

Using the Palaver Settlement Paradigm as a means of fortifying the search for the democratic ideal in Sub-Saharan Africa

By
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Résumé

Dans les civilisations orales, la parole engage l'homme, la parole EST l'homme (...) Dans la civilisation moderne, le papier s'est substitué à la parole. C'est lui qui engage l'homme. Mais peut-on dire en toute certitude, dans ces conditions, que la source écrite est plus digne de confiance que la source orale, constamment contrôlée par le milieu traditionnel ?¹

La démocratie n'est point un instant donné. C'est un mouvement permanent qui consiste à chercher l'idéal pour une société donnée. Les mécanismes pour y parvenir sont multiples et varient selon les besoins et les intérêts poursuivis par des communautés. Après l'indépendance la plupart des pays africains se sont embarqué derrière des modèles occidentaux et orientaux. Ils estimaient que ces modèles seraient leurs feuilles de route idéologiques pour enfin construire des bases démocratiques et appropriées par rapport à leur accès au développement socio-économique. Il existait bel et bien un consensus (autour de la majorité des leaders africains) sur des valeurs qui sous-tendaient l'idéal démocratique. La liberté, l'égalité et l'état de droit fondaient et restent les principes clefs de l'idéal démocratique. Mais les moyens pour y accéder varient. Dans les années 1980 et 1990, de nombreux problèmes furent constatés dans la plupart des régimes africains. Ces scléroses démocratiques étaient marquées par les coups d'états ainsi que des guerres civiles dans la majorité de ces pays. Les assassinats politiques, l'arrestation d'opposants politiques ainsi que les disparitions subites ont caractérisé les règnes des militaires ghanéens, nigériens, sierra léonais, libérien ainsi que les gouvernements successifs d'Afrique du Sud qui soutenaient l'apartheid. Force est de constater qu'avec ces dérives qui se multipliaient, de nombreux systèmes se détachèrent de l'idéal démocratique. Avec le recul, nous notons que les leaders des pays africains (sauf, dans une certaine mesure, le Botswana) ont maintenu, *mutatis mutandis*, les modèles coloniaux dans un esprit de 'mimétisme', en négligeant les réalités des contextes africains. Dans cette optique, ils ont minimisé le rôle des institutions et valeurs africaines telle que l'arbre à palabres dont on constate une réincarnation moderne dans des institutions éphémères telle que la Commission de Vérité (et de Réconciliation), les Conférences (Souveraines) Nationales et les juridictions dites *gacaca* du Rwanda. Notre opinion est que ces institutions, rappellent la palabre africaine, peuvent être utilisées comme des moyens de fortifier et/ou catalyser la recherche d'une démocratie idéale. De ces analyses nous déduisons la possibilité d'institutionnaliser certains principes de ces palabres modernes dans les courants politico constitutionnels actuels.

Certes la démocratie représentative est ici pour rester. Néanmoins, plus le citoyen se rapproche de la source des décisions, plus la légitimité est renforcée. Plus l'homme de la rue est se voit accorder la parole, plus il sera assuré de la bonne gestion de ses impôts. Et tant que la parole est négligée, la démocratie s'auto détruit. Beaucoup reste à puiser dans les richesses culturelles africaines. En matière de démocratie et de droit, ces richesses restent considérablement sous-exploitées. Lesdites richesses se conjuguent en une diversité phénoménale qui ne demande qu'à

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¹ Bâ Hampâté, A., *Aspects de la civilisation africaine*, 1972, Condé-sur-Noireau, Présence Africaine, p25.

être apprivoisée. Si ces richesses étaient bien explorées et exploitées, nous serions alors en mesure de répondre à la question soulevée par Hampâté Bâ.

Introduction

The political dispensation of most Sub-Saharan African (SSA) countries beams with painful and gracious variety. Like the arm of a pendulum it oscillates from share 'warlordism' in Somalia to acceptable participatory democracy in Botswana. In the middle of these extremes lies a cocktail of democratic hybrids that could respond to what Bidima describes as *les démocraties*². Such is the diversity of a continent with a demography that resonates with variety and a geography unique in nature. Yet Africans, as conscionable as they can be, bask their divergences in an ultimate pursuit of ideals – not least of which is the democratic Holy Grail – a truly productive democracy. As the said democratic ideal appears hard to tame so does consensus as to the means of harnessing the desirable common will.

A fundamental concern in every productive democracy is that of building consensus with regard to the acceptable goals of the society. Closely associated to this challenge is necessarily that of identifying the apposite forum or sphere of discourse. Post-independence political evolution in most African nations has been jerky, if not turbulent. Identifying a common language of political discourse together with the appropriate platform for the same has been substantially mired in altercations on the clash of public/private interests. While agreement as to the nature and end of democracy in most of these states remains remote, accord as to the various means of attaining any contemplated common vision of democracy is ever more distant. The common approach has been that of looking up to the democratic systems of some Western nations. Unfortunately this is usually done with little regard to the historical, geographical, demographic and economic circumstances under which the Western models were formulated. By so-acting, African realities have been considerably neglected. The cultural potential of Africa in providing adapted solutions to the problem of institutional deficits has been underexploited.

It is to this last contention that we address ourselves. The paper rests its case on two premises. First, we argue that the Palaver Settlement (PS) system immanent in most pre-colonial and traditional societies provided a public sphere where people expressed their opinions on every aspect of life that actuated social harmony. Individuals could directly determine the course and direction of the community. Participation was the rule. Not the exception. It was of course. Such was the conception of a culture of African democracy. A conception widely neglected by most of the post-colonial governments. Secondly, we intimate that an institutionalisation of the PS paradigm is not only possible but imperative if African legal and social systems have to pierce the conceptual veil that separates traditional Africa from modern Africa. This dichotomy represents a simplistic attempt to solve certain complex social problems that require more comprehensive and sophisticated approaches. From this premise, the treatise reviews some of the recent experiences whereby the PS paradigm has been used, successfully or otherwise to direct, redirect and reorient state business in some societies. In this light therefore, an analysis is made of the Truth and Reconciliation Commission (TRC) model and The Sovereign National Conference (SNC) paradigm. It is our opinion that these bodies have been invariably used to fortify the democratic ideal, as the case may be.

² Bidima, J-G, *La Palabre – Une juridiction de la parole*, 1997, Editions Machalon, p75, where he opines that most African political systems are neither dictatorships in the strict sense of the word nor are they true democracies. They can be situated between these two extremes. Such systems are neither fully autonomous themselves nor can they guarantee autonomy to their citizens.

The method adopted by the paper is that of juxtaposing the concept of a democratic ideal and the PS paradigm. This is done in part by a presentation of the precepts that underpin the democratic ideal (1). In the second part of the work a review is made of the democratic deficits as perceived from the experience of certain African nations such as Ghana, Nigeria, Sierra Leone and South Africa (2). Other countries are equally given appropriate attention when necessity so mandates. In the third part of the paper an analysis is made of the PS paradigm which serves to provide some of the raw materials that make good the deficits exposed in the preceding section (3). Part (4) considers an empirical study of the pros and contras of the various attempts made by some African nations to fortify their democracies by making recourse to the TRCs or SNCs- bodies, whose ideals, we argue, fall on all fours with the spirit of an African Palaver. The final section exposes some of the options and alternatives to the extant democratic models of African political systems; models which we believe, reflect the cultural wealth as well as the economic limitations of most of the countries across the continent. However important these suggestions might seem, what is fundamentally impending is the task of defining and circumscribing what the paper considers to be the democratic ideal. Also, delimiting and describing the confines of Palaver Settlement could not be more urgent.

1-The Democratic Ideal

Democracy is not a moment. It is not a given. It is a process. It is a movement³ and above all, a complex equation that is balanced (if ever) by a deliberate and conscientious interposition of both known (societies) and unknown (contingences) variables. It is widely accepted to be that form of government in which the sovereign power rests and is exercised by the common people (the silent majority). The people constitute the final source of power. "It is the man-in-the-street, in the last analysis, whose will is decisive"⁴ not the will of a selected coterie of oligarchs who represent the vested interests of private lobby concerns. It entails rule by the whole body of free citizens either directly or otherwise via a system of representation, as distinguished from monarchy, aristocracy or oligarchy⁵. The term emanates from two Greek words, to wit, *demos* meaning people and *Krateîn* that equates 'to command'. A twinning of the two terms refers to that form of government in which sovereign power rests with the people. As a movement or process, it relates to the manner in which public policies- the most important of which is law, it being the will of the sovereign- are reflected upon and adopted by the people. While acknowledging its polysemic nature, Burdeau notes that it is a cherished value and the inalienable vocation of men to take their destiny in their hands both jointly and severally⁶.

There are certain principles or values that are immanent in any democratic system worthy of the calling. These include liberty (*isonomia*), equality, participation (*ecclesia*), communication, justice and the rule of law.

Liberty

The direction of a state can only necessarily be assumed by men who have the capacity to act at an hour of their choosing; to exercise their best of talents undeterred and to voice their concerns on socio-economic issues in an unbroken flow. To be able to act as such and do as much in a democratic society, people have to be free. Freedom therefore, is an unavoidable prerequisite of a

³ Such is the position adopted by George Burdeau, *La Démocratie*, in *Encyclopaedia Universalis*, 1978, Vol 5, dirigé par Claude Grégoire, pp408/409.

⁴ Fonlon, B.N., *The Task of Today*, Cameroon Publishing Co.Ltd., Victoria, p.8.

⁵ See generally *Black's Law Dictionary*, 1979, 5th edition, St. Paul Minn., West Publishing Co.

⁶ Burdeau,, op cit, p.409.

democratic society. It is the power to do as one pleases. It entails freedom from physical restraint. It equally embraces the enjoyment of various rights and privileges and includes the power of choice. Liberty precedes any other democratic value. It is in Fonlon's words the right by which each man creates for himself his own course. A man's freedom "constitutes the path through which his powers and talents must pass to reach their fullest development"⁷. Harold Laski on his part describes liberty as the "eager maintenance of that atmosphere in which men have the opportunity to be their best selves"⁸. However, the full exercise of liberty in decision-making as it existed during the Greek agora cannot be feasible given the number of people inhabiting modern nation-states. This inflation in population has necessitated the development of indirect representation. In this regard, Kamto writes that

En dépit de l'attrait que la démocratie de l'agora peut exercer sur l'homme du XXe siècle, l'on sait bien que L'Etat-Nation n'est pas la Cité grecque et que la démocratie représentative correspond mieux à sa structure⁹...

