

**HUMAN RIGHTS MECHANISMS AND STRUCTURES UNDER NEPAD AND THE
AFRICAN UNION:
EMERGING TRENDS TOWARDS PROLIFERATION AND DUPLICATION**

Paper 15

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1 Introduction

This contribution examines the human rights component of Africa's contemporary development blueprint - the New Partnership for Africa's Development (NEPAD). The focus of the paper is on structures and mechanisms that are being developed under the NEPAD framework to address human rights challenges on the continent. The main aim is to highlight the emerging trends towards proliferation of these structures and mechanisms and to propose ways and means to curtail these trends.

The article is divided into five main parts. The first part gives a historical backdrop to NEPAD. An overview of the substance and institutional framework of NEPAD follows under part two. Next, the NEPAD provisions with human rights content are scrutinised and analysed. Trends towards proliferation and duplication of mechanisms and structures are highlighted under part four. Proposals are then made with the view of consolidating, rationalising and harmonizing the human rights mechanisms and structures under NEPAD and the African Union (AU). This is followed by a conclusion.

2 Background of NEPAD

The NEPAD document started off as the Millennium Action Plan (MAP) conceived by President Mbeki of South Africa in the year 2000. MAP merged with the OMEGA plan developed by President Wade of Senegal to form the New African Initiative (NAI) in July 2001. The title NAI was later changed to NEPAD in October 2001.

The MAP document had its origins in the OAU Extraordinary Summit held in Sirte in September 1999 and the South Summit of the Non Alignment Movement and G77 held in Havana, Cuba in April 2000. During the Sirte Summit, the OAU mandated Presidents Mbeki of South Africa and Bouteflika of Algeria to negotiate with African creditors, on behalf of the OAU, the total cancellation of Africa's external debts. The Havana summit mandated Presidents Obasanjo of Nigeria and Mbeki of South Africa to communicate the concerns of the South to the World Bank and the International Monetary Fund as well as the G8 countries.

Noting the similarity between these two parallel mandates, the OAU Summit held in Togo in July 2000 mandated Presidents Mbeki, Obasanjo and Bouteflika to engage the countries in the North with a view of developing a partnership for the renaissance of the continent. Pursuant to this mandate, the three leaders relentlessly engaged the industrialised countries in the North and multi-lateral organisations on the partnership at various fora. Going in tandem with these promotional efforts was the development of a document named MAP outlining the terms of the partnership. Around the same time, the newly elected president of Senegal, Wade, conceived a plan titled OMEGA.

The MAP and OMEGA plans were presented respectively by Presidents Obasanjo of Nigeria and Wade of Senegal during the 5th Extraordinary Summit of the OAU held in Sirte, Libya from 1 to 2 March 2001. Recognising the synergies and complementarities between the two plans on continent-wide development, the Sirte 2001 OAU Extraordinary Summit recommended the integration of the two initiatives. The decision to have a single, co-ordinated African plan was grounded on the need to avoid confusing Africa's partners, diffusing the focus, eroding capacity, splitting resources and undermining the credibility of the plans.

The first step towards implementation of the Sirte 2001 Summit decision was a conference of African Ministers of Finance held in Algiers from 8 to 10 May 2001. At this conference, the OMEGA plan, MAP, and the MAP Programme of Action (developed by the United Nations Economic Commission for Africa) were presented and discussed. The conference urged the experts involved in developing the three documents to work together towards the merger and consolidation of the documents. After two meetings related to MAP and OMEGA held in Abuja, Nigeria and Dakar, Senegal from 2 to 4 June and 11 to 13 June 2001 respectively, a joint meeting of experts held in Cairo, Egypt on 18 to 21 June 2001, merged the two documents and developed an integrated and co-ordinated initiative. The result of this merger, which was finalised on 3 July 2001, was NAI. The NAI was approved by the OAU Assembly of Heads of State and Government on 11 July 2001.

The NAI had to be reorganised and edited to clear repetition and inconsistencies emanating from the hasty merger of the MAP and OMEGA plans. The finalisation of the NAI document was achieved on 23 October 2001, when its name was also changed to NEPAD.

