



Challenges to the Rule of Law in Africa

Workshop report
12–13 April 2016
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Executive summary

The workshop on ‘Challenges to the Rule of Law in Africa’ took place on 12–13 April 2016 in Pretoria, South Africa. The purpose of the workshop was to identify the challenges that confront African Union (AU) Member States with respect to the rule of law and to propose strategic actions that could be used to overcome the identified difficulties. As part of the workshop preparatory process, a draft Discussion Paper was compiled and distributed to participants to guide engagements. The core issues outlined in the paper served to shape the workshop panel topics and the substantive deliberation that unfolded from each of the workshop sessions. To facilitate engagement with the workshop report, the summary of issues presented below is an interpretive capturing of the single core challenge that emerged from each of the panel sessions.

Rule of law and state legitimacy

State legitimacy is undermined when the judiciary does not act as a positive force for social change, with considered independence and in a manner that promotes ethical political leadership.

Primacy of the constitution and law

The unequal exercise of power in the international geo-political system and the insertion of sectional economic interests into legal processes serve to undermine constitutionalism and a wider commitment to the rule of law.

Implementation of regional norms and standards

The application of regional rule of law related norms and standards within African Union (AU) Member States have been weakened by low levels of domestication, local participation and awareness.

Respect for human rights and civil liberties

People within the African region do not often have access or information that would facilitate the securing of rights and community perspectives on rights have not been codified as law, neither do they feature in actions that impact at a local level.

Challenges of poverty and exclusion

Economic realities and forces often serve to undermine the exercise of national political agency and hence make it very difficult for the judiciary to mediate the realities of

exclusion and poverty within a framework that secures commitment and adherence to the rule of law.

Shrinking civic spaces

More sophisticated forms of legal and operational actions have emerged to counter civic engagements, civil society activism and human rights advocacy. The closing of spaces is often justified on the basis that it enhances national sovereignty.

Judicial democracy and the rule of law

Judicial democracy is undermined when there is a lack of legal capacity to engage on the technicalities of securing law and when processes for appointing and dismissing judges are not legitimate or are exercised in a manner that serves to encourage political partisanship amongst judges.

Next steps

In responding to the challenges that emanated from discussions, the following were broadly the actions proposed for the future. These actions are a summary capturing of the intended follow-up actions and should hence be read in conjunction with the more detailed workshop conclusions.

- To facilitate wider discourse on the rule of law in member states it is imperative that a policy paper be produced and that further empirical research be undertaken to secure a more in-depth reflection on challenges and modalities to move the continent forward.
- To engage on detailed matters that impact on the rule of law, it is imperative that there be much more detailed support work, with and in member states, on the basis of adopted instruments, by the African Union Commission (AUC) and the International Institute for Democracy and Electoral Assistance (International IDEA).
- Civic and civil society participation in securing the rule for law can be enhanced if further African supportive mechanisms are created to facilitate independence of action and advocacy by non-state organizations and individuals.
- To build deeper understanding of the leadership required for the future, greater attention would need to be focused on generating knowledge on ethical practices and greater leadership agency amongst public office bearers.

This Executive Summary provides a concise snapshot of the contents of the workshop. A broader and more substantive summation is contained under each section of the report. Participants were appreciative of the value of the workshop and were very positive on the value complementing partnership that has been forged between the Department of Political Affairs of the AUC and International IDEA.

Introduction

The workshop on ‘Challenges to the Rule of Law in Africa’ took place in Pretoria, South Africa on 12–13 April 2016. The workshop was organized as a collaborative activity between the African Union Commission (AUC) and the International Institute for Democracy and Electoral Assistance (International IDEA) and its Africa and West Asia Programme. The overall purpose of this specific collaboration is to support the implementation of the principle of the rule of law in African Union (AU) member states. The workshop was attended by invited organization representatives and individuals active in the terrain of focus from within the African region. It includes academics, civil society individuals, government officials and members of the judiciary from the region. A full list of the participants is attached as Annex C.

The obligation to uphold the rule of law is an integral part of the overall commitment to governance and democracy by African heads of state and government, as expressed in the AU Constitutive Act during the period of transformation of the Organisation of African Unity (OAU) into the AU. The statutory responsibilities and related assurances to abide by the rule of law are part of wider AU efforts to counter the threats to peace and security, particularly those arising from armed conflicts associated with electoral processes and political level transitions. The duty to uphold the rule of law is furthermore embedded in the African Charter on Human and Peoples’ Rights (the Banjul Charter) and the African Charter on Democracy, Elections and Governance (ACDEG).

Stimulating further action to consolidate democratic gains is central to achieving the articulated aspiration in the Agenda 2063 strategy of the AU which provides that one of the key continental dreams is an ‘Africa that has implemented good governance, democracy, respect for human rights, justice and the rule of law’. To achieve this, the 2063 strategic document reflects on the role and mandate of regional organizations and the importance of improving governance, establishing strong institutions, having a developmental orientation and visionary leadership. International IDEA has committed itself to working with the Department of Political Affairs of the AUC in efforts to promote constitutionalism and the rule of law within the context of continental instruments and shared values including the Constitutive Act of the AU, the ACDEG and related policy instruments.

The overall purpose of the workshop was to bring together content experts and practitioners on rule of law issues to discuss the challenges embedded in the exercise of securing the rule of law and to validate actions and strategies that would be essential for rule of law promotion across the continent. The workshop is held in the context of a draft discussion paper compiled to facilitate deeper deliberations. The following specific objectives were established for the workshop:

1. Build a common understanding of the challenges in implementing and securing the rule of law across all regions in the African continent.

2. Identify specific strategies and actions that can be established to promote rule of law adherence and secure deeper commitment to upholding rule of law obligations.
3. Strengthen interactions amongst organizations and individuals active in rule of law research, advocacy and action to facilitate substantive cooperation and coordinated initiatives.

In line with the objectives established for the workshop, the approach was to maximize interactions and engagements through a series of focused panel discussions. Each panel began with inputs from a lead speaker and was followed by related insights from key discussants. The panel sessions were broadly as follows (actual titles adjusted for brevity):

- Panel 1: Rule of Law and State Legitimacy
- Panel 2: Primacy of the Constitution and Law
- Panel 3: Implementation of Regional Norms and Standards
- Panel 4: Respect for Human Rights and Civil Liberties
- Panel 5: Challenges of Poverty and Exclusion
- Panel 6: Shrinking Civic Spaces
- Panel 7: Judicial Democracy and the Rule of Law

Panel inputs were preceded by a presentation of the working draft paper compiled by content experts. The paper serves to guide the overall trajectory of debates and deliberations. Collectively, the draft Discussion Paper and related panel discussions served to establish a wider agenda of action on the rule of law for the AUC and International IDEA. In keeping with which, the overall established outcomes for the meeting was a broad mapping of strategies and actions that would assist in the promotion of the rule of law in Africa. It was anticipated that these would include strategies for the promotion and monitoring of rule of law in State Parties to the ACDEG, proposals on the development of tools and guidelines for upholding the rule of law in Africa and recommendations on the design of capacity building programs to support the implementation of ACDEG.

This report provides a broad and brief summary of the inputs from different panellists as well as the ensuing discussions amongst participants. The workshop programme (Annex B) broadly followed the pattern of objectives outlined above and elaborated upon in the workshop Concept Note (Annex A). Some adjustments were made to lead speakers, discussants and session moderators due to late cancellations. Actual moderation and inputs made are as is reflected in the detail of this report. The report captures, in summary interpretive form, the substance of issues presented by panel members and that arose from discussions. It does not capture details or all elements of debate or questions and responses during discussions.

The report is not a verbatim account of presentations and should not be used as a basis for attribution.

Opening session

This session focused on outlining to participants the broad purpose of the workshop, the journey taken thus far and the hope for the workshop and the future established by the key partners in the process. As part of the introduction, Dr Maurice Engueleguele of International IDEA broadly outlined the journey travelled and the purpose of the workshop as outlined in the concept note for the event. He noted, in particular, that the Department of Political Affairs of the AUC was keen to take the process forward during 2016.

The session was moderated by Honourable Mrs Thoko Didiza, acting chairperson of Commonwealth Women Parliamentarians (CWP). Professor Adebayo Olukoshi, Regional Director of Africa and West Asia Region of International IDEA, provided welcoming remarks. The keynote address was made by Dr Remember Miamingi, Representative of the South African Human Rights Commission. This was followed by an opening statement from Ms Bridgette Mabandla, panel member of the African Peer Review Mechanism (APRM) and former Minister of Justice of the Republic of South Africa. In opening the session, Honourable Didiza warmly welcomed all and noted that the workshop has long been planned and is part of a larger process. She specifically highlighted that the deliberations are part of the African regional effort on governance issues and not related to recent developments in the southern region of Africa.

