THE RULE OF LAW IN POST-COLONIAL AFRICA: A BRITISH LEGACY?

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Thank you for the invitation to give this lecture. It is both a great honour and an intimidating challenge. Your Bar is not only the foremost body of forensic legal practitioners in the world but also the legendary training ground for public speakers. Therefore the very opportunity to engage with your members and guests is an exciting prospect for me. To be afforded, in addition, a platform to raise matters of great moment to African lawyers is a bonus. And then, by signal good fortune, the Damian Green debacle erupts to provide a relevant backdrop for a discussion of the Rule of Law. The flurry of conflicting opinions this incident has spawned, each asserted with absolute confidence in its irresistible veracity, foreshadows the imminent trundling-out of the Rule of Law, requiring one to examine yet again the meaning and applicability of this 'principle of constitutional law'. But allow me the *Schadenfreude* of observing that a police raid on the parliamentary office of an opposition MP does appear on the face of it to be characteristic of my country 20 years ago rather than of the mother of parliaments …

Of course I realise that the invitation and the honour it entails are mine in a representative capacity only, not personally. They acknowledge the part played by the South African Constitutional Court in protecting and advancing the Rule of Law in a transitional democracy. But my vicarious involvement does not imply that I am in some way a spokesman for my profession. On the contrary, I have no constituency and am beholden to no-one. I speak my own mind and can do so frankly, keeping no backdoor open. I am answerable only to my own conscience, though I remain committed to the values I undertook to uphold when I took office as a member of that Court. I still regard it as my duty to protect and promote the fundamental values on which we hope to build a new society in my country.

Certain further prefatory disclaimers are, I believe, necessary. First, I am no blind admirer of Britain's colonial institutions and heritage. I am an Afrikaner whose grandfather was killed in battle defending his country's independence against British imperialism. Subsequently his widow and children, including my father then two years old, were transported to a series of concentration camps hundreds of miles from their deserted hearth and home. British colonial rule in Africa was no unmitigated curse, however. It brought a number of benefits, one of which, the Rule of Law, forms our subject matter tonight.

This leads to the second disclaimer. Although I have lived my professional life with English legal textbooks and judicial precedents, I am no common law expert. I became more or less familiar with concepts of your system of law by application, not instinct. In the case of the Rule of Law, however, the process was relatively simple. Although I cut my legal teeth on the Institutes of Justinian and not the profundities of Professor Dicey, I readily related to the concept of an overarching legal norm that governs all relationships, obligations and rights in an ordered society. Indeed, this major inarticulate premise of the law was acknowledged and applied in my country more than a century ago.

But, and this is the third and last disclaimer, I relate to the Rule of Law not as a philosopher but as a journeyman judge. Paraphrasing Oliver Wendell Holmes, I claim that the stuff of the law is experience – and having spent half a century applying and latterly administering the law in one capacity or another in South Africa and further afield, I believe I can claim expertise in two fields vital to the Rule of Law: independent courts and elections. Therefore, although I am no jurisprudent, I think I can rightly say that on these two topics I have expert knowledge based on extensive experience and I intend using them as my yardsticks in discussing our topic.

Having disavowed any profound theoretical understanding of the law, it would be a waste of time for me to venture a definition of the Rule of Law. Google records more than eight-and-a-half million entries under this heading, three-quarters of a million of them relating to the Rule of Law in conjunction with South Africa, and I have no intention of sifting through that overburden in search of payable ore. The term has been debased by

gross over- and misuse, often serving as the last refuge of political hypocrites and other sophists. Genuine legal academics and professional associations have exhaustively debated it for decades.

More importantly, barely two years ago Lord Bingham delivered a magisterial lecture on the topic and I readily adopt his description of the core of this elusive concept.[1] In principle I believe it means that all persons and authorities within the state, whether public or private, are bound by and entitled to the benefits of laws that have been publicly and prospectively promulgated and that are publicly administered by courts of law. In particular, every wielder of public power is constrained by the law to function strictly within the limits of the empowering instrument. For my purposes this definition suffices. With apologies and acknowledgement to Justice Potter Stewart,[2] I can recognise an infringement of the Rule of Law when I see it.

In what follows I shall focus on two aspects of the Rule of Law: the right of each individual citizen (i) to participate in government through regular, free and fair elections; and (ii) to enforce such right and all other entitlements by means of accessible, competent and independent courts. I shall briefly survey a number of former British colonies in Africa of which I have personal and recent experience. Although each of these countries presents fascinating material for a case-study in depth, time constraints oblige me to limit the survey to a brief overview.

