

STAKEHOLDERS' WORKSHOP ON THE RULE OF LAW IN SUB-SAHARAN AFRICA: PROMISES, PROGRESS, PITFALLS AND PROSPECTS

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SUMMARY REPORT



I. INTRODUCTION

This report gives a summary of papers as presented under each sub-theme of the conference and discussed during plenary sessions. It summarizes the presentations and highlights the connection that the papers made with the concept of the rule of law.

The conference themed "The Rule of Law in Sub-Saharan Africa: Promises, Progress, Pitfalls and Prospects," sought to identify and discuss the contemporary challenges to, and reasons for the steady decline in the state of the rule of law

in the Sub-Saharan Africa while seeking for possible solutions for a prosperous future.

It was conducted in six sessions along the following sub-themes:

1. The rule of law and democracy
2. The rule of law and access to justice
3. The rule of law , discriminatory practices and social inequalities
4. The rule of law and surveillance
5. Monitoring and enforcing the rule of law in Africa, and
6. Addressing the crisis of the rule of law in Africa

The conference brought together about 45 legal practitioners, constitutional and human rights activists, civil society representatives, scholars, judges and students from various parts of sub-Saharan Africa including South Africa, Ghana, Nigeria, Kenya, Ethiopia, Malawi, Zimbabwe, Nigeria, DRC, Eritrea and Cameroon.

Welcoming and opening remarks were delivered by Prof. Andre Boraine, the Dean of the Faculty of Law, University of Pretoria and Dr. Arne Wulff, the Director of KAS' Rule of Law Program for Sub Saharan Africa both of whom implored upon the participants to seize the opportunity to deliberate on the possible solutions to curb against further slide and promote the rule of law for the benefit of the current and future generations in Africa as a means to attaining peace, stability and sustainable development.

A total of 18 main presentations were made at the conference. To set the tone, Prof Charles Manga Fombad began by offering "An Overview of The Crisis of the Rule of Law in Africa" wherein he began by contextualizing and giving a detailed analysis of the meaning of the concept of the rule of law. It was evident from the various presenters that there is no single or one commonly adopted meaning of the concept of the rule of law, but all were in agreement that there are minimum ingredients that make up and satisfy the concept of the rule of law, namely, observance of good and just laws that advance good governance, accountability and the protection of human rights. Drawing from published surveys on the rule of law, Professor Fombad demonstrated that for nearly two decades, there has been a steady decline in the state of the rule of law in Africa. This is of concern especially considering that even in countries that had recorded significant gains in the past as far as the rule of law is concerned were increasingly experiencing steady decline, while some that had consistently performed poorly over the years showed no or little progress. To

remedy the slide, Prof Fombad recommended for enhancement of mechanisms of monitoring compliance and enforcement using the existing legal framework of the African Union, such as the African Union Commission, Peace and Security Commission, and the African Peer Review Mechanism.

II. **SESSION ONE: THE RULE OF LAW AND DEMOCRACY**

Three presentations were made under this sub-theme:

- a. Mr. Chikosa Banda began with a paper titled: "Administrative Justice, Environmental Governance and the Rule of Law in Malawi". It focused specifically on the rule of law and environmental governance in Malawi wherein he highlighted the successes and failures of administrative law as an important aspect of advancing the rule of law by checking the conduct of public bodies and officials in the course of making, adjudicating and enforcing rules. He highlighted the phenomenon in which courts in Malawi have sometimes condoned the subversion of the rule of law under the excuse of "necessary illegality." This tendency, one can say, undermines the core of the rule of law in that courts, which are mandated to uphold the rule of law, connive at its subversion for the sake of convenience, utilitarian justifications or simply pandering to the whims of the executive.

Disturbingly, the presentation highlighted how power and decision-making by governmental authorities particularly on environmental issues were being heavily influenced by vested interests from politicians and powerful business people in total disregard of the law. In terms of advancing environmental governance, he noted that the Environmental Management Bill (Act), 2016 seeks to relax rules of standing such that one does not need to have sufficient interest to bring environment-related cases provided he/she can show that they have interest in protecting the environment.

