’s role in constitutional democracies.\textsuperscript{18}

The Bills are not preceded by any detailed policy statement. Their policy objectives therefore have to be identified from the provisions of the Bills, but that has proved to be difficult, if not impossible in most instances. In the absence of any policy document commentators therefore must address the apparent effect and potential reach of obscure legislative provisions. This has created the impression that hidden policy objectives are being deliberately shielded from scrutiny. Claims that the Bills promote transformation have been rejected as unfounded.\textsuperscript{19}

The explanations offered in the memoranda about the objects of the proposed legislation are as obscure as particular provisions of the Bills. The stated object of the CAB is ‘to regulated responsibility in respect of the judicial and administrative functions of all courts’. It seeks to amend the Constitution, but for spurious reasons. The SCB purports ‘to rationalise the various superior courts and the legislation applicable thereto in order to establish a judicial system suited to the Constitution’. In other words, it is a transitional exercise, but as such seen as a failure.\textsuperscript{20}

The proposed constitutional amendments tamper with textual provisions in the Constitution which protect judicial independence and with structural protections of judicial independence afforded by the Constitution as a whole. This removes constitutional defences against intrusions by other branches of government and sets up circumstances of institutional confrontation. It diminishes the role of the judiciary in upholding the rule of law and protecting constitutional rights and thus, incrementally, subverts the foundations of constitutional democracy.

For these reasons legal commentators are unable to support key provisions of the CAB and their counterparts in the SCB. Significant findings are set out below.

\textsuperscript{18} GCB Submissions, note 15, p. 4-8.
\textsuperscript{19} Ibid. p. 2.
\textsuperscript{20} GCB Submissions, note 7, p. 60.
IV. Towards Political Control of the Courts

1. ‘Separation of Powers’ between Judiciary and Executive

Clause 1 of the CAB seeks to amend section 165 of the Constitution by the introduction of new sub-sections 165(6) and 165(7).\(^1\) It provides for a separation of powers between the executive and the judiciary, with the responsibility for the judicial functions of the courts the sole preserve of the judiciary and the responsibility for the administrative functions the sole preserve of the relevant minister. This demarcation of powers substantially limits the institutional independence of the judiciary. The rationale for the proposed changes is without merit.

The Memorandum on the Objects of the Bill claims that the amendment to section 165 of the Constitution maintains and constitutionally entrenches the Commonwealth model of the separation of powers between the judiciary and the executive. This claim is untenable both in fact and in law.\(^2\) There is no such thing as a Commonwealth model of the separation of powers that could be maintained or constitutionally entrenched. The doctrine forms part of the Constitution anyway.\(^3\) Commentators are not aware of any Commonwealth jurisdiction with an independent judiciary that would accept this as an adequate definition of judicial independence.\(^4\)

The global trend is toward increasing the authority of the judiciary to administer its own activities even in countries where the judicial administration is assumed by the executive branch, usually the ministry of justice. Furthermore judicial leaders in several commonwealth countries, most notably Britain and Canada, argue that administrative, policy and budgetary functions should be exercised by the judiciary, not by the executive.\(^5\) The

\(^{1}\) Amendment of section 165 of Constitution
1. Section 165 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is amended by the addition of the following subsections: “(6) The Chief Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law. (7) The Cabinet member responsible for the administration of justice exercises authority over the administration and budget of all courts.”

Clause 15(1) of the SCB complements clause 1 of the CAB: ‘15. (1) The Minister exercises authority over the administration and budget of all courts in accordance with section 165(7) of the Constitution.’

\(^{2}\) This rationale has been debunked, politely by the former Chief Justice, unceremoniously by a former Justice of the Constitutional Court who did not mince his words: ‘Anybody who can talk about a Commonwealth model of the separation of powers is a fool or a scoundrel. There is no such thing as a Commonwealth model of the separation of powers.’ J Kriegler, The Constitutional Importance of Judicial Independence, in: Conference Transcript, note 17, p. 46, 52.

\(^{3}\) GCG Submissions, note 7, p. 12.

\(^{4}\) Ibid. p. 11.

\(^{5}\) Both Spain and Italy created judicial councils in the 1980s to assume from the ministries of justice the management functions of the judicial system. A number of countries in South America
proposed separation of powers is out of step with international developments. It can be seen as a move in the wrong direction.

2. Central Regulation of the Judiciary

Section 165(6) provides that the Chief Justice will be ‘the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law.’ The concept of ‘the judicial authority’ is a novelty. Its parameters are both obscure and perplexing. Most significantly, its introduction points to a diminished role for the judiciary. It reflects either a lack of understanding of the judiciary’s role in a constitutional democracy as the third branch of government or, more likely, a deliberate attempt to diminish that role.

The proposed amendment distinguishes between the judicial function generally and the actual adjudication of cases. Only in decision-making or adjudication are judges afforded independence from outside direction, restraint and potential interference. Otherwise they are to be subordinate to ‘the judicial authority’ and subject to its direction in accordance with as yet unspecified ‘norms and standards’. This reflects a significantly narrower view of judicial independence than that articulated by the Constitutional Court. The performance of judicial functions will be administered by an official responsible to the Minister.

The centralisation of these matters in a single office by public servants responsible to the Minister leaves ample scope for political interference with the judicial work. This is even more so, when considered in the light of other proposed amendments to the Constitution regarding judicial appointments. It is deemed fundamentally important that adminis—


27 GCB Submissions, note 7, p. 10.

28 SCB sections 11, 12, 13.
trative matters such as listing are operated independently of political influence. Otherwise access to justice runs the risk of political obstruction. 29

Section 165(6) apparently prepares the ground for a centralised administration of all the divisions of the High Court by remote control. 30 The decision-making body is constituted by the Chief Justice and a forum including in the first instance all heads of courts, all of them selected by the President. 31 The functioning of the courts is therefore more or less controlled by the executive, either directly or by remote control (through individuals all of whom duly appointed by the political head of the executive). This is seen as a move away from judicial independence towards political control of the courts. 32 This even more so in the absence of compelling reasons to justify central judicial regulation and centralised administrative control of the courts.

3. Executive control over administration and budget of courts

In terms of the proposed subsection 165(7), the Cabinet member responsible for the administration of justice will control the administration and budget of all courts. Clause 15(1) of the SCB complements clause 1 of the CAB. It provides: '15. (1) The Minister exercises authority over the administration and budget of all courts in accordance with the new section of the Constitution.' Currently that is not the case. The Executive is precluded from interfering with the Courts’ control over administrative decisions that directly affect the exercise of the judicial function, whereas the Courts’ budget is fixed directly by an Act of Parliament (under the Judges’ Remuneration and Conditions of Employment Act 47 of 2001). 33 In De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) para 70, the Constitutional Court referred to the ‘administrative functions that bear directly on judicial functions’, noting that they were part of the ‘institutional independence’ of the courts as set out in the Canadian case of R v Valente (1985) 24 DLR (4th) 161.

Administrative independence is one of the elements of judicial independence. Institutionally this requires structures to protect courts and judicial officers against external interference. 34 The proposed amendments in effect seek to dismantle these structures either inadvertently or, more likely, deliberately. They are seen as ‘retrograde steps that remove from the courts a level of independence that they even enjoyed under the apartheid state’. 35 No convincing explanation for the amendment of the Constitution has been advanced. Its

29 English Bar Council (note 6 above).
30 GCB Submissions, note 7, p. 17, 18.
31 SCB section 11.
32 GCB Submissions, note 7, p. 19.
33 A. Spilg, Judicial Independence – Impending constitutional crisis?, in: Conference Trasncripts, note 17, p. 130, 134...
34 GCB Submissions, note 7, p. 6n4.
perceived purpose is to establish a constitutional justification for unconstitutional provisions in the SCB dealing with judicial administration and thus to insulate administrative and budgetary matters affecting the functioning of the courts from judicial challenge.\(^36\) In other words, it is seen as a pre-emptive measure.

4. Executive Control over Key Judicial Appointments

Section 9 of the CAB seeks to amend the manner in which the judges-president and the deputy judges-president of the divisions of the High Court are appointed. Currently they are appointed by the President on the advice of the Judicial Service Commission (JSC) under section 174 (6) of the Constitution. The new subsection (5) provides that these appointments are to be made, after consulting the Chief Justice and the Cabinet member responsible for the administration of justice, from a list provided by the JSC. The role of the JSC in the appointment process is thereby significantly diminished. At the end of the day the decision would be that of the President alone. The only constraint would be an obligation to consult. The presidential discretion is otherwise unfettered. This also applies to other key judicial appointments.

Presently the President appoints the Chief Justice and the Deputy, all the judges of the Constitutional Court and the President of the SCA and the Deputy. Now he would select every senior member of the judiciary. Over and above that, this power of appointment probably extends to the new special divisions of the High Court defined in the SCB. All heads of courts and all deputies, the entire complement of judges in the Constitutional Court and the Special Divisions of the High Court will be appointed by the President. He is therefore to be vested with truly extensive powers of judicial appointment.\(^37\) Enormous powers of patronage within the judiciary go hand in hand with that.

The worldwide trend points in a different direction towards appointing judges on merit and with significant involvement of independent bodies, including the legal community. This proposal is seen as ‘a reversion to the pre-Constitutional era when the State President, acting through the Minister of Justice made all judicial appointments’\(^38\).

The motivation for the proposed amendment and the reason for the diminishment of the role of the JSC remain unclear, with some suggesting that the proposed change is motivated by the transformation agenda of the government of the day.\(^39\) But that remains inconclusive. The shifting of power from the JSC to the executive is widely perceived as a move...

\(^{36}\) Ibid 21 and 22.
\(^{37}\) GCB Submissions, note 7, p. 25.
\(^{38}\) Ibid.
\(^{39}\) IBAHRI Report, note 5, para 3.110. – SA Report, note 17, para 198, 211, observes: ‘The challenge to transform the judiciary to be representative of South African demographics could pose a threat to its independence.’ It advises South Africa to ensure that ‘the transformation of the Judiciary’ does not ‘jeopardize or undermine the independence of the Judiciary.’
towards a more politicised process for the appointment of heads of court and away from a transparent and accountable selection process that affirms democracy. \[40\] Such a move is in conflict with the United Nations Basic Principles on the Independence of the Judiciary which require that judicial appointments must be made in a manner that safeguards the independence of the judiciary.\[41\]

5. Executive Control over Acting Judicial Appointments

Clause 10 of the CAB seeks to amend the constitutional provisions regarding acting appointments. The proposed amendment does away with the concurrence of the Chief Justice for any acting appointments. All that is required is consultation. This disturbs the delicate balance of powers between the judiciary and the executive as endorsed by the Constitutional Court in the First Certification judgement.\[42\]

The proposed amendment limits judicial involvement in the appointment of a broad category of acting judges. This enables the executive to appoint acting judges to leadership positions in the judiciary for improper motives or purposes and not necessarily in the best interests of the administration of justice.\[43\] The proposed amendment effectively empowers the Minister to appoint acting judges that could swing the vote in any particular case in favour of the executive or its political allies. A recent politically charged case involving Cape Judge President John Hlope and judges of the Constitutional Court illustrates this point.

A complaint of judicial misconduct laid by the Constitutional Court judges against the Cape Judge President with the Judicial Services Commission (JSC) in 2008 was made public by these judges without first affording Hlope an opportunity to be heard.\[44\] If, for argument’s sake, the matter had gone to the Constitutional Court, which it has not, all judges\[45\], including the then Chief Justice Pius Langa and his deputy Dikgang Moseneke, could have been asked to recuse themselves.\[46\] The Court sits \textit{en banc}.\[47\] In the circumstances eight acting appointments would have to be made – unprecedented in legal history.

\[43\] Namely to the position of (a) Deputy Chief Justice, (b) judge of the Constitutional Court, (c) Deputy President of the Supreme Court of Appeal, or (d) Deputy Judge President of a Division of the High Court of South Africa. --The UN Basic Principles applicable here clearly state: ‘Any method of judicial selection shall safeguard against judicial appointments from improper motives.’ IBAHRI Report, note 17, para 3.107.
\[44\] Statement by the Judges of the Constitutional Court, note 4.
\[45\] Hlope to Appeal in ConCourt, The Times (01 April 2009).
6. **Jurisdiction Stripping**

Clause 7(b) of the CAB seeks to prevent the courts from hearing any matter dealing with the suspension of the commencement of an Act of Parliament or a provincial Act, or making an order suspending it, despite any other provision of the Constitution. The Memorandum asserts that this provision introduces an ‘important new principle’, but no cogent justification for its introduction is offered. The covert purpose of the amendment apparently is to pre-empt a decision by the Constitutional Court on this issue.

In terms of section 172(2)(b) of the Constitution, a court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party. Such temporary relief probably includes the interim suspension of an Act in exceptional circumstances. In this view, clause 7(b) of the CAB in effect deprives the courts of the power ‘to suspend the commencement of an Act of Parliament in the interests of justice’ even where such commencement ‘may involve a gross violation of a right in our Bill of Rights’. The full extent of the threat to constitutional democracy ‘may only become fully appreciated if a government in the future were to introduce legislation to fundamentally amend one of the guaranteed freedoms contained in the Bill if Rights’. The proposed constitutional amendment is therefore seen as an ouster clause of the most pernicious kind and a reversion to old order practices.

In other words, it is classified as an instance of illegitimate jurisdictional regulation or jurisdiction stripping.

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47 Section 167 (1) of the Constitution provides: ‘A matter before the Constitutional Court must be heard by at least eight judges.

48 GCB Press Statement, note 15, and Legal Resources Centre Comments Constitutional Fourteenth Amendment Bill (14 January 2006), para 3, 6, 6.4, 7.4, 7.5., available at <www.lrc.org.za>. The Constitutional Court held that a court could grant interim relief in terms of section 172(2) of the Constitution, but such interim relief could merely suspend the operation of a provision in an Act, pending the constitutional challenge, without suspending the commencement of the Act. However, it is clear from this decision of the Constitutional Court that a court, in very limited and special circumstances, could suspend the commencement of an Act. In the absence of the proposed amendment this might indeed happen. The new principle apparently seeks to prevent that eventuality. See President of the Republic of South Africa and Others v United Democratic Movement 2003 (1) SA 472 (CC) para 28.

49 GCB Press Statement, note 15.

50 Mitigating its perniciousness is the fact that the proposed section is so badly drafted that it will not achieve its objective.’ T. Roux, ‘Thinkpiece’ for Seminar on the Constitution Fourteenth Amendment Bill, 2005’, p. 5, available at <www.lrc.org.za>. There are other indications of bad drafting. In terms of sections 80 and 122 of the Constitution, members of a legislature may apply to the Constitutional Court to have all or part of an Act declared unconstitutional after signature by the President. Clause 7(b) effectively also wipes out sections 80(3) and 122(3) which, in the context of abstract constitutional review, make express provision for an order of suspension by the Constitutional Court. It is not clear whether this is an unintended side-effect. The repeal is brought about indirectly via an amendment to section 172, causing collateral damage to the Constitution.
7. The Impasse between Judiciary and Executive

The judiciary has consistently offered to cooperate with other branches of the government to develop a model of court administration that best reflects the principle of judicial independence, most recently at the judges’ conference held near Pretoria in July 2009. At that conference the new Minister of Justice and Constitutional Development, Jeff Radebe, publicly distanced himself from the controversial attempts to amend the Constitution discussed above. He reportedly said that ‘he had no intention of amending the Constitution and would consult on contentious issues arising from the proposed reform of the judicial system’. He also reassured the judges that there were no hidden agendas.

Former President Mbeki has taken the consultative route before. In 2006, he first had the deadline for comment extended and then axed the contentious bills altogether until further notice. This was done in order to slow down the process and ‘engage the judiciary to understand properly’ their objections to the draft legislation.

These objections are easy to understand. Their core is essentially this: ‘[A] structure which in fact says that the Executive controls all aspects of the functioning of courts other than the way they decide their cases, is not consistent with judicial independence.’ Failure to properly understand this could mean that a constitutional crisis is a distinct possibility, with far reaching consequences: ‘The other route will lead to a constitutional crisis impacting not only on our judicial system and our constitutional values for all time but also our ability to sustain socio economic objectives.’

The link between sustainable economic growth and the key objectives of constitutional democracy, including an independent judiciary, is the central premise of the NEPAD initiative, supported by South Africa and reaffirmed in the APRM Self-Assessment Report on South Africa of 2007. The Maritime Law Association of South Africa, in similar vein, observes that these bills (CAB and SCB)
have the potential to very seriously damage the administration of justice in South Africa and to undermine its credibility in international commerce' and that ‘undoubtedly foreign investment and foreign trade would suffer’ as a result.  

However, the ruling party has firmly resolved that judicial independence refers to ‘the adjudicative function of the courts’ only, not to ‘the administration of the courts, including any allocation of resources, financial management and policy matters relating to the administration of courts – which are to be the ultimate responsibility of the Minister responsible for the administration of justice’.  