Professor Adebayo Olukoshi: Welcome remarks

Professor Adebayo Olukoshi began by thanking all of the collaborating organizations within the region for the positive response and their continued partnership on governance issues. He expressed appreciation for the continued collaboration with the Department of Political Affairs of the AUC and acknowledged the participation of an APRM panel member and other important and senior personalities from the judiciary and other organizations in the region.

In outlining the importance of the event and the significance of rule of law for the continent, Professor Olukoshi noted that it is not a uniquely African issue. Countries across the globe face challenges within this space. This is evident in the struggles around the treatment of refugees in the north that are going against established 'constitutional' cultures and long established rights frameworks. He noted though that Africa does face particular challenges. This includes a history of rule by law, a propensity to violate the governance rules adopted and executive over-reach.

Professor Olukoshi noted that Africa has come a long way in its governance reforms and is now beginning to face new constraints and challenges. Of particular significance is how to engage with the issue of excessive executive authority and with non-governing groupings (such as Boko Haram) that have no concept of the rule of law and human rights. At the level of the African Union, the assembly and other structures are also

struggling to deal with rule of law violations that have emerged in member states. In encouraging a wider search for solutions, he noted that this workshop is part of a series of consultations with member states and other actors to explore the challenges and possible pathways into the future. Professor Olukoshi concluded that the challenge for the workshop is helping the AU take a step forward in implementation through the adopted instruments and related values and norms.

Dr Remember Miamingi: Keynote address

Dr Miamingi began his address by recognising the dignitaries present and by expressing the apologies, of the Chairperson of the South African Human Rights Commission (SAHRC), for his absence. He commended International IDEA for arranging the event and noted that the issues for reflection and deliberation are of particular importance to South Africa and indeed to the wider region. He indicated further that his input would focus on South Africa as it provides a useful example for the region.

Dr Miamingi advanced that South Africa has one of the most progressive constitutions and has established a range of constitutional institutions for securing implementation and adherence to the rule of law. He noted that central to success is a judiciary that is vigorous in judgement and progressive in orientation. He noted that the country has moved a long way towards securing equality before the law and that law has been a very effective vehicle for the transformation of society.

Even as Dr Miamingi captured the transformative powers of the judiciary, he also noted that for many the transformation has not gone far enough. Of particular concern to many are the realities of poverty and inequality throughout society. He noted further that poverty and inequity affected women, children and people with disabilities in much deeper ways. The realities of poverty, he argued, often pushes people towards the conclusion that law only works for some and hence putting pressure on the overall legitimacy of the legal system.

In line with the concerns expressed, Dr Miamingi concluded that current realities often push politicians to question the legitimacy of the constitution. They would, at one level, express commitment to the constitution and, at another level, express reservations of the same constitution. He noted therefore that the larger challenge for South Africa is ensuring that law is perceived to work for all people and hence securing, through this, higher levels of legitimacy for the rule of law as embodied in the constitution.

Advocate IAM Semanya SC: Opening statement

Advocate Semanya's presentation focused on the substantive legal content and interpretative issues as they relate to the concept of the rule of law. He noted that there is no single definition of the rule of law and hence reliance is often placed on traditions of what the concept entails. He noted that at the centre of which is the idea that everything done by public institutions has to be authorized by law. As such, he argues that this requires specifying the competence of specific authorities and the circumstances by which authority (laws) may be used and promulgated.

In taking the overall argument on the rule of law forward, Advocate Semanya indicated that the judiciary is also only able to act in terms of what is allowed by law. Hence, the judiciary itself is subject to the rule of law. He argued further that the courts can only do so much. He notes that there are matters where the law is silent and hence the judiciary has to apply basic principles of law to determine constitutionality. He cautioned that the judiciary cannot be expected to make judgements over which it has no authority in law. This would amount to judicial overreach.

As per the orientation of his inputs, Advocate Semanya concluded by noting that all laws and executive action are subject to judicial review, as part of actions related to upholding the rule of law. He however emphasized further that there has to be appreciation that the courts themselves are subject to law and cannot make decisions that are beyond their own authority. For example, courts will not permit the retrospective application of law and will require that no law should be imposed arbitrarily.

Ms Bridgette Mabandla: Opening Statement

Ms Bridgette Mabandla began by expressing appreciation for the invitation to address the workshop. She pointed out that the APRM was particularly significant as it brought to the fore the idea of Africans solving their own problems. In this respect, she indicated that it was important to recognize the positive progress made thus far by the APRM. Over 35 countries have signed up for the review process and over 17 have undergone initial reviews. She noted that the APRM is now more stable and has appointed a new head of the secretariat.

In locating the importance of APRM for the rule of law, Ms Mabandla indicated that the APRM process has been positive as it served to promote and entrench accountability in each of the reviewed countries. She indicated that in many instances, opposition often emerged when applying the rules of participation adopted for the review process. In pointing to the value of APRM, Ms Mabandla indicated that many of the findings made on countries were a reflection of unfolding realities. She pointed to the specific cases of Kenya and South Africa as illustration.

Ms Mabandla concluded by indicating that there are questions within the APRM that cover issues relating to the rule of law. In this respect, she specified that the APRM questionnaire has been updated and includes various new areas and has very specific issues relating to the separation of powers and the role of the Political Executive. She also stated that the APRM will incorporate monitoring country commitment to Agenda 2063 of the AU and would be glad to work with all organizations to make a difference on the continent.

Presentation of draft Discussion Paper

In this session the Barrister Nadine Mishika from the Democratic Republic of the Congo (DRC) and Professor Mathieu Mebenga from the Republic of Cameroon presented a draft Discussion Paper, ‘Contemporary Challenges of the Rule of Law in Africa’, completed as part of the overall engagement process on the rule of law.

In opening the presentation, Barrister Mishka noted that the draft Discussion Paper contained details on the challenges confronted and made very specific recommendations on the rule of law for the AU. It was noted that the rule of law has been placed on the African agenda in recent years as part of the overall democracy drive. It is now a part of common African legislation. However, it has to be appreciated that there are different influences on how the rule of law is operationalized across countries.

In capturing the challenges confronting the rule of law, the presenters noted that the larger issues relate to state fragility. It is noted that many states still struggle to exercise a monopoly of power over a given territory. In addition, some countries continue to struggle with issues relating to the role of the military in the governance process. This is also sometimes impacted upon by ethnic relationships and in the use of religion by different political actors. It was also advanced that the state itself faces a crisis of legitimacy as it often fails to deal with the challenges of poverty and the effective delivery of services.

In addition to state fragility, the presenters put forward a range of challenges associated with unstable legal systems. Many of the challenges relate to implementation problems associated with weak judicial institutions and executive dominance. It was further noted that there is often instability in constitutional norms—with repeated amendments to constitutions. In addition, many countries often limit the role and powers of courts and there is inadequate protection of rights. To further highlight the unfolding challenges, the presenters also made reference to governance related data from Afro Barometer.

To guide future actions related to the rule of law at the level of the AU, the presenters outlined a series of recommendations. These included propositions around actions that would facilitate conformity to adapted charters, such as the African Charter on Democracy, Governance and Elections. Detailed proposals on amending and strengthening existing AU instruments are contained in the discussion document. These include the possibility of adopting further instruments that would serve to strengthen rule of law application on the continent. In concluding, the presenters encouraged participants to comment directly on the draft Discussion Paper.

Panel 1: The rule of law and state legitimacy in Africa

This panel session was moderated by Mr Brian Tamuka Kagoro. The session sought to focus attention on the important relationship between the exercise of rule of law and the enhancement of state legitimacy. This panel session was combined with the presentation on the draft Discussion Paper. The speaker for the session was Professor Nqosa Mahao, Vice Chancellor of the National University of Lesotho.

Professor Nqosa Mahao (Lead Speaker)

Professor Mahao began by indicating that Lesotho provides some useful lessons on the close link between the rule of law and state legitimacy. He noted that the emphasis on the rule of law in Africa is fairly recent and as a result of changing perceptions and social discourse. He specified further that conception of law and the exercise of justice were shaped by the manner in which political power was exercised and prevailing ideological orientations.

In linking the rule of law to state legitimacy, Professor Mahao argued that the rule of law is not a constant and is often reshaped by social discourse and the changing attitudes and values in a society. He noted that it is often a part of the social contract forged between the people and government. He emphasized that that core to the rule of law is the principle of legality, within which all public actions unfold in terms of laid down procedures.

Professor Mahao said that the larger challenge for Africa is the tension between liberal and social democratic perspectives or influences on the rule of law. Whilst some may emphasize procedural elements, others would focus on the more substantive elements. He further indicated that inequalities and poverty need to be addressed and actions should not simply be constrained by procedural requirements. He however qualified this by suggesting that even as systems are developed to be more responsive, it was imperative that governments be based on the formal consent of the people.