Imagine the map of Africa and superimpose a large question-mark, starting with Sierra Leone on the bulge of West Africa. Then sweep the curve through Uganda, turn south-eastwards through Kenya, head down through Malawi and Zimbabwe and mark South Africa as the dot at the foot. More specifically I shall concentrate on Kenya and South Africa in this survey, not only because they are the centres of gravity in their respective regions and cast a shadow beyond their borders, but also because I have particularly up-to-date knowledge of both.

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[1] See "The Rule of Law", *Cambridge Law Journal*, 66(1), March 2007, pp. 67-85.

[2] … who famously observed that although he might not be able to define pornography, he knew it when he saw it.

Sierra Leone

Sierra Leone need not detain us long. After its emergence from colonial rule in the early 1960s the fledgling state languished, even before it was plunged into bloodshed and unimaginable cruelty some 25 years later. An uneasy peace imposed by external force in the mid 1990s has been succeeded by relative quietude, and three general elections have been held. The first of these, in 1997, was administered virtually wholly with foreign resources and expertise and established a reasonably legitimate legislature and executive. The second, in 2002, was conducted to a substantial extent by Sierra Leoneans and was seen by all concerned, including the general body of foreign observers, to have been free and fair. It was subsequently discovered, however, that the integrity of the election had in truth been marred by widespread corruption of the process and ballot-stuffing across the political board. The third election, administered in 2007 by a reconstituted electoral management body under dynamic new leadership and guided by Ghanaian advice, was a creditable exercise and laid a sound foundation for legitimate government.

There have, however, been serious lapses in national security, governmental abuse of power still occurs and policing is rudimentary and ineffectual – even in Freetown, which is generally better served than the remoter hinterland. In the absence of elementary essential services such as potable water, rubbish- and sewage-disposal, electricity and trafficable roads, the quality of life for the vast majority of Sierra Leoneans is so abysmal that speaking of the Rule of Law verges on the obscene. When last I was there, the only court really functioning was the International Criminal Court. Its acres of trim compound, neat and air-conditioned office buildings and state-of-the-art glass and steel court building stood in stark contrast to its shanty-town surroundings and the dilapidated local court buildings. Graham Greene's cotton trees and Levantine businessmen are still there, but Greene would hardly recognise the place – and of a useful colonial legacy pitifully little remains but some run-down colonial-era administration buildings. The prospects for the immediate future are not encouraging.

Uganda

Let us proceed to Uganda, where President Yoweri Museveni restored a large measure of peace and stability in 1986 and later led his country out of the miasma into which Amin

et al had plunged it. Despite a festering civil war, Museveni governed fairly benignly and his government, prodded from abroad, initiated commendable constitutional reforms during the 1990s. These were aimed at relaxing the tight one-party control that Museveni's National Resistance Movement had maintained since its victorious emergence from the bush. Although the implementation of these reforms was slow and accompanied by constitutional tension between the government and the judiciary, some progress was made towards multi-party democracy. But, at the same time, the security situation – which certainly is an ongoing cause of concern in the region – was proffered as justification for persistent governmental breaches of the Rule of Law, such as civilians being tried by courts martial for civilian crimes, leading to drum-head justice, double jeopardy, arrests without warrant and indefinite incarceration in secret places of detention.[3] The government did, however, acknowledge a general commitment to the Rule of Law.

Fairly recently, however, with the emergence of the president's former personal physician, Dr Kizza Besigye, as a presidential aspirant, a number of more retrograde steps have ensued. In November 2005, in the run-up to presidential elections, a large body of paramilitary men, officially styled the Joint Anti-Terrorist Team ('JATT') but more colourfully called the Black Mambas,[4] invaded the High Court building to block the release on bail of Besigye and 22 others who had been arrested some time before. The presiding judge was sufficiently intimidated to resign from the Bench shortly afterwards. The elections went ahead peacefully enough and the incumbent president and his party were re-elected with a comfortable plurality.

In March 2007 a large body of armed men in uniform again invaded the court building to block the judiciary in the exercise of its duties. This led to the International Bar Association's Human Rights Institute commissioning an enquiry by a delegation that I was privileged to lead. Our report records a disturbing number of serious breaches of the Rule of Law over and above those already mentioned, more particularly public criticism and veiled threats directed at individual judges by senior politicians, including the

[3] These secret places of detention (and, reportedly, worse) are, with delightful irony, called 'safe houses'.
[4] The black mamba is a notoriously venomous and aggressive snake known in most of sub-Saharan Africa.

president himself, following rulings against the government; under-funding and under-staffing of the judiciary; repeated government defiance of court orders; and state harassment of opposition politicians, using the criminal justice system.[5]

On balance, however, matters could be much worse in Uganda. More specifically, although the Rule of Law may be honoured more in the breach than the observance, government does appear to be aware of the principle and to be embarrassed by the breaches. The most propitious portent, however, is that the judiciary is standing firm. The judges whom the IBA delegation met were not intimidated by the bully-boy tactics employed by the Black Mambas and their masters, rather the opposite. I came away heartened by the competence, dedication and courage of these men and women. If in future they need support, the organised international legal profession should seriously consider renewing its earlier efforts.

