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**THE DEVELOPMENT, ADAPTATION AND IMPLEMENTATION CHALLENGES OF SADC PROTOCOL IN ITS RELATION TO HUMAN RIGHTS AND CORRUPTION**

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## Introduction

Human rights are founded on the inherent dignity of the human person. Democratisation builds the effective participation of individuals in decision making and the exercise of power in society, both through the formal processes of democracy and through the organisations of civil society that give voice to popular concerns. Good governance ensures the effective, honest, equitable and accountable exercise of power by governments. The values that underlie human rights, democracy and good governance which include respect for human dignity, justice, equity, participation and accountability are deeply held throughout the world. Respect for human rights, democratization and good governance are important, in their own right, for the security of individual children, women and men and the development of the societies in which they live. Together, respect for rights, democratisation and good governance create the framework of society within which the development efforts of people, whether working as individuals, as groups in civil society, or through their governments, can be effective.

It is for the foregoing reasons that human rights issues have taken centre stage in human development. This can be traced back to the historical development of human rights and how human rights have shaped international relations, as we know them today. Going back to the First World War, issues of human rights were not seen as a source of instability and were therefore not provided for in the Charter of the League of Nations. It was not until the aftermath of the Second World War that the international community became convinced that human rights needed special mention and an extra effort to protect these to maintain world peace and cooperation and also to avoid another war such as the Second World War breaking out. The United Nations Charter, which was signed on 26 June 1945 in San Francisco and entered into force on 24 October 1945, accordingly was the first international treaty that specifically provided for human rights with a number of articles referring to these.<sup>1</sup> It is important to note that at the signing of the Charter of the United Nations, it was felt that issues relating to human rights were so important that they required to be dealt with more fully and in a separate binding treaty. This resulted in the adoption of the Universal Declaration of Human Rights, which was adopted by resolution 217 (III) of 10 December 1948 by the General Assembly of the United Nations. The Universal Declaration of Human Rights was the beginning of standard setting in human rights with the intention of transforming it into a binding treaty.<sup>2</sup>

Since the adoption of the Universal Declaration of Human Rights, there have been many developments on issues around human rights. A great deal of attention has been given to the issue of human rights and many conferences, symposiums, seminars, workshops and indeed academic courses and training manuals have been developed to further define human rights and to make sure that they are given the importance they deserve. As human rights are characterised by, among other things, their universality, interdependence and indivisibility, one of the main aims of human rights is the eradication of poverty from the human race. Many human rights instruments recognise that it is human

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<sup>1</sup> See Articles 1, 55 and 56 of the Charter of the United Nations, which contain principles relating to human rights.

<sup>2</sup> Part of the preamble of the Universal Declaration of Human Rights, it is stated as follows: "Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

beings that are at the centre of concerns related to sustainable development. The Rio Declaration under Principle 1<sup>3</sup> recognises this fact and states the following:

*“Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”*

Principle 5<sup>4</sup> of the Rio Declaration goes on to state as follows:

*“All States and peoples shall cooperate the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world”*

Human rights and development are inextricably interwoven. It is not possible, it is argued, to attempt to separate the two. The ultimate objective of mankind’s endeavours is the enhancement of the standard and quality of life that a human being can enjoy. This quality of life can be further defined to include the economic, social, cultural, civil, political and spiritual aspects. This explains why most humans wake up in the morning and go to work. This also explains why humans first have to attend school so that they acquire the necessary skills that will sustain them in their day-to-day livelihood. Upon acquiring the necessary skills whether through formal or informal education, the next activity that a human being will involve himself or herself in is work to acquire the necessary resources whether they are financial or otherwise to enable them to sustain themselves physically and spiritually. Accordingly, humankind is continuously and insistently striving to eliminate the scourges of ignorance, poverty and disease.