The plenary was in agreement that the idea of "necessary illegality," being embraced by the courts should never be allowed to thrive in any functional rule of law regime as it poses the risk of undermining the entire fabric of the rule of law because it grants unfettered discretionary power to the duty-bearers yielding a fertile ground for abuse and violation of human rights

- b. Prof. Mbata Mangu's paper, 'Joseph Kabila's Third Term Campaign and the Complicity of the Constitutional Court and others in the Crisis of Democracy and the Rule of law in the Democratic Republic of Congo,' carried on the thread by highlighting the ongoing crisis facing constitutional and democratic order in the Democratic Republic of Congo.

He provided a detailed account of the happenings in the DRC which showed the current situation where presidential elections were already six months overdue with no election plans in sight. He highlighted Joseph Kabila's ambitions to hold on to power indefinitely, his manipulation of the political system, and most regrettably, the complacency of Constitutional Court and the National Independent Elections Council which lack independence. Further, he lamented the monumental failure on the part of the African Union to intervene and impress upon President Kabila and the institutions in the DRC to respect the Constitution, the rule of law and the wishes of the people. His exposition mirrored similar situations in Uganda, Rwanda and Burundi, which are evidence of a trend in reversal of democratic gains brought about by multi-party democracy at the beginning of 1990s. Prof. Mangu emphasised on the need for democratic rule of law noting that the rule of law and democracy are not synonymous.

- c. A paper titled "The Rule of Law and Democracy in Ghana since Independence: Uneasy Bedfellows?" co-authored by Prof. Kwame Frimpong & Mr. Kwaku Agyeman-Budu concluded presentations under this session.

This presentation took participants through Ghana's democratic journey since independence in 1957 to date. The presentation exposed two problems facing the rule of law and democracy in contemporary Ghana namely, the security of tenure of judges and appointment of Members of Parliament as cabinet ministers all of which have adversely undermined the principle of separation of powers. Further, the presentation showed how the judges of the Supreme Court in the presidential election petition challenging the election of John Mahama failed to uphold the constitution and instead chose to be guided by convenience thereby contravening the principle of the rule of law and the cardinal democratic principle that elections must always reflect the wishes of the people. The upshot of this presentation was that the courts in Ghana have many a

times failed to uphold the rule of law in their decisions. Fundamentally, it was claimed that the Constitution of Ghana inherently undermines the rule of law in Ghana because of the immutable 'indemnity clauses' that bar the courts from challenging the actions of the military regimes. The two recommended for change of constitutional order in Ghana.

III. SESSION TWO: THE RULE OF LAW AND ACCESS TO JUSTICE

The following presentations were made under this sub-theme:

- a. Delis Mazambani in her paper "The Rule of Law and Access to Justice in Zimbabwe: Citizens' perception on challenges and opportunities," discussed various perceptions that members of the public in Zimbabwe have towards the country's justice system. Drawing from a survey conducted in the country, the paper noted that whereas the formal justice system present certain advantages including being less arbitrary and sensitivity to rights of vulnerable groups such as women and children, the system is generally perceived as foreign, distant and expensive to majority of the citizens. Worse still, many citizens have no confidence and trust in the system partly due to judicial corruption. On the other hand, the informal, hybrid and parallel justice system is perceived as generally cheaper, quicker and more accessible. It was noted that although the perception may be illusionary, it affects people's willingness to rely on the formal justice system for redress and oftentimes take matters in their own hands thereby undermining the rule of law.

- b. Mr. Admark Moyo in his paper 'Standing, Access to Justice and the Rule of Law in Zimbabwe' evaluated the position of the law in Zimbabwe in respect of standing and how it affects access to justice and the rule of law broadly. He highlighted the progress that had been made from the now defunct Lancaster House Constitution and the judicial declarations made then, which he observed took very narrow and restrictive positions that effectively locked out legitimate claims for reasons that claimants did not have "direct and substantive" interest in the matter. He observed that under the new constitution this position had greatly changed through broad provision and interpretation of the scope of *locus standi*. Currently, courts can entertain claims of violation or threat of violation of rights from persons who are directly affected as well as those suing on behalf of

others or in the interest of the public thereby enhancing access to justice, the protection of human rights and the rule of law.

