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Governance, Human Rights and the Public Sphere in Africa: The Case of Zimbabwe

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CODESRIA

1 Introduction

The debates about the public sphere have up until recently been confined to an European audience. This is mainly because Habermas' *magnum opus* was only translated into English just over nineteen years ago. The Anglophone world is slowly catching up now to the debates that have been going on for a while now.¹ Despite the difficulties attendant to the translation of the term 'public sphere' as used in the German language, the essence of what the term connotes has not been lost.² Throughout its evolution, the concept of the public sphere has over history one element that has remained unchanged: public participation.

From the early Athenian democracies to modern day twenty-first century democracies, public participation in matters of governance has been a subject of great debate. For instance, in the early Athenian democracy, the great debate was whether the uneducated or *hoi polloi* should be allowed to shape matters of policy or not. The question was, as Goodnight puts it, "should the *polis* adhere to beliefs informed by the *doxa*, common opinion, or should its policies be shaped only by those who have refined, specialised knowledge secured by *episteme*?"³ The public sphere in the Athenian era was the province of the elite who at the time were men.

The concept of the public sphere is not new or unique to Habermas⁴, however Habermas' work stands out because it provides "the most systematically developed critical theory of the concept now available".⁵ As the sub-title of his seminal work indicates, Habermas' initial interest was an enquiry into the bourgeois public sphere. This he defines as "the sphere of private people come together as a public"⁶ to engage the authorities through reason on matters of common interest to all. Like in the Athenian era, Habermas' bourgeois public sphere was populated by "jurists..doctors,

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¹ Habermas J (1989) *The Structural Transformation of the Public Sphere: An Inquiry into the Category of Bourgeois Society*. This work was originally penned in 1962 in German and was only translated into English in 1989 by Thomas Burger, assisted by Frederick Lawrence.

² See Kleinstuber HJ 'Habermas and the Public Sphere: From a German to a European Perspective' *The Public* (2001) vol 8 no 1, 95-108.

³ Goodnight TG 'Habermas, The Public Sphere and Controversy' *International Journal of Public Opinion Research* (1992) vol 4 no 3, 243-254 at 243.

⁴ Habermas J (1989) *op cit* n 1. See page 14 for the genesis and historical evolution of the concept.

⁵ Dahlberg L 'The Habermasian Public Sphere: Taking difference seriously?' *Theory and Society* (2005) vol 35, 111-136 at 111.

⁶ Habermas J (1989) *op cit* n 1 at 27.

pastors, officers, professors, and ‘scholars’ who were at the top of the hierarchy reaching down through schoolteachers and scribes to ‘the people’”⁷ to the exclusion of the general populace.

Just over a decade after his seminal work, Habermas wrote on the topic of the public sphere that, “by public sphere we mean first of all a realm of social life in which something approaching public opinion can be formed. Access is guaranteed to all citizens”.⁸ Central to this inclusive and the improved version of the public sphere is the fact that access is open to all and certain rights and freedoms are guaranteed. To this effect he writes that “[c]itizens behave as a public body when they confer in an unrestricted fashion – that is, with the guarantee of freedom of assembly and association and the freedom to express and publish their opinions – about matters of general interest”.⁹ Making a comparison of the early Athenian era public sphere and the modern one, Goodnight writes that the Greek public sphere was rooted in a static class system, whereas the modern public sphere was founded on declarations and guarantees of basic rights of participation for all.¹⁰ It is this latter assertion of guaranteed rights and access for all to the public sphere that we seek to address in this paper with reference to the African continent in general and the Zimbabwean situation in particular.

As it can be evidenced from the many sub-topics of this conference, the concept of the public sphere is multi-faceted and can be approached from different angles. To complicate it further, Habermas makes a further distinction between the political public sphere and the literal one. The literal one, he writes, refers to “a realm of our social life in which something approaching public opinion can be formed”.¹¹ The political public sphere on the other hand refers to when “public discussion deals with objects connected to the activities of the state”.¹² The realisation or actualisation of these two public spheres depends on the existence of an environment that guarantees

⁷ *Ibid* at 23. For a public sphere that is based on issues rather than class see Hauser G ‘Vernacular Dialogue and the Rhetoricity of Public Opinion’ *Communication Monographs* 65 (1998) vol 2 83-107 and Hauser G (1999) *Vernacular Voices: The Rhetoric of Publics and Public Spheres* at 64.

⁸ Habermas J ‘The Public Sphere’ *New German Critique* 3 (1974) at 350.

⁹ *Ibid.*

¹⁰ Goodnight TG (1992) *op cit* n 3 at 243.

¹¹ Habermas J (1974) *op cit* n 8 at 350.

