

‘Strengthening African Democracy – The Rule of Law and Institution Building’

Abuja, Nigeria, 22-25 November 2004

Mark S Ellis*

I. Introduction – Defining the Rule of Law

There is no single template for what defines the concept of the ‘rule of law’. Everyone seems to have a different interpretation of what the term means. For me, I turn to Africa and to a courageous attorney and friend, Sternford Moyo, the Past President of the Law Society of Zimbabwe. He speaks eloquently on the meaning of the rule of law:

‘The Rule of Law is the antithesis of the existence of wide, arbitrary and discretionary powers in the hands of the executive or the legislature. The Rule of Law is a celebration of individual rights and liberties and all the values of a constitutional democracy characterised by the absence of unregulated executive or legislative power. It is a celebration of the concept of separation of powers and the checks and balances which form part of that concept. In a society in which rule of law is observed, through the mechanism of judicial review, executive decisions and legislative enactments which are outside the framework of the law are declared invalid thereby compelling both the executive and the legislature to submit to enjoyment, by the individual, of all rights and liberties guaranteed by the constitution.’

Under this definition it is fair to say that many countries, including those in Africa, are still struggling to incorporate the rule of law within their own systems.

This is not to suggest that there is no understanding of the rule of law concept within the African perspective; that would be an absurd statement. As UN Secretary-General Kofi Annan has stated,

‘Africans have much to learn from their own traditions, and something to teach others, about the true meaning and spirit of democracy.’ He added, ‘We need to understand that there is much more to democracy than simply holding elections and deciding fairly which candidate, or which party, has majority support.’

The question today is whether Africa has reached a critical turning point where the rule of law is the foundation for democratic improvement, human rights and sustainable development. This is the key question because the rule of law is a prerequisite for the security, stability and development of Africa.

I recognise that there is a sensitivity in various regions around the world, including Africa, that transplanting Western institutional models may be problematic.

* Mark Ellis is the Executive Director of the International Bar Association, London.

However, the motives of some of those who advocate ‘African solutions to African problems’ may be suspect. Many egregious violations of the rule of law in Zimbabwe, for instance, have been justified on the grounds that this is a variant of democracy best suited to peculiar ‘African’ or ‘postcolonial’ circumstances and yet it is increasingly evident that these justifications have little to do with ‘African concepts of governance’ and more with consolidation of political power through the elimination of all political opposition.

Zimbabwe reminds us that we should be cautious of attempts to distinguish African rule of law norms from those of the rest of the world. It presents a challenge to us all to speak out whenever governments systematically undermine democratic institutions, hiding behind the argument that there are peculiar local circumstances that justify deviance. This is because a breakdown on the rule of law, if unchecked, seriously threatens the regional institutions and international institutions which are essential to securing human rights for all throughout the world.

Thus, whether the rule of law is, in fact, at the foundation for African development depends on understanding several key features of African governance and law (both past and present); it also requires an understanding and commitment to the rule of law.

II. The Rule of Law

Establishing the rule of law is analogous to a pocket watch. There are numerous elements that must be in sync for the system to work. Police, prosecutors, judges, the legislature, education, the media - each play a unique part and reform must involve them all. And supporting all of these elements is a political will, without which the rule of law as a theoretical aspiration will never be transformed into reality.

History clearly highlights the fact that the rule of law process is less a formalistic system than an attitude. The rule of law is an approach of setting rules for government, creating enough checks and balances to ensure that the government is dependent less on individuals and their personal whims, and more on systems and processes. Where there is no political will to deliver the rule of law, written constitutions and laws, however eloquently they proclaim rule of law principles, will be insufficient to guarantee them.

III. The Judiciary

For me, the existence of a solid, independent judiciary is the cornerstone of the rule of law. In addition, the role of Law Societies in developing institutions and providing a necessary legal framework and a monitoring body also proves to be crucial if the rule of law is to be sustained, accessible and workable as a practical concept.

The judiciary plays a key role in helping to secure that ‘the rule of law is aimed at achieving one objective - the establishment of individual freedoms and the protection against any manifestation of power by the public authorities’.* Through its position as something of a bastion within the concept of the separation of powers, the judiciary

* Adama Dieng, ‘The Legal Profession and Human Rights: Role of Judges and Lawyers in Defending the Rule of Law’. [1997] 21 Fordham Journal of International Law 550.

