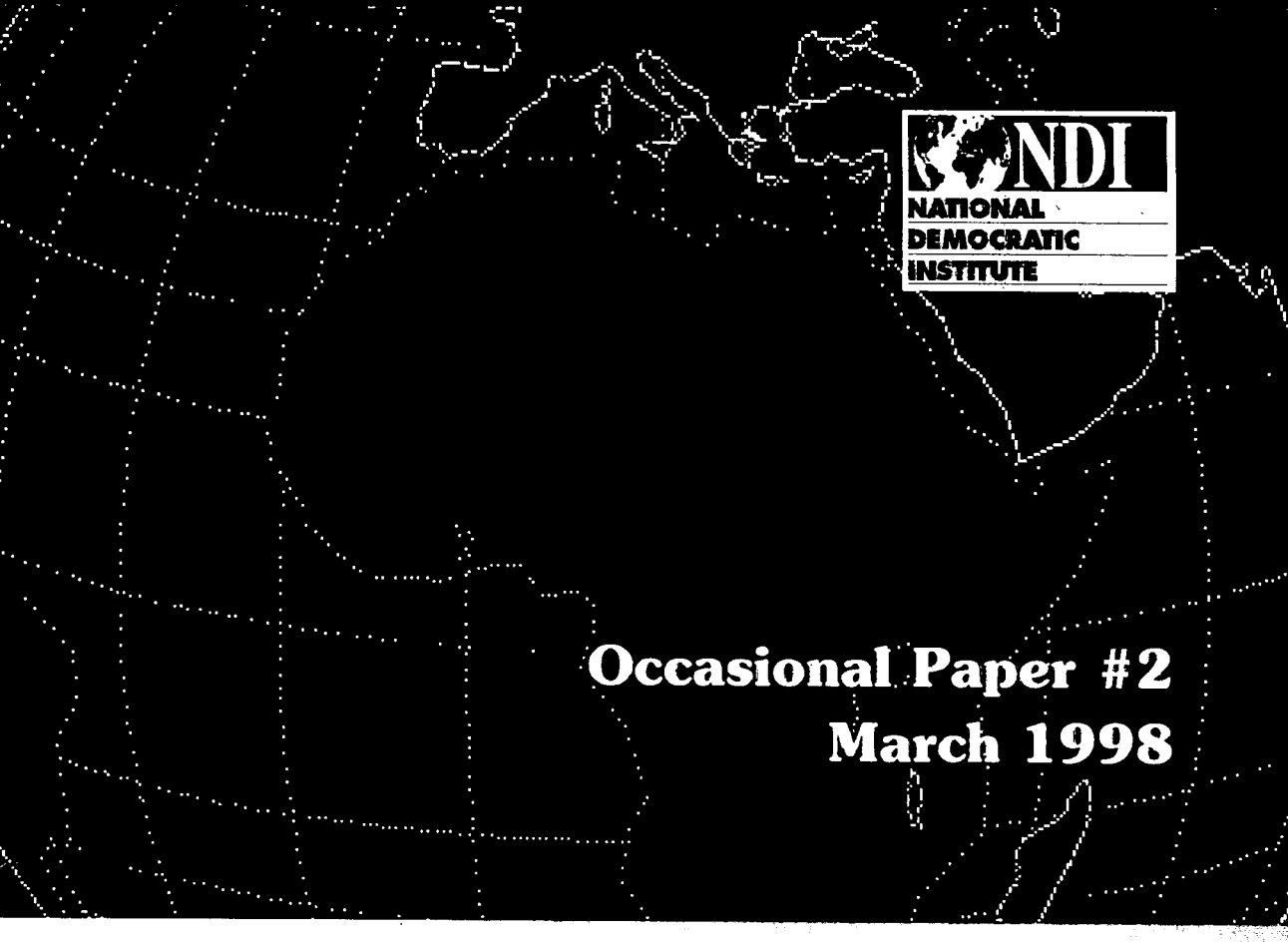


Occasional Paper #2
March 1998

# THE JUDICIARY AND HUMAN RIGHTS

Jesús Fernández Entralgo

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# THE JUDICIARY AND HUMAN RIGHTS: The Role of Judges in the Promotion, Protection and Effective Development of Human Rights Policies

**Jesús Fernández Entralgo**

National Democratic Institute for International Affairs
Luanda, Angola

Titles in the *Occasional Paper* Series:

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| #1 | *VOICES OF RECONCILIATION: Angolans Speak on Peace and Democracy (Focus Groups)* | January 1998 |
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| #2 | *THE JUDICIARY AND HUMAN RIGHTS: The Role of Judges in the Promotion, Protection and Effective Development of Human Rights Policies,* by Dr. Jesús Fernández Entralgo | March 1998 |



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Jesús Fernández Entralgo
Madrid
November 30, 1997

# FOREWARD

Nothing in Angola's history has prepared either government officials or ordinary citizens to play their roles effectively in a democratic political system. The overall goal of the program of the National Democratic Institute for International Affairs (NDI) in Angola is to promote accountable, responsible government within the context of Angola's new political settlement. The program seeks to establish a basis for effective participation of both the government and the governed in the democratic political system. This means both fostering a culture of tolerance and respect for diverse opinions that is essential to democracy; and providing the kinds of information and experience that will help both government officials and the average citizen to make the new system meaningful and workable in the Angolan context. It is within this framework that NDI has published *OCCASIONAL PAPER #2: THE JUDICIARY AND HUMAN RIGHTS: The Role of Judges in the Promotion, Protection and Effective Development of Human Rights Policies* by Dr. Jesús Fernandez Entralgo.