¹² *Ibid.*

certain rights and freedoms. These guaranteed rights and freedoms are: access to the public sphere, freedom of assembly and association, and freedom of expression. While access to the public sphere is open to all, state authority does not form part of it, as Habermas puts it, “state authority is so to speak the *executor* of the political public sphere”.¹³ The political public sphere sets the context within which state authority can be understood and defined. As Habermas puts it, “Only when the exercise of political control is effectively subordinated to the democratic demand and information is accessible to the public, does the political public sphere win an institutionalized influence over the government through the instrument of law-making bodies”.¹⁴ It is the political public sphere that is going to be the subject of our discussion in this paper.

The post-independence African state has not fared well in its task as the “executor” of the political public sphere. In most cases, states have not only been unable to guarantee the rights above, but have deliberately denied them to citizens. Instead of being the “executor” of the public sphere, state authority has been used by political leaders to make access to the public sphere impossible by legislating draconian laws, which muzzle the citizenry. In some of the post-independence African states, participation in the political public sphere exposes citizens to victimisation, imprisonment and even to death. Extreme examples are the case of Ken Saro-Wiwa and ten others who were condemned to death and killed for advocating the rights of the Ogoni people and numerous political activists who were killed in South Africa during the apartheid era.

We will argue that the debate about governing the African public sphere is contingent upon the existence of the “guaranteed” human rights and freedoms mentioned above. Such a guarantee provides an enabling environment within which Africa can begin to explore the concept of the public sphere.

Though most African states have ratified international instruments that protect human rights, in most instances, the enjoyment of such rights is not guaranteed. It is our view that the recent political developments in Zimbabwe provide a modern day

¹³ *Ibid.* Emphasis added.

¹⁴ Habermas J (1974) *op cit* n 8 at 350.

prototype of the extent to which the concept of the public sphere can be eroded if rights and freedoms are not guaranteed. We will further argue that when public opinion is eroded, the citizenry is silenced into submission. The erosion of the public sphere and the silence of the citizens become a fertile ground for the African state to be subjected to dictatorship and thus become “a human rights graveyard”.¹⁵

2 Human rights in Africa: Instruments

What are human rights? These are those basic rights and freedoms to which all humans are entitled, often held to include the right to life and liberty, freedom of thought and expression and equality before the law. It speaks to all human beings and as such has a principle of universality of human rights, which is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions. The 1993 Vienna World Conference on Human Rights, for example, noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.¹⁶ There are many mechanisms in place at the international, regional and even domestic levels for the protection and enforcement of these human rights. At the international level, we have the United Nations and its specialised Human Rights Council, and other human right treaty bodies under the different key human rights treaties. These human right treaty bodies are composed of experts who monitor the implementation of their enabling treaty by state parties.¹⁷

Over the past decades, the history of Africa, the political struggle for freedom from colonialism, incessant outbreak of conflicts and poverty have done a lot to stifle the growth and development of human rights on the continent. The process of setting up effective mechanisms to help enforce human rights in Africa has been very challenging. As was noted by Heyns, this process has become a struggle in its own

¹⁵ Anyangwe Carlson, as quoted in Udombana, NJ ‘Between Promise and Performance: Revisiting States’ Obligations under the African Human Rights Charter’ *Stanford Journal of International Law* (2004) vol 40 at 105.

¹⁶ UN Human Rights website at www.ohchr.org (accessed on 27th August 2008).

¹⁷ *Ibid.*

right.¹⁸ Also initially, there was the notion of the whole regime of human rights being foreign to Africa. This has gradually changed over the years as the struggle for independence and the struggle to retain that independence intensified. This struggle is far from over or complete, it is still ongoing.¹⁹ More and more inroads are being made into this field of effective protection of human rights in Africa with the evolution of the OAU into the AU and the incorporation of human rights and its protection into the African Union system.²⁰

Today, the Constitutive Act of the African Union of 2000²¹ has placed human rights squarely on the agenda of the regional body. Article 3 lists the objectives of the AU as amongst others, to “encourage international co-operation, taking due account of the Charter of the United Nations, and the Universal Declaration on Human Rights” (thus imputing IHR),²² whereas subsection (h) further lists the promotion and protection of human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments, as one of the objectives. Article 4 which deals with the principles guiding the functioning of the AU, provides in subsection (l) the promotion of gender equality, and in subsection (m) the respect for democratic principles, human rights, the rule of law and good governance as guiding principles. Further, in subsection (o) the respect for the sanctity of human life is listed.