This is not the judicial independence enshrined in the new Constitution and endorsed by the Constitutional Court. It truncates this independence with potentially dire consequences for constitutional democracy in South Africa. Addressing a conference of the international Commission of Jurists in Cape Town on 21 July 1998, the late Chief Justice, Ismail Mahomed warned: ‘Subvert that independence and you subvert the very foundations of a constitutional democracy.’  

A Letter from the then President in ANC Today of 10–16 June 2005 recites this statement with approval. The Judges of the Constitutional Court, speaking for all the courts in the country, have meanwhile vowed not to ‘yield to or tolerate unconstitutional, illegal and inappropriate attempts to undermine their independence or impartiality’ which threaten ‘the administration of justice in our country and indeed the democratic nature of the state’.  

The battle about the nature of judicial independence continues unabated, despite indications of a détente between the judiciary and the government after the recent charm offensive launched by the executive. In the course of these overtures President Zuma reassured the judges that ‘the transformation of the judiciary should be advanced and undertaken without interfering with the principle of judicial independence, that an ‘independent judiciary is one of the cornerstones of any democracy’ and that the executive respected ‘without reservation the principle of judicial independence and the rule of law’. In the view of the judiciary that principle includes the power to administer courts and its own budgets whereas the proposed legislation suggests otherwise: ‘In the end, it is the impasse between the executive and the judiciary over this constitutional amendment that is the democratic problem.’  

56 Maritime Law Association Submission, note 16.  
57 Transformation of the Judiciary, note 5, para 11, 12.  
59 Fiat justitia ruat caelum – Let justice be done through the heavens should fail!, ANC Today (10-16 June 2005).  
60 Statement of the Judges, note 4, para 8, 9.  
61 Albertyn, note 40, p. 137.
C. Interference with Prosecutorial Independence

I. Enquiry into the National Director of Public Prosecutions

Section 179(4) of the Constitution guarantees prosecutorial independence. It stipulates: ‘National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.’ Any legislation or executive action inconsistent with it is therefore subject to constitutional control by the courts. The prosecuting authority is accountable to parliament, while the Minister of Justice exercises final political responsibility over the prosecuting authority. It is crucial to note that the Act nowhere provides for ministerial control over the decisions of the NDPP or any Director of Prosecutions (NDP).

The appointment of the National Director of Public Prosecution (NDPP) by the President does not compromise the independence of the prosecuting authority.

The National Director of Public Prosecutions (NDPP), Vusi Pikoli, was suspended on 23 September 2007, allegedly for a breakdown of communication between him and the Minister of Justice and Constitutional Development, Brigitte Mabandla. According to his lawyers ‘it was Pikoli’s refusal to let the minister second-guess his decision to prosecute Selebi that prompted her demand for his resignation. When he refused, the president also asked him to resign. When Pikoli refused again, the president signed a letter of suspension that again underscored the centrality of the Selebi matter.’

A High Court judgement with far-reaching political consequences delivered on 12 September 2008 by Judge Chris Nicholson concurs. The court inferentially found ‘that the Selebi warrants were cancelled by Mr Mpshe [the acting NDPP] after political interference and that Pikoli was suspended because he refused to do so’. In the court’s opinion ‘the suspension was a most ominous move that struck at the core of a crucial State institution’.

These findings on matters not

64 S Sole, How Ginwala blew it, Mai&7Guardian (12 December 2008) <www.mg.co.za/article/2008-12-12-how-ginwala-blew-it>.
65 He ruled that the NPA’s charges against ANC president Jacob Zuma were unlawful and found that the State President, Thabo Mbeki, had interfered with the prosecution of Zuma for political reasons. Mbeki was recalled on 19 September 2008 by the ANC leadership on the basis of these findings, since squashed on appeal as gratuitous. All charges against Jacob Zuma and others were controversially withdrawn in April 2009 when prima facie evidence of such interference was tendered. See Statement by the National Director of Public Prosecutions (6 April 2009) available at<http://www.npa.gov.za>.
66 Zuma v National Director of Public Prosecutions (8652/08) [2008] High Court of South Africa, NPD para 205 and 207.
66 Ibid. para 91.
in issue or canvassed in that case were set aside on appeal.\footnote{National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1 (12 Jan 2009) para 48. The Report of the Enquiry into the Fitness of Advocate V P Pikoli to Hold the Office of National Director of Public Prosecutions (Ginwala Report) equally found that political interference could not be sustained on the evidence before the Enquiry. Report of Enquiry into NDPP (4 November 2008) para 12. Available at <http://www.iss.co.za/dynamic/administration/file_manager/file_links/20081208PIKOLIREP.PDF>.} They are relevant here as an obiter dictum.

Under section 32(1) of the National Prosecuting Authority Act, 1998 (NPA Act) it is an offence to interfere with, hinder or obstruct the prosecuting authority or any of its members in the performance of their functions. The letter that instructed the DNPP to put on hold the investigation and prosecution of the National Commissioner of Police, Jackie Selebi, was signed by the Minister of Justice, Brigitte Mabandla. According to the Ginwala Report this ‘letter was tantamount to executive interference with the prosecutorial independence of the NPA, which is recognised as a serious offence in the [NPA] Act.’\footnote{Ginwala Report, note 67, para 12.}

The Ginwala Report concluded that the ‘grounds advanced by Government for the suspension of Adv Pikoli have not been established before the Enquiry’ and recommended that he be restored to the office of NDPP.\footnote{Ibid. para 13 and Recommendations I.} But that has not happened. The application for judicial review of Pikoli’s subsequent dismissal persuasively asserts ‘that the decision to fire him was a breach of the constitutional guarantee of the independence of the National Prosecution Authority and the principle of legality.’\footnote{Former DPA boss set to take Motlanthe to court, Business Day (14 February 2009). The Ginwala Report does not support this view. It observes: ‘Much of the focus of South African scholars, jurists and media has been on prosecutorial independence. Sufficient attention has not been paid to the requirement of democratic accountability of the prosecuting authority. In focusing only on independence from political interference they have erred in conflating freedom from control with freedom from accountability.’ Ginwala Report, note 67, para 51. However that may be, the constitutional guarantee of prosecutorial independence is under the spotlight here, not the accountability to parliament. The Pikoli matter is about executive interference with the Prosecuting Authority.}

D. Disbandment of the Directorate of Special Operations

I. Background

Article 36 of the United Nations Convention against Corruption of 2003 (which South Africa ratified on 22 November 2004) provides: ‘Each State Party shall … ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental legal system of the State Party, to be able to carry out their functions effectively and without undue influence.’ Article 5 of the African Union
Convention on Preventing and Combating Corruption of 2003 (which South Africa ratified on 7 December 2005) provides as follows: ‘State Parties undertake to... (3) Establish, maintain and strengthen independent national anti-corruption authorities or agencies.’

The Directorate of Special Operations (DSO) was established in terms of section 7(1) of the NPA Act and came into being on 12 January 2001. Its mandate was to deal with all national priority crimes, including police corruption, and to supplement the efforts of other law enforcement agencies in fighting national priority crimes, operating as a specialist unit equipped to deal with increasingly sophisticated levels of criminality and organised crime.

On 1 April 2006 the President of South Africa appointed a judicial commission of enquiry into the mandate and location of the DSO, chaired by Judge S V Khampepe. The report of the Commission was handed to the president on 3 February 2006, but only released on 5 May 2008, at the same time when the General Law Amendment Bill and the National Prosecuting Bill – dealing with the disbanding of the DSO or Scorpions--were due to be tabled in Parliament.

The National Prosecuting Authority Amendment Bill was published in Government Gazette number 31037 of 8 May 2008, the General Law Amendment Bill in Government Gazette number 31018 of 9 May 2008. According to the explanatory notes released the bills emanate from the decision to relocate the investigative capacity of the DSO in the SAPC. The stated aim of the NPA Amendment Bill is to repeal provisions of the NPA Act, 1998 that deal with the establishment and functioning of the DSO. The General Law Amendment Bill provides for the establishment of a Division in the SAPS, to be known as the Directorate for Priority Crime Investigation. These legislative measures give effect to resolutions of the ruling party.

The disestablishment of the DSO was a fait accompli in 2009.

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71 See Glenister v President of RSA (note 106 above) para 23-27.
73 A Cabinet statement of 29 June 2006 reveals that Cabinet endorsed the National Security Council’s decision to accept, in principle, the recommendations of the Khampepe Commission, including the retention of the DSO within the NPA. A further statement of 7 December 2006 recorded that, at its meeting of the previous day, Cabinet had reviewed progress in implementing the recommendations of the Khampepe Commission.’ Glenister v President of the Republic of South Africa (CCT 41/08) [2008] ZACC 19 (22 October 2008) para 12. However, the Minister of Safety and Security, Mr Charles Nqakula, speaking during the debate on the President’s State of the Nation Address in the National Assembly on 12 February 2008, announced: ‘The Scorpions, in the circumstances, will be dissolved and the Organised Crime Unit of the police will be phased out and a new amalgamated unit will be created.’ Ibid para 13. This was in the aftermath of the Polokwane conference in December 2007 and the election of ANC president Jacob Zuma.
74 The ANC resolutions on Peace and Stability, under the heading Single Police Service, state that the DSO must be dissolved, members of the Scorpions performing policing functions must fall
Yet the judicial commission of inquiry into the mandate and the location of the DSO unequívocally disapproved of such measures. In the light of ‘the totality of the evidence and the law relevant in terms of reference’, it found it ‘inconceivable that the Legislature will see it fit to repeal the provisions of the NPA Act that relate to the activities of the DSO’. Both the legal mandate and the location of the DSO were unequívocally endorsed. In its considered view, the argument (advanced by the ruling party) ‘that the legal mandate of the DSO to investigate and prosecute serious organised crime is unconstitutional within the meaning of section 199(1) of the Constitution is without merit’ and that ‘the rationale for locating the DSO under the NDPP [National Director of Public Prosecutions] and the Minister for Justice and Constitutional Development in 2002 still pertains’. It therefore recommended that the ‘the DSO should continue to be located within the NPA’.

A recent critical analysis of the crime investigative system within the South African criminal justice system arrives at a similar conclusion. It recommends the establishment of a new single prosecution-led investigation agency and the retention of the brand name ‘Scorpions’. The Law Society of South Africa concurs: ‘We firmly believe that South Africa requires a dedicated and specialised crime-fighting unit such as the DSO.’ None of these recommendations were institutionalised for apparently no principled reasons. The executive’s decision to introduce the bills has since been challenged in court. But the Constitutional Court found it not appropriate for the Court to intervene in the affairs of Parliament in this case.

under the SAPS and that the relevant legislative changes be effected as a matter of urgency to give effect to the foregoing resolution’. Single Police Service, Resolutions, note 5, para 8-10.


Ibid. para 47.1.

Ibid. para 47.2 and 47.4. The report of the Commission was handed to the president on 3 February 2006, but only released on 5 May 2008, at the same time when the General Law Amendment Bill and the National Prosecuting Bill – dealing with the disbanding of the Scorpions – were due to be tabled in Parliament.


LSC Comment, note 2.

‘In conclusion, then, I find that the applicant has not established that it is appropriate for the Court to intervene in the affairs of Parliament in this case. He has not shown that material and irreversible harm will result if the Court does not intervene. In the circumstances, both the application for leave to appeal (in Part A) and the application for direct access (in Part B) must be refused as it is not in the interests of justice for the applications to be granted.’ Glenister case CC (note 73 above) para 57.
II. The Reasons behind the Decision

The reasons behind the decision to disband the DSO have remained shrouded in secrecy right to the end of the decision-making process. Allegedly, they were not even disclosed to the members of the DSO until after the publication of the most recent bills in May 2008 and, inexplicably, to members of Cabinet either until the day when the cabinet approved the bills (30 May 2008).\(^{81}\) An ulterior motive or purpose can therefore not be ruled out, but none has been substantiated so far.

The DSO in the National Prosecuting Authority was tasked with the investigation of allegations of criminal activities relating to the so-called ‘arms deal’. The involvement of ANC politicians in these activities is well-documented.\(^{82}\) These investigations had been abandoned in 2001 for lack of evidence.\(^{83}\) They were resumed in 2007 when damning new evidence surfaced in Germany.\(^{84}\) Hence there is a reasonable apprehension that allegations of impropriety and corruption in the arms deals have substance.\(^{85}\)

Against this background, both the timing of the resolution to disband the DSO and the decision to give effect to it as a matter of urgency make perfectly sense. Inferentially, the call for the disbandment of the Scorpions was not based solely on what is best for the administration of justice and the investigation of organised crime in South Africa.

The applicant in the Glenister case accordingly argued that the President and Cabinet had decided ‘to disestablish the DSO and place its members in a dysfunctional unit (the SAPS) because a number of members of the ANC are (or have been) subject to the unwelcome attentions of the DSO.’\(^{86}\) This argument is bound to resurface in future litigation which is on the cards. The court did not rule on its merits, but found it irrelevant in dealing with the purely jurisdictional matter at hand.

\(^{81}\) On 29 April 2008 two members of cabinet and their legal representative, the Director General of the Justice department filed affidavits, in which they flatly ‘denied that any decision whatsoever was taken to disestablish the DSO’. On 30 April 2008 Cabinet approved the Bills aimed at relocating the DSO from the NPA to the SAPS. Glenister v President of the Republic of South Africa (14386/2008) [2008] High Court of South Africa, TPD (27 May 2008) p. 17.


\(^{83}\) The Joint Investigation Report into the Strategic Defence Procurement Packages of 2001 concluded that ‘up to now no evidence has emerged, to suggest that these activities affected the selection of the successful contractors/bidders, which may render the contracts questionable.’

\(^{84}\) The Public Protector in his letter to Trent on 20 April found: ‘It is therefore for the NPA to decide whether the allegations made by Der Spiegel warrant any further investigation in South Africa, at this time.’

\(^{85}\) Joint letter from Desmond Tutu and F W de Klerk to President Kgalema Motlante (1 December 2008) <www.armsdeal-vpo.co.za>.

\(^{86}\) Glenister case CC, note 73, para 53.
E. Freedom of the Press and other Media

I. Declining Media Freedom

The trend of declining media freedom in South Africa has been spotted before with attendant calls to reverse it before it is too late. In 2006 the ANC seemed to endorse these sentiments in its National Press Freedom Statement. However, a year later the Polokwane Conference resolved that ‘the right to freedom of expression should not be elevated above other equally important rights such as the right to privacy and more important rights and values such as human dignity’. It therefore proclaimed ‘the need to balance the right to freedom of expression, freedom of the media, with the right of equality, to privacy and human dignity for all’ and called for external regulation of the media, in effect prepublication censorship. The stated reason for this resolution is ‘that the current form of self regulation … is not adequate to sufficiently protect the rights of the individual citizen, community and society as a whole’. Hence the call for the establishment of a media appeals tribunal (MAT). However, in the view of stakeholders, self-regulation in the new South Africa has served the media and the public well. In their experience and in principle self-regulation by key stakeholders in the press is better for democracy than regulation by external forces with political agendas: ‘With no State or other external oversight, the media can perform as an independent agency – the ‘Forth Estate’ – alongside executive, legislative and judicial authorities.’ The Freedom of Expression Institute (FXI) therefore suggests that this system could be applied in the academic context with equal success.

In a National Press Freedom Day statement of 2006 the ANC had called on all South Africans ‘to declare that never again shall the right of our people to free expression be silenced by censorship or intimidation’. However, the Polokwane resolutions no longer

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87 In 2006 FXI called on civil society and journalists to unite and ‘reverse’ this trend ‘before it becomes difficult to reverse’ at all, cited ‘the deteriorating state of media freedom at the SABC’ and ‘the recent issue of the SABC seeking an interdict against the Mail and Guardian website publishing its report about allegations that it banned using certain analysts and commentators’. SA must save press freedom, available at <http://www.fxi.org.za>.

88 Statement on Media Freedom Day (18 October 2006), available at <http://www.anc.org.za/ancdocs/pr/2006/pr1018htlm>. ‘Media Freedom Day…provides an opportunity for all South Africans to declare that never again shall the right of our people to free expression be silenced by censorship or intimidation.’

89 Communications and the Battle of Ideas, Resolutions, note 5, para 125.

90 Ibid para 128.

91 Ibid para 93.

92 Ibid para 126-131.


seem to heed that call. They are about limiting the right to freedom of expression and media freedom, not about acknowledging ‘the important role of the media and freedom of expression as one of the pillars of democracy’\textsuperscript{95}. Indeed, almost half of ANC supporters agree that the ANC is a different party in the aftermath of the 52\textsuperscript{nd} National Conference of the African National Congress (ANC) in December 2007.\textsuperscript{96} This new ANC might well be perceived as an external force with political agendas that poses a threat to freedom of the press (and other media) and freedom of expression in general, including academic freedom.