3 Unzipping NEPAD: Content and institutional framework of NEPAD

NEPAD constitutes a framework on the basis of which Africa as a continent intends to interact with the rest of the world, particularly the industrialised countries and the multi-lateral global institutions such as the World Bank, the International Monetary Fund and the United Nations. Its main objective is to place African countries individually and collectively on a path of sustainable growth and development and by so doing to put a stop to the escalating marginalisation of the continent. Unlike prior analogous endeavours, NEPAD is an initiative conceived, owned and led by Africans themselves.

Apart from the introduction and conclusion, the NEPAD document is divided into six parts. Part one is the introduction. Part two places Africa in the global context and provides a historical analysis of Africa's underdevelopment. Part three attempts to make a case why NEPAD is poised to succeed while similar programmes undertaken in the past failed. Part four is an appeal to peoples of Africa to mobilise in support of the implementation of NEPAD.

Part five containing the Programme of Action, is the core of NEPAD. This part is also the largest. It encompasses more than half of all the provisions of the NEPAD document (115 paragraphs of the total 207). Part five is divided into three main sub-parts. Sub-part A highlights the conditions for sustainable development in Africa. These are peace, security and political governance initiatives, economic and political governance initiatives and sub-regional and regional approaches to development. Sub-part B identifies the sectoral priorities for achieving sustainable development. These include bridging the infrastructure gap, investing in people, developing agriculture, protecting the environment and the role of culture

as well as science and technology. Sub-part C outlines ways of mobilising resources for sustainable development.

Part six underlines the partnership nature of NEPAD. Part seven deals with the implementation of NEPAD. Part eight is the conclusion.

The institutional framework for the implementation of NEPAD is three-tiered, comprising the Heads of State and Government Implementation Committee (HSIC), Steering Committee and the Secretariat. The HSIC consist of Heads of State of the five states who have been the promoters of NEPAD as well as fifteen other states. It has a chairperson and two vice chairpersons. HSIC meets every four months. The Steering Committee comprises the personal representatives of the Heads of States of the five NEPAD promoters. Its functions include developing terms of reference of identified programmes and projects, developing a strategic plan as well as supervising the Secretariat. The Secretariat is located in Midrand, South Africa. It handles the co-ordination and liaison responsibilities as well as administrative and logistical functions. As it is composed of a very small core staff, the secretariat outsources work on technical details to the lead agencies and experts from the continent.

4 Human rights in NEPAD

Ensuring democracy, human rights and good governance is a central feature of NEPAD. NEPAD seeks to address Africa's underdevelopment and marginalisation through a number of ways including promoting and protecting democracy and human rights in African countries and sub-regions, as well as developing clear standards of accountability, transparency and participatory governance at the national and sub-national level. NEPAD acknowledges that African leaders have learnt from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for development. In this regard, African leaders pledge to work both individually and collectively to promote these principles not only in their countries but also in their sub-regions and the whole continent.

This pledge is given concrete expression under the sub-heading entitled 'democracy and political governance initiative'. The purpose of this initiative is to contribute to the strengthening of the political and administrative framework of participating countries in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law. The NEPAD document reiterates that development is impossible in the absence of true democracy, respect for human rights, peace and good governance. On the basis of this recognition, Africa makes an undertaking to respect the global standards of democracy.

The NEPAD states will undertake a series of commitments towards meeting basic standards of good governance and democratic behaviour while giving support to one another. The NEPAD states will also be expected to show leadership in supporting and building institutions and initiatives to safeguard these commitments. In addition, to ensure that states adhere to their commitments, these commitments are to be institutionalised through the NEPAD leadership. The Heads of State Forum of NEPAD will serve as a mechanism for monitoring and assessing the progress made by African countries in meeting their commitments towards achieving good governance and social reforms. The Forum will also

provide a platform for sharing experiences with a view of fostering good governance and democratic practices.

NEPAD is working toward the setting up of structures and mechanisms to administer, among others, its human rights component (democracy and political governance initiative). Already, a subcommittee on peace and security has been established. In addition, there has been a proposal for the establishment of the post of a Commissioner to be responsible for democracy, human rights and good governance.

But perhaps the mechanism under the NEPAD process that is likely to have the most far-reaching implications is the independent mechanism of peer review, the African Peer Review Mechanism (APRM). The proposal for the establishment of APRM was first made during the first HSIC meeting held in Abuja on 23 October 2001. APRM is an instrument voluntarily acceded to by African members of the African Union for the purpose of self-monitoring. The mandate of the APRM is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration of Democracy, Political, Economic and Corporate Governance (hereafter Declaration on Governance). The African leaders reaffirmed the commitment to the principles and core values contained in the Declaration of Governance during the first summit of the AU held in Durban recently.