Forming part of the African human rights system is the 1986 African Charter on Human and Peoples’ Rights (African Charter) as the main regional document for the protection of human rights.²³ It incorporates a wide range of international human rights with its own unique features. It recognises civil and political rights, economic, social and cultural rights, individual and (most importantly) peoples’ rights. This document has two protocols to it, namely; Protocol to the African Charter on Human

¹⁸ Heyns C and Killander M (2006) ‘The Regional African Human Rights System’ in Gomez Isa F and de Feyter K, (eds) *International Protection of Human Rights: Achievements and Challenges* Deusto: University of Deusto-EIUC (cited in Heyns and Stefiszyn (ed) *Human Rights, Peace and Justice in Africa: A reader* at 195).

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Adopted in Lome, Togo on 11 July 2000 and entered into force on 26 May 2001. The Assembly of the AU held its inaugural meeting in Durban, South Africa in July 2002.

²² Subsection (e).

²³ Sometimes referred to as the Banjul Charter, adopted by the OAU in Kenya in June 1981, and entered into force in October 1986, after being ratified by all 53 member states of the then OAU.

and People's Rights on the Establishment of the African Court on Human and Peoples' Rights²⁴ (ACHPR) and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.²⁵ The ACHPR was established and a decision has now been made by African Heads of States to merge it with the African Court of Justice, to give birth to the African Court of Human Rights and Justice.²⁶

Other instruments in the African human rights system are the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, which entered into force in 1974 with 45 ratifications; and the African Charter on the Rights and Welfare of the Child of 1990, which entered into force in 1999 with 38 ratifications (a monitoring body for this Charter has been set up known as the African Committee on the Rights and Welfare of the Child).²⁷

3 Human Rights in Africa: Mechanisms for Enforcement

Within the AU, its many organs are designed to and also do contribute to the protection of the human rights of the people of Africa. This contribution is made either through positive steps being taken in line with the different instruments or through preventive measures put in place to prevent a situation that gives rise to human rights violations.

The Pan African Parliament (PAP) has as one of its objectives to "promote the principles of human rights and democracy in Africa".²⁸ Currently, the powers of the organ of the AU are purely consultative and advisory and as such do not really have much impact on the human rights situation in Africa.²⁹ The Economic, Social and Cultural Council (ECOSOC) was set up to provide a role for civil society in the AU.³⁰ It has as one of its objectives, to promote and defend a culture of good governance, democratic principles and institutions, popular participation, human rights and

²⁴ Adopted in 1998 and entered into force in January 2004.

²⁵ Adopted in 2003 and entered into force in November 2005.

²⁶ Decision taken by the African Union Assembly at its summit of July 2004, see paragraphs 4 and 5 of Assembly /AU/Dec 45(III).

²⁷ Heyns C and Killander M (2006) *op cit* n 18 at 13.

²⁸ Article 3(2) of the Protocol to the Treaty Establishing the African Economic Community relating to the Pan African Parliament.

²⁹ Heyns C and Killander M (2006) *op cit* n 18 at 15.

³⁰ Its Statutes were adopted by the AU Assembly in July 2004.

freedoms as well as social justice.³¹ The Peace and Security Council (PSC)³² was set up as an organ having the power to deal with conflict situations (or emerging conflict situations) in Africa, as a means of avoiding massive human rights violations. It has as one of its objectives the “promotion and encouragement of democratic practices, good governance ... protection of human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law as part of the efforts for preventing conflicts”.³³ The criteria for membership of this Peace and Security Council include respect for the rule of law and human rights, amongst other things. The protocol mandates the PSC to seek cooperation with the African Commission in relevant matters.³⁴

Pursuant to the African Charter in articles 30 - 61, an African Commission on Human and Peoples’ Rights (the ‘Commission’) was set up to “promote human and peoples’ rights and ensure their protection in Africa”.³⁵ The Commission is charged with the job of enforcing the Charter and in doing this, it has decided through the cases it has heard that inasmuch as not all of the internationally recognised rights are specifically mentioned in the African Charter, such rights should be regarded as being implicitly included.³⁶ The Commission is made up of individuals from member states of the African Union, serving in their personal capacities, and met for the first time in 1987. The Commission has been and is still the sole supervisory body of the African Charter, however this will soon change with the emergence of the African Court of Human and Rights and Justice.³⁷

The Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (ACHPR) was adopted in 1998, and entered into force in 2004. It was set up with the aim of complementing and reinforcing the functions of the African Commission on Human

³¹ Heyns C and Killander M (2006) *op cit* n 18 at 15.

³² *Ibid.* Protocol on the Peace and Security Council was adopted in 2002, and entered into force in 2003.

³³ Article 3(f) of the Protocol.

³⁴ Article 19.

³⁵ Article 30.

³⁶ Constitutional Rights Project and Another v Nigeria (2000) AHRLR 227 (ACHPR 1999); Legal Resources Foundation v Zambia (2001) AHRLR 84 (ACHPR 2001) and others (cited in Heyns & Killander (ed) *Compendium of Key Human Rights Documents of the African Union* at 188, 225).