Kenya

Let us then look at Kenya, the economic engine-room of East Africa – if Kenya sneezes the Great Lakes region takes to its bed with a raging fever. Kenya is a functioning multi-party democracy with a vigorous free-market economy, served competently by a vibrant and creative media sector. It has a wonderful climate sustaining rich agricultural farming and some of the world's most breathtaking scenery and wildlife. Approximately 77% of its 34 million people are said to be literate, its economy is healthy enough and the armed forces are substantially apolitical. It has a rich diversity of cultures and there is little, if any, religious animosity.

But this glowing picture is misleading. In the opening weeks of 2008 Kenya was rocked by widespread violence following general elections on 27 December 2007. The presidential election was claimed to have been stolen by the incumbent, President Mwai Kibaki, with the active connivance of the electoral management body. Some 1 200 people were killed, most of them in the northern Rift Valley where ethnic mixing and tension is

[5] The report *Judicial independence undermined: A report on Uganda*, an International Bar Association Human Rights Institute report (September 2007), details widespread inroads into the Rule of Law.

comparatively high. Over 300 000 men, women and children were forced to flee their homes and livelihoods and many of them are still in tented refugee camps, possibly never to return home. The main opposition, the Orange Democratic Movement, and its presidential candidate, Raila Odinga, refused to accept the presidential election result, Kibaki stood his ground and the country was plunged into a constitutional crisis, hamstringing the economy of the whole region.

The African Union intervened, a mediation panel of eminent Africans, led by former UN Secretary General Kofi Annan, was mustered and eventually an uneasy settlement was brokered. One of the terms of the deal was the appointment of a commission of enquiry to investigate all aspects of the elections, including the integrity of the presidential result, and to recommend improvements to the electoral system and its legal framework. This commission, which I chaired, conducted a six-month investigation in the course of which we scrutinised electoral material, interrogated electoral officials, held specialist workshops, reviewed academic material, criss-crossed the country hearing over a thousand interlocutors, subjected a number of key witnesses to cross-examination by our own counsel and by advocates acting on behalf of the interested parties in a quasi-adversarial process, and eventually produced a report.[6]

Although the investigation was directed towards the elections, much of what relates to our topic can be gleaned from this report. I can and should, however, add some observations that are pertinent in the present context. The commission was, for instance, not mandated to review the competence of the Kenyan judiciary or the suitability of its procedures. Yet, in the course of the enquiry, especially in relation to the examination of the electoral dispute mechanisms available to disgruntled candidates in Kenyan law and practice, it became apparent that there were serious shortcomings, of substance, procedure and, regrettably, of attitude.

[6] The *Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007*, dated 17th September 2008, is available from the Government Printer, Nairobi, and, together with its supporting documents, on the Panel's website www.dialoguekenya.org.

An election petition is inherently urgent and, albeit indirectly, affects the interests of tens of thousands of voters in addition to the candidates and political parties. In the case of a presidential election and in some instances in national legislative elections, the result could determine the identity of the national government. Speedy, appropriate and effective remedies are of paramount importance.

Moreover, all election cases are highly contentious and excite public emotion. Consequently the traditional prophylactic function of court proceedings is extremely important; and, of course, the educative function of the judicial process is also of particular importance when there are so many interested onlookers. Therefore election cases should be handled with the utmost care and expedition. Yet a number of the barrage of electoral cases lodged in the wake of the disputed elections were still unresolved more than eight months after the announcement of the election results.[7] I was struck more than once by a predilection to focus on the procedural niceties so beloved of lawyers and hated by the lay public – for instance, was there or was there not proper and/or timely service of the petition on the successful candidate? If not, did the substituted service comply with the prescribed requirements? These peripheral issues were more often than not determined by oral hearings with lengthy cross-examination, followed by appeals – the whole elaborate paraphernalia of private law-suits – while the underlying political issues festered. I was especially horrified to see an election petition being dismissed on a preliminary point of standing *years* after the petition had been lodged.

