

The rule of law in sub-Saharan Africa – An overview

Peter Shivute

Introduction

The *rule of law* is the notion that the powers of state and government can be exercised legitimately only in accordance with the applicable laws and according to laid down procedures. Thus, the legitimacy of all organs of state and its institutions must have roots in the law. And as administrative lawyers in common law jurisdictions would say: the exercise of any power of state or government must be traceable to an applicable written law and procedure. In this regard, every public office-bearer and every public official is accountable for every act done that the law does not authorise, as is any private person. Doubtless, as a principle, the rule of law is intended to be a safeguard against arbitrary and capricious governance and abuse of power, and to enforce limitations on the power of the state and all its institutions of government.

The hallmarks of respect for the rule of law include separation of powers of the executive, the legislature and the judiciary; regular, free and fair elections in which the electorate are asked to freely choose their rulers; an independent and impartial judiciary, coupled with an independent, fearless and vibrant legal profession; free and independent media institutions; and equality of the people before the law.

What has gone before denotes the principle of legality which underlies the concept of the rule of law. In that sense the principle conduces to what John Adam referred to in his draft of the constitution of the Commonwealth of Massachusetts in 1780, as “a government of laws and not of men”.⁴⁵⁴

454 Massachusetts Constitution, Part the First, Article XXX. The Article in its entirety reads: *In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.*

It could be said that, in that parochial sense, the concept of *the rule of law* in itself says nothing of the justness and fairness of the laws. The upshot is that, if that narrow view is taken of the rule of law, states which do not respect human rights can carry on business as usual without the observance of the rule of law. But it is non-controversial that the rule of law is considered a prerequisite for democracy and democratic practice. It cannot, therefore, be contradicted that the rule of law plays a crucial role in the protection and promotion of human rights, democracy and good governance.

The role of the rule of law in a free and democratic society

Yet again, the role of the rule of law goes beyond the narrow parameters of legality. In 1959, at an international colloquium of over 185 judges, lawyers and law academics from some 53 countries meeting, in India, as the International Commission of Jurists, made the Declaration of Delhi regarding the fundamental principle of the rule of law. At that important conference, the late Lord Denning, the eminent English jurist, observed the following:⁴⁵⁵

The Rule of Law is not confined to the negative aspects of preventing the Executive from abusing its power. It has a positive aspect involving the duty of government, not only to respect personal rights but to act positively for the well-being of the people as a whole.

Thus, apart from its enduring relevance in the promotion of “government of laws and not of men”,⁴⁵⁶ democracy, and political and civil rights, the rule of law must also be seen as an instrument for the promotion of social and economic development and social justice – which in themselves are conducive to peace and security. In its social and economic role, the function of the rule of law is to ensure that the objective of development is to bring about sustained and meaningful improvement in the welfare of the individual and to bestow the wealth of the country on all members of society. If unjustified privileges, extreme income disparities and social injustices are the order of the day in a country, then development fails and the rule of law is thrown out of the window.

455 For a summary of the proceedings of the conference, see the website of the International Commission of Jurists, <http://www.icj.org>; last accessed 18 March 2008.

456 *Supra*, footnote 1.

The conditions necessary for the maintenance of the rule of law

The maintenance of the rule of law is extremely important because it is the bedrock on which democracy and democratic practice are anchored.

Constitutionalism is a sharp instrument for ensuring the maintenance of respect for the rule of law. And, it is further submitted, constitutionalism is only attainable to a marked degree in states where there exists an independent and impartial judiciary, that is, a judiciary that is independent from the pressures of the executive, legislature and private persons and institutions; a judiciary that is fearless to apply the law in all cases, even where the government is an opposing party. Thus, just as the absence of freedom of action by judicial officers could erode the successful workings of democracy, so too can the dishonourable conduct and unacceptable attitudes of judicial officers undermine and sap the confidence of our people in the judiciary. If that happens, one of the most important bastions of democracy is in danger of destroying itself.

Complementary to an independent judiciary is the requirement of a well-organised and independent private legal profession, ready and willing to represent individuals in pursuit of their rights – even where the other party is the government. In other words, in a true democracy, there has to be an independent and proactive legal profession, which, without fear of reprisal from any office or authority, is allowed to serve justice as officers of court; to represent their clients' interests to the fullest extent permitted by law; to vindicate the rights of minorities and the disadvantaged; to initiate social programmes to inform members of the public about their rights and duties; and to make the law more accessible to them – to mention but a few.

As the late Chief Justice Ismail Mahomed of South Africa and Namibia so lucidly and succinctly stated in an address at a conference on “The Rule of Law and its Constitutional Organs” held in Windhoek on 2 October 1994, –

[t]o survive meaningfully, the values of the constitution and the rule of law must be emotionally internalised within the psyche of citizens. The active participation of the organs of civil society outside of the constitution in the articulation and dissemination of these values is a logistical necessity for the survival and perpetuation of the rule of law. Without it, the law and the ruler become alienated from the ruled. In a dangerously sterile sense the law itself becomes a series of mechanical commands to the citizen, resting its ultimate authority on the physical might of the state and its capacity to impose

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its will on the citizenry. There can be no security in such a legal system either for the governor or the governed. A maturing society premised on the rule of law therefore urgently requires the support of national ethos of human rights conscientiously and methodically propagated, legitimised and activated [sic] by all organs of civil society.

To all these domestic aspects of the rule of law should be added the need for states to comply with their obligations under international law – whether the particular rule of international law derives from treaty or international custom and practice. Nowadays, it is important that respect for the rule of law ought not to be restricted to municipal laws only, for obvious reasons. It is not uncommon to find that a state which has no respect for the rule of law at home in most cases does not comply with its obligations under international law – with dire consequences.