II. Speaking to the Media

There is a long line of disciplinary cases in the new South Africa where academics have been disciplined for speaking to the media about the institution in which they work\textsuperscript{97}, some of them in terms of Conditions of Service with apartheid-era censorship written all over them.\textsuperscript{98} That may come as a surprise in a constitutional democracy with freedom of expression, including academic freedom, enshrined in its bill of rights. The right to academic

\textsuperscript{95} As acknowledged by the Southern African Judges Commission at a meeting of Chief Justices from Southern and East Africa held in Windhoek, Namibia, on 11-13 August 2005. The Commission’s stated objects include ‘the promotion of the rule of law, democracy and the independence of the courts in the region’. <http://www.concourt.gov.za/site/southernafricanjudgescommission.htm>.

\textsuperscript{96} According to an Ipsos Markinor poll conducted from 3 to 22 October 2008 published in 2009.

\textsuperscript{97} ‘Recently, the University of KwaZulu/Natal has been a flashpoint for controversies around academic freedom, with disciplinary action having been taken against two academics for a number of alleged misconducts, including speaking to the media. A case has also arisen at Fort Hare University, involving a law professor who is being disciplined for criticizing the University administration in his lectures, at conferences, in private conversations and in the media. These academics are accused of bringing their respective institutions into disrepute, including by lying to the media, and defaming University managers. A member of the support staff of the Tshwane University of Technology is being charged with the apartheid era offence of immorality, for distributing sexually explicit photographs to some of his friends. A disciplinary case is also being heard at Wits University, where students are being charged for bringing the institution into disrepute for criticizing the lack of freedom of expression on campus, in the media.’ J. Duncan, The Rise of the Disciplinary University, Harold Wolpe Memorial Lecture (17 May 2007). FXI Submission to UKWZ Council Committee on Governance and Academic Freedom: Recent cases (19 February 2009), available at <http://www.fx.org.za>. – See also K. MacGregor, South Africa: Freedoms Gained Now being Lost, World University News (13 January 2008). <http://www.universityworldnews.com/topic.php?topic=SpecialReports&page=3>

\textsuperscript{98} Academics were charged with misconduct and dismissed in terms of Conditions of Employment which, inter alia, provide: ‘An officer shall be guilty of misconduct and may be dealt with in accordance with the provisions of regulation D4, if he—(a) contravenes a provision of the Act [‘the act’ means the University of Fort Hare Act, 1965 (Act No 40 of 1996)] and these regulations or fails to comply with any provision thereof with which it is his duty to comply; (f) publicly comments on the administration of the University’. A request for an audit of subordinate legislation of this kind has since been referred by the South African Law Reform Commission to the Council of Higher Education with a view of resolving the problem jointly.
freedom, according to the High Court of South Africa, would ‘include an unfettered debate on issues surrounding the autonomy of a university and the roles that managerial and academic staff, respectively, should play in that regard’ 99. In terms of the 1997 UNESCO Recommendations higher education teaching personnel are entitled ‘to express freely their opinion about the institution or system in which they work’, 100 without fear of institutional censorship. According to these standards academic freedom covers teaching and research as well as comments on conditions of service and the administration of the university. Comments made by academics that are not directly related to their area of expertise are thus permissible and desirable. A self-regulatory framework to protect academics from external censorship would therefore be appropriate 101. Extramural comments on matters of public interest are warranted in the context of a democratic society and seen as essential for its further development. 102 Not necessarily so in the context of a developmental state, however, as recently argued at a regional forum on government regulation of academic freedom. 103

100 FXI Submission to UKWZN, note 97.
101 FXI Submission to CHE, note 93, para 8.
102 This means: ‘All higher-education teaching personnel should have the right to fulfil their functions without discrimination of any kind and without fear of repression by the state or any other source. Higher-education teaching personnel can effectively do justice to this principle if the environment in which they operate is conducive, which requires a democratic atmosphere; hence the challenge for all of developing a democratic society.’ UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997) para 27 <http://unescodoc.unesco.org/images/0011/001102/110220e.pdf#page=32>.
103 ‘Academics had always had an image of the university as being a community of scholars, engaged in teaching, research and knowledge production, with a curriculum that went beyond just vocationalism and utility. But in the context of a developmental state, should one not have a developmental university that pursued that developmental agenda of the state? This idea might be seen in fundamental contradiction to traditional ideas of the university, where academic freedom was understood as the freedom to do research, to decide who should teach, and who should be admitted.’ Council of Higher Education Regional Forum on Government Involvement in, and Regulation of, Higher Education, Institutional Autonomy and Academic Freedom (HEIAAF) (22 May 2006) available at <http://www.che.ac.za>.-- The Task Team on Higher Education, in its analysis of academic freedom, has since explored (section 2.3.1) ‘how a renewed concept and practice of academic freedom in higher education can benefit South African society at large... It finds that any such reformulation begins by seeking to counter potential and actual external and internal threats to the academy – state repression and/or interference, over-control by government bureaucracies and institutional hierarchies, commercial and functional impingements on academic work, and un-reformed institutional cultures.’ Report of the Independent Task Team on Higher Education, Institutional Autonomy and Academic Freedom (HEIAAF): Academic Freedom, Institutional Autonomy and Public Accountability in South African Higher Education (August 2008) available at <http://www.che.ac.za/documents/d000183/CHE_HEIAAF_Report_Aug2008.pdf>.
In the context of a developmental state, it was suggested, one should have a developmental university that pursued the developmental agenda of the state, admittedly in fundamental contradiction to the traditional idea of the university with academic freedom as endorsed by UNESCO. The implications of this suggestion for academic freedom as understood in South Africa today are ominous. The Orwellian concept of a developmental university pursuing the agenda of the state may well be seen as a potential threat to academic freedom as we know it even in its violation by censorious measures – not state sponsored as yet. 104

F. Conclusion

In South Africa politics are rooted in the resolutions and election manifestos of the dominant party seeking to impose its own ideological vision on the larger society. 105 At the national conference in Polokwane the ruling party ‘affirmed that the ANC remains the key strategic centre of power, which must exercise leadership over the state and society in pursuit of the objectives of the NDR [National Democratic Revolution].’ 106 Apparently the new ANC has resolved to intensify ‘its efforts to bring all spheres of state and society under party control.’ 107 In so doing ‘the structures and collectives of the movement must make the decisions on the direction our country should take collectively.’ 108 Clearly, there is nothing wrong with such aspirations in a multi-party democracy whether or not one shares this vision. 109

104 The argument about the crucial importance of freedom for development may have been conveniently overlooked in this debate. Assessments of the correlation between development and democracy corroborate the findings that there is a democracy advantage for well being and prosperity. See Poverty Reduction, Economic Growth and Democratisation in Sub-Saharan Africa, Afrobarometer, Briefing Paper No. 68 (May 2009), available at <http://www.afrobarometer.org>.

105 SA Report, note 17, para 199. – Of course, it would be a mistake to see South African politics exclusively through the lens of democracy, given the limited experience with this form of political regime in this country. It is only one of ten African countries to be rated as ‘free’ and qualifies as a ‘liberal democracy’ with a Democracy Status score of 4.2 (out of 5). R Mattes, Democracy without People: Political Institutions and Citizenship in the new South Africa, Afrobarometer Working Papers 82 (November 2007), p. 10. However it is not ranked as a consolidated democracy with a sustained balance between perceived demand and supply of democracy. M Mattes, Neither Consolidated nor Fully Democratic: The Evolution of African Political Regimes, 1999-2008, Afrobarometer Briefing Papers 67 (May 2009), p. 2. The project of democracy building has still a long way to go.

106 Organisational Renewal, para 55, Resolutions, note 5.


108 Organisational Renewal, para 55, Resolutions, note 5.

109 Prominent ANC defector Saki Macozoma with the benefit of hindsight reportedly said: ‘The idea of a liberation movement that is the sole and authentic political vehicle for the national democratic
However, specific Polokwane resolutions impact on the independence of the courts, law-enforcement agencies and the mass media.\textsuperscript{110} This has created a public perception that ‘the new ANC has a driving motive to protect its leader (and other cadres) from investigation and prosecution’.\textsuperscript{111} In other words, the independence of the judiciary and other institutions involved in upholding constitutional democracy and the rule of law have become vulnerable to party-political interference. Recent developments in the aftermath of Polokwane arguably suggest\footnote{112} that there is a deliberate and sustained attack on important institutions involved in upholding the Rule of Law and in protecting the administration of justice, orchestrated by the ruling party and maintained by its cadres ‘deployed’\textsuperscript{112} in government or within the institutions targeted. The deliberate ‘capture or co-optation’ of parliament by the ruling party and the weakening of its oversight role is seen as a significant threat to multi-party democracy.\textsuperscript{113}

The explanations offered for contentious aspects of the measures proposed or taken are untenable. The two judicial bills have nothing to do with the transformation of the judiciary. They are transitional measures\textsuperscript{114} and as such must suit the requirements of the new Constitution, which they do not do. The suspension and subsequent dismissal of the NDPP are the result of unwarranted executive interference with prosecutorial independence which is constitutionally guaranteed. The relocation of the DSO is not constitutionally mandated as claimed, but serves another, prima facie ulterior purpose. The proposed external regulation of the press limits the constitutional right to freedom of expression and promotes pre-publication censorship. It has nothing to do with balancing the right of privacy with the right of the public to know as claimed. All this does not augur well for constitutional revolution and the aspirations of the people of SA no longer hold water.’ The Times (28 February 2009).

\textsuperscript{110} These are the Resolutions on Transformation of the Judiciary, Single Police Service and The Battle of Ideas read together.

\textsuperscript{111} Myburgh, note 107).---According to an Ipsos Markinor poll conducted in October 2008, released on 26 February 2009, few South Africans from all walks of life and across the racial spectrum and less than half (41%) of ANC supporters think that Jacob Zuma is innocent of corruption. Merely 47% of eligible voters agree that government is ruling in the interests of all South Africans, 42% that government only thinks about the interests of the members of the ANC, 46% that it is difficult to tell what the interests of the ANC and what the interests of the state are. Merely 47% of eligible voters agree that government is ruling in the interests of all South Africans, 42% that government only thinks about the interests of the members of the ANC, 46% that it is difficult to tell what the interests of the ANC and what the interests of the state are.

\textsuperscript{112} The deployment of cadres ‘to senior positions in government, such as President, Premiers and Mayors’ is a problematic practice, however. Organisational Renewal para 55, Resolutions, note 5.

\textsuperscript{113} Ibid. para 212.

\textsuperscript{114} Albertyn, note 40, p. 126.
According to the Constitutional Court, ‘there is nothing wrong, in our multi-party democracy, with Cabinet seeking to give effect to the policy of the ruling party’, but ‘Cabinet must observe its constitutional obligations and may not breach the Constitution’.\textsuperscript{115} Accordingly there is nothing wrong, in a multi-party democracy, with deployed cadres seeking to implement party resolutions. But, in so doing, they must observe their constitutional obligations and may not breach textual provisions or structural protections of the Constitution which guarantee the independence of important institutions of multi-party democracy. The complaint is that they have not done that or have not been seen to do it. This is perceived as one the most direct threats to democracy and the rule of law in South Africa since 1994.\textsuperscript{116} Following the elections in 2009, the Superior Courts Bill, 2003, was allowed to lapse, paving the way for the introduction of the new, revised Constitution Amendment Bill, 2010, and a new Superior Courts Bill, 2010, into Parliament. Both Bills result from further consultation with, particularly, the Judiciary. The draft Constitution Amendment Bill, 2010, is further being published in the Gazette for public comment in accordance with section 74(5)(a) of the Constitution and, since the Bill is closely linked to the transformation envisaged by the Superior Courts Bill, 2010, the latter draft Bill is simultaneously published for public comment.\textsuperscript{117}

\textsuperscript{115} Glenister case CC, note 73, para 54.
\textsuperscript{116} S. Friedmann, ANC’s Belief in its Divine Right to Rule Warrants our Attention, Business Day (1 July 2009).
\textsuperscript{117} Memorandum on the Objects of the Constitution Amendment Bill, 2010
Späte Sehnsucht nach *la madre patria*: Formen lateinamerikanischer Migration in Spanien

Von Andreas Baumer, Rostock*


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Um die genannten Fragen im Kontext der gegenwärtigen lateinamerikanischen Migration in Spanien diskutieren zu können, sollen zunächst die Migrationsprozesse nach Spanien und die Entwicklung der Zuwanderungspolitik der letzten zwei Jahrzehnte skizziert werden. Daran anschließend, werden die einzelnen Phasen der Migration aus Lateinamerika umrissen. Im nächsten Teil werden die gegenwärtigen Formen der lateinamerikanischen Migration in Spanien dargestellt. Am Schluss steht die Analyse der rechtlichen, politischen

3 Instituto Nacional de Estadística, (Fn. 1).
5 “Los preferidos del siglo XXI.” Izquierdo Escribano et al., (Fn. 2), S. 1.
und gesellschaftlichen Rahmenbedingungen, unter denen sich dieser unbestreitbare Boom der Zuwanderung aus Lateinamerika innerhalb der letzten zehn Jahre entfalten konnte.

A. Einwanderungsland Spanien: Entwicklung und Charakteristika der Zuwanderung


EG-Beitritts musste diese Bevorzugung von Zuwanderern aus den ehemaligen Kolonien eingeschränkt werden – genauso wie die Zuwanderungsbestimmungen insgesamt auf Druck der Europäischen Gemeinschaft sukzessive verschärft wurden. 8


Neben dieser enormen Dynamik zeichnet sich die Migration in Spanien durch eine Reihe von weiteren Merkmalen aus, die sie von vergleichbaren Prozessen in anderen europäischen Ländern unterscheiden:


8 Andreas Baumer, Chancen und Risiken der spanischen Migrationspolitik, Berlin Risk Brief No. 2. (2008), S. 7-12.
9 Diese und alle weiteren Angaben: Instituto Nacional de Estadística, (Fn. 1); eigene Berechnungen.

11 El País, 13.03.2008.
12 Vgl. Baumer, (Fn. 8); Instituto Nacional de Estadística, (Fn. 1).
13 Instituto Nacional de Estadística, (Fn. 1).
14 Vgl. Joaquín Recaño Valverde, Andrea Domingo i Valls, Evolución de la distribución territorial y la movilidad geográfica de la población extranjera en España, in: Eliseo Aja / Joaquín Arango
B. Entwicklung der spanischen Migrationspolitik


Der Wahlsieg der sozialistischen PSOE (Partido Socialista Obrero Español – Spanische Sozialistische Arbeiterpartei) von José Luis Rodríguez Zapatero im Jahr 2004 fiel mit dem Höhepunkt des beispiellosen Migrationsbooms nach Spanien zusammen. Die sozialistische Regierung unternahm den Versuch, mittels einer umfassenden Neuformulierung der Migrationspolitik auf diese Situation zu reagieren. Der Politikbereich Migration wurde vom Innenministerium ins Ministerium für Arbeit und soziale Angelegenheiten verlagert, was eine Neubewertung symbolisierte: nicht mehr sicherheitspolitische und polizeirechtliche Aspekte der Migration, sondern Fragen der Integration in die Sozialsysteme und in den


Arbeitsmarkt sollten im Vordergrund stehen. Das von der Vorgängerregierung verschärfte Ausländergesetz wurde zwar nicht reformiert, jedoch in seinen Ausführungsbestimmungen liberalisiert.


Neben der Regularisierung eines großen Teils der schon eingewanderten \textit{sin papeles} bildete die Abwehr neuer Irregulärer einen weiteren Schwerpunkt der sozialistischen Migrationspolitik. Wie schon die konservative Vorgängerregierung schlossen die Sozialisten weitere bilaterale Rücknahmeabkommen mit Herkunftsländern und Transitländern, um die möglichst rasche Rückführung irregulärer Migranten zu ermöglichen. 2007 wurden über 92\% der bei der Einreise aufgegriffenen Irregulären abgeschoben.


Im Kampf gegen die irreguläre Migration setzte die sozialistische Regierung auch auf die Schaffung von Möglichkeiten der regulären Zuwanderung. Die spezifische Nachfragestruktur des spanischen Arbeitsmarktes nach ausländischen Arbeitskräften – also der wichtigste Pull-Faktor für die irreguläre Zuwanderung – sollte in verschiedenen Politiken zur Förderung von regulärer Migration abgebildet werden. Dazu gehörten bilaterale Abkommen über temporäre Migration mit einer Reihe von Entsendeländern, Regelungen für Saisonarbeit, sowie eine mit Unternehmensverbänden und Gewerkschaften abgestimmte Liste von schwer zu besetzenden Stellen, für die gezielt ausländische Arbeitskräfte angeworben

\textbf{20} El País, 09.01.2008.


Im Zuge der schweren Wirtschaftskrise, von der Spanien seit dem zweiten Halbjahr 2008 massiv betroffen war, begann sich auch der bislang dezidiert migrationsfreundliche Diskurs der sozialistischen Regierung zu wandeln. Das Ministerium für Arbeit und Immigration legte im Frühjahr 2009 ein – weitgehend wirkungsloses – Programm zur Rückkehrförderung von Migranten auf. Im Dezember 2009 verabschiedete das spanische Parlament eine Reform des Ausländergesetzes, die den Familiennachzug beschränkte und einige

23 Baumer, (Fn. 8), S. 12.

C. Phasen der Migration aus Lateinamerika


26 Baumer, (Fn. 10), S. 171.
Die Einreise dieser Migranten erfolgte in den meisten Fällen regulär, zu Irregulären wurden sie erst nach Ablauf der Frist zu Ausreise.