³⁷ *Op cit* n 26.

and Peoples' Rights (functions conferred on it by the African Charter). The court has jurisdiction over "all cases and disputes brought before it concerning the interpretation and application of the Charter ... and any other relevant human rights instrument which the states concerned have ratified".³⁸ So basically, this means that the jurisdiction of the Court is wide, as it covers any human rights related issue or instrument that the parties have entered into. As stated by Heyns,³⁹ this means that "adjudication in respect of even UN and sub-regional human rights instruments will fall within the jurisdiction of the Court provided such treaties have been ratified by the states concerned". Article 4 gives the court jurisdiction to give advisory opinions upon the request of member states of the AU, the AU itself or any of its organs, or any other African organisation recognised by the AU.

4 The public sphere in Africa

As discussed in the preceding paragraphs, in the last four decades, the African continent has witnessed a number of noble attempts by African leaders to address continental issues as a collective. Notable among these was the formation of the Organisation of the African Unity (OAU).⁴⁰ Under the auspices of the OAU, various normative and institutional mechanisms were set in place to address matters pertinent to the continent. Despite these strides, it is an historical fact that some of the worst and unimaginable atrocities that the continent has witnessed occurred in the last forty years, "under the not so watchful eyes"⁴¹ of the OAU.

Africa's woes and tragic past have been well documented and therefore would not need to be repeated in this paper. However it is important to point out that democracy, good governance and constitutionalism have evaded most of the countries in the continent for the past four decades. As a result life presidents, dictatorships and military coups have been a common feature for a greater part of the second half of the last century. It is no surprise that the world's longest serving head of state is none other than President Omar Bongo of Gabon.⁴² Two years short of thirty years, President Mugabe is still at the helm of the nation he led to independence. Swaziland

³⁸ Article 3.

³⁹ Heyns C and Killander M (2006) *op cit* n 18 at 26.

⁴⁰ OAU was established on 26 May 1962.

⁴¹ Nmehielle VO 'The African Union and African Renaissance: A new Era for Human Rights Protection in Africa?' in *Singapore Journal of International and Comparative Law* (2003) 7at 412.

⁴² Omar Bongo has been the head of state since 28 November 1967.

which just celebrated its 40th anniversary of independence has since 1973 up until recently, been ruled by decree which was re-enforced by the current monarch.⁴³ In the Conflict in the Democratic Republic of Congo alone, over four million people have lost their lives.⁴⁴

Not everything has been doom and gloom for the continent. There have also been great leaders in the continent in the likes of Leopold Senghor, Jomo Kenyatta, Nkwame Nkrumah, Mwalimu Julius Nyerere and Nelson Mandela who have tried to steer events in their respective countries into the right direction. They succeeded, not only because they had a vision, but also because they were considered legitimate in the eyes of their people whom they had in their confidence. Africa's problems cannot be hinged to one problem as the main source, but it is fair to say that poor governance is one of the many causes. In the words of Mwalimu Julius Nyerere: "This continent is not distinguished for its good governance of the peoples of Africa and their affairs. Poverty may be a problem, and I believe that is a problem as we try to establish the condition for good governance throughout Africa. But without good governance we cannot eradicate poverty, for no corrupt government is interested in the eradication of poverty; on the contrary and as we have seen in many parts of Africa and elsewhere widespread corruption in high place breed(s) poverty".⁴⁵ In a similar vein, President Ellen Johnson-Sirleaf said, "It is our firm conviction that Africa, and indeed Liberia, is not poor but rather poorly managed".⁴⁶ It is our argument that one of the resources that are poorly managed by the leaders is the human capital.

What has been missing in Africa's form of governance has been public participation (in essence a vibrant public sphere) and corollary to that, accountability on the part of government. There has been in general a serious deficit in terms of accountability to the general populace in Africa. Once liberation from colonialism was attained, the general population was relegated to the margins. To this effect Mangu writes that,

⁴³ What was termed the 40/40 celebration was celebrated amidst fan fare despite opposition from civil society. See <http://www.observer.org.sz/main.php?id=46726§ion=Notebook> (accessed on 15 September 2008).

⁴⁴ Mangu ABM 'The Conflict in the Democratic Republic of Congo and the Protection of Rights under the Charter' in *African Human Law Journal Rights* (2003) vol 3 Issue 1 at 237.

⁴⁵ As quoted by Kamaba, W. *Constitutionalism in Zimbabwe* (2006) at 9.