The importance of representative democracy which is equally examined by Fonlon does not preclude the possibility of direct participation wherever and whenever it is necessary. While the African palaver may be anachronistic to the Westphalia Nation-State model, it can be actuated and ameliorated upon by certain principles upon which the African palaver is founded as we reveal later. Fonlon evokes the importance as well as the dangers of indirect representation or representative democracy in these words;

There can be no democracy where people vote in fear, where elections are rigged or gerrymandered, where votes are bought and sold; because then, the so-called representatives would not be the choice of the people, for the common good would not have been the determining factor in their being voted into office¹⁰.

Civil libertarians usually categorise liberty into two sub-types, namely, private liberty (freedom of religion) and public or political liberty that includes the power to take part in public affairs. The latter is predicated on two variables, to wit, the provision of sound and adapted education on the one hand and the guarantee of honest and true information on the other. Burdeau equally classifies liberty into two types- liberty of autonomy and liberty of participation which both respond, respectively, to the preceding categorisation¹¹. It is the duty of the state to guarantee the liberty of its citizens in their activities. This, it endeavours to do in an equitable manner that responds to the equality in nature of all and sundry subscribing to the laws of the said state.

Equality

Equality is perceived by many to be the state of being equal. Man needs to be convinced that as a citizen, he is amenable in equal dimension (as any other citizen) to the obligations or rights that devolve from the state to private individuals. He needs assurance that he will not be treated as a citizen-by-half. It is trite stating that men are not absolutely equal in every respect. Differences abound, yet their uniqueness fades and wanes into the horizons of citizenship. This is the quality that accords one vote to one person thereby consecrating equiponderant leverage to each and

⁷ Op cit, p.12.

⁸ Laski, H., *A Grammar Of Politics*, p.142 cited by Fonlon (*supra*).

⁹ Kamto, M., *Pouvoir Et Droit En Afrique Noire (Essai sur les fondements du Constitutionnalisme dans les Etats d'Afrique Noire francophone)*, 1987, Librairie Générale de Droit Et de Jurisprudence, Paris, p.498.

¹⁰ Regardless of the admiration for agora by men of 20th century, it is clear that the Nation-State is not the Greek City-State and it is also clear that representative democracy aptly corresponds to the same structure..."

¹⁰ Op cit, p.12.

¹¹ Burdeau, op cit, p.409. The author makes an interesting comment on the nature of liberty- it is not a pre-existing constant that necessitates or occasions protection. Rather, it is a faculty to be conquered, pp. 409/410.

every person in the shaping of the *Polis*. The gap that exists between this conceptual exposition and the realities that usually unfold in most societies is overwhelming. Inequality may have preposterous, pernicious and deleterious consequences. The experience of racial minorities in The United States of America during the 19th century adequately drives home this point. During this regrettable epoch it was a licit presupposition that the Negro was a fraction of a human hence could be sold and disposed of as a chattel. Here was the exhibition of inequality at its worst. For liberty to be fully exercised, the equality of men must be ascertained. Special privileges for people under similar circumstances ought to be banished and adequate opportunities for proper development ought to be laid bare to all.¹² Equality is the faculty that allows individuals the latitude to exercise their rights in the ultimate fulfilment of the common good. This relates to their hallowed right of participation that includes communication as well as free speech.

Participation (Communication)

As noted above, there is perceptible consensus (amongst constitutionalists) as to the fact that participation within the framework of the Nation-State can only be indirect through representatives. Even in Switzerland where citizens vote via referenda on issues that range from the construction of roads to joining the UN; where much political action takes place in the 2800 local communities, a bicameral representative legislature is not foreclosed.¹³ However, the closer the citizen is to the sacrosanct procedure of decision-making, the better the validity of the democratic process, ipso jure, the legitimacy. Not only is he assured direct say in the management of his taxes but he equally has the feel of being in charge- of being personally engaged in the project. Therefore, the cherished values of participation and communication need not be overburdened with emphasis. With regard to communication, it behoves us to note that dialogue and frank debate that averts the monotony of sterile monologues (a staple of some state-owned media institutions) is vital for the burgeoning of any sane and sound democracy. The policies and decisions of the Government ought to be amenable before the focal lens of public scrutiny. One cannot gainsay the fact that Government reaps stupendous benefits from frank discourse with the people. Such dialogue can and need to go beyond the confines of legislative walls.

The speed of the globalisation process that is paradoxically accompanied by a heightened degree of cultural consciousness of people around the world has ushered in novel actors in the international arena.¹⁴ The growth of Multinational Companies and the crescendo of awareness within ethnic and nationalist groups indicate that the types of pressures to which law makers are subject have substantially metamorphosed. The increase in number of these new actors necessitates a rethinking of the entire legislative endeavour. As demonstrated below, the modern representative process has considerably been susceptible to the caprices of vested interests unconnected to the needs of the majority of the people via whom legislators are thought to speak. David Risser has poignantly explained some of the deficiencies of representative participation in modern democracies. While acknowledging the importance of the legislative process he notes that the first weakness in the extant paradigm relates to the manner in which issues find their way into the agenda of legislative and other policy-making bodies. Interest groups with undeclared and unclean intent easily manipulate representatives thereby influencing the legislative agenda. This not only casts a shadow on the probity of the actors within the entire political spectrum, but equally erodes the prospects of an even-playing field in the democratic process. The second democratic fallacy is that which is predicated on majority rule. Democracy is usually acclaimed

¹² See generally Fonlon, B.N., op cit, p.24.

¹³ Beck, B., in 'A Survey of Switzerland- A Special Case', *The Economist*, February 14 2004, pp.5-10.

¹⁴ See generally Smis, S., *A Western Approach to the International Law of Self-determination: Theory and Practice*, 2001, VUB, *Revue de Droit Africain* N°21/2002.

to be the rule by the majority within a political circumscription. None the less, in developed democracies such as the USA the leverage exerted by powerful minorities (lobbies and pressure groups) on the direction of legislation on certain sensitive issues as subsidies, cannot be minimized. The result of the procedural strain is that the silent majority or politically active segment of the society has no strong or particularly articulated preferences. Instead the ‘activated minorities’ actuate legislative outcome and “each policy area attracts its own unique constellation of interest groups”. In certain systems, consultative bodies are erected to make good this participation gap. However, these too are not immune from powerful interest groups. The existence of parliamentary majorities on the other hand, only works at distancing the silent majority given the ease with which select committee members can be manipulated by lobbies with vested interests. Robert Dahl has described this evolution has as “polyarchal democracy”. The third problem is what Peter Bachrach characterises as “democratic elitism” which relates to the political system in which representatives, constitutional institutions and practices conceal the underlying ‘oligarchical’ concatenations of power.¹⁵ Hence representative democracy is not perfect in all given circumstances. Yet the charm of perfection remains irresistible. Little wonder, options and other alternatives are always under review. Such is the vocation of the present endeavour; an endeavour reminiscent of (not identical to) Habermas’ “procedural paradigm of law” that intricately explores various ways of activating an informal public sphere within the framework of extant institutional networks. Albeit his resort to deliberative democracy reflective of or articulated by representative bodies such as Parliament and Congress, his bent on augmenting citizens’ participation in the democratic process is firm. As noted above, participation is predicated on free speech. This has to be sincere, constructive, informed, and animated by the spirit of tolerance. We now shift our gaze towards justice and the rule of law.¹⁶

Justice and the rule of law

Justice relates to conformity to truth, fact or reason. It embraces the quality of being just, impartial and fair. Democracy as noted earlier, targets the concerns of free, equal and active citizens. They need to be constantly reassured that the principle of ‘one man one vote’ is hallowed and will not be flouted by a select few who detain unbridle financial, intellectual or political capital. Justice is the meta-value that checks excesses in this regard .The importance of justice within a political system is taken up by Jacques Derrida for whom the demands of justice are infinite compared to the finite realm of the law. For him, while a system of justice is not deconstructible, that of law is. However, like justice, the law serves as a vital valve in checking the excesses of democratic systems. This is done through efficient judicial bodies before which everyone, presidents inclusive, is equally amenable. Nevertheless, empirical studies have it that most leaders in post-colonial Africa are either ‘the law’ or ‘above’ the same. This aspect of democracy escorts our mind to yet another fundamental principle of a workable democracy—Separation of Powers. The limited remit of this paper constrains a comprehensive overview of the said principle. But it is important to note that mechanisms of checks and balances are necessary to temper excesses from either of the arms of Government. Citizens as well as the state ought to respect rules. The rule of law guarantees legal certainty and this in turn facilitates and encourages investors whose confidence in the system is bolstered by their trust in a workable judiciary rather than by the whim of a dictator. Law is thus always at the sentinels of man’s risky predisposition of sliding into the precipices of excesses. All the same, the paper takes issue not with the necessity for laws but with the manner and process by which laws are made and applied.

¹⁵ Risser, D., *Democratic Process in The Philosophy of Law-An Encyclopaedia* , 1999, Christopher Berry (ed.), Garland Publishing Inc. pp. 193-194.

¹⁶ See generally Habermas, J., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Translated by William Rehg, Cambridge, M.I.T. Press, 1996.

We have hitherto explained the nature, values and merits of the democratic ideal. One cannot convincingly assert that most African nations have attained the threshold of the acceptable. In the second part of the work, we present a synopsis of the democratic experiences of certain African states in their pursuit of the democratic ideal. Non-exclusive focus is accorded to Ghana, Nigeria, Sierra Leone, South Africa and Rwanda. Efforts have been made in these countries to reach out to workable democratic systems yet the end of the road appears ever more distant. There is hope but that indeed is just a small part of the jigsaw of a panacea.