NDI's program is in three areas, namely: 1) national government and political officials; 2) provincial and local government officials, many of whom have been recently named to government structures after having served in UNITA's administrative system; and, 3) the general public. Major components of the program and their objectives include:

- A series of national-level workshops and "Making Democracy Work" seminars aimed at providing opportunities for a select group of government officials and political leaders with international comparative information and experience on issues that are crucial to the democratization process.

- Training for local and provincial government officials concerning: the role of local government structures in the reconciliation and democratization processes; the separation between politics and administration; the relationship between local, provincial and

central government; and, ways to improve relations between government officials and citizens at the local level.

- Radio and grassroots civic education programs aimed at the general public, designed to: educate citizens about their rights and responsibilities in a democracy; provide information about the functioning of democratic institutions, particularly as established in the Angolan context; and, promote basic democratic values.

These three levels of programming reinforce each other. In particular, civic education activities aimed at the general public focus on the role of citizens and government in joint resolution of the challenges presented by the process of national reconciliation, reconstruction and political transition. It is important to note that democratic institutions actually constitute the centerpiece of Angola's peace agreement. The Lusaka Protocol calls for political accommodation between the MPLA government and UNITA on the basis of a politically integrated Government of National Unity and Reconciliation (GURN) which extends down to the local level; the full participation of UNITA in the nation's multiparty parliament, elected in 1992; and, increased participation by Angolan citizens in the political life of the nation, through freedom of expression and political affiliation, and participation in elections.

## "Making Democracy Work" Seminars

In addition to providing concrete information that is immediately useful to the target audiences, the "Making Democracy Work" seminars provide a forum in which political leaders and government officials of varying viewpoints and areas of expertise can come together to discuss key aspects of the peace and democratic transition processes. They also help to foster a culture of tolerance and respect for diversity of opinion that is essential for building democracy. Two themes have been identified as priorities: the role of various government institutions, particularly the judiciary, in strengthening rule of law; and strengthening the political mechanisms of national reconciliation.

The first of the "Making Democracy Work" seminars was held in collaboration with the Ministry of Justice on August 27, 1997. The seminar was opened by the Vice-Minister of Justice Dr. João Alves Monteiro and the American Ambassador to Angola Donald Steinberg, featuring Dr. Jesús Fernandez Entralgo, President of the 17th Section of the Provincial Appellate Court of Madrid (Spain), as the guest speaker on strategies for promoting human rights and respect for rule of law within the judicial system. Attendees included: the Special Representative of the United Nations Secretary General in Angola Maître Alioune Blondin Beye, government ministers, members of parliament, judges, police officers, members of the Angolan Bar, civil society organizations and United Nations (UN) police and human rights officials. The subject for this seminar emerged out of discussions with officials at the Ministry of Justice and the Attorney-General's office, who emphasized the important role that local prosecutors, magistrates and local police can and should play in ensuring that all citizens are treated equally and fairly under the law.

## Biography

Dr. Jesús Fernandez Entralgo has worked extensively in the area of comparative research on the reform of penal codes to strengthen human rights protection in Latin American countries; and established an association called Judges for Democracy, which seeks to strengthen human rights protection within the judicial system in Spain. He is a founding member of this well respected association, composed of a group of Spanish jurists that was formed toward the end of the Franco regime, for the purpose of strengthening human rights in the Spanish justice system. In addition, he was active in the Spanish democratic transition.

## *Occasional Paper* Series

The first in the series of Occasional Papers, *VOICES OF RECONCILIATION: Angolans Speak on Peace and Democracy* was published in English in January 1998. As the second in this series, NDI is publishing, in both Portuguese and English, the report and speech that was given by Dr. Entralgo in August 1997 on the role of the judiciary in promoting human rights.

*(Left to Right) Fernando de Oliveira, Manuel Gonçalves, Jesús Fernández Entralgo, César Ferrante*

# THE JUDICIARY AND HUMAN RIGHTS

Jesús Fernández Entralgo

In 1789, at the height of the French Revolution, the drafters of the "Declaration of the Rights of Man and the Citizen," did not hesitate to affirm [1] that ***"[any] society in which the exercise of these rights is not guaranteed, or where there is no separation of powers, has no constitution."***

Students of African constitutionalism[2] often emphasize that, contrary to expectations raised by the so-called "Law of Lagos,"[3] constitutions and international treaties (including the one founding the Organization for African Unity) do not seem to give any particular importance to human rights. Possibly the explanation lies in that, while revolutionary movements like the French in 1789, so concerned with this issue, were the expression of the struggle of the people against an absolute monarchy and often took place in already independent countries, which, like in the case of France, had been consolidated centuries before as an independent state; revolutionary movements of national emancipation by old colonies against their respective metropoles were primarily interested in the affirmation of their independence and their identity. The common struggle unified everyone, and it was only after achieving their primary goal that they could become concerned with guaranteeing to every person a distinct boundary against the power of the State.

