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# African Regional Forum news

Newsletter of the International Bar Association Legal Practice Division

**VOLUME 6 NUMBER 2 JULY 2012**





# INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE

## DUBLIN 30 SEPTEMBER – 5 OCTOBER 2012



**S**teeped in history, yet buzzing with youthful energy, Dublin's medieval, Georgian and modern architecture provide a backdrop to a bustling port where the cosmopolitan and charming meet in delightful diversity. Serving as Ireland's historical and cultural centre, as well as the nexus of Irish education, administration, economy and industry, Dublin is perfectly suited to host the IBA's 2012 Annual Conference.



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**Contributions** to this newsletter are always welcome and should be sent to Toyin Adegoke at the following email address:  
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# From the Chair

**T**he IBA African Regional Forum continues to make great progress in its resolution to ensure that lawyers practicing in Africa are involved in the Forum's activities. It is in pursuance of this objective in particular that we are holding the next IBA African Regional Forum Conference in Kampala on the 8–10 August 2012. The conference will be hosted by the Uganda Law Society, and is already attracting the attention of many of our colleagues working in Africa, who are all enthusiastically looking forward to another constructive and exciting conference on our continent which aspires to empower our African colleagues. Many of us have a firm resolve to make Africa a world-leader in legal practice and there is absolutely no reason why we cannot achieve this objective in the not-so-distant future.

The Kampala Conference is another African Regional Forum initiative, planned with a view to traversing the continent

to ensure transparency and inclusivity in the Forum's activities. It presents a fantastic opportunity to network with legal professionals from all over the world, including those working in Africa. It will be an excellent chance for us to share our common interests in, and opinions on, various hot topics of debate including: arbitration; human rights; infrastructure finances; international criminal justice; and the future of law firms in the 21st Century.

The Forum also has exciting sessions planned for the IBA Annual Conference in Dublin this year, with sessions on global warming and public private partnership, and we look forward to seeing many of you there as well as in Kampala.

The IBA African Regional Forum has a future full of promise; let's all work to make Africa what we desire it to be: a strong continent with trailblazers in law!

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# Repositioning the investment climate for growth in Africa

I heartily welcome esteemed African Regional Forum members and ardent readers of the *ARF Newsletter* to another scintillating edition of our newsletter which promises to educate and bring to the fore the potential investment opportunities of the African region. For an economy to grow the government must provide an atmosphere that encourages good investment and certainty in the law to govern such investment. If this is not the case, prospective investors may be unwilling to risk their resources. Trade and investment are increasing globally and Africa, as an emerging market in terms of trade and investment opportunities, is today creating a new environment to ensure an efficient market where equity and fair access will prevail.

Through its transport policy in 1996, Mozambique approved a new strategy which encourages the involvement of private capital investment through public and private partnership in the building and operation of railway and port infrastructure. This initiative of the Mozambique government has in turn promoted the development of a competitive tariff policy, thereby enhancing the monitoring of tariff policy and the avoidance of monopolies. Investors in Mozambique's transport policy enjoy ownership status in their investment, government policy guarantees for their investment and the remittance of their funds abroad, and there are many tax incentives for investors as well.

On the other hand, Zimbabwe, through its Indigenisation Laws, provides for investment in the mining sector. This policy is geared towards the promotion of the economic well-being of its citizens by placing restrictions on the extent of foreign control or ownership of certain businesses or resources. The aim of the Zimbabwean Indigenisation and Economic Empowerment Act (otherwise known as the 'Indigenisation Act of 2007') is to ensure that a minimum controlling stake of 51 per cent of the shareholding in every business is held by indigenous Zimbabweans. It is pertinent to note at this juncture that, despite the indigenisation policy of the

Zimbabwean government, foreign investors can still enjoy profitable returns on their investment by seeking special dispensation from the Minister of Youth, Development Indigenisation and Economic Empowerment who is empowered to grant the award of management contracts to foreign investors who provide the bulk of the capital and who may possess the technical know-how to exploit the minerals. Zimbabwean business moguls abroad are therefore called upon to come home and invest in this area of the economy.

The Nigerian Securities and Exchange Commission is the highest regulatory institution of the Nigerian capital market. Through this Commission, the Federal Government of Nigeria has made giant strides in the development of the capital market. Investors in Nigeria's capital market are protected through the registration and regulation of capital market operators, the investigation of complaints by investors and the establishment of an investor protection fund. Potential investors in Nigeria's capital market therefore need not worry about their income and/or diversifying risk.

Following the uprising in January 2012, which saw a change in power in Egypt and the coming-to-power of the Supreme Council of the Armed Forces, the Egyptian Investment Law No 8 of 1997 was amended to introduce the possibility of reconciliation with investors suspected of being involved in corrupt practices affecting public funds. The article in respect of this amendment law focuses extensively on Article 7 bis which states that it is possible for public authorities, represented by the General Authority for Investment (GAFI), to reconcile with the investors suspected of committing or having participated in the commission of any of the crimes mentioned in Chapter IV, Book II of the Penal Code of Egypt, which exclusively deals with the crimes affecting public funds. The legal consequences of the new amendment have been enumerated for the comment of the readers.

The issue of children's rights in Africa remains topical and will continue to be so because of the inhibitions many Africa cultures place on the rights of children. The rights



## FORUM OFFICERS

of children are a critical global issue which should be a focus of attention for governments and organisations like the IBA African Regional Forum. Suggestions are welcome as to what may be done to enhance the survival, protection, development and participation of so many children in the developing world and in sub-Saharan Africa who are being denied the opportunity to grow.

The IBA Pro Bono and Access to Justice Committee has established an African Working Group and Tim Soutar discusses its aims in his article on page 8 of this newsletter. I would encourage you to read the article and join the team.

I hope you enjoy this issue of the newsletter.

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# INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE

## DUBLIN 30 SEPTEMBER – 5 OCTOBER 2012

### AFRICAN REGIONAL FORUM SESSIONS

#### **BRICS: trade and investment activities in 2012 and beyond**

*Presented by the IBA Regional Fora.*

The increasingly important role that the BRICS economies play in the global economy is an important trend affecting global legal practice. This panel will analyse current developments affecting trade and investment among the emerging economies of Brazil, Russia, India, China and South Africa. It will focus on developments and issues relating to trade and investment among the BRICS countries themselves, and between those countries and Europe, the United States and other developed markets. In addition to a discussion of relevant legal and regulatory matters, this panel will address cultural and practical issues encountered by practitioners in this area.

**MONDAY 0930 – 1230**

#### **Global warming and the environment – a challenge for lawyers in Africa?**

*Presented by the African Regional Forum.*

Climate change (global warming) is the defining issue of our time. In pursuit of endless growth and material wealth, our contemporary world has lost sight of the essential values and principles which are essential for the well being of humanity, society and the living planet upon which we totally depend.

The Intergovernmental Panel on Climate Change predicts in its Fourth Assessment Report that by 2020, between 75 and 250 million Africans are likely to be experiencing increased water stress caused by climate change. Large parts of the continent are likely to experience temperature increases higher than the global average increases. This, in turn, will have serious implications for agricultural production and access to food. Widespread poverty, forced migration and increased conflict are among the likely consequences.

The session will debate the challenges that African lawyers face in relation to governments seeking measures to avoid the consequences and the rights of society in challenging commerce to effectively curb the use of coal as an energy provider in the future.

**MONDAY 1430 – 1730**

#### **African Regional Forum breakfast**

**TUESDAY 0800 – 0930**

#### **Whither Africa: nationalisation, privatisation or public-private partnerships?**

*Presented by the African Regional Forum.*

In the immediate aftermath of the attainment of political independence in the early 1960s, the state assumed an active role in most African economies. Beyond the role of enabler of a business-friendly economic environment, the state combined the role of owner with management of state-owned enterprises leaving little room for private participation in business. By the mid-1990s, however, the state had beaten a retreat from active participation in business. This period was characterised by the privatisation of state-owned enterprises. In more recent times, the state has found the need to enter into partnership with private enterprises in the provision of infrastructural projects across the continent. At the same time, the odd voice has been raised urging a return to state control of African economies by adopting nationalisation as a tool.

A multidisciplinary panel will cast a reflective eye on Africa's record with nationalisation, privatisation and public-private partnerships. The panel will also look into the future by highlighting the issues, particularly those of a legal nature, that are of utmost importance within the context of the role of the state in economic development.