- c. Mr. Derek Inman paper's "International Crimes, National Trials, and Victim Participation: An Avenue to Enhance the Rule of Law and to Tackle Impunity in the DRC?" discussed the right of victims to participate in trials of international crimes. He traced the origin of the right of victims participation and explored the position under the United Nations Basic Principles and Guidelines on the Right to a Remedy and Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law; the European Convention on Human Rights (as interpreted by the European Court of Human Rights); the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; the American Convention on Human Rights (as interpreted by the Inter-American Court of Human Rights), and the practice before the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the military tribunals in the Democratic Republic of Congo (DRC). He observed that participation of victims is essential as it recognises the victims' right to retribution and enhances the notion of access to justice by the victims. He pointed out that the practice of participation of victims before the ECCC provides a good model for the trials before the military tribunals trying international crimes committed in the conflicts in the DRC because it is based on the civil law tradition that is similar to that in the DRC. He noted various challenges that the trials before the military tribunals in the DRC face, such as poor or complete lack of representation of victims by competent lawyers, lack of effective witness and victim protection and high court fees, which make it impossible for many victims to realise reparations ordered by the courts. Undoubtedly, this undermines access to justice by the victims of international crimes and perpetrates the high level of impunity in the DRC.

IV. SESSION THREE: THE RULE OF LAW , DISCRIMINATORY PRACTICES AND SOCIAL INEQUALITIES

The following presentations were made under this sub-theme:

- a. Mr. Tilahun Weldie Hindeya's paper "Large-scale Agricultural Land Acquisitions and Ethiopia's Ethnic Minorities: a Test for the Rule of Law" highlighted the challenges that the rule of law in Ethiopia face in respect

to land rights of minority communities. It demonstrated that although the Constitution of Ethiopia protects land rights of minority communities and gives regional states the power to manage land resources, the practice is at variance with these guarantees. Through delegation of power by regional state government to the federal government as well as the far-reaching power and patronage of the ruling party, the federal government enjoys wide powers to deal with land. He noted that the purported delegation of powers is contrary to the letter of the constitution and lacks basis in law yet under this regime, the federal government has continuously transferred huge tracts of land to foreign investors without the consent or involvement of local communities. As a result, ethnic minorities in Gambella and Benishangl-Gumuz regions of Ethiopia have been disposed and deprived of their land rights, with little or no recourse for justice since the public generally have no confidence in the courts especially on matters where the executive is the violator of the law.

- b. Prof Annika Rudman in the paper titled "Women's Access to Regional Justice as a Fundamental Element of the Rule of Law: The Absence of a Committee on the Rights of Women in Africa and its Effects on the Enforcement of the Maputo Protocol" focused on the challenges facing the enforcement of women rights in Africa before regional human rights enforcement institutions, namely the African Commission on Human Rights and the African Court of Human and Peoples' Rights. She noted the significant strides that had been made on the continent insofar as the promotion of women's rights is concerned, particularly through the adoption and wide ratification of the Maputo Protocol to the African Charter on Human and Peoples' Rights while remaining cautiously optimistic about its full implementation due to the numerous internal and external weaknesses that undermine the realisation of the rights as guaranteed in the Protocol. As part of the remedial measures, she recommended that a Committee on the Rights of Women within the Maputo Protocol similar to the CEDAW committee should be considered. She noted that such a committee will enhance women's rights by not only receiving complaints with respect to violations but will also be a key driver or champion of enforcement of the rights before the relevant institutions. Overall, she called upon the African Commission to reconceptualize its approach to women issues.

V. SESSION FOUR: THE RULE OF LAW AND SURVEILLANCE

The following presentations were made under this sub-theme:

- a. Hiruy Wubie Gebreegziabher in a paper titled “The Right to Privacy in the Age of Surveillance to Counter-Terrorism in Ethiopia,” evaluated the counter-terrorism surveillance law and practices in Ethiopia against the right to privacy as guaranteed under the ICCPR and the Ethiopian Constitution. Recognising that the idea of the rule of law entails respect for fundamental rights and the observance of limits and procedures set out in law by public officials, this paper highlighted how surveillance laws and counter-terrorism strategies in Ethiopia fall short of these tenets of the rule of law. It demonstrated how the Ethiopian legal framework does not regulate mass surveillance thereby leaving room for state abuses of police powers and the violation of the right to privacy. For instance, although illegally obtained evidence is inadmissible, the use of evidence obtained from warrantless interceptions is frequent, and often goes unchallenged under the guise of intelligence reports which are exempt from scrutiny. He called for regulation of mass surveillance by law for it to be an effective and viable counter-terrorism strategy and curb against abuse.
- b. On his part, Dr Lukman Abdulrauff (in a paper jointly authored with Prof Fombad), ‘The Challenges for the Rule of Law Posed by the Increasing Use of Electronic Surveillance in Sub-Saharan Africa’ focused specifically on electronic surveillance and its legal framework in sub-Saharan Africa. They showed how electronic surveillance undermines the right to privacy and other human rights guaranteed under the law. They argued that mass electronic surveillance fosters massive abuse of power by the state, and often have negative effect even on the independence of the judiciary. They called for the development of *sui generis* laws to regulate electronic surveillance since privacy laws are clearly inadequate.