2-Synopsis of the Democratic Deficit in Africa during the post-Cold War Era

Democracy is not edible. So most common people will say in Africa. However macro-economic studies reveal that democracy is a major non-exclusive herald of propitious economic growth and development. While some of the success stories of the Asian Tigers might reveal that economic development is not necessarily predicated on democracy, it is difficult to identify workable democracies with substantially hopeless economic balance sheets. This implies that in most cases, true democracy is accompanied by incidents that range from economic stimulants to social benefits. In this regard an economic nirvana remains a distant contemplation for most African nations. A survey of the continent by Robert Guest of *The Economist* magazine revealed that from 1960 – 2003 there were 107 incidents whereby African leaders were toppled either through coups, civil wars, or invasions. During the same period only 19 of these leaders threw the gauntlet through democratic elections.¹⁷ A comparison of the economic performance of countries such as Liberia, Sierra Leone, Angola and Somalia with that of Botswana¹⁸ during the same period is telling. While per capita income of the GDP of the four countries averaged 400 dollars per annum that of Botswana was 3,000 dollars. This implies that democracy considerably facilitates economic growth. Such a democratic system is that which (variably) encapsulates all the values evoked above. As we reveal in the paragraphs that follow most of the systems have been redolent with democratic gaps.

Many African nations inundated their post-colonial constitutions with several provisions that celebrated the democratic values of liberty, equality, justice and participation in the democratic process (whatever that meant).¹⁹ The translation of these provisions into action proved much more challenging. Grievances regarding the political landscape were usually transformed into coups and civil wars. While countries like Sierra Leone, Ghana, Nigeria, The Central African Republic, Togo, Mauritania, Mali, Liberia, Chad and Burundi had a fair share of the experiences of the hard hand of military dictatorships, most South Africans lived under the pangs of apartheid laws. In Rwanda, political discontent assumed an ethnic dimension that finally led to the massive

¹⁷ Robert Guest, *The Economist, A Survey of Sub-Saharan Africa*, January 17 2004, p.5, citing Arthur Goldsmith, *Risk, Rule and reason in Africa*, Harvard University.

¹⁸ Botswana is the only African country that has experienced unbroken democracy since independence. As we argue later one of the main reasons for the success of democracy in Botswana is the deliberate endeavor by the people to marry modern institutions and values of democracy to their traditional values and institutions. The country has been witness to unrivalled ‘democratic enculturation’, a concept deplete in most of the other systems.

¹⁹ There appeared to be a broad consensus as to the attainment of democracy yet the means put in place towards that end was grossly dissimilar as a function of whether or not the country was to tailgate Marxist-Leninism or Western capitalism. Socialism won many adherents amongst who were Sékou Touré of Guinea Al-Nasser of Egypt, Francis Kwame Nkrumah of Ghana, Julius Nyerere of Tanzania and Tom Mboya of Kenya. The latter noted that ‘Socialism is the permanent tradition of our people’. See generally Ki-Zerbo, J., Mazrui, A., and Wondji, Ch., *Construction de la Nation et Evolution des Valeurs Politiques in Histoire Générale de L’Afrique*, Vol VIII, *L’Afrique Depuis 1935*, Mazrui (ed.), Edition UNESCO, p.524.

killings of Tutsis and moderate Hutus prior to and after the genocide of 1994. All these experiences variably revealed 'legitimacy crises'. We hereby address two benchmarks or thematic areas that account for the democratic deficit in many African states; these include Governments' treatment of Opposition parties and general dissent and institutional mode of distributing resources.

Freedom of expression or association is unequivocally the badge of liberal democracies. Most constitutions of Africa reflected this. Yet during the dawn of independence Nkrumah transformed the youth wing of his Convention People's Party into a repressive machine. His rather austere economic and fiscal policies were received with dissent that was expressed through the various attempts on his life in 1962. In 1966 he was toppled by a military junta. The next civilian leader, Dr Kofi Busia, acceded to the seat of power in 1969. But this period of a civilian lull was broken by the military regime of Ignatius Acheampong in 1972. His decentralisation policies were paralleled by blatant ruthlessness towards political opponents. In 1981 Jerry Rawlings ousted the third civilian Government of Hilla Liman in a coup d'état. Disappearances and alleged political killings became a cause for concern in internal as well as international quarters. These included the execution of former statesmen and judges. The National Revolutionary Council tolerated minimal dissent. The scenario was not very different in neighbouring Nigeria where military Governments almost became a given.²⁰ Political freedoms always posed a problem for the regimes. Under the rule of Gen. Ibrahim Babangida the renowned journalist, Dile Giwa, was killed in 1986. During the reign of Gen. Sani Abacha (1993-1998) prominent activists such as Ken Saro Wiwa and Kudirat Abiola were killed. In Sierra Leone the civil war that pitted Government forces (Civil Defence Forces) against rebels of the Revolutionary United Front-RUF (of Foday Sankoh) and those of the Armed Forces Revolutionary Council-AFRC, claimed thousands of lives in the wake of the military rules of Johnny Paul Koroma and Valentine Strassa. These regimes gained notoriety in their heartless treatment of opponents. In South Africa the majority black and coloured communities experienced the wrath of apartheid rules that raised racial segregation to a legal pedestal. Acts of civil disobedience and riots were summarily silenced by a repressive military machinery. The massacres in Sharpsville and Soweto in 1960 and 1976 respectively, together with the murder of Steve Biko of the South African Consciousness Movement provoked international denunciation of the policies of the apartheid system.

Equitable distribution of resources and a mechanism of power sharing have been the major causes of coups and civil wars in Africa. In Rwanda such differences in political as well as economic capital assumed the dimension of an ethnic friction between the Hutus and the Tutsis. Before independence, power was largely in the hands of the Tutsi pastoralists. Tutsi superiority over Hutus was tolerated by the colonial masters.²¹ Hutus were greatly resentful of the Tutsi minority. In an orgy of ethnic killings that commenced on July 25 1959, about 100,000 Tutsis were slain to death. The United Nations then organised a referendum that brought a Hutu party (Parmehutu) to power in 1961. The following year, the country attained its independence and thereafter there were intermittent attacks launched by the Tutsis one of which led to the massacre of 20,000 Hutus in 1963²². Power remained in the hands of the Hutus. Events came to a head on April 6 1994 when the plane that was carrying Presidents Juvenal Habyarimana (a Hutu and President of Rwanda) and Cyprien Ntaryamira, was shot down as it made its way from Dar-es-Salam. In the violence that ensued, about 800,000 Tutsis and moderate Hutus were killed within a

²⁰ Since independence, Nigeria has been ruled by four civilian Presidents, namely, Nnamdi Azikiwe (with Tafawa Balewa as Premier), Shehu Shagari, Ernest Shonekon and Olusegun Obasanjo (himself a former military ruler).

²¹ First, by the Germans (1890-1916) and then by the Belgians (1916-1962).

²² See generally, Ayittey, *Africa in Chaos*, 1998, RR Donnelley & Sons, p.55

hundred days. As Ayittey postulates, the main cause of this carnage was simply and lack of the will to share power²³. The disastrous effects of inequitable distribution of resources and political power were equally demonstrated by the experiences of Liberia. She was ruled solely by Americo-Liberians (to the exclusion of the local ethnic groups) from its independence until 1980 when Samuel Doe seized power from William Tolbert. The hopes of the local populations were dashed when Doe began to fill major posts with people from his native Krahn tribe. Disgruntled rebels led by Charles Taylor (an Americo-Liberian) and his Lieutenant Prince Johnson captured and killed Doe in September 1990. In ex-Zaire Mobutu accorded many privileges to his Gbände tribesmen. In other African countries such as Kenya, Burundi, Sudan, Nigeria, Ghana and Cameroon a majority of the ruling elite has been identified with specific ethnic groups. This does not necessarily imply that ethnic diversity serves as a risk factor for civil strife. Rather, it is evidence of the fact that when power is very much concentrated in a particular hub, the ensuing tension that builds, may lead to a potential severing of the spokes. This centre-periphery paradigm is not so much a problem as is the monopolisation of the centre by a limited number of people.

We have hitherto considered the values of the democratic ideal. Reference has equally been made to the democratic weaknesses that characterised certain African nations in the wake of the Cold War, which in itself symbolised the depletion of Africa's strategic worth on the global geopolitical chess board. In the next section we opine that the problem with African 'democratic' systems has not been with *democracy* per se but with the *systems* themselves. To our mind the major *faux pas* of many leaders was to radically mimic liberal and/or Marxist models without sufficiently contextualising the said ideological loans to African realities. Whenever attempts were made at contextualising foreign models to African particularities, resources to complete the schemes always proved inadequate. Such was the fate of Nyerere's *Ujamaa vilijini* scheme of 1967 in Tanzania. One of the institutions -a mirror of the said African realities- that guaranteed social cohesion and consensus (with regard to decision-making) in Traditional African Societies (TAS) was the African Palaver or the PS paradigm. It has been castigated by jurists (notably positivists) as a subject of Anthropology. The African Palaver has thus not solicited much attraction from forensic circles. Yet its underlying conceptual and empirical worth has been used (advertently or otherwise) in some of the countries treated above. We argue (*infra*) that such bodies or fora as Sovereign National Conferences and The Truth and Reconciliation Commissions of South Africa and Sierra Leone are modern re-incarnations of the African Palaver and that they have been used variably over the years to fortify the search for a democratic ideal in the said countries. But in order to appreciate this analogy, it is apposite first to consider the types of palaver through the screen of justice as perceived in African traditional settings (3.1). Thereafter we review the nature, end, the principles, the actors, the venue and the effects of the African Palaver (3.2).