D. Gegenwärtige Formen der Migration aus Lateinamerika


Instituto Nacional de Estadística. (Fn. 1).
oder aus anderen Gründen nicht an der letzten Regularisierung 2005 teilnehmen konnten, bedeutet dies, dass sie kaum Chancen auf eine Regularisierung ihrer Situation haben.29

Öftmals ist die Migration Teil einer „Familienstrategie“30 und beginnt mit der Auswanderung eines Familienmitglieds. Gerade im Fall der Migranten aus den Ländern des Andenraums sind das in vielen Fällen Frauen, die erst nach einer Etablierungsphase ihre Partner, später auch Kinder und weitere Familienangehörige nachholen. Pilar Ponce hat für den Fall der ecuadorianischen Migration beschrieben, dass im Normalfall die Frau als erste migriert, nach einem Jahr der Mann und nach zwei weiteren Kindern und evtl. auch Großeltern kommen.31 Diese Migrationen finden meist noch unter Bedingungen der Irregularität statt. Bis vor wenigen Jahren konnte allerdings auf eine Regularisierung zu einem späteren Zeitpunkt gehofft werden – eine Perspektive, die sich für die Protagonisten der jüngsten Einwanderungswellen, insbesondere der aus Bolivien, wohl nicht mehr bietet.


Jenseits dieses kulturellen Kapitals der Sprache und der Religion, das den meisten latinos zur Verfügung steht, unterscheiden sich die einzelnen Gruppen der lateinamerikanischen Migranten stark in ihrer jeweiligen sozialen und ökonomischen Situation. Neben Herkunft, Bildungshintergrund, Ausbildung, Dauer des Aufenthalts und anderen individuellen Faktoren ist es vor allem der Aufenthaltsstatus, der die soziale Situation determiniert. Der Umstand, ob ein Migrant die spanische Staatsbürgerschaft erlangt hat, oder Aufenthaltsgenehmigung verfügt oder gar keine Papiere hat, sich also irregulär im Land befindet, entscheidet maßgeblich über Zugang zu und Qualität von Arbeit, Wohnung, staatlichen Leistungen, Partizipationsmöglichkeiten, sozialer Anerkennung etc.33 Und hier sind die Unterschiede zwischen den einzelnen Migrantenkollektiven aus Lateinamerika enorm.

30 „Estrategia familiar.” Ponce, (Fn. 4), S. 99.
31 Ebd., S. 101.
32 „Trato cotidiano”, “simpatía cultural.” Izquierdo Escrubano et al., (Fn. 2), S. 19.
33 Javier de Lucas, Igualdad jurídica e inclusión política: por el empowerment de los migrantes, in: Secretaría General Iberoamericana, (Fn. 21), S. 248.

Die beste Voraussetzung für soziale und ökonomische Integration von Migranten stellt auch in Spanien die Einbürgerung dar. Wie weiter unten noch ausgeführt werden wird, sind lateinamerikanische Migranten im Allgemeinen und direkte Nachfahren spanischer Auswanderer im Besonderen bei der Erlangung der Staatsbürgerschaft bevorzugt. Dementsprechend viele der in Argentinien geborenen Migranten (33,79 %) sind spanische Staatsbürger, einen Status, den Angehörige der indigen geprägten Andenstaaten seltener erreichen. 25,39 % der Peruenser, 17,41 % der Kolumbianer, 14,57 % der Ecuadorianer und lediglich 2,58 % der Bolivianer haben die spanische Staatsbürgerschaft erlangt.

Ganz anders stellt sich die Situation bei der Gruppe der lateinamerikanischen Migranten mit einem regulären Aufenthaltsstatus dar. Hier sind es die Migrantenkollektive, die vor (Dominikaner) oder zu Beginn des großen Booms (Ecuadorianer, Peruaner, Kolumbianer)


35 Instituto Nacional de Estadística, (Fn. 1); eigene Berechnungen.

36 Alle Angaben zum 01.01.2009. Vgl. Instituto Nacional de Estadística, (Fn. 1).


37 Tatsächlich sind in der Statistik des Ministeriums für Arbeit und Immigration zum Stichtag 31.12.2008 mehr ecuadorianische Migranten mit Aufenthaltsgenehmigung verzeichnet als im padrón municipal vom 1.1.2009 registriert sind, so dass sich rechnerisch ein Prozentsatz von 102,98 ergibt, was auf die weiter oben schon angemerkte Ungenauigkeit dieser beiden Statistiken zurückzuführen ist. Ein Jahr zuvor verfügten 96,01 % der gemeldeten Ecuadorianer über eine Aufenthaltsgenehmigung. Es ist also davon auszugehen, dass zwischenzeitlich nahezu alle Migranten aus diesem Land ihre aufenthaltsrechtliche Situation regularisieren konnten. Alle Angaben: Ministerio de Trabajo e Inmigración, Secretaría de Estado de Inmigración y Emigración, (Fn. 34); Instituto Nacional de Estadística, (Fn. 1); eigene Berechnungen.

rung aufgrund von „Verwurzelung“ profitieren zu können. Bolivianische Migranten sind also vom Syndrom der Konsequenzen von Irregularität in hohem Maße betroffen, das sich am besten mit dem Begriff der „Verletzlichkeit“ beschreiben lässt.


Die Integration der Migranten aus Lateinamerika in den spanischen Arbeitsmarkt weist einige Charakteristika auf, die sie von anderen Migrantengruppen unterscheiden. Im Jahr

39 „Vulnerabilidad.“ De Lucas, (Fn. 33) S. 245.
40 Bernales Ballesteros, (Fn. 21), S. 240.
41 Gómez Ciriano et al., (Fn. 29), S. 92.
42 Ebd.
waren 74,67 % der sozialversicherungspflichtig Beschäftigten im regulären Sozialversicherungssystem (Régimen General de la Seguridad Social) angemeldet. 5,29 % fielen unter das System für den Agrarbereich (Régimen Especial Agrario), 15,48 % waren in dem System für Beschäftigte in privaten Haushalten registriert. (Régimen Especial de Empleados del Hogar) Zum Vergleich: Von den marokkanischen Beschäftigten waren im gleichen Jahr nur 57,82 % im regulären, jedoch 34,48 % im System für den Agrarbereich angemeldet. Sozialversicherungspflichtige Jobs in Haushalten machten bei dieser Gruppe nur 1,23 % der Beschäftigungsverhältnisse aus. Betrachtet man die Verteilung in den Beschäftigungssektoren, die dem regulären Sozialversicherungssystem zugeordnet sind, werden die Unterschiede noch deutlicher. 75,45 % der Lateinamerikaner waren im Dienstleistungssektor beschäftigt, gegenüber 55,74 % der marokkanischen Migranten. Diese waren dagegen zu 28,03 % im Baugewerbe angemeldet, von den Lateinamerikanern waren es 15,19 %. Unter den einzelnen nationalen Kollektiven der lateinamerikanischen Migranten ist ebenfalls eine Spezifizierung zu konstatieren. Bolivianer und Ecuadorianer sind überproportional in der Landwirtschaft und in der Bauwirtschaft vertreten, während die große Mehrheit der Argentinier ihr Auskommen im Dienstleistungssektor gefunden hat.

E. Los inmigrantes preferidos? Politik, Recht und öffentliche Meinung

Migrationsprozesse sind stets das Ergebnis eines Zusammenspiels aus Push- und Pullfaktoren, also den Umständen, die im Herkunftsland und im Zieleland auf die Migrationseinscheidung einwirken. Zu den Pull-Faktoren gehören konjunkturelle Faktoren, etwa die Nachfragesituation in bestimmten Segmenten des Arbeitsmarktes, genauso wie strukturelle Faktoren, beispielsweise einreise- und aufenthaltsrechtliche Bestimmungen. Aspekte wie gemeinsame Sprache, Religion, kulturelle Nähe etc. können ebenfalls eine wichtige Rolle spielen, insbesondere dann, wenn sie die Migrationspolitik des Aufnahmelandes beeinflussen.

Im Folgenden sollen nun diejenigen Faktoren untersucht werden, die Migration aus Lateinamerika nach Spanien gegenüber der aus anderen Regionen begünstigen. Daran wird sich die Diskussion der Frage anschließen, ob tatsächlich von einer Politik der Bevorzugung gesprochen werden kann und welche Rolle dabei das Bewusstsein einer gemeinsamen Geschichte oder Konzepte wie das der Hispanidad spielen.


I. Rechtliche Rahmenbedingungen

Lateinamerikanische Migranten haben gegenüber Zuwanderern aus anderen Regionen verschiedene rechtliche Vorteile:


• Visumsfreiheit: Auch nach der Angleichung der Einreisebestimmungen an die der übrigen Schengen-Staat benötigten Angehörige lateinamerikanischer Staaten kein Visum, um nach Spanien einzureisen. Diese Regelung wurde erst in den Jahren 2001 bis 2003, also in der Hochphase des Migrationsbooms, für die wichtigsten Herkunftsländer (Kolumbien, Kuba, Ecuador, Peru und Dominikanische Republik) ausgesetzt.

49 Domingo, (Fn. 47), S. 4.


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50 Izquierdo Escrivano et al., (Fn. 2), S. 19.
52 „Programa Global de Regularización y Coordinación de Extranjería y de Inmigración.“ Kreienbrink, (Fn. 15), S. 436-444.

III. Öffentliche Meinung


Auf der politischen Ebene wurde diese gesellschaftliche Präferenz gegenüber lateinamerikanischen Migranten in einen Diskurs integriert, der „eine klare Bevorzugung für die Migranten aus dieser Region im Namen der historischen und sprachlichen Gemeinschaft, wie sie in der hispanidad verkörpert wird“, einschloss. Der Verweis auf das Konzept der hispanidad findet sich im offiziellen Diskurs der Regierung normalerweise zwar nicht, gleichwohl wird das Thema der lateinamerikanischen Migration stets in den Kontext der Iberoamerikanischen Staatsgemeinschaft gestellt, mithin also der demokratisch recycelten Version der hispanidad. Unter dem Titel „Vereint

56 Domingo, (Fn. 47), Izquierdo Escribano et al., (Fn. 2).
57 “Los prefieren los empresarios y los políticos, los vecinos del barrio, las organizaciones católicas y los maestros en los colegios.” Izquierdo Escribano et al., (Fn. 2), S. 3.
58 “Choque cultural con otra religión.” Ebd.
59 Domingo, (Fn. 47), S. 2.
60 “Una clara preferencia por los migrantes procedentes de ese territorio en nombre de la comunidad histórica y lingüística que supone la hispanidad.” Ebd., S. 19.
Baumer, Späte Sehnsucht nach la madre patria: Formen lateinamerikanischer Migration in Spanien

347

durch Migration: Iberoamerikanische Konferenz über Migration und Entwicklung fand im Sommer 2006 ein großes Symposium zu diesem Thema in Madrid statt. Ein Jahr zuvor hatte die Konferenz der iberoamerikanischen Staats- und Regierungschefs auf ihrem Gipfeltreffen in Salamanca dem iberoamerikanischen Generalsekretariat das Mandat für die Vorbereitung einer solchen Konferenz erteilt. Marta Rodríguez Tarduchi, zu diesem Zeitpunkt Generaldirektorin für Immigration im damaligen Ministerium für Arbeit und soziale Angelegenheiten, hat auf dieser Bezugsrahmen der spanischen Migrationspolitik gegenüber Lateinamerika umrissen:

Diese historischen Überlegungen, die im Kontext der iberoamerikanischen Gemeinschaft angezogen werden, müssen an die Solidarität und die Gastfreundschaft vieler Länder Lateinamerikas erinnern, die vor noch nicht allzulanger Zeit viele Tausend wirtschaftliche und politische Migranten aus Spanien großzügig empfangen haben, die vor einer feindlichen Gegenwart flohen und in Amerika Unterstützung und Chancen vorfanden. Die notwendige Bestimmtheit der Politik und die Verpflichtung, die Migrationsträme kontrolliert und geordnet zu verwalten, dürfen in Bezug auf die iberoamerikanische Gemeinschaft nicht dazu führen, dass wir diese gemeinsame Geschichte vergessen, die Bindungen zwischen beiden Küsten des Atlantiks geschaffen hat, welche die konkreten historischen Konjunkturen, die die einzelnen Gesellschaften durchliefen, transzendentieren.


F. Fazit

Die Migration aus Lateinamerika gleicht in Form und Verlauf in vielerlei Hinsicht den Zuwanderungen aus anderen Regionen nach Spanien. Die Kombination von Push-Faktoren, die in den Herkunftsländern große Gruppen von Menschen zur Migration getrieben hat, ist in vielen Fällen eine ähnliche. Das gilt auch für eine Reihe von Pull-Faktoren, allen

61 „Unidos por las migraciones. Encuentro Iberoamericano sobre Migración y desarrollo.“ Vgl. Fn. 22.

62 Inzwischen hat sich Denomination geändert: die neue Bezeichnung lautet „Ministerium für Arbeit und Immigration“ (Ministerio de Trabajo e Inmigración).

63 „Esta reflexión histórica, formulada en el contexto de la comunidad iberoamericana, no puede dejar de evocar la solidaridad y la hospitalidad de tantos países de América Latina que, no hace tantos años, recibieron con generosidad la inmigración económica y el exilio político de miles y miles de españoles que huían de una realidad hostil y dramática y encontraron en América solidaridad y oportunidades. El rigor en la determinación de las políticas y el imperativo de gestionar controlada y ordenadamente los flujos migratorios no pueden, cuando hablamos de la comunidad iberoamericana hacernos olvidar esta historia común que establece entre ambas orillas del Atlántico vínculos que trascienden las coyunturas históricas concretas por las que atraviesan unas y otras sociedades.“ Rodríguez Tarduchi, (Fn. 55), S. 385.
voran die lange Zeit ungebremste Nachfrage in bestimmten Segmenten des spanischen Arbeitsmarktes.


64 Izquierdo Escribano et al., (Fn. 2), S. 1.
Squatters' Rights and the Land Laws in Tanzania

By Kennedy Gastorn, Dar es Salaam

1. Land Tenure Regime in Tanzania

Tanzania has a pluralist legal regime. Two sets of laws exist governing land tenure in the country, namely statutory and customary laws. Statutory laws are those contained in the Land Act, 1999, while the framework of customary law is now under the Village Land Act, 1999. Two sets of tenure derived from the above structure are the ‘granted right of occupancy’ under the Land Act, 1999, and ‘customary right of occupancy’ under the Village Land Act, 1999. The two sets of tenure are combined together as a ‘right of occupancy’.

The right of occupancy system traces its root back to the British colonial regime. After the defeat of Germany in the World War I, and in accordance with Article 119 of the Versailles Treaty of 1919, Germany was forced to surrender all her foreign possessions including the colony of German East Africa. Tanganyika (then the larger part of German East Africa) was put under British rule as a mandate, and later a trust territory, under the supervision of the League of Nations. British rule proceeded to install a new land tenure regime that best suited its needs. In 1920 and 1922 parts of English common law were declared to be applicable in the territory. The concept of squatting, together with other English and common law doctrines thus entered the country. In 1923 British rule enacted

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1 The two laws were enacted in 1999 but came into force with effect from 1st May 2001 via Government Notices No. 485 and 486 of 2000.


3 Signed on June 28th, 1919 at Versailles.


5 Order in Council 1920 and Reception Clause [Land (Law of Property and Conveyancing) Ordinance No. 2 of 1923, Cap 114]
the Land Ordinance specifically to deal with land in the territory. The ordinance introduced the right of occupancy system. Essentially this is a system where the radical title on land remains in the state but people are granted rights to use and occupy land for a certain period of time under certain conditions. These rights are called ‘granted rights of occupancy’.

At the enactment of the ordinance the assumption was that the indigenous people had no ownership over land. Communal or group-based ownership of land was unknown to British rule. The Land Ordinance declared all land whether occupied or unoccupied as public lands vested in His Majesty, the King of England, giving the state a free hand to control and alienate indigenous lands, unencumbered by any legal obligations. The meaning of the right of occupancy was conveniently enlarged in 1928 to include customary tenure as a deemed right of occupancy as an outcome of the criticisms of the Permanent Mandates Commission of the League of Nations that customary land rights of indigenous people had been left out in the Ordinance. Right of occupancy tenure still exists today.

2. Squatters under Common and English Law

A squatter has been defined as one who settles on the lands of others, including public land, without any legal authority. Squatting is therefore an act of occupying land, not necessarily unused land, without any tenurial rights over the land. It is assumed to be the oldest mode of tenure in the world. A squatter acquires title to land through adverse possession and that is why adverse possession is also called ‘squatters’ rights’.