⁴⁶ Addressing the sixth annual Nelson Mandela Lecture at Kliptown http://www.nelsonmandela.org/index.php/dialogue/annual-lectures/category/annual_lecture_2008 (accessed on 09 September 2008)

“Once in power, many former nationalist leaders allied themselves with their erstwhile colonial masters. Using the very rules and governance practices of their former oppressors to deny their own peoples virtually all the rights they had fought for during colonisation, they pushed the masses of the people into a struggle for a ‘second independence’”.⁴⁷ As a result the people remained uninformed about government programs and what the leadership was about. This problem continues to beset the African continent to this very day of information highway. Africans, as Hansungule points out, “have no proper strategies to market themselves to their own people”.⁴⁸ In a situation where the masses do not have access to states’ information, it becomes difficult for them to form public opinion or even engage and criticise the activities of the state.

The free flow of information is central to facilitation of the public sphere. Newspapers, magazines, radio and television are one of the media of the public sphere.⁴⁹ The media cannot operate properly in an environment that does not respect basic rights such as freedom of speech, assembly and the press.⁵⁰ In most of the African states, like Zimbabwe as it will be argued later, the media is state controlled and independent press is banned, thus pointing to the states’ attempt to curtail the public sphere. It is to the situation in Zimbabwe that we now turn.

5 The Zimbabwean situation: Background and historical developments

Zimbabwe has in the recent past been a focus of attention from scholars, the media and commentators alike for wrong reasons. Just over ten years ago, the political landscape took a turn for the worst.⁵¹ It is said that when President Julius Nyerere arrived in Harare for the inauguration of the then Prime Minister Robert Mugabe in 1980, he greeted him with the words, “You have inherited a jewel. Keep it that

⁴⁷ Mangu ABM ‘What Future for Human and People’ Rights under the African Union, New Partnership for Africa’s Development, African Peer-Review Mechanism and the African Court’ in (2004) 29 *SAYIL* at 136.

⁴⁸ Hansungule, M ‘Malawi and the African Peer Review Mechanism: a bold step towards good governance?’ *Malawi Law Journal* (2008) vol 2, Issue 1 at 3.

⁴⁹ Habermas J (1974) *op cit* n 8 at 350.

⁵⁰ Goodnight *op cit* 3 at 246.

⁵¹ It is generally accepted that 1997 was the beginning of the economic decline. See Coltart, D ‘A decade of suffering in Zimbabwe: Economic Collapse and Political Repression under Robert Mugabe’ in *Center for Global Liberty & Prosperity Development Policy Analysis* March 24 2008. No.5 pg 2.

way”.⁵² Things are now different, the country that was once upon a time the “darling of the international community”⁵³ has now become the pariah state.

This is not a political indictment on the country that was once the breadbasket of the southern region but an appraisal of the political developments as they have unfolded under the leadership of President Robert Mugabe. The struggle from colonialism in Zimbabwe was hard-won, with human casualties.⁵⁴ This struggle did not end in 1980 with the independence of Zimbabwe from colonial rule. As Saunders reminds us, up until 1980, “the struggle focused on the achievement of majority rule - the control of the government and state by the whole of the people. Since independence, the democratic struggle has broadened to include the fight, waged on a number of fronts, to make sure that the government represents and serves the best interest of the nation”.⁵⁵ The post independence struggle has also had its own casualties which are difficult to quantify as people are now dying from poverty, HIV-AIDS related deaths and as a result of brutality related to the recent political climate. Various reasons can be proffered for what has led to the demise of Zimbabwe, some internal and others external. It is beyond the scope of our paper to follow through on all of those but safe to say that this paper will concentrate on those reasons that impact on the public sphere.

6 The public sphere and Zimbabwe

The litmus test for the public sphere is the free access to public institutions, free flow of information and freedom of the press. The public sphere thrives when there is information readily available which the public can utilise in their effort to shape public opinion on matters of common interest. This was at the core of Habermas’ public sphere where a form of “secular politics developed that valued the formation of public opinion as a way of ‘critical-rationality’ to test policy by publicising and debating the interests of state power, especially in regards to matters of commerce,

⁵² Scholtz DB ‘Robert Mugabe: Revolutionary or rebel?’ in Harold-Barry D (ed) 2004 *Zimbabwe: The past is the future*” at 19.

⁵³ *Ibid.*

⁵⁴ An estimated 80 000 died, See Scholtz (*ibid*) and also *The man in the middle: torture, resettlement & eviction and Civil War in Rhodesia*, (1999) A report compiled by the Catholic Commission for the Justice and Peace in Rhodesia, First printed and published in 1975 by the Catholic Institute for International Relations.

