

# D+C

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## FOCUS

# Rule of law

## Long road to independence

Kenya's law courts face huge challenges. They must clear a massive backlog of cases and end corruption. At the same time, political interference and budget cuts are serious issues, writes Alphonce Shiundu of Africa Check, a media agency. **PAGE 20**

## Serious challenges

Recurring problems in Tanzania include bad governance, rule bending and corruption. Journalist Lawrence Kilimwiko reports that making people aware of their rights helps to improve matters. In Burundi, the prisons are overcrowded. Occasional presidential pardons are no solution, argues radio journalist Mireille Kanyange. **PAGES 23, 25**

## Secure ownership

Liberia's new Land Rights Act explicitly protects the customary land rights of rural communities. It will help to stabilise peace, report Sahr Nouwah of Welthungerhilfe and Roselyn Korleh of the Rights and Rice Foundation. Christiane Rudolph of the development finance institution DEG elaborates that, since all private businesses appreciate secure ownership, the rule of law is a component of a good investment climate. **PAGES 27, 30**

## Limited reach

The International Criminal Court (ICC) ensures that perpetrators of atrocious crimes can be held accountable even if they are not put on trial in their home countries. For people to come to terms with trauma, more needs to happen, says Kai Ambos, a German law professor. **PAGE 32**

## Political career

Sérgio Moro, a Brazilian judge is joining the cabinet of Jair Bolsonaro, a right-wing populist. Carlos Albuquerque of Deutsche Welle assesses the impact of this decision. **PAGE 34**

## A minority's human rights

In March 2018, Pakistan's legislators passed a new law to protect transgender people. It is a step towards ending marginalisation, writes Mahwish Gul of Ruhr University Bochum. **PAGE 36**

## Involve the people

World Bank thinking is becoming more sophisticated and nuanced over the years. In 1997, its World Development Report deviated from the previous market orthodoxy, emphasising that development and economic growth depended on appropriate action by state agencies. It argued that the institutional set-up was dysfunctional in many developing countries, so bad governance was blocking progress. It demanded “good governance” instead.

Twenty years later, the World Bank published another World Development Report with a focus on related matters. In 2017, the guiding question was no longer what role the state should play, but how to bring about the institutions and the legislation that would deliver the desired results. The point was that people’s acceptance is essential. What citizens think matters.

The historical background, of course, is that developing countries typically kept the laws and agencies that they inherited from the colonial powers when they became independent. New constitutions spelled out vast aspirations, but the institutional set-up was not designed to make them come true. It remained authoritarian and unresponsive. In many countries, authoritarian rule took hold. During the cold war, the World Bank and other international financial institutions promoted market orthodoxy and largely neglected domestic politics. In the 1990s, it became undeniable that state dysfunction and corruption were problems, so the World Bank spelled out the good governance paradigm in 1997.

Donor governments soon accepted these insights. Unfortunately, it cannot be taken for granted that governments will assume national policy ownership in a responsible manner. Some cling to power in order to exploit the people. How to bring about good governance is an important question, and by tackling it, the World Bank proved that it is a learning organisation. Yes, there are gaps between its theorising and its tangible policies, but that does not mean that the theorising is worthless. The truth is that big bureaucracies only change slowly.

In a similar sense, it does not make constitutions meaningless that grassroots reality tends to differ from their principles. Without aspirations, day-to-day practice will not improve, but only deteriorate. The wider the gaps are, however, the less fit-for-purpose a state’s institutional set-up is.

Good legislation reflects people’s views and helps them to cope with daily life. On that basis, institutions – including an impartial judiciary – can effectively ensure peace and political stability. As the World Bank pointed out in 2017, the acceptance and legitimacy of governance depend on what the people concerned think is right. Notions of fairness and appropriateness are shaped by many things, including traditions, international norms, education, public discourse and citizens’ experience or involvement in public affairs. If, by contrast, legislation is barely implementable or if enforcement requires excessive force, policymakers should figure out what is going wrong (see our focus section on drugs policy, for example, in D+C/E+Z e-Paper 2018/12).

It is most promising that, in many developing countries, people are indeed becoming more involved in public affairs. On the other hand, it is bewildering to watch US President Donald Trump belittling and disparaging the judiciary. It is far more encouraging so see Kenya’s Supreme Court judges doing their best to rein in the administration of President Uhuru Kenyatta.

► You’ll find all contributions of our focus section plus related ones on our website – they’ll be compiled in next month’s briefing section.



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Photos: Aaron Favila/picture-alliance/AP Photo; Saner

## Debate



### Independent-minded journalists

The freedom of expression is under threat in the Philippines, but brave journalists are fighting back. Emmalyn Liwag Kotte, a freelance author, assesses the situation.

PAGE 11

## Tribune



### Keeping the ILO relevant

The International Labour Organization must rise to new challenges if it is to stay relevant. Its tripartite setting, which involves governments, private sector businesses and trade unions, was useful in the past, but is no longer adequate for tackling important issues of social justice, argues Raymond Saner, a Geneva-based scholar.

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### Elevated trains

A new metro is being built in Nagpur, India. Local authorities expect the light rail system to contribute to decongesting road traffic as well as improving air quality. Sabine Balk of D+C/E+Z was invited by KfW development bank to visit construction sites.

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## JOURNALISM

## Why some reporting is skewed

**“Media capture” means that formally independent news organisations become subordinate to vested interests. In practical terms, the result is often similar to direct government control of the media. While reporting may seem to be free and independent, it is actually skewed and biased.**

By Mahwish Gul

According to Anya Schiffrin, a media professor at Columbia University in New York, there are five methods of media capture:

- Government or other vested interests may give a whole range of favours to media companies that are friendly and supportive of their narrative.
- They may influence media through advertising.
- They can restrict access to information to those who do not support them.
- Media may also be captured cognitively, if they subscribe to a specific narrative on any particular issue and reject any views that do not fit in.
- Lastly, the age-old method of bribery is also used to influence and manipulate media workers.

Once a media house is “captured”, it is prone to covering up crime and corruption, promoting and protecting allies. Ultimately, it becomes a mouthpiece for propaganda. As Schiffrin points out, governments and other powerful forces can try to punish opposing media groups. Leaders with authoritarian leanings are known to use taxation, criminal investigations, parliamentary inquiries and defamation laws to intimidate journalists and restrict unwelcome coverage. Schiffrin speaks of “soft censorship”. A recent example of an authoritarian leader trying to silence a critical media outlet is the way the administration of President Rodrigo Duterte of the Philippines is hounding the website Rappler (see Emmalyn Liwag Kotte on p. 11 in this issue).

Media scholars know, of course, that no media organisation can be entirely independent of its sources of funding. Professional conventions have evolved, however,

that ensure that news media are “objective” in the sense of indicating precise facts, revealing their sources and conveying different parties’ diverging interpretations of undisputable facts.

Indeed, the opinion pieces in traditional western newspapers help to give read-



Journalists attending a press conference in Nairobi in 2010.

ers an idea of that papers’ orientation, on the basis of which it is easier to assess whether it is covering opposing views with reasonable fairness. The general public, nonetheless, needs a broad diversity of media organisations, since competition forces journalists to do solid work.

In the past, broadcast media were mostly owned by the state, while newspapers belonged to private-sector companies. This division of labour ensured diversity. It has been eroded to a large extent, however, as private TV and radio stations have become ever more popular.

Deepanjali Abeywardana, who works for Verité Research, a private think

tank based in Colombo, reports that media concentration has become an issue in Sri Lanka. The state and three private-sector businesses are the four main players. The owners of the media holdings all lean towards specific political parties, and that has had a bearing on the recent political upheaval. “It is not just the state media that is the problem, but also the independent privately-owned media with their political affiliations,” she told a conference on media capture in Berlin in late November. It was hosted by the Friedrich Ebert Foundation, which is close to Germany’s Social Demo-

crats, the international NGO Reporters without Borders and MiCT (Media in Cooperation and Transition), a German non-profit organisation.

### INTERNET CHALLENGES

In the past three decades, the internet has been changing the media landscape fast all over the world. It has given rise to new websites and blogs, for citizens to express their views independently. This trend has been further reinforced by the emergence of social media. At the same time, advertising, which used to fund established media operations, has shifted online. This develop-

ment has undermined traditional business models in many countries.

There are now many new avenues to uncover scandals, advance alternative interpretations of events and challenge dominant narratives. At the same time, fewer people are being paid well for doing full-time journalistic work, so mere rumours and disinformation spread fast. The established news media have been trying to adapt to the internet, but so far, publishers struggle to generate the revenues they need for full-fledged professional reporting.

Reporters without Borders and others warn that media capture is becoming ever more likely in this scenario. Vested interests are adapting their manipulative methods to new technological trends. To some extent, ruling factions are falling back to controlling social media through state-sanctioned regulations and by ways of coercion. However, they also take innovative approaches. Often, “trolls” are paid to spread fake news, rumours and outright fear via online media (see Arfa Khanum Sherwani in the focus section of D+C/E+Z e-Paper 2018/05).

Lisa-Marie Neudert from the Oxford Internet Institute emphasises the need to pay attention to “social media” capture, which she considers a rising threat. Online platforms such as Facebook, Twitter, Ins-

tagram and others are increasingly replacing traditional media as people’s primary sources of information. They are particularly prone to spreading disinformation, however, since there is no editorial control.

Neudert warns that it can be difficult to tell objective news from manipulated content on social media. Media literacy, which is about understanding how media items are produced and distributed, is essential, she says, for people to not only consume items, but to evaluate their substance (also see contributions by Julia Odoj and Benjamin Gaul in the focus section of D+C/E+Z e-Paper 2018/05). She advises professional media operations, moreover, to focus on investigative and specialised reporting in order to build a reputation for objective and independent journalism.

Globally, traditional media is in decline. Eroding advertising revenues have made media companies ever more dependent on a decreasing number of advertisers and other sponsors.

Verah Okyeo, who works for Kenya’s Daily Nation newspaper, is aware of such matters. She appreciates that the Bill and Melinda Gates Foundation is funding the science desk she works for, but admits that this has an impact on the desk’s work. The

growing clout of private philanthropists in international affairs is not uncontroversial, and some observers find it irritating (see Barbara Unmüssig in the focus section of D+C/E+Z e-Paper 2017/12).

In lack of resources, Okyeo adds, media organisations are increasingly turning to donor institutions for their training needs. One implication is that their coverage tends to reflect those institutions’ ideas.

In many countries, financially vulnerable media outlets are increasingly relinquishing control to private investors and their interests. Close ties to political parties are common too. Fewer quality media in public debate, however, means that fewer well-researched and documented contributions are made in fight for what Antonio Gramsci called “hegemony”. The Italian communist developed the philosophical concept of civil society and pointed out that hegemony results from public debate at many levels – from the household to work places, educational institutions and ultimately legislatures. Media input obviously matters in this context.

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**LINK**

**Conference website:**

<https://fome.info/events/symposium-2018/documentation>

## Limited freedom of expression

Media censorship today has become, in many ways, more pervasive and sinister, according to international observers. While coercive practices to intimidate and silence media are also on the rise. The murder of Jamal Khashoggi in Istanbul was merely the most prominent case in 2018.

UNESCO has recorded at least 80 murders of journalists in 2017 and 79 until mid-October 2018. The agency’s 2017/2018 report “World Trends in Freedom of Expression and Media Development” adds that “rapid political, technological

and economic transformations [...] have placed new strains on media freedom.” On media independence the report writes of increased pressure from political powers and regulatory authorities as well as constraints posed because of financial dependency. There is a substantial rise in violence against journalists, including kidnapping, enforced disappearance, arbitrary detention and torture.

The analysis of Freedom House, a non-governmental agency based in Washington, is similar. It argues that media freedom has been declining in

recent years. Its “Freedom of the Press” report of 2017 talks of “unprecedented threats to journalists and media outlets”.

Media capture is a worrisome trend, and it takes many forms (see main story). It does not only have impacts on the media sector, but on democracy and societies’ development as a whole. In many conflict-prone countries, media is also divided between main rival political factions. In these countries, it is political parties that try to influence public opinion in their favour by supporting, owning or running media.

One aspect is the great power of private-sector publishers who tend to favour business interests over labour

interest. Media capture is not restricted to poorer economies or transitioning democracies. In European countries like Hungary or Italy, there are only few media outlets that still criticise the respective governments in a coherent and systematic way. Moreover, social media is being used to spread disinformation – for example before elections. (mg)

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**LINKS**

**UNESCO:**

<https://en.unesco.org/unesco-condemns-killing-of-journalists>  
<https://en.unesco.org/world-media-trends-2017>

**Freedom House:**

<https://freedomhouse.org/report-types/freedom-press>



Germany continues to extract climate-destroying brown coal at mines like this in Garzweiler, North Rhine-Westphalia.

SUSTAINABILITY

## Do the right thing

**Hans-Rudolf Zulliger, a Swiss physicist, entrepreneur and researcher, has made sustainability the focus of all his activities. His book “Gaias Vermächtnis. Plädoyer für eine integrale Weltsicht” (“Gaia’s legacy. A plea for an integral worldview”) elaborates that the world must be understood as a living organism of which each individual part – including humanity – depends on the survival of the whole.**

**By Katja Dombrowski**

If people saw the earth as a living thing, they would not cause so much damage. That is what Zulliger believes. He wants others to see matters this way too. At first glance,

it may seem esoteric to think of water, soil or rocks as being alive. But doing so makes sense, if one adopts a holistic perspective, recognising that everything is connected to everything else. Water and soil nourish plants and animals, and even rocks serve as habitats and supply essential minerals. Earth, therefore, is a living system, and human beings are a part of it.

This perspective is ancient wisdom that can be found in many religions and worldviews. The title of Zulliger’s book refers to Gaia, the earth goddess of ancient Greece. This maternal deity was believed to nurture all forms of life. Unfortunately, the author laments, we have been ignoring this kind of wisdom for centuries. While this

statement does not apply to everyone, it is certainly true of the share of humanity that has exploited our earth to its limits.

