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# **INTERMEDIARY GROUPS AND PARALLEL STRUCTURES: INTERNATIONAL LEGAL ASPECTS OF DEVELOPING CONSTITUTIONAL ORDERS IN SUB-SAHARAN AFRICA**

Konrad Ginther\*

## **I. Introduction**

“Developing constitutional orders in Sub-Saharan Africa” can be understood so as to refer to constitutional orders in Sub-Saharan Africa (SSA) which are developing in a dynamic process and which form part of a larger developmental context. “Developing constitutional orders in Sub-Saharan Africa” can, however, also be understood to refer to the active creation of constitutional orders in SSA through individual and collective human efforts of different kinds, including academic analysis and categorization of such processes and the design and theoretical projection of alternative constitutional models and modes of their implementation.

In this paper the latter approach is taken. The initial assumption is that the development of constitutional orders in SSA will be determined by both internal and international factors. This paper will mainly attend to the question of how recent developments in international law and international legal thinking are or should be related to the issue of developing constitutional orders in SSA.

According to the “Call for Papers of the Antwerp workshop”<sup>1</sup> one should leave the law as it is for the time being, and study the specific circumstances related to the “global environment of SSA political systems and their impact on the constitutional order and governmental practice.” The “global environment” includes internal and external factors, and, with the latter, relevant aspects and/or segments of the international

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1. Cf. “Call for Papers” 11 February 1988.

political *and* legal order. The global environment, in which any political system functions today, can be characterized by: global interdependence and the increasing need for coordination and cooperation between states; in particular development cooperation on a governmental and non-governmental level; the broadening spectrum of statehood, reaching from superpower-status to micro-states and the so-called least developed countries, the majority of which are on the African continent; a growing international recognition of peoples' rights to self-determination and development both vis-à-vis specific governments and the international community at large; a new understanding of the promotion of human rights, including peoples' rights, in particular participatory rights to development; the growth of international organizations endowed with collective guidance/legitimizing authority in respect to newly emerging order systems regulating both internal and inter-state relations of a new kind; and ultimately the fact that the traditional notion of statehood as a generic term, which is supposed to cover at least all the 159 member states of the United Nations, has become questionable, due also to the fact that peoples are gradually endowed — in theory and practice — with rights under international law, in particular so in a developmental context.

The notions "intermediary groups" and "parallel structures" will be introduced here in order to highlight the parallelism of peoples and governments as a structural quality of SSA political systems, the impact of which on the constitutional orders and governmental practice in SSA will depend also on the development of the international legal order and its institutions, in particular on the proper application of those specifically designed for development co-operation.

The survival and development of the "weak African state" depends on co-operation within a "benevolent international system," regional, inter-regional and global.<sup>2</sup> The objects of this paper are: to discuss recent developments in international law which can have a "domestic policy function" in regard to internal factors concerning the development of constitutional orders in SSA; to delimit certain fields of research; and to raise questions connected therewith. The internal factors which are of interest here are the so-called "intermediary groups," which can under certain circumstances build up to so-called "parallel structures," which exist and function outside of, or parallel to, the structures of formal statehood. "Intermediary groups" as a sociological concept refers to a

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2. Cf. Jackson & Rosberg, *Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood*, WORLD POLITICS 1 (1982).

broad range of naturally grown collectivities, such as ethnic groups, extended family structures, villages, chieftainships, etc. as well as to a broad range of voluntary associations of individuals such as churches, trade unions, cooperatives, NGOs of various orientations, and organizations of popular participation for different purposes, e.g., soil or water conservation, etc. Intermediary groups stand between and thus mediate between the individuals and the macro-structures of states.<sup>3</sup> In the case of developing states some of the intermediary groups assume development functions independently of official development programs and try to stay independent from government control. The focus of this paper is on the legal aspects of this type of "intermediary group," i.e., on voluntary organizations of popular participation, emerging from spontaneous initiatives at the grassroots level.

The international lawyer's concern with this phenomenon has its roots in a broadening spectrum of statehood, including the so-called "weak African developing state," in the gradual emergence of "peoples' rights" under international law, and the evolution of an increasing body of international law of development cooperation with attending institutions. What is the relationship between a people's right to development under international law and organizations of popular participation in a developmental context of the African developing state? The purpose of this paper is to elaborate on the theoretical validity and the practical meaning of this question. Another question is whether the special circumstances related to the development of constitutional orders in SSA require a broad concept of constitutional process, so as to include the constitution building functions of people, starting with spontaneous initiatives of self-organization at the grassroots level, and whether the special nature of the African developing state justifies a recourse to a broad understanding of law, which allows certain institutions to operate as legal agents of developing constitutional orders, without forming part of the formal constitutional order of the state and to be thus involved in establishing African statehood as the product of its specifically Africa-centered legal history. In an attempt at "fresh thinking" on developing constitutional orders in SSA a number of questions will be raised here, without, however, providing any conclusive answers. It cannot be otherwise; in this respect further research will be needed.

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3. Cf. Peter L. Berger's contribution in the Working Group of Governmental Experts on the Right to Development; see *infra* note 26. This contribution and the conversation I later had with Professor Berger stimulated the present paper, for the weaknesses of which the author of this paper is of course alone responsible.

## II. The Nature of the African Developing State, the Role of Peoples in Developing Constitutional Orders in SSA and the International Law of Development Cooperation.