⁵⁵ Saunders R *Never the Same Again* (2000) at page 9.

taxation, and capital formation”.⁵⁶ This public opinion becomes crucial especially during election times as it empowers the public body of citizens to shape the course of how they want to be governed.⁵⁷

Both the political and legal environment within which the public sphere should be facilitated is stifled in Zimbabwe. It is common knowledge that in Zimbabwe there is no freedom of speech or assembly, and the state has unleashed untold violence on its own citizens.⁵⁸ Politically, as it turns out to be the case in most African states, there is no clear divide in Zimbabwe between the ruling party and the state. About this Kaulemu writes:

When a government after elections, occupies state structures, it enters into a public arena. It takes on the job of dealing with national issues through publicly established procedures and processes. The political party that makes up the government does not occupy public space in this sense. Not all members of the ruling party are members of the government, only those who make decisions about national issues. Confusion enters when some ruling-party members in Zimbabwe consider themselves to be part of the government and have used state structures for their own ends.⁵⁹

When there is no separation between the private realm and the public realm, or the two are intertwined, then the situation leads to a collapse of the public sphere.⁶⁰

Normatively, the Constitution of Zimbabwe⁶¹, which is the supreme law in the land, guarantees the right to freedom of expression⁶² and freedom of assembly.⁶³ The

⁵⁶ Goodnight *op cit* n 3 at 245.

⁵⁷ See Habermas J (1974) *op cit* n 8 at 350-1.

⁵⁸ See Coltart.D *op cit* n 51 at 1.

⁵⁹ Kaulemo, D ‘The Culture of Party Politics and the Concept of the State in Zimbabwe: Harold-Barry D (ed) 2004 *op cit* n 52 at 79-80.

⁶⁰ See Goodnight *op cit* n 3 at 247.

⁶¹ Constitution of Zimbabwe (as amended on 14 September 2005, up to and including amendment no.17). On an anecdotal note, it is interesting to note that as of 2006, the Constitution of Zimbabwe had been amended 17 times during the first 25 years, while the American Constitution had been amended 27 times over a period of 200 years. See Kamba *op cit* n 45 at 13-4.

⁶² Section 20 (1) states that, “Except with his own consent, or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence”.

beginning of what has been branded in the media as the political “crisis” in Zimbabwe has seen the introduction of laws that have had an impact on press freedom in general and through that had an impact on public opinion in particular. Critical publicity is vital for the formation of public opinion.⁶⁴

The independent media were among the first casualties of the political crisis in Zimbabwe. The process of either closing down independent media or having a clampdown on them was facilitated by the promulgations of draconian laws.⁶⁵ State media continues to be the sole voice that feeds the public with propaganda information. The general public are therefore deprived of an opportunity to engage critically with issues of common interest but are, to use Habermas’ words, “caught in the vortex of *publicity that is staged for show of manipulation*.”⁶⁶ In a situation where the public do not have access to the public sphere and cannot form their own public opinion informed by critical publication, we talk of the collapse of the public sphere.

7 Recommendations

There are certain conditions that need to be in existence for the human rights system in Africa to be effective, especially as they relate to having a vibrant public sphere, which directly impacts on democracy and governance problems existing in the continent. As we have seen from the analogy of Zimbabwe, there is a need for these related rights not only to be guaranteed but also to be secured, entrenched and enforced on the continent. The constant and continued failure to do this gives rise to the continuing situation we have on the continent now. Heyns has enumerated some of these conditions.⁶⁷ One of such conditions is the requirement of an adequate level of compliance with the human rights norms by the state and its agents. Domestic courts must be equipped and empowered to implement these norms within the state also. This implies that the necessary political will must exist on the part of the states

⁶³ Section 21(1) states that, “Except with his own consent, or by way of parental discipline, no person shall be hindered in his freedom of assembly or association, that is to say, his right to assemble freely and to associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests”.

⁶⁴ See Habermas J (1989) *op cit* n 1 at 247-8.

⁶⁵ Information and Protection of Privacy Act (AIPA), Public Order and Security Act (POSA) and some Amendments to the Broadcasting Services Act (BSA).

⁶⁶ Habermas J *op cit* n 1 at 247. Emphasis in the main text.

⁶⁷ Heyns C ‘The African Regional Human Rights System: The African Charter’ *Penn State Law Review* (2004) vol 108 no 3 679 – 702 at 700.

to ensure that the provisions of the instruments it has committed itself to, both on the regional and international front, are implemented and really do work, and does not, in the words of Heyns, end up being “an empty façade”.⁶⁸