The received wisdom seems to be that the procedural rules for the initiation of an electoral complaint were not only devised and imposed by the Medes and Persians but are to be followed with the precision of an ophthalmic surgeon. The time-honoured techniques employed by judicial officers and practitioners to kick for touch and the little stratagems they use to disguise their dilatory intentions are universal, at least in the

[7] Although the Commission did not research the data, there was ample evidence from electoral administrators, informed journalists, legal practitioners and politicians that election petitions in Kenya have for many years been notoriously drawn-out affairs, occasionally remaining undecided when the next elections fall due.

English-speaking world. They are alive and well in Kenya.

The Kenyan judiciary has from time to time been severely criticised and on occasion subjected to mass purges on the grounds of its corruption, real or perceived. Its image is tainted. Obviously there are exceptions but the judiciary as a whole seems vulnerable to criticism and enjoys little media support. While I was in Kenya the judiciary sought to resist moves by the executive to impose quality control and performance-related contracts but this was generally seen – or at least represented by the media – as self-serving. The judges enjoyed no visible public support.[8] The potential impact of such measures on the independence of the judiciary and the importance of such independence for the protection of fundamental human rights was to the best of my knowledge never raised. If it was, it had no significant effect on the public debate. Judges were seen to be government functionaries who were obliged to fit in with standard control measures for civil servants. This attitude, to my mind, is irreconcilable with the role of judges in a polity where the Rule of Law prevails.

It goes without saying that independence does not mean unaccountability. Without doubt judges, who are paid from the public purse to serve their country and its people, are not free agents, privateers at liberty to do as they wish without being answerable for their actions (or, more often, lack thereof). But clearly judges should not be subject to the orders or supervision of bureaucrats or politicians. A judicial code of conduct, transparently and punctiliously applied by the judiciary, alone or with some outside participation, is the best remedy for judicial misconduct. Judges must do their work in public, giving the reasons for their rulings in public, and be subject to public correction by higher tribunals. If this elementary contention was put forward in the course of the Kenyan debate it eluded me.

I was even more depressed by the poor standard of advocacy I encountered, always a reliable indicator of the quality of judicial proceedings in a jurisdiction. Just as much as a Bench is dependent on the quality of the input made by the Bar, so does a Bar grow or shrink in stature and competence to fit the Bench with which it interacts. Not only did

[8] Indeed, the Law Society was agitating for the removal of the Chief Justice.

some of the advocates with whom we worked not do their homework, they proved factually unreliable, by my lights an unforgivable deficiency that has to be firmly addressed and relentlessly stamped out. Once mutual trust between Bar and Bench is lost, the administration of justice suffers, the standard of adjudication drops and the Rule of Law falters.

The most significant feature of public life in Kenya reflecting on the state of the law and the sanctity of its Rule relates to the electoral process we had to evaluate. It became increasingly clear as our investigations progressed that there was no moral sanction against any kind of electoral skulduggery. Not even the eleventh commandment – 'Thou shalt not be caught out' – has any force. No-one can remember when last anybody was criminally prosecuted for an electoral offence. Vote-buying, bribery, ballot-stuffing, impersonation, intimidation – anything goes and everybody accepts it as normal, natural, satisfying and right.

There are standard rates for vote-buying and standard methods for its perfection. For the benefit of illiterate, paralysed or similarly incapacitated voters there is a procedure whereby one can ask that a 'friend' assist one to cast one's vote; and if one has sold one's vote, the buyer ensures delivery by providing the 'friend'. Although more than three-quarters of the Kenyan population are said to be literate, we had it on no less an authority than that of a member of the electoral management body that roughly 70% of voters were 'assisted'. Accepting that the electoral commissioner in question was exaggerating, it was still common cause that vast numbers of voters adopted this fraudulent stratagem.

No-one, not a single voter, not one politician, academic, journalist or lawyer, not even an electoral administrator, ever made the point that the practice of vote-buying denied the voters concerned their inalienable right to participate in their governance. No-one gave a passing thought to this right for which men and women had fought and died for so long. Nor did it seem to upset anybody that this denial of the citizens' right to have a say in their government assailed their essential humanity. It was also quite clear that at least the two main competing parties in the presidential race resorted to ballot-stuffing on an industrial scale in polling stations where there were no opposition agents present. Turnout

percentages that would have been the envy of Mr Stalin were recorded and accepted without demur, I suspect on the revered principle of tit for tat. Participatory democracy is really not seen as an element of the Rule of Law in Kenyan politics.

Hardly less disturbing is the circumstance that not a single one of the many thousands of electoral observers regarded this pandemic of electoral fraud as sufficiently important to note. Many well-meaning and principled human rights activists, many skilled and disinterested foreign observers, some of them British, made nothing of these features.[9] To anyone who respects the truth, who respects the Rule of Law, this wholesale condonation of the abandonment of electoral propriety and absolution for blatant transgressions is ominous. The Report accordingly impressed upon the Kenyan authorities that this prevailing spirit of electoral corruption was a root cause of the polluted Kenyan elections and the violence they triggered. The 2007 elections were indeed stolen, but not by a gang of conspirators from those who complained so vociferously; they were stolen from the people of Kenya by their political process.