In terms of the challenges that confront the rule of law, Professor Mahao noted that it was imperative that there is substantive compliance with procedural requirements of the rule of law. This included preserving the independence of the judiciary and securing media freedom. In concluding he expressed concern that judicial independence is lost because of intimidation and political pressures on the judiciary and the media. He noted that the challenges to the rule of law mostly relate to active implementation and not so much on the content of law itself.

Discussion

The following summary includes comments made on the draft Discussion Paper produced for the workshop.

- The appointment of judges and constant changes to the judiciary are a matter of concern in the region. Politicians sometimes act to change judges so as to create judicial amenability to their policy perspective and orientation. Measures to prevent arbitrary appointments and which exercise undue influence need to be established as these are important for securing the rule of law. The role of the Judicial Service Commission for the appointment of judges is crucial and serves to ensure a level of independence and accountability.
- There needs to be more careful reflection on the origins of the rule of law. In the case of Africa, we should look for inspiration in some of the regions history. This may well provide ways of shaping societal perspectives on the rule of law that go beyond existing western constructs on the rule of law.
- Deeper reflection is needed on the substantive content of laws and not just procedural practices. Judgements need to be made on the contents of laws and their relevance in particular contexts. There has to be some foundational basis for making decisions on how 'just' a law is. It is crucial, in this respect, to see how a constitutionalism can be used to address issues of poverty, inequality and exclusion. The idea of social justice has particular relevance in Africa.
- The case of elections in the DRC demonstrates some of the complexities relating to the implementation of specific legal decisions that arise from the wider global community. There has to be careful reflection on the balances needed between legality and operational practicality. Judicial decisions that are difficult to implement serve to delegitimize the state and rule of law.
- It is imperative to reflect on the positive role that the Human Rights Commissions can play in securing the rule of law. These institutions should have adequate authority and be well resourced. In many instance, they really do not have much authority and do not have the resources to conduct proper investigations of rule of law violations.
- When thinking through recommendation to be made on the rule of law, it is imperative that there is clarity on the role and mandate of particular institutions and what remains at the level of national sovereignty. We need to be clear on the role of particular AU institutions and actions that they can take to strengthen adherence to the rule of law. This requires having a more practical approach when shaping recommendations.
- When thinking through issues of rule of law application, it is important to engage with questions relating to the resources provided to the judiciary and the control over them. Judicial inadequacy often arises because of low salaries and poor infrastructure for judges and others in the sector.
- More research is needed on the complexities of linking formal rule of law elements to actions that unfold in local communities. The influence of culture and indigenous

institutions cannot be underestimated. The idea of rule of law, versus rule by people needs to resonate with local communities and be linked to the powers exercised within indigenous institutions.

- It is imperative to move beyond simple legality towards issues of ethical leadership. Often people who exercise political power would hide behind legality to act in very unethical ways. A culture of impunity sometimes unfolds when people fail to act in accordance with the spirit and substance of laws. Moral and ethical leadership is vital for securing the rule of law.
- To assist the authors of the Discussion Paper, it is essential that participants send direct comments to the authors and International IDEA. These should focus on the content of the paper and on providing very specific recommendations on changes needed. It is vital to be clear on the role of regional organization and the powers that they exercise.
- Even as we reflect on issues of integrity and ethical leadership, we cannot remove existing struggles and discourses around the rule of law from a historical context. Liberation movements have historically fought against an imposed law and hence struggle to think of law as a vehicle for transforming a society. Understanding the political and technical dimensions of the rule of law should assist in shaping future strategies.

Panel 2: The primacy of the constitution and the law

This session was moderated by Mr Siphosami Malunga, the executive director of the Open Society Institute for Southern Africa (OSISA). The lead speaker for the session was Mr Brian Tamuka Kagoro, a lawyer from Zimbabwe. The session focused on issues relating to securing the rule of law through constitutional arrangements. The discussants for the session were Ms Nokukhanya Nox Ntuli from the Department of Political Affairs of the AUC and Professor Andre Mbata Mangu, from the University of South Africa (UNISA).

Mr Brian Tamuka Kagoro

Mr Kagoro began by indicating that conversations were fundamental to engaging on the contradiction embedded in the concept of the rule of law. At one level, a constitution, with rule of law provisions is expected to function on its own and at another level it is expected that it would serve as a vehicle for the transformation of society. It is within these contradictory pressures that state systems are expected to deliver and from within which they derive legitimacy. Mr Kagoro argues that when looked at in the context of poverty and inequality, the rule of law crisis is in effect a crisis of the state. The state is still fundamental for development and a key mediator of interests. He further postulated that what is needed is a more institutional view of the state, in contrast to the past where the focus is on the strong man. Current challenges are very different and require different perspectives on how to mediate varied interests.

In concluding, Mr Kagoro pointed out that constitutions and human rights can be used to protect privilege. He noted that constitutions cannot resolve all issues and hegemonic forces fighting for control over resources and distribution. The current momentum should be on issues of transition and wider changes in societies.

Ms Nokukhanya Nox Ntuli (Discussant)

Ms Ntuli began by noting that the focus in rule of law engagements has been on the formal institutions with very little on the informal. She argued that when we bring in culture and heritage we begin to recognize that over 90 per cent of disputes are resolved through local informal arrangements, with little or no resources from the formal sector or involvement from formal courts.

Ms Ntuli indicates that many rural communities do not have access to formal justice and many do not identify with the formal court system. In light of this, she concluded by advancing that more needs to be done to integrate the informal into the formal.

This, she indicated, requires engaging with some of the local challenges, such as gender discrimination, the separation of roles so that there is proper adjudication and weak systems of record keeping. As a final note she indicated that a greater focus on the informal would assist in breaking barriers on access to justice and would serve to harmonize practices.

Professor Andre Mbata Mangu (Discussant)

Professor Mangu began by posing the question of why so much emphasis was placed on constitutions. He noted that there are many different meanings to what the essence of a constitution is. He further pointed out that it was vital that there be some reflection on the rule of law at a regional and international level to avoid contradictory approaches. Professor Mangu also made specific reference to the DRC and how people often don't understand or appreciate a constitution, relative to the authority exercised by an individual, such as the president.

Professor Mangu noted that an independent judiciary is vital for the rule of law exercise. This also required that there is a leadership that is prepared to champion the rule of law and the independence of the judiciary. He noted that the region still faces many challenges and a number of countries have had unconstitutional changes of power. This is a very difficult issue for many in the region, as there is a propensity towards drafting amendments that go against the overall spirit of a constitution.

In concluding Professor Mangu indicates that it is very important to have good institutions and leaders who appreciate the need for constitutional supremacy and the rule of law. In the final analysis, he pointed out the importance of people exercising authority and having the space to rebel against the arbitrary use of power or any attempt to act against the rule of law.

Discussion

- It is imperative to recognize that in the current world where military and financial power is exercised, international law can be used as an instrument for the powerful. It is hence essential that we look at the connection between law and power in international systems. It is equally important that injustices in international systems not be used as an excuse to circumvent the rule of law.
- The African Union may not have done enough to secure the application of the rule of law in its member States. The AU has the required instruments and it is essential that there is implementation on the part of countries. It should nevertheless be recognized that the Commission and other AU institutions cannot impose on member states and hence actions have to unfold at the national level.
- The situation in the DRC on elections and related matters of legality poses fundamental challenges. Even though a measure might be perceived as legally necessary, this has to be balanced with the realities on the ground and practicalities when it comes to implementation. Resolutions of the UN need to be engaged with to avoid situations where these serve to usurp local sovereignty.

- There has to be careful reflection on the hierarchy of international laws that impact on Member States. There are often contradictions between more recent treaties and historically adopted agreements. The Vienna Convention may well be more important than the more recent arrangements regarding obligations of countries that are members of the International Criminal Court.
- There is a general neglect of traditional mechanisms for justice and the resolution of conflicts. Even where they are recognized, there are still gaps in the manner in which these institutions operate. Greater reflection and support would assist in better incorporation and synergy.
- There is a propensity in the continent to use the people to establish authority. This raises the question of sovereignty derived from the people or from the constitution. People can be used to act against the rule of law and the fundamental principles of constitutionalism.
- We should not underestimate the power of international capital and other forces to shape the choices made at national level. There are recent instances where capital would use its power to shape the appointment of Ministers. Elites would often act in very contradictory ways and would conveniently act against the rule of law when it suits them.
- Despite the challenges in the international environment, these cannot be used as excuses on how we engage rule of law issues. We have to appreciate the principles of democracy and the required ethical orientation this requires. There is a positive trajectory and this cannot be set aside because we are in a hurry for results. Democratic discourse and discussions are vital for the continent's development.