[1] Article 16 of the "Declaration of the Rights of Man and the Citizen."
[2] Kéba M'Baye could be a significant example.
[3] At the jurists' conference on the Rule of Law that took place in Lagos in January 1961, it was strongly proclaimed that "the rule of law is a dynamic concept that should be used to preserve and promote the will of the people, the political rights of the individual and to establish social, educational and cultural conditions, under which the individual can attain personal dignity and achieve the realization of his legitimate aspirations, in all nations, whether dependent or independent...."

In 1974, Salmón, writing about this matter in his "Report about the People's Right To Self Determination," said that ***"the real and true problem is that you cannot speak about human rights for people who belong to a subjugated country which has been denied the right to be itself."*** The political and economic emancipation of the countries and the elimination of all forms of discrimination beginning, obviously, with the racial one, became priority matters. Bread, was very expressively said, must come before roses. On the other hand, this is not a new phenomenon. The "hard nucleus" of the Constitution of the United States of America of 1787 was primarily concerned with the internal political organization of the nation. It was not until December 1791 that the first ten amendments[4] were added as a "Bill of Rights." In Spain the first Constitution worthy of its name is proclaimed, the Cádiz of 1812, in the heat of the War of Independence against the invading Napoleonic army; it does not include any proclamation of human rights.[5]

Finally, however, "roses" are also necessary. The affirmation of human rights is not only not incompatible with collective progress and the attainment of a higher level of economical development, but progress and human rights are unequivocally entwined.

In this context, the African Charter on the Rights of Men and Nations, approved in June 1981 by Resolution 792 (XXXV) of the Assembly of Heads of State and Government of the Organization for African Unity, acquires great significance by fulfilling Decision 115, XVI, adopted at the meeting of said Assembly in Monrovia, July 17-20, 1979 (hereinafter the "African Charter" or the "Charter").

*1. The Charter Constructs What can be Termed an "African Way" concerning Human Rights.*[6] Far from ignoring the "classic" international texts about human rights, it expressly incorporates them. The fundamental article 60 of the Charter, when allocating the working responsibilities of the African Commission on Human Rights and People's Rights, it clearly refers to ***"the United***

[4] Owed fundamentally to the pen of James Madison.

[5] We must not forget, also, that an aspiration to a Declaration of Rights was precisely part of the ideology of the invading Army.

[6] M'Baye, Ndiaye and Buergenthal point out the peculiarity of this "African way," based on the African Charter analysis.

***Nations Charter,...the Universal Declaration of Human Rights and other measures adopted by the United Nations...concerning human rights and people's rights, as well as...[to] the provisions of the diverse instruments adopted by specialized departments in the UN of which the signatories of the Charter may be members...."***

*2. Takes the "Classic" Perspective on Human Rights Insisting on the so-called "First-Generation" Rights, that is, Civil and Political Rights.* Their proclamation, however, could very well be only a nice but hypocritical exercise in rhetoric.[7] Freedom and liberties are a must, but have little significance if they are not accompanied by "second generation" human rights: the ones concerning economic, social and cultural matters.[8] The *Preamble* of the Charter shows the signatories' convictions that ***"civil and political rights cannot be disassociated from economic, social and cultural ones in their conception and universality, and that the satisfaction of economic, social and cultural rights constitute a guarantee of enjoyment of the civil and political ones...."***

*3. That Same Preamble Affirms the Charter's Purpose of Taking into Account "the Virtues of [the] Historical Tradition and Values of African Civilization...."* Precisely one of the characteristic features of Africanism is its insistence on the communitarian tendencies of human beings. The social dimension of human beings, in the end, forces individuals to sink or swim with their communities, their environments. That is why the Charter does not simply list the rights of individuals, but also "rights of peoples"--the "third generation" of human rights. It is within this macroscopic point of view that the solidarity perspective can be found.

---

[7] Anatole France uses irony to illustrate the poor practical effect of these liberties: ***"Freedom that makes it possible for both the rich and the poor to sleep under a bridge!"*** Denouncing a reality that begs the question: freedom, to do what?

[8] That is why the Universal Declaration of 1948 and the International Agreement on Civil and Political Rights of 1966, find their inevitable complement in the International Agreement on Economic, Social and Cultural Rights, also of 1966; the same way that the European Convention for the Protection of Human Rights and Fundamental Liberties of 1950, finds its own complement in the European Social Charter of 1961.

At the XIL Francophone Medical Congress (Dakar, 1975), Collomb emphasized that Africa meant ***"to abandon the right to be an individual being, separate, competitive, selfish, aggressive and conquering... in exchange for being at peace and in harmony with every thing: the alive, the dead, the natural environment, the spirits that inhabit it and give it life...."*** African solidarity is the opposite of the callous selfishness that appears inseparable from the dominant philosophy of western societies based on capitalist market economies.[9]

*4. The Community Recognizes the Rights of the Individual; as a Countermeasure, it Demands from the Individual Obligations and Sacrifices.*[10] The Preamble of the Charter contains an explicit proclamation of this solidarity that legitimizes the imposition of duties on individuals. Revisiting an idea that had been incorporated into some constitutions of the first quarter of this century,[11] it advises that ***"the enjoyment of rights and liberties also implies acceptance of duties by all...."*** These words from the Preamble are not just rhetoric. The Charter includes a "Declaration of Duties," comprising Articles 27-29, of Chapter II, Part I.