Unless and until this major departure from the Rule of Law is frankly acknowledged and addressed, future elections augur ill for Kenya. The ever-present undercurrent of ethnic tension, the century-old unresolved land claims and the growing frustration of the unemployed underclass in the sprawling peri-urban shanty towns will continue to spill over in bloodshed as long as elections in Kenya remain the sham that they are.

Therefore, although there are significant vestiges of the British colonial legacy in Kenya, they are in need of refurbishing. Kenya itself is important and its role in relation to the region is even more significant. The human material is there but without assistance from beyond its borders, the country is unlikely to make the necessary reassessment or carry through with the necessary reforms.

[9] On the contrary, donor community representatives at first gave the 2007 elections their all but unqualified stamp of approval for all processes up to the point where the presidential votes were collated at the central data collation centre. When, many months later, I drew the attention of this august body of diplomatic representatives to the manifest and manifold shortcomings in the electoral process as a whole, starting with an inadequate and skewed register of voters and culminating in widespread abuse of the balloting process, I was met with disbelief and hostility. I suppose that in the circumstances I should not have been shocked when one particular mission, backed by prestigious academics, tried to pressure me personally to suppress certain evidence.

Malawi

We can skip lightly through Malawi, not because it is small or unimportant but because there is at the moment no real cause for concern about Malawi and the Rule of Law. In a generally peaceful society, since Dr Hastings Banda was persuaded to retire some 16 years ago, multi-party elections have been held regularly and are largely uneventful. The real competition for political power is conducted by jockeying for majority alliances within parliament.

The judiciary and its independence have not been particularly contentious issues in recent times. Everybody has hopefully (!) learnt a lesson from a constitutional crisis that arose some years ago when the then Speaker and some colleagues resolved to bring some bright young high court judges down a peg or two and summoned them to appear before parliament. A low-key intervention by two senior lawyers from abroad seemed to have a beneficial effect. Latterly the independence of the Malawian judiciary seems to have reached calmer waters and the legal profession of this charming country can be left to putter on quietly. The country is gearing up for general elections next year. I expect to be involved in a consultative capacity in what augurs to be a successful process.

Zimbabwe

You do not need me to tell you anything about that tragically failed state or the heroism of our friends and colleagues there. They, not Mugabe and the coterie of wicked men he has gathered around him, carry the spirit of Zimbabwe. They are the hope for the restoration of that once good and prosperous land: Beatrice Mtetwa, Sternford Moyo, Irene Petros, Arnold Tsunga, Joseph James, Josephat Tshuma, David Drury, Tino Bere, Mordecai Mahlangu – the roll of honour is too long to mention all. The illustrious list goes on and on: people who make me proud to call myself a lawyer; people who refuse to be cowed even in the face of police beating and arrest, who stick to their task and keep the torch of freedom under the law alive. Last Friday, 28 November 2008, they enjoyed a significant forensic victory. Judge Luis Mondlane, speaking on behalf of a Southern African Development Community Tribunal sitting in Windhoek, handed down judgment in the case of *Campbell v Zimbabwe.* The court ruled that the Zimbabwean government

had violated its treaty obligations in denying Mr Campbell and other farmers access to the courts to seek protection of their property rights. The government was consequently ordered to 'take all measures to protect the possessions and ownership of the farmers'. Notwithstanding the government's defiant and contemptuous response, the judgment sounds a clear and ringing endorsement of the Rule of Law in Southern Africa. It also provides a basis on which to build once reconstruction can start in Zimbabwe. So, in these last days of the evil regime, we should be preparing our plans to speed that recovery.

Ironically, in this most benighted of Britain's one-time colonies in Africa, the legacy of that former era is the most noteworthy. The current judiciary might be hopelessly compromised and the proud tradition of Telford George, Enoch Dumbutshena and Tony Gubbay, who led the Zimbabwean judiciary with such distinction, besmirched by grubby collaborators, and the memory of decent elections might be overridden by Mugabe's shabby charades. Nevertheless belief in the inherent dignity and worth of human beings and the indispensable role of the Rule of Law in vouchsafing these values survives. The steadfastness of those preserving this grail is sure evidence that they are heirs to the spirit that kept Britain going in its finest hour.

South Africa

Lastly, my own country. Providing even the briefest of overviews of the current status of the Rule of Law in South Africa would require many hours. Providing sufficient political background and historical contextual material would require a whole series of lectures. I am therefore forced to give you a highly personalised perspective on what I regard as the most salient features.