**WEDNESDAY 1430 – 1730**

#### **CSR in Africa – effective tool or convenient escape?**

*Joint session with the African Regional Forum and the Corporate Social Responsibility Committee.*

**Session highlighted as part of the President's focus for the IBA Taskforce on 'Challenges for the Legal Profession post Global Financial Crisis'.**

Africa is an interesting environment for investment and development. Chinese, Indian and European companies come to the continent to exploit its natural resources but also to develop infrastructure, often financed by the World Bank and other institutions. The project finance contracts usually contain CSR-related requirements which establish standards, in particular regarding environmental protection, often not in place in the respective countries. Companies active in Africa endeavour to be compliant with CSR requirements established in the UN Global Compact and other standards. It is questioned, however, whether CSR compliance is really an effective instrument to meet human rights, environmental and corruption challenges, or, whether it is just a convenient tool to escape the 'real' responsibilities.

The session will discuss this controversy with experts from government, corporations and civil society.

**THURSDAY 0930 – 1230**

#### **African Regional Forum lunch**

**THURSDAY 1230 – 1430**



# Pro Bono and Access to Justice Committee establishes African Working Group

Tim Soutar

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As part of its work to promote and support the provision of pro bono services, both by members of the IBA and by the wider profession, the Pro Bono and Access to Justice Committee has recently established an African Working Group. This is intended to be the first of a small number of regional working groups to be created to assist the Committee to communicate more directly and effectively with its constituency and generally to further its work. By raising awareness locally and acting as a conduit for the transmission of information on access to justice and pro bono in their respective regions, it is hoped that the regional working groups will cause a broader spectrum of the IBA membership and of the global profession to become engaged in the work of the Committee and in the direct provision of pro bono services.

The Africa Working Group will, therefore, serve as a role model for further regional groups in due course. Its founder members are representatives of firms from Cote d'Ivoire (Bile-Aka, Brizoua-Bi & Associés), Ghana (Oxford and Beaumont), Kenya (Hamilton Harrison Matthews), Nigeria (Templars) and South Africa (Webber Wentzel), together with Clifford Chance, who are providing coordination and secretariat services. Although the group is starting with a small number of participants, in order to minimise the initial logistical challenges, an attempt has nevertheless been made to obtain a satisfactory degree of diversity and the plan is to add further members in relatively short order from across sub-Saharan Africa once the group is functioning fully.

The IBA's dedicated pro bono website – [www.internationalprobono.com](http://www.internationalprobono.com) – will be used by the Working Group to report and disseminate information and share best practice, thus helping it meet its goals, whilst contributing to the website's growing position as the 'go-to' site for those interested in international pro bono issues. At least one member of the Group will sit on the Committee to ensure a proper channel of communication, particularly in the development of the Group's strategy and priorities, and to

ensure that the Committee can provide necessary support on a timely basis.

The inaugural conference call between all members was held at the end of March and it is intended that further calls will be held on a monthly to bi-monthly basis. As well as providing an opportunity for introductions, the first call enabled everyone to share initial information on the current status of pro bono work in their respective jurisdictions. Moving forward, the understanding gained will allow the members to identify needs and create an appropriate strategy for growing and delivering its work.

A number of common issues were identified on the call including:

- that in all jurisdictions the demand for pro bono services far outweighs the existing provision;
- that of all the countries represented, South Africa is the most advanced in its thinking and action on meeting pro bono demand but even there much work remains to be done;
- except in cases where assistance is requested by foreign law firms or foreign clients who are engaged in some pro bono activity, there is an almost exclusive focus in most jurisdictions on criminal law work, with some legislative change advocacy, but little help on such issues as housing, family matters, prisons reform, employment or the assistance required by NGOs in tackling these and other poverty and access to justice related issues;
- the need for coordination of pro bono activities among members of the profession at a local level; and
- the need to encourage local Bar Associations to demonstrate leadership in the promotion of pro bono work and in tackling corruption in their respective jurisdictions.

In many of these areas, the IBA should be well placed, through the African Regional Forum and relevant committees, to help the Group begin to confront these issues.

If you would like to learn more about the Group's activities, please contact the author at [tim.soutar@cliffordchance.com](mailto:tim.soutar@cliffordchance.com).

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# Zimbabwe's indigenisation laws: investing in the mining sector

For a long time and in all parts of the world, governments of many countries have enacted legislation designed to promote the economic well being of their citizens by placing restrictions on the extent of foreign control or ownership of certain businesses or resources. In 2007, the President and Parliament of Zimbabwe enacted the Indigenisation and Economic Empowerment Act [Chapter 14:33] which is loosely akin to the South African Broad Based Black Economic Empowerment Act of 2003 and is reminiscent of the Nigerian Enterprise Promotions (Indigenisation) Decrees of 1972 and 1977.

Like many other indigenisation economic empowerment legislations in Africa and the world over, the broad objective of the Zimbabwean Indigenisation and Economic Empowerment Act (hereinafter referred to as the 'Indigenisation Act') is to ensure that a minimum controlling stake of 51 per cent of the shareholding in every business is held by indigenous Zimbabweans.

The implementation and administration of the Indigenisation Act is entrusted to the Minister of Youth Development, Indigenisation and Economic Empowerment (hereinafter referred to as the 'Minister') who is conferred with wide powers and discretion to prescribe specific regulations to apply to each particular business sector in order to achieve the aforementioned objective. The Minister is thus endowed with the unenviable and delicate task of ensuring that non-indigenous Zimbabweans dispose of their controlling stake in various businesses to indigenous Zimbabweans while at the same time ensuring that Zimbabwe remains a viable option for foreign investors.

In 2010, the Minister published the Indigenisation and Economic Empowerment (General) Regulations, SI 21/2010, which stipulate that every business with a net asset value of at least US\$500,000 in respect of which 51 per cent of the shares is not held by indigenous Zimbabweans should ensure that by the year 2015, at least 51 per cent of the shares in such business is held by indigenous

Zimbabweans. The said regulations also provided for the gazetting of minimum requirements for indigenisation compliance in each specific business sector. At the time of writing this article, the Minister had gazetted minimum requirements for the mining and manufacturing sectors only. This article focuses on the mining sector and aims to highlight practical steps for foreign entities wishing to invest in Zimbabwe's mining sector.

## Indigenisation requirements specific to the mining sector

On the 25 March 2011, the Minister gazetted the Indigenisation and Economic Empowerment (General) Regulations, 2011, GN114/2011, which specified that every mining business whose net asset value is at least US\$1 should comply with the indigenisation requirements that 51 per cent of the shareholding must be held by indigenous Zimbabweans as opposed to a net asset value of US\$500,000 which applies to other business sectors (the manufacturing sector threshold has been set at US\$100,000).

The 25 March 2011 regulations also went on to state that all existing mining businesses in which the 51 per cent shareholding was not held by indigenous Zimbabweans should ensure that the indigenisation quota of 51 per cent indigenous shareholding would be achieved within six months of the publication of such notice, as opposed to the initial five year period which had been specified in the general regulations of 2010 published under SI 21/2010. It must thus be noted from the outset that all new foreign investors to the mining sector can only own a maximum of 49 per cent shareholding in the mining venture.

It must also be stressed that the compulsory indigenous shareholding quota should not deter foreign investors from partnering with indigenous Zimbabweans in mining ventures as there are ways in which, despite the shareholding structure, the foreign investors can still enjoy profitable returns on their investments. One such way is seeking special dispensation from the Minister for the



awarding of the management contract to the foreign investor who almost invariably would have provided the bulk of the capital and who may possess the technical know-how to exploit the minerals.

However, the thrust of the present article is to provide a broad guideline for investing in the mining sector and the issue of maximising the return on investment (within the confines of the indigenisation laws, of course!) is a subject for another article altogether.

Below is a broad guideline to the major indigenisation approvals to be obtained and other requirements to be fulfilled by investors wishing to carry on business in Zimbabwe's mining sector.

### *Obtaining the approval of the Ministry of Youth, Indigenisation and Economic Empowerment*

After the foreign investor has identified a local company or indigenous Zimbabweans to partner with in a mining venture, the parties should incorporate a joint venture company which will run the mining venture. Needless to state, the shareholding of such joint venture company should be at least 51 per cent to the indigenous Zimbabwean and 49 per cent to the foreign investor.

Having regard to the substantial equity and/or working capital that the foreign investor contributes as well as the technical expertise which the foreign investor may possess, the parties may agree to award the management contract of the venture to the foreign investor.

It is the indigenous partner who then approaches the Minister seeking a special dispensation or approval for awarding the management contract to the foreign investor.

In applying for such approval, the indigenous partner must complete an IDG 01 Form stating the shareholding of the joint venture company and explaining the need for the partnering with a foreign investor. Attached to the IDG 01 form should be the following documents:

- the joint venture agreement;
- the joint venture company's Certificate of Incorporation and other company registration documents such as the CR14 Form specifying the current directors of the company;
- the shareholders' agreement of the joint venture company;
- the proposed management contract;
- details of how many local and foreign

people shall be employed in the venture and in what positions;

- details on which of the parties shall hold key positions such as CEO, Finance Manager, Procurement Manager, ect, in the joint venture company; and
- details of corporate social responsibility activities to be undertaken, technology and skills transfer programmes intended to be undertaken as well as environmental impact assessments.