With decolonization and the accession of a whole continent of new states to formal "independence," a new type of state appeared in the international arena. Some authors wonder whether the traditional notion of statehood is still of universal applicability. In any case, it appears appropriate to depart in respect to an inquiry into the development of constitutional orders in SSA from what might be perceived as essential characteristics of the African developing state and to elaborate on how the international environment relates to it. This paper will refer to the African Charter on Human and Peoples' Rights and to the peoples' right to development enshrined therein. A people's right to development is presently promoted also on the level of the United Nations. Development strategies, allowing for more popular participation in development, are envisaged and furthered by the International Labor Organization (ILO) and within the Lomé process. The relevance of "grassroots movements" has meanwhile also caught the serious attention of the World Bank<sup>4</sup> and the Economic Commission for Africa (ECA).<sup>5</sup> People are becoming more important with respect to developing constitutional orders in the emergent African state and with respect to the international law of development cooperation.

### A. *The African Developing State, the Decline of Territoriality and the Increasing Role of Peoples*

#### 1. *The Question of the Nature of the African Developing State*

The development of constitutional orders in Europe and the development of the international legal order went hand in hand, creating a Euro-centric bias, in respect both to the notion of statehood and to the fundamentals of international law. Our thinking on law and state, and indeed also on international law, is closely linked to the historical, political and legal phenomenon of the European state and the development of its constitutional order. In view both of decolonization and present strategies and policies of development cooperation a "fresh thinking" on African

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4. Cf. WORLD BANK, *SUSTAINABLE GROWTH WITH EQUITY, A LONG-TERM PERSPECTIVE FOR SUB-SAHARAN AFRICA* (1989).

5. See *infra* note 33.

political and constitutional systems is indeed called for and does not sound over ambitious.<sup>6</sup> One author recently stated that the Euro-American state remained the model when we speak of African states and when we formulate our "help," and, questioning the existence of African states beyond their recognition in international law, this author ultimately concluded that the concept of the nation state of the Western type had no genuine roots in African soil and was bound to degenerate shamefully.<sup>7</sup> The traditional concept of statehood, a product of the formation of the European state system, is indeed a questionable legacy of colonialism in respect to the formation of constitutional orders in SSA.<sup>8</sup> While the classical notion of statehood need not be discarded altogether, its elements - territory, people and government - will have to be weighed in view of the realities of the African developing state and in the light of new developments of international law or in any case of new claims under it.

The African developing state has been characterized as a "weak state" for several reasons.<sup>9</sup> A deficit of state penetration manifests itself in a gap between the state government on the one hand and the state's population on the other, which is most obvious in respect to the relationship between urban and rural areas. The lack of forward and backward linkages between different sectors of the economy and insufficient or partly non-existent exchanges between the modern formal and the traditional informal sectors of the body politic and the economy amounts to what has been called "structural heterogeneity."<sup>10</sup> This state of affairs constitutes a further weakness of the African developing state, which is best highlighted by reference to the gap between the world of the modern industrial base in the urban area with a more direct access to and control of available development resources on the one hand and to the world of the neglected, marginalized and impoverished rural areas where the majority of the state's population resides and where the "weakness" of the African state in the sense of the absence of the state as a provider of

6. Cf. "Call for Papers" 11 February 1988.

7. H. Henrý, *Political Order in Sub-Saharan Africa — The European View of African States at Stake*, KANSAINOIKENS. IUS GENTIUM (1988).

8. Cf. Jackson, *Quasi-states, Dual Regimes, & Neoclassical Theory: International Jurisprudence and the Third World*, 1987 INT'L ORG. 519, 535.

9. Cf. Jackson & Rosberg, *supra* note 2. The concept of the "weak state" was introduced by GUNNAR MYRDAL, *ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS* (1968). With regard to the dependent weak African state see F. Nuscheler and K. Ziemer, *POLITISCHE HERRSCHAFT IN SCHWARZAFRIKA* (1980) at 148 and following.

10. See Nohlen & Sturm, *Über das Konzept der strukturellen Heterogenität*, in 1 HANDBUCH DER DRITTEN WELT 92-116 (1982).

services is said to be felt most, on the other. The economists speak of a "crippled economy."<sup>11</sup>

The duality of the traditional and the modern sectors of the body politic of the African state finds its legal underpinning in a legal dualism (or, as the case may be, pluralism) of modern received European law and traditional African customary law (and, as the case may be, Islamic law). The legal dualism (pluralism) is, as regards the social culture and sentiments in the African developing state, accompanied by a gap between the government, its administration and impersonal bureaucracy on the one hand and the people, who tend to rely on their traditional values and institutions, on the other.

An inquiry into developing constitutional orders in SSA should address squarely the question of the nature of the African developing state as a new phenomenon from the point of view both of the theory of state and international law. If the essence of statehood under international law is traditionally seen in a territorial unit with defined frontiers, a settled population and an independent effective government extending over more or less the whole state territory, many an African state may be considered to be a questionable subject under international law. However, this is not the real issue. The real issue is that a large part of the African people remain outside the formal structures of African states, and will have to rely for their survival on self-help and self-reliance vis-à-vis a state or government which is often incapable of providing the majority of its population with such collective goods as law and order, justice, human rights and social justice, security and welfare, sufficient and clean water and soil, etc.