So-called modern people who live in urban environments marked by technology see themselves as separate from nature. Biodiversity, for instance, is perceived as something “out there”, but not right where we live. It is generally considered to be something good, but not understood to be a precondition for our (continued) existence.

Zulliger shows that such every-day thinking is wrong. He refers to the latest research that proves that species’ diversity is essential for the stability of ecosystems. Biodiversity is not a luxury, but a necessity. “As species become extinct as a result of global warming, for instance, the ecosystem will lose the ability to regenerate itself and therefore also its ability to sustain life,” the author emphasises.

Maintaining the earth system is called sustainability nowadays. The term originated in forestry. The principle is to only cut as

much timber as can grow back. Over time, a three-dimensional understanding of ecological, social and economic sustainability became commonplace. According to Zulliger, environmental sustainability depends on the following principles:

- The life-giving ecosystem should not be destroyed.
- There is no such thing as waste because everything ends up somewhere. All cycles of matter must be closed. In other words, it must be possible to recycle any material used in a product or a production process. If we cannot assess the risks associated with a certain action, we should not act at all (precautionary principle).

In many parts of the world, the notion of sustainability is unknown. Some people associate it with utopian claims or unpleasantly austere lifestyles. In fact, the concept is neither new, nor does it have negative connotations. Zulliger presents the example of the Benedictine monks of Einsiedeln Abbey in Switzerland, who for over 1000 years have been living according to the principles of moderation and long-term viability.

Buddhism similarly exhorts its followers to live mindfully and cause as little harm as possible. By contrast, no major religion promotes destruction, exploitation and waste.

If the notion of sustainability is as obvious as the book claims, why do so few people live according to it? Zulliger's answer is: "Many of us assume that our actions cannot have negative consequences or we simply disregard the potential risks." According to Zulliger, the path to sustainability ultimately requires "broad knowledge, attentiveness and the willingness to do the right thing".

Changing one's own lifestyle and consumption habits is not popular – especially not, if it is associated with renouncing things and accepting limitations. Many people expect policy measures, market dynamics and technical innovations to rise to global challenges such as climate change. While Zulliger thinks that a global carbon tax would make sense, he points out that there is a lack of political will. And the author doubts that better, cleaner or more efficient technologies can make current consumerist lifestyles sustainable. In spite of such efforts, resource

use has kept increasing. "Worldwide there has never been as much innovation as today, and still our carbon footprint is growing faster than the world population," the author bemoans. Indeed, global carbon emissions hit a record high in 2017.

According to Zulliger, the prime obstacle to rapid change is the "obstinance of evolution". There is no lack of knowledge, and a great deal can be done. But people's worldviews must change too, and that will take much more time. Unfortunately, time is running out, as climate scientists and other researchers have emphatically demonstrated. Zulliger offers no solution to this dilemma. He does point out, however, that people can still "turn the ship around" in time to ensure the survival of the earth and our species. As the author summarises, "We are the problem, but also the solution".

**BOOK**

Zulliger, H.-R., 2018: *Gaias Vermächtnis. Plädoyer für eine integrale Weltsicht* ("Gaia's legacy. A plea for an integral worldview"). Rüffer & rub, Zürich. (Only in German.)



Please visit our website [www.DandC.eu](http://www.DandC.eu)



## Deeply rooted slavery

Slavery is no longer legally allowed anywhere in the world. Nonetheless, human trafficking remains a hugely profitable criminal business, estimated to generate revenues of \$150 billion a year. Mauritania is one of the countries where slaves are sold.

The UN defines modern-day slavery as the “recruitment, transportation, transfer, harbouring or receipt of persons by improper means for forced labour or sexual exploitation”. There are various forms of slavery: domestic servitude, abuse in prostitution, forced or bonded labour, child labour and forced marriage.

The 2016 Global Slavery Index revealed that 46 million people were living as slaves. According to the civil-society organisation “Free the Slaves”, 70 % of the world’s slaves are trapped in forced labour and 30 % in forced prostitution.

Mauritania was the last state in the world to officially abolish slavery in 1981. But despite legal provisions, it is still prevalent in the country, according to “SOS Esclaves”, a local civil-society organisation. Slavery has existed in Mauritania for many centuries and has deep roots in social traditions.

According to the Global Slavery Index, one percent of Mauritania’s population is enslaved. The absolute number is above 41,000. Activists who campaign for the rights of the persons concerned, however, estimate that up to 20 % of the population are held as slaves. The reason

for the gap between these figures is that “there are no statistics on Haratines and Afro-Mauritanians.” That is the explanation offered by Philip Alston, the UN Special Rapporteur on extreme poverty and human rights. Enslaved people often belong to these two ethnic groups. They constitute approximately two thirds of all Mauritians and are excluded from economic and social life in many ways.

Abou is a freed slave. He is only called by this name. “I just can’t put into words the whole suffering I went through in a decade,” he recounts. He fled the house of his owner in April 2018.

Mauritanian authorities flatly deny the existence of slavery. There has been more repression against anti-slavery activists and journalists than the perpetrators of slavery practices themselves. “Human-rights defenders and anti-slavery activists were intimidated, attacked and prosecuted for their peaceful activities,” states Amnesty International’s report for 2017/2018.

In March 2018, French-Moroccan photojournalist Seif Kousmate, who was conducting research on slavery, was detained and expelled. In May 2017, the authorities expelled Marie Foray, a human-rights lawyer working with the local NGO “Initiative pour la Résurgence du Mouvement Abolitionniste”.

Mauritania is set to face strong actions from the international community. According to the US trade representative’s office, the United States will end the country’s trade benefits under the African Growth and Opportunity Act in early 2019.

### LINKS

**Free the Slaves:**

<https://www.freetheslaves.net/>

**Initiative pour la Résurgence du Mouvement Abolitionniste:**

<http://www.iramauritanie.org/>

**SOS Esclaves:**

<https://www.facebook.com/SOS-Esclaves-179463132122473/?nr>



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## CLIMATE

# Higher ambitions are essential

The international community has adopted rules for the implementation of the Paris Agreement on Climate Change. Therefore, the 24<sup>th</sup> UN climate conference is considered a success. It took place in Katowice, Poland, in early December. But rules alone do not lead to success, so all nation states must now raise their climate ambitions – and act accordingly.

By Katja Dombrowski

Human beings react instinctively to immediate threats. With a certain level of adrenaline in their bloodstream, they will jump even if it hurts. To address long-term risks, by contrast, the mind is needed. It will weigh diverging interests, and is likely to expect external solutions. Nobody seeks pain voluntarily.

Climate change is a long-term trend. The earth has been getting warmer since industrialisation set in 200 years ago. In many parts of the world, climate change has been obvious for a long time, and it can no longer be denied anymore in advanced nations either: California and Australia are hit by ever more severe wildfires, Germany experienced drought this year and parts of Italy were flooded.

But the big bang that would trigger radical change has not occurred yet. Irreversible tipping points include the melting of the polar ice caps, the thawing of permafrost soils or the breakdown of the gulf stream. They will not materialise quickly, but they are in sight, implying existential risks.

Once a tipping point is reached, adaptation is impossible. Prevention is therefore necessary. Change is urgent in sectors such as energy, construction, housing and transport as well as in agriculture and forestry. To preserve the planet for future generations, the world economy must be transformed, and that would make sense in business terms too. But too many of the world's leaders have other priorities and are biased towards powerful interest groups who want to keep benefiting from fossil fuels.

A collectively accepted set of science-based rules can be helpful. At the climate summit, almost 200 countries agreed on a joint framework for implementing the Paris Agreement, fending off obstructive action by the USA, Saudi Arabia and Russia, for instance. The international community has thus reaffirmed the Paris Agreement. The multilateral guidelines will facilitate the comparison of individual countries' contributions to climate protection, and

countries. Moreover, countries that do not play by the rules are set to lose the right to participate in international carbon trading. Carbon trading allows countries to compensate shortcomings at home with climate investments in other countries. New and stricter trading rules are to be adopted at the next climate conference in Chile next year. The issue remained unresolved in Katowice because of a dispute with Brazil.

A solid foundation, however, does not automatically lead to appropriate action. There has been sufficient time for change. Nonetheless, global carbon emissions are once again at a record level this year – 21 years after the adoption of the Kyoto protocol and three years after the Paris summit. Even if all nation states obey the new rules,



Demanding system change to stop global warming: rally at the UN climate conference in Katowice.

compulsory reports on climate financing will boost compliance.

A foundation for action has thus been laid, and the chances that countries will live up to their Paris commitments have grown. Even the US delegation did not torpedo the result, but kept the door open for an eventual return to the Paris Agreement. The new rule book still doesn't include sanctions, but "naming and shaming" will put pressure on

climate change will continue. Nations must raise their ambitions fast – and act accordingly. That is what really matters.



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## BIODIVERSITY

# North-south conflict lingers on

The results of the 14<sup>th</sup> conference of parties (COP) to the UN Convention on Biological Diversity (CBD) were mixed. Tensions between the global north and the global south make it difficult to adopt a joint strategy for the time after 2020.

By Günter Mitlacher

The international community holds conferences every two years to discuss how to achieve the goals of the CBD. The goals include to:

- protect biodiversity all over the world,
- make sustainable use of forests, seas and other ecosystems and
- adopt rules for exploiting genetic resources, for example in the production of pharmaceuticals or cosmetics.

In the Japanese prefecture of Aichi in 2010, the 196 member countries of the CBD agreed 20 tangible biodiversity targets. They committed to achieving them by 2020. The targets included establishing additional protection areas, both at sea and on land, as well as action against biopiracy. Biopiracy has occurred over centuries as genetic resources from developing countries were exploited without compensation.

This year's COP took place in Sharm el-Sheikh, Egypt, in late November. It took stock of the progress made up to 2018. Unfortunately, not enough was achieved in regard to urgent issues.

One target was to have 17% of earth's surface to be declared protected areas by 2020. That target will probably be met as 15% was demarcated accordingly in 2018. However, there are gaps in sustainable management and long-term funding. Too many areas are thus only protected on paper. On the upside, protection areas of which local and indigenous communities are in charge have expanded.

Another target was to phase out all subsidies with harmful impacts, especially in agriculture. Due to strong resistance, that will certainly not happen by 2020.

In Egypt, ministers of the environment agreed on mainstreaming biodiversity issues in essential business sectors such as power generation and mining, infrastructure, manufacturing and the processing of goods. Progress will now depend on whether the ministers will manage to convince their cabinet colleagues who have jurisdiction over these matters.

## ROADMAP

An important success in Sharm El-Sheikh was the agreement to draft a joint strategy for the years 2021 to 2030. The roadmap for adopting this new global framework foresees that relevant issues will be discussed in seven rounds of negotiations. Among other things, they will focus on forest protection, marine conservation areas, standards for

the sustainable production of food and consumer goods, the fight against the illegal wildlife trade and raising awareness for the values of nature across all countries. The list indicates great aspirations, which are indeed necessary to stop the downward spiral of biodiversity erosion. As the international NGO World Wide Fund For Nature (WWF) showed in its Living Planet Report 2018, vertebrate populations around the world have declined by about 60% since 1970.

On the other hand, old conflicts flared up again in Sharm El-Sheikh. Biodiversity-rich countries want their genetical resources to be protected from high-tech biopiracy. By contrast, industrialised countries want to ensure that big agriculture and pharma multinationals have free access to the genetic resources of marine and terrestrial life. Developing countries want the use of genetic resources to be regulated, and they demand a share of any profits. Because of this dispute, the COP in 2010 came close to failure. That risk may arise again in two years, when China will host the next COP in Beijing.

All CBD members have emphatically stated that they want the conference in Beijing to trigger the kind of momentum that the climate summit unleashed in Paris in 2015. However, the north-south conflict lingers on. China will need a smart negotiating strategy to overcome serious obstacles. Political will is required, mere lip service is not enough.

To tackle the global crisis of biodiversity erosion, the world's top leaders must get involved. Therefore, the WWF is demanding that the UN General Assembly in September 2020 must include a biodiversity summit with all the heads of state and government. We must put an end to the downward spiral of biodiversity.



Biodiversity is globally in danger: diver near the Island Mindoro, Philippines.

## LINK

WWF, 2018: Living Planet Report  
[https://www.wwf.de/fileadmin/living-planet-report/2018/WWF\\_Living\\_Planet\\_Report\\_Englische\\_Version.pdf](https://www.wwf.de/fileadmin/living-planet-report/2018/WWF_Living_Planet_Report_Englische_Version.pdf)



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MEDIA

# Brave professionals

**As press freedom is under attack in the Philippines, international civil-society organisations appreciate the work done by independent-minded journalists.**

By Emmalyn Liwag Kotte

The news website Rappler ([www.rappler.com](http://www.rappler.com)) has become one of the Philippines' "most popular and effective investigative journalism outlets, providing critical coverage of the administration of President Rodrigo Duterte", according to the International Press Institute (IPI). The IPI is a global network of media professionals committed to independent journalism. This year, it gave its Free Media Pioneer award to Rappler, praising its "innovative approach to journalism" as well as its "determination to hold authorities accountable despite aggressive attacks on its operations".

Indeed, Rappler has become a target. In response to its diligent coverage of human-rights violations in Duterte's so-called "war on drugs" (see my contribution in the focus section of D+C/E+Z e-Paper 2018/12), the president and his supporters have been attacking the news website – and not only rhetorically. In early December, Maria Ressa, Rappler's top editor and chief executive, voluntarily surrendered to the local court that issued a warrant for her arrest. She had to post bail for her temporary release.