3 - The African Palaver

The dictionary definition of 'palaver' warrants its immediate dismissal from the contemplation of any mature discourse.²⁴ All these definitions come down to 'protracted time-wasting talk'- and

²³ Ibid, p.57

²⁴ a) *Encarta World English Dictionary*, 1999, St. Martin's Press New York, p.1299—"A conference between different parties (humorous); an idle flattering or time-wasting talk; a conference between explorers or colonialists and local African officials, usually requiring the use of a pidgin language". b) *The Oxford English Dictionary*, 1933, The Clarendon Press, vol , p. 390. --" Palaver appears to have been used by Portuguese traders on the coast of Africa for a talk or colloquy with the natives (1735); to have been picked up by English sailors (1771) and passed from nautical slang to colloquial use; it is a talk, parley, conference, discussion. Chiefly applied to conferences with much talk, between African or other

we might add ‘as perceived by the observer’. These definitions obscure the realities that occasioned such discussions. An apt definition of the African Palaver (AP) might be hard to seek because in most of the TASs it represented a complex network of institutions that had specific tasks. That notwithstanding, Bidima, while alluding to Atangana, makes reference to a specific genre of palaver (the agonistic palaver) which he defines as the resolution of a conflict through verbal exchange in a discourse that humanely neutralises violence²⁵. He goes on to describe it as a forum of social drama; a procedure and a concatenation of human interaction. Von Saenger refers to the AP as the expression of religious beliefs that envelops every social, political and judicial institution.²⁶ That notwithstanding, the AP has itself evolved as a function of social mutations which in themselves reflect the diversity as to the types of such institutions.

Bidima classifies the AP institutions into two broad types, to wit, the irenic palaver and the agonistic palaver. The former is a peace-seeking and consensus-building mechanism that is deployed, a priori, in providing a sound framework of social harmony. Unlike the irenic palaver, the agonistic palaver aims at settling and resolving disputes between members of a society. Hence with regard to conflict management, it is convened a posteriori. Another form that can be added to the two broad categories and which in itself cuts through these two is what we can describe as the ‘virtual palaver’. It relates to the recrudescence in the utilisation of the internet by most Africans in the diaspora²⁷. Like the typical African palaver it revolves around invisible actors and serves as a true source of knowledge. Yet its full merit remains to be harnessed in Africa itself given the limited availability of modern technology still perceived as the preserve of the parvenus or nouveaux riches. All the same, its benefits to Africa, however tainted, have been considerable. It has served in the reconstitution of filial bonds, diminished social ruptures, and guaranteed an instance of ‘communication for development’²⁸. Tersely put, it has been a true post-modern space for the expression of public opinion. What is more, the internet has equally provided a platform (a ‘necronet’) for the ululation of Africans for their fallen heroes. The focus of this paper is on the first and second types of palavers whose nature as social valves can only be grasped with an adequate understanding of the conception of justice in a typical traditional African setting.

3.1-The conception of justice in the traditional African setting

The ‘Traditional African Setting’ is a nomenclature that invites great obscurity. At times it is considered to be the pre-colonial dispensation of most African societies. It is equally used by modern political discourse and constitutional literature to refer to that realm of the colonial as well as post-colonial societies that existed in parallel sway with the modern, formal, Western or imported models of societal organisation and regulation. In an authoritative endeavour, Fortes and Pritchard classify African political groupings under two heads, namely, Group A and Group B societies. The former relate to societies that operate perceivable centralised administrative structures as well as judicial mechanisms that all deduced their authority from a central pyramidal

uncivilized natives and traders or travelers. c) *Webster’s Third New International Dictionary of English Language Unabridged*, 1976, Babcock, Ph., (ed.), G & C Merriam Co. Publishers, p1629—“It means an often prolonged parley, usually between persons of different levels of culture and sophistication (as between a 19th century European trader and natives of the West African coast)”.

²⁵ Bidima, op cit, “...la réduction d’un conflit par le langage, la violence prise humainement dans la discussion” pp.10-11 .

²⁶ Von Saenger, A., *Sagesse Bantou*, 1988, <http://www.avs-philo.org/bantou.php>

²⁷ See Kiyindou, A., *L’internet ou le nouvel arbre à palabre: Contribution à la réflexion sur la reconstruction virtuelle du lien social*, 2003, CERIME, Université Robert Schuman Strasbourg.

²⁸ It has been used by Africans back home as a means of informing those abroad of the development needs in their countries. As such The Diaspora of Uganda and Ghana contributed an income inflow of 400 million dollars and 450 million dollars respectively for both countries in 2000, Kiyindou, op cit, p.9.

source of power manned usually by a King. An example of such a society, so they opine, was the Ngwatos, the Bayankole and the Zulu Kingdom under Shaka and his successors. Group B societies are smaller societies with decentralised administrative structures that are usually depleted of a discernible sole source of authority. Such societies included the Tellensi and Tswana.²⁹ While the indigenous political system of the Tale was basically disparate and founded on a rotatory form of Government³⁰, that of the Zulus revolved around the King. Regardless of the acute centralisation of power in the Zulu kingdom, wise kings tolerated and accepted majority decisions after protracted discussions. Such deliberations were attended by the various chiefs of the kingdom. Direct participation was not tolerated but the king consulted the perplexities and convivialities of the people through their chiefs and if the common or popular will was disregarded by the king, he was dethroned or simply put, killed. Such was the fate that Shaka suffered from the hands of Dingane. While the people respected their chiefs, there was no question that reciprocation was of course. Any one could take part in the Chiefs' Councils and assist in judging cases. Every one could speak in the African palaver.³¹ In the King's Council, *indunas* or councillors were given the opportunity to air their views and the king spoke last. This allowed the other councillors to freely voice their opinions without any fears of contradicting the king's word. Referring to the value of strictures in the Zulu King's Council, Gluckman intimates, *inter alia*,

The king was supposed to follow the advice of his council. If he did not, it is said that the council could take one of his cattle. The Zulu believed that the welfare of the country depended on the king's having wise and strong councillors ready to criticise the king.³²

In other societies such as the Akim Kotoku of the Akan, and the Barotse, participation in ordering the political sphere was neither direct nor indirect in literary terms. Instead, the concerns of the people were canalised and communicated to the king through a 'Great Commoner' or *krontihene* (Akim Kotoku). The *Ngambela* played such a role with the Barotse.³³ In the relatively acephalous societies direct participation in law-making and application was keener. Allott, describing the Sotho law-making process, has noted that the tribal assembly consisted of all adult males of the tribe meeting at the tribal capital. Thus in both the Group A and Group B societies, individual participation was either indirect in the large political units (as through and engaged Great Commoner) or direct as in the smaller societies. Yet in both the spirit of the African palaver was always used to articulate a sense of justice. Modernism has infiltrated most of these systems and in a great many of the cases only caricatures of the pristine structures remain. The erudite Hampaté Bâ attributes this to the lack of a relay mechanism that would ensure the continuity of the traditions from the sages to the youth who are ever-more enticed by the marvels of modernism³⁴ at the detriment of traditions and customs. Today, the current equation as between traditionalism and modernism leaves many countries in a confusing systemic troika: modern received institutions, contemporary customary law (written) organs fashioned by received institutions in a bid to tame customs and finally, the pristine and least-adulterated traditional paradigms in greed of depleting self-sustainability. And to this last segment we now focus our attention.

²⁹ Fortes, M., and Evans-Pritchard, E.E., *African Political Systems*, 1958, Oxford University Press.

³⁰ Fortes, M., *The Political System of the Tellensi of the Northern Territories of the Gold Coast* in Fortes and Evans-Pritchard, 1958, op cit, p257.

³¹ Gluckman, M., *The Kingdom of the Zulu of South Africa*, in Fortes and Pritchard, op cit pp.42-44.

³² Op cit, p33.

³³ See the work of Allott, A., *The People As Law-Makers: Custom, Practice, and Public Opinion As Sources of Law in Africa and England*, in *Journal of African Law*, Allott, A., and Morris, H.F. and Roberts, S.A., (eds), 1977, Vol. 21, N°1, School of Oriental and African Studies, University of London.

³⁴ Bâ Amadou Hampaté, *Aspects de la civilisation africaine*, 1972, Coné-sur-Noireau, Présence Africaine, pp.27-27, cited by Eberhard, Ch., and Aboubakri Sidi Ndongo, *Relire Amadou Hampaté Bâ pour une approche africaine du Droit. Images réfléchies de la 'pyramide' et du 'réseau'*, 2001, R.I.E.J.

Popular literature has it that justice in traditional Africa was based on a common world view and that the major aim of dispute settlement institutions was reconciliation and the re-establishment of social harmony. Conciliation, mediation and negotiation through perpetual dialogue and unbroken verbal intercourse were considered to be the engine for a common world vision that tended to celebrate humanity³⁵ and social perpetuity in gracious felicity. In their work entitled *The Realm of a Rain Queen* (1943) Krige and his wife have explored the political and jural systems of the Lovedu. They write that “The genius of the Lovedu political system is its network of reciprocities; the genius of the legal system is the procedure of reconciliation and compromises; and both the political and legal systems reflect the main emphases and purposes of the culture”. This aspect of reconciliation in articulating a sense of justice is added yet another dimension of conciliation (consent) by Bohannan who studied the Tiv of Nigeria and concluded in his *Justice and Judgment Among the Tiv* (1957) that “the *mbatarev* (elders) suggest a settlement, and the litigants must concur if the case is to be considered thoroughly successful.”³⁶ However, writers such as Martin Chanock take issue with such conceptions of justice in traditional African societies as represented by the workable conciliatory dogmas which he describes as ‘Garden of Eden’ perception of what obtained. He warns against generalisations regarding the popular appeal to the non-violent notions of law in pre-colonial or traditional African societies. This is because there were many people who resorted to violence in settling scores in their acknowledgment of the *lex talionis*³⁷. Be that as it may, there is solid consensus as to the conciliation-friendly approach to justice as was articulated by the African palaver which we now consider in greater profundity.

3.2 -The nature of the African palaver

In this sub-section, we consider the principles, the end, the practical side and the effects of the African palaver. As we noted above, three types of palavers can be distinguished, the irenic, the agonistic and the virtual; the last of these being a modern tool to articulate the others. In the lines that follow we address these issues seriatim while underpinning some of the underlying values analogous to the democratic ideal as delimited in part 1.

The *principles* that guided the African palaver settlement institutions included tolerance, participation, social solidarity and equality. Tolerance imposed a neutral ethic of plural triumph. Winners or losers, victors or vanquished were not a cherished vocabulary in the communal lexicon. In his book on the African palaver entitled *La Palabre. Une juridiction de la parole* (1997), Jean-Godefroy Bidima explores the contours of tolerance as a fundamental principle that is widely respected and applied in an African palaver. He distinguishes between passive and active tolerance³⁸. The former relates to the infallibility of the ego that can be translated into the communicational difficulties between different perspectives and levels of discourse (tribal, national (as between religious or economic entities) and international as between the Western and African cultures). Meaningful palaver without the recognition or imperfections is bland, empty and potentially destructive. Active tolerance on the other hand adopts a more responsible outlook of the ‘self’ and is actuated by empathising for the ‘other’. In this light therefore, he notes that in

³⁵ See generally, Eberhard and Ndongo, op cit, p8; Kiyindou, op cit and Bidima, op cit, p20.