In view of the infrastructural weaknesses of the African developing states,<sup>12</sup> the legal and in particular international legal standing of the people in such a state becomes crucial, in respect both to the short-term objective of assuming essential public functions and responsibilities and to the longer-term objective of developing constitutional orders in SSA.

## 2. *The Decline of Territoriality and the Increasing Role of Peoples in Respect to Constitution-Building*

The artificiality of territorial delimitation as well as the institutional and infra-structural weaknesses of the African state imply a certain

11. See to the foregoing SENGHAAS, *PERIPHERER KAPITALISMUS, ANALYSEN ÜBER ABHÄNGIGKEIT UND UNTERENTWICKLUNG* (2d ed. 1977), in particular: R. Stavenhagen, *AGRARISCHE STRUKTUREN UND UNTERENTWICKLUNG IN AFRIKA UND LATEINAMERIKA*, at 276.

12. See A. Allott, *The Past and Future Contribution of Law to Development in Africa*, 1980 Y.B. AFR. L. 3 at 6.

measure of “de-territorialization,”<sup>13</sup> i.e., that the territorial dimension of statehood and government is, in respect to constitution and nation-building, of declining importance, while the development of social infrastructure is becoming more and more the essential element of any long-term development strategy, in which socio-economic and constitutional developments are mutually dependent upon each other both in legal and in broader cultural terms. The decreasing importance of territoriality — a phenomenon of universal validity<sup>14</sup> — goes hand in hand with an increasing importance of popular participation in community development, which means in fact the empowering of people in respect to developing constitutional orders in SSA, as an essential act of improving governance in Africa by relying on the social responsibility of the people and thus enhancing the accountability of their leaders. In view of the structural nature of the African developing state — not to mention the legitimacy crisis often going along with it<sup>15</sup> — the people will often be left to provide essential services for themselves and will have to organize themselves accordingly. They will at the same time assume functions in respect to developing constitutional orders, in particular in respect to organizing limited and responsible government. To this effect their roles and functions need to be characterized in terms of law, particularly in relation to the promotion and protection of human rights under international law. The African Charter on Human and Peoples’ Rights, which has recently entered into force, offers new opportunities to promote and guarantee a peoples’ right to development and participation in developing constitutional orders in SSA on the African regional level.

***B. The Inclusion of a Peoples’ Right to Development in the African Charter of Human and Peoples’ Rights (Banjul Charter)***<sup>16</sup>

The insertion of “peoples’ rights” in the Banjul Charter may, in view of what is normally the substance of a Human Rights Convention, seem somewhat out of place. The inclusion in the Banjul Charter of peoples’

13. On the decreasing importance of “territory” in international relations and law in general and in respect to African states in particular, see Dembinski, *Le territoire et le développement du droit international*, 1975 REVUE SUISSE DU DROIT INTERNATIONAL 121, 136 and following.

14. Cf. the recent statement by Federal Chancellor Helmut Kohl on Self-determination of Peoples in Europe and on the Decreasing Importance of Frontiers as Delimitations of Sovereign Territory, *Neue Zürcher Zeitung*, Oct. 12, 1989, at 1.

15. Cf. R.H. JACKSON & C.G. ROSBERG, *PERSONAL RULE IN BLACK AFRICA, PRINCE, AUTOCRAT, PROPHET, TYRANT* (1982).

16. CAB/LEG/67/3 Rev. 5 in 21 INTERNATIONAL LEGAL MATERIALS 58-68 (1982).



(collective) rights in addition to human rights pertaining to individuals was, we have been told, a concession to the demands of socialist oriented member states of the Organization of African Unity. It was part of the compromise that the notion of "peoples" was not defined.<sup>17</sup> The provisions of the Banjul Charter on peoples' rights in general and on the right of peoples to development in particular (Art. 22) may, due to their origin and to the obscurity of the meaning of "peoples," remain a dead letter. They could be used, however, for a dynamic interpretation of developing constitutional orders in SSA.

Article 22 of the Banjul Charter provides for the right of all peoples to enjoy economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. According to Art. 22 para. 2, states shall have the duty, individually or collectively, to ensure the exercise of the right to development. According to Part II of the Banjul Charter, the African Commission on Human and Peoples' Rights (Commission) shall ensure the protection of human and peoples' rights under conditions laid down by the present Charter (Art. 45). The Banjul Charter allows that communications and complaints with regard to the violation of the Banjul Charter may be communicated to the Commission by states and other applicants, without any further specification. In its preamble the Banjul Charter refers to the "virtues of African historical tradition and values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights." There is an ongoing debate as to what extent African historical traditions and values constitute a hindrance to nation building and development. At the same time there is also an increasing awareness that the traditional African social and normative culture, in particular a "communal" approach to questions of law and society, constitutes an indispensable factor of institution building and development in Africa.<sup>18</sup> In order to be effective the developing of constitutional orders in SSA will have to take account of the "milieus of thought" in which constitutional systems and theories of law have a

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17. See Benedek, *Peoples' Rights and Individuals' Duties as Special Features of the African Charter on Human and Peoples' Rights*, in REGIONAL PROTECTION OF HUMAN RIGHTS BY INTERNATIONAL LAW: THE EMERGING AFRICAN SYSTEM 59 at 60, 63 (Künig, Benedek & Mahalu eds. 1985).