### **What Are Human Rights?**

Professor Louis Hinkin defined human rights as:

*“...claims, which every individual has, or could have, upon society in which he/she lives. To call them human rights suggests that they are universal, they are the due of every human being in every society. They know no geography or history, culture or ideology, political or economic system or state of development. They do not depend on race, class or status. To call them ‘rights’ implies that they are ‘claims as of right’ not merely appeals to grace or charity or brotherhood or love, they need not be earned or deserved. They are more than aspirations or assertions ‘of the good’ but claims of entitlements and corresponding obligations”.*<sup>5</sup>

Jack Donnelly said this about human rights:

*“Human rights are, literally, the rights that one has simply because one is human”.*<sup>6</sup>

In elaborating he added that:

<sup>3</sup> Rio Declaration on Environment and Development, The United Nations Conference on Environment and Development, Rio de Janeiro, 3 to 14 June 1992.

<sup>4</sup> Ibid.

<sup>5</sup> “Rights here and There”, Vol. 81, 991 Columbia Law Review 1582.

<sup>6</sup> “What are Human Rights?” Introduction to Human Rights, page 3.

*“Human rights, because they rest on nothing more than being human, are universal, equal and inalienable. All human beings hold them, universally. One either is or is not human and thus has or does not have rights, equally. And one can no more lose these rights than one can stop being a human being – no matter how inhuman the treatment one may suffer. One is entitled to human rights and is empowered by them”.*

Related to the principle of equality of all human persons is the principle of non-discrimination. All forms of discrimination are prohibited, such as discrimination on the grounds of gender, race, colour, creed, opinion, place of origin, language, etc. The Universal Declaration of Human Rights thus emphasises that all people are equal before the law and are entitled without any discrimination to equal protection of the law.

From the two definitions of “human rights” discussed above the major characteristics of human rights, emerge as being that:

- They are universal.
- They are inalienable.
- They are indivisible and inter-dependent.
- They inhere from the dignity of the human person.
- Their enjoyment is based on the principle of non-discrimination.

Human rights create state obligations. These obligations can be found in the various human rights treaties that have been developed and adopted by the international community. These obligations in effect are now part of international human rights law. These can be summarised as the obligation to:

- Enact legislation giving effect to human rights treaties in national law
- Promote and disseminate human rights treaty law widely
- Protect the enjoyment of human rights
- Respect the enjoyment of human rights
- Fulfil the realisation of human rights
- Provide for effective remedies (where violations occur)
- Report on implementation measures and progress to supra national bodies that have judicial oversight in human rights matters
- Implement recommendations of treaty bodies.

### **What Is Corruption?**

Corruption is a term that each time it is mentioned; it generates a number of different reactions among different people. In fact, one can say that the reactions to corruption can be as many as there are persons reacting to this phenomenon. What is agreed though is that corruption is one of the main causes of the various ills that southern Africa finds herself in. The mixed reactions are as a result of the different perception of what corruption really is. The question that one asks though is, is corruption really a perception or the definition of corruption is now very clear and is understood by each and every person.

Just to illustrate how complex corruption is, a number of definitions of corruption will be listed below:

*“Corruption involves behaviour on the part of persons in which they improperly enrich themselves or those close to them by misusing power with which they have been entrusted. In short, corruption is the misuse of public power for personal gain.”<sup>7</sup>*

*“Corruption involves behaviour on the part of officials in the public and private sectors, in which they improperly and unlawfully enrich themselves and/or those close to them, or induce others to do so, by misusing the position in which they are placed.”<sup>8</sup>*

*“...behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of the public power entrusted to them. This would include embezzlement of funds, theft of corporate or public property as well as corrupt practices such as bribery, extortion or influence peddling.”<sup>9</sup>*

*“...corruption is an abuse of (public) power for private gain that hampers the public interest. ...corruption entails a confusion of the private with the public sphere or an illicit exchange between the two spheres. In essence, corrupt practices involve public officials acting in the best interest of private concerns (their own or those of others) regardless of, or against, the public interest.”<sup>10</sup>*

Whichever of the definitions stated above that one may choose to use, what is clear is that corruption is something that needs to be stopped. This is because corruption involves the abuse of a position by someone in a position of authority for private gain. The best interests of the generality of the people are overlooked. It is an individual who benefits from by virtue of abusing their position.