Another condition needed is publicity and education. One of the reasons why African leaders have been able to get away with their atrocious actions over the years is the lack of knowledge on the part of the citizens. A lot of Africans do not know what agreements are binding on their countries, or what instruments have been ratified on their behalf by their governments. Coupled with this, most Africans are not aware of the various government programs in their respective countries. This inhibits the ability of the ordinary citizen to respond or to seek avenues for relief when their rights are violated or infringed. The situation has improved over the years with the increased awareness created by the focus on international human rights, as a result of wars and conflicts all over the world, and on the continent. This increased awareness created has enlightened people more as to their rights and obligations as regards human rights. However, it is still necessary that more is done by governments, legal bodies and civil society to publicize the decisions and resolutions of the courts and or human rights bodies within and outside the territorial borders of a state. Critical publicity is needed so that citizens will not only know their rights but will be able to form public opinion. Also so that those who want to comply voluntarily know what is expected of them, and as stated by Heyns, “it is also necessary to ensure that shame or peer pressure can be brought to bear on reluctant states and governments”⁶⁹ for them to know that their citizens are aware of their rights and are “guarding them jealously”. A good example of this is the situation in Ghana. Ghana has made significant and commendable progress in institutionalising democracy and promoting good governance. Ghanaians have created unique institutions and processes that promote, publicize and provide a forum for the education of human rights. These are namely the Annual Governance Forum and the Peoples' Assembly. The Forum and Assembly have expanded the political space for ordinary people and have brought the

⁶⁸ *Ibid* at 701.

⁶⁹ *Ibid*.

government somewhat closer to them. These institutions have certainly demystified the government, rendering it less abstract and remote.⁷⁰

There is also the need for the citizenry to have the confidence that the rights demonstrated by participating in the public sphere are and will be protected. These rights are expressed in norms like political participation and the rights of association and expression. This is one of the ways whereby people will be free to talk and express their opinions. The state structures, institutions and organs must make every effort to promote this confidence by its record of behaviour and the institutionalisation of the structures meant to facilitate and promote these rights, they must be democratised. The independence of the judiciary must be promoted on all fronts. The court system must be well institutionalised and be protected against any state interference. These human rights (which are constitutionally protected) must be interpreted in such a way that they trump state interest, because these rights protect not only the individual in a democracy but democracy itself.⁷¹ In the words of Udombana, “a court must not be very positivistic or legalistic in its attitude, but must go to the spirit of the law in the defence of human rights and human beings”.⁷²

A good converse of this is what currently exists in the regional system. The Protocol to the African Court of Human and Peoples’ Rights (ACHPR) does not allow for individuals to approach the Commission directly and freely.⁷³ There have thus been calls for the Protocol to the ACHPR to be amended in order to broaden its access and grant NGOs and individuals *locus standi* directly without having to first apply and obtain an observer status before the Commission and without the State concerned having to make a declaration authorising the Court to receive NGOs and individuals

⁷⁰ Mangu AMB ‘Accessing the Effectiveness of the APRM and its Impact on the Promotion of Democracy and Good Political Governance’ (2007) 7 *African Human Rights Law Journal* 354 – 388 at 377.

⁷¹ Udombana NJ ‘Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies’ (2005) 5 *African Human Rights Law Journal* 47 at 57.

⁷² *Ibid*; The South African Constitutional Court has been able to achieve this through its elaboration of general principles on constitutional interpretation. In *S v Makwanyane* 1995 3 SA 391 (CC) (paragraph 9), the Court adopted a liberal and creative approach to the interpretation of the Bill of Rights, when it stated that whilst paying regard to the language, an interpretation of the Bill of Rights should be generous and purposive and give expression to the underlying values of the Constitution.

⁷³ Article 5(3) and 34(6) of the Protocol.

complaints.⁷⁴ This is necessary in order to promote the basic human rights to be enforced by the courts. The restriction of direct access to the ACHPR does not work to facilitate or promote the rights guaranteed under the Charter and its Protocol; rather it provides a way for State parties to retain some kind of monopoly on the system.

8 Conclusion

As can be seen from the above and from a legal perspective, African states have taken definite steps in the promotion of respect for human and peoples' rights by drafting and adopting many instruments dealing with human rights and its enforcement, also the African Union is replete with structures and organs which touch on human rights in one way or the other. Unfortunately, actual change has been much slower and less impressive than change on paper.⁷⁵ There exists to an extent, a divide between the rights as they exist on paper and the lives of Africans. These rights and the protection they offer do not seem to have been realised by the larger majority of Africans. This begs the question, why? Naldi⁷⁶ proffers a reason. He is of the view that "the realisation of international human rights standards is inhibited by a variety of factors, including lack of political will, inter- and intra-state conflicts, and resource constraints".⁷⁷ The fact that Africa has had to grapple with civil wars, international conflicts, dictatorial rule, the collapse of civil society in many cases, economic crises and natural disasters, has resulted in the continuous deterioration of human rights on the continent.⁷⁸ He argues that the commitment of many African states to uphold fundamental rights and freedoms also remain suspect to a large extent. The situation in Zimbabwe is a very good example of this. Zimbabwe, having ratified the African Charter as far back as 1986, has in recent times as shown above failed to respect, protect, promote and even to fulfil the obligations it undertook in 1986.