After submitting these documents and details, the Ministry will consider the application and respond within two weeks on whether the special dispensation to award a foreign investor the management contract has been accepted or rejected.

It should be borne in mind that what guides or influences the Minister's decision whether to accept or reject an application for a special dispensation to award a management contract to a foreign investor is essentially whether or not the indigenous Zimbabwean appears to be in control of the venture.

In order to increase the chances of the special dispensation being granted, the shareholding of the indigenous Zimbabwean may be a little more than 51 per cent and at least one or two key positions in the joint venture company must be occupied by an indigenous Zimbabwean. Foreign investors must note that they are allowed to bring in skilled expatriates but there must be a plan to enable indigenous Zimbabweans to understudy the skilled expatriates such that the indigenous Zimbabweans can eventually take over from the expatriates.

The Minister is also more likely to grant the special dispensation where the initial duration of the management contract is not too long but is a reasonable number of years such as three years (subject to renewal for further terms, of course). This is so because part of what is expected of the foreign investor in the mining sector is a transfer of technical and other skills, such that someday the indigenous Zimbabweans should be able to manage the mining ventures on their own.

### *Obtaining an investment licence from the Zimbabwe Investments Authority*

All new foreign investments require an Investment licence issued by the Zimbabwe Investments Authority.

The Ministry of Youth Development, Indigenisation and Economic Empowerment

and the Zimbabwe Investments Authority have designed a one-stop shop to the effect that the application for a special dispensation referred to above can be determined simultaneously with the application for an investment licence.

In fact, the Ministry of Youth Development, Indigenisation and Economic Empowerment has set up an office at the Zimbabwe Investment Centre to enable investors and their local partners to submit applications for indigenisation approval and for investment licences at the same time, at the same place. The application form for an investment licence can be obtained from [www.zia.co.zw](http://www.zia.co.zw).

What then happens is that as soon as the Ministry grants the special dispensation to approve of the awarding of the management contract to the foreign investor as well as to certify that the joint venture company has complied with indigenisation requirements, the investment licence may then be issued.

This whole process of approval of special dispensation and granting of an investment licence is set to take about two weeks. It appears that once the special dispensation has been granted by the Ministry, the investment licence is almost automatically granted as well.

#### *Obtaining exchange control approval*

Investment by a foreign investor requires exchange control approval by the Reserve Bank of Zimbabwe (RBZ).

After the special dispensation has been granted and the Minister has certified that the joint venture complies with indigenisation requirements, the joint venture company applies to the RBZ for exchange control approval through such company's local commercial or merchant bankers.

The application for exchange control approval must be accompanied by the following:

- description of the nature of the transaction and detailed agreements of the transaction, whether the foreign investor is bringing in cash or equipment;

- current shareholding structure of the company and the proposed shareholding structure after the investment or the shareholding in the joint venture company to be formed;
- financial cash flow projections of the company for the next five years;
- financial statements of the company for the past five years, if the company was operating, including the latest financials, preferably audited financial statements;
- justification for the transaction; and
- a supporting letter from the Ministry of Youth, Indigenisation and Economic Empowerment that such transaction has been approved and that it meets the indigenisation requirements and/or adequately protects the economic interests of the indigenous party to the transaction.

If all the papers are in order the approval may be obtained in approximately two weeks time.

Once the joint venture company has obtained an investment licence, exchange control approval and the necessary approvals from the Minister, the company can commence operations.

#### **Conclusion**

As unpopular with foreign investors as they may be, indigenisation economic empowerment laws are very common and are not unique to Zimbabwe. Foreign investors (and/or their lawyers) have always and continue to find ways to ensure that they enjoy profitable returns on their investments regardless of the restrictions imposed by indigenisation laws and the political noises surrounding such laws. Thus every foreign investor should bear in mind that despite the 51 per cent minimum indigenous shareholding quota and various approvals which must be sought and granted under Zimbabwe's indigenisation laws, investing in Zimbabwe's mining sector remains very much possible and more importantly, very much viable.



# Securities and Exchange Commission and investor protection

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**T**he capital market is a very important institution in the attainment of economic, development and social goals of a nation. It provides for efficient mobilisation and application of funds for the attainment of these goals. It also provides the individual investor and investing bodies with the opportunity to increase their financial fortunes that will in turn enable them to meet their personal goals and obligations. It is therefore a landscape that needs proper protection. In Nigeria, the apex body in place to offer this protection is the Securities and Exchange Commission.

## The Securities and Exchange Commission

The Commission started with the establishment of the Capital Issues Committee in 1962 as an arm of the Central Bank of Nigeria. It was an ad hoc body charged with, inter alia, the responsibility of regulating the timing of public issues of securities.

Following a review of the Nigeria capital market, the Capital Issues Committee developed into the Securities and Exchange Commission in 1979 with the promulgation of the Securities and Exchange Commission Decree 1979. This decree gave the Commission a formal legal existence.

In 1988, the Securities and Exchange Commission Decree 1979 was replaced by the Securities and Exchange Commission Act 1988. To protect investors and market operators, it empowered the Commission to suspend or revoke the registration of erring market operators.

In 1996, the Federal Government of Nigeria appointed a panel to review the capital market. The recommendations of the panel led to the enactment of the Investments and Securities Act 1999. This act re-established the Securities and Exchange Commission as the apex regulatory body in the Nigerian capital market and investor protection was improved upon extensively.

In 2007 the Investment and Securities Act

1999 was repealed by the Investments and Securities Act 2007. This act brought investor protection to the fore.

## Investor protection

The Securities and Exchange Commission's glossary of terms defines an investor as a person (or institution) who buys and sells financial instruments with the aim of enhancing income and/or diversifying risk. In view of their importance in the economic development of a nation, they ought to and are usually clothed with protection.

Before the enactment of the Investment and Securities Act 1999, investor protection centred mainly on regulation, registration and rule making but even then it was with minimal provisions.

However, the Investment and Securities Act 1999 increased investor protection. Some of the germane provisions are captured in section 8 of the Acts, as seen below:

- a) Regulate investments and securities business in Nigeria as defined in this Act.
- b) Register and regulate Securities Exchanges, Capital Trade Points, futures, options and derivatives exchanges, commodity exchanges and any other recognized investment exchanges.
- c) Register Securities to be offered for subscription or sale to the Public.
- d) .....
- e) .....
- f) Register and regulate corporate and individual capital market operators as defined in Section 30 of this Act.
- g) Register and regulate the workings of venture capital funds and collective investment schemes including mutual funds.
- h) Facilitate the establishment of a nation wide system for securities trading in the Nigeria Capital Market in order to protect investors and maintain fair and orderly markets.
- i) .....
- j) Act in the public interest having regard to the protection of investors and the

maintenance of fair and orderly markets and to this end to establish a nation-wide trust scheme to compensate investor's whose losses are not covered under the investors protection funds administered by Securities Exchanged and Capital Trade Points.

- k) .....
- l) .....
- m) Protect the integrity of the Securities Market against abuses arising from the practice of insider trading.
- n) Act as a regulatory apex organization for the Nigerian Capital Market including the promotion and registration of self-regulatory organizations and capital market trade associations to which it may delegate its powers.
- o) .....
- p) Promote investors education and the training of all categories of intermediaries in the Securities industry.
- q) .....
- r) .....
- s) .....
- t) .....
- u) Prevent fraudulent and unfair trade practices relating to the securities industry.'

In the same vein, section 9 provided that the Commission shall have the power to establish departments for the purposes of regulating securities exchanges and capital market operators.

In 2007, the Federal Government of Nigeria enacted the Investments and Securities Act 2007 (the '2007 Act'). This act brought investor protection to the fore and made more provisions to protect investors. The 2007 Act in its long title stated thus:

'An Act to Repeal the Investment and Securities Act 1999 and to Establish the Securities and Exchange Commission as the Apex Regulatory Authority for the Nigerian Capital Market as well as Regulation of the Market to ensure the protection of investors, maintain fair, efficient and transparent market and Reduction of systemic Risk; and For Related matters.'

Section 13 outlines the functions and powers of the Securities and Exchange Commission. It is similar to section 9 of the 1999 Act but made some improvements/modifications. By section 14 of the 2007 Act, the Commission could establish specialised departments for the purpose of regulating and developing the Nigerian capital market.