Apart from being very nebulous in defining the phenomenon known as corruption, there is an added complication. This complication arises from the fact that corruption can be categorized into grand corruption and petty corruption. Corruption can also be organized or unorganized. Corruption arises in both political and bureaucratic offices. Whilst corruption facilitates criminal activities such as drug trafficking, money laundering and prostitution, corruption is not restricted to these activities. For purposes of understanding the problem of corruption and devising appropriate remedies to fight corruption, it is important to keep crime and corruption analytically distinct.

### **The Relationship Between Corruption and Human Rights**

Generally speaking, corruption has not until very recently, been viewed as a human rights violation. All along, the tendency has been to regard corruption as a crime, unethical behaviour or just as an immoral activity. Even the definitions given above tend to

<sup>7</sup> National Integrity Promotion Campaign –Namibia.

<sup>8</sup> World Bank.

<sup>9</sup> Transparency International (TI).

<sup>10</sup> United Nations Manual on Anti-Corruption Policy.

suggest that corruption is more of a crime than anything else. There has been a tendency therefore to over criminalise the concept of corruption. This is more so given the relationship between corruption and organised crime. This failure by legal systems to recognise corruption as being something that goes beyond it being a crime has made the fight against corruption very difficult and more complex to deal with. At one of the regional roundtables on corruption that SAHRIT ran, an Attorney general from a SADC country confessed that it took him very long to appreciate that a person could be dismissed from the civil service for doing an act that is not necessarily criminal but was unethical and could lead to serious financial prejudice for the government.

Treating corruption as a crime and therefore allowing the normal rules of criminal procedure to be used in its prosecution, has made it very difficult to convict accused persons of having committed corruption. This has resulted in the reversal of the burden of proof and the onus in cases where accused persons are charged with corruption. A number of countries have changed their legal frameworks to ensure that prosecutions of corruption are more easily done and that a number of activities are criminalised. This trend was largely as a result of the presentations made at the 9<sup>th</sup> International Anti-Corruption Conference held in South Africa in 1999. The discourse on corruption has accordingly included issues of democracy, human rights, the rule of law and the separation of powers. This therefore makes it relevant and indeed important to discuss corruption in the light of human rights and sustainable development.

From the definition of corruption, one can conclude that corruption undermines fair play, justice and equal opportunities, equity and non-discrimination. All these issues are principles which underpin human rights. The link between corruption and human rights is more clearly demonstrated when one looks at economic rights although this is not limited to this category of rights. Corruption violates human rights more specifically in that:

1. It leads to the misallocation of resources meant for the uplifting of the majority for the benefit of a few individuals.
2. It leads to the production and distribution of defective and sometimes harmful products and services.
3. It results in low levels of investment thus directly affecting sustainable development.
4. It makes the products and services unnecessarily more expensive and out of the reach of the poor thus threatening their right to nutrition and well-being.
5. It disempowers the citizenry by denying them the right to participate and demand for accountability and transparency.
6. It diverts resources meant for the public benefit into private pockets and makes it more expensive for the provision of public services by a government to its citizens.
7. Corrupt governments "win" new terms of office through using processes that will not allow the citizens to freely express themselves thereby voting into office those representatives they would want to see in power.

8. The justice delivery system can also be affected by corruption. Where the judiciary is also corrupt, the justice delivery system in a country suffers. The manifestations of this are that unfair acquittals will result. Equally, unfair convictions may also become the order of the day. Getting an acquittal or conviction will then depend on which side of the fence the accused person will be and not on the merits of the case brought before the courts.
9. In situations where corruption is practised as a matter of routine, a system of patronage is developed. This system accordingly makes sure that whoever is in a position of authority in any government owes that position to leadership of a political party or whatever authority bears power in that country. Patronage itself then results in administration and management systems based on this and more often than not, the persons who will be in positions of authority will not be qualified to carry out the jobs that they will be employed to do.