Earlier, Duterte had banned her and one of her reporters from covering events at the presidential palace Malacañang. He called Rappler a "fake news outlet" and declared that it is illegally owned by Americans. The Philippine Securities and Exchange Commission (SEC) revoked Rappler's licence to operate for allegedly violating the rule that media entities must be 100% Filipino-owned. Moreover, the Philippines' Department of Justice indicted Rappler Holdings Corporation for alleged tax evasion. Allegedly, taxes had not been paid for the issuance of bond-like financial instruments called Philippine Depositary Receipts (PDR) in 2015.

Rappler is actually not the only media company to have issued PDRs to foreign investors, but it is the only one that had its registration revoked. A shutdown was only averted by a court order. The judges demanded that the SEC reinvestigate the matter.

Rappler's lawyer, Francis Lim, insists that Rappler is 100% Filipino-owned. He also points out that there was no tax evasion since the company is not a securities trader. Ressa states that she has done nothing wrong: "Because I'm a journalist, I'm now labelled a criminal and can go to prison for 10 years."

Many people saw the licence revocation as the government's attempt to silence a highly effective critic. Observers pointed out that leaders with authoritarian tendencies have used similar means to discredit and thwart independent news outlets in other countries, including Turkey, Russia, India or Hungary, for example.

International appeals to the Duterte administration to change its stance, however, have so far fallen on deaf ears. Ma Salvacion "Inday" Espina-Varona, a journalist, reports that colleagues "face death threats, vilification campaigns and revocation of access to coverage, for doing what journalists

are supposed to do – questioning official acts and claims, especially on issues of human rights and corruption".

When Reporters without Borders awarded her its Press Freedom Prize for Independence in London in November 2018, Varona pointed out that, since the restoration of "a fragile, perpetually threatened democracy" in 1986, 185 journalists were killed – 12 of them in the first two years of Duterte's rule. The international non-governmental organisation praised her "extensive reporting on sensitive issues" and her role in the Filipino equivalent of the #MeToo campaign, which is fighting misogyny.

Also in November, Maria Ressa received the Committee to Protect Journalists' Gwen Ifill Press Freedom Award. At the awarding ceremony in New York, Sheila Coronel, who teaches journalism at Columbia University, reminded the audience of Duterte calling journalists "bullshit", "garbage" and "sons of bitches". The professor accused the president of "weaponising the internet – unleashing fake news and troll armies" (also see Alan C. Robles in the focus section of D+C/E+Z e-Paper 2018/05). Coronel lauded Rappler's courage to reveal such malpractice and expose police impunity in the war on drugs: "They told the truth – and so made enemies."



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Maria Ressa showing papers after being released – and as Time magazine's "Person of the Year".



KENYA

## Sex for fish

To make a living, many female fish traders around Lake Victoria region in Kenya trade sex for the right to purchase fishermen's catch. This practice has contributed to high HIV infections, largely affecting women. Even with efforts put in place by the government and other stakeholders to curb the HIV infections around the region, the problem has remained of concern. This leaves one to wonder, why is the HIV infection rate still disproportionately high in the region despite the various prevention, treatment and care interventions?

By Brenda Mbaja Lubang'a

On a late Friday evening in October 2017, I finally arrived in Mbita, one of the many fishing beaches on the shores of Lake Victoria. This will be my home for the next few weeks and I am looking forward to enjoying the delicious highly praised Tilapia and Omena (a type of sardine). Even though the area is not fully electrified, I noticed that on the far horizon there were many little lights and I wondered what city that was! My host informed me that actually that was no city, that was the mighty Lake Victoria and the lights were solar lamps that fishermen use.

Omena, the major catch in this region, is fished at night with the aid of solar lamps. Fishing is done with wooden boats and fishing nets that resemble mosquito nets. One fishing boat is manned by at least four muscular men who are employed by the boat owner. The fishermen spend most of their nights on the lake and they mostly sleep during the day. My host informed me with hard winds blowing, pulling fishing nets requires considerable physical strength, and only strong men can do the work.

Early Saturday morning, my host and I headed straight to the nearby fishing beach. Tired fishermen were pulling ashore the catch of the day. Some boats were half full and some full to the brim. Women were eagerly waiting to buy their share of fish for the day. Like in many other fishing communities, the division of labour in Mbita is



Buckets filled with Omena fish in Sindo, Kenya.

traditionally defined and observed; the men fish and the women dry the fish and sell them at the local markets. Some sell them to middle men who collect and transport the Omena in large quantities to major markets as far away as Mombasa. As on many other inland fishing beaches, the fishermen sell less fish than the female fish traders want to buy.

At the beach, I met Akinyi (not her actual name). She is 26 years old and has three children. After the death of her husband, she left her husband's home in the inland area and moved to Mbita because she did not want to be "inherited" by her brother-in-law. Wife inheritance is a custom of the Luo, who are the major tribe living on the Kenyan shores of Lake Victoria. Even though the custom is slowly fading away, there are some families that still uphold it.

Akinyi is not familiar with the term "sex for fish", but she says that everyone knows the local term "Jaboya". In the Luo language, Jaboya refers to a floater attached to a fishing net that helps the fishing net stay afloat even when loaded with fish. Fishermen who help female traders secure the catch are also called Jaboya because they are like a floater, they help the women secure access to fish. Akinyi says that due to the tough competition to secure access to the limited catch, a Jaboya is like a bridge between her and the merchandise. She says it is a common practice in Mbita even though people do not openly talk about it. In exchange for sex, female traders are given priority to buy Omena, and a woman without a Jaboya will have to wait and hope for the surplus in order to get some fish.

When asked if she has a Jaboya, Akinyi shyly nods. After relocating to Mbita, selling Omena was the only hope to earn a living in order to support herself and her three children. In the beginning she refused to join the Jaboya system, but after many days of disappointment and going home without any catch, she changed her mind. Stiff competition for the limited fish left her with no other choice. Like many other female fish traders, Akinyi opted for a sexual relationship with a fisherman due to poverty and desperation. She mentioned that she has multiple Jaboyas in different fishing beaches. During my stay, I spoke with some of Akinyi's friends and other female fish traders, who narrated similar experiences with Jaboya.

While walking around Mbita one cannot miss to notice the many posters and billboards with information aiming to raise awareness of HIV and AIDS. There are also several tents in strategic places and at the beaches where people can be tested for free and sent to a health facility for treatment. HIV awareness raising is also done through door to door campaigns, roadshows and on local radio programmes. Condoms are provided free of charge and placed in condom dispensers at the fishing beaches. However, many women said that they do not use them. For example, even though Akinyi was aware of the condom dispensers, she has never picked a condom from them. She does not want to risk being seen collecting condoms. She fears people will look down on her, considering her immoral.

### DRUNK FISHERMEN

Women also mentioned that it is very common for fishermen to consume a lot of alcohol and it is extremely difficult to negotiate condom use with a drunk fisherman. Many studies on sexual behaviours have linked alcohol consumption to risky sexual behaviour. Akinyi said that, on several occasions, she had to forgo the use of a condom because her Jaboya threatened not to sell the fish to her if she insisted on using condoms. For a long time, she was very scared of getting tested for HIV, but during one of the door to door HIV testing campaigns, she decided to get tested. She tested positive for HIV and since then she has been enrolled in HIV care and treatment. However, in the past four months, while looking for fish, she has been moving between five fishing beaches. The frequent movement interferes with her appointments at the health facility. She sometimes misses appointments and fails to go to refill her medications.

Akinyi's story is similar to those shared by many other female fish traders that I met. Even though most of them are aware of the availability of HIV prevention, treatment and care and understand the benefits, they did not make full use of them. Moreover, many of the women who had a Jaboya did not feel at high risk of contracting HIV. They did not consider themselves as being involved in a form of prostitution or transactional sex as they would commonly be labelled. Most of the women had long-term relationships with the fishermen and

some mentioned that having a Jaboya was like having a boyfriend or a husband. Sometimes, fishermen would live with the woman for a few weeks and she would cook and wash for him. In such relationships, those involved did not see reasons to use condoms or even test for HIV.

Sex for fish has been identified as one of the leading causes of the high HIV incidence among the fishing communities on Lake Victoria. According to the Kenya HIV County Profiles published by the National AIDS Control Council in 2016, HIV prevalence rates were highest in the counties there. For example, in Homa Bay county (which includes Mbita) the HIV prevalence rate was 26%, almost four times the national average of 5.9%. The situation is similar in other in-land fishing communities of some sub-Saharan African countries. In spite of many HIV prevention and treatment initiatives, studies have identified concentrated epidemics among fishing communities in Uganda, Tanzania and Malawi.

To achieve the Agenda 2030 goal on ending the AIDS epidemic, every country should work on reducing the HIV prevalence among its key populations and also offer care and treatment. There is need to develop and scale up innovative and target-oriented prevention, treatment and care services. In particular, the interventions need to respond to the needs of the local communities. For example, women in Mbita mentioned that sometimes there was "moonlight HIV testing". People could get tested at night and without having to worry about being spotted by friends and family. However, such initiatives are not carried out regularly. Also, for a highly migratory community like the fishing communities, it is important to offer mobile health services so as to bring services closer to those in need. Scaling up of such interventions would go a long way in the fight against HIV and AIDS.



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Recently restored wall painting in the WTO headquarters in Geneva. The building originally belonged to the ILO.

GLOBAL GOVERNANCE

## Labour is not a commodity

**The International Labour Organization (ILO) was created in 1919 at the end of World War I. Its establishment was part of the Treaty of Versailles. The initial ILO statutes pointed out that lasting peace depends on social justice. To stay relevant, the ILO must now rise to huge challenges and contribute to solve the socio-economic problems humanity is facing today.**

By Raymond Saner

In the first four months of 1919, a commission representing nine countries drafted a constitution for the new agency. Having lost the war, Germany and Austria were not involved. The text subsequently became Part XIII of the peace treaty signed in Versailles. The first annual conference of the newly created ILO was held in Washington in October 1919. Since 1920, it has been based in Geneva.

For tangible political reasons, social justice was the dominant topic in 1919. Europe was facing revolutionary unrest. The war had caused horrific destruction and suffering. After four years of bloodshed, workers unions went on strike. Compounding the problems, however, they were split between those who had joined their respective country's war ambitions and those who had opposed the war.

In late 1918, revolutionary uprisings toppled the emperors of Germany and Austria. In Russia, the Bolsheviks had ended the czar's rule one year earlier. Industry leaders wanted the upheavals to end. In their eyes, it made sense to improve working conditions by taking steps towards more social justice. Indeed, there were even proposals to call the new institution the International Organisation for Social Justice.

There were competing ideas on what an international body should do. Socialists

and Social Democrats were keen on establishing an international trade union.

By contrast, Samuel Gompers convinced US President Woodrow Wilson that an international agency was needed to tackle social problems in ways that were consistent with market economies. A former member of the British parliament, Gompers had moved to the USA and become the first leader of the American Federation of Labour (AFL). His views were resolutely anti-communist and anti-socialist, so he did not want to leave labour issues to leftists.

### TRIPARTITE APPROACH

Indeed, the ILO always rejected socialist ideas of nationalising industry. From the start, its approach was tripartite, involving governments, labour unions and employers associations. The idea was that social justice would result from the cooperation of these three parties, which make up the membership of the ILO.

They debate issues and then propose solutions which can either be achieved through new legislation (concerning governmental health insurances, for example) or by the collective bargaining of labour

unions and industry associations (concerning things like wages or the duration of vacations). In the early 20<sup>th</sup> century, the tripartite setting was innovative. It fast proved useful to involve all relevant parties in the social-justice debate.

Of course, the ILO had to face many political challenges. For example, free-trade unions clashed with those from totalitarian regimes, including the Stalinist Soviet Union, Fascist Italy and from 1933 on Nazi Germany. After World War II, tensions between east and west marked the cold war era. The tripartite approach actually delivered good results in western Europe and North America. In the cold war era, workers tended to be more prosperous in western than in eastern Europe.

As overthrowing capitalism was not on its agenda, the ILO was an ally of the west in the ideological battles of the cold war. The top leaders of the ILO were former government officers or policymakers from western countries. That only changed when Guy Ryder was elected director general of the ILO in 2012. He is a trade-union leader and had served as the general secretary of the International Confederation of Free Trade Unions.

Today, the ILO has 187 member states. Its most important achievements are the core labour standards which are spelled out in several international conventions. The standards include:

- freedom of association and the right to collective wage bargaining,
- the elimination of forced and compulsory labour,
- the effective abolition of child labour,
- the elimination of discrimination in respect to employment and occupation and
- internationally recognised labour rights, including the right to a living wage, a regular working week of not more than 48 hours, no forced overtime, safe and healthy workplaces as well as a recognised employment relationship with social protection.

For practical purposes, however, the standards remain aspirational in many countries. Important powers such as the USA, China and India have not ratified all of them. Moreover, various countries do not comply with obligations they signed up to. Internationally, moreover, labour unions have been losing influence for decades, and social-protection policies have been weakened. The reasons include

the success of market-orthodox ideology, globalisation and – more recently – right-wing populism.

In the advanced economies, the distinction between employment and self-employment have been blurring, and in recent years, digitalisation became an important driver of this trend. Platform economies, part-time jobs, flexibilisation, renewed pauperisation and de-industrialisation mean that masses of people in rich nations no longer enjoy the kind of social protection that was taken for granted a generation ago. A new understanding of social justice and labour relations is needed. In developing countries and emerging markets, moreover, informal employment means that masses of people have no social safety nets apart from the support their families and communities grant them.

The World Bank has discussed these issues in its most recent World Development Report, and one of its proposals is that, in the future, state agencies should provide universal social protection regardless of a person's employment status (see Hans Dembowski in focus section of D+C/E+Z e-Paper 2018/11). Obviously, the ILO must rise to these challenges too.

The missing partners on the GB (Governance Board) are the cooperatives and civil society. In many countries, cooperatives generate between seven to 14% of GDP, have impressively high levels of employment and contribute to social inclusion and social cohesion. The ILO is the only international organisation which has a unit that is devoted to cooperatives, but the cooperatives are not included in the GB as equal partners together with governments, employers' associations and labour unions.