Investor protection by the Securities and Exchange Commission may be summarised thus:

- *Regulation of the capital market:* The capital market is a financial market which trades in medium to long term financial instruments, that is, stocks and bonds. The Commission protects investors by regulating the primary market and the secondary market. It ensures that players in the primary and secondary market keep to the rules, failing which players are sanctioned. New issues are scrutinised and approved before they are offered to the public.
- *Registration and regulation of capital market operators:* The Commission ensures that issuers, issuing houses, brokers/dealers, registrars, trustees, underwriters, fund managers and investment advisers are registered. They are also regulated to ensure compliance. Recently the Commission directed brokers to recapitalise, which is laudable as this protects investors.
- *Rule making:* To effectively and efficiently carry out its objectives the commission made the general rules and regulations which regulate the market and capital market operators thereby ensuring protection.
- *Investigation of complaints by investors:* Further to section 13 of the 2007 Act, the Commission operates an Investigation Division which investigates complaints made by investors. The Commission through this division has investigated complaints and has given adequate remedies in deserving cases, thereby saving investors the time and money litigation would have consumed. This again is laudable.
- *Establishment of investor protection fund:* The Commission has pursuant to its powers established an investor protection fund to compensate investors who suffer loss as a result of the activities of the capital market operators. This is an insurance fund established to compensate clients of stock broking firms and other capital market institutions which have collapsed or defaulted on their obligations. Although there is a limit placed on the amount of compensation receivable by a client, it is laudable and goes a long way to protect investors. Those whose losses are not covered by this fund are protected by section 13(k) of the 2007 Act which empowers the Commission to establish a nationwide trust scheme to compensate investors whose losses are not covered under the investors' protection fund.



## Conclusion

Investment in the capital market is crucial to the development of a nation as well as an individual. Protection of investors is therefore of immense importance. The federal government through the establishment of the Securities and

Exchange Commission has made bold strides in this direction. It is hoped that the Commission will not rest on its oars. It must remain vigilant and keep prying eyes on the capital market operators and ensure that the rules of the market are kept failing which appropriate sanctions should be imposed.

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# Legal overview and analysis of the January 2012 Amendment to the Egyptian Investment Law No 8 of 1997

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In the aftermath of the revolution of 25 January 2011, which overthrew the former regime of President Mohamed Hosny Mubarak and brought the Supreme Council of the Armed Forces (SCAF) to power, SCAF issued and enforced an important legal amendment to the Egyptian Investment Law No 8 of 1997. This amendment (the 'Amendment'), which introduces the possibility of reconciliation with investors suspected of being involved in corrupt practices affecting public funds, has been the subject of severe criticism since its issuance as it is suspected of negatively affecting the business environment in Egypt and its legal framework.

The Egyptian Investment Law is one of two major regulations governing investment in Egypt, the other being the Corporates Law No 159 of 1981. Taking into consideration the wide scope of application of the Investment Law and the fact that the Amendment will have a remarkable effect on the shape of relations between investors and Egypt, it is essential to examine this new amendment and the potential consequences it produces at the legal level.

## Overview of the Amendment

The Investment Law No 8 of 1997 is one of the most important pieces of legislation governing private investment in Egypt. It covers certain business activities mentioned by this law and in its implementing regulation. Its scope of

application covers a great number of business entities which resort to it in order to benefit from the investment incentives it offers.

On 3 January 2012, a new amendment to this law was issued by SCAF, adding two new articles to the Investment Law. The most significant is Article 7 bis which forms the subject of our analysis in this article. The newly added Article 7 bis states that it is possible for public authorities, represented by the General Authority for Investment (GAFI), to reconcile with investors suspected to have committed, or to have participated in the commission of, any crimes mentioned in Chapter IV, Book II of the Penal Code, which mainly deal with crimes affecting public funds. Article 7 bis requires the investor to give back all movable and immovable property which was acquired in violation of the Penal Code provisions to the relevant public person. Furthermore, Article 7 bis states that the reconciliation is possible even if non-final judgment was issued by the competent criminal court. However, in such cases, if the investor was condemned to a financial penalty by the court, the payment thereof is a prerequisite for the completion of reconciliation.

The main effect of such reconciliation is the expiration of the criminal lawsuit filed against the investor. It should be noted that the effect of this reconciliation is strictly limited to the investor and not to any other person who committed the crime or assisted the investor in committing it.

### **The legal consequences of the Amendment**

The Amendment of January 2012 had been heavily criticised for its timing and consequences. Furthermore, it sparked controversy among legal scholars with regard to the political integrity and intentions of SCAF. The negative consequences of the amendment could be severe at the legal level and may open the door for corruption in the business sector in Egypt. The most important effects are discussed below.

#### *The reduction of the business environment transparency*

Egypt ranks very low in several business transparency reports. Egypt has ranked 112th position out of 182 economies in the *2011 Corruption Perceptions Index* published by the Berlin-based organisation Transparency International. The high percentage of corruption and pressure exercised by political powers on public authorities in different investment sectors have always been major challenges to the development of the Egyptian economy prior to 25 January 2011. These challenges remain, even after overthrowing the former political regime. The new Amendment raises serious suspicions regarding the intentions of SCAF. The Amendment fails to achieve the required balance between the public interest and the attraction of investors and, furthermore, opens the door wide for corrupt investors at a time where Egypt desperately needs to implement a truly transparent business environment.

#### *The violation of the constitutional principle of equality of citizens before the law*

Article 40 of the former Constitution of 1971 and Article 7 of the current Constitutional Declaration of 2011 both confirm the principle of equality of all citizens before law. The current amendment grants the investor the opportunity to enter into reconciliation with public authorities while it deprives

those who committed the crime with the investor or assisted them of such exceptional privilege. This issue raises criticism and doubts regarding the conformity of Article 7 bis of the Investment Law with this essential constitutional principle.

#### *The questionable role of GAFI in the reconciliation process*

The new Amendment authorises GAFI, which is the authority in charge of promoting and facilitating investment in Egypt, to conduct the negotiation and reconciliation with the investor. We believe that this could lead to grave consequences as it allows this public authority to play a role which does not fall within its original scope of competence. It is suggested that allowing GAFI to perform this task could lead to a conflict of interest, as an authority that is interested in facilitating and promoting investment will probably be less strict than a financial control authority when dealing with the suspected investor since GAFI's main concern will be not to exercise pressure on the investor as much as it will be giving the impression that the government puts the investor and its business as its top priority. Thus, such a task should have been granted to a more competent financial control authority.

### **Conclusion**

The timing of the Amendment raises serious doubts regarding SCAF's intentions on how to deal with the figures from the former regime. The great majority of public officials and the National Democratic Party (NDP) figures of the former regime had significant business activities in Egypt and used their title and contacts to garner illicit profits in violation of the applicable laws. By enacting this highly criticised Amendment, SCAF has willingly thrust controversy regarding its political integrity, its ability to lead Egypt and to establish the rule of law during the transitional period.



# Public and private partnerships in Mozambique

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**A**lthough not specifically regulated as such, some public-private partnerships (PPP) projects already existed in Mozambique in the port and rail sector during the first half of the 20th century. During that period, private companies built and operated ports in Mozambique but in the late colonial period, with the exception of a few surviving privately operated ports, the port and railway infrastructure was operated exclusively by a public institution.

After independence in 1975, a public institution created during the colonial era called CFM (Mozambique Railways) maintained its dominant position as the sole provider of port and railway services.

CFM's practical dominance, and Mozambique's option for a centrally planned economy during the first years of its independence, meant there was little need for further development of the legislative framework, thus Mozambique's sector-specific legislation on port and rail is framed largely by instruments conceptualised and enacted in the late colonial period

In 1996, through Resolution 5/96 of 2 April (the 'Transport Policy'), the government approved a new policy, so as to encourage the involvement of private capital in the building and operating of railway and port infrastructure, to promote the development of a competitive tariff policy, and to promote the monitoring of tariff policy and the avoidance of monopolies.

Through Resolution 37/2009 of 30 June (the 'Strategy for the Integrated Development of the Transport System'), the government endorsed increased competition and called for new institutional and regulatory arrangements, so as to permit the participation of private capital in port investment, in order to improve national economic competitiveness.

Also in 1996, through Decree 31/96 of 9 July, the government approved the legal framework for toll road and bridge concessions.

## Legal and regulatory framework

### *Background law*

Mozambique has been a multi-party democracy since the enactment of the 1990 constitution. The executive branch consists of a President, a Prime Minister, and a Council of Ministers. There is a National Assembly and municipal assemblies. The judiciary consists of a Supreme Court, regional Superior Appeal Courts and provincial, district and municipal courts. Suffrage is universal, at age 18.

The Mozambican legal system is based on the Romano-Germanic tradition of the civil law. At the time of independence, all Portuguese laws not inconsistent with the new Constitution were retained and remain in force. Most of the socialist-oriented economic and organisational legislation has now been replaced with contemporary legislation consistent with market principles.