18. Cf. African Alternative Framework to Structural Adjustment Programmes for Socio-Economic Recovery and Transformation (AAF-SAP, UN-ECA, E/ECA/CM.15/6/Rev. 3, 10th April 1989, para. 34 ff.: "Establishing a Self-Sustaining Process of Economic Growth And Development") and ALLOTT, *THE LIMITS OF LAW* (1980).

chance to develop and which constitute the most fundamental framework for their operation.<sup>19</sup> If the provision of a peoples' right to development, as enshrined in the Banjul Charter, is being explored as an evolutionary concept and interpreted and developed in the light of the specific African socio-cultural milieu and in response to the everyday needs of those directly concerned, as ultimately the driving force for the formation of law,<sup>20</sup> it may well lend itself to provide a basis for enhancing "popular participation in development,"<sup>21</sup> in respect of which the concept of "intermediary groups" is gradually gaining ground.

The concept of "intermediary groups" is an analytical concept which allows the identification of "peoples" by reference to smaller *operational units* (as distinguished from or in addition to ethnic, language or religious groups) which may, besides their functions as organizations of self-help and self-reliance, also assume a participatory role in developing constitutional orders in SSA. The Banjul Charter does not contain a direct indication to this effect; in Art. 60, however, the Commission is asked to draw inspiration from international law on human and peoples' rights in general and from the provisions of various African instruments on human and peoples' rights in particular. In Art. 61 the Commission is asked to take into consideration as subsidiary means to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity. These provisions contain a broad reference to international law as it is presently developed on a regional, universal and international level.<sup>22</sup>

The promotion of human rights in general and of a people's right to development in particular requires that the idea of human rights be related

19. On this and for an analysis and comparison of the social framework of the development of law in Europe and in Africa see M.G. Smith, *The sociological Framework of Law*, in *AFRICAN LAW. ADAPTATION AND DEVELOPMENT* 24, 25 (Kuper & Kuper eds. 1965). See also AAF-SAO *supra* note 18, at para. 22 on "Social Setting" and Th. Verhelst, "No Life without Roots" in *NORTH SOUTH NETWORK ON CULTURES AND "DEVELOPMENT."* Presentation of the Network, 20 April 1988 (23 Av. d'Auderghem, B-1040 Brussels).

20. Cf. MAX WEBER, *RECHTSZOLOGIE* 243 (Hgg. und eingel. von Johannes Winckelmann 2. Aufl., 1967), and K. Ginther, *Redefining International Law from the Point of View of Decolonization and Development and African Regionalism*, 1982 J. AFR. L. 49.

21. See A.B. Durning, *Action at the Grassroots: Fighting Poverty and Environmental Decline*, *WORLD WATCH PAPER* 88 (Jan. 1989).

22. For more details see K. Ginther, *The Promotion and Protection of Human Rights under the Banjul Charter: Peoples' Right to Development and the Position of 'Intermediary Groups'*, to be published in *HUMAN RIGHTS - PEOPLES' RIGHTS: CONTRIBUTIONS OF THE AFRICAN CHARTER* (Gündling ed. 1990).

to the social fabric and body politic of given states and ultimately to their normative culture and the fundamental categories of social ethics on which any development of social and legal institutions will depend, and on which any effort to promote human rights and to develop constitutional orders will have to rely.

The insertion of “peoples’ rights” in the Banjul Charter offers an opportunity to strengthen the role of peoples in developing constitutional orders in SSA as part of the promotion of human and peoples’ rights in Africa. As envisaged by the Banjul Charter, the promotion of human and peoples’ rights will have to draw from the law and the legal thought developed by other international institutions, regional, inter-regional and global.

**C. *The Promotion of a Right to Development and Participatory Development Strategies in the Light of the Work of Other International Institutions***

In an enquiry into developing constitutional orders in SSA and for that matter in determining the nature and essence of the African developing state, increasing emphasis on peoples as agents of development and as partners of development cooperation and addressees or, in any case, beneficiaries of specific international enactments can be observed. The notion of intermediary groups addresses smaller units of people, the function of which is or should be to bear responsibilities in respect to popular participation and in creating a development-centered constitutional order, both on the internal level of developing constitutional orders and on the international — governmental and non-governmental — level of development cooperation.

**1. *The UN “Declaration on the Right to Development” and the American Effort to Promote the Concept of “Mediating Structures”***

The “Declaration on the Right to Development” adopted by the General Assembly on 4 December 1986<sup>23</sup> offers an opportunity for strengthening popular participation in development.<sup>24</sup> In this declaration “the right to development” has been declared to be “a human right by

23. Res. 41/128. The Declaration was adopted by a recorded vote: 146 - 1 (USA) - 8.

24. Cf. Petersmann, *The Right to Development in the United Nations: An Opportunity for Strengthening Popular Participation in Development*, in DES MENSCHEN RECHT ZWISCHEN FREIHEIT UND VERANTWORTUNG 125 (Jekewitz ed. 1989).

virtue of which human persons and *all peoples* are entitled to participate in, contribute to and enjoy social, economic, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”<sup>25</sup>

While according to Art. 8 of the “Declaration on the Right to Development” states should encourage popular participation, the mode of its implementation was not specified, neither was the meaning of “peoples” defined in any way. In the discussion in the “Working Group of Governmental Experts” the United States delegate took a common sense approach of relying for the meaning of “peoples” on empirical evidence and on what the sociologist calls “mediating structures.” He addressed as holders of a “peoples’ right to development” various forms of “collectivities other than the State” which are crucial for development:

Even if a system does not permit private enterprise by individuals, the economic effort of families, villages, various traditional groupings (such as the groupings of kinship, tribe or ethnicity) and more modern forms of association (cooperatives and the like) are the true carriers of development. In sociological parlance, all such collectivities have been subsumed under the category of “mediating structures” — that is, collectivities that stand between and thus mediate between the individuals and the macro-structures of modern States. These “mediating structures” are essential to development under any system, be it a market or command economy; language which obscures their role *ipso facto*, obscures the real dynamics of development; by the same token, and very importantly, *if one talks about collective rights in the area of development, one must also bear these collectivities in mind.*<sup>26</sup>

This approach relies — as it was said on another occasion — on the “deeply communal, non-individualistic character” of non-Western cultures as well as on the mediating structures as “the soil from which political democracy may grow.”<sup>27</sup>

## 2. *The EC’s Emphasis on Decentralization and Popular Participation in Development and the Madrid Appeal of the Council of Europe*

A line similar to the one taken by Peter L. Berger in the “Working Group on the right to development” is being followed by the Commission of the European Communities, emphasizing decentralization and poli-

25. Art. 1 para. 1. Italics are mine.

26. Cf. General United States approach: Contribution by Prof. Peter L. Berger, United States Expert, 25 November 1981; E/CN.4/AC.34/WP.13 (26 Nov. 1981). Italics are mine.

27. Cf. P.L. Berger, *Democracy in Today’s World*, 2 DIALOGUE, 2, 4, 6 (1984).

centric development cooperation with the group of the ACP states and stressing in this respect the importance of rural communities, local collectives, unions and cooperatives as well as the support for spontaneous initiatives at the grassroots levels. Also the European Parliament came out in support of an active involvement of the rural populations in their own development by encouraging them to form groups, and at the same time it regretted the general lack of recognition of the major role played by peasant organizations and cooperatives at all stages of development.<sup>28</sup>

The involvement of grassroots communities and self-help-organizations as mediating structures has already been an objective of the Lomé III Convention.<sup>29</sup> The promotion of "popular participation" in development might well experience an upgrading in the course of the negotiations of Lomé IV<sup>30</sup> and become a major subject of the "policy dialogue" under the new Lomé Convention.<sup>31</sup>

Also the "Madrid Appeal," June 1988, contains a plea for self-reliant development and the promotion of local interest and self-help groups.<sup>32</sup>

### 3. *The African Alternative Framework to Structural Adjustment Programmes (AAF-SAP) for Socio-Economic Recovery and Transformation, Adopted on 10th April 1989*<sup>33</sup>

Africa's economic crisis is characterized by the disintegration of the productive and infrastructural facilities. Orthodox adjustment programs however cannot achieve their objectives without addressing the fundamental structural bottlenecks. This led the ECA to search for a viable conceptual and practical framework for structural adjustment in keeping with long-term development objectives, in the course of which the AAF-

28. See Report of the Committee on Development and Cooperation of the European Parliament, 4 Oct. 1988, Doc. A-2-205/88, 15 ff.

29. Cf. Arts. 30, 122 and 185.

30. See Ouverture Solennelle des Négociations pour la nouvelle Convention, ACP-CEE, Intervention du Président du Conseil, 12 Oct. 1988, SN 3519/1/88 rev. 1; the Final Declaration of the 12th Annual Meeting of the ACP-EEC Economic and Social Interest Groups, Brussels, 7 Dec. 1988; and Hailu, *Involving peasant organizations in Lomé IV*, LOME BRIEFING, No. 8/April 1989. See also the speech by Mr. Lorenzo Natali, Vice-President of the Commission of the EC for the opening of the negotiations for Renewal of the ACP-EC Convention/Luxembourg, 12 Oct. 1988.

31. On "policy dialogue" in general see *Is Lomé Policy Political?*, 105 THE COURIER 6 (Sept./Oct. 1987).

32. Cf. The Madrid Appeal of the European Conference of Parliamentarians and Non-Governmental Organizations on North-South Interdependence and Solidarity, held 1-3 June 1988, under the auspices of the Parliamentary Assembly in pursuance of its Resolution 878 (1987) of the Council of Europe.

33. E/ECA/CM.15/6/Rev. 3.

SAP was worked out and adopted by a joint meeting of African Ministers of Economic Planning and Development and the Ministers of Finance held in Addis Ababa on 10th April 1989.

In the present context it suffices to stress that the AAF-SAP extends its critique of present development efforts to the neglect of the informal sector (para. 11), that it emphasizes a human-centered development (para. 34 ff.) and postulates implementation strategies based on a genuine and active partnership between the government and the people through their various institutions and organizations. Popular participation should according to AAF-SAP, encourage the people to increase the development efforts (para. 123 ff.).