APRM is intended to 'foster the adoption of policies, standards and practices that will lead to political stability, high economic growth, sustainable development and accelerated regional integration of the African continent'. In the words of President Mbeki, one of the NEPAD architects, the provisions of APRM are 'aimed at foreseeing problems and working to prevent their spread — rather than just censuring and punishing when things go wrong'. The HSIC has approved the establishment of APRM and has recommended that the proposed Secretariat of APRM be located in the UN Economic Commission for Africa in Addis Ababa, Ethiopia. The establishment of the APRM has received AU's backing. The recently held first session of the Assembly of the Heads of State and Government of the AU encouraged all AU members to adopt the Declaration on Governance and accede to the APRM.

5 Proliferation and duplication of human rights structures and mechanism under NEPAD and AU

The development of NEPAD should be seen in the light of another historic development in Africa's legal and political scene over recent years: the metamorphosis of the OAU into the AU. NEPAD operates under the rubric of the OAU/AU. The history of the NEPAD process reveals clear links with the AU predecessor, the OAU. The ideas behind NEPAD were conceived, developed and consolidated within the rubric of the OAU.

NEPAD is part and parcel of the OAU/AU structure. It is a mandated initiative of the OAU/AU. NEPAD has been approved at the highest level of the OAU, the predecessor of the AU, as the development blueprint for the AU. NEPAD's institutional framework derives its legitimacy from the OAU/AU since the central institution in the NEPAD framework, the HSIC, was set up by the OAU Assembly. The OAU Assembly decision setting up the HSIC confers on the HSIC the responsibility to 'ensure a continuous follow-up on the initiative, particularly the establishment of management institutions for the NAI (NEPAD)'.

In terms of lines of accountability, NEPAD's HSIC has to report to the OAU/AU summit, which also provides guidance as to how the NEPAD process should progress. There are also mechanisms in place for participation of the OAU/AU institutions in the NEPAD processes. The OAU/AU Chairperson and Secretary General are ex-officio members of the HSIC. Apart from that the OAU/AU secretariat participates at NEPAD's Steering Committee meetings.

The above analysis establishes the location of NEPAD within the AU, and the delegation of power to NEPAD's central institution, the HSIC, to set up institutions for managing NEPAD. This fuels the concern that if this power is not exercised judiciously it might lead to proliferation and duplication of, among others, African structures and mechanisms for promotion and protection of human rights.

Africa has a regional human rights system, operating under the auspices of the AU. In addition, the Constitutive Act of the AU has human rights provisions, which could provide a basis for creation of mechanisms and structures for promotion and protection of human rights. Since the HSIC has powers to create institutions for managing NEPAD whose components include human rights aspects, it is conceivable that human rights mechanisms and institutions could be set up under the auspices of NEPAD. The above state of affairs poses a danger of proliferation and duplication of human rights mechanisms and structures in Africa. Indeed, there have been three types of developments towards proliferation and duplication of human rights structures and mechanisms.

In the first instance, structures have been developed under the auspices of NEPAD, which mirror existing structures within the AU. The Abuja meeting in October 2001 decided to set up a Subcommittee on Peace and Security to focus on conflict management, prevention and resolution in Africa. Given that the AU already has the Central Organ for Conflict Prevention, Management and Resolution as one of its organs, the probability of the mandates of the two organs overlapping is very high.

In the second instance, some proposals have been made under the auspices of NEPAD for the establishment of the structures within the AU whose mandate could potentially rival that of the existing OAU/AU structures. For instance, a proposal has been made to establish, within the AU, the portfolio of a Commissioner to be responsible for democracy, human rights and good governance. It is likely that the mandate of such an office will overlap with that of the African Commission on Human and Peoples' Rights, unless conscious efforts are made to prevent this.