VI. SESSIONS FIVE AND SIX: MONITORING AND ENFORCING THE RULE OF LAW IN AFRICA

Sessions five and six sought to share best practices and the different mechanisms that are available for use in the Sub-Saharan Africa insofar as monitoring and enforcement of the rule of law is concerned.

- a. Justice Gerard Niyungeko presented on ‘The Rule of Law in the Jurisprudence of the East African Court of Justice’ wherein he discussed

the jurisprudence of the East African Court of Justice as pertains to the promotion and protection of the rule of law and human rights in East Africa. He noted that despite the challenges of jurisdiction and limitations on its powers, the court has consistently upheld human rights and insisted on adherence to the rule of law by EAC member states as part of its jurisdiction to interpret the EAC treaty. He noted the potential the Court has in advancing human rights and the rule of law among EAC states and called for member states to adopt a protocol that shall give the court human rights jurisdiction as contemplated by the EAC treaty if the court's potential is to be fully unlocked.

- b. Makanatsa Makonese presented on 'The Role of National Human Rights Institutions in Monitoring and Enforcing the Rule of Law in Sub-Saharan Africa' pointing out that there is a strong connection between democracy, rule of law and human rights protection. She argued that the creation of NHRIs demonstrates a commitment of many African states to the three principles. She observed that given sufficient resources and latitude to carry out their mandates, NHRIs can play a critical role for benefit of both the state and citizens. She noted that NHRIs help promote a culture of human rights, the rule of law and democracy thereby improving the international standing of any country. Further, they facilitate citizen participation and engagement in governance issues thereby bridging the government - citizen divide which ultimately enhances national cohesion, peace, security and the rule of law.
- c. Dr Thomas Obel Hansen presented on 'The Nairobi Principles on Accountability as a means of Monitoring and Enforcing the Rule of Law and Accountability for International Crimes in Africa.' He highlighted draft principles that can be beneficial to the ICC, the AU, the civil society and other players in the international criminal justice system drawn from the experiences of the collapsed Kenyan cases before the International Criminal Court (ICC). The paper showed how cooperation among member states is an obligation that cannot be assumed simply because it is required by the Rome Statute. The paper demonstrated how cooperation from Kenya became a huge challenge during the proceedings in light of the fact that key suspects held powerful positions in government. The paper also showed how immunity of state officials is a complex issue noting that whereas the position of suspects is irrelevant

under the Statute, the cases against Kenyatta and Ruto adopted a contrary position, creating an exception to suspects holding powerful positions. Drawing from the experiences of these cases, he argued that the proposals under the Malabo Protocol to grant immunity to heads of state and senior government positions will inevitably result into similar outcome and may therefore not necessarily promote accountability for international crimes in Africa. He argued that other issues that need to be considered if accountability for international crimes is to be enhanced include States' own commitment to fighting impunity so as to give effect to the complementarity principle; the enhancement of witness protection mechanisms and active participation of victims in the cases.

The Nairobi Principles on Accountability is therefore a practical training, advocacy and practice tool for all the key players in international criminal justice.