Doubtless, a national constitution – as the supreme law – represents the extent to which all laws and enforcement of those laws must conform. International human rights instruments, on the other hand, are common-denominator yardsticks against which states' respect for the rule of law, human rights and democracy must be measured at home and at the international level. And for Africa, the African Charter for Human and Peoples' Rights is relevant in this regard.

Nearly all African countries (except one, which is presently grappling with internal strife) have written constitutions, whose provisions conform – to a lesser or greater degree – to international standards.

The state of the rule of law in sub-Saharan Africa

In Africa today, there is the political will at the levels of state and its subjects to work hard towards the attainment of respect for the rule of law. Of course, some African countries face stupendous challenges than others in this regard. Concomitantly, levels of respect for the rule of law vary across sub-Saharan Africa: some countries have done more than others to attain this noble goal. But all in all, the move towards respect for the rule of law is gaining root throughout most of sub-Saharan Africa.

Respect for the rule of law ultimately requires a respect for international legal standards, especially the respect for human rights standards. The two main international human rights instruments that are most relevant to the rule of

law are the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). By June 2004, at the last of the four yearly counts, only one out of the total of 46 sub-Saharan African countries was not a member of those two instruments. It is submitted that this means almost all sub-Saharan African countries are alive to their international obligation to promote the rule of law at home and abroad, and are prepared to work with international organisations and other countries towards attaining that goal. Of course, as mentioned above, some have done more than others to reach that goal.

In addition, international cooperation through regional and sub-regional institutions and/or organisations is important in providing a platform for the exchange and sharing of resources and ideas between member states. A prime example of such an initiative is the African Peer Review Mechanism (APRM) under the New Economic Partnership for Africa's Development (NEPAD), which is aimed at encouraging and assisting African states to institutionalise a culture of respect for democracy, human rights, the rule of law, social justice and economic development.

Admittedly, there are also many negative forces impinging adversely on national efforts to attain the rule of law. Many sub-Saharan African countries are trapped in disease – particularly malaria and HIV/AIDS, poverty, and illiteracy. But there are more destructive, insurmountable agencies and conditions. More specifically, there are centrifugal forces that tend to eat away at nation states, particularly civil wars and armed conflicts, reversing any political, social and economic gains that have been made. In such situations, it is idle to talk about the attainment of the rule of law, which, as it has been shown, is a multifaceted concept that cuts across varied but interlinked practical issues.

However, only a negligible percentage of sub-Saharan African countries are presently in that unpleasant and unfortunate situation. The only problem is that the ripples of civil unrest and armed conflicts in a country or sub-region can create real problems for neighbours.

The other equally destructive agency that can infect a state and militate against respect for the rule of law is the scourge of corruption. This cancer in a nation state desecrates the principle of the rule of law and systematically destroys the fabric of society and good governance in any country.

In a poll jointly conducted by *The New York Times* and the Pew Global Attitudes Project in April and May 2006, a majority of Africans polled in ten sub-Saharan African countries in West, East and southern Africa indicated that they had been better off five years prior to the survey; but a greater majority of those interviewed thought corrupt political leaders in their countries were a real problem.

It is heartening to note that many sub-Saharan African countries have set up independent anti-corruption agencies to fight this social evil. The work of the ombudsman in various countries should also be noted here. This office provides a valuable service to the people, and in some countries it has proved itself to be quite capable of taking wrongdoers to task, including in instances of alleged corruption. The fact that sub-Saharan African countries have admitted that the evil of corruption exists and must be rooted out and efforts – genuine and meaningful efforts – are being made to fight it is an achievement in itself.

In this vein, it is important to recognise the role that civil society and non-governmental actors play in the realisation of the rule of law in many sub-Saharan African states. These organisations play a crucial role as they take on the responsibility of being watchdogs, tasked with ensuring that governments live up to their obligations. It goes without saying that critical voices are a necessary component to any democratic state. Indeed, the media serves as a prime example in this regard: it is important that the media are free to report to the people, without fear of government or other intimidation. Needless to say, journalists are bound to observe the basic tenets of journalism in their work. It is also to be noted that, in the area of media freedom, some sub-Saharan African countries are performing better than others.

Although many African countries have excellent constitutions providing for the protection of fundamental rights and freedoms, it is disheartening to note that these rights are in some instances not respected in reality. Wanton disregard of the rights of the citizenry, principally by the executive, is a phenomenon which can be noted amongst some African states. This situation ultimately stems from skewed implementation of the separation of powers doctrine, characterised by timid judiciaries and legislatures run by the executive.

The lack of decentralised government services in some African states is a phenomenon which harshly affects those persons who live below the poverty line, especially in rural areas. The lack of formal government institutions in rural

areas makes it difficult for these persons to have access to the law, and formal law enforcement and protection agencies. Closely connected to and as a result of this lack of decentralisation in rural areas is the proliferation of the practice of traditional law. The fact that the formal judicial systems may not reach those citizens in rural areas has meant that inhabitants there have to resort to or sustain their traditional or cultural means of solving disputes. It may be argued that resolving disputes through customary law could be advantageous in that it may alleviate some of the burden on the 'formal' justice systems; however, the reality is that some of these traditional practices do not conform with a number of human rights standards. It is recognised, nonetheless, that customary law is an important source of law and is instrumental in the attainment of a state where the rule of law prevails. It should be given the recognition it deserves, and mechanisms should be put in place to ensure that its practice accords with human rights standards.

Conclusion

All is not lost in our quest to institutionalise a culture of respect for the rule of law – although of course a lot needs to be done in that regard. In doing so, it is necessary to take cognisance of the fact that the rule of law is a situation which can only be fostered through a concerted effort, and can only be maintained through the realisation that the rule of law operates in a dynamic society. Therefore, it needs constant attention in order to flourish.