Popular participation has become the key concept of development strategies both of developing countries' governments and their cooperative partners. In February 1990 a major international conference on "Popular Participation in Africa's Economic Recovery and Development" will be held. It is hoped that this conference will re-enforce at the grassroots level the African people's right and ability to achieve sustainable development and to generate a spirit of solidarity and self-reliance. In announcing the conference, Professor Adedeji, the Executive Secretary of the ECA, called it "an exciting opportunity to work together with African grassroots organizations in finding innovative ways of harnessing the enormous energies of Africa's people in bringing the continent's crisis to an end."<sup>34</sup>

According to its founding fathers the AAF-SAP should constitute a basis for a constructive policy dialogue between African countries and their development partners in the implementation and financing of human-centered country programs, which should imply full democratization of all aspects of economic and social activities and — despite the peculiar characteristics of each country program — an intensified inter-country cooperation.<sup>35</sup>

With an apparent shift in development theory and strategy towards a more bottom-up approach of development with emphasis on popular participation and grassroots initiatives, new fields of research will require new modes of production of knowledge and a new paradigm of international relations and law, according to which "people matter,"<sup>36</sup> at times more maybe than states.

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34. Cf. 2 (1) AFRICA PRESS CLIPS 15 (1989).

35. Cf. Adebayo Adedeji, Foreword to AAF-SAP, E/ECA/CM.15/6/Rev. 3, iii.

36. Cf. R. Preiswerk, *Could We Study International Relations as if People Matter?*, in INTERNATIONAL RELATIONS IN A CHANGING WORLD 43-69 (Institut Universitaire de Hautes Etudes Internationales ed. 1977).

For this approach to become theoretically meaningful and practically relevant in respect to developing constitutional orders in SSA, the field of grassroots activities and various modes of popular participation need to be adequately researched.

### III. Popular Participation in Development: Parallelism of State and People and the Role of Intermediary Groups for Constitution Building in SSA

#### A. *The “Domestic Policy Function” or the “Internal Dimension” of the Right to Development*

Socio-cultural traditions and the modes of social organization and agricultural production that existed before colonialism cannot be restored. Small scale farming and respective social organizations, which are today considered to be crucial elements for an economic recovery and the development of more homogenous social and political structures in Africa,<sup>37</sup> will nonetheless be based on and informed by African traditions and by the African social culture, but will equally have recourse to new forms of social organization.

According to the “Guidelines for ILO activity for the promotion of people’s participation in rural development,” “participation-promotional activity” should help the poor in rural development through independent organizations, such as trade unions, cooperatives, action committees, associations, etc., always respecting the common people’s wisdom and culture with the aim that their knowledge and know-how be taken into account in developing and implementing a project from its inception onwards.<sup>38</sup>

Rural development as the centerpiece of development strategies requires support services by governments or otherwise, including credit facilities. Self-help organizations receive in many cases foreign financial and technical assistance, mainly through non-governmental organizations (NGOs).<sup>39</sup> For that matter, and since many African governments see in this a signal of limitation on their governmental power and react with apprehension

37. On this see Nwagboso, *The Agricultural Crisis*, WEST AFRICA 136 (Jan. 30-Feb. 5, 1989).

38. See Supplement to the ILO’s Role in Promoting People’s Participation in Rural Development, DGA/TEC (23 Mar. 1984).

39. Cf. PUTTING PEOPLE FIRST: VOLUNTARY ORGANIZATIONS AND THIRD WORLD DEVELOPMENT (Poulton & Harris eds. 1988).

and seek to assert or reassert control,<sup>40</sup> a clarification of the legal regime of peasant organizations and other self-help groups is required; in particular the strengthening of their positions vis-à-vis their own governments will at times need outside support.

At this point the "inner dimension" of a peoples' right to development<sup>41</sup> materializes, when the "life" of organizations of community development, self-help and popular participation needs to be guaranteed and becomes the subject of the "development policy dialogue" and/or possibly also of a complaint procedure before the Commission under the Banjul Charter.

The right of peoples to development will gain here its normative strengths however only on the basis of African realities. These need to be studied in order to allow regional and international instruments to exert a "domestic policy function" in respect to developing constitutional orders in SSA.

***B. On the Theory of Popular Participation and Research in the Real World: Participatory/Action Research and the Question of Legal Awareness***

The implementation of a people's right to development, which constitutes a prolongation of its right to self-determination, requires institutions of popular participation in development, not under the control of or dependent upon the state government.

According to Tilikaratna, self-reliant popular participation in rural development and the pursuit of an autonomous course of action require a combination of material, intellectual, organizational and management capabilities. The requirement of *organizational and management capabilities* implies the building of organizations and institutions over which people have effective control and which they can use as instruments of action. Popular participation will thus amount to *structural changes* through which peoples' access to material and intellectual resources will be improved. The essence of participation are organic entities created by

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40. See The Legal System of Human Rights in Africa and Europe: A Comparison. A Report on an Afro-European Conference in Strasbourg, November 8-14 1988, organized by the Institut Panafricain de Relations Internationales and the Friedrich-Naumann-Stiftung 8 (26, Av. Palmerston, B-1040 Brussels); L. TIMBERLAKE, *AFRICAN CRISIS* 213 (1985).