Many state-owned enterprises have been privatised and processes for privatisation and/or sector liberalisation are underway for the parastatal enterprises, including those providing telecommunications, energy, ports and railways. Legal reform initiatives included the Commercial Code, the judiciary, the strengthening of the financial sector, civil service reform and improved government budgetary, auditing, and inspection capabilities.

### *Specific enabling law*

In August 2011, Parliament approved law 15/2011, which creates a legal framework for the enabling of the greater involvement of private partners and investors in PPPs, large-scale projects (LSPs) and business concessions (BCs), and greater efficiency, effectiveness and quality in the use of resources and other national property assets, as well as the efficient provision of goods and services to society and the equitable sharing of the respective benefits.

The purpose of this law is to establish rules for the process of contracting, implementing and monitoring PPPs, LSPs and BCs.

### *National ownership*

A participation in the share capital of the undertaking or in the equity of the joint venture must be reserved for preferential sale to Mozambican natural persons, via a stock market which is in favour of economic inclusion on commercial market terms, on terms to be negotiated and agreed to by the parties. This provision does not detract from other provisions requiring a specific percentage of local participation.

### *Procurement process*

The general legal regime for the conclusion of contracts for PPP undertakings is that applicable to public tenders, and the rules governing public procurement apply on a subsidiary basis.

With due consideration for the public interest, and once legal requirements have been met, a PPP contract may be concluded by way of a tender with prior qualification, or a two-stage tender.

When the gravity of the situation warrants it, after due justification and as a measure of last resort, subject to the express prior approval of the government, the conclusion of a PPP contract may exceptionally be effected via negotiation and direct award. In the event that there are no bidders, or the winner declines to implement the public-private partnership, large-scale project or business concession, a contract may also be concluded via negotiation and direct award, on terms to be regulated.

In any of the contractual forms in which PPP contracts are concluded, the principles of legality, finality, reasonableness, proportionality, pursuit of the public interest, transparency, publicity, equality, competition, impartiality, good faith, stability, motivation, integrity and reliability, good economic and financial management, promptness and further applicable principles of public law must be complied with.

In addition to the general legal framework applicable to PPPs, Mozambique has specific regulations relating to the contracting of public works and the supply of goods and services to the state, which envisage three distinct contracting systems: a general system; a special system; and an exceptional system.

### *PPP forms*

A PPP undertaking is implemented on the basis of one of the following contract types:

- a concession contract;
- an 'assignment of operation' contract; or
- a management contract.

### **Guarantees and incentives**

Each PPP, LSP and BC undertaking is eligible, in terms of the provisions of sector-specific legislation on the matter, to benefit from the guarantees and incentives applicable to investments made in the country.

In addition to providing guarantees relating to ownership and the remittance of funds abroad, the government also guarantees the granting of the tax and customs incentives applicable, in terms of the Code of Fiscal Benefits, to investments made in Mozambique (eg, the acceleration of depreciation and amortisation, investment tax credits, exemptions, a reduction in taxes, and the deferral of payments).

### **Payment mechanisms**

From its gross revenue, the project company is required to:

- pay an award fee or signing bonus, as stipulated in the respective tender, at the time of signature of the contract, in an amount of not less than 0.5 per cent and not more than five per cent of the fair value of the assets contractually assigned to it by the state or other public partner, for the undertaking; and
- pay a concession or assignment of the operation fee on a monthly, quarterly, semi-annual or annual basis, as agreed by the contracting parties.

### **Changes to the law**

The government must ensure the prevention and the mitigation of occurrence of the following risks:

- political and legislative risks, arising from the unilateral adoption of measures, or the taking of action, by the government or public institutions, with negative and adverse effects on the normal implementation, operation and management of the PPP undertaking, or on its competitiveness and economic and financial feasibility; and
- conflict of interests of an institutional nature, arising from the full or partial



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concentration or accumulation, in the same public entity, of the functions of regulatory authority and granting authority.

### Dispute resolution

#### *Judicial and administrative courts*

In Mozambique, as elsewhere, there are many good reasons to avoid litigation. The courts tend to be slow and expensive.

Lawsuits against the Mozambican government or a subordinate body are heard either in the civil courts or, if the dispute is considered to relate to an administrative law matter, and once a series of available administrative remedies has been exhausted, in the Administrative Court.

#### *Arbitration*

A reasonable alternative to litigation in Mozambique is arbitration. In the case of a dispute between an investor and another private party, when both parties have chosen to submit their conflict to arbitration under Mozambican law, it will be heard in accordance with the procedures set out in Law 11/99 of 8 July 1999 (the Law on Arbitration, Conciliation and Mediation or Law of Arbitration).

Mozambique is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention, ratified by Resolution 22/98 of 6 June 1998). Hence, the only grounds on which the enforcement of a private arbitral award in Mozambique may be denied are the limited grounds available under the New York Convention.

Mozambique is also a member of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the Washington Convention, ratified by Resolution 10/92 of 25 September 1992). Provision for dispute resolution by arbitration under the aegis of the International Centre for the Settlement of Investment Disputes (ICSID) is a common feature of contracts in Mozambique.

### Tax issues

The current Mozambique tax system, established by Law 15/2002, draws a distinction between national and municipal taxes. National taxes, in turn, are of two categories:

- direct taxation on income and wealth; and
  - indirect taxation on expenditure.
- Direct taxation on income and wealth is accomplished through the following taxes:
- corporate income tax; and
  - personal income tax.

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# The Nigerian child in the eyes of the law

**T**here is no denying the fact that children constitute the most vulnerable and powerless members of society, and a careful perusal into the major international instruments such as the UN Convention on the Rights of the Child, OAU Charter on the Rights and Welfare of the Child and the Geneva Declaration on the Rights of the Child shows that the rights of the child are contained not merely in these conventions, but also in other instruments such as the Child's Rights Act 2003.

For the purpose of this article, we will define a child according to the following definitions:

- statutory definitions of a child;
- treaty definitions of a child; and
- customary definitions.

## Statutory definition

The Children and Young Persons Law (CYPL) views a child as a person under 14 years of age, and a young person as one who has attained the age of 14 years and is still under the age of 18.

## Treaty definition

A child has been defined by the UN Convention on the Rights of a Child to be any person or human below the age of 18 years of age. The OAU Charter on the Rights and Welfare of the Child in Article II defined a child as every human being below the age of 18. However, *In Re Calton* [1945] 1 Ch 372, Cohen J said that the meaning of the word 'child' must, in every case, depend on the context in which it appears.

## Customary definition

Besides the statutes and treaty definitions, there is the customary definition of a child. The customary definition varies from ethnic group to ethnic group due to the lack of a uniform customary law in Nigeria. In some ethnic groups, a boy remains a child until initiated into an age-grade society or until he is old enough to contribute financially to the development of their community. In other groups, childhood terminates at puberty.<sup>1</sup>

Another question we need to address at this point in our discussion is what are a child's rights?

It may interest you to know that children's rights are those basic claims that all children have to survival, development, protection and participation. These basic principles of children's rights are enshrined in the UN Convention on the Right of a Child stating that:

- Every child has a right to life and to be allowed to survive and develop.
- Every child is entitled to a name, family and nationality.
- Every child is free to belong to any association or assembly according to the law.
- Every child has the right to express opinions and freely communicate them on any issue subject to restriction under the law.
- Every child is entitled to protection from any act that interferes with his or her privacy, honour and reputation.
- Every child is entitled to adequate rest, recreation (leisure and play) according to his or her age and culture.
- Every child, male or female, is entitled to receive compulsory basic education and equal opportunity for higher education depending on individual ability.
- Every child is entitled to good health, protection from illness and proper medical attention for survival, personal growth and development.
- Every child must be protected from indecent and inhuman treatment through sexual exploitation, drug abuse, child labour, torture, maltreatment and neglect.
- No child should suffer any discrimination, irrespective of ethnic, origin, birth, colour, sex, language, political and social belief, status or disability.

All of the above go a long way to address the issue that a child's rights in Nigeria are one and the same as the fundamental human rights in Chapter IV of the Federal Republic of Nigeria 1999 Constitution.

All would agree that, by the simple and fragile nature of the child in society, there is enough reason to protect these children from unsavoury characters because these children are regarded as helpless members of society.



It is also important to note that the concept that children have specific rights deserving enforcement and protection is a comparatively modern development. However, subsequent to the various reform movements of the 19th century, concern for the protection of the dignity, equality and basic human rights of children came to the forefront of public consciousness. Children have since become a constituency in their own right on whose behalf laws have been enacted providing for protection against the abuse of parents and other adults, economic exploitation and social neglect.

Noting with concern that the situation of most Nigerian children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, such as natural disasters, armed conflicts, exploitation and hunger, and due to the child's physical and mental immaturity, we must recognise that they need special safeguards and care.

The big question is does the Nigerian child know of these rights? Does he/she know that on a daily basis his/her rights are being trampled upon and needs to be redressed? What steps have been taken by the government in educating the Nigerian child of his/her rights?