Possession is important under English law because the fact of possession of land entitles a person to retain the land against anyone in the world except someone who has

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8 Sections 2, 3 and 4 of the Land Ordinance, Cap 113.
10 Land (Amendment) Ordinance No. 7 of 1928.
superior title. That is why the law puts a period of limitation upon which the holder of better title may recover or bring an action for recovery of land. After that period, a squatter has the right to remain in possession, having acquired a good possessory title, and old title becomes obsolete and its claim stale. Apart from the factual possession, which is normally demonstrated by a degree of exclusive physical control, a squatter must prove the requisite intention to possess the land to the exclusion of all others, including the owner with the paper title (animus possidendi).

Following the enactment of the Land Registration Act 2002, distinction has been made between registered and unregistered land as far as adverse possession is concerned. In order for a squatter to obtain title to registered land, the squatter may, after being in adverse possession for ten years, apply to the land registry to be registered as owner. The land registry must then respond by sending a notice to the registered proprietor and others with registered interests in land informing them that an application has been made by the squatter. They are given 65 working days in which to object to registration of the squatter as having title to the land at this stage. It has been argued that these provisions are an emasculation of adverse possession in relation to registered land, signalling the end of adverse possession as a threat to the security of registered title, save in cases where the registered owner genuinely has no use for the land and does not wish to keep it. The system of registered land moves from title by registration to registration of title.

It needs to be noted that the law of limitation was unknown to common law. Many rationales exist behind the law of limitation. It is in the public interest that a person who has been in undisputed possession be able to manage the land as its owner. Established and peaceable possession is therefore protected by law instead of law assisting the agitation of old claims. ‘Long dormant claims have often more cruelty than justice in them’, and those who ‘go to sleep upon their claims should not be assisted by the courts in recovering their

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14 12 years, according to the Limitation Act 1980, Land Registration Act 1925 and Land Registration Act 2002.
17 Harcup, note 15, p. 216.
19 O’Mahony, note 18, p. 891.
20 Harpum, note 18, p. 1409.
property (a duty of stewardship).\textsuperscript{22} It is also important that a civil litigation should have an end. Moreover, since possession is the basis of unregistered title, limitation facilitates the investigation of title to unregistered land. On the other hand, some people do have a strong moral stance on the immorality of squatting. It is argued that since the basis of adverse possession is wrongful possession, legitimizing it is tantamount to sanctioning theft of land, it is not logical that illegal possession can prevail over legitimate ownership \textit{(de facto v. de jure)}.\textsuperscript{23} Limitation needs to be distinguished from prescription. The latter rests on the presumption of right and not a wrongful possession which is the basis of limitation. Also prescription is primarily a common law doctrine by which a certain incorporeal rights such as easements are acquired over land of others.\textsuperscript{24}

3. Evolution of the Concept of Squatting in Tanzania

Colonial laws and policies brought the concept of squatters to Tanzania. Likewise, colonial legal practice and colonial activities created a class of people occupying land without title to land. The majority of Africans who lived in towns during colonial time were squatters. The colonial government removed Africans from certain sections of towns and placed strict conditions on them for remaining in town.\textsuperscript{25} Even some richer Africans who could afford to acquire, and build on, urban plots, preferred to build outside the towns where they were free of the tough and peculiar township building and health regulations under which Africans were allowed to settle in towns.\textsuperscript{26} In British colonial days it was also the practice that upon the extension of city or town boundaries, urban lands ceased to be subject to native law and custom upon payment of compensation to the former holders who were affected by the order. Those who remained within the urban boundaries came to be called squatters.\textsuperscript{27} Interestingly, the law of limitation was not applicable to the government because squatters could be evicted at the will of the government at any time. As it was held in \textit{Muhena Bin Said v. Registrar of Titles}, the doctrine of long possession, which is the basis of adverse possession, was a creature alien to native law. Therefore squatters in the Tanzanian context differed in certain aspects from his or her counterpart under the English law.

Squatters were also created through land alienation. Colonial government acquired huge chunks of fertile land occupied by indigenous people and caused them to search for

\textsuperscript{23} \textit{O’Mahony}, note 18, p. 982.
\textsuperscript{24} \textit{Harpm}, note 18, pp. 1410-1411.
\textsuperscript{26} East Africa Royal Commission 1953-1955 Report, Cmd 9475, Chapter 19, paras 60-64.
\textsuperscript{27} \textit{Roden William James}, Land Tenure and Policy in Tanzania, Dar es Salaam 1971, p. 100.
\textsuperscript{28} (1948) 16 EACA 399.
alternative land for grazing and cultivation. The absence of paper title reduced customary landholders to no better than squatters. It has to be remembered that the 1923 Land Ordinance disowned indigenous people of their land by declaring all land as public land under the control and subject to the disposition of the Governor, and no title to the occupation and use of any such lands shall be valid without the consent of the Governor. Even the amendment of the Land Ordinance which recognised customary title as deemed right of occupancy was only declaratory,\(^{29}\) which in itself could not safeguard the customary rights of the indigenous people.\(^{30}\) Occupation of land under customary law was legally construed by courts as permissive in the nature of licences.\(^{31}\) James argues, nevertheless, that technically Africans occupying public lands were in lawful occupation of such lands under deemed rights of occupancy, provided they occupy and use such lands in accordance with African law and customs.\(^{32}\)

An artificial shortage of land by dispossessing and denying natives their land rights, not only made them squatters on public land but was also used deliberately to ensure the availability of labour to the colonial plantations. The Land Ordinance provided a legal framework for plantation agriculture in Tanzania.\(^{33}\) Without land, people had nothing but their labour to be sold for a wage in the plantations. This also happened in many other jurisdictions. In Kenya, for instance, by the alienation of land of indigenous people, inhabitants were turned into squatters. Yet the colonial government proceeded to prohibit natives from settling on any land held by Europeans unless bona fide employed by the owner. The reason being that ‘the Europeans settlers who have invested their fortunes in the country at the invitation of the British government cannot be blamed for demanding native labour. Put in the same situation, the twelve apostles would not have acted otherwise’.\(^{34}\) Therefore the demand for labour could only be satisfied through squatterdom rather than wage labour.

Tanganyika independence in 1961 did not greatly change the position of customary landholders. Several colonial practices survived independence, and in land laws the big change was the substitution of the word “Governor” for “President” wherever it appeared.\(^{35}\) It was for instance still assumed that native law and customs were only applicable in rural areas but not in urban centres where land could not be acquired other than by grants of

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\(^{29}\) Land (Amendment) Ordinance No. 7 of 1928.  
\(^{30}\) Shivji, note 9, p. 3.  
\(^{32}\) James, note 27, p. 100.  
\(^{33}\) Fimbo, note 31, p. 3.  
\(^{35}\) Gamaliel Mgongo Fimbo, Essays in Land Law Tanzania, Dar es Salaam 1992, p. 3.
rights of occupancy. Therefore when an area is given urban status customary law ceases to apply, and the former owner who has become a squatter must apply for a granted right of occupancy. In general the Land Ordinance was not entirely unambiguous on the legality or illegality of Africans’ rights to town lands. Other policies of independent government contributed much to the uncontrolled growth of unplanned settlements within and at the fringes of urban centres. This was partly due to the inherited colonial planning laws that could not easily be availed of by the mass of the population because of their over-ambitiously legalistic nature, lack of sufficient surveyed plots, bureaucracy in land administration procedures, the unregulated land market, population increases in urban centres and the uncontrolled alteration of town master plans. The independent government was indeed vigilant in preventing squatting activities, only it had no capacity to counter the magnitude of the problem. For instance, nearly two weeks after independence the government warned squatters not to continue erecting houses on public land without title because it was determined not to pay them compensation if the government decided to clear the land for public purposes. It even warned squatters that their presence hindered several national development projects, citing Tanga region as an example, which had missed two opportunities for industrial establishment due to squatting. Informal landholding cum squatting continued to exist. In 2002 the Ministry of Lands made it clear that squatting accompanied by occupation constituted 18% of the actions by which people accessed land in urban areas in Tanzania. And in 2003/4 it was estimated that 80% of all residential houses in Dar es Salaam were in the unplanned settlements. In 2007, the Minister for Lands clarified that over 70% of urban Tanzanians live in non-surveyed areas, 25% of the population in the country lived in surveyed areas and the housing deficit in urban areas alone was estimated

36 James, note 27, p. 101.
37 James, note 27, p. 103.
39 James, note 27, pp. 100-105; Twahi, note 11, p. 101. For instance in the Guardian (Tanzania), December 20, 2007, p. 1, the Minister for Lands confessed as being fed up with avalanche of written proposals from district officials seeking to alter the status of open spaces in the master plans.
at 1.2 million units.\footnote{Hon. John P. Magufuli, M.P. See Daily News (Tanzania), December 20, 2007, p.1; The Guardian (Tanzania), December 20, 2007, p.1.} To this end, the usage of term ‘squatters’ in its true sense seemed unwelcome and instead terms like ‘unplanned settlements’ and ‘informal landholders’ were preferred.

In rural areas, the land tenure confusion caused by the rural development approach of the villagisation programme in the 1970s left millions of customary landholders uncertain of their tenure.\footnote{United Republic of Tanzania, Report of the Presidential Commission of Inquiry into Land Matters, Vol. I, Land Policy and Land Tenure Structure, Uppsala 1994, chapter IV, para 81. On villagisation and land tenure also see Wanitzek, note 2, p. 180.} Villagisation was a compulsory scheme of resettling people in villages so that they could produce on a communal or cooperative basis. The main purpose of the villagisation programme was to speed up rural development through agriculture.\footnote{Julius Kambarage Nyerere, Freedom and Unity: Uhuru na Umoja, Dar es Salaam 1967, pp. 176-187, Julius Kambarage Nyerere, Freedom and Socialism: Uhuru na Ujamaa, Dar es Salaam 1974, pp. 337-366.} The programme hardly took into account contradictions between the existing land tenure system and the new tenure system to be installed in the villages. It created land tenure confusion and, as has been argued, the resulting mass relocation of people into new villages opened up possibilities of alienation of village land on a scale greater than prevalent even during colonial times.\footnote{Shivji, note 9, p. 12.} Villagers became informal landholders because their title to land was uncertain. In the villages in question land was not acquired in accordance with either customary law or statutory tenure.\footnote{Tanganyika Standard, August 23, 1962, p. 4. Also see The Nationalist August 5, 1964, p. 2. Tanganyika Standard, May 10, 1963, p. 1.}

It needs to be noted that the government had earlier on, before the villagisation programme, already embarked on similar resettlement schemes near cities as a way of fighting unemployment in towns. For instance in 1962, a 3,000 acre resettlement area at Tumbi (Kibaha), 24 miles from the city centre of Dar es Salaam, was created to provide a farming livelihood for 200 unemployed persons. The exercise was carried out on a voluntary basis.\footnote{Mwafrika, February 7, 1962, p.1.} The government had even threatened that if people continued to stay in towns without moving to villages to farm,\footnote{‘Kupasua Mbuga na Kulima’.} it would have no option but to give foreigners land so that they could produce for the benefit of the nation.\footnote{'}
4. Courts Articulation of the Concept of Squatters in Tanzania

British colonial land tenure structures survived independence. The system continued to apply with minor modifications to suit the needs of the new government. Therefore the concept of squatters remained although not applied as before. Since the concept was used politically against the interests of the natives during colonial days, and therefore resisted by natives, the independent courts had a different approach to it, particularly in relation to African rights on town lands.

In *Metthuselah Paul Nyagwaswa v. Christopher Mbote Nyirabu*[^52^], one issue was whether, once an urban area is declared a planning area, existing customary rights become extinct. As noted above, the practice during colonial times was that upon the extension of city or town boundaries, urban lands ceased to be subject to native law and custom upon payment of compensation to the former holders affected by the order. Those who remained within the urban boundaries came to be called squatters. The court resolutely held that:

“...the law in Tanzania on land and land tenure is still developing and certain areas are unclear and would have to await the necessary legislation. At any rate I am not prepared, on the rather inconclusive and tenuous arguments advanced in this appeal, to hold that the right of a holder of a right of occupancy by virtue of native law and custom is extinguished and he thereby becomes a squatter on an area being declared a planning area”.

Since the law was still developing, the court avoided giving a clear verdict on the issue. This might imply that given other conditions, such as compensation being paid, a land-holder may be a squatter. Later, in *Mwalimu Omari and Another v. Omari A. Bilali*,[^53^] the court considered the assumptions on squatters in view of the status of customary tenure holders in urban or town areas. The court held that:

“Title under customary law and a granted right of occupancy in an area declared township or minor settlement cannot co-exist. Title to urban land depends on grant. Once an area is declared an urban planning area and land is surveyed and plot demarcated whoever occupies land under customary law has to be quick to apply for right of occupancy. If such person sleeps on such right and the plot is given to another, he becomes a squatter in law and would have to move away; he strictly would not be entitled to anything”.

The court had the advantage of the judgment in the Nyangaswa case above. The court clarified the decision in Nyangaswa’s case as follows:

“What Mustafa J.A. said in Nyangaswa's case is that after an area is declared urban planning area, a squatter or a person holding title under customary law continues to enjoy some rights, e.g. compensation but this was not superior to that of a holder of right of occupancy. Squatters have a right of facing authorities for fast registration if they comply with set down rules. If they do not do so and someone is granted the plot, they can only be compensated for unexhausted improvement”.

In this regard, a squatter is as good as a person holding customary tenure in a planning area. Also a customary landholder, once an area is declared a planning area, becomes a squatter with two rights, namely right for compensation for unexhausted improvements, and right to be considered first for new title upon application for the same.

In Rashid Makwamba & 1016 others v. Kilombero Sugar Co. Ltd, villagers settled and occupied a piece of land for a number of years. It was later discovered that the land in question belonged to one legal person under title, although it was unused land. Villagers were sued for trespassing on the land in question. The villagers disputed the claim as they had occupied the land for a long period of time. The court held against the villagers that they were squatters having intruded and trespassed on the land, and had no rights whatsoever but to vacate the area. At this juncture, a squatter as a person holding land without any tenurial rights over the land needs to be distinguished from a person holding land in a surveyed or planning area by virtue of being the former occupier of the land under customary law. A clear distinction between the two is put by Twaib. According to Twaib, a person on land without tenurial rights is a squatter per se, not entitled to compensation and his or her occupation is merely permissive, he or she therefore having no right to continue staying on a piece of land after it has been allocated to someone else. But for the previous holder in customary law, his or her rights remain legally recognized until they are lawfully acquired.

5. National Land Policy and Squatters

Tanzania put in place, for the first time, the National Land Policy in 1995 as a policy framework upon which new land laws should be modeled, and all persons exercising powers under, applying or interpreting the laws should have regard to. The National Land Policy provides that:

(a) The existing [squatter] areas will not be cleared, but will be upgraded and provided with facilities for adequate sanitation and other services except for unplanned housing in hazardous areas.

(b) Residents in unplanned urban settlements shall have their rights recorded and maintained by the relevant land allocating authority and that record will be registered.

54 For example see Rashid Mkwamba & 1016 others v. Kilombero Sugar Co. Ltd, Land Case No. 15 of 2003, High Court of Tanzania (Land Division) at Dar es Salaam (unreported).
55 Twaib, note 11, p. 98.
57 Suzan Kakabukuba v. Walwa Joseph Kasubi, High Court of Tanzania at Mwanza, Civil Case No. 13 of 1987 (unreported).
58 National Land Policy, para 6.4.1 (iii & iv)
59 National Land Policy, para 4.2.22.(iii).
(c) The land rights of peri-urban dwellers will be fully recognized and rights of occupancy issued.\(^60\)

Also the Human Settlements Policy of 2000 issued by the Ministry of Lands, Housing and Urban Development\(^61\) calls for the need to recognize unplanned settlements and provides strategies for curbing development and regularisation of the same.

The implications of the above policies may be seen from the fact that the squatter or unplanned settlements phenomena in Tanzania revolve also on the role of the government as a provider of basic social services and the people (squatters) as recipients of the services. This has influenced the juridical and policy approaches to the question, as seen above, and the approaches have defied the English myth that ‘squatters are parasitic deviants who steal people’s houses and constitute a threat to everything decent in society’.\(^62\) The government is determined to grant squatters in unplanned settlements immediate provision of services such as power and water, and is proceeding to take early steps to check the sprawl of unplanned settlements and not to wait until when it is too late to demolish structures. It has recognized that although squatter areas are unplanned, they nevertheless represent assets both in social and financial terms. Responses seemed to require a balancing of two questions: fault on the part of both the squatter and the government (as virtual land owner) and the hardship likely to be occasioned upon each party in the event of alternative legal outcomes. Four factors may be considered in determining the appropriate legal responses to squatter tenurial land rights in Tanzania,\(^63\) the identity of squatters; the type of property in question; the squatter’s motives; and the conduct of the land owner.