The net effect of corruption on a large scale is that money that is meant for social services is diverted from the public into the pockets and hands of the rich and famous or those well connected with those in power. Money meant for roads, schools, clinics, infrastructural development, education is diverted from all these causes into private pockets. As human rights are interdependent, cultural rights are also affected by corruption. Culturally therefore, citizens are also denied through corruption. Accordingly, corruption attacks the basic principles of human rights and democracy. The effect of this will be the weakening of the component system of sustainable development. The principles include:

- Transparency.
- Accountability
- Participation.
- Freedom of expression.
- Freedom of assembly.
- Rule of law.
- Separation of powers.
- Equality and non-discrimination.
- Equity and fairness.

The fact that there is a link between human rights and corruption makes it important for there to be a multi-dimensional approach to the fight against corruption. The results of corruption how damaging these are have also made it important that in any fight against corruption, there should be a process that holistically tries to cover all areas that are susceptible to the scourge of corruption. It was with this in mind, that SAHRIT facilitated the discussions through to the adoption of the SADC Protocol Against Corruption.

### **The Development of the SADC Protocol Against Corruption**

SAHRIT facilitated the evolution of consensus through the development and subsequent signing of the SADC Protocol Against Corruption (the Protocol) in August 2001. To get to this point, several initiatives were undertaken. Three regional roundtables on ethics and governance attended by senior government officials, politicians, heads of anti-corruption institutions, members of parliament, members of the judiciary and speakers of parliament

were held between 1998 and 2001. Each meeting focused on specific aspects aimed at developing consensus on the issue of corruption. The first regional roundtable was held in Botswana in 1998. This meeting in Botswana took place after the Heads of State and Government, this being the supreme body of SADC, had rejected a Southern African Declaration Against Corruption in June 1998. SAHRIT adopted strategies of ensuring that the processes for the development of the Protocol would be anchored on ownership and full participation in the processes. Persuasive and diplomatic skills were a necessary prerequisite in the successful resuscitation of the regional efforts to fight corruption. This is because regional leaders had displayed high levels of sensitivity to issues of ethics and governance and corruption. There was a feeling that the anti-corruption agenda was being donor and externally driven and so it was therefore unacceptable to them for this reason.

It is important to point out that this roundtable in Botswana was the first one where SADC policy makers had met to discuss issues of fighting corruption. The objectives of this roundtable were to:

- Enhance discussions on ethics and governance in southern Africa.
- Assist in fostering a common understanding of the major concepts regarding corruption, ethics and governance.
- Nurture the development of strategies and mechanisms to combat corruption in the region.
- Explore the development of a regional approach to combat corruption.

The following recommendations were made by this first roundtable:

- That an inventory of anti-corruption institutions and mechanisms be undertaken as matter of urgency.
- That there be a review of the effectiveness of existing national and regional strategies and mechanisms against corruption.
- That a second roundtable be convened on ethics and governance in SADC.
- That SAHRIT shares the southern Africa experience at the 9<sup>th</sup> International Anti-Corruption Conference due to be held in Durban South Africa in 1999.

This roundtable introduced an unusual phenomenon whereby a non-governmental organisation, SAHRIT, spearheaded the process of bringing together governments of the region to discuss contentious issues and methodologies of fighting corruption. The second roundtable on ethics and governance was convened in Dar Es salaam Tanzania in 1999. the objectives of this roundtable were the following:

- To present for adoption the report on the inventory on strategies and mechanisms to combat corruption in southern Africa.
- To share experiences and information on country experiences on the prevalence of corruption and efforts being made to fight the scourge.
- To discuss the way forward with regards to developing regional strategies against corruption.
- To identify ways of broadening participants at the roundtable.

The usual denials of the prevalence of corruption in SADC characterised the discussions at this meeting. The meeting accused NGOs and western countries of fermenting the allegations that Africa was more corrupt than western countries. SAHRIT was commissioned to develop Afro-centric diagnostic tools for quantifying corruption in the



region. The role of SAHRIT at all these roundtables was that of a secretariat and ownership of the processes were with the participating countries. The second roundtable acknowledged the need for the anti-corruption programme to be taken over by the then SADC Legal Sector chaired by Namibia. This debate was adjourned to the next roundtable as Namibia did not appear too keen on taking over this activity. This resulted in SAHRIT entering into a number of discussions with Namibia with respect to how the anti-corruption discourse could be carried forward.