³⁶ Cited in Gluckman, M., *Politics, Law and Ritual in Tribal Society*, 1977, Basil Blackwell Oxford and note the criticisms he levels against both authors as to the benchmarks and analogies of discourse made in their research.

³⁷ Chanock, M., *Neo-Traditionalism and the Customary Law in Malawi*, 1978, N°16, African Law Association in America, Inc., and the African Studies Centre, UCLA.

³⁸ Bidima, op cit, pp40-42.

the immediate aftermath of a palaver settlement, while the ‘unsuccessful’ participant was required to solicit forgiveness from the ‘successful’ participant through an act of contrition, it was equally common for the successful participant to implore pardon from the community. This was done in a bid to save the honour of the ‘unsuccessful’ participant.³⁹ Participation was an important feature of the palaver. Irenic palavers addressed issues such as birth (*id est* a determination of paternity) and the adoption of positive decisions regarding social organisation. At times these necessitated what Bidima describes as mini-palavers that allowed family members to speak their mind. Participation in these and other major palavers was the very essence of palaver, that is, participative participation. Participation was between the subjects, the object and engaged or active onlookers⁴⁰ whose intermittent applause strengthened the spirit of social solidarity. In most traditional societies as that of the Sotho (*supra*) limited societal sizes facilitated effective palavers. Then, the social bond was perceptible. Larger political units as the Yoruba or the Ashanti also maintained a firm social nexus. Today, most African countries are mainly plagued by the lack of a common social bond. Sovereignty of self has superseded the collective spirit that has run amok. Yet as Bidima notes most nations have not identified the importance of a palaver that will reconstitute the social bond⁴¹ or ‘le vivre ensemble’. He attributes this to a psychological disorganisation that pulls Africa apart between the nostalgia of a past she will never recapture and a present that shines for everyone but her. The African ‘conventional state’ cannot provide the mechanism to reach this ideal link because it is manned by an alienated elite that is detached from the hard lives of the local masses. Turning to tribes will be more chaotic as they are simply a force for gross divisions. Building the social link, ipso facto, the democratic ideal may be realised by the construction of a communicative space that is wide enough to represent the diverse voices of the given space. One might wander as to what Bidima proposes regarding the practical parameters that will constitute the building blocks for the communicative space. The internet could be a possible option in this regard. Yet the possibility is blurred by the fact that the majority of Africans need bread and protein for survival rather than some distant computer connections which have very minimal meaning to them. Wherefore the importance of education and political will takes mandatory precedence. One avenue to pursue in this regard could be the acceleration of the decentralisation process. Governments could focus on establishing autonomous local communities wherein citizens would be able to directly contribute in articulating a form of democratic participation best suited to their needs. Another principle of the African palaver was that of equality. Social continuity was predicated on communal harmony itself. This means that efforts were always made to usher the participants through the threshold of consensus. The assumption that undercut the preceding was that the disputants were equally amenable before the traditions and customs of the land.

The *end* of a palaver varied as a function of the subject of the debate. The search for social harmony and peace constituted the goal of every palaver be it irenic or agonistic. As already noted above (in the work of Chanock), such a ‘Garden of Eden’ view of palaver was a rather simplistic myth that blurred realities. All the same, and in a majority of the reported cases, social harmony constituted the driving force behind the African palaver. Eberhard and Sidi Ndongo opine that the import of the palaver was not so much to say who was wrong as it was that of re-establishing harmony between the participants. The purport therefore was not that of paying damages (as these were only the means to an end) or levying sanctions, as the case might be. Instead, the goal was that of renewing social bonds. Tersely put, the truth was mobilised towards

³⁹ Ibid, p.31.

⁴⁰ Ibid, pp21-23.

⁴¹ Ibid, pp.43-44. As will be noted below the SNC of Benin and the TRC of South Africa are both bodies that endeavoured to shape the social bond of the respective countries. With the benefit of hindsight, these experiences have proved to be isolated islands in a turbulent sea of political complacency.

the realisation of peace.⁴² Forgiveness was vital in this respect and in this regard the Betis of Cameroon literarily offered a hand of help to uplift the ‘fallen’ from the ignominy of abysmal humiliation. In cases where the ‘unsuccessful’ participant had to indemnify the ‘successful’ deponent with an animal the latter was expected to slaughter the same and to share it with the former. This was done with goodwill however protracted the practical side of the process.⁴³

The *practical side of the palaver* or the debate itself was replete with much symbolism and reminiscent of meticulous preparation. Most palavers in West Africa were held under a large tree and this venue was carefully chosen. It usually reflected the longevity hence potential continuity of the society. As Saenger notes that such a tree served as a cosmic condenser. It was sacrosanct and animated by mysterious forces. It reminded the officiating sages of the wisdom of those who manned their seats before them. This instilled in them the resolve of maintaining that tradition. The choice of this venue was usually held *sub rosa*. More often than not it was attributed to a solar or lunar eclipse. In a typical agonistic palaver, children, women and the initiated youth were the first persons to assemble under the tree. Thereafter, the petitioner, the accused, the elders and the sages (judges) made their way into the assembly. The eldest of the sages then invoked the invisible spirits through the process of libation. Libation entailed an offering of wine and cola nut to the ancestors.⁴⁴ This was followed closely by a recitation of the history of the land and past events that provided similar facts to the dispute to be resolved. The recantation was performed by a griot whose task it was to remind the assembly that the dispute is surmountable today as it was yesterday. Saenger has described this as a form of traditional precedents tracing the direction that would guide present as well as future sages⁴⁵. The role of the elders was to assist and guide the participants who will be the ones to argue and negotiate a solution to their problem. Bidima notes that the sages usually used two rhetoric techniques in their endeavour to guide the participants. These included cataplexies and epiplexis. The latter was an interrogative device of leading questions aimed at exposing some of the faults of the speaker. The former was a technique used to pressurize the accused so as to provoke in him an awareness of the seriousness and the stakes of the issue. On the part of the petitioner and the accused they were expected to use communicative as well as illustrative techniques to make a case. Proverbs and gesticulations were thus assets in this regard. But as with the Betis of Cameroon, speed in speech was not tolerated. The palaver ended with a decision reached by the sages (usually after extensive consultation with public opinion). In irenic palavers the decision could be a string of unwritten rules to organize a specific activity. In agonistic palavers the elders usually settled for a payment in kind or cash (as with the Winye⁴⁶ of Burkina Faso) to the victim and to the sages in recognition of their efforts in reconciling the disputants or deponents. In the Winye community of Burkina Faso, the accused was given the chance to plead mitigating circumstances in a bid to reduce the sentence. Moreover, the sages in this community had the allowance to either grant or reject an appeal to a higher council of the community.⁴⁷ After the decision was reached the sages

⁴² Bidima, op cit, p19. ‘La palabre se sert du vrai pour aboutir à la paix’.

⁴³ Ibid, p.21.

⁴⁴ Our experiences with the Nsos in the North West Province of Cameroon exposed us to one of such palavers whereby a cock was necessary. The eldest sage in the community took the cock, muttered a string of esoteric words wherefore the bird shuddered in a spasm and muted on command without being pressured by violence. Its silence indicated the self-abdication of its blood to the ancestors. These in turn, it was believed, were to restore social peace once their ire had been mellowed by the blood of the bird together with palm wine and cola nuts.

⁴⁵ Saenger, 1988, <http://www.avs-philo.org/bantou.php>, op cit.

⁴⁶ Jean-Pierre Jacob, *Trancher la Justice chez les Winye, Gurunsi du Burkina Faso*, in *Droit et Cultures*, N°19, 1990, Erasme.

⁴⁷ Ibid, p.238.

washed their hands in a purification ceremony that marked the height of the reconciliation. Then tribute was paid to the ancestors for the peace. Thereafter attention was diverted to the enforcers.

The decision of the palaver was expected to take *effect* as a matter of course. The possibility that disputants could disregard the decision was not ruled out. Hence there were enforcement institutions in most traditional state societies whose mandate it was to effect the decisions of the palaver. In his study of the use of legitimate force in traditional political institutions, Aletum has explored the alacrity and expedience with which decisions of palaver and other political decisions were enforced. In his referent societies in the Grassland areas of Cameroon (Bafut, Bali, Nso and Kom) he identifies the organs that were charged with the enforcement of the decisions in the event of default or utter disregard of the same. The Kwifor (Bafut), Mundgum or Ngumba (Bali), Ngwerong (Nso) and Kwifoyn (Kom) were the enforcement and implementation arms of the societies.⁴⁸ Other societies established enforcement mechanisms as a function of the amplitude of the disputes forwarded to the Chief-in-Council.

In part three we have demonstrated that most of the features of the African palaver coincided with the traits of the democratic ideal. We also noted that these palaver institutions have been considerably disregarded or minimally utilized by contemporary African states. In the next part we review some of the attempts made in certain countries in recent years to institute a national palaver. A couple of these have been successful (South Africa and Benin). The other attempts have been but a timid mimicry of unrealistic national aspirations. The Truth and (Reconciliation) Commissions of South Africa, Nigeria, Ghana and Sierra Leone have all been variably used in the said societies as a means of fortifying the search for the democratic ideal. The paper addresses some of the strengths and weaknesses of these *ad hoc* bodies (4.1). In most of the Francophone African countries, the fall of the Berlin Wall and the advent of multi-party politics heralded a wave of popular reclamation of Sovereign National Conferences. With the benefit of hindsight, we argue that with the isolated exception of Benin, most of these conferences failed in their ambitious bid of harnessing a national palaver (4.2).

4 – Truth Commissions and Sovereign National Conferences: Democratic stimulants?