Thirdly, some mechanisms have been created within the AU without sufficient thought as to how these new mechanisms could interface with the existing institutions and mechanisms under the African human rights system. Thus, while the APRM has no equivalent in the AU framework, its development in isolation from human rights mechanisms developed under the OAU/AU should be a source of concern. Sufficient care ought to be taken when fleshing out the mandate and functions of this mechanism to avoid overlaps with the mandate and functions of the African Commission on Human and Peoples' Rights. In the same vein attempts should be made to create linkages and synergies between APRM and the African Commission on Human and Peoples' Rights.

The three examples given above indicate at worst a trend towards duplication and at best a trend towards proliferation. There is at least one example within the African system of human rights of duplication and proliferation of human rights bodies. The African Charter on the

Right and Welfare of the Child (ACRWC) which was adopted nine years after the adoption of the African Charter on Human and Peoples' Rights provided for establishment of a supervisory body, the African Committee of Experts on the Rights of Welfare of the Child. As the mandate and functions of this new body bear striking resemblance to that of the African Commission, there was an articulated view against its establishment and instead a proposal was made to amend the ACRWC to allow the African Commission to fulfil the functions designated to the Committee. This proposal has not been heeded and the African Children's Committee has already been established, adding yet another body whose functions could as well be handled effectively by existing institutions.

It is also crucially important not to forget that the AU envisages the establishment of more institutions than those currently functioning under the OAU. Thus, even without the addition of new institutions under the auspices of NEPAD, there will be more African institutions scrambling for the AU's meagre resources in the near future than those operational at present. Magliveras and Naldi put their finger on the issue when they warn that '[t]he number of organs in the Union appear to be very large and in the long run it could not only result in the cumbersome operation of the Union but also present a financial burden'. In addition, the creation of more institutions and mechanisms at the regional level is likely to present problems to African states regarding how to allocate resources and personnel to deal with obligations arising from their involvement in these institutions and mechanisms. For example, the APRM is to develop a review procedure, which is similar to the state reporting under the African Charter thus adding yet another burden on the bureaucracies in the African states.

The problem of proliferation of international institutions is by no means unique to Africa. The international community is currently grappling with the phenomenal proliferation of international tribunals in recent years. However, in under-resourced Africa it should be a source of major concern, since underfunding and understaffing plague the existing human rights institutions in the continent. Both the African Commission on Human and Peoples' Rights and its parent institution, the OAU/AU, are currently under severe shortage of human and financial resources, which restricts their effective functioning. If Africa has failed miserably to sustain financially and focus its attention on one human rights institution it is unclear how it will cope with several others.

All in all, there is a need to develop ways of increasing funding for existing and projected human rights institutions in the AU and NEPAD to cater for increasing demand of resources. Efforts are being made in this respect as exemplified by the following proposed initiatives. The first initiative is the proposed OAU Fund for Human Rights, which will be funded by the proposed NEPAD's Human Rights Initiative tax or visa charges in all African countries. The second is an initiative taken by some concerned Africans to set up a fund to be known as the Arusha Trust Fund for the NEPAD Initiative on Human Rights, during the Second African Dialogue held in Arusha, Tanzania from 24 to 26 May 2002. However, the availability of funds, should not serve to justify the creation of multifarious human rights mechanisms and structures with their attendant operational and staffing needs. With rationalised, synchronized and consolidated African human rights mechanisms and structures, the increased funding emanating from these noble initiatives will make more effective contribution in achieving demonstrable results in promotion and protection of human rights in the continent.

6 Towards harmonious linkages and synergies between NEPAD's and AU's structures and mechanisms for human rights

Human rights structures and mechanisms established under NEPAD and AU will have similar regional focus and will operate under the auspices of a common international organisation, the AU. They are also likely to operate on the basis of the treaties, standards and regulations that are at least compatible to one another if not similar to one another. This presents ample opportunities for synergies between these two sets of structures and mechanisms. However, this potential will remain untapped unless there is a determined drive to develop strategies for co-operation and co-ordination among these structures and mechanisms.

One strategy that could facilitate the tapping of this synergy potential is to create a dual process within the AU: a legal process and a political process akin to the treaty-based and charter-based human rights procedures in the UN system. The UN treaty-based procedures refer to the specific committees of independent experts formally established through the principal UN human rights treaties. These 'treaty bodies' monitor the implementation of the individual conventions by the state parties. The UN charter-based procedures, on the other hand, are independent and ad hoc systems of fact-finding outside the treaty framework, which derive their legitimacy from the UN Charter. In other words, these are procedures established by mandates emanating not from treaties but from resolutions of relevant UN legislative organs such as the Commission for Human Rights or the General Assembly.