Huge challenges thus lie ahead for the ILO. To remain relevant, the ILO needs to rethink and redefine its structure, mission and advocacy role. The reform agenda must have several items that regard the organisation's governance, membership and means of rule enforcement (see box next page).

### LIMITS OF TRIPARTITE ACTION

The most important question is probably whether the tripartite setting is still adequate. It was an important innovation initially. It proved a useful setting not only for discussing issues of labour rights and social justice, but also for negotiating legal stand-

ards. The approach's limits are becoming ever more evident, however.

Part of the problem is that it is ill-equipped to deal with informal employment, which is not registered by government agencies, not provided by regular companies and hardly represented by trade unions. Moreover, experience shows that the tripartite setting has increasingly become skewed to the benefit of employers. The most important reasons are that:

- governments are keen on low labour costs in order to keep economies competitive and attract foreign investors,
- labour legislation thus makes it hard for trade unions to organise and go on strike, and
- social protection is often considered a reward for successful development rather than an important foundation of development (see Markus Loewe in focus section of D+C/E+Z e-Paper 2018/11).

Indeed, some even think that some core labour standards have become issues of controversy. Employer associations increasingly oppose workers' right to go on strike, for example. Employers' representatives, moreover, are becoming ever more unwilling to discuss matters like the living wage even though the concept itself was mentioned in some of the earliest ILO documents.

As the ILO gets ready to celebrate its 100 year anniversary, it makes sense to reconsider why it was established in the first place. Social justice is indeed the foundation of peace. The ILO vision was depicted in paintings and frescos in its original building, which today serves as headquarters for the World Trade Organization (WTO). The old images have recently been restored. Their style and subjects reflect the early 20<sup>th</sup> century, showing workers and farmers living decent lives. And the inscription on the large monument in front of the building states that labour "is not a commodity" (*Le travail "n'est pas une marchandise"*).



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## A reform agenda for the ILO

The ILO membership is composed of governments, employers' associations and trade unions. This tripartite setting was useful in the past (see main essay), but it does not represent the world of work adequately today.

Typically, the informal sector dominates the economies of low-income countries. Even in India, a giant among emerging markets, the informal sector accounts for about 90% of employment. Trade unions, however, normally only represent workers in formal employment. Compounding the problems, such employment is often closely linked to public enterprises and governmental organisations in developing countries.

So far, the ILO is thus incapable of dealing with labour issues in low-income countries appropriately. That will not change unless the informal sector is properly taken into account. It would therefore make sense to include non-governmental organisations (NGOs) in ILO meetings and proceedings. Many NGOs are dealing with social-justice issues, and they are independent from governments. Given that their role in achieving the UN Sustainable Development Goals is generally appreciated, NGOs should also be made constituents of the ILO.

For similar reasons, cooperatives should become involved as well. In many countries, cooperatives generate seven to 14% of gross domestic product. Owned by their staff, they do not only contribute to employment, but also promote social inclusion and social co-

hesion. Cooperatives differ fundamentally from other private-sector enterprises, and they are not part of the public sector. Involving them in the ILO would make this organisation more comprehensive and help to counter-balance the employers' dominant power.



Labour monument in Geneva.

Tripartism was a major social invention when the ILO was created. However, if one of the three parties refuses to engage in discussions on specific issues, no discussion takes place. This was apparent over the last two years with employers' representatives blocking debate on important matters, including the living wage. As digitalisation and globalisation are changing labour relations,

such debates are important, and they would benefit from broad-based participation. Cooperatives and NGOs should be involved.

In any case, the ILO must become more democratic. Its Governing Body is composed of 56 permanent members (28 governments, 14 employers' associations and 14 trade unions) plus 66 non-permanent members (28 governments,

changing international environment.

So far, the implementation of the ILO core labour standards remains inconsistent around the world. Some member countries have not ratified all relevant conventions, and many do not fulfil duties they have signed up to.

Member states must report regularly to the ILO on their rule compliance. A Committee of Experts (CoE) reviews those reports and compiles a black list of the 30 worst offenders. Apart from such naming and shaming, however, the ILO has no means for enforcing its rules. There is no judicial process that might result in sanctioning offending countries. The WTO does not even facilitate public debate on member countries' track record as the UN Human Rights Council does. More media outreach in these matters might make a difference too.

The ILO certainly needs an effective complaint mechanism, moreover. People whose rights have been infringed upon should be able to make appeals. The ILO's Multinational Enterprise (MNE) Declaration is a starting point. It was adopted in 1977 and is currently being revised. It is basically a summary of the ILO rules plus recommendations on applying them to major enterprises. People who suffer rule violations, however, cannot turn directly to the ILO, but must revert to a tripartite "national focal point". This body will hear the case, decide on the case's merit and subsequently submit the case for ILO review. However, employers' associations are constituents of the national focal points, and they can block proceedings and veto. (rs)





Maha Metro is particularly proud of the 4.5-kilometre-long double-decker section of the track that allows the metro to run above the street.

MOBILITY

# A contribution to sustainable transport

**In the Indian metropolis of Nagpur, a new metro line is being built with support from the KfW Development Bank. The project is intended to make public transport more sustainable. Sabine Balk of D+C/E+Z has visited construction sites and went for a test drive along a completed portion of the track.**

**By Sabine Balk**

The elevated trains will plough through the centre of the city of 2.4 million – a medium-sized metropolis by Indian standards. Over 70% of the 42-kilometre-long track has already been built. The management says that

work is going on at the construction sites every day around the clock. The new light-rail system will rest on meter-thick concrete pillars, atop of which, eight metres up, the new track can already be seen. A 4.5-kilometre-long double-decker flyover in the heart of the city is particularly impressive: the street runs along the ground level, and the metro will be on the second and third level.

The Maharashtra Metro Rail Corporation (Maha Metro for short) is developing, building and operating the enormous infrastructure project. It is an Indian public sector company which is jointly owned by the national government and the state govern-

ment of Maharashtra. Ramnath Subramaniam is the Maha Metro manager in charge of planning. He spent one day taking visitors from Germany on a tour of construction sights. The visitors were KfW employees and journalists, who were invited by the bank. Subramaniam proudly told them: “The work is on schedule, there are hardly any delays, and we will certainly finish on time.” The Nagpur Metro should start operating in 2020.

The city authorities hope that the new means of public transport will bring a number of advantages. Until now, Nagpur does not have any public transport to speak of. There are a few municipal buses, but they make up less than ten per cent of local traffic. The buses are poorly maintained, unreliable and shabby. “Who would want to ride in a bus like that if you can take a brand-new metro instead?”, Subramaniam asked.

Most people ride mopeds into the city, and a smaller number drive cars. Private minibuses, taxis and rickshaws (both of the cycle and the motorised varieties)

are available too, but they offer rather poor services. Individual passenger transport makes up over 70% of traffic. The management of Maha Metro hopes the new railway will improve matters. As in many cities in India, traffic jams, poor air quality and noise are part of everyday hassle on the streets of Nagpur.

Nagpur's stated goal is to provide climate-friendly mobility and to shift personal transport towards public transport. The core of the new transportation plan is the metro, which is being built along two corridors (north-south and east-west). There will be a total of 40 stations and two depots to maintain the trains.

In order to encourage widespread use of the metro, people must get to the stations easily. The planners are aware of the matter, Subramaniam says. The stations will be surrounded by infrastructure for non-motorised transport, like pedestrian and bike paths or bike sharing. Park & Ride spots for mopeds will also be built. Moreover, electric buses will provide feeder services. But despite all this careful planning, the Maha Metro manager knows how difficult it is to get people to change their habits: "It will take some effort to convince people to switch to the metro."

The affected residents did not strongly oppose the construction, says Brijesh Dixit,

the managing director of Maha Metro. According to him, fewer than 100 people had to be relocated, and they were generously compensated. "It was primarily shop owners who were affected, but some of them will be able to continue to operate their businesses at the new stations", he said.

Maha Metro plans to run awareness-raising campaigns in order to win people over. The company expects to have 380,000 passengers per day by 2021, one year after the project's planned implementation. It should have over half a million by 2041. By shifting traffic from the streets to the tracks, Nagpur expects to reduce carbon emissions by an annual 67,000 tonnes. Air quality should improve thanks to the reduction of particulate matter and nitrogen oxide emissions. The project should create around 1,700 directly-related jobs. According to Subramaniam, moreover, about 10,000 workers are currently busy on the construction sites.

In order to make the project even more sustainable, Maha Metro is implementing other goals as well, the executive director affirms: the stations are being designed and built to be energy efficient, and a big part of the electricity used by the metro will come from solar panels. All wastewater will be recycled, rainwater will be collected and used, and a new tree will be planted at other loca-

tions for every one that has been cut down. So far, 5,000 new trees have been planted.

In the eyes of KfW, this comprehensive approach to sustainability is convincing. It is supporting the metro project with a loan worth half a billion euros. That is the largest single loan the bank has ever granted. France's Agence Française de Développement (AFD) has provided a further €130 million, and the rest of the costs are being shared equally by India's central government and the government of Maharashtra. The total cost of the project will amount to about €1.2 billion. While visiting the site, Joachim Nagel, a KfW board member, expressed his satisfaction: "The project is very well managed and is proceeding according to plan."

He and the rest of the German delegation happily boarded a brand-new, Chinese-built metro car for a test drive and learned about the technology along the way. The cars are still sparkingly clean, and the air conditioning lowers the temperature of the hot Indian air to around 20 degrees.



**SABINE BALK** is a member of D+C/E+Z's editorial team and visited the new metro in Nagpur by invitation of KfW.

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The new metro cars were built in China and feature Maharashtra's national animal.

Court building  
in Lahore,  
Pakistan.



## Rule of law

Good laws serve the purpose of resolving conflicts peacefully and according to norms that are generally accepted in society. The rule of law thus not only depends on enforcement, but also on legislation reflecting people's sense of justice and fairness. Popular participation in public affairs matters, and the legitimacy of state institutions hinges on people's acceptance. Judges' authority

depends on the public perceiving them to be independent and committed to the rule of law rather than special interests.



This focus section directly relates to the UN's 16<sup>th</sup> Sustainable Development Goal (SDG): Peace, justice and strong institutions. The topic also has a bearing on the entire SDG agenda.



David Maraga, Kenya's chief justice, with his deputy Philomena Mbete Mwilu in November 2017.

## Long road to independence

Kenya's law courts face huge challenges. They are expected to hear cases and clear a massive backlog. Moreover, they are supposed to end corruption and impunity. To rise to the challenges, the judiciary must expand its own infrastructure and build professional capacities. At the same time, political interference and budget cuts are serious issues. The most important thing, however, is probably that the judges' integrity itself must never be in doubt.

By Alphonse Shiundu

In 2010, Kenya adopted a new constitution. The background was gruesome post-election violence in 2007/08, when members of different ethnic groups had turned on one another. The new constitution was designed to reconcile a deeply divided nation. One of the instruments for doing so is a strong and independent judiciary.

Since colonial times, Kenya's law courts had previously mostly toed the government's line. The new constitution has changed expectations, and efforts have since been made to ensure the courts' independ-

ence. The reform process has gone on slowly but decisively for several years. It is radical and costs a lot of money. Last year, however, it was hit by a political whirlwind. The reason was that the Supreme Court annulled a presidential election (see box next page). The decision was politically controversial, of course, and sparked angry responses. On the other hand, many Kenyans appreciated that the judges were serious about enforcing constitutional standards.

Today, the reform caravan is trudging on in what remains an uphill struggle. Two key events have slowed it down somewhat.



Both were obviously responses to the Supreme Court's election nullification.

- The Kenyan government has cut its ties to the International Law Development Organization (IDLO), an inter-governmental body that supports judicial reform processes. IDLO had funded the bulk of Kenyan capacity building in this field, including the training of judges, magistrates and judicial officers.
- The government, supported by legislators, denied the judiciary more than half of the budget it had requested.

IDLO is a non-partisan organisation. It was launched by 34 governments of countries as different as China, Italy and Senegal. It is affiliated to the UN and gets funding from various parties, including the EU or the Bill and Melinda Gates Foundation. Its mission is to promote the rule of law. Nonetheless, politicians and bloggers close to the government accused IDLO of meddling in Kenya's judiciary after the election annulment. IDLO got abrupt shutdown orders. Judges were threatened and slandered in national newspapers. Judicial officers were publicly defamed.

As for the budget, the judiciary requested 31 billion Kenyan shillings (the equivalent of \$310 million) for the current financial year. The treasury only allotted it 17.3 billion shillings, and the National Assembly reduced that sum to a mere 14.5 bil-

lion shillings – not quite half of the judiciary’s requirement.

David Maraga, Kenya’s chief justice, was not prepared to accept the cuts. “The Judiciary exists not for its own sake, but to serve the common person by ensuring the efficient administration of justice and facilitating smooth commercial interactions between business entities,” he said in July 2018, shortly after the budget was approved. He even spoke of “budgetary strangulation” and warned that the courts were about to become unable to do their work. His appeal to the public’s common sense compelled the treasury to draw up a supplementary

budget, which was soon approved by the National Assembly. This raised the allocation to the judiciary by 1.5 billion shillings, which brought the total allocation to 16 billion shillings, which is just over half of the budgetary requirement and insufficient to cover the need.

It is no secret that Chief Justice Maraga’s relations with the administration of President Uhuru Kenyatta remain tense. As the incumbent, the head of state was confirmed in the second election held last year, but he ran unopposed since the opposition boycotted the polls. In political terms, many questions thus remain about the legitimacy

of Kenyatta’s presidency as well as the opposition’s complicity in keeping him in office.

On the upside, Maraga has reassured the country that the constitution is designed to cope with tensions between different branches of government and that he is determined to fight for the judiciary’s independence. The judge’s authority has benefited considerably from the appreciation that the Supreme Court’s election decision got in other African countries as well as at the global level.