*5. Within this Context, is Easy to Understand the Constitutional Law of the Second Republic of Angola, as Enacted by Law Number 23/92 of September 16, 1992* (hereinafter "Angolan Constitutional Law" or "ACL"). The double influence of both "classic" and "African" law is obvious in its Article 21, Section 2 which states: ***"[the] constitutional and legal***

[9] This self-centrist concept is the base for the construction of the "self-preference" principle ("Selfishness") as the primary norm of the economic theories of Jeremy Bentham.

[10] This idea already appears in "Criton's Dialogue," where Plato puts words into the mouth of a Socrates, who, condemned to death, refuses to flee from Athens in a supreme demonstration of his respect for the law.

[11] Such as those of the Weimar Republic and the Second Spanish Republic. Just as a historical curiosity, it should be remembered that the Spanish Constitution of 1812, which has no proclamation of individual rights, in Chapter II ("about the Spaniards") cites, instead, various duties and obligations. Worthy of notice is Article 6 which emphasizes that ***"love of country is one of the first obligations of all Spaniards, as well as being just and generous."***

***rules relating to fundamental rights must be interpreted and constructed in harmony with the Universal Declaration of Human Rights, the African Charter on Human Rights and Peoples' Rights and any other international treaties adhered to by Angola."*** Its long and important Title II is named "Fundamental Rights and Duties," where the proclamation of rights seems to have shifted to first place, outlining the duties (of the individuals, the family, the society and the State) some times as a limit on and others as a frame for the enforcement of rights. In the same way, the Spanish Constitution of 1978 (hereinafter the "Spanish Constitution" or "SC") would call its Title I, "Of Fundamental Rights and Duties" without separately listing the latter.

*6. Clarifying Considerations.* In an interesting book about judicial interpretation of the U.S. Constitution and, specifically, the *Amendments*, Burt Neuborne writes:

> [To] establish a judicial order guided by the Rule of Law, one that affords effective protection for the rights and duties of individuals against state power, three elements are necessary:
>
> First, the right in question must be sanctioned, even if in general terms, by a written text with value of a binding norm that cannot be easily modified by the government in power.
>
> Second, an independent public official, lets call him a judge, must have the jurisdiction, and obligation, to invalidate any act by the state power that may infringe on the judicial interpretation of the positive or written form of the right in question.
>
> Third, the citizens must be guaranteed an easy and immediate access to the judge, and must be granted all means necessary for an effective presentation of their complaints.

# PROMULGATION OF HUMAN RIGHTS IN CONSTITUTIONAL TEXTS

***Symbolic Value of a Constitution*** Spaniards of my generation know the symbolic value of a Constitution. After three years of a bloody civil war, or rather, an "uncivil" one, the dawn predicted by the songs of the victors never arrived. We had instead forty years of a "*longa noite de pedra.*"[12] The Constitution of 1978 was indeed the sun that finally cleared away the darkness of that terrible and prolonged "long night of stone."

The current Spanish Constitution is a document of compromise, of agreement. Its symbolic value lies in its idealized projection of life in common. It is a program for the future that becomes real at the very moment of its ratification by the people that want, through it, and by this exercise in self-determination, to grant to themselves a *fundamental law.* As a consequence of this forward-looking perspective, the current Spanish Constitution, like the Constitutional Law of the Second Republic of Angola, like all constitutions, has the character of a "work in progress." Ronald Dworkin likens constitutional texts to "serial novels." They are only a chapter, the first and, without doubt, a very important one, but destined to be continued by others that will be written by future generations, in response to new needs and situations.

***The Constitution as Fundamental Law*** Legally a constitution must be the ***"fundamental law"***[13] of the Society it rules. This constitutional role has three sides to it, namely as:

[12] "Long night of stone" is the title of the excellent book of poems by Galician writer Celso Emilio Ferreira.

[13] In the Federal. Republic of Germany, the Constitution is called "*Grundgesetz,*" or "Fundamental Law."

- A "fundamental law" because it provides a specific model of socio-political organization;

- Also, a fundamental side, because it provides the "foundation" for the legitimacy of all the other provisions that comprise the ***"normative pyramid;"***[14] and,

- Finally, a supreme rank of validity, that carries with it the automatic invalidity of all norms that oppose it or are incompatible with it.[15]

Both the Spanish Constitution and the Angolan Constitutional Law of 1992 fulfill those three functions.

## *Constitutional Anthropocentrism: the person (individually or collectively considered) as one of the two axes of the bipolar construction of the Rule of Law model*

The fundamental Article 10 of the Spanish Constitution, states in its first paragraph: ***"Personal dignity, its inherent inviolable rights, the free development of the personality, respect for the Law and the rights of others, are the foundations of political order and social peace."***

## *The Question in the Angolan Constitutional Law*

Within the text of the Angolan Constitutional Law of 1992, we find two fundamental principles:

---

[14] To use the well-known expression of Hans Kelsen.