Panel 3: Implementation of regional norms and standards

This session focused on the challenges embodied in the domestication of continental and regional norms and standards. The session was chaired by Dr Maude Dikobe of Botswana. The lead speaker of the session was Mr Calixte Mbari, the acting head of division: Democracy Governance and Human Rights of the Department of Political Affairs of the African Union Commission. The discussion respondents for the session were Professor Mohamed Bousoltane, of Algeria and Professor Sheila Bunwaree of Mauritius.

Mr Calixte Mbari (Lead Speaker)

Mr Mbari began by drawing attention to the philosophical basis for the rule of law. In this respect, he noted that law arises from the imperative of living together and out of the need to limit the liberty exercised by individuals. Such an approach requires that implementation be impersonal, unbiased and independent. Mr Mbari further indicated that although countries have constitutions, what is often lacking is a culture of constitutionalism.

Mr Mbari asserts that there are many countries where power is not used in a responsible manner and where the application of law is not without bias. The momentum to ensure that people do not break laws needs to unfold at all levels and required active cooperation between regional and international organizations. He noted further that there are many treaties and protocols to shape regional actions.

In concluding, Mr Mbari indicated that it was essential that all African countries ratify the African Charter on Democracy, Elections and Governance. In addition, it was vital that the pace of implementation picks up. He noted that there are problems with respect to institutions that have to uphold and protect the rule of law. In this respect, he pointed to the importance of vigilance on the part of continental and international institutions.

Professor Mohammed Bousoltane (Discussant)

Professor Bousoltane focused his presentation on the complexities of mainstreaming international law into national law. He notes that this was a complex technical process and has historically been guided by Article 46 of the Vienna Convention (Law of Treaties). He noted further that often countries were constrained by the challenges

associated with domesticating laws into specific national legislation and amending laws where there are contradictions.

In concluding his brief technical inputs, Professor Bousoltane noted that treaties that have been ratified are binding on member states. In practice, states needed to work through these obligations and ensure that all matters are introduced in national legislation. Even without specific local actions, norms are binding where the state has ratified a particular treaty. He noted that systems and approaches for domestication vary across countries.

Professor Sheila Bunwaree (Discussant)

Professor Bunwaree began by noting that often regional and international norms and instruments are not known by people in countries. Where there is a lack of political will to implement, people can be in the forefront of ensuring that rights are secure. She noted further that the largest challenge for people is the absence of social justice, as reflected in the prevailing economic models.

As a step forward, Professor Bunwaree suggested that greater attention needs to be focused on capacity building and enhancing information flows to local communities. She noted also that it was equally imperative to open spaces at the meetings of heads of state, so that issues of impunity, the absence of follow-up mechanisms and the need for ethical leadership can be directly raised. She concluded by indicating that there is a need for more ethical, moral leadership that goes beyond pure legalistic compliance.

Discussion

- One of the biggest challenges for the region is the historically top down approach to policy construction. It is hence imperative that greater attention be focused on building wider awareness of regional and continental instruments and processes. The capacity for transformation is at the local level and hence greater attention is needed on building a bottom to top dynamic.
- The Commission must be seen as a safeguard for the charters adopted at the level of the AU. Much more needs to be done to ensure that member states are acting in accordance with these instruments. The institution needs to be more vocal in the manner in which it exercises its responsibilities.
- To address the issues of the lack of knowledge on regional and continental institutions, it is vital that the AUC extends its role to encourage the study of regional laws at higher educational institutions. This could also facilitate actions directed at harmonising laws and cutting down the number of instruments that countries have to adhere to. The AUC has been working with Ministries of Education on introducing the Charter (ACDEG) in all schools in the continent.
- Issues of social justice and the role of institutions at the national level are matters of sensitivity. It is hence imperative that leadership over these is at the national level. Member states have the responsibility of communicating internally on obligations

established through regional and international engagements. The role of civil society is particularly important in this respect.

- The system of representative democracy has various limitations. It is hence essential that greater attention be focused on deeper forms of participation as these would assist in overcoming some of these social justice challenges. In our interaction on the rule of law and human rights issues, it is important to recognize that these have not been imposed on Africans. In many instances, Africans were at the forefront in promoting these instruments.

Panel 4: Respect for human rights and civil liberties

The session was moderated by Professor Corsino Tolentino, Academia das Ciências e Humanidades de Cabo Verde. The lead speaker for the session was Mr Franck Kamunga, Team Leader, Human Rights, Access to Justice and rule of Law Cluster of the African Governance Platform. Responsive discussions were from Professor Mame Penda Ba, Senegal and Advocate Kholong, South Africa. The session focused on the link between human rights issues and the rule of law.

Mr Franck Kamunga

Mr Franck Kamunga began by indicating that most African countries have specific human rights instruments. Provisions have been included in various legal documents and in many instances within Constitutions. Some countries also have special norms for designated groups and have adopted various UN resolutions and other regional instruments. He however noted that the problem is not the existence of laws, but rather the failure to appropriate domesticate and implement.

On elaborating on the issues of the failure to domesticate and implement, Mr Kamunga pointed out that there are various instances where people are arrested and jailed for no good reasons, despite the existence of laws that are meant to protect people from arbitrary state action. It is hence imperative that people are educated on the rights and supported in ensuring that these are secure. This is particularly the case with respect to individuals from the gay and lesbian communities. Greater attention needs to be focused on helping people to secure the rights which are already embodied in legal instruments.

In concluding his inputs, Mr Kamunga indicated that it is vital that programmes be mainstreamed so that people understand legal obligations and appreciate processes for securing their rights. He noted that part of the challenge is also that judges and others within the judiciary do not know how to deal with many issues and often are not familiar with some of the technicalities embedded in the rights that people seek to exercise. Greater attention hence needs to be focused on the training of judges and lawyers and on building the capacities of human rights institutions and civil society organizations.

Professor Mame Penda Ba (Discussant)

Professor Ba began by indicating that it is important to engage with human rights issues from an African perspective. She noted that the initial emphasis in Africa was on

self-determination and on securing collective rights. She however argues that there have been more recent shifts and the current emphasis amongst many is on securing social economic rights.

Building on her argument on securing further rights, Professor Ba made reference to experiences in Senegal. She drew attention to the importance of securing information from government such that people could understand the basis for decisions made that impact on economic distribution, particularly in the terrain of extractive industries. She noted that greater emphasis needs to be placed on participatory democracy where people are involved in a much more meaningful manner.

Professor Ba concluded by noting that we should not neglect fundamental rights as we move forward and on the importance of young people in the establishment of new models that incorporate fundamental and social rights. Professor Ba further emphasized the importance of moving beyond the exercise of voting periodically towards deeper forms of engagements on securing rights.

Advocate Kholong (Discussant)

Advocate Kholong began by indicating that it was imperative to look at the manner in which rights were codified. He note that codification provides a useful avenue for finding the balance between collective and individual rights and would serve as a basis for creating new possibilities that are rooted in local realities. Related to this, Advocate Kholong noted that a larger issue was the justiciability of human rights.

Advocate Kholong indicated that key to human rights is the strength of civil society and state institutions. If these are weak then it becomes a challenge to secure rights and ensure proper implementation. He noted that the SA experience has been positive as a rich and healthy jurisprudence has developed. He also noted that government has made positive efforts and that South Africa has a civil society that takes up issues of the poor to the highest court. Advocate Kholong concluded by indicating that codification of rights is vital and that more attention needs to be focused on mediation to resolve challenges that emerge.

Discussion

- It is important to recognize that there is a human rights system and strategy on the continent. There is engagement on the ground from the AUC and regional institutions, but more needs to be done to ensure that existing normative instruments are effective to deal with unfolding challenges.
- There has to be further reflection on the norms and institutions that can hold African States accountable on human rights issues. This should include measures to protect individuals from the LGBT community. At the institutional level, we need to explore the challenges that confront the Southern African Development Community (SADC) Tribunal and the possibility of establishing specialized parliaments on rights issues.

- When looking at state compliance with rule of law, there needs to be consideration of instruments that can measure the levels of adherence. In this respect, we need to look at the level of adherence to human rights instruments. One possibility that needs to be explored is how regional instruments can become binding immediately after adoption.
- Much more attention needs to be focused on training people in human rights and access to justice. Greater attention should also be focused on the judiciary and enhancing its capacity for engaging on rights issues and integrating these into decisions made.
- The issues relating to LGBTI rights are very difficult within the continent. There are many countries where gay relationships are illegal and the status of B&T people are not developed. More information needs to be shared on countries that are progressive on these issues.
- Access to rights by rural communities is very important. We have to find strategies that facilitate local level engagements. This requires greater attention on more deliberative forms of democracy and could be assisted by specialized parliaments. Civil society engagements at local level are vital to secure and promote rights.
- The capacity of the state is very important for implementation of decisions related to people's rights. Very often there is a failure to implement decisions of courts. Human Rights institutions often do not attract much funding and hence there is a need for deeper resource mobilization and collaboration nationally and regionally. National Human Rights Commissions are vital to success as they serve as safeguards and are mandated to foster a culture of human rights.