A third roundtable on ethics and governance in southern Africa was held in Victoria Falls Zimbabwe in 2000. The objectives of the third roundtable were the following:

- To share experiences and information on anti-corruption strategies and mechanisms at national and regional levels.
- To present a progress report since the last roundtable.
- To present corruption diagnostic tools.
- To concretise the development of a regional strategy and instrument against corruption.

It is after this third roundtable and the fourth roundtable that was held in Lusaka Zambia that the Protocol was developed and accepted in its form.

### **Human Rights Elements In the SADC Protocol Against Corruption.**

The negotiations leading to the development of the SADC Protocol were very sensitive and were delicate. In view of this reality, it was necessary that the progress that had been made should not be disrupted by saying or doing the wrong thing. Issues of human rights therefore are those that needed careful integration into the Protocol. This was done through the discussions of what corruption was and why it was undesirable. The debilitating effects of corruption were discussed at length with particular emphasis on what they would do to development. This line of discussion was acceptable to the governments and it was found that this strategy worked. Human rights issues were therefore fused within the main framework of the Protocol. Each of the sections of the Protocol will therefore be looked at separately:

#### **1. The Preamble**

The Preamble stresses the need for SADC states to fight corruption and the necessary political will to guarantee effectiveness of anti-corruption institutions. The preamble embraces the need for an all inclusive approach to the fight against corruption. The adoption of the all inclusive approach to the fight against corruption is in line with all major instruments on corruption. This approach also reaffirms the point that corruption is a problem that goes beyond it being a crime. There are human rights issues that arise in the fight against corruption and those who engage in acts of corruption in fact violate the human rights of citizens when they do so. The preamble makes a fundamental link between corruption and its negative effects on political, economic, social and cultural rights. This is an important inclusion as the Protocol acknowledges the inter-relatedness between corruption, violations of fundamental rights and the effect of this on governance. The preamble also notes that anti-corruption initiatives are necessary for regional development, integration and cooperation.

## 2. The Purpose Of The Protocol

The Protocol encourages member states to develop mechanisms to combat corruption at the national level among other things. For those countries that already have these mechanisms, the call is to strengthen these. The Protocol also calls for closer cooperation among member countries and the need to have harmonised legislation.

## 3. Acts Of Corruption

A definition of corruption is provided in the Protocol. The scope is however widened to include corruption in the private sector. Like UNCAC, the Protocol urges member state to criminalise as many acts of corruption as possible. The Protocol does not give an exhaustive list of these crimes and it is left at member states' discretion to widen the definitions to include as many issues as possible as part of the definition of corruption. This wider look at corruption means that issues of human rights are taken into account. The definition now goes beyond what was traditionally regarded as corruption crimes.

## 4. Institutional Arrangement From Implementation.

The implementation of the Protocol lies with the will of the state party that has ratified the Protocol. There are no punitive measures that will be taken against a member state that fails to implement the Protocol. The mechanisms in the Protocol are similar to the ones that are contained in the various international instruments that largely rely on embarrassment for state parties. The Protocol creates the SADC Anti-Corruption Committee (SACC) that has the mandate to oversee the implementation of the Protocol. SACC also has other duties which include the gathering and dissemination of information to members states organisation of training programmes for member states and the evaluation of programmes of implementation. The set up of the committee is similar to treaty bodies set up by human rights instruments. This also illustrates the fact that implementation of anti-corruption measures is being taken seriously and there is an expectation from SADC states that all its members will take seriously the standards that they have agreed to adopt in their countries.

## 5. Preventive Measures.

Prevention is better than cure. This is the basis upon which this was included in the Protocol. A wide range of prevention measures are set out in the Protocol and these include the following:

- a. Access to Public and Other Information – each member state to the Protocol is called upon to put in place mechanisms to promote access to information to facilitate eradication and elimination of opportunities of corruption.<sup>11</sup> Information is key to the effective fight against corruption. Access to information is also a fundamental human right. This access to

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<sup>11</sup> Article IV (d) of the Protocol.

information will also empower the citizens to know what is right and what is wrong. The fight against corruption requires the public buy in as they are the ones who more often than not will be able to see when things are going wrong.