[15] García de Echeverría writes: ***"The idea of the Constitution as supreme law of the land, as it is proclaimed in the Article VI, Section 2 (sic) of the American Constitution of 1787, comes from two sources: the social pact and, above all, Locke, who sees in a basic social pact the foundation of all political and judicial order, and the idea of a higher law, as the idea of a Natural Right conceived of as fundamental law and lex legum, whose ideas were brought by the puritans to American soil, later to be used by the settlers as the base for the ultimate severance of the ties of obedience to the English King, when those superior rights were ignored."***

*(a) Article 2*: ***"The Republic of Angola is a democratic State under the Rule of Law based on...human dignity...and the respect and guarantee of fundamental human rights and liberties of men, as individuals as well as members of organized social groups."***

*(b) Article 20*: ***"The State respects and protects the human person and human dignity. All citizens have the right to the free development of their personality, within the limits of respect for other people's rights and to the superior needs of the Angolan Nation. The Law protects the life, freedom, personal integrity, good name and reputation of each citizen."*** And also, on Article 4, Section 2: ***"Political parties must, within their objectives, programs and practices, contribute to...d) the protection of fundamental liberties and human rights;...."***

***Proclamations of Rights, Liberties and Concrete Guarantees*** In comparison with the Declaration of the Rights of Man and the Citizen, or the "Amendments" to the United States Constitution (to mention two important examples), these proclamations are becoming increasingly longer, including a larger number of rights and liberties, stating in greater detail their content and limitations. With a salutary sense of humor, Neuborne points out that they resemble the "shopping list" of a meticulous housewife.

*1. The Spanish Constitution.* Title I of the Spanish Constitution, named "Of Fundamental Rights and Duties," has been structured as follows: It opens with its introductory Article 10, already partially transcribed above, in which recognizes the value of the human person and his or her rights, within the law and the rights of others, incorporating by reference the major international proclamations concerning human rights. It continues with a Chapter I, titled "Of Spaniards and Foreigners" (Articles 11-13), which contains rules about nationality and basic guidelines for the regulation of aliens. Then, Chapter II, dealing with "Rights and Liberties," which in turn breaks down into: Article 14, in which, resembling a preamble, it consecrates the right of all Spaniards to be treated with equality before the law and not be subjected to arbitrary discrimination; Section 1, consisting of Articles 15-29 about "Fundamental Rights and Public Liberties," a

category that enjoys a specially binding precedence and a no less energetic constitutional protection; Section 2 (Articles 30-38) named "Of Rights and Duties of the Citizens," which acts as a complement to the previous one. Chapter III concerns "Ruling Principles of Social and Economic Policy" (Articles 39-52). Article 53.3 of the Spanish Constitution provides the constitutional base for guiding norms needed when developing legislation, without prejudice to the effectiveness of such norms as "inspiration" as much for the corresponding legislative measures as for the acts of the judicial branch. Article 4 is dedicated to regulating "The Guarantees of Fundamental Liberties and Rights" (Articles 53 and 54). Article 54 creates the institution named "*Defensor del Pueblo*" ("People's Defender"). Although in Spanish history there once existed an official position named "*Justicia Major*" ("High Justice") of the Kingdom of Aragón, which could be considered a remote antecedent to the modern "*Defensor,*" in reality the new title aims to create a figure equivalent to that of the "*Ombudsman*" found in the legislation of Nordic countries. Finally, the long Article 55 integrates, by itself, Chapter V dealing with "the suspension of rights and liberties."

2. *The Angolan Constitutional Law of 1992.* Title II, dedicated to "Fundamental Rights and Duties," consists of thirty-five articles (Articles 18-52). Without any lengthy analysis, its content is equivalent to Title I of the Spanish Constitution.

## *Influence of the International Normative Frame in the Interpretation and Application of Human Rights-Related Laws*

1. *The Question in the Spanish Constitution.* Article 10, Section 2 of the Spanish Constitution provides: ***"2. Norms relating to fundamental rights and liberties recognized by the Constitution, shall be interpreted in accordance with the Universal Declaration of Human Rights and other treaties and international agreements on the same subjects which have been ratified by Spain."***

2. *The Question in the Angolan Constitutional Law.* Adherence to accepted international norms under the Angolan

Constitutional Law can be found principally in its Article 21 as follows:

(a) *Constitutional Law as a "Law of the Minimum."* Article 21, Section 1 states: ***"Fundamental rights enumerated in this Law do not exclude others arising under applicable laws and rules of international law."***

(b) *Interpretation of National Law in accordance with International Texts.* Article 21, Section 2 states: ***"Constitutional and legal norms relating to fundamental rights shall be interpreted and integrated in harmony with the Universal Declaration of the Rights of Man, the African Charter on the Rights of Men and Nations and other international instruments ratified by Angola."***

(c) *Judicial Initiative.* Article 21, Section 3 states: ***"In the examination of litigation by Angolan courts, these international instruments must be applied even though they have not been invoked by the parties."***

*3. Comment from the Point of View of Human Rights Strategic Policy.* The ability of judicial courts, even by their own initiative, to interpret national laws "by the light" of international law, has emerged as a tool of extraordinary effectiveness. This has been clearly proven by the Spanish Constitutional Court which gives certain constitutional principles the best possible bias in favor of effective human rights implementation.

*4. The Importance of a Higher Outside Appellate Proceeding.* Two venues should be mentioned:

(a) *The Labor of the European Court for Human Rights.* Its jurisprudence has become an effective tool for the defense and promotion of human rights.