Superficially we have retained much of the English judicial legacy. In practice our South African forensic style is firmly rooted in our British colonial heritage. You would, for instance, feel quite at home in our civil or criminal trial and appeal courts, where the procedure is English in origin and spirit, adversarial and litigant-driven, with 'm'luds', 'with respects', 'my learned friends', cross-examination, objections to leading questions or hearsay, and all the other robed and bibbed trappings so dear to the hearts of the

tabloids and television. (We have, however, unlike many of our kindred jurisdictions in Africa, never taken to wigs.[10])

More substantively, we have for more than a century, even in the darkest days of apartheid, professed adherence to the Rule of Law. Many interested but uninformed observers have a fairly simple two-dimensional perception of South Africa before 1994. They would be surprised to hear the ringing declarations of libertarian principle that occasionally fell from the lips of judges in those days and would not comprehend how Felicia Kentridge, Arthur Chaskalson and others in the Legal Resources Centre were able, by means of public interest litigation – that is, by using the courts – to chip away at the granite face of the regime. The uninformed observer would not be able to understand how, by these means, step by tiny yet inexorable step, the mighty influx control edifice, a vital component of 'grand apartheid', could be brought down.

But apartheid South Africa was not two-dimensional. It was infinitely more complex.[11] Much of that complexity remains. South Africa, nearly two decades after its emergence from apartheid, is still a very strange society and anybody who oversimplifies it will not be able to gain a real understanding of the country and its people. Clearly this is not the time or the place to provide a comprehensive description of present-day South Africa in all its fascinating complexity – even if I were capable of providing it. Broad background strokes relevant to our topic are all that we have time for.

Any discussion of the Rule of Law in South Africa must start with the Constitution, section 1 of which provides as follows:

> The Republic of South Africa is one sovereign democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.

[10] No-one who has sweated under a wig in a hot and humid courtroom would not applaud the perspicacity of our distant predecessors who declined to follow this practice in our courts.

[11] I have been impressed by a recent publication, Jens Meierhenrich's *The Legacies of Law, Long-Run Consequences of Legal Development in South Africa, 1652-2000* (Cambridge University Press, 2008), which grasps and seeks to explain the curious dichotomy of the law under apartheid, in part commendably liberal but also harshly discriminatory, *normative* and *prerogative* in the author's lexicon.

(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

There is also no dispute about the formal independence of the judiciary and the duty of the government and all organs of state to protect it. Section 165 of the Constitution is unequivocal and unchallenged:

(1) The judicial authority of the Republic is vested in the courts.
(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

One should not forget, however, that South Africa has but recently transmogrified from a neo-colonial racial oligarchy into a fully-fledged constitutional democracy based on freedom, equality and human dignity, separation of powers and express adherence to the Rule of Law. Our extensive and wholly justiciable Bill of Rights was therefore an enormous leap for humankind and a novelty for the country. In the last decade of the twentieth century South Africa produced a miracle. Very much to the surprise of the world and the delight of South Africans, the country's political leaders negotiated a bloodless revolution, averting a racial Armageddon and reversing a 350-year tradition of colonial and neo-colonial rule. But the country’s transformation brought a multitude of problems, many foreseen yet unavoidable. These problems were daunting.

The judiciary is a vivid example. The decision to exchange apartheid for freedom and equality under a libertarian and egalitarian constitution, protected, interpreted and applied by an independent judiciary, was relatively straightforward and pain-free. Identifying and defining the fundamental rights to be enshrined in the Bill of Rights presented no insurmountable obstacles. Indeed, the main participants in the negotiation process at times seemed to vie with one another in articulating libertarian principles. There was also no noticeable opposition to wholehearted acceptance of the separation of powers

doctrine. The problem lay with the practicalities. For instance, the existing staffing of the courts, especially the magistracy, was heavily biased in favour of white Afrikaner men and self-evidently there had to be adaptation, rapid and radical. The pale male face of the judiciary had to change so as to mirror more closely the society it was to serve. In the old South Africa, appointments to the high court Bench came all but invariably from the ranks of the senior Bar. Although Afrikaners were not predominant at the Bar, white men made up the bulk of the practising advocates in the country for many years. At the time of the transition to democracy, in South Africa as it then was there was one judge who was not male and one who was not white; in addition there were a number of female and black magistrates.