Africa is replete with stories of inter-ethnic bitterness, economic implosions, political segregation and divisive elitism, power sharing failures, bubonic plagues, chaotic pandemics (AIDS) and other ills that stifle economic development. As much as Africans could be their own problem they nevertheless constitute the solution thereof. Yet awareness in this regard appears to be minimal. But when push comes to shove, Africans themselves will be the ones to call the shots. As we discussed above, there exists a wealth of democratic principles and institutions of traditional Africa that remain untapped. Most political regimes have voted for the least resistance option of mimicking former colonial powers. The result as part two revealed has been abysmal mediocrity for the most part. In countries such as South Africa, Nigeria, Ghana and Sierra Leone, awareness as to the palaver approach to democracy has been revealing. Conscious of the inadequacies in the efficacy of received models at fortifying a waning social contract in African polities, the said systems elected models akin to the African palaver. The similarities of both are highlighted by the underlying democratic values of liberty, equality, participation and justice which are all the driving forces of a productive democracy, of the palaver paradigm and (as we hereby demonstrate) of the TRCs and SNCs.

⁴⁸ See generally, Aletum, T.M., *The use of legitimate force in traditional political institutions in Revue Juridique Africaine* N°2, 1990, Maurice Kamto and Paul-Gérard Pougoue (eds.).

4.1- The modern palaver of the T(R)C as stimulant of the democratic ideal

Truth (and Reconciliation) Commissions constitute one of the major tools of transitional justice deployed in nations that have been subjected to protracted socio-political malaise. In most societies burdened with gross violations of human rights, political crises and societal stagnation such bodies have enjoyed special appeal and increasing attractiveness. Given that the experiences and demands of societies vary, so too have these bodies reflected their diverse mandates. Yet their various tasks have revolved around a common compass of consensus as to their vocation for a societal rebirth. However, and for our present purposes, we use the term TC as a generic denominator that embraces Truth and Reconciliation Commissions (South Africa and Sierra Leone), National Reconciliation Commissions (Ghana) and National Commissions of Inquiry for the Investigation of Human Right Violations as the ones of Nigeria (Oputa Panel), Uganda, Zimbabwe and Chad. Henry Steiner defines TC as a governmental organ intended to construct the record of society's tragic history.⁴⁹ Such a terse definition of this concept (which is still in its embryonic phase of articulation) conceals some of the fundamental attributes of these bodies amongst which are the suggestion of recommendations for prospective reform and in most cases, the task of reconciling past adversaries. Focusing on the moral side of these bodies, José Zalaquett notes that TCs provide the moral underpinnings that serve as the cornerstone of societies recovering from political crises. He goes on to intimate that a TC as a conceptual initiative, ought to serve as an invaluable platform for people to come together and ask basic questions as to their *esse* and *bene esse*. Such questions include 'Why are we together? What values do we believe in? What is the best arrangement for justice?' In this manner nations collectively reflect on the 'refounding' of their common shared values. Fateh Azzam on his part opines that they offer an opportunity for political groupings to reclaim 'the moral high ground' by telling what actually took place after a protracted period of societal cataclysm.⁵⁰ In this manner therefore, focus is on the 'telling' highlighted by Archbishop Tutu when he asserts that 'As we have discovered, the telling has been an important part of the healing'.⁵¹ Generally speaking, Truth Commissions aim at a clarification and acknowledgement of the truth, contribute to a sense of justice and accountability, outline institutional responsibility, recommend reforms and above all they promote reconciliation.⁵² Such objectives have served to guide some of the operations of 'truth search' around the world thereby aiding these bodies to focus and streamline their task rather than engage in a frolic of a 'wild goose chase' or what Geoffrey Hawthorn aptly describes as 'a random fishing expedition'.⁵³ They are usually preceded by a discontinuity of political regimes and are normally articulated in three stages described by Bryan Hehir as –catharsis, moral reconstruction and the political processes of utilizing the truth. Despite the strictures that have been levelled against such organs, their merit goes farther afield and their functioning is commendable when compared with the possible alternatives, for example, criminal prosecutions or (as we later illustrate) Sovereign National Conferences. As we explore in detail (*infra*), some of these merits include cost efficiency, individual amnesty-for-full disclosure, reconciliation and societal harmony. The values that have underpinned the TCs in Africa - especially those of South Africa and Sierra Leone - have included amongst others, participation, equality, tolerance,

⁴⁹See generally, *Truth Commissions: A Comparative Assessment*. (An Interdisciplinary Discussion Held at Harvard Law School, May 1996, organised by the Human Rights Programme, Harvard Law School (HRP-HLS) and the World Peace Foundation (WPF). This instructive debate can be accessed through the website; <http://www.law.harvard.edu/programs/hrp/Publications/truth1.html>

⁵⁰See generally HLS-WPF Discussions, op cit.

⁵¹ <http://www.niza.nl/trc/1chap1.htm>, foreword to the Final Report of the South African TRC, p.8

⁵² Hayner, B.P., *Unspeakable Truths*. Facing the Challenge of Truth Commissions, 2002, Routledge New York, pp.24-30.

⁵³ HLS-WPF Discussions, op cit.

restorative justice and social peace. All these values are coincident with the values and principles of the productive or ideal democracy and of the African palaver paradigm. We do not hereby suggest that South Africa and Sierra Leone have attained the democratic ideal. Rather, we appeal to the means used by these societies to break with a difficult past. In this process both societies together with the Nigerian and Ghanaian operations embraced and incorporated values that are worth considering if the democratic ideal is to be realized.

The TRC of South Africa

In 1995 the South African Parliament passed the Promotion of National Unity and Reconciliation Act⁵⁴ creating the TRC after an intense process of negotiations on amnesty provisions. While the National Party and the security forces bargained for a general or blanket amnesty, others preferred a much more constricted option. Compromise was struck for individual amnesty in exchange for full disclosure. President Mandela endorsed its creation in the Government Gazette of 15th December 1995 and its first meeting was held the next day at Bishops court, the official residence of the Archbishop of Cape Town. Espousing its aims in a speech in Parliament on May 17 1995 the Minister for Justice at the time, Dullah Omar noted inter alia,

Its substance is the very essence of the constitutional commitment to reconciliation and the reconstruction of society. Its purpose is to provide that secure foundation which the Constitution enjoins: '...for the people of South Africa to transcend the divisions and strife of the past, which generated gross human rights violations...and a legacy of hatred, fear, guilt and revenge.'⁵⁵

The work of the Commission was divided into three inter-related committees, namely the Human Rights Violations Committee charged with the investigation of gross violations of human rights and atrocities; The Amnesty Committee, and The Reparations and Rehabilitation Committee. Led by Archbishop Desmond Tutu, the organ was made up of people who were selected after a protracted process of inquiries and interviews as to their probity, motivation, cares and concerns. The final list of members reflected the geography as well as the texture of the South African civil and professional society.⁵⁶ Participation was a fundamental aspect in the hearings of the Human Rights Violations Committee of the TRC. The Government together with security services, the media, civil society, religious bodies and over 20,000 people (who gave statements to the Commission either in public or in camera before the Human Rights Violation Committee), participated fully in the proceedings of the Commission. Equality was also perceptible. The political calling of an individual was irrelevant. Perpetrators, be they members of the National Party or the African National Congress, were equally amenable before the Commission that had wide powers of search and subpoena. Focus was on restorative justice. Tolerance and human

⁵⁴ It is significant to note that like the TRC of Sierra Leone, that of South Africa was created by the Assembly and as such enjoyed better legitimacy than the Commissions of Chad, Uganda, Zimbabwe or even Nigeria that were created by an act of the Heads of state of the said countries. It is equally very important to refer to the enormous inputs of certain international actors in promoting the TRC of South Africa and Sierra Leone (notably the assistance of the UN Human Rights Commission) as well as the one of Uganda.

⁵⁵ <http://www.niza.nl/trc/1chap4.htm>

⁵⁶ Members included Archbishop Desmond Tutu (Chair), Dr Alex Boraine (Deputy Chair; jurist and influential religious authority- once served as the youngest president of the Methodist Conference), Mary Burton (Human Rights activist), Chris Jager (Senior Counsel and Judge), Rt. Rev Bongani Finca, Ms Sisi Khampepe (Labour Rights lawyer), Richard Lyster (Human Rights lawyer), Mr Wynand Malan (lawyer), Dr Khozo Mgojo (President of South African Council of Churches), Ms Hlengiwe Mkhizen (Psychologist), Mr Dumisa Ntsebeza (Human Rights lawyer), Dr Wendy Orr (Medical Doctor), Denzil Potgieter (Senior Counsel-lawyer), Dr Mapule Ramashala (Clinical Psychologist), Dr Fazel Randera (Medical Doctor), Ms Yasmin Sooka (lawyer and President of the World Conference on Religion and Peace who later served on the TRC of Sierra Leone), Ms Glenda Wildschut (Psychiatric Nurse and President of the Centre for Victims of Violence in Cape Town), Tutu, D., *No Future without Forgiveness*, 1999, Rider London, p.66.

empathy were milestones in the process. The latter is evidenced by the centrality that the Commission accorded to the truth both from the victims as well as the perpetrators. In his foreword to the Final Report Archbishop Tutu recounts the agony of a victim and the crass nature of a perpetrator in these revelations chronicled by the Commission;

They undressed me and opened a drawer and shoved my breast into the drawer which they then slammed on my nipple! (or) I drugged his coffee, then I shot him in the head. Then I burned his body. Whilst we were doing this, watching his body burn, we were enjoying a braai on the other side.⁵⁷

The erudite prelate equally presents the difficult hearings of Ms Winnie Mandikizela Mandela whose Mandela United Football Club (M.U.F.C.) had provoked much ire from several quarters. Alleged actions of the M.U.F.C. included the controversial murder of the 14 year old Stompei Seipei. The main person accused for the murder of Stompei was Jerry Richardson the former 'coach' of M.U.F.C. In his statements made before the Human Rights Committee he said, *inter alia*,

...I slaughtered him. I slaughtered him like a goat. We made him lay on his back and I put garden shears through his neck and the garden shears penetrated to the back of his neck and I made some cutting motion...I killed Stompei under the instructions of Mummy (Ms Mandela). Mummy never killed any one, but she used us to kill a lot of people...She used us!⁵⁸