It is so disheartening that today in Nigeria, the child does not know if he/she has rights which need protection and need to be redressed each time these rights are trampled upon or violated. The child feels, and in all likelihood believes, that fundamental human rights are for adults alone. It is important to note that children are not educated on these rights, not even in primary schools and colleges, hence these children are kept in perpetual ignorance of their basic and fundamental God-given rights.

The Nigerian government is a signatory to many treaties on the protection of children and their rights and it has been at the forefront of the campaign on the protection of a child's rights. The government cannot claim to be unaware of the various violations of the rights of Nigerian children and it consequently enacted the Child's Rights Act, 2003.

In Nigeria, it is not far from the truth to assert that a person who violates a child's rights may be just next door and these defaulters continue because nothing has been done by the government or its agencies to combat the abuse. This is reminiscent of the saying: 'Because sentence against an evil man is not executed speedily, the hearts of the sons of men are set to do evil continually'.

The reasons that some people violate children's rights are down to the fact that some

of the enactments, treaties and legislations are weak, while there is no strict punishment for defaulters. Again, other factors such as culture, ignorance, economic factors and education play a role and these are discussed as follows:

- Nigerian culture differs from western culture, which will make it nearly impossible to implement anything contained in the international instrument as regards the child's rights.
- Secondly, there is ignorance as to the special needs of the child and there is ignorance on the part of the child, parents and society as to the existence of the rights of the Nigerian child.
- Thirdly, the economy, which is having the most far reaching effect and is causing poverty in the country, also impedes the enforcement of the rights of the Nigerian child. This is the reason why children from poor homes are seen on the street hawking and doing all manner of jobs.
- Lastly, a lack of education amongst the parents and the Nigerian child is another factor. Education, as we all know, is a light and a lot of people have remained in perpetual darkness by reason of their inability to embrace education. This explains the reason why a lot of parents today are violating children's rights and the child may not even be aware that his/her rights are being trampled upon.

Having considered all of the above, it may be appropriate to ask the following question: are there any children's rights in Nigeria? If there are, do they not simply appear in books and seem unenforceable?

With utmost humility, but with painful regret, it seems that all the wonderful enactments and acts bordering on children's rights in Nigeria are best seen in books and they are never to be implemented fully. Having at the back of our minds that these children are the leaders of tomorrow, people we hope will carry on from where we have stopped, what will become of them if we do not protect their rights when they are too young to defend themselves?

We will conclude by saying that all hope is not lost as regards the rights of the Nigerian child. The government can still set up agencies and bodies solely for the purpose of protecting children's rights and these institutions need to be prepared to hand out strict punishments to those who violate these rights.

#### Note

- 1 Azogu G I U, 'Women & Children – A Disempowered Group under Customary Law', in *Towards a Restatement of Customary Law in Nigeria*.

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## Fulfilling rights for children – what can we do?

**T**he recognition of children's rights within the framework of the international community which sets out human rights as minimum standards of legal, civil and political freedom is of utmost importance for the translation of such rights into reality. These rights are entrenched in various international human rights instruments which also entail the development of internationally recognised standards as endorsed or negotiated in these instruments.<sup>1</sup> The main sources of the contemporary conception of human rights are the Universal Declaration of Human Rights<sup>2</sup> and the many human rights documents and treaties developed by international organisations, for adoption by state parties, such as the United Nations, the Organization of American States and the African Union.<sup>3</sup> The human rights of children, and the standards to which all governments must aspire in realising these rights, are most concisely articulated in the preamble to the Convention on the Rights of the Child (CRC).<sup>4</sup>

The CRC is the most universally accepted human-rights instrument in history that has placed children at centre-stage in the quest for the universal application of human rights. Built on various legal systems and cultural traditions, the CRC is a universally agreed set of standards and obligations defining a child as 'any human being below the age of eighteen years "unless", under the law applicable to the child, majority is attained earlier'.<sup>5</sup> It stipulates that every child has a right to their childhood – a hopeful existence free of exploitation, violence, neglect and extreme poverty, that children need education, health services, consistent support systems as well as love, hope and encouragement. The CRC further requires state parties to commit themselves to the respect and promotion of children's rights.<sup>6</sup> It orders states to submit country reports periodically to the Committee on the Rights of the Child.

Furthermore, some regional instruments with specific focus on protecting the rights of children and women were adopted by

the African Union to be ratified by African countries and aim to supplement the United Nations system. These are the African [Banjul] Charter on Human and Peoples' Rights,<sup>7</sup> African Charter on the Rights and Welfare of the Child, which entered into force on 29 November 1999, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,<sup>8</sup> which entered into force on 25 November 2005.

By ratifying these international and regional treaties, governments agree to actively observe and implement the provisions therein. Governments are subjected to regular reviews by the relevant treaty-monitoring bodies with respect to their implementation record.

Despite the ratified treaties and standards set for the protection of children, as well as established monitoring bodies at international, regional and national levels, the violation of children's rights has been pervasive throughout many countries and fuels struggling economies – especially in sub-Saharan Africa. Alarming, children are too often the recipients of violence in their own home, where a high percentage of sexual, physical, emotional and psychological abuses takes place.

Globally, available data shows that approximately 126 million children aged between 5–17 are believed to be engaged in hazardous work, excluding child domestic labour;<sup>9</sup> more than one million children worldwide are detained by law enforcement officials;<sup>10</sup> more than 250,000 children are currently serving as child soldiers;<sup>11</sup> and around 14 million adolescent girls between 15 and 19 give birth each year.<sup>12</sup> Girls in this age group are twice as likely to die during pregnancy or child births as women in their 20s. It should also be noted that some 62 per cent of the world's young people are infected with HIV and about 80 per cent of the children orphaned by AIDS live in sub-Saharan Africa.<sup>13</sup> An estimated 300 million children worldwide are subjected to violence, exploitation and abuse,<sup>14</sup> a figure which includes the worst forms of child labour



in communities, schools and institutions, violence suffered during armed conflicts and that of harmful practices such as female genital mutilation/cutting and child marriage. Millions more, not yet victims, also remain without adequate protection.

International concern for the welfare of children and the recognition of rights for children are critical global issues and should also be the focus of the IBA African Regional Forum. So many children especially in the developing world or in sub-Saharan Africa are being denied opportunities to grow up, develop and live in a safe, secure and healthy environment. The abuse, violence and exploitation suffered by children and the effectiveness or ineffectiveness of governments, institutions and international communities to ensure that children are provided with these opportunities in spite of the various standards set for their protection should be our focus as an association. Is this to continue? Or is there something we can do?

#### Notes

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- 1 United Nations Educational, Scientific and Cultural Organizations *A Guide to Human Rights Institutions, Standards, Procedure* (2001) UNESCO France.
  - 2 Adopted by the UN General Assembly on 10 December 1948, hereinafter referred to as 'UDHR'.
  - 3 International Covenant on Civil and Political Rights, hereinafter referred to as 'ICCPR'; the International Covenant on Economic, Social and Cultural Rights, hereinafter referred to as 'ICESCR'; these were both adopted on 16 December 1966 by the United Nations General Assembly and entered into force respectively on 23 March 1976 and 3 January 1976; Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the UN General Assembly on 3 September 1981, hereinafter referred to as 'CEDAW'; Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment adopted by the UN General Assembly on 26 June 1987; Convention on the Rights of the Child adopted by UN General Assembly Resolution 44/25 on 20 November 1989 and entered into force on 2 September 1990; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, hereinafter referred to as 'ILO No 182', adopted by the UN General Assembly on 19 November 2000; Optional Protocol to the Convention on the Elimination of Discrimination against Women, adopted by the UN General Assembly on 22 December 2000; Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, adopted by the UN General Assembly on 18 January 2002; Optional Protocol on the involvement of Children in Armed Conflicts, adopted by the UN General Assembly on 12 February 2002; International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, adopted by the UN General Assembly on 1 July 2003; and Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children adopted by the UN General

Assembly on 9 September 2003. See also: United Nations Office of the High Commissioner for Human Rights: A compilation of International Instruments (1997), UNHCHR, New York and Geneva.