Panel 5: The challenges of poverty and exclusion

This session was moderated by Ms. Benetia T. Chingapane, Director Multilateral Affairs, Ministry of Foreign Affairs and International Cooperation, Botswana. The lead speaker for the session was Mr Abba Omar, Director of Operations, Mapungubwe Institute for Strategic Studies and the response was from Dr Matloteng Matlou, South Africa. The session focused attention on the impact of poverty and exclusion on efforts to secure and promote the rule of law.

Mr Abba Omar (Lead speaker)

Mr Omar began by indicating that his approach is focused more from the economic side on issues of exclusion and poverty. He noted that power and exclusion and the general lack of prosperity in Africa has created situations of fragility and has contributed to a climate where people feel betrayed by elites. Mr Omar noted further that this reality is very different to the narratives of countries in West Asia, where there has been positive economic leadership and where citizens have experienced deeper forms of consultation.

In countering arguments on the positive relationship between inequality and innovation, Mr Omar noted that all evidence shows that growth does not last in situations of high inequity. He further makes reference to data generated by Thomas Piketty in demonstrating that inequality has increased in the past decade. Mr Omar indicated that available data shows there is a strong relationship between inequality and social mobility. There is little social mobility in situations of high inequity.

In concluding, Mr Omar argues that it is essential that there be economic models for escaping the current cycle of deepening inequality and exclusion. He noted that this required bolder leadership and stronger efforts towards improving education, access to land and investment capital. Mr Omar placed emphasis on the importance of reducing inequality as the basis for escaping the current situation of low growth and increasing exclusion. He further emphasized the importance of leadership and the exercise of making positive economic choices in a particular historic and global context.

Dr Matloteng Matlou (Discussant)

In contrast to Mr Omar, Dr Matlou indicated that he has a more political approach to the issue of poverty and exclusion. In particular, he notes that Africa has a challenge of leadership. In this respect, he put forward that the leadership has not been able to move the existing political formation into the global realm to contest historical injustices.

In arguing for a much deeper historical analysis and more engagements with the international community, Dr Matlou put forward perspectives on how European development was predicated on the super exploitation of Africa. He further noted that historic theft and related action have served to undermine the development potential of Africa. Using illustrative maps, Dr Matlou contended that this reality of historic dispossession cannot be overcome without bold African leadership.

In concluding his input, Dr Matlou indicated that the continent has substantive resources and can make a decisive development shift if these are used for the benefit of its people. He however indicated that the major challenge is poor governance. As a step forward he argued that there is a need for value based ethical leadership at all levels of society. Furthermore, such leadership has to work with people across all echelons of society.

Discussion

- We need to look carefully at the issue of the rule of law in the context of poverty and economic power. Of particular importance is reflecting whether the rule of law can really mediate relationships in a manner that allows for redistribution or is it an instrument that serves only to protect existing economic power relationships.
- Poverty needs to be seen as a violation of human rights. People need to be able to go to court to ensure that their rights are secure and to ensure that actions are taken to move them out of poverty. However, there has to be appreciation that sometimes the matter goes beyond the capacity of existing state institutions as constraints often emanate from the wider global context.
- The exercise of leadership is fundamental for the future and for establishing strategies that facilitate positive action. Where there is corruption and unethical leadership, it becomes very difficult to engage wider economic actors to facilitate positive economic change in a manner that serves to secure the rule of law. A new compact is needed to secure and ensure ethical leadership.
- The world is sinking deeper into a crisis of low growth and increased inequality. Africa is in the middle of all of this and has many 'choice-less democracies'. Arguing for deeper accountability and better governance may well be putting the 'horse before the cart'. Existing economic models and related constraints stand as an oppressive albatross to those in political leadership. In light of which it is important to reflect on the economic model which would work for society, rather than having society work for an economic model.
- In building the integration agenda, it is vital that greater attention be focused on existing and available human capital. The continent has not been optimally utilising available resources and very little attention has been focused on the knowledge economy and on making sure people have access to information for skills development purposes. This will help to shape practical solutions to the challenges needed. It's essential that we reflect on island states as we engage with issues of integration.

- There is need to question the philosophical approaches that we have on the economy and, in particular, neo-liberal economic models. Even with the challenges that have arisen as a result of the financial crisis, we have not found a new approach and there are no clear solutions. There are many constraints, such as those embodied in international economic agreements and those that deal with local issues, such as land ownership.
- We must engage in more historical analysis to understand the disruptions to economic production that existed on the continent. In understanding past patterns, we could find solutions that would facilitate positive future actions. All of which require better leadership and much more attention on issues of implementation.
- We have to look at the close relationship between redistribution and decentralization for development. Realities on the ground are often very different from what is anticipated in plans and often what government expects does not materialize. Much more attention needs to be focused on local level engagements to overcome exclusion.
- In light of existing economic realities and the inability to move beyond, we must consider the possibility that we have reached the apex of human productive potential. We may well want to consider going back to earlier modes of survival or finding alternative models for economic and social inclusion.
- We have to appreciate the evolution of the rule of law in the context of changes in the capitalist system. Each evolutionary phase has resulted in certain groups exercising dominance. Ideally, rule of law should serve as a framework that goes beyond sectional interests and hence serve to avoid situations where sectional powers serve to capture the larger society or hold it to ransom. High levels of transparency are essential to overcoming state capture by sectional interests. Rule of law can be a positive force in mediating conflict over resource distribution and inequity.
- Discussions on the relationship between poverty, inequality and the exercise of political power are very important. The debates and challenges faced in the continent suggest that a further workshop is needed on these issues on their own. More research is needed to look at the rule of law and its relationship with economic growth. This requires detailed analysis of exclusion and whether the law serves to mediate or re-inforce such exclusion.

Panel 6: A shrinking civil space

This session focused on reflecting on spaces available to engage with human rights issues and on related concerns of transparency and access to information. The session was moderated by Dr Suzie Nansonzi Muwanga, University of Makerere, in Uganda. The lead speaker for the session was Mr Desire Assogbavi, the OXFAM International Resident Representative to the AU and UNECA. The discussants were Ms Keneilwe S. Mooketsane of the University of Botswana and Mr Muzi Masuku of the Open Society Initiative of Southern Africa (Swaziland).

Dr Desire Assogbavi (Lead speaker)

Dr Assogbavi began his input by highlighting international perspectives on the importance of civic spaces. He notes that such civic spaces are fundamental for all societies and essential for development processes. The existence of such spaces is not only a legal issue. However, the closing of such spaces is often a violation of international norms and in many instances a violation of regional and national laws.

Dr Assogbavi notes that there has been a steady closing of spaces for civic engagements in the wider region. In addition to state actions that serve to close the civil space, over 29 restrictive laws have been adopted across the continent. In many countries, civil society organizations face many more restrictions and barriers to operating than business organizations. He noted further that often these laws and actions contradict international laws. Restrictions often relate to issues of formation, access to resources, and the ability to engage in advocacy, communications during and after elections and restrictions on operational activities. Even though there are instances where civil society organizations act unethically, the increased restrictions pose a challenge.

In terms of the future, Dr Assogbavi indicates that there needs to be more international solidarity to place pressure on national and regional organizations. He further puts forward that there should be consideration of a charter on civic society to foster greater openness. In concluding, Dr Assogbavi urged the AUC to have a louder voice on matters relating to the closing of civic space. Issues of challenge should also be brought to the attention of the Africa Progress Panel, the wider media and regional parliaments.

Ms Keneilwe S. Mooketsane (Discussant)

Ms Mooketsane began by indicating that the trends over the past years, as they relate to civic space, have been positive as most states have enshrined in law the right to access information. In addition, most people now have the right to express themselves

openly and there are a range of established platforms for participation. She nevertheless argues that very often challenges arise in implementation and in securing these rights in practice.

Using Botswana as an example, Ms Mooketsane noted that sometimes the government attempts to find alternative ways of controlling access and engagements on social issues. However, because it is an open society with a good judiciary, government has been taken to court and in many instances the courts have upheld the rights of individuals. Even as the courts have acted positively, there is always a danger that the independence of the judiciary could be compromised through the power over appointments exercised by the executive.

Ms Muzi Masuku (Discussant)

Ms Masuku began her inputs by indicating that very often those who are in power are fearful of contestation and any form of opposition. She argues further that regulations are used to close spaces and to restrict actions by civic activists and others. Ms Masuku made specific reference to instances in Southern African countries where laws have been changed to restrict civil society and block investigations of arbitrary government actions.