It is proposed that the structure of the UN system of human rights could be replicated in an African regional setting. The current African human rights system, which is founded on the African Charter on Human and Peoples' rights and other African human rights instruments, should be the African Charter-based procedures, the equivalent of the UN treaty-based procedures. The proposed new mechanisms under NEPAD particularly the APRM should be part of the Constitutive Act-based mechanism (the equivalent of the UN Charter-based mechanism) since it will be founded on the provisions of the Constitutive Act of the AU.

Just like in the UN system, the two procedures should complement one another rather than compete with one another. Duplicity will be avoided on account of the complementary nature of the two procedures. The African Charter-based mechanism will be primarily a legal procedure while the Constitutive Act-based mechanism will be primarily a political process.

There should be a close co-operation and co-ordination between the two proposed procedures. There are legal and pragmatic grounds for such co-operation. First, as stated above, both sets of procedures will operate under the auspices of one institution, the African Union. Second, the Constitutive Act and the NEPAD provisions, which will constitute the Constitutive Act-based procedures, underpin the socio-economic rights, right to peace and right to development provisions of the African Charter, an instrument on which the African Charter-based procedure is founded. Third, on a pragmatic level, the alternative to co-ordination in co-operation is not that encouraging: considerable double work, splitting of resources, diffusion of focus and erosion of capacity.

Under the proposed arrangement, it is to be expected that there will be a clear demarcation between the two procedures. However, it should also be recognised there will be instances when boundaries between the two procedures will be blurred. Furthermore, in most cases, seeking synergies and symbiotic linkages between them will enhance the effectiveness of the two procedures. In this regard, ways and means will have to be explored as to how the two processes jointly pursue the common goal of a peaceful, stable and developed Africa. This is particularly the case in relation to issues such as conflict prevention efforts, which will

invariably call for contribution of both political and legal approaches if optimum results are to be attained.

Ultimately, proper and sufficient thought prior to the creation of new institutions would contribute immensely in avoiding the problem of proliferation and duplication of human rights institutions. I propose the following criteria that ought to be considered before setting up a new human rights structure or mechanism under either NEPAD or AU: First, what is the value-added of the new structure? Second, what kind of legal, financial and administrative implications will the new structure have on states? Third, should the new structure be placed under the African Charter-based procedure or the Constitutive Act-based procedure? Finally, how will the new structure interface with the existing structures and mechanisms?

7 Conclusion

There is no denying that NEPAD holds great promise of unravelling the complex web of conflicts, diseases and poverty entangling the African continent at the moment. Besides espousing a philosophy of African ownership in the conception, management and implementation of development plans, NEPAD looks set to avoid pitfalls that doomed previous regional development plans by synchronizing itself with contemporaneous development endeavours on the continent such as the UN Millennium Declaration. A coherent strategy emanating from this wholesome and integrated approach offers a real hope of progress.

However, in furtherance to this approach, there should be concerted efforts to link up NEPAD with African regional institutions of human rights. The AU is set to establish more institutions than those functioning at present in a period when international organisations all over the world, particularly in Africa, are struggling to meet their financial needs. This paper has highlighted the growing trends towards duplication and proliferation of human rights mechanisms under NEPAD and the AU and has proposed a cautious approach towards creating new human rights institutions. The creation of a dual complementary set of mechanisms similar to the charter-based and treaty-based mechanisms under the UN system of human rights has been proposed as a way of curtailing the duplication and proliferation of human rights institutions in Africa. There should be a shift of focus from the creation of new institutions to consideration of ways the existent institutions, better funded and resourced, can be made to work towards contributing to overall NEPAD objectives. New institutions should only be created in instances where they will have clear added value.

During their annual meeting held on 8 to 10 July 2002, the OAU/AU Heads of State and Government called upon the African Commission to prepare a report proposing ways and means of strengthening the African system for the promotion and protection of Human and People's Rights within the African Union and submit it in next year's AU session. In preparing its report, the African Commission might wish to reflect how the new and old structures and mechanisms of the African regional human rights system could be systematised within the AU in a more consolidated, rational and harmonized manner. Hopefully, ideas expressed in this paper might assist in this vital reflection.