It is therefore necessary for African leaders and states to show that they can indeed "put their money where their mouth is" by demonstrating the needed political will to allow free speech, freedom of association, freedom of movement, and all the other

⁷⁴ Mangu AMB 'The Changing Human Rights Landscape' *Netherlands Quarterly of Human Rights* (2005) vol 23 no 2 pg 379 – 408 pg 405.

⁷⁵ *Ibid.*

⁷⁶ Naldi G 'Future Trends in Human Rights in Africa: The Increased Role of the OAU?' in *The African Charter on Human and Peoples' Rights: The System in Practise, 1986 – 2000* pg 1 – 35.

⁷⁷ *Ibid* at 35.

⁷⁸ *Ibid* at 17.

rights necessary for a vibrant public sphere. This will allow for exchange of ideas and checks and balances that will help in fostering good governance and human rights on the continent.

Bibliography

- Catholic Commission for Justice and Peace in Rhodesia (1999) *The Man in The Middle: torture, resettlement & eviction* Catholic Commission for Justice and Peace in Zimbabwe (First printed and published in 1975 by the Catholic Institute for International Relations) Harare: Zimbabwe.
- Evans M and Murray R (ed) (2002) *The African charter on Human and Peoples' Rights: The System in Practice, 1986 – 2000* Cambridge University Press: Cambridge, UK.
- Habermas J (1989) *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* Polity Press: Great Britain.
- Harold-Barry D (ed) (2004) *Zimbabwe: The Past is the Future* Weaver Press: Harare, Zimbabwe.
- Hauser G (1999) *Vernacular Voices: The Rhetoric of Publics and Public Spheres* University of South Carolina: Columbia.
- Heyns CJ and Killander M (ed) (2007) *Compendium of key Human Rights Documents of The African Union* Pretoria University Law Press: Pretoria, South Africa.
- Heyns CJ and Stefiszyn K (ed) (2006) *Human Rights, Peace and Justice in Africa: A Reader* Pretoria University Law Press: Pretoria, South Africa.
- Kamba W (2006) *Constitutionalism in Zimbabwe* Benaby Printing and Publishing Ltd: Harare, Zimbabwe (Papers presented at the Centre for Peace Initiatives in Africa's fifth Annual Review Conference).
- Saunders R (2000) *Never The Same Again* Strand Multiprint (Pvt) Ltd: Harare, Zimbabwe.

- Coltart, D “A decade of suffering in Zimbabwe: Economic Collapse and Political Repression under Robert Mugabe” *Centre for Global Liberty & Prosperity Development Policy Analysis* 24 (2008), 2.
- Dahlberg L “The Habermasian Public Sphere: Taking Difference Seriously?” *Theory and Society* 34 (2005), 111 – 136.
- Goodnight TC “Habermas, The Public Sphere, and Controversy” *International Journal of Public Opinion Research* 4 (1992), 243 – 254.
- Habermas J “The Public Sphere” *New German Critique* 3 (1974), 350 – 356.
- Hansungule, M “Malawi and the African Peer Review Mechanism: a bold step towards good governance?” *Malawi Law Journal* 2 (2008), 3.
- Hauser G “Vernacular Dialogue and the Rhetoricity of Public Opinion” *Communication Monographs* 65 (1998), 83.
- Heyns CJ, ‘The African Regional Human Rights System: The African Charter’ *Penn State Law Review* 108 (2004), 679 – 702 at 700.
- Kleinstuber HJ “Habermas and The Public Sphere: From a German to a European Perspective” *The Public* 8 (2001), 95 – 108.
- Mangu ABM “The Conflict in the Democratic Republic of Congo and the Protection of Rights under the Charter” in *African Human Law Journal Rights* 3 (2003), 237.
- Mangu ABM “What Future for Human and People’ Rights under the African Union, New Partnership for Africa’s Development, African Peer-Review Mechanism and the African Court” *South African Yearbook of International Law* 29 (2004), 136.
- Mangu AMB ‘The Changing Human Rights Landscape’ *Netherlands Quarterly of Human Rights* 23 (2005), 379 – 408.
- Nmehielle, VO “The African Union and African Renaissance: A new Era for Human Rights Protection in Africa?” *Singapore Journal of International and Comparative Law* 7 (2003), 412.
- Udombana NJ ‘Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies’ *African Human Rights Law Journal* 5 (2005), 47.
- Udombana NJ “Between Promise and Performance: Revisiting States’ Obligations Under the African Human Rights Charter” *Stanford Journal of International Law* 40 (2004), 105.