In making a case for more civil space and the protection thereof, Ms Masuku made reference to the closure of the SADC Tribunal. She notes that the Tribunal was a positive development as it allowed civil organizations to take matters to wider regions. The closure of the Tribunal has been a move backwards for civil society. In concluding Ms Masuku suggested that there was a growing tendency to use global challenges as a way of countering local opposition and to close the space for organizations working on political issues.

Discussion

- There are a range of instruments at the regional and global level that can be used to secure spaces for civil society action and advocacy. There will always be tension between government and civil society organizations; the challenge is to ensure that this does not result in the closing of spaces. Actions are needed to ensure rights are exercised and do not just remain as features in adopted documents.
- Civil society organizations need to promote the securing of positive socio-economic rights. To do this effectively they should be working with communities and other organizations, such as trade unions.
- In the history of the continent, there has always been a struggle for power between the state and people. The challenge hence is for people to safeguard such power as the state will always try to get this back. People very often act to open spaces and sometimes use issues of cultural sensitivity to highlight the challenges that they face.
- As part of the efforts to secure spaces for civil society and have positive legal protection, it is important to secure the separation of powers and in particular

credible processes for the appointment of judges. There has been a tendency to fire and appoint judges arbitrarily. Some countries are establishing open appointment and interview processes and this is very positive.

- There has to be appreciation of the reality that sometimes the closing of civic spaces arises because of interference in the domestic affairs of countries. This is unfortunate and often militates against positively engaging civic organizations that pay the prices for those who have acted irresponsibly or for those who have abused resources.
- We have to appreciate that sometimes the existence of spaces for civil engagements goes beyond political issues. Such spaces are often important for development purposes and to assist communities and governments. Spaces have to be used well so that they remain open and so that government see the value of such open engagements from civil society organizations. Those spaces that have been lost have to be reclaimed. A Charter on Civil Society can help to facilitate actions to ensure civil spaces.
- There has to be appreciation that civil society organizations often assist governments and very often serves to help people where there is state failure. When designing regulatory policies, government must recognize the positive value derived from civil society. Government may well consider providing added support to civil society in the form of training on regulations and assistance in accessing resources. There should nevertheless be caution that government does not create civil organizations to orchestrate support and legitimate actions.

Panel 7: Judicial democracy to consolidate the rule of law in Africa

This session focused on reflecting on matters relating to the manner in which judiciaries are established or formed and how these assist or hinder the consolidation of the rule of law. The session was moderated by Professor Fombad, who also provided the initial lead input. The session received inputs from Justice Chinembiri Bhunu from Zimbabwe and Justice Siphon Nkosi from Swaziland. Dr Maurice Engueleguele, from International IDEA also made a brief input during this session.

Professor Charles Fombad (Lead speaker)

Professor Fombad began by outlining that there has been a substantive rule of law shift in the continent over the past two decades. Military dictatorships are considered a thing of the past and there is a view that we are now moving towards having judicial democracy. Professor Fombad notes however that much depends on what is implied when talking about judicial democracy. From his perspective, this essentially entails a situation where judges become agents of change and where they adopt a more principled and rights based approach that goes beyond traditional roles.

Professor Fombad argues that it is imperative that judges look towards incorporating wider values and broader techniques for interpreting constitutions. He argues that an inward orientation needs to be abandoned and there should be more cross fertilization. In concluding, he pointed towards the positive experiences in South Africa and the imperative for greater African solidarity and learning amongst judges on the continent.

Justice Chinembiri (Discussant)

Justice Chinembiri began by indicating that democracy is an abused word and often conflated with rule of law issues. In this respect, the judge indicated that democracy is firmly anchored in the rule of law, in so much as it provides for universal human standards. He further indicated that the rule of law essentially serves to afford all of society equal protection.

Justice Chinembiri further argued that the judiciary has always been the custodian of law and to some extent the custodian of public policy and morality. In addition to having the responsibility of ensuring that the state conforms to laws, it has to ensure that all within the judiciary itself do not act outside of the law or perceive themselves to be above the law.

In concluding, Justice Chinembri noted that it was important that the judiciary itself is credible and gives rise to a democratic process. In essence, arguing that judges have to be democratically appointed. He noted in this instance that in some countries judges are nominated in the public spaces and are subject to public interviews before their appointment.

Justice Siphon Nkosi (Discussant)

Justice Nkosi began by raising the issue that judicial democracy could be about the contribution of judges to democracy building and the democratic process, as well as be about the manner in which judges are appointed. By virtue of regional instruments, such as the Banjul Charter, judges have an obligation on the promotion and protection of rights. How this unfolds in practice is a matter that requires further exploration and the sharing of information across different jurisdictions.

In stressing the importance of information sharing between judiciaries, Judge Nkosi also pointed to the importance of taking constitutionalism to people and on reflection is related to how traditional bodies dispense justice. In concluding Judge Nkosi indicated that it was important to focus attention on the role of traditional leaders in dispensing justice, as they often have more legitimacy in dispensing justice and securing local participation and adherence.

Dr Maurice Engueleguele (Discussant)

In his brief input Dr Engueleguele raised issues around the precise meaning afforded to the issue of judicial democracy. At one level, this relates to the issue of separation of power and, at another level, this relates to issues impacting on the manner in which judges are appointed. He noted that there are different systems across the continent and wide variation between the French and English influences on systems.

In concluding his input, Dr Engueleguele argued that further reflection is needed on the ground rules related to the appointment of judges. This would help to avoid situations where judges become instruments of state control. He also asserted that sometimes changes do not result in an increase in the real powers of the judiciary.

In highlighting the challenges faced by the Africa region, Dr Engueleguele also made reference to the data generated by the World Justice Project on Rule of Law compliance. It is noted that many African countries fair badly on the index in terms of their overall adherence to the rule of law and in terms of measures and institutions to safeguard the rule of law.

Discussion

- Some countries in the region face very specific challenges with respect to the appointment of judges. Where there is executive dominance, this is often because some level of control is sought by the executive. One strategy to overcome such dominance is to facilitate exchange amongst judges and engage in some level of training of judges.

- There is need for further reflection on the notion of the separation of powers. Is this in the interest of the continent? Judicial independence cannot be achieved by the judiciary on its own and hence there has to be engagement with other sectors on the optimal approach for a better future for all. The judiciary should not dominate as this often serves to undermine the voice of the people, as expressed through electoral processes.
- Political tension in a country can often serve to divide the judicial system and hence weaken the judiciary. It must be recalled that unlike the executive and legislature, where decisions are made as a collective, judges have to act independently and individually in the decision process. Hence, greater attention needs to be focused on protecting judges so that they can act with conviction and without bias. Judicial democracy should assist rather than hinder such independence of action.
- The power of the executive over the judiciary is often much more than is desirable. Very often they control resources and employment within the judiciary. The executive also has the ability to apply political pressure on the judiciary. The exercise of independence must hence be seen as a constant process of adjustment. The support system for judges must be strengthened. Judicial independence is a relative concept and not absolute.
- Generally there is compliance with the decisions of judges. However, where cases are politically charged, there has been a tendency to change laws to avoid compliance or to find strategies to avoid full compliance with judicial decisions. Better engagements between the judiciary and government can help to overcome such challenges.
- There are very different systems for the appointment of judges and their periods of tenure. Further research needs to be done on these, with the possibility of looking at common basic standards on the continent. This could include guidance on periods of training required and the ongoing learning that is needed for individuals to retain and develop their roles and responsibilities. Greater attention needs to be focused on the technical nature of judicial action—hence further reinforcing the importance of training.
- There are many other factors that impact on the judiciary that need to be grappled with to ensure that they remain a valuable terrain for the protection of the rule of law. These include issues of insecurity, with judges having to flee their home countries and issues relating to the dominance of males in the judicial sector. A Code of Conduct for judges can be very helpful as sometimes, for example, they take a very long time to make a judgement.
- There must be appreciation of the importance of the separation of powers. Even as the Constitution is the main instrument for separation, actual litigation serves to affirm separation and create the clear demonstrators of independence. Judges should not be associated with the views of political parties. However, this should not mean that judges do not have a view of society. They should have a perspective on a better society as this allows them to play a catalytically role. We should avoid a situation where justice is commercialized—especially in instances where the judiciary raises its own revenue.

Closing ceremony

The Honourable Mrs Thoko Didiza, Acting Chairperson of the Commonwealth Women Parliamentarians (CWP), moderated this closing session. The session was addressed by Professor Adebayo Olukoshi, Africa and West Asia Regional Director, International IDEA and Professor Khabele Matlosa, Director of Political Affairs Department, AUC. In addition, Mr Brian Kagoro presented the broad conclusions of the workshop.

Mr Brian Tamuka Kagoro

At the request of International IDEA and AUC, Mr Kagoro presented a summary outline of the conclusions derived from the workshop. The document, as distributed at the workshop, is attached as Annex A. In his presentation Mr Kagoro highlighted the broad conclusions derived from the inputs and discussion. He then proceeded to present the essential recommendations of the workshop, which includes a more detailed study on the rule of law in Africa. This, he indicated, will be preceded by the development of a policy paper for distribution to Member States.