In principle, all squatters in Tanzania are people entitled to any vacant public land. All land belongs to the nation. It is vested in the President as a trustee for the benefit of the citizens.\(^64\) In absence of freehold ownership, land is mainly occupied on condition that it is developed. This means that citizens can not only move and reside wherever they want but also occupy land anywhere provided they use it.\(^65\) That is why, especially after independence, the majority moved to towns in search of a better life.\(^66\) This political and legal environment regarding citizens’ rights to occupy land encourages people to make good use of all unused land whether in town, peri-urban or rural areas. What makes them squatters is the absence of formal title to land, mainly by non-compliance with the acquisition procedures, planning laws, and uncertainty over the application of customary tenure in urban

\(^{60}\) National Land Policy, para 6.3.1. (iii)
\(^{61}\) Now the Ministry of Lands and Human Settlements Development.
\(^{62}\) O’Mahony, note 18, p. 883
\(^{63}\) Based on the current factors considered significant in the UK, see O’Mahony, note 18, p. 882.
\(^{64}\) National Land Policy, para 4.1.1(i); S. 3(1) Land Act.
\(^{65}\) Nyerere, note 46, pp. 53-58.
\(^{66}\) In colonial time, African were removed or prevented from living in towns. See East Africa Royal Commission 1953-1955 Report, Cmd 9475, Chapter 19, para 60-64; Burton, note 25.
areas. The type of property is generally unused public land. As to the motives of squatters, it ranges from lack of alternative, deliberate acquisition of title to simply mistaking urban boundaries and those of neighbouring villages. Village lands are often engulfed by town boundaries or declared planning areas without sufficient notice to the landholders. Villagers, who later become squatters in law, continue holding their land for they have not been given alternative land or their rights are yet to be lawfully extinguished. They are good faith squatters for they bear no fault in relation to their land occupation. The conduct of the government here leaves a lot to be desired. Inability of land delivery system and poor planning laws promote the sprawl of unplanned settlements in urban and peri-urban areas. In many cases, the government has deliberately or otherwise failed the duty of stewardship bestowed upon it as the virtual land owner (trustee).

6. The Question of Squatters in Law Drafting Stages

The issue of different classes of squatters with different treatment in the eyes of law came out significantly during the drafting process of the new land laws. As noted above, the Ministry of Lands acknowledged that ‘squatting accompanied by occupation’ constitutes 18% of the ways in which people access land in urban areas in Tanzania. Again the policy is interested in protecting squatters or informal landholders. It was noted with concern that unauthorised market transactions for land had existed for several years and must therefore be recognised and not be ignored or the ‘fiction’ maintained that all people who have ‘paid’ for land have no rights and are only squatters, liable to be dispossessed without compensation at any time.

It was then suggested, among other things, that the term ‘squatter’ be defined and also the different classes of squatters be included in the land laws.

7. Intervention of Land Laws to the Question of Squatters

Land law provides neither definition nor a classification of squatters. It however contains several schemes to enable squatters cum informal landholders to validate or formalize their tenure. This includes schemes for the ‘validation’ and ‘regularisation’ of interests in land.

67 National Land Policy, para 6.2.0.
68 Under English law, unlike in USA, there is no distinction between good faith trespassers and bad faith trespassers.
69 Sijaona, note 42, p. 7.
71 McAuslan, note 70, p.118 (Discussion Group III on Dispute Settlements& Miscellaneous Part XIII-XIV).
72 Part VII Land Act.
(a) Validation of Interests in Land

The validation scheme applies to disposition of a right or interest in land held under customary or informal tenure irrespective of where the land is located.\(^{73}\) Disposition is broadly defined to include sale, mortgage, transfer, grant, partition, exchange, lease, assignment, surrender, disclaimer, creation of an easement, or a usufructuary right.\(^{74}\) Under the validation scheme a disposition must have been drawn up between parties who should have but did not obtain a grant of approval from the relevant authority, such as the commissioner for lands, or have applied for a grant of approval and having been refused nonetheless proceeded to carry out that disposition.\(^{75}\) An occupier of land through this disposition automatically has two rights. First, his or her occupation is deemed lawful for a period of six years from 2001 (a date of commencement of the Land Act, 1999) or any longer period as the Minister for Lands may determine. Secondly, he or she may apply to the commissioner for lands for a certificate of validation of that occupation.\(^{76}\) With the certificate of validation, the occupier, if the disposition in question was for transfer of right of occupancy, is entitled to apply and obtain a right of occupancy for a period of not less than thirty-three years.\(^{77}\)

Non-application for certificate of validation within the prescribed time would render such interest occupied as a deemed licence, valid and irrevocable until the end of the given six years or more as the case may be.\(^{78}\) A licence holder within this period of time may apply for a right of occupancy in accordance with ordinary procedures under the Land Act, 1999.\(^{79}\) If refused, he or she will be entitled to compensation for the value of the unexhausted improvements on land.\(^{80}\) In the premises, it is clear that validation of unauthorised land market transactions that were done under the previous legal regime was a deliberate attempt to redress the symptoms that resulted, as Mutakyamiliwa puts it, "from a malfunctioning government land delivery system partly because of corruption coupled with budget

\(^{73}\) S. 53 Land Act.
\(^{74}\) S. 2 Land Act.
\(^{75}\) S. 53(1) (a) and (b) Land Act.
\(^{76}\) S. 53(2) Land Act. An application for a certificate of validation is done on a prescribed form, accompanied by the prescribed fee, and it must be signed by the applicant or his duly appointed representative or agent, and must contain any other information as may be prescribed or which commissioner for lands may require.
\(^{77}\) S. 53(5) Land Act.
\(^{78}\) S. 54(1) Land Act
\(^{79}\) SS. 24 to 52 Land Act.
\(^{80}\) S. 54(3) Land Act. Unexhausted improvements include anything or qualities permanently attached to the land directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf and increasing the productivity capacity, the utility, or the sustainability of its environmental quality and include trees, standing crops and growing produce whether of an agricultural or horticultural nature. See S. 2 Land Act.
limitations that impacted on the capacity to adequately deliver land in urban areas, peri-
urban areas and areas with high agricultural potential. 81

The government was also unable to control illegal sub-division, change of use and
occupation of the illegally sold and purchased land in the market. Informal land trans-
actions were also fuelled by the fact that government land policy did not facilitate the
operation of property markets by allowing people to sell undeveloped land to developers. 82
Bare lands were legally considered as of no value but practically marketable. The National
Land Policy now recognizes that land has a value. 83 This is a remarkable shift from the
hypocrisy of the past, to use the words of Twaib, which had even refused to recognize the
reality of the land market that has existed for a long time in the country. 84 To this end, the
new land laws through the validation process seek to address this reality by attempting to
‘legalise’ what was ‘illegal’ under the hitherto legal regime, ostensibly to avail tenure secu-

(b) Regularization of Interests in Land

Regularisation is a scheme of determining the interests in land which exist in the large
unauthorised settlements in and around the urban areas by recording them and allocating
tenure security to the occupiers and users of land in those areas. The Land Act categorically
provides that the purpose of the regularisation scheme is to facilitate the recording, adjudi-
cation, classification and registration of the occupation and use of land by informal land-
holders in a given area. 85 The Tanzanian regularisation scheme is designed to apply within
the boundaries of any urban authority or any land in a peri-urban area whether that land is
within the boundaries of a village or not. 87 Only the Minister for Lands, suo motto or at the
request of an urban authority or village council, has the power to determine and declare a
scheme of regularisation over a particular area. Before declaration, the minister is required
first to direct the commissioner for lands to prepare or cause a draft of the scheme to be

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81 Fidelis Mutakyamilwa, Harmonisation of Land Markets Development with Tenure Security under
82 National Land Policy, para 4.2.17.
83 National Land Policy, para 4.1.1 (b).
84 Fauz Twaib, Land Law and the Growth of human Settlement in Tanzania A Research Report,
Recht in Afrika (2000), p. 84.
85 Mutakyamilwa, note 81, p. 176.
86 S. 57(1) Land Act.
87 S. 56 Land Act.
prepared. The minister is also responsible for the implementation of the scheme but he may delegate the responsibility to the commissioner or village council depending on where the scheme takes place. According to section 57 of the Land Act, the criteria to be taken into account in determining whether to declare a scheme of regularisation in any area are the following:

(a) whether the area is used substantially for habitation in dwellings of their own construction or dwelling places adapted from buildings abandoned by their former occupiers by persons holding at the will or sufferance of a person having title to the land or as a trespassers;

(b) whether a substantial number of persons living in the area appear to have no apparent lawful title to their use and occupation of land notwithstanding that they have paid for or are paying for the land they are occupying and are managing the land in accordance with rules generally recognised within the area;

(c) whether the land, although part of an urban local authority is occupied under customary land law, where that customary land law is the law of one group of people living in the area;

(d) whether the area is a substantially built-up area;

(e) whether the area has been or is likely to be declared to be a planning area under the Town and Country Planning Act;

(f) whether the area has a substantial number of persons who have lived there for a substantial period of time so that the area is a well established, and settled area from a social point of view;

(g) whether there is evidence that despite the lack of any security of tenure for the persons living in the area, a considerable number of such persons appear to be investing in their houses and businesses and attempting to improve the area through their own initiatives;

(h) whether a substantial number of people and community-based organisations within the area indicate that they wish to participate in a scheme of regularisation; and

(i) such other criteria as may be prescribed or which the Minister considers relevant.

The Land Act provides also that a scheme of regularisation may contain all or any of the following matters:

(a) arrangements for the survey, adjudication and recording of the interests in land claimed by those persons occupying land in the regularisation area;

(b) arrangements for the readjustment of the boundaries of plots of land;

(c) arrangements, within the framework of the rights in land provided for under paragraphs (a) and (b) for the better planning and layout of the land, including the pooling, sharing and redistribution of rights in land;

(d) arrangements for the involvement of the local authorities having jurisdiction in the regularisation area in the implementation of the scheme;

88 S. 58 Land Act.
89 S. 60(2) Land Act.
90 S. 57(2) Land Act.
91 S. 60(1) Land Act.
(e) arrangements for the involvement of the people whose land is the subject of the scheme of
regularisation in the implementation of the scheme;
(f) arrangements for the assessment and payment of any compensation that may become payable
as a result of the implementation of the scheme; and
(g) a budget for the scheme.

At the end of the regularization scheme residents in the area will be issued with rights of
occupancy as a formal title to land (tenure). To this end, clearly the idea of regularization is
in harmony with the spirit of the National Land Policy of accommodating informal land-
holders who are on land without title. Long-standing use of land is the most important thing
in this regard. Despite the fact that there are few models of legal regimes for the operation
of the regularisation process within Africa, land regularisation is mandated as an appropri-
ate policy for dealing with the land and housing problems of the urban poor by the Habitat
Agenda.92 No wonder Fimbo argues that the Tanzanian scheme of regularization is about
squatter upgrading intended to protect members of the petty bourgeoisie93 who have bought
vast tracts of land in suburbs and villages on the fringes of urban areas such as the Mlala-
kuwa, Makongo, Msewe and Kimara areas of Dar es Salaam City.94

8. The Future of Squatters’ Land Rights in Tanzania

Squatters have remedial measures (via validation and regularisation of their interests in
land) to change their status by formalizing their land tenure. In future it is important that
people should avoid living in insecurity by following the required procedures of acquiring
and holding land.

This presupposes that the government as a land service provider will have done its part. In
this regard, the government too has a key role to play in avoiding the future growth of
squatters’ areas. As the National Land Policy provides,95 the government should:

(a) timely plan all the potential areas for urban development in the periphery of all towns,
(b) design special areas for low income housing with simplified building regulations and afford-
able level of services,

92 Adopted at the UN HABITAT Summit at Istanbul City in 1996. See Patrick McAuslan, Com-
dwWEB/engiish/pdf/cedoc_pdf/Angola%20Land%20Law%20-%20of%20the%20Republic%20
93 Analytical term describing a social stratum in possession of state power in a post-colonial state; it
includes the national leadership, intellectuals, higher civil servants, higher military and police
officers as well as prosperous traders. It is allied to the international bourgeoisie but subordinate to
it. See Fimbo, note 31, p. xii.
94 Gamaliel Mgongo Fimbo, State and Property Rights in Tanzania, Dar es Salaam 2005, pp.17, 27;
Fimbo, note 31, p. 37.
95 National Land Policy, para 6.4.1.
(c) make land services readily available, and
(d) upgrade all existing squatter areas and provide them with tenure security and basic social services.

9. Conclusion

Because of its nature, it cannot constitute good public policy to simply protect squatters. As held in *Mwalimu Omari and Another v. Omari A. Bilali*[^96^] squatters in the eyes of law cannot equate themselves to any person holding a title under right of occupancy even where the squatter occupies land under customary law. On the other hand, due to the uncontrolled growth of unplanned settlements in the country, squatting has, albeit de facto, been accepted as a way of accessing land in urban and peri-urban areas. Nearly all houses in urban areas, including those of decision makers, lie in unplanned areas. Hence it is neither practical nor just to call all these people on land without title squatters, let alone attempt to remove these hundreds of thousands of squatters from within or the fringes of cities.

That is why, arguably, the new land laws refrain from not only defining but also mentioning the word ‘squatters’.[^97^] This is despite the fact that squatting accompanied by occupation constitutes 18% of the ways in which people access land in urban areas in Tanzania.[^98^] The land laws significantly accommodate squatters by recognizing that they are there to stay and wish to make positive contribution to their country, towns, society and themselves. Accordingly, it supports them by giving them tenure security through schemes of validation and regularisation of interests in land. This is likely to encourage them to invest in their lands as developers, not squatters, and to remain good citizens. They need to be tolerated for want of a practical alternative.

Squatters protected by land law are those who have settled on public land other than reserved and hazardous land which has no existing private right or protected interest. This includes those who have acquired land through unauthorized property market transactions. The spirit of the land laws is to recognize, clarify and secure in law any form of informal tenure including the existing long standing use and occupation of land for people who are without apparent lawful title to their use or occupation of land.[^99^] This is even more justified in a country like Tanzania where land is public property belonging to all citizens with the President as a trustee, where only 25% live on surveyed land, the urban housing deficit stands at 1.2 million units and over 70% of urban dwellers live in unsurveyed areas.[^100^]

[^97^]: Even trespassers are seldom mentioned in sections 57(2)(a) and 151(3) Land Act as well as 24(5) and 57(3)(b) Village Land Act.
[^99^]: S. 3(1) (b) Land Act.
The challenge then to land administrators is how to swiftly regularize existing unplanned areas; plan ahead of development; make land services like plot surveying and building permits less costly, less bureaucratic and readily available; take early steps to check the further sprawl of unplanned settlements; and not to wait until it is too late, which would compel them to resort to squatter upgrading schemes which are relatively expensive and difficult to manage.
BERICHTE / REPORTS

Der Beitrag der Verfassungsgerichtsbarkeit zur Sicherung von Grundrechten, Demokratie und Entwicklung.
VII. KAS–Völkerrechtskonferenz, 12./13. November 2009, Heidelberg

Von Stefanie Djidonou, Gießen*


I. Bedeutung und Wirkung der Verfassungsgerichtsbarkeit in Afrika


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positive Bilanz zur Entwicklung der Verfassungsgerichtsbarkeit in Südafrika bezeichnete Prof. Fombad auch die Entwicklungen in Benin als erfolgsversprechend.

II. Bedeutung und Wirkung der Verfassungsgerichtsbarkeit in Lateinamerika


III. Bedeutung und Wirkung der Verfassungsgerichtsbarkeit in Asien

IV. Bedeutung und Wirkung der Verfassungsgerichtsbarkeit in Mittel-, Ost- und Südosteuropa


Abschließend zog Dr. Rainer Grote mit Blick auf zahlreiche „neue“ Demokratien eine insgesamt positive Bilanz der Bedeutung der Verfassungsgerichtsbarkeit für die Entwicklung und Stabilisierung demokratischer Strukturen. Gestützt auf etliche Beispiele aus allen Teilen der Welt betonte er den Wert internationaler Zusammenarbeit auch auf diesem Gebiet.
The International Centre for Settlement of Investment Disputes

*Funnekotter and Others v. Republic of Zimbabwe*, Case No. Arb/05/6 – a test case for commercial farmers in Zimbabwe or: how ICSID can fill the gap in the protection of human rights violated by a lawless state like Zimbabwe

By *Cornelia Glinz*, Heidelberg*

**A. Introduction**

The case *Funnekotter and Others versus the Republic of Zimbabwe*, which was decided on the 22nd April 2009 by an ICSID Tribunal deals with the claims of 13 Dutch farmers who were displaced from their farmland in Zimbabwe without compensation during Zimbabwe’s notorious land reform programme. In question was the alleged breach of the Bilateral Investment Treaty concluded between the Netherlands and Zimbabwe. The Tribunal declared the Republic of Zimbabwe in breach of international law and bilateral treaty protections. It ordered Zimbabwe to pay damages of 8 Million Euros plus interest, amounting to approximately 16 Million Euros in total. It can be considered a land mark decision, since it is a major success for victims of land seizures in Zimbabwe. Moreover, the award is the first one that gives meaningful financial relief to the commercial farmers for their losses. However, it was not the first time that farmers who lost their land in similar ways in Zimbabwe sought redress before an international adjudicator. Already in 2007 a case was brought before the Tribunal of the South African Development Community (SADC), the so called SADC Tribunal. In this case, known as the *Campbell*-case, a judgment was delivered on the 28th November 2008. There, the regional Tribunal dealt with the expropriations of 79 farms by the Republic of Zimbabwe. In its judgment, it set an example by stating that

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2 Agreement on encouragement and reciprocal protection of investments between the Republic of Zimbabwe and the Kingdom of the Netherlands, 11.12.1996 (signed), 01.05.1998 (entered into force).

the land reform programme was in breach of the SADC Treaty\textsuperscript{4} and of the commitment of its Member States to human rights and the rule of law. However the judgment proved to be meaningless to the Claimants in practice, since Zimbabwe refrained from fulfilling its obligations under the judgment. Thus, the two cases provide an interesting comparison of how, firstly, a regional Tribunal and an international arbitration Tribunal deal with human rights violations and secondly, of the enforcement mechanisms of the two regimes.