(b) *The Need to Create an African Court for Human Rights.* One with a more aggressive jurisdiction than the one granted to the [Human Rights] Commission of the Organization for African Unity. The quasi-judicial[16] authority of the Commission created by the Charter, appear, without a doubt, far less energetic than the properly judicial authority granted to the European Court for Human Rights. In addition, even though complaints brought on by individuals are not totally barred, they must be grounded on ***"special cases which reveal a pattern of grave or massive violations of human rights or the rights of nations."***[17]

## 5. *The Triple Effect of a Constitution.*

(a) *Derogatory Effect over Previous Contradictory or Incompatible Rules: the so-called "Supervening Unconstitutionality."* The third paragraph of the Derogatory Provision that closes the Spanish Constitution, decrees that ***"all provisions that oppose those established in this Constitution, are hereby repealed."*** A constitutional principle is only the solidifying of the preferred criteria of a subsequent norm as a solution to the conflicts arising from a chronological succession of laws ("*lex posterior derogat priorem*"), which is faithfully reflected in Article 2, Section 2, Clause 2 of the Spanish Civil Code. Similarly, Article 165 of the ACL provides that ***"[the] laws and regulations in effect in the Republic of Angola may be applied so long as they are not amended or revoked, and provided that they do not conflict with either the***

[16] To use Buergenthal's expression: it refers to what are basically mediation functions between parties in conflict. From the point of view of traditional African psychology, a trial always involves an undesirable confrontation, therefore it must always be guided towards settlement.

[17] Which excludes, as emphasized by Buergenthal, complaints over individual violations, which proved so effective under the European Convention of 1950, as applied by the European Court for Human Rights.

***letter or the spirit of this Law."*** Therefore, an ordinary judge may fail to apply a rule that is incompatible with a previous constitutional law. Obviously, this failure to apply is only effective as of the specific case in question. If the object is to attain an absolute declaration of unconstitutionality ("*erga omnes*"), the question must be brought before the Constitutional Court.[18] It is not necessary to emphasize the extreme importance of having this judicial power to control the constitutionality of norms which predate a Constitution, particularly when such norms are in a frontal collision with human rights recognized under the Constitution.

(b) *A Constitution Always has a Superior Normative Rank in Relation to Any Other Inferior Norm, by Virtue of the Principle of Normative Hierarchy.* This principle of normative hierarchy has been explicitly adopted under Article 9, Section 3 of the Spanish Constitution: ***"The Constitution guarantees...the principle of normative hierarchy."*** In harmony, Article 6 of the Organic Law for the Administration of Justice, 6/1985, July 1 (hereinafter "OLAJ"), states: ***"Judges and courts shall not apply these regulations or any other provisions herein, contrary to the Constitution, to the laws or to the principle of normative hierarchy. But if a judge or court finds that one of more constitutional provisions are incompatible with other subsequent legal principles with the rank of law, they cannot simply fail to apply such principles[19] without first presenting the corresponding 'constitutional question' to the Constitutional Court."***

[18] In Spain, when the constitutionality question is put before an ordinary court. In Angola, lacking this avenue to channel the question directly from an ordinary court to the Constitutional Court, the question could, nevertheless, reach the higher court "by way of recourse" as provided in Article 134 (d) and (e) of the CLA.

[19] Contrary to what happens in the case of norms that precede the constitution.

In Spain, Article 35, Section 1 of the Organic Law of the Constitutional Court 2/1979, of October 3 (hereinafter "OLCC"), clearly states: ***"When a Judge or Court, on its own initiative or at the request of one or more parties to the action, finds that a norm with the rank of law applicable to the case being heard and which norm is essential to the outcome of the action, may be unconstitutional, such Judge or Court must bring this constitutional question before the Constitutional Court."*** The same identical provision can be found in Article 5, Section 2 of the OLAJ. In Angola, Article 153, Section 1 of CLA provides, in part: ***"norms that violate the provisions of the Constitutional Law or the principles therein are unconstitutional."*** From the rules that determine the limit of a declaration of unconstitutionality can be inferred that such declaration assumes the ineffectiveness of unconstitutional norms, the difference in the time extension of application depending only on whether such norms preceded or succeeded the constitution. In any case, it is always advisable to insert a provision in the constitution declaring null and void all measures that oppose the precepts stated in the constitution.

(c) *A Constitution Sheds Light over Any Other Rules in the Juridical Order (in the Normative System) Forcing All Eventual Interpretive Doubts to be Resolved in accordance thereto.* From its first decision, dated January 26, 1981 (in the matter of constitutionality of norms preceding the current Spanish Constitution), the Spanish Constitutional Court has been teaching that constitutional principles must determine the interpretation given to legal norms prior to the enactment of a constitution. Such norms must not be disparaged as long as it is possible to find an interpretation coherent with the

constitution, whichever is the most coherent interpretation is the one that must prevail. Principles pre-dating the constitution must be interpreted in that one of all possible options that brings it in accordance with the constitution, even though this conforming interpretation may differ from the traditional juridical interpretation of the principle prior to the enactment of the constitution. Through this conforming interpretation of principles prior to the constitution, it is possible to avoid normative gaps arising from the aspersion of sound principles due to old interpretations contrary to the new constitution.

This correcting interpretation may be handed down by either the Constitutional Tribunal (in reference to processes brought before it) or by the judges and courts of normal jurisdiction. In Spain, this constitutional doctrine became positive law under Article 5, Section 3 of the OLCC, which states that ***"the question of constitutionality can only be brought up [before the Constitutional Court] when accommodating interpretations cannot be found that will conform the norm to the constitutional principle...."*** There is no comparable provision under the Angolan Constitutional Law, but it is obviously implied by the proscription of all contrary norms. In this way, ordinary polysemic norms must be interpreted in harmony with constitutional principles on the same subject.