- b. **Protection of Whistle Blowers** – most legislation in SADC before the entry into force of the Protocol did not provide for the protection of whistle blowers. The Protocol makes provision for this by requiring member states to provide systems for protecting individuals who in good faith report acts of corruption.<sup>12</sup> As corruption is done in secrecy, it is clear that to effectively fight it, there is need to incentivise those who come across corrupt acts to report to the authorities. By providing protection to these individuals, law enforcement becomes easier in that there will be full cooperation in investigations and identifying the perpetrators of the crime. This is another recognised principle in human rights that has been enshrined in the Protocol.
- c. **Establishment of Anti-Corruption Agencies** – the Protocol encourages the setting up of anti-corruption institutions whose mandate is to deal solely with anti-corruption matters.<sup>13</sup> These institutions play a very important role in the fight against corruption. The realisation that there is need to set up anti-corruption institutions is an admission that corruption is not just a crime. This is because these institutions go beyond just investigation. They carry out public campaigns and prevention measures. They are also key in the exchange of information between countries. They are also key in ensuring that the legal framework as it exists in that particular country is adequate to deal with all the various issues of corruption. More importantly, the existence of these institutions is to ensure that the full effects of corruption are minimised. The prevention aspects are more critical than the investigations and the recommendations to prosecute that these institutions give to various governments. Anti-corruption institutions thus play a proactive role in the fight against corruption.
- d. **Participation of Civil Society** – the Protocol makes provision for the participation of civil society in the fight against corruption.<sup>14</sup> This is a very important article in the Protocol. This is in line with the United Nations position that the implementation and enjoyment of human rights in any country is enhanced where civil society is allowed to participate in full. Civil society involvement in the fight against corruption means that the governments cannot go it alone. It also means that the watchdog role of civil society is accepted and encouraged. It also means that governments will be held accountable and the involvement of civil society gives the citizens confidence that whatever the government has done, will be subjected to scrutiny. Most important is that civil society can ensure that

<sup>12</sup> Article IV (e) of the Protocol.

<sup>13</sup> Article IV (g) of the Protocol.

<sup>14</sup> Article IV (l) of the Protocol.

governments are held accountable for the commitments that they would have made on paper.

- e. **The Media** – the Protocol specifically mentions that member states should encourage participation of the media in the fight against corruption.<sup>15</sup> The media is regarded as the fourth estate in the nation. Its role is to bring to the fore any issue for public debate and for accountability. There is a need for a free media for this to be done effectively. In addition to the media being free, the media must also have the capacity to deal with all the issues that arise in the anti-corruption discourse. The need to involve the media is also in line with principles of human rights which emphasize the need for information and the need for there to be access to information. Citizens are able to express themselves through the media thus exercising their fundamental rights of expression. It is through the media that certain government policies can be questioned. This free debate cannot take place where the media is not free.

## **Conclusion**

In the development and adoption of the SADC Protocol Against Corruption, human rights issues were taken into consideration. Although the words human rights might not appear in the text of the Protocol the drafters of the Protocol indeed took this into account. This is clearly shown by the fact that the Protocol recognises that the fight against corruption goes beyond it being a crime. This is the infusion of human rights issues into the Protocol. Furthermore, it is becoming important to take into account human rights issues even in the fight against corruption. Prevention techniques that are included in the Protocol take into account the role of stakeholders in the fight against corruption. The Protocol was signed and ratified by SADC member states in record time, less than one year. This in itself is testimony of the fact that all players now accept that corruption and human rights issues are really important. The fact that SADC member states were agreeable to adopting the Protocol in the form and manner that it is is also a recognition of the importance of the relationship between corruption and human rights. The Protocol clearly illustrates this link. When compared to other international instruments on corruption, the Protocol is up there with the rest of these international instruments. It takes into account recent trends of fighting corruption and recommends that member states adopt measures that have been proved at the international level that they are effective and necessary in the fight against corruption.

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<sup>15</sup> Ibid.