‘checks’ executive and legislative excesses and functions as a ‘brake upon the abuse of power as well as the protector and guardian of rights and liberties.’[†] Not only does the judiciary ensure that the legislature and the executive comply with the law; but as a representative of society, the judge is able to deliver the law to the people en masse, thereby eliminating the sense of distance and confusion that exists between the law and the community, protecting fundamental rights and freedoms, and seeking justice in accordance with the law.

Being independent necessarily requires judiciaries to be free from undue influence, bias, or pressure.[‡] Such independence can be divided into two categories: institutional independence, and personal independence.[§] The role of the judiciary in this process of realising dreams and institution-building is tantamount but only if they are entirely independent of the other branches of government. In furtherance of these ideals, it is reasonably argued that the institutional independence of the judiciary can be more easily obtained if the constitution of the state provides for it. For many African countries, the independent role of the judiciary as an institution is proclaimed in the constitution. The constitutions of Uganda, Namibia, Zambia and Nigeria recognise the judiciary as an independent body. However, the key is enforcement.

In Swaziland, the government refused to abide by the judgments of the High Court. All of the judges simply resigned in protest. Nearly two years later, the judges recently returned to work after the government finally assured the Court it would adhere to the court’s decisions.^{***}

Building the capacity that supports an independent judiciary requires a long-term commitment and necessary resources. Appendix 1 sets forth my suggestions for creating the standards necessary for an independent judiciary.

The predominance of honest and qualified judges is also essential. It is necessary, therefore, for there to be an effective system for the appointment of the judiciary controlled not by the executive but by an independent body. The transparency of the selection process is key. Provisions exist in the constitutions of Kenya, Uganda, Zambia, Namibia and South Africa for the appointment of the judiciary by a Judicial Service Commission.

Improved selection processes must be reinforced by security of tenure. Appropriate promotion and disciplinary processes that are transparent, as objective as possible,

[†] Okechukwu Oko, ‘The Challenges of Lawyering in Developing Societies’ [2004] 35 Rutgers Law Journal 59.

[‡] See for example the definition drawn up by the International Commission of Jurists in 1981 ‘Every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, or pressures, direct or indirect from any quarter or for whatever reasons.’ Study on the Independence of the Judiciary, Jurors, and Assessors and the Independence of Lawyers, UN Commission on Human Rights, UN ESCOR 34th Sess, Annex, UN Doc E/CN.4/sub.2/481 (1981).

[§] *supra* n 1. Dieng refers to two categories of judicial independence.

^{***} The six justices resigned in November 2002 amid a chorus of concern from key donors and international human rights groups after former Prime Minister Sibusiso Dlamini said the government would not recognise two court judgments challenging King Mswati III’s right to rule by decree. Prison officials refused to release suspects charged with offences that fell under the Non-Bailable Offences Order, despite an Appeal Court ruling in 2002 that the ‘non-bailable’ law was invalid. The authorities also continued to prevent the communities of Chief Mliba Fakhudze and Chief Mtfuso II from returning to their homes in rural Swaziland, even though the High Court had decided in their favour.

and adhered to in practice are the primary mechanisms through which security of tenure is protected. The length of a judge's term is closely related to security of tenure. As judges near the end of their term in office, they are most vulnerable to outside influences. Whether a term is for life or a fixed period, it must be long enough to reduce this vulnerability.

The judiciary also has a more personal significance. One cannot underestimate how much the law determines the life of society: 'It is not readily realised how much the law comes into play and controls the day-to-day events in the life of ordinary citizens. It is in the law, with the law, and by the law that the ordinary citizen moves, lives and has his being.'^{††} Therefore, it is vital that on a personal level the judiciary is also independent and impartial. Such personal independence requires a certain amount of courage from a judicial body that is determined to remain devoted to defending the rule of law and representing causes without fear of repression and persecution, quite probably in the face of hostility.

Judges who lack sufficient commitment to an independent judiciary, or who do not have adequate training and skills, are more vulnerable to outside influences. Training programme can, therefore, be influential. Training in ethics is particularly emphasised. There is also consensus amongst legal specialists that deficient law school training is one of the most serious obstacles to development of an independent judiciary. The low status of the judiciary in many countries, reflected in low salaries and poor working conditions, is perceived to make it difficult for judges to maintain the sense of professional dignity needed to withstand corruption and other outside pressures. Improving benefits and conditions can therefore be critical. Judges' associations have been an effective method of enhancing the professionalism of judges.

