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CONCEPT NOTE

CONSULTATIVE WORKSHOP TO ENGAGE TRADITIONAL AND INFORMAL JUSTICE STRUCTURES AND JUDICIARY TO PROMOTE THE RULE OF LAW IN EASTERN AFRICA

13 to 15 September 2017

KAMPALA, UGANDA

DEPARTMENT OF POLITICAL AFFAIRS



I. CONTEXT

The importance of Constitutionalism and Rule of Law remains primordial in entrenching a culture of democratic governance on the African continent. This vision is also echoed and strengthened by the African Union Shared Values instruments which also form the pillars of the realisation of the vision the African Union- that of a peaceful Africa, prosperous, integrated and driven by the people, as highlighted in Agenda 2063.

The concept of rule of law encompasses; creating strong institutions with constitutional limits on power, promoting and protecting human rights, creating effective electoral systems, commitment to gender equality, protection of minority and vulnerable groups and creating a space to foster a strong and vibrant civil society.¹ Adherence to the Rule of Law is essential to a thriving democracy where governments and citizens are equal and accountable under the law.

As a key stakeholder in promoting and upholding the rule of law in the country, the judiciary is tasked with the role of promoting adherence to the rule of law and constitutional order. It ensures compliance with the limitations of power placed on state organs by the constitution, fair and equitable adjudication of disputes and protection of human rights.² Because of the judiciary's role in promoting the adherence to rule of law, the African Charter on Democracy, Elections and Governance recognises the judiciary as a guarantor of constitutionalism and rule of law and encourages member states to protect the independence of the judiciary. It is also recognized that traditional justice mechanisms also help to promote justice to several segments of the population who do not have access to courts easily.

The entrenchment of constitutionalism and rule of law as stipulated in the ACDEG, aims to contribute to the institutionalization of a democratic culture in Africa. The values of constitutionalism and rule of law are strengthened by an active participation from the citizens on all levels ranging from political to economic. Good governance thus embodies the proximity with citizens to be able to have a voice in the decision making of their countries.

On the African continent and especially in the Eastern African region, there has been a growing interest on issues of constitutionalism, rule of law and justice and this can be demonstrated by an increased interest in the regional treaties which the Regional Economic Communities have also been pushing for. The entrenchment of constitutionalism, rule of law and justice is both a matter of duty and rights for any citizen. These civic rights and responsibilities are also based on the assumption that people participate effectively and that their voices are taken into account on issues that have a direct bearing on their lives; that public actions or decisions taken by government are managed in a transparent, efficient, responsible and fair manner while abiding by the rules. Thus this brings us to the concept of the collaboration between the

¹ Cordenillo R, Sample K (2014) Rule of Law and Constitution Building, Stockholm, International IDEA

² Thoko K. 2004, SADC and Human Rights: Fighting Human Rights into the Trade Matrix, African Security Review V13 No. 1 pg. 109 -117

formal and the informal justice structures as being key stakeholders in the maintenance of Law and Order and the civil society organisations, as being the bridge between the two institutions.

Last but not least, to highlight the collaborative mechanisms between the judiciary and informal justice structures in Africa, there are the peace-making circles, which already form part of traditional justice mechanisms among native communities in Europe, Asia, and Africa, have been developed to deal with offences within the criminal justice system. Peace-making circles complement the formal justice system, but are mainly conducted in an informal manner with the participation of all parties and the entire community.³

These circles focus on communal rather than individual healing, and are guided by peace-makers who draw knowledge from traditional narratives, customs and norms.⁴ The Gacaca courts passed orders of community service which were intended to provide perpetrators with opportunities to take active responsibility for the crimes they committed. Unfortunately, it was overshadowed by concerns about proportionality of punishments to the crimes committed, and fears of reprisal. Moreover, the Gacaca courts were primarily modified with punitive measures and punishments, the application of which was limited by arbitrary arrests, the rejection of evidence or witnesses for the accused, partiality of judges towards victims, and false testimonies, among others. The Gacaca model presents an example as to how traditional justice processes could be modified with punitive measures, and the limitations of such modifications in establishing accountability.

II. JUSTIFICATION

This consultation involves the efforts of the Department of Political Affairs of the African Union Commission, supported by Intergovernmental Authority on Development (IGAD) and the East African Community (EAC) and it is designed to engage civil society organizations, judges and representatives of traditional justice structures in the importance of constitutionalism and rule of law, through focusing on the values of constitutionalism and Rule of Law as enshrined in the ACDEG.

This consultation involves implementing the recommendations of the Dakar meeting held in April 2014 which aims to create a good synergy between the various actors on the national level to establish a structural dialogue for promoting and monitoring the implementation of the ACDEG while strengthening constitutionalism and rule of law.