## *Three Ways of Applying the Constitution*

*1. The Constitution as a Norm of Direct Application.* There are examples of norms in the Angolan Constitutional Law which can be applied immediately upon enactment without need for the further development of legislation, for example:

- the prohibition of the death penalty (Art. 22, Sec. 2);
- the prohibition of any form of torture (Art. 23);
- the principle of penal legality (Art. 36, Sec. 3);
- the ban on prejudicial *ex post facto* laws (Art. 36, Sec. 4);
- the presumption of innocence as a trial rule (Art. 36, Sec. 5); and,
- the right to know the cause of detention immediately upon arrest (Art. 39).

*2. On Other Occasions, the Constitution Acts as a Simple "Programmatic Norm" in Need of Development by a Complementary "Normative Block."* For example, it establishes policy guidelines on the following subjects:

- protection of the environment (Art. 24, Sec. 2);
- protection of the nuclear family and children (Arts. 29 and 30);
- health (Art. 47); and,
- promotion of education, culture and sports (Art. 49).

In any case, these guidelines have an undeniable interpretive value of the pre-existing regulatory norms covering the above mentioned subjects. Any doubts about their scope must be resolved in accordance with the indications found in the constitutional norms.

*3. Finally, There are Declaratory Constitutional Norms on Rights and Guarantees That Need, in Larger or Smaller Measure, to be Integrated by Remand to a Regulatory Law.*

***Role of the Applier*** Application must follow some guidelines, such as:

- Apply the law directly as much as possible without recourse to the developing law.

- Integrate the gaps through prior laws as long as they are not incompatible with constitutional provisions. One example of this application method can be found in the application of Article 42 of the ACL, which controls curtailment of liberty through recourse to the judicial power by *habeas corpus*. To illustrate this point: ***"1. Against the abuse of power by virtue of illegal imprisonment or detention, there is*** *habeas corpus* ***to be brought before the competent court by the injured party or any other citizen. 2. The law regulates the exercise of the right to*** *habeas corpus."*

Article 17, Paragraph 4, Clause 1 of the SC, when first promulgated in 1978 stated that ***"[t]he law shall regulate an*** *habeas corpus* ***procedure for the purpose of placing into immediate judicial custody any person illegally detained."*** It took six years until the Organic Law 6/1984, of May 24, finally developed the constitutional mandate. Spanish judges, during this long interval, had to make use of their imagination in order to construct a way to control possibly illegal arrests. They found a means through the use of Article 286 of the Law of Criminal Procedure, which enabled them to take control of the investigation, if they so chose, before the judicial police could close the preliminary investigation.

The situation in Spain, after the Constitution, was different from the situation in Angola. In Spain, *habeas corpus* was unknown, and Article 17, Section 4, Clause 1 of the Constitution, did not establish it directly, but rather it clearly deferred its implementation until such a

time when regulatory law could be enacted. The exact opposite was the case in Angola. According to professor Grandão Ramos, the Criminal Procedure Code of 1929, in force in Angola, regulated through Articles 315-325 a process specifically named *habeas corpus*, and, through Articles 312-314, another equivalent procedure, even though it did not receive the same name.

Angolan jurisprudence, after political emancipation, interpreted that the first route should be considered invalid due to the loss of competence of the "*Tribunal de Relação*" (Relation Court), the organism then responsible to hear said procedure. The second procedural route fell into disuse after the enactment of laws 4/79, of April 27, and 4-D/80, of June 25, which removed the judicial aspect from the control of the legality of preventive imprisonment.

After the Constitutional Law of 1992, professor Grandão Ramos proposes a suggestive and progressive interpretation: now that the recourse of *habeas corpus* has been constitutionally ratified, and has been remanded for legislative action by ordinary law under Article 42, Section 2 of the ACL, for the purpose of determining latitude, content and procedure to exercise this right, ***"it will not strain juridical reality to admit that Article 42 of the Constitutional Law restores the validity of precepts, previously considered nullified, of Articles 315 et seq. of the Penal Code, which could be thereby applied, with the necessary adaptations, so that nothing should bar the citizenry from exercising this right, provided there is concurrence with the corresponding presumptions...."***

## *A Constitution is also a Source for the Interpretation and Integration of the Juridical Order*

This ability can be exercised in several directions.

*1. Bar on Interpretations that Conflict with the Constitution.* Article 5, Section 1 of the OLAJ provides, unequivocally, that all judges and courts ***"shall apply laws and regulations in accordance with constitutional precepts and principles,"*** which, from another point of view, means a bar on any interpretations that conflict with such precepts and principles.