There actually has been considerable progress in recent years. The judicial infrastructure has improved slowly, but steadily.

## Election drama

In a historic decision, Kenya’s Supreme Court annulled presidential elections last year. That was unprecedented in Africa. However, the opposition then boycotted the rerun elections.

Most observers considered Kenya’s presidential elections in August 2017 fair. Uhuru Kenyatta was officially reported to have won 54% of the votes. In view of opposition grumbling, however, he suggested that Raila Odinga, the main opposition candidate, go to court. Odinga kept stating that this was not an option, though international observers and church leaders urged him to either concede or turn to the judges.

Shortly before the final deadline, Odinga and his lawyers indeed appealed to the Supreme Court, arguing they had sufficient evidence of malpractice. The case was accepted, the Supreme Court heard both sides and finally decided in favour of the opposition. Due to many “illegalities and irregularities”, it declared the election null and void and ordered a fresh one to be held within 60 days.

At first, Kenyatta said that he accepted the decision, though he did not agree with it. In campaign mode, he later turned against the judges, calling them “crooks” and promising to “fix” something he considered “broken” in the judiciary. The fight for a fair and transparent election system was evidently not over.

The opposition raised a set of demands it wanted the electoral commission to fulfil, including the dismissal of some officials and measures to enhance transparency. It spoke of an “irreducible minimum”, and threatened to stay away from the rerun election, which was scheduled for 26 October. The electoral commission half-heartedly accepted some of the proposals, but made it clear that it considered the election’s credibility a matter of perceptions, rather than substance. The government, in turn, insisted that there was no time for major reforms. Its strategy was to press ahead with the elections fast.

The president’s party has a majority in the parliament.

It changed the electoral law, deleting and watering down clauses that had led to the election annulment. Legal disputes erupted immediately. On 24 October, activists appealed to the Supreme Court, asking it to decide whether the election could take place as planned on 26 October at all. The government then declared 25 October to be a public holiday, but Chief Justice David Maraga announced the Supreme Court would sit nonetheless.

That evening, the car of Philomena Mbete Mwilu, the deputy chief justice, was shot at. The driver was injured; she remained physically unharmed herself. However, she did not show up in court the next day. Another judge was abroad for medical treatment, and yet another one missed an airplane to Nairobi. Two other judges did not appear, but did not offer excuses. Apart from Maraga, only one other Supreme Court justice was present. According to its quorum, the Supreme Court needs a minimum of five judges to take decisions. The meeting had to be aborted, and the elections took place as scheduled.

Odinga boycotted the event, so Kenyatta now won

98% of the votes. Turnout, however, dropped from 79% in August to a mere 38% in October. In 25 constituencies, which are opposition strongholds, no vote was cast.

Protests erupted, but the security forces managed to suppress them, while the Kenyatta government agitated against the opposition and harassed some of its leaders and financiers. Some were charged with treason. One lawyer, who has the dual citizenship of Canada and Kenya, was arrested and forced to leave the country after he had dared to swear in Odinga as the “people’s president” during a protest rally in January.

Things have since calmed down, especially after Kenyatta and Odinga held a surprise meeting in March 2018. They shook hands and declared a ceasefire. Doubts linger on about the legitimacy of Kenyatta’s presidency, but it has not been questioned in court. The judges have, however, reversed most of the election law amendments which the parliament passed shortly before the rerun election. The fight for a fair and transparent election system is still not over. (as)

There are now more courts with more officers and better equipment. Codes of practice were published. The legislature has been reviewing Kenyan laws to ensure they comply with the new constitution and judges have been subjecting these laws to strict constitutional tests. The growing clout of independent courts, moreover, helped to attract international investors who appreciate predictable rule of law.

Long before the election annulment, the judiciary had begun to assert its relevance. In dozens of cases, judges nullified laws which the executive branch had rammed through the legislative branch. The courts thus prevented draconian amendments which threatened citizens' liberty and privacy under the pretext of ensuring security and fighting terrorism. The courts also protected media freedom and the independence of the auditor general. The public generally appreciated these many small steps, which added up to a powerful trend in defence of constitutional principles.

### THE ROAD AHEAD

There certainly is a need for the judiciary to do much more however. The big question is how to deal with corruption and impunity. These twin vices are prone to cause dangerous apathy among citizens. Even President Kenyatta has said that he wants the courts to fix the situation.

Chief Justice Maraga is aware of the challenge. The judiciary has set up a special division for corruption cases. In August 2018, the top judge told members of the country's Law Society: "We either say no to impunity and prosper or keep quiet and perish."

It is clear that the courts will have to work diligently and pass judgments based on solid evidence. In September 2018, the new Criminal Procedure Benchbook was launched. It is a jurisprudential manual for implementing the young constitution. Maraga considers it yet another step towards a "purposive, robust, indigenous and patriotic jurisprudence that reflects the values, principles and aspirations of all Kenyans".

Maraga knows that leaders must be held accountable, and he has appealed to all Kenyans to contribute. He made a pitch for eternal vigilance against corruption and impunity, declaring that the media, civil

society and the citizens themselves are important partners in such efforts. Moreover, the top judge has warned that the constitution would be "hollow" without respect for human rights, including socio-economic rights.

Paul Kihara, Kenya's attorney general, basically endorses this vision. "The judiciary must be given constitutional and operational independence," he has said. "The decision of the court must be respected by all, no matter how powerful or influential they may be." The attorney general emphasised that judges and magistrates "must be let to make decisions on the basis of law and law alone."

Recent experience, however, shows that politicians are often vindictive. There can be no doubt, moreover, that the judici-

be clean. It does not help that Philomena Mbete Mwilu, the deputy chief justice, is accused of graft and must stand trial. Noordin Hajj, the director of public prosecutions (DPP), brought criminal charges against her. Mwilu insists that she is innocent and the alleged corrupt transactions were merely commercial and above-board.

This case is a nightmare for the Judicial Service Commission, which has oversight over the courts. To many people, the top prosecutor's action reeks of vendetta after the election annulment. Moreover, his initial plan looked ridiculous: he wanted low-ranking magistrates to try the deputy chief justice. In the end, Chief Justice Maraga decided that a special five-judge bench



Kenyans are fed up with corruption.

ary is fighting deep-seated systemic issues and that it made itself new enemies by annulling the election. On top of all this, the backlog of cases is a serious problem. At the last count, at least 110,000 cases had been pending for more than five years. It was hoped that the number would be reduced to zero by the end of 2018, but the budget cuts made that improbable. Currently, the expansion of infrastructure – establishing new law courts all over the country and improving the information technology networks – slowly hobbles on amid financing gaps.

The greatest challenge, however, may be that the judiciary itself must be seen to

would do the job. The proceedings are odd, nonetheless, because the judges concerned must decide the case of a judge who is formally their superior.

Kenya's people are paying close attention to how the judiciary handles the trial of one of its own leaders. They want to see fairness, fidelity to the law and – ultimately – justice.



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# Civic competence contains corruption

**Municipal authorities are the tier of government that is closest to the citizens. However, service delivery at the local level is problematic in Tanzania, due to the behaviour of many officials. Recurring problems are bad governance, rule bending and corruption.**

By Lawrence Kilimwiko

Corruption is part of everyday life for Tanzanians. Local government staff take bribes for various services, including the issuing of licenses, awarding tenders to private companies or allocating market stalls. In the health sector, staff sell medicines stolen from government hospitals or expired drugs. Moreover, patients must pay bribes in order to get medicines and see doctors.

Court clerks demand bribes to get cases started or to slow them down. Magistrates take bribes and then give soft sentences, reduce penalties, withdraw charges or release arrested persons on bail. In the education sector, teachers take bribes for letting students pass exams and even to en-

rol children in school. On the other hand, they pay bribes to get promoted or to be transferred to a more comfortable place. Corruption not only thwarts good governance, it also poses a threat to peace, national cohesion, equal opportunities and even security. Tanzania’s Prevention and Combating of Corruption Act defines corruption as “abuse of power for private gain”. It can be classified as grand or petty, depending on the amounts of money lost and the sector where it occurs.

Grand corruption affects government procurement, privatisation processes, election finance, taxation and customs clearance. By contrast, petty corruption flourishes in all lower ranks of society. In the annual reports of Tanzania’s Prevention and Combating of Corruption Bureau (PCCB), which was established by the parliament, local authorities always top the list of corrupt public institutions. Sosthenes Kibwogo, who heads the PCCB Regional Bureau in Dodoma, reports that in his region, in the second half of 2017, 149 corruption cases were found



to have involved civil servants, and “73 cases involved local-government staff”.

President John Magufuli has launched a campaign against grand corruption. A special court has been established to handle the matter, corrupt officials have been fired and the president is working to instil a general sense of discipline in the public service.

## CORRUPTION IN RURAL MUNICIPALITIES

Rural communities suffer most from corruption. Owing to poor education and long-time marginalisation, many rural people are accustomed to unfair treatment by local public officials. Out of fear, they remain loyal and submissive to those in authority. The only way they know how to get things done is through bribery. Petty corruption is part of everyday life.



Villagers in a group discussion organised by the “United for Our Rights” project in Kalole, Tanzania.

Fears are growing that the anti-corruption efforts will end when the president steps down. International organisations are supporting anti-corruption projects, for instance, the Konrad Adenauer Stiftung (KAS) – a German foundation with close ties to the ruling Christian Democrats.

The European Union and the KAS Tanzania office are implementing a project worth 2.5 billion Tanzanian shilling (the equivalent of € 950,000) to empower grassroots structures for fighting local corruption. The project is named “United for Our Rights”.

Partner in this effort are two Tanzanian non-governmental organisations, the Civic Education Teachers Association (CETA) and Actions for Democracy and Local Governance (ADLG). The project is being carried out in seven regions of Tanzania with a combined population of 11 million, which is about 25% of Tanzania’s population.

By supporting the local communities, “we can achieve our goals of more accountability, more transparency and less corruption”, says Daniel El-Noshokaty, the KAS country resident director. Project manager

Maria Kayombo points out that the project aims to “empower villagers in the localities to better understand their rights and how to address corruption and governance issues.”

This project is geared to strengthen civil-society organisations including community radios. According to Kayombo, radios can “facilitate dialogue between communities and local authorities in order to lessen corruption in their localities.” Community radio allows local people not only to learn about current affairs and to share information, but also to raise their voice. The aim is to empower citizens so that they can drive social change.

**VILLAGERS’ RIGHTS**

Kalole in Kisarawe, a backward district outside Dar es Salaam, is one of the villages where this project is being implemented. At a public meeting there, inhabitants complained about “lack of transparency in the management of local affairs and public service providers.” As an example, they pointed to their village pharma dispensary. Until re-

cently, Kalole villagers were not even aware that, according to Tanzania’s health policy, dispensaries must display all necessary information concerning available medicines on their notice boards. That made corruption easy: uninformed patients were forced to pay, even for drugs which were supposed to be given for free.

Thanks to the project, the citizens are getting to know more about their rights. Ramadhani Ngakonda, Kalole’s village chairman, says that “village meetings are geared to generate a healthy dialogue” on matters pertaining to all forms of corruption, transparency, accountability and service delivery. Shaibu Lipwata is one of Kalole’s village leaders who have attended trainings on good governance. He describes corruption as a “disease” hindering development: “We have to voice our demands for accountability and transparency.”

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Prisoners released in January 2018.

## Overpopulated prisons

Burundi's prisons are hopelessly overcrowded. Even a presidential pardon for 2,000 detainees has done nothing to solve the long-term problem. The country needs to ensure that the legal time limit on remand in custody is observed. It must also develop alternatives to custodial sentences and make the prevention of crime a priority.

By Mireille Kanyange

At the end of November 2018, there were officially 10,987 persons detained in Burundi's prisons, which are only designed to hold 4,195. The country has 11 prisons and two institutions for young offenders. Eight of Burundi's 18 provinces have no prison at all; the others' correction facilities are bursting at the seams. More than half of the inmates are on remand awaiting trial. Many of them have been detained on remand for

much longer than the 14-day time limit established by Burundian law.

Overcrowding is the biggest problem for Burundi's prisons and their inmates, but it is not the only one. The buildings are very old, and their design makes it difficult to separate different groups of detainees from one another. Moreover, the prisons' budget is too small to ensure that all prisoners get decent food, clothing, hygiene and medical care. For these factors, prison conditions are dire. They are compounded by a shortage of prison staff and the lack of any system that might prepare inmates for life after prison.

Nazim Yadat, a coordinator with the International Committee of the Red Cross

(ICRC), points out that many detainees receive no legal assistance. He believes that remand in custody is being abused, with many accused persons staying imprisoned without trial for long periods. He sees a need for penal alternatives to prison sentencing and says that more must be done to help inmates not to commit further crimes after being released. The overcrowding is due partly to the high reoffending rate.

## NUMBERS ARE GROWING

According to the local human-rights group APRODH, which has been working from exile since 2015, the number of people detained in Burundi's prisons has risen sharply. In 2017, for instance, the population of the country's largest detention centre, Mpimba Central Prison in the capital Bujumbura, grew from 3,141 to 3,670. At the Ngozi Men's Detention Centre, the inmate number rose from 1,113 to 1,576, and at Gitega from 850 to 1,137.

Apart from the large number of prisoners on remand, inmates who should actually have been released are contributing to prison overcrowding. Fabien Banciryanino, a member of parliament without party affiliation, has submitted a list of 120 prisoners who fall into this category. Burundi's Vice-President Gaston Sindimwo conceded that such cases exist during a Nelson Mandela memorial in Mpimba in July. The justice ministry denies it, however – although Adolphe Havyarimana, its spokesman, promised that a commission of inquiry would be set up to investigate the matter.