In addition to the study to be conducted, Mr Kagoro indicated that the recommendations includes that the AUC look towards providing rule of law support for a selection of Member States, that the AUC establishes a programme for ethical leadership and that the AUC Directorate of Citizens and Diaspora Organisations (CIDO) and the Pan African Parliament (PAP) be encouraged to establish a Civil Society Fund to mitigate against the perception of or the existence of external influences over civil society. In concluding, Mr Kagoro indicated that if there were any further comments on the draft document and related actions proposed, these should be submitted in writing to Dr Enguelegeue.

Professor Adebayo Olukoshi

Professor Olukoshi began by thanking all participants for their inputs and their commitment to assisting the process. He noted that there is a lot that can be said on the topic of the workshop and that the deliberation would continue well into the future. He further indicated that there is no shortage of normative framework at the level of the AU and that the most important aspect for the future is to focus on implementation.

Professor Olukoshi pointed out that there is now renewed energy on the continent and the Department of Political Affairs in the Commission is beginning to take the lead in carving a new path into the future. He propagated that it is important to have a strong and well supported department in the context of the reality that much further work still stands before the region. In particular, he highlighted that further work is needed on citizen mobilization and on ensuring that nobody stands above the law. In concluding, he thanked International IDEA personnel for their good work and the

researchers for the Discussion Paper presented. He also expressed a special word of appreciation to Ms Kgothatso Semela (who recently moved out of International IDEA) for her presence at the closing of the workshop.

Professor Khabele Matlosa

Professor Matlosa started by thanking the chairperson of the closing session for her continued guidance, all other session moderators for their efforts, and the presenters and participants for their inputs. He expressed particular appreciation for the partnership with International IDEA. Professor Matlosa also voiced his gratitude for the workshop results, as presented by Mr Kogoro. These he indicated would serve to energize all in his department.

In concluding, Professor Matlosa indicated that the efforts will really help the department fulfil its mandates of preventing conflicts. He noted that without the rule of law, conflict prevention is not possible. In this respect, the AUC needs all the assistance it can get. By arranging the event at a local level, the department is assisting the process of ensuring that the AU becomes a citizen driven organization. As a final word, he expressed the department's commitment to taking forward the actions contained in the report.

Honourable Thoko Didiza

As a final closing word, the moderator, Honourable Didiza, reflected on the positive partnership that has been established between International IDEA and the Department of Political Affairs of the AUC. She noted that there has been substantive progress over the past two years on the joint efforts. She further purported that the issues discussed were particularly important for legislatures across the continent. She emphasized the significance of the event in assisting the region with the improvement of governance systems for development and for securing deeper participation from young people. She thanked all for their contributions and wished all a safe return home.

Conclusions

What needs to be done

Following the two-day deliberations and discussion on the context of the rule of law in Africa by various stakeholders, based on the draft Discussion Paper on Challenges to the Rule of Law, the meeting noted that:

- Africa has comprehensive normative frameworks that address issues of constitutionalism, democracy, rule of law, access to justice and human rights known as the AU Shared Values;
- There are gaps in the ratification and domestication of AU Normative Frameworks such as the ACDEG and AU Shared Values instruments;
- There is a need to strengthen informed and active citizen participation/engagement on the issues of constitutionalism and rule of law, which requires a rooted and autonomous civil society that is free from intimidation as well as external control/manipulation;
- Even where human rights institutions exist at national levels, there are still lingering challenges pertaining to resourcing of such institutions, their autonomy, appointment of members and general effectiveness;
- The rule of law cannot be discussed in Africa outside the context of poverty, power, inequality and justice; and
- In order to promote and sustain the rule of law in Africa, there is a need to promote ethical leadership.

Policy recommendations

The meeting proposed the following policy recommendations:

1. That pursuant to this meeting AUC-DPA in partnership with IDEA should develop a policy issues paper for circulation to AU Member States and AU Organs as a precursor to the study referred to below.
2. AUC-DPA in conjunction with International IDEA and the Pan African Parliament should popularize the normative frameworks of the African Union especially the ACDEG for the purposes of ratification and domestication by Member States. The AU should operationalize the state reporting mechanism to ensure continuous monitoring of compliance with ACDEG and other AU Shared Values instruments.

3. AU-DPA Constitutionalism and Rule of Law Cluster to conduct an in depth study on challenges to the rule of law in Africa, taking into account the outcomes of this meeting and other existing materials such as the APRM reports.
4. AUC-DPA in partnership with International IDEA (and other interested stakeholders) to provide technical support to five countries that have ratified the ACDEG or undergone an APRM Review (or have acceded to APRM) to align their national rule of law frameworks with ACDEG and AU Shared Values instruments.
5. The CIDO and PAP consider creating a Mechanism for Institutional Support to African Civil Society (fund), to mitigate against external influence in shaping the programmes for African CSO as well as general capacity constraints.
6. The AU-DPA should—in consultation with relevant AU organs and institutions and appropriate partners—create programmes that promote ethical leadership at all levels. Further, the AUC-DPA should commission studies and publications that focus on issues of ethics and leadership for public office bearers.

Next steps

AUC-DPA and IDEA will constitute a small technical working group to give effect to the above recommendations.

Annex A. Concept note

Background

In the course of the transformation from the Organization of African Unity (OAU) into the African Union (AU), Heads of States and Governments of the AU committed themselves even more strongly to the promotion of democracy, good governance and rule of law in Member States. This was a calculated response to the emerging threats to peace and security on the continent which in the past two decades have tended to emanate predominantly from elections and political transitions; and which in a number of cases have led to armed conflicts or full blown civil wars.

The importance of the rule of law is highlighted in two key legal instruments: The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) and the African Charter on Democracy, Elections and Governance (ACDEG). Article 4 of ACDEG provides that 'State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights'. Against this background, International IDEA's Africa and West Asia Programme has undertaken to support the implementation of the principle of the rule of law in AU Member States.

Justification

The African development agenda, in its aspiration 3, dreams of an 'Africa that has implemented good governance, democracy, respect for human rights, justice and the rule of law to the 2063 horizon' through the consolidation of democratic gains of the continent and improving the quality of governance, the establishment of strong institutions, development oriented and the emergence of visionary leadership. To achieve this aspiration, Agenda 2063 identifies specific areas of interventions that reflect on the mandates of continental and regional policy institutions and organs.

International IDEA has a vision and mandate to promote and enhance the respect of constitutionalism and rule of law within the context of continental instruments and shared values including the Constitutive Act of the AU, the African Charter on Democracy, Elections and Governance (ACDEG) and other policy instruments. It is in response to the requirements its mandate and current developments on the continent that International IDEA commissioned a Discussion Paper on the challenges to the rule of law in Africa.

Objectives

The overall objective of the workshop is to bring together experts, practitioners and continental policy makers to discuss and validate the actions and strategies recommended

to promote the rule of law in these regions within the context of the outcome of the study on the rule of law in Africa.

More specifically, the meeting aims to:

- Discuss the challenges faced in the implementation and maintaining of the rule of law in Northern, Eastern, Western, Central and Southern Africa regions; and
- Strengthen coordination, cooperation and interaction between experts and practitioners on the rule of law to facilitate sharing of experiences and lessons.

Expected results/outcomes

The meeting is expected to map out a plan for the development and implementation of an engagement strategy for the promotion of rule of law in Africa. The strategy will have three pillars: (1) the promotion and monitoring of rule of law in State Parties to the ACEDG, (2) development of tools and guidelines for promoting the rule of law in Africa, and (3) designing capacity building programs to support the implementation of ACDEG. The consultation will specifically highlight and discuss measures to address the challenges faced by African states in the Northern, Eastern, Western, Central and Southern Africa regions in the implementation of rule of law at the national level.

Meeting

The meeting will take place from 12–13 April 2016 in Pretoria, South Africa. It is organized by the International Institute for Democracy and Electoral Assistance (International IDEA) Africa and West Asia Programme.