- 4 'Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'... 'Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'... 'Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration, taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child'... 'Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries', the United Nations General Assembly, on 20 November 1989 (resolution 44/25), adopted the Convention on the Rights of the Child which entered into force on 2 September 1990.
- 5 Articles 2, 6, 19 23, 24, 26, 27, 34, 35, 36, 28, 29, 31 37 and 44.
- 6 The Preamble states that: '... Recalling the Declaration on the Rights and Welfare of the African Child (AHG/ST.4 Rev.I) adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia, from July 17 to 20 1979, recognized the need to take appropriate measures to promote and protect the rights and welfare of the African Child'... 'Recognizing that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding'... 'Recognizing the critical situation of most African children and the fact that children require particular care with regard to health, physical, moral and mental development and legal protection', the Organization of African Unity, in 11 July 1990, adopted the African Charter on the Rights and Welfare of the Child. It entered into force on 29 November 1999, hereinafter referred to as 'ACRWC'. See further discussions in chapter 2, section 2.4.
- 7 Adopted on 28 June 1981 by the Organization of African Unity (OAU), the African Charter on Human and Peoples' Rights entered into force on 21 October 1986.
- 8 Adopted by the African Union on 11 July 2003; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, entered into force on 25 November 2005.
- 9 International Labor Office, *The End of Child Labor Within Reach*; Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work International Labor Conference (2006) ILO Geneva
- 10 Defense for Children International 'No kids behind Bars: A global campaign on justice for children in conflict with the law', at: [www.kidsbehindbars.org](http://www.kidsbehindbars.org) <accessed on 21 January 2009>.
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- 13 Joint United Nations Programme on HIV/AIDS, *Report on the Global AIDS Epidemic* (2004), UNAIDS, Geneva.
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## Lex:lead Group scholarship competition 2011

The following articles were winning submissions in the 2011 Lex:lead Group annual scholarship competition and discuss the role of law in post-conflict economic, social and cultural recovery. The Lex:lead Group annual scholarship competition is open to the majority of the world's 48 developing countries and is judged by a selection of distinguished judges, lawyers and academics. For more information, please visit [www.lex-lead.org](http://www.lex-lead.org).

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### The contribution of law in post-conflict economic, social and cultural recovery

In a post-conflict society, recovery is challenging because the grass-roots are in a state of confusion, scepticism and doubt about the veracity of every relationship they engage in. The challenge is not only posed against the citizens of that particular state or the victims of that conflict; it is also a headache for immediate neighbours and the rest of the international community. As can be observed from the contemporary global situation, those post-conflict zones that have been left aside are proving to be the harbour and safe haven to terrorists and other destructive groups. To make matters worse, they are being spearheaded by individuals that are cold blooded and who show no signs of remorse when destroying the lives of many.

In addition, the absence of peace and security is creating chaos and distress in other nations around the world. The influx of refugees to Europe is a recent phenomenon following the unsolved and unmanaged conflict of Somalia, which is costing billions of dollars to fund the refugee camps. On top of that, these countries face challenges with the grant of asylum and refugee status because most of the refugees from post-conflict zones lack the proper skills and intellectual training and thus are difficult to integrate into the workforce of the host nation. The list goes on because the dimension of the problem of a nation that failed to recover, and the possible serious problems that comes along with it, is multifaceted. This makes the successful recovery of the post-conflict zones essential.

It is achieved by the implementation of various tools, and the burden of accomplishing this task should not be left to the nation that is the immediate victim. It also has to be the duty and mandate of the international community, the nations of the world, international and national non-governmental organisations and other stakeholders.

Various disciplines can and should be used for the successful recovery of post-conflict zones. Law is a mechanism of social engineering and regulating a given society, be it national or international, and can be used successfully as an agent for transformation. The aim of this article is to pinpoint how law can be used in the recovery process by considering the following:

- relevant steps that need to be followed in law-making procedure;
- types of laws that are aimed at healing the wounds caused by the conflict;
- utilisation of the native culture in making the laws;
- considering who should be the focal point of any given law;
- domesticated version of democratic form of governance;
- the type of institutions that should be legally established and their aim;
- parties that should be made part and given a role in the national law of the recovering state; and
- the mechanisms that are put in place by international law and the role played by international law.



### **Relevant steps that need to be followed in the law-making procedure**

The law maker in any democratic society should strictly follow certain procedures for creating legislation that is legitimate and accepted by the majority of society regardless of the differences in status of individual citizens. This would save the law from being a dead letter. The procedures that we follow not only guarantee the future acceptance and applicability of the law but help to address the concerns of society and the root causes of the conflict. Law making procedures should also be addressed by proper administrative law legislation that would guide any law-making process. This would bind any law maker, be it the law-making organ of the nation or any other executive as delegated by the parliament. As a result, they will be able to control arbitrary law making in the various tiers of the government.

Unique to post-conflict zones, the law making procedure should be commenced by a Post-Conflict Needs Assessment (PCNA). The circumstances on the ground need to be addressed by a law that has the strength to encourage the peace-building mechanism of these fragile zones. The focus of the PCNA must be to address the cause of the past conflict, the present challenges that the society is facing in the peace-building process and future potential stumbling blocks. These types of assessments should not be done solely by the governmental agencies of the post-conflict zones because the governments of the post-conflict zones, as observed in many instances, do not possess the required skill and resources to come up with a well rounded result.

### **Types of laws that should be aimed at healing the wounds caused by the conflict**

The source of any conflict is where parties come to possess mutually incompatible goals (whether the parties are individuals, nations, social groups or organisations). What sorts of conditions regularly give rise to mutually incompatible goals? The major source of incompatible goals lies in a mismatch between social values and social structure. Many conflicts involve conditions of scarcity and differing values, incompatibilities regarding use or distribution of resources, differing social and political structures or opinions about the beliefs and behaviours of others. In more complex social settings, both intra-nation and inter-nation conflicts arise

from a scarcity of goods that existing value systems define as worthwhile or desirable and over which competition occurs. If there is scarcity, then it is almost inevitable that incompatibilities over distribution will arise, which ultimately leads to a full blown conflict.

Law is a quintessential tool for minimising the incompatibility of goals by giving proper solutions to problems, for instance by distributing resources. The law has a dual benefit: first, it might contribute to the prevention of the conflict that might arise from the scarcity; and secondly, even in the post-conflict zones it is a social engineering device to rectify the problem of the past and to speed up the peace-building process.

After having conducted the PCNA, the legislation of the nation should reflect the need of the society and it should be comprehensive and coherent. A given law is comprehensive and reflective of the need of the society when, from its very inception, stakeholders from all of the society are part of the legislation process. This is important because each and every part of the society has their own perspective of the situations or problems. The lawmaking process has to take into consideration all of these viewpoints to avoid future conflict and to successfully get over the situation of the past.

The best mechanism to come up with coherent legislation is to follow proper law-making procedure. For instance, holding consultations with the public and, more specifically, with legal research centres and law teaching institutions would enable the law maker to know the possible contradiction that may arise or render the would-be law unconstitutional. The fact that these centres and institutions make their analysis for academic reasons would make their analysis reliable and impartial.

### **Laws that utilise the culture of the society**

Most of the nations that are known as centres of violence and conflict are endowed with a very rich culture and tradition. These cultures and traditions include alternative dispute resolution mechanisms that are unique, and which lead to high rates of case disposition. This is because the indigenous societies give high regard to a process that has earned the complete trust of that society, mainly due to the reason that the judgment is rendered by the local elders who are elected through a mechanism that has been locally developed by the community. Hence, recognition of these

dispute resolving mechanisms through a law passed by the legislature can serve two goals at the same time:

- to ensure the quick disposition of the case before deep rooted hatreds are developed; and
- to maintain and develop national culture.

### **Who should be the focal point of any given law?**

There are two prime targets of any law in the post-conflict zones. The first should be those who were victims or in a vulnerable group, such as ethnic minorities, women, internally displaced people or certain classes in the society. This is because the past injustice committed against these groups should be adequately addressed in a way that ensures their resentments are resolved. Failure to give proper attention might bring about conflicts *de novo*. The second should be the potential 'power house' of the recovery: those agents of change that create a sustainable economic development, such as, youth, foreign investors, and diasporans.

It is quite challenging to appeal to these groups because they have their own concerns: a reservation against engaging in an economy that is fragile. Also, the nation's youth may have developed violent behaviour as a result of their experiences through the period of conflict. Foreign investors might fear the greater risk they are undertaking for investing their assets. The diasporans, who are likely equipped with better skills and knowledge, might be less tempted to work in the country as they are likely to be employed with little money and forced to live with lower standards of living. However, if the post-conflict zones managed to establish a democratic government that would hear the people and address their problems, then the agents of change might overlook the above-stated problems.

### **Domesticated version of democratic form of governance**

The law adopted in post-conflict zones should reflect the actual need of the society and it should, if it is a nation of diversity, obtain legitimacy from a majority of the society regardless of the differences they possess. With this in mind, direct application of policies and laws that have proven to be successful in foreign nations might not result

in the desired outcome in another nation. Hence, the legislature should be meticulous in forecasting the probable result of a given law thinking carefully about it at the time of incorporation.