Examples of persons who are illegally detained include nine members of Amizero y'Abarundi, the largest opposition alliance, in Bubanza Province in the west of the country. They are charged with posing a threat to domestic security. On 10 October, a court ordered their provisional release. But the order was not carried out. Instead, in early November, the accused were transferred to Bujumbura's Mpimba Central Prison. In response to the opposition activists' illegal detention, Agathon Rwasa, the leader of Amizero y' Abarundi and first deputy speaker of the National Assembly, pointed out that court rulings must be obeyed. "A prison governor does not have any right to appraise a decision or add further considerations."



Justice Minister Aimée Laurentine Kanyana has spoken of "irregularities" to explain the failure or slowness to carry out court orders. To avoid such irregularities in the future, she said, her ministry was considering computerised links between the courts and the prisons. "When a judgement is delivered, the prison governors will see it on their computer," she explained. That would solve the problem of delays in compliance.

In April 2015, the political opposition and civil-society organisations launched protests against President Pierre Nkurunziza running for a third term. There were large rallies throughout the country, and the security services arrested protestors including members of the MSD opposition party. Masses of people, including MSD leader Alexis Sinduhije, fled abroad.

After months of unrest, Nkurunziza was confirmed in office in highly controversial elections (see Marc Niyonkuru in the debate section of D+C/E+Z e-Paper 2016/10). Some of the persons who were arrested have since been released, but not all. The opposition in exile, CNARED (Coalition National pour le Rétablissement de l'Accord d'Arusha et la Restauration d'un Etat de Droit), and opposition groups within the country refer to the detainees as political prisoners. Officially, however, ethnic, political and religious affiliation are not supposed to play any role in sentencing.

## PREGNANT WOMEN, THE SICK AND THE ELDERLY RELEASED

President Nkurunziza regularly makes use of his constitutional right to pardon prisoners. In 2010, for instance, he set more than 1,300 inmates free. In 2012 he pardoned all pregnant women and nursing mothers, pris-

oners suffering from advanced incurable illness and all detainees over 60 or under 18. Exceptions were made in the case of prisoners sentenced for crimes against humanity, war crimes or rape. In the latest and largest round of pardons, in 2018, more than 2,000 detainees were released.

But according to Félix Niragira, the chairman of the Senate Justice Commission, such steps have done little to ease the pressure on Burundi's prisons. Commission members visited ten of the correctional facilities, he says, and found them accommodating 8,583 prisoners although they were designed to hold only 3,800. That was after the presidential pardons were carried out.

Most national constitutions give the president the right to pardon convicted criminals. Legal scholars point out, however, that such provisions are meant to help to resolve rare individual cases with serious political, cultural or other implications. The general idea is not to allow the head of state to impose arbitrary rule by overriding judgements or circumventing court trials.

Indeed, APRODH, the human-rights group, argues that presidential pardons alone are not the solution to Burundi's prison crisis. More needs to happen. The trials for those remanded in custody must accelerate, more defendants should be released on bail, and any accused who is acquitted must be released immediately.

Presidential pardoning is only helpful to some extent, says Gervais Hajayandi, the director of the National Prison Authority. Inmate numbers are already rising again. Since the pardons went through, Hajayandi reports, more than a thousand repeat offenders have been registered. After intensive deliberation, he says the Authority has decided to limit prison intakes.

Jean-Marie Nshimirimana of Ntabariza, a civil-society group that works to protect the rights of prisoners and their families, states categorically: "Freedom is the rule, remand in custody the exception." Particularly in view of the poor conditions that detainees have had to endure in Burundi's prisons, he says, this principle must be applied and the trial process accelerated.



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Liberia's rural women are now entitled to land ownership.

## A historic first

Liberia's new Land Rights Act explicitly protects customary land ownership. This reform should help to stabilise peace and can prove to be a game changer. Civil-society organisations have played an essential role in drafting the new law.

By Sahr Nouwah and Roselyn Korleh

After it was passed by the country's Senate and House of Representatives, Liberia's President George Weah signed the Land Rights Act into law in September 2018. It is

the result of a long legislative process. The major challenge was to take into account the views of Liberia's grassroots communities, who have historically been excluded from policymaking. Civil-society organisations gave them a voice.

For the first time in history, the customary rights of Liberia's village communities are protected by formal legislation. Among other things, the law's provisions state:

- Communities define who they are themselves, though they must not exclude residents or discriminate against them.

- Community members are considered to be private owners of their customary lands.
- Oral testimony establishes customary ownership, so paperwork or a formal title are not necessary.
- Women, youth and members of minorities have equal ownership claims to their ancestral lands and equal rights to use and manage community land.
- Communities can decide themselves, how their customary land is governed. They have to establish land governance bodies which must decide by consensus and have appropriate representation of men, women and youth.
- Outsiders cannot interfere with customary lands unless they have the local community's free, prior and informed consent.

- Community members may continue to use land designated as “protected areas” for their livelihoods.

The law is designed to resolve problems that have caused conflict and strife in the past. In 1847, Liberia became an independent state. It was not a colony, but in important ways its social reality reflected imperialist power structures.

Liberia was founded and run by freed slaves from the USA. They and their offspring dominated politics. They relied on formal law, which state agencies would enforce throughout the country. By contrast, the rural people mostly lived ac-

ording to the traditional rules of various tribes. There were thus two kinds of land rights: customary land rights and formally acknowledged land rights.

Rural communities used land for farming and raising livestock, and they also hunted wildlife and gathered other resources in the forests. They managed disputes among themselves according to their traditional rules. If, however, their interests clashed with those of members of the country’s dominant social strata, they lacked deeds and other documents to prove their land ownership. The urban-based elite generally prevailed in disputes. For many dec-

ades, Liberia thus had a system of multiple rules which were defined by formal law and various tribal customs.

It was a recipe for permanent tensions and repeated conflicts. Poor rural people could not rely on state agencies’ protection of their rights. Mining and logging industries often displaced villagers. While large plantations were protected by formal law, smallholder farmers owned their land only according to customary law.

Violence escalated brutally in Liberia’s civil war from 1989 to 2003. Thanks to the Comprehensive Peace Agreement that was signed in Accra in 2003 and the deploy-

## Promoting local ownership

Welthungerhilfe, the Bonn-based non-governmental organisation, considers Liberia’s new Land Rights Act to be one of the most progressive of its kind in Africa. It sets an example in terms of national self-determination. As it was drafted with broad-based involvement of the public, it reflects both the country’s traditions and its current needs. Both aspects are most relevant in a society traumatised by violent conflict.

Land grabbing is a serious problem in many developing countries. People are driven away from their homes and deprived of their livelihoods. The underlying reason is that governments aim to “fast-track” agricultural development, promoting land-related private investments and neglecting customary rights. As a result of such misguided policymaking, displaced people may even require humanitarian assistance.

Land grabbing occurs in complex settings, marked by many actors with diverging interests. Taking account of such

complexity, Welthungerhilfe’s “Land for Life” programme, which is supported by Germany’s Federal Ministry for Economic Cooperation and Development (BMZ), promotes multi-stakeholder partnerships for land governance. The idea is to involve government agencies, civil-society organisations, private-sector businesses and scholars in dialogue in order to open up spaces for joint learning and new ideas. The “Land for Life” approach is innovative in the sense of not working towards a predetermined result. Instead, it is geared to enabling stakeholders to develop long-term solutions of their own, based on a shared assessment of challenges and opportunities. Acknowledging existing power imbalances, Welthungerhilfe in particular supports local communities and their representatives to raise their voices and claim their rights.

Many Liberian civil-society organisations have joined forces in the Civil Society Working Group on Land Rights, which



had a strong impact on the recently passed land legislation.

The national campaign was supported by international partners, including the International Land Coalition, Oxfam, Welthungerhilfe and others. It was a good example of how timely and flexible international support can strengthen the voice of national actors and provide funding for them to use creatively. Of course, such campaign must always be led by civil-society organisations of the country concerned.

The new law was only passed in September 2018, so its impacts remain to be seen. International experience shows that good laws are not always enforced well. First lessons from the “Land for Life” programme indicate that it takes a lot of time to involve many stakeholders and build trust. However, solutions reached

in inclusive and consultative processes tend to be sustainable and have the potential to be transformative. From this perspective, the new Land Rights Act seems very promising because it resulted from broad-based popular participation. Moreover, there is a very active civil society whose activists will continue to engage with all stakeholder to ensure its implementation. With BMZ funding, the Land for Life programme supports similar initiatives in Sierra Leone, Burkina Faso and Ethiopia.



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ment of the UNMIL peacekeeping mission, elections could be held in 2005. Ellen Johnson Sirleaf became the president. The peace agreement acknowledged that unresolved land inequities had been a driver of civil strife.

As Stanley Toe, the current executive director of the Liberia Land Authority, recalls, the new head of state wanted to tackle the matter. She understood that it had the potential for tumbling the country back into war unless it was resolved. Accordingly, the parliament established the Land Commission in 2009. It included representatives of civil-society organisations. Over the years, their contributions to the debate proved very important, argues Toe.

The Commission had the task to draft a policy on land ownership. Its work included nationwide stakeholder consultations, extensive collection of data and evidence as well as legal reviews. In March 2013, the government adopted the commission's policy proposal.

According to this new approach, there are now four categories of land ownership:

- public land, which is owned, but currently not used by the government,
- government land, which is used by state agencies (for office buildings and other purposes),
- customary land, on which the livelihoods of most rural communities depend, and
- private land, which is owned by a private person.

The policy was widely appreciated, but it soon became evident that a law was needed to ensure consistent land governance as well as legal certainty for every category of land ownership. The legislation process began, but soon ran into trouble. As Frances Greaves, the founder of the non-governmental organisation Voice of the Voiceless, reports, legislators kept watering down important rights. Civil-society organisations were disappointed because powerful government officials and vested interests were doing their best to once again marginalise rural communities. The debate dragged on over the years.

In response to the obstruction, the Rights and Rice Foundation and the Sustainable Development Institute convened other non-governmental organisations to form the Civil Society Working Group on Land Rights. Together, they spelled out seri-

ous criticism of the modified draft law that was passed by the lower legislative chamber in August 2017. Important points included:

- Women's land rights were not recognised at all.
- Too much customary land was considered to be public land, which the government would be entitled to make use of in spite of villagers' livelihoods depending on it.
- No provisions were made to ensure that communities were guaranteed free, prior and informed consent in regard to any concessions or investments made on their customary land.

### REACHING OUT TO STAKEHOLDERS

The civil-society organisations did not only lobby legislators and took part in meetings convened by the authorities. They reached out to all relevant stakeholder groups, and – most important – to the rural public, engaging people at the grassroots in the debate.

According to Alphonso B. Henries of the Liberia Land Reform Movement, it proved useful that civil-society organisations were active at this level. They were in touch with rural communities and aware of their needs. Moreover, they were able to mobilise people. Henries reports that the activists' stance was diplomatic rather than confrontational, as civil-society organisations were striving to build bridges.

Rural outreach mattered very much because one of the big challenges in regard to protecting customary rights was that these rights differ from region to region and from tribe to tribe. Moreover, the traditional rules were mostly not documented in writing, since they had been passed down orally from generation to generation. It further complicated the situation that many communities had been displaced by war. Civil-society activism empowered rural people, many of whom are still illiterate, to spell out their demands.

At the same time, there was an obvious need for action. The reason was that the government wanted to speed up economic growth. It sold land and granted mining as well as logging concessions to investors, including foreign businesses. As in earlier times, the rights of the rural poor were not respected. One consequence was deforestation (see Silas Kpanan'AYoung Siakor in D+C/E+Z 2013/10, p. 366). Many people were

evicted by force. Given that the communities concerned had often lived on the land for decades, E. Musu Coldman of the National Council of Chiefs and Elders insists that they should have been consulted at the very least.

In 2017, Liberia held the most recent elections. For the first time in more than 70 years, power was peacefully transferred from one elected government to the next. Many legislators lost their seats in parliament to competitors. When the country's new president George Weah referred to the "fundamental issue of land" in his inaugural speech, he opened the window for continuing the struggle for meaningful land legislation, and the issue was taken up by newly constituted committees.

This summer, the debate of more than a decade finally resulted in the new Land Rights Act. Civil-society organisations particularly appreciate its clauses concerning customary land.

The reform is an important step towards securing their welfare. According to Senator George Tengbeh, who represents Lofa County and was one of the legislators who promoted the new bill, the law reduces the scope for conflict. To ensure that the innovative legislation is equitably enforced, however, more work needs to be done. Tengbeh says, that people must now be made aware of its provisions.

The senator expects civil-society organisations to support such efforts, and they certainly will do so. Unless people understand their rights, they will not be able to defend them.



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# Facilitating investments

**For poverty to be reduced, the private sector must flourish and generate employment. The rule of law matters very much in this context.**

**By Christiane Rudolph**

A good investment climate means that private-sector companies, ranging from small-scale enterprises to multinational corporations, have incentives to invest. The term investment climate refers to the entire political, legal, economic and institutional environment that has a bearing on enterprises' opportunities and risks. Investors must assess these matters diligently, and incalculable risks are likely to scare them off.

The protection of ownership rights is crucial. Land ownership, for example, must be clear and safe. Contract enforcement is important, and low levels of corruption and crime are appreciated. Investors also want to be sure that competitors do not gain advantages due to personal contacts of monetary favours. When a business partner does not fulfil contract obligations, moreover, they need the courts to enforce that contract.

Accordingly, national laws have a bearing on investment decisions, but law enforcement matters just as much. However, the quality of both legislation and the court system diverge considerably from country to country. The interaction of the judicial, legislative and administrative branches of government is a complex affair. Generally speaking, there are always gaps between black letter law and everyday life. In the eyes of investors, non-transparent, overly complex or ambiguous legislation means greater risks.

In private contracts, partners can agree which country's law will apply. They are not forced to simply rely on the law of the location where an investment takes place. German courts may thus get jurisdiction over investments in Africa. If an investor has the impression that local laws and local law-enforcement do not add up to legal certainty, he or she may still agree to investing if another country's courts get the say should disputes arise.