B. Background

First of all, to give a background to the case, it has to be seen in the context of the history and legal development of Zimbabwe’s land reform programme.\textsuperscript{5} In 1992, the Zimbabwean government passed the \textit{Land Acquisition Act}, which authorised compulsory acquisition of land for agricultural resettlement purposes. Under its Article 5, the first step for such an acquisition was the issuance of a preliminary notice which deprived the owner of the right to dispose of the land. In a second step, an \textit{acquisition of land order} could be issued according to Article 8. Although a provision of the Act provided for the payment of fair compensation, in practice, no or at least no adequate compensation was granted. In 2000, the government then proposed a new Constitution which provided for the acquisition of land without compensation. This proposal was defeated in a referendum in February 2000. That defeat immediately resulted in violent invasions of commercial farms, led by so called war veterans who fought in the 1970s War of Liberation. They were encouraged and supported by the Zimbabwean government and the police did not intervene. Only two months after the defeat of the proposed Constitution, a constitutional amendment was finally adopted which abolished the duty to pay compensation. By contrast, expropriated farmers were referred to the United Kingdom as former colonial power to request compensation from them.\textsuperscript{6} An amendment of the \textit{Land Acquisition Act} followed which stated that “compensation shall only be payable for any improvements on or to the land” (Section 29C). Subsequently, an accelerated Land Reform and Resettlement Plan, known as “Fast Track Programme” was started. To protect the illegal occupiers of the farms, the Parliament of Zimbabwe enacted the \textit{Rural Land Occupiers (Protection from Eviction) Act} in June 2001. Under this Act, occupiers of rural land were protected against eviction. Finally, in 2005, the Zimbabwean Constitution was again amended. Through this amendment the remaining safeguards contained in the \textit{Land Acquisition Act} were revoked and vast areas of agricultural land were directly transferred to the state.\textsuperscript{7}

\textsuperscript{5} Funnekotter, para 21 ff.
\textsuperscript{6} Section 16A (1) (c), Amendment No. 2, 2000.
\textsuperscript{7} Section 16B, Amendment No. 17, 2005.
C. The award

I. The facts

First steps in the case were taken in 2003, when 13 Dutch farmers turned to ICSID and requested arbitration against the Republic of Zimbabwe. The request for arbitration was registered by the Center in April 2005. After the Parties failed to agree on the composition of the Tribunal, in 2006 the former President of the ICJ Gilbert Guillaume was appointed as the presiding arbitrator. An oral hearing of the Parties was held over three days in Paris in October 2007. The thirteen Claimants, all of them of Dutch nationality, had directly or indirectly owned large commercial farms in Zimbabwe. All of them have been dispossessed of their farmland sometime between 2001 and 2003. Most of them have been forcibly evicted through violent land invasions by war veterans. Additionally, in the majority of cases, the Zimbabwean authorities also issued orders under Section 8 of the Land Acquisition Act to deprive the Claimants of their property. However, none of them received any compensation. The Commercial Farmers’ Union had challenged the occupation of the farms before the Zimbabwean Courts. In 2000 the Supreme Court found that acquisition of farms without compensation under the Fast Track Programme was unconstitutional and the farm invasions were unlawful. In the following year, the composition of the Supreme Court was changed. In a subsequent decision the Court decided contrarily. It held that the land reform programme was constitutional and found that there was no breach of the rule of law concerning the actions taken on the farms. In 2005 the amendment to the Zimbabwean Constitution finally formalised the expropriation of the Claimant’s farms. Most relevant to the facts of the case is the existence of the Bilateral Investment Treaty between the Netherlands and Zimbabwe, concluded in 1996 (hereinafter BIT). As to the main submissions of the Parties: the Claimants requested the Tribunal to declare Zimbabwe responsible for its unlawful action and to order Zimbabwe to compensate them for all the damages suffered, plus interest and costs. They based their claims on the BIT and alleged that the Zimbabwean government violated the Treaty’s provisions on expropriation, on fair and equitable treatment, and on full protection and security. Zimbabwe admitted that the Claimants did not receive any compensation as required by the BIT.

II. The decision

In its decision, the Tribunal dealt with three main aspects: firstly, with the alleged breaches of the BIT; secondly, with the evaluation of the damages; and finally with interest and costs.

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8 Article 36 ICSID Convention.
9 Article 38 ICSID Convention.
10 See above, note 2.
1. The obligations under the BIT

Concerning the first point, the Tribunal considered the question of whether Zimbabwe violated its obligation to pay just compensation under Article 6 of the BIT. Although Zimbabwe had admitted that no compensation was paid, it tried to justify its actions. It raised the defense that a state of necessity or emergency existed which relieved it of its obligations under the BIT. The policy of land redistribution was necessary to rectify the unjust land ownership patterns remaining from colonial times. In this respect it invoked Article 7 of the BIT, as well as Zimbabwean domestic law and customary international law. The Tribunal stated that ultimately international law, not the domestic law of Zimbabwe, would determine whether the Respondent can rely on an emergency defense in the dispute. As the BIT doesn’t release Contracting Parties from their obligation to pay just compensation in cases of national emergency, the question had to be answered exclusively under international law. The Tribunal admitted the state of necessity as an argument recognised by customary international law. However, it can be invoked only under certain strictly defined conditions. According to the Tribunal, Zimbabwe raised the state of necessity only to justify the measures of expropriation. Nonetheless, it had not shown why the alleged state of necessity would have prevented it from paying compensation. As a consequence, the Tribunal concluded that Zimbabwe breached its obligation under Article 6 of the BIT to pay just compensation to the Claimants. Therefore, with regard to the other alleged violations of the BIT, the Tribunal stated that it was not necessary to consider them. Consequently, the sole task left for the Tribunal was to fix the damages due to the Claimants.

2. The evaluation of the damages

As to the evaluation of the damages the first question to decide was whether there is a difference between a lawful and an unlawful expropriation. In this respect the Respondent argued that the damages must be calculated as specified in the relevant Article of the BIT (Article 6[c]). The Claimants objected that the BIT only provided the standard of compensation for lawful expropriation. By contrast, compensation due in case of unlawful expropriation must be calculated according to customary international law. Although the Tribunal acknowledged the distinction between lawful and unlawful expropriation in international law, it stated that the distinction was only relevant in two cases: first, when award-
ing restitution; second, when the value of the property has increased between the date of expropriation and the later date of the decision awarding compensation. The Tribunal found that neither of the two options was an issue here, so that the differentiation between lawful and unlawful expropriation was irrelevant to the case. A further question arose concerning the date of evaluation of the damages and on the method to be applied for such an evaluation. On the first point, the Tribunal determined that the property must be evaluated at the date of dispossession. In this regard, the Tribunal referred to both general international law and the relevant provision of the BIT. As the exact dates of dispossession were in dispute, the Tribunal had to determine the various dates concerning the different farms. The main difficulty in this respect was how to deal with the invasions on the farms by the war veterans and if Zimbabwe could be held responsible for those events. The Tribunal found a way to come up with a solution without answering the latter question. It distinguished between two cases: at first, there was the majority of cases in which the farms were confiscated through expropriation orders under Section 8 of the Land Acquisition Act. Although most of the farmers had previously been forced to abandon their farms due to invasions, the Claimants agreed to fix the date of the evaluation of damages at the date of the relevant governmental orders. That’s why, according to the Tribunal it was not necessary to decide on the impact of those invasions. Thus it retained the date of issuance of the expropriation orders as the relevant date. However there was a second group of three cases in which no expropriation orders had been issued. The Tribunal decided that these farms were seized under the Rural Land Occupiers Act of 200114 which protected illegal occupiers from eviction. As the war veterans who occupied those three estates in 2001 were “protected occupiers” under the Act (Article 3 [2]), the Claimants were unable to recover the possession of their land. According to the Tribunal, this fell within the responsibility of the Respondent. The relevant date for the evaluation of damages was thus the date of entry into force of the Rural Land Occupiers Act.15 After elaborating on the date of evaluation, the Tribunal had then to decide on the method of evaluation. The Tribunal sided with the Claimants that compensation must represent the “genuine value” of the investment, which corresponds to the fair market value. This result could be equally drawn from Article 6 of the BIT or general international law. Further, the Tribunal rejected Zimbabwe’s argument that the calculation of the damages should take into account the initial amount of the investment, the date of the investment and its past profits. The Respondent also submitted that discounting from the market value must be made in case of large scale nationalisations. The Tribunal objected that under general international law as well as under the Investment Treaty the value of the investment has to be calculated independently of the origin and past success of the investments, as well as of the number and aim of the expropriations carried out. In the next paragraph the Tribunal elaborated in detail on the evaluation of damages.

14 See above, at B.
The amounts suggested by Zimbabwe’s experts were rejected as obviously too low. The Tribunal also criticised the Claimant’s valuation method for not fully considering Zimbabwe’s economic situation in the relevant years and arrived at a lower figure of 7.2 Million Euros for all the farms. In a separate calculation the Tribunal also considered the value of the movable assets left on the farms. Finally the Tribunal agreed with the Claimants that they must obtain reparation for the disturbance resulting from the taking over of their farms, for the necessity for them to start a new life in another country and the tangible expenses related to that. It evaluated the damages suffered in this respect for each Claimant at 20 000 Euros. Furthermore, in the hearing, the Claimants had requested for the first time moral damages, additionally and distinct from the disturbance claim, evaluated at 100 000 Euro for each Claimant. The Court stated that those claims were inadmissible because of the very late stage of the submission. However, it mentioned that the moral damages claim would partially overlap with the damages already compensated by the disturbance indemnity. The Tribunal ordered the Respondent to pay the compensation within a period of three months.

3. Interest and costs

In its final section, the Tribunal dealt with interest and costs. With respect to interest, the Tribunal granted a 10% rate compounded bi-annually. Regarding costs, the Tribunal referred firstly to the general practice in international arbitration that the successful party under an award should recover its legal costs. However, the Tribunal decided differently, taking into account the situation in Zimbabwe in 2001 and 2002. Thus, the Tribunal exercised its discretion that the costs for representation before the Tribunal will remain with the Parties. Only the costs for the Tribunal and ICSID were imposed on the Respondent.

D. Subsequent events

I. Enforcement

After presenting the decision, the crucial questions remaining are: what has happened subsequently and did Zimbabwe finally pay the amounts due to the farmers? The deflating answer is that to date, the Claimants have not been successful in obtaining any payment from the Republic of Zimbabwe and corresponding attempts to pursue diplomatic channels through the Dutch Embassy in Harare failed. Thus, to realise the Claimant’s rights under the award, an aspect of the ICSID Convention becomes important: an ICSID award is binding and enforceable in each Contracting State as if it was a final judgment of a national

16 Article 61 (2) ICSID Convention.
court in that State. In particular, it means that Zimbabwean assets can be seized in any of the Contracting States to the ICSID Convention of which there are more than 140. Thus, immediately after the award was rendered the Claimants announced that if Zimbabwe didn’t pay they would start enforcement proceedings. However, the crucial impediment that the Claimants face in attempting to enforce the award in jurisdictions outside of Zimbabwe is related to the identification of property belonging to the cash-strapped government. Subsequently, to set an example, the Claimants finally filed a Petition to confirm the arbitration award with a United States District Court on the 24th September 2009. Zimbabwe for its part failed to respond to the Petition. On February 1st, a judgment was rendered in favour of the Petitioners. Using the Euro/U.S. Dollar exchange rate on the day of the judgment, the Petitioners were awarded 11,5 Million U.S. Dollars for the damages. Additionally, the Court granted the amount of 13.5 Million U.S. Dollars for interest, due as of the day of the judgment, plus 232,500 U.S. Dollars for the ICSID fees. In contrast to the decision of the ICSID Tribunal, the Court awarded attorney’s fees and costs associated with this proceeding to the Petitioners. Thus the total of the judgment amounted to over 25 Million U.S. Dollars. With every day of non payment, the interest continues to accrue in the future pursuant to the arbitration award and as expressly confirmed by the District Court. Hence the judgment can be considered as a further success for the farmers on the way to realising their rights.

II. Upcoming claims

Another interesting point is the significance of the decision to other foreign nationals who also lost their farms in Zimbabwe. In this respect the case was meant to be a test case. Following the decision, one of the counsel for the Claimants announced that his law firm

18 Article 53, 54 ICSID Convention.
20 The English “Telegraph” suggested for example that passenger jets of Air Zimbabwe which land at London’s Gatwick airport could be confiscated: note 19.
21 Funnekotter et al v. Republic of Zimbabwe, New York Southern District Court, Case No. 1:09-cv-8168-CM, Petition to confirm arbitration, filed Sept. 24, 2009. The petition was based on 22 U.S.C. § 1650a. In approaching specifically this Court, the Petitioners could follow the example of a case which was brought before the same Court earlier in the year also with the request to confirm an ICSID award (see page p. 2 of the Petition).
was in the process of organising additional claims for some 50 European nationals.23 Zimbabwe concluded Bilateral Investment Treaties with several countries in Europe, like Germany, France and Sweden.24 An interesting issue in an upcoming claim will be the question of whether moral damages can be requested, as this matter was left open in the present case due to the late submission.25

E. In comparison: the judgment of the SADC Tribunal

I. The judgment

As already mentioned in the introductory section, the present case has to be seen in the context of the earlier judgment by the SADC Tribunal in the Campbell-case. In this first judgment by the newly established regional Tribunal,26 it took the opportunity to establish itself as a forum providing relief for human rights violations. Primarily set up to resolve disputes arising from closer economic and political union within the community,27 the court established that the principles and objectives of the SADC Treaty - which comprise the respect for human rights, democracy and the rule of law (Article 4) - are not just vague declarations but that the Member States are bound by them and they are reviewable by the Tribunal. Thereby, it provided for an avenue of redress for farmers of many different nationalities28 who suffered human rights violations during the Zimbabwean land reform programme. In its judgment the Tribunal held that the Republic of Zimbabwe was in breach of its obligations under Article 4 of the SADC Treaty. According to the Tribunal, the Respondent had violated essential elements of the rule of law in denying access to court to the Applicants. Additionally, the land reform programme was found to be racially discriminatory and thus in breach of the obligations under Article 6 of the SADC Treaty, which comprises a non-discrimination clause. Finally the Respondent had violated international law by refusing the payment of compensation. Therefore, the court ordered the Respondent firstly, to take all necessary measures to protect the ownership of the lands of the Applicants and secondly, to pay fair compensation on or before the 30th June 2009 to the Applicants that have already been evicted from their lands.


25 See above, at C II 2; note 22.

26 The establishment of the Tribunal was already laid down in Article 9 and 16 of the SADC Treaty but it took 14 years before the Tribunal began its work in 2007.


28 As laid down in Article 15 (1) of the SADC Protocol on Tribunal (note 29), the jurisdiction of the Tribunal encompasses “disputes between States, and between natural or legal persons and States” without differentiating on the nationality.


II. The enforcement side

According to Article 16 (5) of the SADC Treaty and Article 24 (3) of the Protocol on Tribunal, the decisions of the Tribunal are final and binding. However, immediately after the decision, the Zimbabwean government declared that, despite the judgment, it was not willing to stop its land reform programme. One month after the judgment, Mr. Campbell filed an urgent application to register the Tribunal’s judgment in the Zimbabwean High Court to give it effect in Zimbabwean national law – which was rejected. By contrast to ICSID awards which immediately have the same status as judgments by a national court, the enforcement of judgments by the SADC Tribunal is governed by the national law for the registration and enforcement of foreign judgments. In the following months the violent invasions on farms continued. In March 2009 it was reported that the violations even increased with special focus on farmers that were amongst the Applicants in the process before the Tribunal. In May 2009 Mr. Campbell and one other farmer filed an urgent application before the Tribunal, seeking a declaration that the Respondent is in breach and contempt of the Tribunal’s judgment. On the 5th June 2009 the Tribunal agreed that the Republic of Zimbabwe failed to comply with the judgment of the Tribunal.