The influx of relatively large numbers of judicial officers from outside the former pool of experienced practitioners called for (and still requires) extraordinary measures to supplement the lack of experience of these newcomers. Manifestly this was an urgent necessity but unfortunately there was much dithering and pettifogging turf-protection about the establishment of a proper judicial education institute, an enterprise that I pursued more or less full-time at the invitation of the then Minister of Justice and Chief Justice after my retirement but eventually abandoned some years ago. Now, 15 years into the new South Africa, a statute has been adopted making provision for the creation of such a body. Heaven knows when it will be up and running and heaven knows what is happening to the standard of adjudication in the meantime.

There are a number of excellent but inexperienced men and women on the Bench who are unfairly expected to do the impossible. I can well remember how nervous and tentative I was when first I sat as a judge – and I had some 20 years of high court experience and umpteen battles behind me. There is a more ominous feature of judicial transformation in my country: latterly some rapidly promoted but insufficiently experienced persons, otherwise well qualified to undertake the work of a judge and with loads of promise, have proved unable to bear the heavy personal burdens that judicial office inevitably brings

with it.[12] The result was predictable: aberrant judgments and questionable behaviour by judges have elicited sharp public criticism, a good deal of it, unfortunately, justified.

This has come at a most unpropitious time. The political scene in South Africa is in a state of flux. Mr Thabo Mbeki, the country's president since 1999, was prematurely forced out of office in September this year by an extra-parliamentary resolution of the National Executive Committee of the ruling African National Congress (ANC). Thus the head of state was brought to his knees, not by an open vote of the national legislature for stated reasons but by the surreptitious manoeuvring of a political clique. For reasons that were not made known to the public, the ANC did not nominate its president, Mr Jacob Zuma, to replace Mr Mbeki but instead put forward Mr Kgalema Motlanthe, its deputy president, and he was duly elected by the National Assembly as interim president. I say 'interim' because the country is due to go to the polls at some time as yet unannounced but probably in the second quarter of 2009. Mr Motlanthe has replaced a number of the Mbeki cabinet appointees, some of whom have made public pronouncements suggesting that they regard their appointments as long-term. Certain current cabinet ministers are seen to be Zuma supporters while others are more likely to be neutral.

I mention these ostensibly irrelevant political features because they are indeed highly relevant to any prognosis on the Rule of Law in South Africa. The ANC, in alliance with two left-wing partners, the South African Communist Party and a trade union confederation known by its acronym COSATU, controls the political stage with a 70% majority in Parliament. This is sufficient to bring about virtually any constitutional amendment that it deems desirable. At the same time influential figures within the ANC alliance have been making ominous utterances about the judiciary, echoes of the 1980s when the ANC, still a revolutionary liberation movement in exile, was debating what it would do with the judiciary once it came to power. One school of thought was then

[12] A particularly sad case in point is that of Judge John Hlophe, a highly gifted young man, potentially a fine jurist, who, having been appointed to the Cape Bench from academia at age 36 in 1995 and then elevated to Judge President of the Cape High Court in 2000, somehow lost the plot and became involved in a succession of distasteful public spats evidencing, in the main, his lack of judicial maturity. Several of these incidents have not only involved Hlophe JP in contention but reflected on the South African judiciary generally.

strongly in favour of a radical purge. Happily for me and other serving judges a more conservative view prevailed.

But there are signs that the radicals are once again pushing for 're-education' and 'reorientation' of the judiciary. It has become quite common for some or other ANC spokesperson to commend or excoriate a judgment and/or its author depending on its perceived political effect. Recently even the judges of the Constitutional Court, the highest court in the land with an unchallenged track record of excellence since its formation in 1994, have been publicly accused of political manipulation, of pursuing a 'counter-revolutionary agenda' and of trying to block the ascent of Mr Zuma to the presidency.

Although I believe these foolish attempts to bend the judiciary to the political will of the ruling party will fail, one cannot be certain. Indeed, if some of the wilder rhetoric is to be taken seriously, there is an identifiable risk that someone within the ruling alliance might next year persuade the new government that some or all of the judges should be brought to heel. Although the venom has emanated from the usual suspects,[13] the new secretary general of the ANC has emerged as a prime broadcaster of unbridled attacks on the judiciary and individual judges apropos politically significant judgments that do not meet with his approval. (Not all of this revolutionary nonsense has come from politicians. Some startling judicial statements have been published, suggesting for example that the whole body of pre-1994 South African law, including our entire common law, should be scrapped as an unwanted relic of the racist past.)