Once a constitution is adopted it may force a different "reading" of existing ordinary legal norms or prompt a reconstruction of interpretations that have deviated from their texts. The consecration of the presumption of innocence in Article 24, Section 2 of the SC and Article 36, Section 5 of the ACL, serve as an example. To presume that every person is innocent until found, through valid sentence, to be guilty, indicates, as pointed out by Professor Ferrajoli, an attitude of anthropological optimism, that is, it presumes a belief in the natural goodness of the human being.[20]

The precepts discussed above about the Spanish and Angolan Constitutions, can be directly applied in their double dimensions, as both a trial and a treatment rule:[21]

- As a *trial rule*, that forces to choose, when in doubt, the solution most favorable to the accused (*in dubio, pro reo*), and to not find him guilty unless it is on the basis of knowledge, beyond all reasonable doubt, of his culpability, grounded on proof legally obtained and introduced into the process; and

- As a *treatment rule* towards the accused, who may not be deprived of his rights or restrained in their exercise, other than for good reason, when there is a higher.[22]

[20] It means the triumph of Rousseauian perspective, as opposed to Hobbesian, which, pessimistically, views man as a wolf towards other men (*homo homini lupus*).

[21] Such double dimension has been studied by Giorgio Illuminati in Italy, and the theoretic construction coincides, albeit partially, with some findings of the Spanish Constitutional Court about provisional imprisonment.

[22] The balancing approach, or perspective of evaluation of the interests in play, has been intelligently and profitably used by American jurisprudence, and this method has finally influenced the theory and practice of continental law.

The need to weaken the presumption[23] of innocence with legally obtained proof that has not been legally introduced as evidence at trial, was determinant, in Spain, of one of the first decisions of the Spanish Constitutional Court (that of 31/1981, of July 28), in which the Court had to emphasize that Article 297, Section 1 of the Spanish Criminal Procedure Law[24] provides that in order to interpret correctly the statements and declarations that members of the judicial police make in their reports (or written records of the content and results of their investigations) this written evidence may not be admitted by itself as proof unless it is validated at trial by the writers.[25]

Professor Grandão Ramos argues that, once the presumption of innocence has been sanctioned by the Angolan Constitution, Article 169 of the Criminal Procedure Code cannot serve as a basis to attribute a radical and absolute "presumption of truth" to an "act of notice." Writes professor Grandão-Ramos: ***"To give evidence at trial means today, by virtue of the constitutional consecration of the presumption of innocence of the accused, that the acts of notice serve only as rational probable cause*** *(corpo de delito)* ***with sufficient weight to allow the judge to make, on that basis, a finding of probability against the accused, but not for considering the facts stated therein as proven until after the accused has been given a chance to offer contrary evidence*** (see Articles 2, and 19º of Decree–Law 35.007)."

In reality, this safeguard must go further. The culpability of the accused must be based on proof admitted at trial and such culpability

[23] Among Spanish procedural experts, prevails the view that the constitutionally denominated "presumption of innocence" is an improper presumption because it is an interim legal affirmation, of a general character, that functions as a working hypothesis destined to be weakened by the proof presented at trial. A presumption, *per se*, consists of a logical inference of a fact based on analysis of clues; an activity that must be carried out in detail in each process.

[24] ***"The sworn statements and declarations of the judicial police officers resulting from their investigations shall be considered official complaints for legal purposes."***

[25] This doctrine has been muddied by a jurisprudence that constructed the model of the so-called "testimonial offense" or "quasi-flagrant" which provides that written reports, declarations, the findings of instruments or effects relative to a crime (drugs, arms, etc.) in a certain place or in the possession of a certain person, or the description of the characteristics of a geographic space, does not need to be validated at trial. In reality, since the declaration documents the "report" (or manifestation) made by the corresponding officer, it must also be validated by him as to that extent.

can only be declared when there is no reasonable doubt about it. This means that the authors of the act of notice must appear at trial to confirm the facts stated therein, ready to submit to cross-examination in order to determine the credibility and accuracy of their reports.[26]

2. *Filling Gaps.* An example of the fruitfulness of this integrating function can be found in the work of American jurisprudence which interprets new situations not expressly foreseen in the Constitution by analyzing them on the basis of the "spirit" of constitutional norms.[27]

3. *"Progress Clauses" and their Interpretive Value.* The Italian doctrine that advocates the "*uso alternativo del diritto*" used the so-called "progress clause" based on Article 3, Section 2 of the Italian Constitution of 1947,[28] as a strategy to take advantage of the cracks in the supposed unity, abundance and coherence of the judicial order to promote the construction of a socialist society model. There is nothing, however, to prevent a non-Marxist reading of such constitutional "progress clauses," to use them as interpretive keys and gap fillers, thereby converting them into operative proclamations instead of relegating them to pure rhetorical formulas.

(a) *Article 9, Section 2 of the Spanish Constitution as a "Progress Clause."*[29] ***"The State is responsible for creating the right conditions to promote real and effective freedom and equality among individuals and the groups to which they belong; removing those obstacles that may impede or difficult their fulfillment and facilitating the participation of all***

[26] This technique is called, literally, cross-examination in Anglo-American procedural law.

[27] Neuborne synthesizes the debate between "originalists" and "internationalists." In Spain, Miguel Beltrán has covered, at some length, the discussion between Bork and Dworkin.

[28] *"E compito della Repubblica rimuovere gli ostacoli di ordine económico e sociale, che, limitando di fatto la liberte e l'eguaglianza dei cittadine, inpoesdiscono il pieno sviluppo della persona umana e effecttiva partecipazione de tutti e lavoratori all'organizzazione política, e conomica e sociale del paese."*

[29] In Spain, Santiago Varela Díaz quickly made the connection between this precept and Article 3, Section 2 of the Italian Constitution.