Furthermore, a consultative meeting held with the civil society organizations and the media in July 2015 in Abidjan, Côte d'Ivoire to promote the ratification and implementation of ACDEG in West Africa highlighted the important role played by parliaments in promoting values of Constitutionalism and Rule of Law in their capacity as legislators. Recommendations were also made for more consultations with

³ Human Rights and Traditional Justice Mechanisms in Africa, UNCHRC Report, 2013.

⁴ Traditional Justice and atrocities by child soldiers in Uganda

parliaments at regional levels to better understand their respective realities in promoting rule of law and constitutionalism. In the recent past, parliamentarians through the Pan-African Parliament have showed how important is the role of parliaments in the signing and ratification of legal instrument, in helping accelerate the signing and ratification of the ACDEG, especially with the campaign "11 by 2011" that allowed the ACDEG to enter into force in early 2012.

Additionally, a consultation with PAP, Regional Parliaments and Members of the Judiciary held in December 2015 in Midrand, South Africa, while discussing ways to address the fundamental challenges faced in fulfilling the three traditional functions of parliaments in advancing constitutionalism (law making, representation and ensuring accountability through oversight) called for such dialogue with national parliamentary, judiciaries and traditional justice mechanisms. The current consultation is partly a response to these calls and is part of a series of regional consultations that will be held throughout 2017-2018.

Furthermore, in line with Aspiration 3 of Agenda 2063, which aims at having a continent where there is respect for the rule of law, human rights, this meeting with the representatives of judiciary and traditional justice mechanisms comes in at a timely moment as they remain a key stakeholder in the promotion of the rule of law.

In recognition of the vital role played by the formal courts and the traditional courts in upholding and strengthening the rule of law, the Constitutionalism and Rule of Law cluster in line with its mandate, seeks to embark on a process of building capacity for the judiciary by engaging the Judiciary in Eastern Africa on the issue of Rule of Law and Justice Reform. This meeting will thus also set the pace for other regional workshops with members of the judiciary in the field of promoting constitutionalism and rule of law.

III. OBJECTIVES

In line with the mandate of the Constitutionalism and Rule of Law Cluster, This consultative meeting seeks to explore and examine the relationship between the formal courts and traditional justice systems while examining the similarities between traditional and international justice and analysing the challenges of codifying traditional justice systems into national laws.

It more specifically aims to

- Engage and inform stakeholders (Member States, agencies and organs of the African Union, Regional Economic Communities, judges, civil society, traditional justice mechanisms) for the importance and urgency of the entrenchment of constitutionalism, rule of law and justice.
- Providing opportunity for experience sharing among the different justice structures of the Member States on the promotion of the rule of law.

- Enhance both horizontal and vertical accountability systems, civil society–legislator engagement to help develop a new political landscape both nationally and regionally;
- Strengthen the quality of national and regional-level policy debates and decision-making processes in terms of justice structures;
- Ensure connections and dialogues between judges and their grassroots constituents;

IV. EXPECTED RESULTS

The main expected outcomes of the consultation include:

- A renewed opportunity for experience sharing among the different justice structures of the Member States on the promotion of the rule of law provided.
- The quality of national and regional dialogues between judges, Civil society and grassroots traditional justice mechanisms enhanced.
- A renewed commitment of States Parties to implement the ACDEG to promote Constitutionalism and Rule of Law and take the necessary steps in this process;

V. PARTICIPANTS

This meeting will be attended by representatives of national and regional judiciaries and representatives of grassroots level organisations/traditional and informal justice structures, the RECS such as the IGAD, the PAP as the Chair of the AGA, African Union Commission, the African Union Organs, Experts in Constitutionalism and Rule of Law, representatives of civil society, think tanks and other organizations.

VI. COORDINATION

The meeting will be coordinated by: **Mr. Calixte Aristide Mbari**, Ag. Head of Division, Democracy, Governance, Human Rights, and Elections at the Department of Political Affairs: Tel. 00 251 115182611/Mob. 00 251 913361605; MbariC@africa-union.org, mbaricalixte@hotmail.com.

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The dates of the meeting are from 13 to 15 September 2017.

VII. METHODOLOGY

The workshop seeks to bring together EAC and IGAD states Representatives of the Judiciary, representatives of the bar, representatives of civil society and traditional justice mechanisms/institutions, RECs and AU organs. Attendees will participate in a collaborative, interactive, fast-paced and hands-on overview of the state of Rule of Law and Justice Systems in the EAC region. The challenges encountered in promoting Rule of Law and Justice Reform will be discussed and the dialogue will seek to establish the

steps which should be taken to transform the justice sector. The dialogue will combine plenary presentations and discussions with small working group sessions. The meeting will be conducted in English and French.

VIII. WORKING DOCUMENTS:

The following documents will be used as the working documents for the consultative workshop.

- The African Charter on Democracy, Elections and Governance;
- The African Charter on Human and Peoples' Rights;
- Reports of the previous meetings
- Any other relevant document.