These political developments must be seen against the backdrop of concerted efforts over a number of years by the Ministry of Justice and Constitutional Development to enact an array of statutory measures aimed at increasing executive control over the judiciary. To date the judiciary, to an extent assisted by the Bar, has managed to hold at bay the more egregious of these enactments but some have found their way onto the statute book and

[13] For example, ANC Youth League president Mr Julius Malema, a notorious source of wild and woolly utterances, and general secretary of the South African Communist Party Dr Blade Nzimande, who has been mentioned as a serious contender for the vice-presidency next year.

will have to be confronted sooner rather than later. And although the Minister of Justice and Constitutional Development newly appointed by President Motlanthe, Mr Enver Surty, has made some reassuring noises relating to the independence of the judiciary, neither he nor anyone else in government or within the upper echelons of the ruling ANC has seen fit publicly to repudiate their comrades who malign and ridicule judges. The Minister, who is after all the constitutional link between the judiciary and the other two pillars of state, has on no occasion protected the judges against their political detractors. No voice has been heard from the legislature or the executive in defence of the judiciary or its independence. Certainly no leading figure in the governing party has decried the attacks.

This is hardly surprising. The measures directed at bringing the judiciary to heel flow directly from resolutions adopted by the ANC in national conference some years ago that were substantially reiterated at last December's watershed ANC conference (where Mr Mbeki was dealt a humiliating defeat by Mr Zuma in the contest for the presidency of the party). Significantly, the prime mover behind the statutory encroachments, in a very real sense their author, parliamentary patron and executive champion, Mr Johnny de Lange, a determined ANC loyalist, has been retained as Deputy Minister of Justice and Constitutional Development. These moves have assumed sinister dimensions now that the ANC has elected as its president – and therefore the presumptive national president – a man who has been and still is embroiled in prolonged criminal proceedings with the National Prosecuting Authority. This, sadly but inevitably, has brought the criminal justice system, and with it the judiciary, into the sights of the more ardent Zuma loyalists. The implications for the Rule of Law are all too plain.

Manifestly there is a need for a reasoned and rational defence of the South African judiciary, its integrity and its independence. The judiciary itself is constitutionally, traditionally and structurally incapable of entering the hustings on its own behalf or in defence of particular judges. The legal profession is not structured or organised to assume this task. Unfortunately neither is any other institution equipped – or, if equipped, willing – to speak publicly in defence of the judiciary and to warn of the imminent threat that

attacks on the integrity and the competence of judges pose for the Rule of Law. Over and above the necessity of defending the judiciary against political attack, there is an urgent need to educate the public about the Rule of Law, to explain why the independence of the judiciary is important to each individual citizen, and to show how and why these apparently abstruse and remote matters are essential for the protection of individual rights and freedoms.

This message must be brought home to the people of the whole of the Southern African region. The crisis in Zimbabwe, tragic in itself, has revealed an even more tragic lack of vision on the part of the political leadership in the region, vision that will be indispensable once post-Mugabe reconstruction is to be undertaken in Zimbabwe. Concerted regional efforts will not be possible without an extensive public information campaign to sensitise the people to the importance of the basic values of the Rule of Law. (As matters stand right now, the average South African has little knowledge of or appreciation for these values. On the contrary, the recent eruptions of xenophobic violence throughout the country would rather suggest public support for the government's callous attitude towards these unhappy victims of events over which they have no control.)

The outlook may be gloomy but that is no reason to wallow in self-pity or despair. We in Southern Africa are not unfamiliar with threats to the independence of the judiciary and the concomitant erosion of the Rule of Law. We have held out before and will do so again. Over time and by dint of hard work, we will be able to generate sufficient public understanding of and support for the Rule of Law to reverse the current downward trend. Some of us have, as individuals, raised our voices, but with limited success. Often the message has been overlooked in the rush to stone the messenger. We need a concerted effort with support spanning the spectrum of our diverse societies.

To this end, therefore, a number of us, concerned Southern African lawyers, have put aside our ideological and other differences to establish an organisation to promote democracy under law and to advance understanding of and respect for the Rule of Law in

Southern Africa. Freedom Under Law was recently incorporated (in South Africa and Switzerland) as a not-for-profit entity committed to promoting democracy under law and advancing understanding of and respect for the Rule of Law. The board of directors, drawn from the legal profession in Southern Africa and chaired by myself, enjoys the patronage of a prestigious international advisory board chaired by the Rt Hon the Lord Steyn.[14]

To return then, on that positive note, to the question posed at the outset: Does anything of value remain of the Rule of Law in Britain's former colonies in Africa? The answer is in the affirmative, but not without qualification. The Rule of Law is indeed acknowledged throughout Anglophone Africa as a guiding principle of statecraft. It enjoys universal recognition as an aspirational norm, a benchmark of participatory democracy; and even though this is often mere lip service, it is nevertheless heartening.

[14] Those who would like more information about Freedom Under Law are welcome to communicate with me at johannkriegler@mweb.co.za.