41. Cf. Ph. König, *Die 'innere Dimension' des Rechtes auf Entwicklung* (with an English summary), *VERFASSUNG UND RECHT IN UEBERSEE. LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA* 383-400 (1986).



the people for collective operations and shaped and patterned according to the design and modalities as decided by them.<sup>42</sup>

Oakley distinguishes between participation as a technical means to implement a development project more efficiently — he calls it the *passive form of participation* — on the one hand, and participation as a process in which confidence and solidarity between rural people are built up — the *active form of participation* — on the other. While the former, the passive form of participation, amounts to a managerial technique, the latter, the active form, is a technique “to facilitate” or “enable” rural people to have a more direct involvement in rural development. The critical elements in this process are *awareness-raising* and *organization-building*, the two fundamental bases for effective participation.<sup>43</sup>

Awareness-raising and organization-building will have to go along with a learning process and a “search for new knowledge.” “The growing complexity suggests that there are natural and social developments which we cannot adequately explain without generating new knowledge.”<sup>44</sup> One of the areas that requires the generation of new knowledge is the application of science and technology to development; another area is the application of the legal science to development,<sup>45</sup> in particular to “popular participation” — strategies in developing constitutional orders in SSA.

If the international lawyer, who turns his attention to the legal status of both peoples and organizations of popular participation under inter-

42. Cf. Tilikaratna, *THE ANIMATOR IN PARTICIPATORY RURAL DEVELOPMENT (CONCEPT AND PRACTICE)* 5 (1987). See further *THE PARTICIPATION OF THE RURAL POOR IN DEVELOPMENT: RELEASING THE CREATIVE ENERGIES OF RURAL WORKERS* (ILO ed.); and *PROMOTING PEOPLE'S PARTICIPATION AND SELF-RELIANCE* (ILO ed. Proceedings of a Workshop of Trainers in Participatory Development, Philippines, August 1988).

43. Cf. Oakley, *People's Participation in Conservation: A Review*, in *SADCC SOIL AND WATER CONSERVATION AND LAND UTILIZATION PROGRAMME, PEOPLE'S PARTICIPATION IN SOIL AND WATER CONSERVATION* 1-43, 3 and following. (Report No. 10, April 1987).

44. Cf. C. Juma, *Technology Policy and Economic Recovery, Africa's Weakest Links*, *SOUTHERN AFRICA, POLITICAL AND ECONOMIC MONTHLY* 14-17, (April 1988).

45. There is an abundant literature focusing to a large extent on the issue of human rights. Cf. *INTERNATIONAL LEGAL CENTER (ed.), LAW AND DEVELOPMENT. THE FUTURE OF LAW AND DEVELOPMENT RESEARCH. REPORT OF THE RESEARCH ADVISORY COMMITTEE* (1974); *INTERNATIONAL COMMISSION OF JURISTS (ed.), DEVELOPMENT, HUMAN RIGHTS AND THE RULE OF LAW* (1981); *INTERNATIONAL COMMISSION OF JURISTS (ed.), RURAL DEVELOPMENT AND HUMAN RIGHTS IN SOUTH EAST ASIA* (1981). For the more general aspects see R. Luckham (ed.), *LAW AND SOCIAL ENQUIRY: CASE STUDIES OF RESEARCH* (1981); C.J. Dias (ed.), *LAWYERS IN THE THIRD WORLD: COMPARATIVE AND DEVELOPMENTAL PERSPECTIVES* (1981); in particular see the essays by Dias & Paul, *Observations on Lawyers in Development and under Development*, and *Lawyers, Legal Resources and Alternative Approaches to Development* in *LAWYERS IN THE THIRD WORLD* (1981) at 337-361 and at 362-380, respectively.

national law, is to make any practically meaningful contribution to developing constitutional orders in SSA, he can do so only if his colleagues in the field of law, sociology, political science etc. share his paradigm of the global environment of SSA political systems, according to which "intermediary groups" and "parallel structures" mean a conceptualization of the situation of constitutional development, characterized by a dichotomy between the state, the colonial heritage, on the one hand and the people on the other, a situation which bears the seeds of fragmentation as well as a growth potential for "government by partnership."

***C. "Intermediary Groups" and "Parallel Structures":  
Subjects for Interdisciplinary Research and a Challenge  
to the Lawyer and to Legal Methods***

"Intermediary groups" and "parallel structures" are of a dynamic character; they are the expression of a formative or as the case may be transformative process of a developing society and its developing constitutional order. Institutions of self-organization of peoples, which are the intermediary groups of major importance, can be defined by reference to the way they are created, to the purpose for which they exist and by reference to the environment in which they have an, albeit precarious, existence.

The concept of a people's right to development, as enshrined in the Banjul Charter and laid down in the UN Declaration on the right to development, is equally of a dynamic character. It is a so-called "promotional right." This means that its realization needs to be promoted by legal awareness-raising and law-making, be it through international treaties, legislative enactments or, as in the present case, otherwise. From what has been said so far, institutions of popular participation can and should be looked upon as a means of legal awareness-raising in general and for promoting the law from the point of view of a right of peoples to development. They are by their very nature subjects of interdisciplinary research par excellence for the political scientist, economist, lawyer, etc. The political scientist's and economist's concern will be the functional soundness of institutions of popular participation, the lawyer's concern will be their durability through legal validation.