- d. Tsega Andualem Gelaye, presentation on "Strengthening Rule of Law enforcement in Sub-Saharan Africa: the Role of African Union" evaluated the protection of the concept of the rule of law in the context of the African Union when viewed parallel to the European model. He noted that unlike the Treaty of the European Union, the Constitutive Act of the African Union does not specifically establish the rule of law as a founding principle of the Union. He argued that this is a weakness *ab initio*. He observed that in Europe, adherence to the rule of law is a prerequisite to a state's eligibility to joining the EU where the European Commission wields greater powers to enforce the principle among member states including financial sanctions or deprivation of voting rights. He lamented that the same position does not obtain in Africa which places the protection of the rule of law on a weaker pedestal as evidenced by AU's inability to firmly and decisively deal with the frequent violations of the rule of law on the continent whenever required to do so. In the foregoing, it was recommended that the Constitutive Act should be amended to make the adherence to the rule of law a prerequisite for admission and its violation a potential basis for sanctions to be imposed by the AU.
- e. Chris Oxtoby's paper entitled 'Best Practice Guidelines for Judicial Appointment' highlighted proposed principles that should inform processes of appointing judges in countries of Southern Africa that are members of the Southern African Chief Justices Forum (SACJF). These

countries include Botswana, Kenya, Malawi, Namibia, Seychelles, Tanzania, Uganda, Zambia, and Zimbabwe. He noted that since judges play a crucial role in enforcing the rule of law, the process by which they are appointed becomes an essential aspect of the rule of law. It follows that the process must be designed to yield judges with the intellectual capacity, rigour and strength of character to be able to decide cases competently and without fear or favour. Among the key principles to guide the process of appointment include transparency, objectivity of the criteria, open advertisement, the need to ensure judicial diversity, vetting and stakeholders' feedback mechanisms, fair and just interview criteria/model, decision-making mechanism, avenue for providing reasons for the decision, judicial tenure among others.

- f. Prof. Thomas Andre Thomashausen presented on 'The Importance of Strong Institutions and Capacity Building for Enforcing the Rule of Law,' lamenting about the paradoxical situation where constitutions celebrated as being good often create weak institutions that are ineffective. Using South Africa as an example, he argued that the constitution has created a weak presidency which has resulted into poor governance as the president is too weak to take effective actions. He noted that institutional weaknesses undermine the rule of law ultimately leading to the collapse of a State.
- g. Edward Murimi's presentation on "Developing Benchmarks and Indicators under ACDEG to Advance the Rule of Law in Africa" analysed the concept of the rule of law as a principle embodied in the African Charter on Democracy, Elections and Governance (ACDEG). He pointed out the difficulty in conceptualising the meaning of these concepts which to a large extent was undermining their implementation because effective implementation requires a level of clarity to meanings. He cited "Freedom in the World" Report (developed by the Freedom House), the Economist Intelligence Unit (by the Economist), the Varieties of Democracy (V-Dem) project and Polity IV Index as some of the benchmarks that can be incorporated in assessing the continent's progress in advancing the rule of law. In developing benchmarks for the ACDEG as mandated under the Charter, he urged the African Union Commission to consider a combination of rule-based/outcome-based indicators and perception-based/fact-based indicators that already exist in the areas of democracy,

elections and governance, while taking into account criticism raised against them.

VII. CONCLUSION AND RECOMMENDATIONS

In a nutshell, the conference noted that;

- a. Based on the various empirical and case studies, there is a steady decline in the state of the rule of law in Sub-Saharan Africa;
- b. This decline is increasingly having a reversal effect on most of the democratic gains made since the introduction of multi-party politics on the continent. Further, it is aiding the escalation of human rights violations, impunity and corruption on the continent. Recent events in DRC, South Africa, Burundi, Zambia and Botswana to mention but a few are hardly inspiring insofar as functional rule of law regime in Africa is concerned;
- c. The problem is generally not one of deficiency in the law to support the rule of law, since there are many international, regional, sub-regional and domestic instruments on the continent to protect and promote the rule of law as a foundational value, but rather the main weakness has been in the implementation and enforcement framework which is made worse by weak, subservient and captured judiciaries in many jurisdictions.

In the foregoing, it was recommended *inter alia*, that

1. The African Union and individual States on the continent take cognizance of the declining trends in the rule of law and devise strategies to intervene to help avert total collapse. In this regard, the 'European Commission for Democracy through Law' (*the Venice Commission*) model as a mechanism for monitoring compliance and enforcement of the rule of law at the Council of Europe was identified as a best practice worth exploring in Africa;
2. Governance and other legal institutions such as the judiciary, the electoral commissions and National Human Rights Institutions (NHRIs) as well as other non-state agencies such as the media and the civil society must be independent and strengthened for effective protection and promotion of the rule of law, human rights and democracy on the continent.