Moreover, emphasis should be given to the applicability of ideology. For instance, the concept of liberal democracy is not the same in both western democracy and a nation recovering from the trauma of conflict. The way a certain legal system appreciates this concept has the potential to determine the future of the nation. Many sceptics doubt that the model of good governance applied in liberal democracy works in poorer societies, or post-conflict zones with acute religious or ethnic divisions, because free political competition sometimes has adverse effects, such as exacerbating ethnic/religious majority tyranny or separatist tensions that might have been the cause of the conflict in the first place. Thus, it is essential to consider what is on the ground when incorporating a law, a policy or an ideology into one's legal system because it might lead to unintended consequences.

### **Legally established institutional structures**

The institutional set up of any government, including in post-conflict zones, reflects the legitimacy of the entire legal system. The process of establishing institutions should be based on constitutional law. The benefit of law in this process is to define the structure, responsibility and power of the government, and also to devise mechanisms that help control the power of the various tiers of the government, such as checks and balances, transparency and accountability. If the power of the government is constitutionally limited, then there is a *prima facie* safeguard of the rights of citizens.

The process of implementation is not easy – not just in post-conflict zones, but also in other nations. The process should be supplemented by financial (fiscal) or monetary laws, focusing on narrowing the gap between the two extreme wings of the rich and the poor. If the rule of law is properly adhered to, the pace of recovery both economically and at a societal level will be hastened because the confidence of citizens, the diasporans and foreigners will encourage others to come and invest. This ultimately results in economic growth and stability.



### The role played by international law for recovery

International law is a mechanism to regulate the behaviour of individual states by requiring compliance with their international obligations. The principle of international law that the sovereignty of states be respected has an exception that was developed following the atrocities committed against mankind during the First and Second World Wars, in which states failed to protect, fulfill or promote the rights of their citizens. The international community now has a duty to render aid to states that are under oppression by their government.

The Security Council of the United Nations can take proportionate and necessary measures against those states that systematically oppress their citizens. The basic standards for evaluating whether a given state is violating the rights of citizens are within the international human rights instruments that have been ratified by the state in question. International human rights, which are composed of economic, social and cultural, and civil and political rights, are expected to be fulfilled, protected and respected by the governments of the signatory states. Even though the direct obligation lies on the particular nation, the international community is also under the obligation to provide technical assistance and financial support to states that seek assistance as provided under Article 2 (2) of the ICESCR. The obligation of the international

community helps the post-conflict nations to speed up their peace-building process. In practice, this obligation is deemed successful if it is consistently and strictly followed by the nations of the world in a uniform manner, without discrimination by those nations that render aid. That it is not is mainly due to the political and ideological affiliation that exists among states.

### Conclusion

The recovery of post-conflict zones is so complex that success needs the participation of many. Different disciplines of knowledge are vital but it is undeniable that the role to be played by law is indispensable. Any change should be spearheaded by the law, whatever type of law that may be: international, national, or customary. Law should be made after having passed all the necessary requirements. This enables the law to be applicable, and not just a dead letter law. The effective application of laws results in economic, social and cultural development, which works as true recovery for post-conflict zones.

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## Laws to assist recovery in the wake of armed conflict

**A**rmed conflict has been dreadful in the history of mankind. Since time immemorial, the entire international community has tried to build mechanisms to avoid the occurrence of conflict in society. After the scourge of different wars that brought untold sorrow to mankind, the United Nations came up with the UN Charter. The Charter's preamble expresses regret for past conflicts and invites all people to practice tolerance, live together in peace with one another as good neighbors and unite their strength to maintain

international peace and security. Regardless, conflict is still a reality in the world. In response to the effects of conflict, laws have been put in place to enhance post-conflict social, economic and cultural recovery. Their aim is to restore people to the place they were before the occurrence of the conflict. This article will review different laws that make post-conflict social, cultural and economic recovery possible.

It has long been a challenge that most of the post-conflict settlement laws do not include economic, social and cultural recovery. This is

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because peace action is mostly taken to end the coercive action. Economic and social rights are perceived as pertaining to development, rather than as being central to establishing political stability and security. But the issue of social and economic recovery can affect the entire recovery.

Still, there are several laws that have dealt with economic, social and cultural recovery. First is an Agreement on Social and Economic Aspect and Agrarian concluded on 6 May 1966 between the presidential peace commission of the Government of Guatemala and the Unidad Revolution group. Article 13 of the Agreement required the government to improve the economic and social welfare of the people who were affected by the war. The economic strategies focused on women and children. Some of the provisions also provided for education and training, housing, health, labour and social security. This law contributed to economic, social and cultural recovery because it compelled the state to provide these rights, and thus it improved the standard of living for the citizens.

Next is a law seen after the great atrocities committed in Bosnia and Herzegovina in the early 1990s. There we witnessed a peace agreement that recognised social, economic and cultural recovery. Article 1 of that agreement provided for the right of property and the right to education, which the state is compelled to provide to the citizens who were badly affected by the hostilities. The most celebrated aspect of this agreement is that it includes some of the United Nations human rights conventions that provide for economic, social and cultural rights to individuals.

Also, another recently developed agreement that provides for post conflict economic, social and cultural recovery is the protocol adopted by the great lakes region. Article 4 of the protocol requires member states to assist internally displaced persons and refugees to recover their properties on their return after the end of the conflict. Under Article 8 of the protocol, there is a requirement of full compensation to the people whose properties have been affected by the conflict and cannot be recovered. The protocol also recognises the economic, social and cultural rights enshrined in the Universal Declaration of Human Rights (UDHR) of 1948 which has acquired the status of *jus cogens*.

Further, the Government of Nepal and the communist party of Nepal also concluded a post-conflict agreement for the sole purpose of social, economic and cultural recovery. Article 3 of that agreement provides for the

adoption of a policy that establishes rights of all citizens in education, health, housing, employment and food reserves. It goes on to provide economic protection to landless squatters and economic backward sections. Article 7 provides for economic and social rights to food security, health, education, private property and social security. All of these are strategies to affect post-conflict social, economic and cultural recovery. The presence of this law led to social, economic and cultural recovery in Nepal because the state was bound to provide all these rights.

Rwanda is one of the great lakes countries which witnessed the killing of about 800,000 people within a year between January–December 1994. After this desperate situation, laws were put in place which aimed at making transitional justice where all people who instigated genocide were to be held liable. In addition, they created a law for economic and cultural recovery. This law is famously known as Organic Law No 2000 and sets up *Gacaca*, meaning the adoption of cultural methods of solving conflict. Law No 2000 allows the whole community to come together and solve their misunderstandings amicably. Through *Gacaca*, people forgive each other and forget about the past and restore their former friendship – a cultural recovery. Also, the laws require compensation to persons who have suffered material losses and damages to their property. In Rwanda, one can conclude that apart from punishing criminals of genocide, *Gacaca* is vital for economic and cultural recovery.

Apart from these express post-conflict agreements addressing social, economic and cultural recovery, the United Nations (UN) Security Council worked on this area through its resolution No 1325 of 2000 to reaffirm the need to implement fully international humanitarian and human rights laws that protect the rights of women and girls during and after the conflicts. It also calls upon states to ‘adopt a gender perspective’ when dealing with ‘the special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction’. Though the resolution is not a binding law, it has still created commitment among the states.

Most of the post-conflict agreements have not covered fully the social, economic and cultural recovery issues but all is not lost because most global human rights conventions provide for social, economic and cultural rights and states are bound by these conventions before, during and even



after the conflict. Some of these conventions are like the UN Charter, which could be simply referred to as the constitution of the world. Article 1(3) of the UN Charter reminds us that the purpose of the UN is to achieve cooperation in solving international problems of economic, social and cultural and humanitarian character. The Charter binds and compels all members of the United Nations after the conflict to make economic, social and cultural recovery so as to achieve the major aims of the Charter.

Other conventions that deal with human rights are the Convention on the Human Rights of Migrant Workers and their Families 1990, Protocol to Prevent Suppression and Punish Trafficking in Person especially women and children, the Convention against Transitional Organized Crime and the Convention on the Right of the People with Disabilities of 2006. All of these conventions have special provisions providing for the social, economic and cultural rights which state parties have to protect at all times, even after the conflict.

At the regional level, there are also numerous conventions that create human rights that protect the social, economic and cultural rights of citizens. One is the Inter-America Convention on Human Rights.

Article 26 of this Convention provides for the rights of education, health and employment. All member states are obligated to comply with all of these provisions at all times.

AFCHR is another regional convention which under Articles 15, 16 and 17 provides for the right to work, mental health, the right to education as well as the right to take part in the cultural life of the community. The ESC under Articles 13 and 14 also provides for education rights and the right of employment.

On the issue of human rights, there are also some soft laws that, although they are not binding, still show and express state commitment. The Universal Declaration of Human Rights under Articles 22–26 provides for social security, the right to education and the right to participate in cultural life. These are effective in assisting with social, economic and cultural recovery.

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