To speak of "intermediary groups" and "parallel structures" in respect to popular participation and in the context of developing constitutional orders in SSA constitutes a projection which needs to be tested by reference to social reality. Theoretical models of popular participation

need to be tested in the course of field research.<sup>46</sup> The ILO has since 1977 gone a long way in Asia and Latin America in doing integrated research and attending to technical cooperation in the area of Participation of the Rural Poor in Development (PORP). It identified innovative initiatives of promoting grassroots participation and self-reliance and conducted methodological experiments in animation and facilitation. More recently it turned to Africa and did research on popular participation in West, East and Southern Africa.<sup>47</sup>

In SADCC, with an inquiry into popular participation in water and soil conservation, a sectoral approach was adopted, cutting across all nine SADCC countries and exposing a considerable spectrum of diversity and variety.<sup>48</sup> Soil and clean water, like a healthy environment, are public goods of a fundamental nature which will have to be accommodated in any constitutional dispensation and for which popular participation will become in general of increasing importance.<sup>49</sup>

The lawyer who is interested in ascertaining the legal aspects of institutions of popular participation, beyond a general and abstract projection of an international legal right of peoples to development, will have to integrate his inquiry into ongoing research on "mediating structures" and should perceive spontaneous initiatives at the grassroots level as a driving force for the development of law and developing constitutional orders in SSA. This raises questions of legal theory and method.

As regards the lawyer's part, he will have to ascertain and characterize the normative structure of institutions of popular participation in terms of law: institutions, which do not originate and obtain their *raison d'être* under formal state law and for the legal characterization of which one will have to reach beyond formal state law in the sense of classical legal positivism. The question whether existing schools of natural law, or "legal realism" lend themselves adequately to understand organizations of popular participation as legal agents inherent in developing constitutional orders in SSA or if the law inherent in the process of developing consti-

46. Cf. The ILO Guidelines, *supra* note 38.

47. Cf. Md. Anisur Rahman, *Glimpses of the "Other Africa"* (World Employment Program Research Working Paper [WEP 110/WEP:48], Jan. 1989). For further examples of a variety of African self-help organizations see 99 *THE COURIER* 62-92 (Sept.-Oct. 1986).

PORP, literally, stands for Participatory Organizations of the Rural Poor.

48. *People's Participation in Soil and Water Conservation* (SADCC Soil and Water Conservation and Land Utilization Program, Report No. 10, April 1987).

49. The "Brundtland Report" mentions effective citizen participation in decision making as a first requirement in the pursuit of sustainable development, see *WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE* 65 (1987).

tutional orders in SSA can ultimately be understood only on the basis of new schools of law emerging with it, can here only be raised, but not further pursued. The more immediate and practical challenge to the lawyer is that the issue of developing constitutional orders in SSA requires a comprehensive approach transcending the boundaries of its discipline and risking active involvement in so-called participatory action research. Ideas of methodological purism will have to be abandoned, in order to opt for a "methodological pluralism," which "although it obviously sacrifices parsimony and elegance, more than makes up for it by affording balance and comprehensiveness . . . seeks to be faithful to the observed pluralism of international political life."<sup>50</sup>

#### IV. Concluding Remarks

The development of constitutional orders in Sub-Saharan Africa depends on both internal and external factors. The latter include the constitutional order of the international community, both in political and legal terms. The principal subjects of the international legal order were originally states alone and the major emphasis was on possession and delimitation of territory, including colonial territories as a base for political and also economic development. With decolonization on the basis of the principle of self-determination of peoples a new fundamental principle was added to the constitutional order of the international community. With the accession of a large number of new states to formal independence, among them some fifty African states, the international system is undergoing a fundamental change. New institutions and regulations of development cooperation and new claims to development have led to a further differentiation of the "international regime," i.e., of the constitutive elements of "international governance." A broadening of the spectrum of statehood as well as the emergence of people as new claimants and actors on the international level can be observed. A certain kind of parallelism between state government and people is becoming apparent, particularly in respect to the African developing state. Within international institutions increasing emphasis has been laid on peoples as agents of development and (potential) partners of development cooperation. A peoples' right to development is presently being promoted as a human right on regional and universal levels of the international legal order, while development theory and development strategies are more and more

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50. Jackson, *supra* note 8, at 548, 549.

concentrating on various modes of popular participation in development as the more realistic and promising modes of self-reliant development and sustainable growth.

For better or for worse, developing constitutional orders in SSA cannot escape the impact of their global environment. The objective of this paper was to elaborate on international legal aspects of popular participation in development to the effect of compensating for or rectifying, in developmental terms, adverse socio-economic and political structures. Developing constitutional orders in SSA implies social infra-structural development as the essential basis of any long-term development strategy. Popular participation in development and for that matter encouraging spontaneous initiatives of self-organization of people have herein been approached from the point of view of promoting a people's right to development as a human right under international law. The issue of developing constitutional orders in SSA thus has its international legal aspects and is wedded to the "international regime" and its development.

The international system and its operation on the basis of international law are of increasing complexity. Under the title of "peoples' rights to self-determination and development" the international legal order's concern and the international lawyer's interests extend necessarily to fields which hitherto came under the shield of "domestic matters" or "principle of non-intervention." Still, the "policy dialogue" between African countries and the development partners as well as promotion of a people's right to development under the Banjul Charter, to mention only two instances, require a clarification of international legal grounds which affect also the developing of constitutional orders in SSA. The notions of "intermediary groups" and "parallel structures" have been introduced here in order to highlight the parallelism of state and people in the case of many African developing states and to draw attention to the international legal aspects of developing constitutional orders in SSA, in particular to the role of peoples both as internal factors in building a new social infrastructure and as subjects and agents of a right to development under international law. What is needed is more research on popular participation, which allows testing of the theories and strategies referred to and the propositions made in this paper in the social reality of the African developing state.