At times, such revelations provided more heat than light. All the same Ms Mandela appeared before the Committee and apologized for all that had transpired. These hearings revealed that every South African had to bow before the altar of equality so as to rebuild a society founded on true humanity or the spirit of *ubuntu*- or social harmony, amity or community spirit which is the *summum bonum* for a true African. *Ubuntu* commands tolerance and forgiveness. As Archbishop Tutu intimates, 'to forgive is not just be altruistic. It is the best form of self interest. What dehumanises you inexorably dehumanises me. Forgiveness gives people resilience, enabling them to survive and emerge still human despite all efforts to dehumanise them.'⁵⁹ The Commission wound up and submitted its findings and recommendations amongst which were the payment of reparations to victims and the constant endeavour by the Government and the entire society to narrow the gap between the majority black poor people of the townships and the minority rich white population. It was indeed an illustration that the African palaver works not least because it is relatively cost effective and is a propitious stimulant of truth revelation. The criminal prosecution of Col. Eugene De Kock cost the Government a stupendous sum of 1 million dollars, as at 1999. The cost of Gen.Malan's prosecution stood at an astronomical 2 million dollars.⁶⁰ The TRC had a yearly budget of 18.5 million dollars- part of which came from foreign donors. *Res ipsa liquitur*. Another merit of the Commission was its focus on the victim rather than the accused or the perpetrator. Yet it was not immune from criticisms. In a recent interview over the BBC the former president, F.W. De Klerk noted that while the TRC facilitated the process of truth telling it fell short of its reconciliation vocation⁶¹. Nobel laureate Wole Soyinka, on his part, castigated the TRC amnesty regime. In his work entitled, *The Burden of Memory, The Muse of Forgiveness*, he notes that where there is pre-determined exclusion of restitution, '...there remains a sense that the adopted formula for the harmonization of that society erodes in some way one of the pillars on which a durable society must be founded- responsibility'. Perceived as a call to move back to aimless legalism the Commission's Chairperson retorted

...it has become fashionable in some circles to decry the provisions for amnesty...To repudiate amnesty now would be to tear up the Interim Constitution. We forget too easily where we come from. Apart from which if the criminal justice system cannot cope with the current crime, how on earth do we expect it to process 33 years of the political crime during the apartheid era?⁶²

⁵⁷ See <http://www.niza.nl/trc/1chp4.htm>

⁵⁸ Tutu, D., *No Future without forgiveness*, op cit, p102

⁵⁹ Op cit, p35.

⁶⁰ Ibid, p27.

⁶¹ BBC World Service, radio program- *The Interview*, April 10 2004.

⁶² See website, op cit.

In a characteristic style, the prelate goes on to caution

At the end of their conflicts, the warring groups in Northern Ireland, the Balkans, the Middle East, Sri Lanka, Burma, Afghanistan, Angola, the Sudan, the two Congos and elsewhere are going to have to sit down together to determine just how they will be able to live together amicably, how they might have a shared future devoid of strife, given the bloody past that they have recently lived through. They see more than just a glimmer of hope in what we have attempted in South Africa.⁶³

This call was heeded to by many other African countries including Sierra Leone, Nigeria and Ghana.

*The TRC of Sierra Leone, the Oputa Panel of Nigeria and the NRC of Ghana*⁶⁴

The people of Sierra Leone experienced a pernicious imbroglio that lasted for about ten years. The war pitted Government forces (Civil Defense Forces) led by President Tijan Kabbah against Foday Sankoh's Revolutionary United Front. It left the country bereft of some basic institutions as well as a traumatized people. The signing of the Lomé Accord in July 1999 guaranteed a lull in the feud that persisted intermittently right into 2002. The Lomé Accord contemplated a TRC and in February 2000 the TRC Act was passed by the legislature and signed by the president. The debates and consultations that led to this piece of legislation were mainly led by the civil society. The TRC was chaired by Bishop Joseph Humper and its membership reflected the diversity of the society. The TRC Act mandated the Commission with the ability to operate within a specific province of competence. It was charged (Article 6(1)) amongst others with the task of undertaking research, receiving statements from victims and witnesses, and to holding public sessions toward the aim of establishing an impartial historical chronicle of the violations of human rights and international humanitarian law related to the armed conflict in Sierra Leone from the commencement of the conflict in 1991 to the signing of the Lomé Peace Agreement. The role of traditional leaders was important and NGOs such as the National Forum for Human Rights and Manifesto 99 were charged in this regard to fashion the kind of role that traditional leaders will play. In most of the hearings that the TRC held out of Freetown traditional leaders were invited and at the end of each week, a protracted solemn ceremony of reconciliation was held. These were laden with traditional customs and procedures that included the cleansing of perpetrators and the washing of hands as a sign of atonement and contrition for the sinister acts. It was indeed in the spirit of the African palaver treated in part three above. As Hayner appositely puts it, 'These were powerful events, although unfortunately limited in number'.⁶⁵ Although many people were initially reluctant to participate, the conduct of later proceedings provoked the avidity (for participation) of many, including the ex-combatants. It marked the acme of horizontal democracy and served as a beacon of hope for a burgeoning and convalescing *demos*. It is hoped that the people will rise to this unique occasion and articulate their opinions on the direction of the country.

The Nigerian Commission of Inquiry for the Investigation of Human Rights Violations was established in June 1996 by President Olusegun Obasanjo. Led by Retired Justice Chukwudifu Oputa, it was mandated with the task of investigating the human rights violations that transpired from 1984 to 1999. This temporal dimension of the mandate was later extended to retrospectively span the period 1966 – 1984. The hearings of the Commission attracted much interest because of the personalities who appeared before it as well as those who did not. The first group of persons included President Obasanjo himself, Gen. Oladipo Diya and Maj. Hamza Al-Mustapha (the Chief Security Officer of Gen. Sani Abasha). Those who were conspicuously absent included former

⁶³ Tutu, D., 1999, p.229

⁶⁴ The National Reconciliation Commission.

⁶⁵ Hayner, P., *The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year*, 2004, Case Study Series, International Centre for Transitional Justice ICTJ, p5.

Presidents Ibrahim Babangida, Muhammadu Buhari and Abdul Salam Abubakar. Participation and free speech was characteristic of the Oputa Panel and in its Final Report it did make certain thoughtful suggestions. However, has been criticized for the limited powers it had to subpoena the former leaders whose testimonies were necessary if the truth was to be ascertained on many issues that remain arcane. In this connection some observers have derided it for being vulnerable to Nigerian political elitism. Thus it will not be an understatement to qualify its score as modest. Yet the values defended by Justice Oputa and his panellists need to be highlighted and upheld. It made vital suggestions for the nation's definite detachment from its military past. It is hoped that this would provide a democracy-friendly society.

The National Reconciliation Commission of Ghana was inaugurated on 14 January 2003 at the Old Parliament Buildings where Nkrumah moved for the adoption of the motion for independence from the British on March 6th 1957. Led by Justice K.E. Amua-Sekyi it was mandated to establish an accurate and comprehensive account of human rights violations perpetrated by state agents during the period of the country's unconstitutional regimes. The Commission has also been mandated via its committees to specifically examine the role played by such bodies as the press, the legal profession, student movements, labour unions as well as traditional rulers. It was attributed wide powers such as that of subpoena and search. Yet it was not empowered to hand down sentences. Critics of the body have it that the NRC was created by President John Kufour as a mechanism to specifically target and deride the National Democratic Alliance of former President Jerry Rawlings. They also point to the fact that such bodies are usually preceded by periods of great national stress as was the case of South Africa under apartheid or Sierra Leone that was wrapped in the conflagration of a chaotic civil war. Ghana they believe, did not experience such political malaise. However, the body has been hailed for the revelations made in some of its hearings not least of which was the testimony tendered by former President Rawlings when he appeared before the Commission on 12 February 2004. Other hearings like those of Emmanuel Adjayi have been laden with emotions and it is believed that these will facilitate the reconciliation process and shade more light on the killings in 1979 of three former heads of state and the assassinations of three judges during the 1980s.

Truth Commissions are in their embryonic stage of elaboration. Further empirical studies of such bodies as well as accompanying conceptual benchmarks are highly recommended. The TRCs of South Africa and Sierra Leone provided an apt public space for a battered *demos* to sufficiently participate in nation building. In most of the French-speaking countries of Africa, the Cold War ushered in a wave of inflated aspirations as to the political direction of the various countries. Citizens of most nations in Francophone Africa were caught in a frenzy of reclaiming Sovereign National Conferences. They believed that such bodies would provide the necessary fora for constitutional revolutions hence, apt democratic mutations. With the benefit of hindsight it is fair to state that such aspirations were overstretched. While TRCs targeted specific institutional or thematic concerns Sovereign National Conferences aimed at overhauling the entire architecture of the state. Today, while Truth Commissions remain attractive as an avenue towards the fortification of the ideal democracy in many states, Sovereign National Conferences have virtually been confined and relegated to the pages of history books. In the lines that follow we examine some of these Conferences and the reasons for their debacle as democratic catalysts.

4.1- Sovereign National Conferences (SNCs) and the democratic ideal

The SNC constituted a platform for constitutional discourse in many countries. Its peculiarity was the diversity in the texture of its attendance lists as well as the amplitude of its themes most of which aimed at establishing a novel direction for the country. A SNC was convened for the first time in the post-Cold War era in Benin (February 1990). Its success provoked a snowball effect as regards the creation of similar bodies around the sub-continent. Between 1990 and 1993 SNCs were held in Congo, Niger, Mali, Togo, Zaire and Chad. Gabon equally organized a National Conference with the sole but fundamental difference that it was not sovereign.