The more trust the legal environment inspires, the more probable it becomes that promising investment ideas lead to tangible action. The rule of law makes it easier to assess – and manage – risks. All private sector companies, whether foreign or domestic, appreciate legal certainty. However, foreign investors will always ponder whether they will be treated fairly.

Foreign direct investments drive national economic development. They lead to additional employment and often increase

to invest. On the other hand, their business model may rely on being protected from foreign competition, in which case they may charge higher prices and have less reason to worry that competent staff might be poached by other companies that offer better pay.

It is well known, moreover, that companies tend to rely on contacts and state patronage in countries where the rule of law is weak. In extreme cases, such scenarios result in individual companies enjoying monopolies in specific sectors. While those companies may obviously thrive, the impacts on the labour force and consumers are harmful.

The overall legal environment matters, and business-specific rules – includ-



**A worker in a cracker factory owned by Beloxxi, a Nigerian family business of which DEG has become a shareholder.**

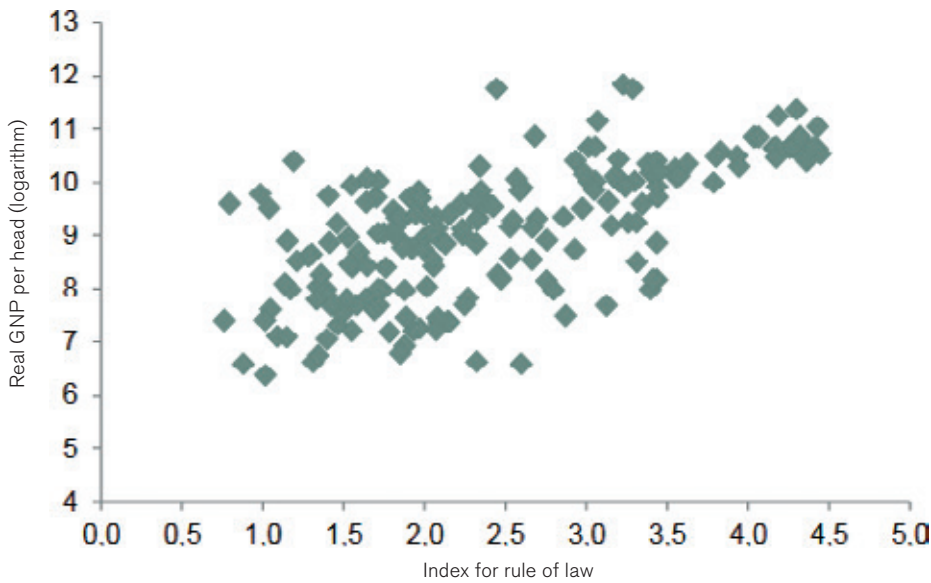
the supply of goods on consumer markets, expanding people's choices. In developing countries, moreover, foreign investors are prone to introducing advanced technology, so staff gets an opportunity to acquire additional skills. In the long run, tax revenues are likely to increase.

If, by contrast, governance does not inspire trust, investments become less likely. Domestic companies too are less likely

ing those on competition – are particularly relevant. The interaction of all branches of government should be geared to ruling out unfair competition or unfairly restricting competition. Investors pay close attention to governance in these matters.

It is generally accepted that the quality of institutions has a positive impact both on income levels and on income distribution. It is no coincidence, that the rule of law

Rule of law and prosperity



Sources: World Bank, WDI, DEG

is correlated with a nation's prosperity (see graph above). Economic research has shown that the inclination to invest increases as legal certainty improves. An independent

and impartial judiciary must be fully operational. At the same time, every state agency should ensure equal opportunities. They all must respect the rights of every citizen and

every company without being influenced by corruption.

During the Hamburg Summit in 2017, the G20 adopted the "Compact with Africa". This initiative was proposed by Germany, and it is geared to improving the investment climate at nation-state levels with an eye to facilitating business activity. For obvious reasons, national governments are responsible for creating and enforcing an appropriate legal framework. Donor governments, however, are prepared to give advice and support. The reason is that, in the long run, enhanced legal certainty will lead to more investments, more jobs and sustainable growth.



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Chart: DEG



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## Limited reach

Since 2002, the International Criminal Court (ICC), which is based in The Hague, has ensured that perpetrators of atrocious crimes can be held accountable if they are not put on trial in their home countries. Earlier, international tribunals served a similar function, for instance regarding Rwanda or the former Yugoslavia. For a nation to come to terms with civil war or despotic rule, however, more needs to happen, as Kai Ambos, a law professor from Göttingen University, argues.

Kai Ambos interviewed by Hans Dembowski

Cases before the ICC often drag on for a long time and then end with acquittals. Civil-society organisations and the media express criticism of the court. Is it fulfilling its mission?

Yes, the ICC is doing reasonably well given the difficult circumstances, but the expectations tend to be too high. The ICC considers individual cases and must find out whether a suspected person can indeed be proven to be responsible for an atrocious crime. The cases take a long time because the investigations take place in very difficult settings and the corroboration of evidence is a complex challenge. The criminal responsibility of the person concerned must be proven. It is important to involve victims in proceedings, and their personal satisfaction certainly matters, but the focus is on the accused person's possible individual responsibility and guilt. An acquittal neither denies that there was a crime nor that victims have suffered. It only means that the judges are not convinced beyond a reasonable doubt of the accused's individual responsibility.

It seems rather unsatisfying when someone like Jean-Pierre Bemba, who was convicted for war crimes in the Central African Republic after a long trial, is later acquitted by the Appeals Chamber.

When things like this happen, the victims and their relatives are obviously disappointed, but that does not mean that this particular acquittal was wrong. The Bemba decision was very close (three to two) and mostly based on procedural technicalities. Ultimately, the Appeals Chamber insisted on more convincing evidence for the crimes allegedly committed by the subordinates. One can certainly debate whether the Chamber asked too much, but the basis of any such debate is what is in the official Court records. It is impossible to assess that from outside. Even specialised lawyers cannot do so unless they attended each and every hearing. In a criminal case, the judgment results from what the judges learned from the evidence presented in front of them in an oral and adversarial fashion. People who have not followed that lack fundamental information and thus are not really quali-



Colombia's holistic approach to building peace is setting examples: commemorating killed and missing people in Bogotá in October 2018.



fied to comment. Sometimes, journalists observe a case from beginning to the end, and their impressions and insights can indeed be relevant. Without such an intimate knowledge, however, it is extremely difficult to decide whether a man like Bemba, as a military commander, could and should have intervened in a specific situation to prevent certain crimes. Unfortunately, civil-society activists and the media tend to simplify things excessively and to demonise the accused.

**But the ICC is supposed to prevent impunity after the atrocities, and acquittals don't do that.**

Not all cases end with an acquittal. Thomas Lubanga and Germain Katanga were sentenced for crimes they committed during the civil war in the Democratic Republic of the Congo. In legal terms, it would be totally unacceptable to convict an accused person so that someone is punished. The job of the ICC is not different from that of any other criminal court. It must decide whether the specific accused is guilty or not. It must do so in a fair trial, relying on means that conform with the rule of law. It thus reduces, but of course cannot eliminate, the previously almost unlimited impunity of despotic leaders and militia commanders. The ICC is merely one component of an international system of criminal justice, and the main caseload rests with the domestic courts where the crimes were committed. We shouldn't forget, moreover, that the reach and impact of criminal law is limited when it comes to societies coming to terms with atrocities. It must be complemented by other mechanisms, such as truth and reconciliation commissions for example.

**In the recent criminal trial of the neo-Nazi NSU terrorists in Germany, many issues were not resolved either. Relevant questions included whether the police had failed and what role the Verfassungsschutz, Germany's secret service, played. Its agents had obviously been in touch with terrorists in several instances, but they hardly submitted any useful evidence. Victims' lawyers spoke of "institutionalised" racism and "state failure".** Yes, and these are all relevant issues, but they go beyond the limited tasks and functions of criminal justice. Munich's Higher Regional Court had to decide whether Beate

Zschäpe and the other accused were guilty or not. Such a narrow focus cannot really satisfy all possible needs of victims. Zschäpe was found guilty, but for a society to come to terms with brutal violence, more is needed than criminal prosecutions. This is why the approach that Colombia is taking to building peace after decades of civil war can serve as a model. It includes a criminal justice component, the Special Jurisdiction for Peace, that can sentence perpetrators up to 20 years. But the Colombian transitional justice system has several further components, especially a truth commission that is dealing with the historical narrative, developing a shared understanding of recent history. On top of that, the system has coherent national mechanisms for compensating victims and even a special unit for disappeared persons. This is a holistic approach, with the various components reinforcing one another.

**Iván Duque, Colombia's new president, has declared himself an opponent of the peace agreement. Has the peace process been institutionalised in a way that is strong enough to last?**

Well, President Duque has actually made a commitment to the peace agreement and the said transitional justice system in principle. He wants to make some changes, but he does not have the legislative majorities to pass radical reforms or even abolish the system.

**You just emphasised the national character of Colombia's system for transitional justice. Do international courts have the same credibility as national ones?**

The acceptance of international tribunals and courts is indeed a serious issue. Outreach programmes are designed to reduce the distance from the places where crimes are committed, but that is only possible to a limited extent. That was true of the International Criminal Tribunal for the former Yugoslavia, which the UN set up in the early 1990s and which is currently wrapping up its work. There was a tendency of Croats resenting judgments against Croatian war criminals, whereas Serbs resented judgments against Serbs. Because of such ethnic sentiments, national or regional tribunals are often more convincing. Just consider that the Nuremberg trials of Nazi criminals did not find much acceptance in Germany shortly after the Second World War. Today,

the Nuremberg Academy is quite successful in promoting international justice and the underlying principles, but it was only established in 2014. The problem with national courts, on the other hand, is that they are not entirely independent and may become toys for powerful political interests to play with. In any case, it makes very good sense that nation states bear the main responsibility for criminal justice and the ICC only has jurisdiction if they are either unable or unwilling to investigate and prosecute.

**How do you assess the criticism expressed by African leaders who say that the ICC is only serving imperialist interests and is biased against Africa?**

If leaders like the late Muammar al-Gaddafi, Sudan's President Omar al-Bashir or Kenya's President Uhuru Kenyatta say these things, they are obviously not being objective and overstating matters. They are involved personally. People like them deny facts and invent alternative ones. They won't even take into account that many ICC staff members are from sub-Saharan Africa, including top officials like the Chief Prosecutor Fatou Bensouda (Gambia), the Court's President Chile Eboe-Osuji (Nigeria) and his deputy Joyce Aluoch (Kenya). It is not hard to see what is driving the African politicians concerned: they fear the court, so they discredit it. Their criticism does not really merit serious debate, but it does unfortunately have an impact on some people and in some countries. For this reason, it is good that the ICC has responded, not least by starting to take a closer look at other world regions. In this context, the investigations of crimes in Georgia deserve to be mentioned, as well as preliminary examinations concerning Iraq/UK, Colombia, Palestine/Gaza, Ukraine and Venezuela.



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From judge to minister: Sérgio Moro.

## Controversial appointment

**Brazilian President Jair Bolsonaro's decision to appoint Sérgio Moro, a federal judge, as justice minister is highly controversial. Critics warn that the justice system is being politicised. After all, it was Moro who ensured that Bolsonaro's strongest political rival, Lula da Silva, the former president, was not allowed to run in the election once more.**

By Carlos Albuquerque

In early April, Moro's investigations resulted in the arrest of former president Luiz Inácio Lula da Silva. Charged with failing to declare ownership of an apartment, the elder statesman was sentenced by the Curitiba judge to 12 years in prison for passive corruption and money laundering. His treatment seems ut-

terly disproportionate given that other Brazilian politicians, who have committed far more serious offences, have not been indicted and so far escaped even the merest stain on their careers.

Although all the polls showed him to be the strongest candidate, Lula was banned from running in the presidential elections in October 2018 because he was in prison. Moro's ruling thus helped Bolsonaro to win – at least indirectly. In the eyes of the people who blame Lula's Workers' Party for all the country's ills since protests erupted in 2013, Moro became a kind of superhero, symbolising the fight against corruption.

Indeed, the conduct of "Superminister" Moro has so far been full of contradictions. Some of his actions as a judge have

not been honourable and impartial. Serving as a judge in Curitiba, he repeatedly stated that he had no intention of going into politics. Now he is joining a new government after having jailed its most influential opponent. That decision casts doubt on the legitimacy of the Operation Car Wash (Lava Jato), the large-scale anti-corruption investigation that, apart from Lula's arrest, has had many legal implications.

One of the responsibilities of the National Council of Justice (CNJ) is to ensure the independence of the justice system. It also conducts disciplinary proceedings against members of the judiciary. In early November, it asked Moro to explain his alleged party-political activities while still serving as a judge. He denied any wrongdoing and any connection between his ministerial appointment and Lula's prosecution.

Moro claimed it had "surprised" him that he was invited to become justice minister. Today, however, it is known that Moro was contacted by Paulo Guedes, the incom-



ing finance minister, during Bolsonaro’s election campaign.

**LINGERING SUSPICIONS**

The suspicions that Moro may be guilty of political interference is fuelled by other facts too. During the Lava Jato investigation, he revealed that former president Lula da Silva’s phone calls had been intercepted, including one with Dilma Rousseff, his successor as head of state. The fact that Lula’s phone was tapped was not entirely surprising, but the timing of the revelations was significant. They came shortly before Lula was going to become a minister in Rousseff’s cabinet. Moro’s intervention prevented that.

Moro later apologised to the Supreme Federal Court for the “controversy” thus

caused. He gave assurances that the breach of confidentiality about wiretapping had not been driven by any desire to generate “party-political polemic or conflict”.

During a conference at Harvard University in 2017, Moro described election slush funds as fraud and “a crime against democracy”. However, Onyx Lorenzoni, the new president’s chief of staff, has admitted the use of slush money for campaign purposes. Initial investigations have been launched against him. Asked how he could join an administration tainted this way, Moro replied: “He has admitted it and apologised”. In Lorenzoni’s case, the judge evidently felt that an apology sufficed for an acquittal from a criminal charge.