As much as we stress the need for judicial independence, it is important to note that no judiciary is completely free to act according to its own wishes. The judiciary, like any other institution fundamental to the rule of law, must be held accountable for its decisions and actions. Accountability requires a balance. Although the judiciary cannot be influenced by outside pressure, its decisions must be perceived as fair and impartial. If this goal is not achieved, then the public has the right to seek changes.

For instance, the Zimbabwe Supreme Court has made a series of flawed judgments that have helped undermine the freedom of expression. Calls for the court's reform seem highly appropriate.

^{††} Retired Nigerian Supreme Court of Justice C A Oputa, in 'The Lawyer and the Society: Yesterday, Today and Tomorrow', *Contemporary Issues in the Nigerian Legal System* 46-e. Smaranda Olarinde et al (eds), 1997.

IV. Importance of an Independent Bar

The rule of law doesn't just require an independent judiciary; it requires a broad-based coalition of supporters from both inside and outside the judiciary. This includes an independent Bar and legal profession that can help support it. The United Nations Basic Principles on the Role of Lawyers highlight the role an independent legal profession can play; they are 'essential agents in the administration of justice'.^{##} Lawyers play a crucial role in helping people understand the law, become involved in the law and seek justice through the law. This duty becomes evident, when lawyers, even in the face of hostility, speak out against abuses of justice and human rights; they act in a sense as crusaders for the rule of law.

An independent and fearless legal profession is an essential prerequisite to the enjoyment of human rights and to transformation to a democratic, free and prosperous society. A weak legal profession is of no value to the public and the administration of justice.

The legal profession, like the judiciary, finds such courage from the support and solidarity that exists within the profession. Bar Associations play a key role in building this support. The Bar Associations contain the foot soldiers of the judiciary and both should receive the support of the executive in administering the legal process to the people.

The present situation in Zimbabwe is that the abnormal is regarded as normal. Legal practitioners are routinely threatened by members of the police and militia simply because they are carrying out their duties. Lawyers are being physically assaulted.

The Uganda Law Society has spoken out in support of the constitutional two five-year presidential term limit in order to enhance good governance.

The Botswana Law Society has called for greater clarification on the issue of judges being able to negotiate their contracts, with some having terms and remuneration packages different from others. The Law Society has stated that such a situation weakens the rule of law and judicial independence.

A senior Zimbabwean lawyer, Edith Mushore, has bravely spoken out against Information Minister Jonathan Moyo for arresting independent Zimbabwean journalists.

The Law Society of Swaziland has lashed out at the government, accusing it of not obeying the rule of law.

There are many such testimonials from African lawyers that reinforce my belief that the legal practitioner is absolutely essential for the rule of law to prosper. Appendix 2 of this paper sets forth my ideas for creating the institutional blocks for a strong, effective Law Society.

V. Governance

^{##} United Nations Basic Principles on the Role of Lawyers - Basic Principles of the Independence of Judges and Lawyers, GA Res. 32, UN GAOR 40th Session Supp No 53 at 205 UN Doc A/40/53 (1985).

One of the key objectives of the African Union is to ‘promote democratic principles and institutions, popular participation and good governance.’ Good governance and the rule of law are the heart and soul of NEPAD (New Partnership for Africa’s Development). NEPAD recognises that these issues stand at the root of African impoverishment. In July 2002, the Durban Summit of African leaders adopted a Declaration on Democracy, Political, Economic and Corporate Governance by which they agreed to enforce the rule of law and submit themselves to peer review under the NEPAD mechanism, by which governments also agree to ‘ensure the independence of the judicial system that will be able to prevent abuse of power and corruption’.

NEPAD formally commits Africa and Africans to a renewed pledge to good governance, rule of law and human rights in at least seven paragraphs out of a total of the 270 paragraphs. This is not insignificant if compared to the near silence on the issues of good governance, rule of law and human rights in the Abuja Treaty Establishing the African Economic Community.

Since its adoption, NEPAD has gone beyond the formal articulation and recognition of good governance, rule of law and human rights.

But once again, the issue is one of enforcement. The Zimbabwean government, for instance, has issued statements suggesting that the NEPAD norms are not binding on the sovereign states of SADC and only offer ‘guidelines’.