It will be held in the 3 official languages of the African Union: French and English in scheduled plenary sessions to discuss general issues relating to the difficulties encountered, and consultations (working groups) to develop joint projects and capacity building programme that will be discussed and approved in plenary session

Working documents

To facilitate and guide interventions during the meeting, the following working documents will be sent electronically to participants before the meeting and available in print during the meeting:

- Discussion Paper on ‘Challenges to the Rule of Law in Africa’
- AU Constitutive Act
- African Charter on Democracy, Elections and Governance
- African Charter on Human and Peoples’ Rights
- Other relevant documents

Annex B. Programme

Day 1: 12 April 2016

08:00–09:00	Registration
09:00–10:00	<p>Opening Ceremony</p> <p>Chair: Professor Somadoda Fikeni, Chair of the Independent Development Trust (ITD)</p> <p>Welcome Remarks</p> <ul style="list-style-type: none"> • Professor Adebayo Olukoshi, Africa and West Asia Regional Director, International IDEA <p>Keynote Address</p> <ul style="list-style-type: none"> • Dr Remember Miamingi, Representative of the South African Human Rights Commission <p>Official Opening Statements</p> <ul style="list-style-type: none"> • Hon. IAM Semenya Sc, Advocate, South Africa • H.E. Ms. Bridgette Mabandla, APRM Commissioner, Former Minister of Justice of South Africa.
10:00–10:15	Group photo and Coffee /tea break
10:15–10:30	<p>Presentation of the main outcomes of the Draft Discussion Paper</p> <ul style="list-style-type: none"> • Barrister Nadine Mishika, Expert • Professor Mathieu Mebenga, Expert
10:30–11:45	<p>Panel 1: Rule of Law and State Legitimacy in Africa</p> <p>Moderator: Honorable Mrs. Thoko Didiza, Acting Chairperson of the Commonwealth Women Parliamentarian (CWP)</p> <ul style="list-style-type: none"> • Lead speaker: Professor Nqosa Mahao, Vice Chancellor of the National University of Lesotho <p>Discussants:</p> <ul style="list-style-type: none"> • Ms Lucy Muyoyeta, Zambia • Ms Louisa Zondo, CEO Bertha GXOWA Foundation, South Africa <p>Discussion with participants</p>

11:45–13:15	<p>Panel 2: The Primacy of the Constitution and of the Law</p> <p>Moderator: Mr Siphosami Malunga, Executive Director OSISA</p> <ul style="list-style-type: none"> • Lead speaker: Mr Brian Tamuka Kagoro, Lawyer, Zimbabwe <p>Discussants</p> <ul style="list-style-type: none"> • Ms Nokukhanya Nox Ntuli, DPA/AUC • Professor Andre Mbata Mangu, South Africa <p>Discussion with participants</p>
13:15–14:15	Lunch break
14:15–15:45	<p>Panel 3: The Domestication and Implementation of Continental and Regional Norms and Standards</p> <p>Moderator: Dr Maude Dikobe, Botswana</p> <ul style="list-style-type: none"> • Lead Speaker: Mr Calixte Mbari, Acting Head of Division, DGHR, DPA/AUC <p>Discussants</p> <ul style="list-style-type: none"> • Professor Mohamed Bousoltane, Algeria. • Professor Sheila Bunwaree, Mauritius <p>Discussion with participants</p>
15:45–16:00	Coffee /Tea break
16:00–17:30	<p>Panel 4: Respect for Human Rights and Civil Liberties</p> <p>Moderator: Professor Corsino Tolentino, Academia das Ciências e Humanidades de Cabo Verde</p> <ul style="list-style-type: none"> • Lead Speaker : Mr Franck Kamunga, Team Leader, Human Rights, Access to Justice and rule of Law Cluster <p>Discussants</p> <ul style="list-style-type: none"> • Professor Mame Penda Ba, Senegal • Advocate Kholong, South Africa <p>Discussion with participants</p>
19:30–21:30	Conference Dinner

Day 2: 13 April 2016

09:00–10:45	<p>Panel 5: The Challenges of Poverty and Exclusion</p> <p>Moderator: Ms. Benetia T. Chingapane, Director Multilateral Affairs, Ministry of Foreign Affairs and International Cooperation, Botswana</p> <ul style="list-style-type: none"> • Lead Speaker: Dr Abba Omar, Director of Operations, Mapungubwe Institute for Strategic Studies <p>Discussants</p> <ul style="list-style-type: none"> • Professor Sarah Bracking, Chairperson Sarchi Chair in Applied Poverty • Dr Matloteng Matlou, South Africa • Mr Joel Maidou, Central Africa Republic
10:45–11:00	Coffee /Tea break
11:00–12:45	<p>Panel 6: A Shrinking Civic Space?</p> <p>Moderator: Dr Suzie Nansonzi Muwanga, University of Makerere, Uganda</p> <ul style="list-style-type: none"> • Lead Speaker: Mr Desire Assogbavi, OXFAM International Resident Representative to AU and ENECA <p>Discussants</p> <ul style="list-style-type: none"> • Ms Keneilwe S. Mooketsane, Botswana • Mr Muzi Masuku, Swaziland <p>Discussion with participants</p>
12:45–14:15	Lunch break
14:15–16:00	<p>Panel 7: Towards a Judicial Democracy to Consolidate the Rule of Law in Africa</p> <p>Moderator: Mrs. Martha Mutisi, South Africa</p> <p>Speakers</p> <ul style="list-style-type: none"> • Professor Charles Fombad, South Africa. • Justice Chinembiri Bhunu, Zimbabwe. • Justice Sipho Nkosi, Swaziland • Maurice Engueleguele, AWA/IDEA <p>Discussion with participants</p>

16:00–16:45	<p>Closing ceremony</p> <ul style="list-style-type: none">• Chair: Honorable Mrs. Thoko Didiza, Acting Chairperson of the Commonwealth Women Parliamentarian (CWP).• Concluding Remarks• Professor Adebayo Olukoshi, Africa and West Asia Regional Director, International IDEA• Concluding Reflections• Professor Khabele Matlosa, Director of Political Affairs Department, African Union Commission• Closing Remarks• Honorable Mrs. Thoko Didiza, Acting Chairperson of the Commonwealth Women Parliamentarian (CWP).
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Annex C. Participant list

Name	Institution	Position
Professor Adebayo Olukoshi	International IDEA	Regional Director, Africa and West Asia Programme
Dr Maurice Engueleguele	International IDEA	Senior Programme Officer
Mr Wissam Benyettou	International IDEA	Programme Officer
Mr Alistair Clark	International IDEA	Programme Officer
Dr Sydney Mufamadi	University of Johannesburg	
Mrs Thoko Didiza	South African Parliament	Acting Chairperson of the Commonwealth Women
Ms Keneilwe S. Moketsi	Botswana	Expert
Mr Muzi Masuku	OSISA	Human Rights, Access to Justice and Rule of Law Manager, Swaziland
Brian Tamuka Kagoro	Zimbabwe	Lawyer
Puteng Lenkabula	University of Witwatersrand	
Mrs Lucy Muyoyeta		
Mr Siphosami Malunga	OSISA	Executive Director
Mr Deprose Muchena	Amnesty Southern Africa	Director
Mr Calixte Mbari	AUC	Head of the Cluster
Mrs Nokukhanya Nox Ntuli	AUC	Constitutionalism and Rule of Law Expert
Dr Edgard Sisa ,	Ministry of Foreign Affairs, Gaborone Botswana	
Mr Franck KAMUNGA	OSISA	Constitutionalism and Rule of Law Expert
Dr Maude Dikobe	University of Botswana	
Professor Charles Fombad	University of Pretoria	Lecturer
Professor Mame Penda Ba	University Gaston Berger Senegal	Lecturer
Professor Mathieu Mbenga	University of Kinshasa	Lecturer
Professor Nadine Machikou Ngame-ni	University of Yaounde II	Lecturer
Barrister Nadine Mishika	Republic of Congo	

Professor Mohamed Bousoltane	Conference of African Constitutional Jurisdictions	Lecturer
Professor R. Songca	UNISA	Lecturer
Professor Vinodh Jaichand	Wits University	Lecturer
Dr Radebe, Keneilwe M	University of Pretoria	Lecturer
Professor Andre Mbata Mangu	UNISA	Lecturer
Mr Salim Latib University of Wits	University of Wits	Lecturer
Justice Catherine Makungu	Zambia	Judge
Justice Siphon Nkosi	Swaziland	Judge
Professor Corsino Tolentino	Cape Verde	Professor
Dr Matlotleng Matlou	Excelsior Afrika Consulting	Director
Mrs Elaine Walker	Principal Legal officer Office of the Ombudsman,	Malawi
Mr Abba Omar	Mapungubwe Institute for Strategic Studies	Director of Operations
Professor Sarah Bracking,	Sarchi Chair in Applied Poverty	Chairperson
Professor Sheila Bunwaree	University of Mauritius	Senior Lecturer
Dr Godwin Murunga	Institute For Developments Studies, Nairobi, Kenya	
Mr Ewald Garr	IDEG	Lead of Rule of Law Department
Dr Suzie Nansonzi Muwanga	University of Makerere, Uganda	Senior Lecturer
Mr Joel Maidou	Central Africa Republic	Rule of Law Expert
Mrs Elaine Walker Ali	Malawi	Office of the Ombudsman
Mr Desire Assogbavi	Ethiopia	OXFAM Representative to the AU and UNECA
Justice Chinembiri Bhunu	Zimbabwe	Judge



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