To push through his right-wing agenda, Bolsonaro will have to forge majorities in Brazil’s fragmented congress. He will also need the support of the Supreme Federal Court. It is quite possible that he will appoint Moro to the highest judicial level in 2020 or 2021. That is when two top-tier justices are due to retire. Asked about this prospect, Moro spoke of “a future possibility”. Experts believe Moro’s immediate appointment as a Supreme Federal Court justice would cause disquiet in Brasilia. So far, he was a lower-level judge and has not handled any appellate cases. The newspaper

Folha de São Paulo quotes one district court judge as likening his possible promotion to “appointing a soldier from the ranks to command generals”.

It is also possible, however, that the former federal judge has other ambitions. Despite denying any such intention, he may be considering to run for president in 2022 in the hope of becoming Bolsonaro’s successor. He says he sees his present role in the administration as a technical rather than political appointment. But given his history, the more liberal sections of the population no longer trust him.

Security experts say that the team Moro has put together, is experienced in fighting corruption and organised crime, but has little expertise in other important areas such as combatting robbery and murder. Moro can no longer pin the blame on the Workers’ Party; his own actions are the ones that will now be judged.



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Supporter of “Superminister” Sérgio Moro.

# Recognising a minority's human rights

In March 2018, Pakistan's transgender people had an unlikely revolution when legislators passed a new law to protect them. It is a step towards ending marginalisation and deprivation.

By Mahwish Gul

The Transgender Persons (Protection of Rights) Act 2018 not only ensures the right to be recognised as per his or her perceived gender identity. It also spells out their fundamental rights, including to inheritance, education, employment, vote, holding of public office, health, assembly, access to public spaces and property for example. The law thus confirms that transgender persons enjoy all the rights that the nation's constitution grants its citizens.

The law accords transgender persons the right to express their gender according to their "innermost and individual sense of self", whether that corresponds to the sex they were assigned at birth or not. It thus guarantees them the right to be officially registered according to the identity they chose. That includes all purposes, including identification card, driving licenses, passports, educational certificates and domiciles. Moreover, they can change existing registrations.

According to the law, the person's sense of identity is what matters, not the genitals or other physical characteristics. The law defines a transgender person as "any person whose gender identity and or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth."

The reform is a huge step for Pakistan, a predominantly Muslim country with rather conservative ideas of gender roles. To what extent it will contribute to improving the fate of transgender people in practice, however, remains to be seen. Traditionally, the Hijras – a South Asian term for transvestites, transgender people and eunuchs – are

a poor and marginalised community, barely surviving on the fringes of the society.

There are no reliable official statistics concerning the number of transgender persons in Pakistan. According to the 2017 census, there are 10,000, but civil-society groups estimate that there are up to 500,000. Census data all over the world tend to be unreliable in regard to marginalised communities. For similar reasons, it is impossible to tell what average incomes Hijras typically have or what their purchasing power is. It is obvious, however, that they are mostly condemned to multi-dimensional poverty.

Pakistan's Hijras live in isolation, confined within their own, scattered communities and shunned from ordinary civic and social life. They are disowned by their families, in most instances soon after their birth, and can only find refuge among their kind. With no hope of a meaningful life, they survive by begging, show dancing and prostitution.

Mocked and ridiculed their entire lives, they face consistent harassment, vio-



lence, abuse, rape and exploitation. Abuse by the police is common too. After decades of neglect and persecution, the Transgender Persons (Protection of Rights) Act now offers new hope to this long-oppressed community, but it has not yet brought an end to structural and systemic discrimination. Authorities must now implement the legal principles.

## JUDICIAL DECISIONS

These principles are not totally new, however. The judiciary first pronounced the inklings ten years ago. The Supreme Court of Pakistan has ruled in favour of transgender persons several times. In an attempt to protect the rights of this community, a lawyer had filed a constitutional petition in early 2009. Soon after, the Court ruled that the government had to register Hijras with an aim to full social inclusion.



Hijras rallying for their rights in Peshawar in 2018.

In 2012, the Supreme Court allowed the transgender community the right to be registered to vote and identify themselves as a third sex. In 2013, the Court ruled that the transgender must be treated as equal citizens of Pakistan, enjoying the same constitutional rights. Among other rulings, the Supreme Court conferred the rights to transgender persons of inheritance, identity, employment and protection from harassment by law enforcement authorities.

In the Transgender Persons (Protection of Rights) Act, legislators have acknowledged these principles. The new law has triggered a series of “firsts” for transgender persons in Pakistan:

- In March, a 21-year-old journalist became the country’s first transgender news anchor.
- In April, the first school for transgender community was launched offering vocation skills training.

- In August, the first transgender citizen was able to open a bank account, and another one launched her own fashion brand.

There are many similar stories. They show that at least some members of the transgender community are benefiting from a changing culture, though their experience may not be representative of all transgender people in Pakistan.

Discrimination has not stopped, however. In September, for example, four men killed a transgender person who resisted a sexual assault. The culprits put their victim on fire, and she died after suffering 80 percent burn injuries. Three days later, an official of Pakistan’s Law and Justice Commission was asked to report to the Supreme Court. He said that, since 2015, at least 500 transgender persons have been killed.

In the same hearing, Mian Saqib Nisar, the chief justice, announced that the

Supreme Court will soon hire transgender staff. Observers consider this an important precedent. The grassroots reality for many transgender people remains tough, nonetheless. Transgender persons continue to be chastised and harassed, ridiculed and stigmatised and deprived from their most basic right of survival and life of dignity. Only time will show what difference the new law can make.



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## History of a marginalised community

In contemporary South Asia, transgender people – commonly called “Hijras” – suffer discrimination and exclusion. Things were not always like this.

In the Mughal era, eunuchs or Khawaja Sira, as they were called, were the most trusted royal servants. They wielded enormous power, respect and some managed to amass large amount of wealth. They were usually appointed as custodians of harem and some rose to the ranks of army generals, royal teachers and court advisors.

With the decline of the Mughal Empire and the advent of British rule, their influence waned. In 1871, the colonial power introduced the Criminal Tribes Act (CTC). It required registration and control of

eunuchs. There was a blanket suspicion of kidnapping, castration and sodomy.

Under the CTC, wearing female clothing was a punishable offence for men. According to this law, “any eunuch [...] who appears, dressed or ornamented like a woman, in a public street or place, or in any other place, with the intention of being seen from a public street or place, or who dances or plays music, or takes part in any public exhibition” could be sentenced to up to two years of imprisonment plus a fine. Moreover, the CTC criminalised “all persons of the male sex who admit themselves or on medical inspection clearly appear to be impotent”.

Colonial law deprived eunuchs of their primary



**Marvia Malik, Pakistan’s first transgender TV anchor, addressing a press conference.**

source of income and any kind of rights. It pushed them further into poverty and social exclusion. According to English understanding, there were only two sexes. Homosexuals were criminalised too.

Historians report that the British wanted to erase the

Hijras as a visible socio-cultural category and gender identity. While they did not succeed in doing so, many faith leaders adopted the colonial power’s understanding. Today, conservative Mullahs oppose reforms that safeguard Hijra rights. This is one reason, why the colonial legacy is only ending very slowly.

It took Pakistan’s Supreme Court until 2009 to formally appreciate the civil rights of Hijras, and it took almost another decade for legislators to pass a protective law (see main story). It is interesting to note that a similar pattern is evident in India. The Supreme Court of India ruled that homosexual acts among consenting adults are a matter of privacy and not illegal. Hindu-fundamentalists did not appreciate that judgment. Their faith has historically been much more liberal than contemporary fanatics admit – as is true of Islam too. (mg)



Rural women in Senegal: the World Bank wants them to have a voice in policymaking.

## Good enough governance

The rule of law is not simply about enforcing legislation. Legitimacy and acceptance depend on people’s broad-based involvement in public affairs. The World Bank assessed related matters in its World Development Report (WDR) in 2017.

By Mahwish Gul

The topic of this WDR is governance and the rule of law. It wants governance to be geared to development, which it does not define in economic terms but as “the removal of various types of unfreedoms”, referring to

Amartya Sen, the Nobel laureate. The report then goes on to state the objectives of development as minimising the threat of violence (security), promoting prosperity (growth) and ensuring that the prosperity is shared (equity). Moreover, sustainability for future generations must be ensured.

The WDR points out that policies that should lead to positive development are often either not adopted at all or poorly implemented, and may even end up backfiring over time. Its guiding question is why this is so – and points out that this is an issue of governance, which the WDR defines as the

process through which state and non-state actors interact to design and implement policies. They all act within a given set of formal and informal rules that shape power – but are also shaped by power.

To gear governance towards development, the WDR makes a passionate case against the “best practice” approach, arguing that “best fit” is more important. Adopting an implementable second-best policy is preferable to a seemingly perfect, but unimplementable one. The WDR argues that three principles should guide attempts to improve governance:

- distinguishing the forms of institutions from their functions,
- building capacities in ways that reduce power asymmetries, and
- focusing not only on the rule of law, but just as much on the role of law.

For two decades, the World Bank has been calling for “good governance”. This was basically a “best practice” approach. Critics pointed out, however that the list of normative requirements was long and apparently unrealistic. Instead, the World Bank is now focusing on “good enough” governance. The first principle means that results matter more than the perfect institutional design.

It is noteworthy that the World Bank considers power asymmetries in the context of capacity building. In the past, it promoted technocratic solutions that were seemingly beyond politics and supposedly transcended power relations. By contrast, the WDR now admits that policies may be ineffective simply because groups with enough bargaining power oppose them. They may even fail when such groups merely lack incentives to cooperate. The second principle thus is about these issues being considered when investments in capacity building are made.

The third principle is to focus on the role of law, which is to settle conflicts peacefully in accordance with norms that society generally appreciates. Such norms develop historically, with legitimacy depending on people’s acceptance and their sense of justice. The rule of law thus results from a home-grown process of contestation that shapes societies. Such processes can take a very long time, according to the WDR.

## THE THREE “COS”

As stated above, governance for development means that policymaking reduces “unfreedoms”. According to the WDR, commitment, coordination and cooperation are essential prerequisites of effective policymaking. Apart from government institutions, a wide range of interest groups have roles to play in governance. For example, various non-governmental organisations, including business associations or faith-based institutions, have a bearing on governance.

The success of development policies depends on three “cos”:

- Commitment can ensure that policies are consistent and continuous over time.
- Coordination implies that diverse beliefs and preferences are aligned.
- Cooperation means that compliance is voluntary and no freeriding occurs.

In real life, none of the three can be taken for granted however, and if one or

more are faulty, the result is policy failure. According to the WDR, it is essential to identify the functional problem in such cases. On that basis, the authors recommend, policymakers can find solutions. To better gear governance to development, they can take several approaches:

- the policy arena can be made more “contestable” by involving additional interest groups in decision making,
- parties can be given incentives to cooperate, and
- actors can appeal to people’s preferences and beliefs.

The WDR wants systems of governance to become more contestable in the sense of all people concerned and affected becoming involved in the policy process. In any given country, power is typically distributed according to some kind of elite bargain that safeguards the status quo. Citizen engagement can challenge and change that constellation. International interventions can help to make that happen. Donor agencies, in other words, do not have an unpolitical role. They should design interventions in ways that lead to development results.

Governance for development ultimately depends on all parties being empowered to express their interests and exert influence. The more interest groups are involved, the better policies will reflect their needs, and, as a result, cooperation will become more likely. Incentives can help to commit actors to policy compromises and facilitate effective implementation. Finally, participants’ preferences and beliefs matter in terms of shaping decisions.

On this basis, reforms can be agreed and implemented. They can concern specific laws, programmes or organisations. They can also lead to adopting entirely new rules. Not only the drafting of laws benefits from broad-based participation, policy implementation and the management of state agencies improve too.

As policy processes are complex and involve many parties, prudent policymakers must anticipate opposition. They must also assess reforms’ unintended consequences. The important thing is to achieve consensus or compromise concerning policy goals and then find ways to make those goals come true.

Historically, the World Bank basically equated development with economic

growth, but that stance has become untenable. The WDR 2017 shows that politics matter because politics shape policies. It is most welcome, moreover, that the World Bank is now looking for “best fit” instead of promoting “best practice” with the implication of one size fitting all. The WDR thus shows that the bank appreciates the ownership of the developing countries rather than proposing technocratic blue prints.

## LINGERING AMBIGUITY

Nonetheless, a sense of ambiguity persists. On the one hand, the WDR points out that the quality of governance and the rule of law depend on people’s acceptance, but on the other hand, it wants international partners to have a bearing on making the policy arena more “contestable”. The irony of the matter is that while human rights were conceived as universal principles, they cannot be taken for granted everywhere.

Rural communities who live according to tradition in developing countries, for example, mostly do not have notions of men and women having equal rights. The World Bank wants these communities to be heard. At the same time, it wants the women to have equal rights and be heard. Indeed, both the community’s empowerment and women’s empowerment are ultimately rooted in western ideas of human rights. Strengthening one, however, may not lead to the strengthening of the other.

Either way, the WDR suggests ways to enforce ideas of human rights in countries that it concedes may not be ready for them. If the rule of law results from long periods of inner-society contestation, we cannot assume that any multilateral organisation’s ideas on these matters seem valid to all people in all countries. Ultimately, the World Bank thus still claims to express a universal truth.

The WDR 2017 is a culmination of the last two decades of the bank’s steady attempt to reposition itself and its policies as pro-poor, inclusive and participatory. The report consists of a rich synthesis and illustrated analysis to make the case for ‘good fit’ approaches to development. It has potentially far reaching implications for not only how the bank operates, but for other international development agencies as well. To what extent that happens remains to be seen.

Biodiversity is globally in danger: diver near the island Mindoro, Philippines.

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