According to Article 32 (4) of the SADC Protocol on Tribunal, may any failure by a State to comply with a decision of the Tribunal be referred to the Tribunal by any party concerned. As a consequence it referred the issue to the SADC Summit for the latter to take appropriate action pursuant to Article 32 (5) of the SADC Protocol on Tribunal. Despite this judicial progress, the homestead of Mr. Campbell was finally destroyed by fire at the end of August.

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32 See above, at D I.
33 Article 32 (1) SADC Protocol on Tribunal.
35 According to Article 32 (4) of the SADC Protocol on Tribunal, may any failure by a State to comply with a decision of the Tribunal be referred to the Tribunal by any party concerned.
36 Campbell and Another v. The Republic of Zimbabwe, SADC (T) Case No. 03/2009.
37 The Summit of Heads of State and Government is the highest decision-making body within SADC (Article 9 [1], 10 SADC Treaty).
38 According to Article 32 (5), the Tribunal can report the State’s failure to the Summit of Heads of State and Government for the latter to take appropriate action. Subsequently, according to Article 33 of the SADC Treaty, the Summit may impose sanctions for non-compliance on a case-by-case basis.
2009. Also in August, the Zimbabwean government took a new position concerning the SADC Tribunal. The country’s Justice Minister wrote a letter to the Tribunal whereby the Zimbabwean government withdrew recognition of the Tribunal’s authority. He argued that the Tribunal was illegal as long as the Protocol on Tribunal was not ratified by at least two-thirds of SADC Member States. What the Justice Minister did not mention was that, in 2001, the SADC Treaty was amended and the SADC Tribunal established as an integral organ of SADC. As a result of this amendment the Articles of the Protocol on Tribunal which had required the two-thirds ratification were repealed. As a consequence, there were high expectations of the SADC Summit which met in Kinshasa in September 2009. However, despite the referral of the issue to the Summit by the Tribunal, the Summit completely failed to deal with Zimbabwe’s contempt of court and did not address the issue at all. In fact, its final Communiqué called on the international community to lift sanctions against Mugabe and his regime and emphasised the progress that had been made in the country in the political field. Whilst this was celebrated in Zimbabwe’s state media as a triumph for Mugabe, it was sharply criticised by opposition parties and human rights activist groups all over Southern Africa. No further action in respect of the enforcement of the judgment has been undertaken so far by SADC. Meanwhile the farmers had initiated several further attempts to register the SADC Tribunal’s judgment before the High Court in Zimbabwe - but without success. Finally, in a decision in January 2010, the High Court rejected the registration, accusing the judgment of contravening Zimbabwe’s Constitution and public policy. The Court stated that it recognised that Zimbabwe is bound in general by the judgment under international law, but noted that in this case the “greater public good” of the agrarian reform must prevail. As a consequence, Zimbabwe’s Commercial Farmers’

42 Communiqué of the 29th Summit of Heads of State and Government of the SADC, held in Kinshasa from Sept. 8 – 9, 2009.
45 Gamara, note 44, p. 19.
Union decided once again to approach the SADC Tribunal on this issue.\textsuperscript{46} Finally, a new application by the Commercial Farmers’ Unions of Zimbabwe and South Africa was sent to the SADC Tribunal on the 12\textsuperscript{th} February 2010. It is again (like the application of May 2009) an urgent application, seeking a declaration that Zimbabwe is in continued breach and contempt of the Tribunal’s judgment of 2008.\textsuperscript{47} The Applicants expect the Tribunal to refer the issue once more to the SADC Summit which will be held in August this year in Windhoek under Namibian Chairmanship and they hope that the Summit this time might consider sanctions against Zimbabwe or even decide to suspend it from SADC.\textsuperscript{48} More recently, a major success concerning enforcement resulted through a confirmation of the SADC judgment by the South African judiciary. The North Gauteng High Court in Pretoria had ordered in November 2009, that the judgment has to be respected by the South African government. A further case was filed on 12\textsuperscript{th} January with the same Court in order to seizure Zimbabwean assets hold in South Africa. Subsequently, the Gauteng Court came up with a land mark decision in February 2010\textsuperscript{49} and ordered that the SADC Tribunal rulings\textsuperscript{50} in the Campbell-case are declared to be registered, recognised and enforceable by the High Court of South Africa pursuant to Article 32 of the SADC Protocol on Tribunal. As a result, ownership documents of a Cape Town house belonging to the Zimbabwean government have already been handed over.\textsuperscript{51}

F. Conclusion

Firstly, the ICSID award covers some interesting issues concerning investment law, especially with respect to the details of the calculation of damages. Furthermore, it is remarkable to observe the influence of investment law on the conditions of land reform programmes, which are relevant to most states with a colonial history; this influence exists at least in so far as foreign nationals are concerned. However, by far the most significant is the fact that the case involves human rights violations and deals with actions of a state

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\textsuperscript{47} Brigitte Weidlich, Zimbabwe: SADC Tribunal forgot Zimbabwe Farmers’ Case, The Namibian, 25.03.2010, http://allafrica.com/stories/201003260550.html , which reported the Tribunal initially forgot to register the application.
\textsuperscript{48} Note 47; SADC Tribunal: Namibia’s President In Limbo Over Zimbabwe Rulings, 03.02.2010, http://investigativezim.com/2010/02/03/tribunal-rulings-namibian-president-in-limbo-over-zimbabwe/.
\textsuperscript{49} Fick and Others v. Government of the Republic of Zimbabwe, Case No. 77881/2009, (Febr. 25, 2010).
\textsuperscript{50} The judgment of 28\textsuperscript{th} of November 2008 and the ruling of 5\textsuperscript{th} June 2009.
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which is not based on the rule of law. Here, the international courts fill the gap which is left at national level: as no independent judiciary existed anymore in Zimbabwe the farmers could not expect protection before the national courts. Therefore they attempted to seek redress before different international Tribunals like the SADC Tribunal and ICSID, both not intended to consider human rights issues originally. In this respect the two decisions provide interesting grounds for comparison of how the two Tribunals handle the human rights topic. Whilst the SADC Tribunal refers to human rights standards and the rule of law as laid down in the SADC Treaty, the ICSID Tribunal deals with the case under investment law without expressly referring to human rights. Additionally, it is noteworthy to evaluate the enforcement mechanisms of the two different legal regimes and their effectiveness in influencing a state such as Zimbabwe. The SADC Tribunal for its part has failed on the enforcement side since Zimbabwe has completely ignored the judgment and there is a lack of political will amongst SADC members to impose pressure upon Zimbabwe. However, as the decisions by the South African High Court show the issue is ongoing. Further the new attempt by Zimbabwean farmers to approach the SADC Tribunal may bring progress, and it will be interesting to observe the discussions at the upcoming SADC Summit later in the year.

By contrast, independently of the actual outcome in practice, ICSID provides a much more effective regime as the award has the same status as a judgment by a national court of a Contracting State. Therefore it cannot be so easily ignored by the Zimbabwean government. That might be a reason why Zimbabwe co-operated from the very beginning much better with the ICSID Tribunal than with the SADC one. Here it will be interesting to see how successful the Claimants will be in finding and seizing Zimbabwean assets and if the awaited claim by Zimbabwean farmers of other nationalities can contribute to raising pressure on the Zimbabwean government concerning human rights violations through the land reform programme.

However, in Zimbabwe forced land takeovers are continuing to date, including land meant to be protected under Bilateral Investment Treaties. Thus unfortunately, the ICSID award has so far had no general impact on the situation in the country.

Der Europäische Auswärtige Dienst – Chance oder Risiko für die europäische Entwicklungszusammenarbeit?

Von Julia Sattelberger, Heidelberg*

Die Europäische Union ist die weltweit finanzkräftigste Quelle von Entwicklungshilfegeldern. Ihre Bedeutung als globaler Akteur auf diesem Politikfeld wird jedoch durch eine komplizierte Struktur von Verantwortlichkeiten und Aufgaben zwischen den Organen der Union geschwächt. Kritik an der derzeitigen europäischen Entwicklungszusammenarbeit manifestiert sich im Vorwurf einer ineffizienten Organisation, die sich nachteilig auf die Umsetzung und Durchführung der europäischen Entwicklungszusammenarbeit auswirke. 

Der Vertrag von Lissabon schafft nun jedoch einen neuen primärrechtlichen Rahmen für dieses Politikfeld: Die Implementierung des Vertrages führt zur Restrukturierung und Neuschaffung von Institutionen, was nicht ohne Auswirkungen auf die künftige Steuerung und Durchführung der europäischen Entwicklungspolitik bleiben wird. Eine der institutionalen Neuerungen durch den Vertrag ist die Schaffung eines Europäischen Auswärtigen Dienstes (EAD).


Im folgenden soll Ashtons Vorschlag auf mögliche Konsequenzen für die Restrukturierung der institutionalen Architektur der Europäischen Entwicklungsverwaltung untersucht

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werden. Bedeutet die vorgesehene Umstrukturierung für die europäische Entwicklungs-
politik eine Chance oder ein Risiko?

I. Europäische Entwicklungspolitik vor Lissabon

Die europäische Entwicklungszusammenarbeit war und ist Teil der außenpolitischen Aktivi-
titäten der EU. Die Entwicklungszusammenarbeit unterstand vor der Implementierung des
Vertrags von Lissabon vollständig der Verantwortung der Kommission. Entwicklungspo-
litische Kompetenzen waren hier zwischen dem Kommissar für Entwicklung und der Kom-
missarin für Außenbeziehungen und europäische Nachbarschaftspolitik aufgeteilt. Inner-
halb der Kommission waren die Kompetenzen nach geographischer Zuständigkeit aufge-
teilt.

Entsprechend war die Generaldirektion Entwicklung zuständig für Kooperationen mit
den sogenannten AKP-Staaten aus Afrika, der Karibik und des Pazifik. Die Gelder für die
Kooperationen mit den AKP-Staaten stammen aus dem Europäischen Entwicklungsfonds.
Dieser wird nicht aus dem Budget der EU finanziert, sondern separat von den Mitglieds-
staaten gefüllt. Den rechtlichen Rahmen, auf dem die Kooperation der jetzigen EU mit den
AKP-Staaten basiert, regelt das Cotonou-Abkommen – dem Nachfolger des Lomé-
Abkommens. Dabei handelt es sich um einen Vertrag, der zwischen der Europäischen
Gemeinschaft, deren Mitgliedsstaaten und den Ländern der AKP-Regionen multilateral
ausgehandelt wurde. In der Entwicklungszusammenarbeit ist das die Ausnahme; in der
Regel handelt es sich um einseitig vom Geber gesetztes Recht.

Die Kooperation mit Ländern in Asien und Lateinamerika, sowie Ländern, die in die
Nachbarschaftspolitik der EU integriert waren, koordinierte dagegen die Generaldirektion
Außenbeziehungen. Die Gelder für Kooperationen mit den Nicht-AKP-Staaten stammen
aus dem EU-Budget. Wichtigstes Finanzierungsinstrument ist hier das Instrument für Ent-
vicklungszusammenarbeit (DCI). Den rechtlichen Rahmen regelt hier die sogenannte DCI-
Verordnung, im Gegensatz zum Cotonou-Abkommen einseitig von der EG gesetztes Recht.

Geplant wird die Entwicklungszusammenarbeit in Form von Programmen in unter-
schiedlichen Planungs- bzw. Programmierungs-Schritten. Bis zum Vertrag von Lissabon
wurde die Programmierung entsprechend der Länder- Zuständigkeit in den beiden General-
direktionen durchgeführt. Entsprechend erfolgten alle Programmierungsschritte in der
Kommission. Die Programmierungsverfahren für AKP- und Nicht-AKP-Staaten waren
dabei ähnlich strukturiert, allerdings wurden die AKP-Staaten formal deutlich stärker in
den Planungsprozess eingebunden als die Nicht-AKP Staaten. Durchgeführt wurde die
Entwicklungszusammenarbeit schließlich gemeinsam mit der Durchführungsorganisation
EuropeAid.

II. Europäische Entwicklungspolitik nach Lissabon

Der Vertrag von Lissabon macht eine strukturelle Reorganisation der europäischen Außen-
beziehungen notwendig. Das betrifft namentlich das Amt der Hohen Vertreterin der Euro-

1. Die mögliche Entwicklungspolitische Architektur Europas – drei Perspektiven


Ein gegenläufiges zweites Szenario wäre die Bildung eines starken EAD, der die gesamte Programmplanung und Überwachung der europäischen EZ sowie die Kontrolle über deren Finanzierungsinstrumente jenseits regionaler Zuständigkeiten verantwortlich wäre. Ein solcher Dienst favorisiert die großen Mitgliedsstaaten der EU – allen voran Frankreich – aber auch Akteursgruppen, die Entwicklungspolitik im Sinne eines erweiterten Sicherheitsbegriffes als Teil der Außen- und Sicherheitspolitik begreifen.
Eine Kompromissversion, die Elemente aus beiden Szenarien enthält, wäre zum einen die Etablierung einer gestärkten Generaldirektion Entwicklung durch die Zusammenfas-
sung aller bislang regional aufgeteilten entwicklungspolitischen Zuständigkeiten. Um die Kohärenz innerhalb der Außenbeziehungen der EU zu gewährleisten, sieht ein Komprom-
issvorschlag jedoch zum anderen die Einbindung des EAD in die Programmierungsab-
läufe der Entwicklungszusammenarbeit vor. Vor diesem Hintergrund lässt sich nun ab-
schließend der Vorschlag Ashtons darstellen.

2. Der Vorschlag zum Aufbau eines Europäischen Auswärtigen Dienstes

Insgesamt umfasst Ashtons Vorschlag 12 Artikel. Er beschäftigt sich neben der rechtlichen Natur und dem Arbeitsbereich des EADs auch mit seinen Aufgaben, der Zusammenarbeit mit anderen Organen der EU, seiner Verwaltungsstruktur und personellen Zusammenset-
zung. Außerdem widmet sich der Vorschlag der Frage nach dem künftigen Budget des EAD und seinen Kompetenzen innerhalb verschiedener Politikbereiche der europäischen Außenbeziehungen. In Bezug auf die Verteilung von Zuständigkeiten sieht der Vorschlag vor, die Entwicklungszusammenarbeit nicht mehr nach regionaler Zugehörigkeit der Ent-
vicklungsländer zu verteilen. Kompetenzen werden stattdessen im Hinblick auf unter-
schiedliche Schritte innerhalb der Programmierung verteilt.

Die Kontrolle über entwicklungsrelevante Budgets soll nach dem Vorschlag innerhalb der Kommission bleiben. So fällt künftig nicht nur der Europäische Entwicklungsfonds, sondern auch das Instrument für die Entwicklungszusammenarbeit unter den primären Verantwortungsbereich des Kommissars für Entwicklung. Allerdings erhält der EAD die Möglichkeit der Einflussnahme auf die ersten drei Programmierungsschritte für die europäische Entwicklungszusammenarbeit und zwar unabhängig von der regionalen Zugehörig-
keit der betroffenen Länder. Somit kann der EAD künftig auch über Fragen der langfristi-
gen Allokation von Geldern zumindest mitentscheiden – und übt dadurch auch eine ge-
wisse Kontrolle aus. Konkret heißt es in Artikel 8 Absatz 3:

“The European External Action Service shall in particular have responsibility for preparing the following Commission decision on the strategic, multi-annual steps within the programming cycle: (i) country allocations to determine the global financial envelope for each region […] (ii) country and regional strategic papers (CSPs/RSPs) [and] (iii) national and regional strategic papers (NIPs/RIPs)”.

Um dieser Aufgabe gerecht zu werden, soll innerhalb des Europäischen Auswärtigen Dienstes eine Referatsstruktur geschaffen werden, die alle Weltregionen innerhalb seiner geographischen Ressorts umfasst und somit die ursprünglich nach geographisch getrennten Aufgabenbereichen agierende Verwaltung ablöst. Die relativ starke Einbindung des EAD in die Programmierung der Entwicklungszusammenarbeit ermöglicht es dem Dienst, künftig wesentlichen Einfluss auf die strategische Ausrichtung der europäischen Entwicklungszu-
ammenarbeit zu nehmen. Allerdings bleibt die Programmierung in Bezug auf die Vergabe von Geldern aus dem Europäischen Entwicklungsfonds und die Vergabe von Geldern
durch das Development Cooperation Instrument unter der Verantwortung des Kommissars für Entwicklung. In dem Vorschlag heißt es dazu konkret in Artikel 8 Absatz 4:

“With regard to the European Development Fund and the Development Cooperation Instrument, any proposals […] shall be prepared […] under the direct supervision and guidance of the Commissioner responsible for Development Policy and then jointly submitted with the High Representative for decision by the Commission.”

III. Fazit und Ausblick


The following selected bibliography has been compiled in cooperation with the information centre of the German Institute of Global and Area Studies – GIGA – (former German Overseas Institute – DÜI) Hamburg. **

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