VI. Conclusion

In the absence of a mechanism for enforcement of the rule of law, it is impossible to control the use of discretionary and arbitrary power by the executive and the legislature. There is no mechanism for intervention by the judiciary to prevent deterioration into an apartheid-style system of government. In the absence of the rule of law, people are not able to influence the decisions of the legislature.

The weak development of the rule of law adds to the already crippling instability in many African countries. Adherence to the rule of law, both in theory and in practice, is essential to Africa’s emergence on the world stage as a potential leader in the reform efforts.

I believe a visible new order is being forged in Africa. States across the continent are working, fighting, and negotiating in an effort to construct liberal societies, effective government, territorial legal systems and national understanding of the rule of law.

It is my fervent hope and desire that this new order continues to expand and prosper. The International Bar Association remains committed to assisting in this endeavour.

Appendix 1

Creating Objective Standards for Judicial Independence*

There is no universally accepted standard for an independent judiciary, and even like-minded democracies will differ on exactly how such standards are defined. There is, however, general agreement that international standards for judicial independence do exist; the United Nations[†] has created such standards.

Selection and Appointment of Judges

Judges should be appointed based on objective criteria such as training, experience, professionalism, and reputation in the legal community. Nominees for judicial vacancies should be subjected to an independent screening and review process prior to appointment. Ethnic and religious minorities should be represented among the pool of nominees. Prior to appointment, judges should be subjected to an objective test covering knowledge of the law and ethics. The public and the Bar (if one exists) should be able to review and comment on judicial nominations.

Education and Training

Judges should have formal university-level training in law. Prior to joining the bench, judges should be required to take a series of courses to supplement their basic legal training and maintain a certain level of knowledge in substantive and procedural areas of law.

Budget

The judiciary should have a meaningful opportunity to influence the amount of money allocated to it by the legislative and/or executive branches. Once allocated, the judiciary should have control over the funds. Government officials must be made aware that creating a functioning judicial system is a much more extensive operation than simply drafting new laws and providing training. Infrastructural support in the form of computers, fax machines, and adequate working facilities is frequently needed to help modernise and facilitate more efficient judicial proceedings.

Salary

Salary levels in the judiciary should be formally linked to the salary levels of other government officials. Thus, the parliament cannot provide a pay rise for itself without a complementary salary rises for the judiciary. The salary of a senior level judge should generally be comparable to the salary level of senior government officials. Judicial salaries should not be decreased.

Maintaining Judicial Independence

* See Mark S Ellis, *International Legal Assistance in Post-Conflict Justice* (Transnational Publishers) (2002).

[†] United Nations, *Basic Principles on the Independence of the Judiciary* (1985).

Judicial decisions should be made without outside political pressure or improper influences by litigants or other interested parties. Judges should have immunity for actions taken in their official capacity. Once assigned a case, a judge may be removed only for good cause, such as conflict of interest. Judicial decisions should be reversed only through the appellate process. An effective police organisation must protect judges from assault or other threats stemming from their work.

Judicial Powers

The judicial branch should have the power to determine the constitutionality of legislation and official Acts, and these decisions must be enforced. In fact, there should be a law enforcement entity responsible for enforcing judicial decisions and orders. The judiciary should have exclusive jurisdiction over all cases concerning civil rights and liberties, including the duration of criminal sentences. The judiciary should work under uniform rules of evidence and procedure that facilitate the conduct of orderly trials and hearings. Judges should have the power to hold witnesses and litigants in contempt, and to subpoena witnesses and parties. The judiciary should have control over certain prosecutorial activities such as wiretapping and the issuance of arrest warrants.

Transparency

Courtroom proceedings should be open to the public and the media. There should be an effort to increase outreach to the public about the importance of the judiciary. Judicial decisions should be published and open to academic and public scrutiny. A transcript of courtroom proceedings should be maintained and available to the public. Courthouses should be centrally located and provide a respectable environment for the dispensation of justice.

Ethics

By focusing on judicial ethics, the integrity of the profession will be enhanced and the judiciary will gain more respect from the public. Judges should receive training on judicial ethics, including regular continuing legal education on judicial ethics, during their tenure. Proper ethical guidelines should be developed for judges, which may take the form of a separate ethical code similar to codes of judicial conduct followed by the European Union and the American Bar Association. The code of conduct should be enforced through a process that respects due process. There should exist a process through which judges, lawyers, and the public may register complaints concerning judicial conduct.