From the foregoing, such bodies responded to two categories, namely, those that were that were sovereign and those that were not.⁶⁶ One of the effects of this distinction is that while SNCs had the extra-constitutional authority to revoke the constitution as was the case in Togo, Niger or Benin, National Conferences lacked the Sovereignty to exercise such powers. The case of Gabon is instructive in this regard. In the same light, SNCs equally played a key role in formulating new constitutions as in Benin, Congo, Mali, Zaire and Niger. In Cameroon, the adventure was rejected outright by President Paul Biya. He exposed his desire to institute a 'Large Débat National' rather than a SNC.⁶⁷

Qualified by some critics as a 'constitutional coup d'état' and as a 'constitutional revolution', the SNC was used as a tool in strengthening the fight to secure multi-party politics in the said African nations. It was perceived by many to be the forum for a true African palaver – an instance that will attract the participation of the masses and give them a say in the articulation process for a viable future. Considered to be the true constitutional mass that will provide the unctio to salvage a politically destitute people, it was equally acclaimed for being the agency that will be deployed by the governed to appropriate a hitherto detached public sphere. Nevertheless, most of the initiatives were not immune from controversy. Raynal has taken issue with the operation of SNCs on several counts. While deriding their neglect of traditional institutions he examines the adverse effects that these bodies had on the existing legal framework. He opines that these bodies did not succeed in diverting their various legal systems from the convention of simply imitating the colonial paradigms. As such, the problem of legal security has been accentuated due to acute and persistent inadaptability.⁶⁸ The author equally castigates the manner in which SNCs addressed the issue of democracy. Not only did they disregard the question as to the apposite kind of democracy needed, but much emphasis was placed on a misguided representative democracy whose application is not uncontroversial in plural societies characteristic of Africa. The effects of such as a cocktail of deficiencies was that some of the leaders regarded as dictators simply disregarded the bodies and fortified their grip on power. This was the case of Togo and Zaire where the SNCs culminated in futile altercations. In those countries where they had provoked regime change (Benin and Madagascar), the effects were much more limited given that the former leaders were brought back at the helm of their states (*id est*, Mathieu Kérékou and Didier Ratsiraka, respectively).⁶⁹ Moreover, the combat to secure multi-party politics that constituted a focal vocation for most of these bodies soon turned into a farce. In Gabon for example the ratio of

⁶⁶ See generally, Bidima, op cit, Kamto M., *Les conférences nationales africaines ou la création révolutionnaire des constitutions*, in *La création du droit en Afrique*, Darbon D., et Gaudusson J., (eds), 1997, Editions Karthala, Paris. See also, Raynal J.J., *Conférence nationale, Etat de droit et démocratie. Quelques réflexions à propos d'une occasion manqué* in Darbon et Gaudusson, op cit.

⁶⁷ Sindjoun L., et Owona Nguini E.M., *Politisation du droit et juridicisation de la politique : l'esprit sociopolitique du droit de la transition démocratique au Cameroun*, in Darbon et Gaudusson, op cit, p.225.

⁶⁸ Raynal J.J., op cit, pp.163-164.

⁶⁹ See Bidima,op cit, p.73.

party to inhabitants was 1:18000. Such a non-isolated political dispensation provoked further divisions in many societies. Bidima⁷⁰ on his part pours scorn on the SNC initiatives for a variety of reasons, to wit, the non-secularity⁷¹ of the catholic oriented SNCs leadership, the hyper-exigent demands of some actors, the neglect of the masses, the narrow dimension of the debates (for example, exaggerated attention was accorded the trite and short term issue of power succession), the exaggerated focus on the political community (the state) to the detriment of the wider society and the deficiency in accessing the passions, feelings and intimate choices of the people⁷². These and other reasons have been advanced for the failure of SNCs. It is not the ambition of this treatise to be as comprehensive. However, it is trite noting that the idea of a national forum such as the SNC was in itself a victory. Although its foibles neutralized its minimal gains, it was nonetheless a watershed in the political evolution of a country such as Benin.

Conclusion: The Way Forward –The gacaca model?

Political systems are not vacuums. They are not value neutral. Private and public interests positions will always overlap. The merit of a democratic political system is to draw an appropriate line between the two. Such a line will preclude individuals from monopolizing the public sphere for egocentric private interests in the name of representative democracy. We have argued that given the complexity of the modern *demos*, representative democracy is here to stay. Yet an ever-narrowing gap between the interests of the representatives and the represented is an indispensable building block for the democratic ideal; an ideal which we endeavoured to delimit in part one. In the second part we referred to some of the consequences that are entrenched in political systems that disregard the importance of reducing the representatives/represented gap. We cited the examples of apartheid South Africa, the civil strife in Sierra Leone and the successive military juntas in Nigeria and Ghana. Thereafter, the treatise examined the African palaver system prided with its merit of participative participation of the masses. It was noted that most of the post-independent African countries did not sufficiently integrate the palaver paradigm in the search for the democratic ideal (part three). Part four reviewed some of the rare and modern occasions in which the palaver paradigm was successfully and unsuccessfully used in catalyzing the search for an apposite democratic model. Our major theses has been that there are specific realizable values attached to the democratic ideal and that the African palaver provides a paradigm prior to or coincident with the democratic ideal.

The way forward cannot be a dogmatic prescription. It necessarily entails constant debate and dialogue, ipso facto, a guaranteed *carte blanche* of constructive participation for all the citizens of the given polis both in rule construction and implementation. The current *gacaca* hearings in Rwanda can serve as an example for modern African states to delve into their untapped cultural wealth. The legitimacy and efficiency of *gacaca*⁷³ in terms of cost-minimization⁷⁴ and expediency has been applauded. In these traditional courts morality, justice and beliefs in the ancestors have

⁷⁰ Ibid, pp.65-77.

⁷¹ In Benin, Gabon, Congo, ex-Zaire and Togo they were all headed by Roman Catholic Bishops.

⁷² The author describes this as ‘affectivity’ that has been considerably eroded by much emphasis on ‘effectiveness’, op cit, p.72.

⁷³ See generally Kritz N.J., *Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation*, in, *The Legacy of Abuse. Confronting the Past, Facing the Future*, 2002, *The Aspen Institute*, Alice Henkin (ed) p.38

⁷⁴ As at April 2004 the International Tribunal for Rwanda had held 18 trials with the average cost of each trial pegged at 50 million dollars. Most Rwandese have derided the tribunal seeing it as a white elephant project that is diverting stupendous sums of funds (18 million dollars per annum as budget) that could otherwise be used in the fight against AIDS and in the provision of social services.(See *World Today*; vol 60 N°4 April 2004, *Genocide Goes On*, Colin Waugh, p.19-20)

all been used to canalise justice from the grassroots; an apt bottom-up approach to law. It is a constant and hallowed search to avert a perversion of the truth. Deponents are well aware of the importance of the truth and of the authority of the invisible⁷⁵ world of the ancestors. In the case of Rwanda, reconciliation has proven to be difficult yet possible with the horizontal system of law as epitomised by the *gacaca* courts.

By classifying the offenders into categories⁷⁶ and organising the hearings into different administrative levels, to wit, cell, sector, commune and prefecture which are all coordinated and supervised by the Department of *Gacaca* jurisdictions of the Supreme Court, the Government has inadvertently institutionalised a traditional mode of adjudication. However, such efforts geared at incorporating the traditional paradigm into the modern legal currents have been criticised by some theorists. Digneffe and Fierens have expressed their concerns in this regard by noting that there are risks of perverting the traditional *gacaca* and the non-respect for due process.⁷⁷ Another demerit of the entire venture is that while its discourses revolve around the establishment of social solidarity it has ironically alienated and estranged most of the alleged perpetrators who prefer to move to other countries so as to avert sanctions. Thus they perceive institutionalised *gacaca* as a ruse by the Government of President Kagame to legitimise its authority and vision qualified in certain circles as totalitarian. Through the *gacaca* jurisdiction and its policy of creating compulsory ‘solidarity camps’, the Government has aimed at reconciling its people. Nevertheless, and as Smis and Hoyweghen have intimated, reconciliation does not necessarily flow from justice, worst still, from a justice perceived to be an imposition.⁷⁸ In other words ill-tuned justice that is enshrouded in political strategising may be antithetical to reconciliation. They expose their preference for an open system which can vouchsafe extensive participation for all. All the same, the stakes could not be higher for the country. Ensuring social solidarity without tolerating impunity is a daunting endeavour. If *gacaca* could adequately balance between the needs of social solidarity and the fight against impunity, then it would have done great service both to Rwandese and their Great Lakes neighbours of Burundi and The Democratic Republic of Congo.

Another example that is worth considering is the constitutional system of Botswana which provides for a House of Chiefs for her traditional rulers. This assures indigenous people an active representation of their cultural values cares and concerns at the national level. While the chiefs transmit constructive modern ideas to their folk at the peripheries they equally actuate the national conscience with sieved cultural inputs. The result of this is that formal laws, for the most part, reflect the aspirations of the town dweller as the villager. None the less, it is important to add the caveat that the mode of choosing such traditional leaders ought to be inclusive. The criteria should be transparent.

TRCs have also proven their worth. However they are usually ad hoc bodies that do not aspire for infinite institutionalisation. Such is the nature of their remit. All the same, the values upon which they operate are instructive and should be capitalized upon by the society as a whole. In other

⁷⁶ Smis, S., and Hoyweghen, S.V., *The Re-establishment of the Traditional Gacaca Jurisdiction in Rwanda: A step forward to reconciliation?* Paper presented to the African Studies Association of the UK Biennial Conference (ASAK), 11-13 September 2000, Trinity College, Cambridge, UK, p.3. Category I includes planners and leaders who can be sentenced to death; category II includes authors and accomplices who can be subjected to the penalty of life imprisonment; category III relates to those suspected of bodily harm or injury and category IV deals with those who committed crimes against property.

⁷⁷ Digneffe, F., et Fierens, J. (eds), *Justice et gacaca. L’expérience rwandaise et le génocide*, 2003, Presses Universitaires de Namur, p.134

⁷⁸ Smis and Hoyweghen, op cit, p.9

words the said values and principles ought to be integrated into the larger framework of government institutions.

One of the major avenues through which the palaver paradigm could inform the modern democratic process is education. Focus on civic education and synchronised traditional practices in the curricular of schools ought to reflect a parallel determination on the part of law-makers to constantly search for a cordial marriage between modernism and African traditional beliefs. The onus is equally on researchers to facilitate the task of law-makers. It is regrettable that the absence of documents that chronicled palaver proceedings in most African societies has been a fundamental weakness in ensuring a relay of these practices hitherto preserved by griots. Yet it is never too late to start. There is no silver bullet for the democratic ideal. It is an ongoing process.

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