

Inaugural lecture of Professor Mbuzeni Johnson Mathenjwa

At the Senate Hall-University of South Africa

16 July 2016-17h00

Acting Vice Chancellor and Vice Principal, Teaching, Learning, Community Engagement and Student Support, Professor Moche

Acting Executive Dean of the College of Law, Professor Tshoose

Acting Deputy Executive Dean of the College of Law, Doctor Kole

Former Executive Dean of the College of Law, Professor Songca

Director of the School of Criminal Justice, Professor Masiloane

Acting Director of the School of Law, Professor Budeli- Nematikonde

Chair of Department of Public, Constitutional and International Law, Doctor Mailula

The respondent to my lecture, Professor Mangu

My family, pastors and the congregation – Evangelical church

Distinguished guests, colleagues and friends

It gives me pleasure to be given the opportunity to deliver my inaugural lecture this evening. I am grateful to the University of South Africa that recognised my work as deserving of the rank of full professor. I consider it an honour to be counted among those who reached this level of academic excellence at the University of South Africa. This inaugural lecture is rooted in constitutional law. I shall carry everyone along on the topic: **constitutionalisation of the rule of law in modern states: consequential or gesture politics?**

1 Introduction

The rule of law is a major source of government democratisation, in that it guards against tyranny, corruption and the abuse of government power. Thus, the government

that abides by the rule of law is seen as democratic and effective.¹ Without the rule of law, school textbooks do not reach schools, basic services do not reach the poorest communities, human dignity, lives are derogated, and military governments because of the prevailing lawlessness replace civilian governments. Accordingly, the rule of law is indispensable to any democratic and effective government. Sadly, Africa is widely perceived in the literature as being characterised by tyranny and dictatorship, and as flagrantly flouting the rule of law.² By contrast, it is assumed that Europe and North America are communities where the rule of law prevails.³ Based on the important role played by the rule of law, modern states have incorporated it in their constitutions. Therefore, in this lecture I examine the significance of the constitutionalisation of the rule of law in modern democracies.

The lecture is divided into four main themes. The first part explains the doctrine of the rule of law and the notion of constitutionalisation. The second part explores case studies on the adherence or non-adherence to the rule of law in selected European, American and African countries. In Europe, the position of Turkey and the United Kingdom (UK) in terms of their performance in the rule of law is discussed, as that of the United States of America's (US) and, in Africa, that of Nigeria, Egypt, Kenya and South Africa. It is hoped that by selecting countries from Southern Africa, East Africa, West Africa and North Africa, the position of Africa in adhering to the rule of law will be fairly reflected. The reputation of the UK and the US with regard to adherence with the rule of law and the history of the military government in Turkey should fairly represent a global picture of the prevalence of the rule of law.

The third part of this lecture explores the significance of constitutionalisation of the rule of law and the fourth part recommends measures that could be employed to improve the prevalence of the rule of law in modern democracies.

2 The rule of law

¹ Tamahana (2012), p. 232.

² Mangu (2005), p. 315 points out that Africa is widely acclaimed in the Western media and literature as a continent of virtually unrelieved tyranny, dictatorship, economic bankruptcy, incompetence and violence.

³ Tamahana (2012), p. 236 argues that the United States is generally thought to be a country where the rule of law prevails and it scores relatively well on the rule of law index.

There is no fixed content for the principle of the rule of law.⁴ Thus, Rosenfeld argues that the rule of law may mean different things to various legal traditions.⁵ However, the basic principle of the rule of law, as expounded by Dicey, entails that, firstly, public power should be exercised in terms of authority sourced from the law; secondly, the law must be applied equally to all persons, since everyone is equal before the law and thirdly, courts are responsible for enforcing the law in a manner that protects the basic rights of all.⁶ Thus, the rule of law entails the absolute supremacy of the law; it means the equal subjection of all people, regardless of their class and social standing, to the law and the administration of law by the ordinary courts.⁷ Rosenfeld further points out that the rule of law is contrasted with the “rule of men”, which connotes unrestrained and arbitrary rule by an unpredictable ruler.⁸ The “rule of men” prevails in regimes where the ruler can change the law unilaterally and arbitrarily, or even ignore the law and remain above the law.⁹ Under the “rule of men”, rulers rule by law, they exercise their powers through the law, but the law does not regulate them.¹⁰

Contrary to the rule of men, the core principle of the rule of law is “that all persons and authorities within the state should be bound by and entitled to the benefit of laws publicly promulgated and administered in the courts”.¹¹ The formal element of the rule of law, which requires public authorities to adhere to the prescript of the law, is open to abuse by public authorities. Hence, authoritarian states and dictators may claim that the rule of law prevails if there is adherence to the procedural requirements of the law, regardless of the nature of the law itself. Ellis correctly argues that the formal definition of the rule of law “provides no guidance to the regimes that establish clear legal rules yet commit egregious human rights violations and flout international obligations”.¹² Rosenfeld further points out that the rule of law in a narrow sense need not be just or even democratic, as it is entirely compatible with legal regimes predicated on slavery, apartheid or other oppressive and dehumanising practices and policies.¹³ Accordingly,

⁴ Donoghue (2008), p. 22.

⁵ Rosenfeld (2001), p. 1309.

⁶ De Vos and Freedman (2014), p. 78.

⁷ Prince (2000), p. 359.

⁸ Rosenfeld (2001), p. 1313.

⁹ *Ibid.*

¹⁰ O’Donoghue (2014, p. 22).

¹¹ Lord Bingham (2007), p. 69.

¹² Ellis (2010), p. 13 14.

¹³ Rosenfeld (2001), p. 13 14.

authoritarians can oppress in the name of order and control.¹⁴ Thus, states could repress and persecute their people as long the repression and persecution was sanctioned by legislation.¹⁵

The rule of law that lacks content on democratic accountability and substantive grounding would not measure up to legitimate democracy.¹⁶ Elaborating on the substantive requirements of the rule of law, former Chief Justice Chaskalson stated that the apartheid government was accountable in accordance with the laws; the laws were publicised and upheld by law enforcement officials and judges but the substantive component of the rule of law was missing; the process by which the laws were made was not fair; the laws themselves were not fair; and the institutionalised discrimination vested broad discretionary powers in the executive and failed to protect fundamental rights.¹⁷

In its broader sense, the rule of law entails that public authorities should not exercise their powers arbitrarily, otherwise such arbitrary exercise of powers may amount to anarchy. Endicote points out that government would be arbitrary if it gave effect to the unconstrained will of the rulers, as in absolute dictatorship, if it did not treat people consistently and if it were unpredictable, such that its citizens were not informed on where they stood and what their rights were.¹⁸ The substantive elements of the rule of law include adequate protection of human rights and compliance by the state with its obligations under international law.¹⁹

The rule of law is not static. Thus, it has developed from the Diceyan era to include the substantive elements that require the protection of human rights and the protection of those affected by the operation of the law. Hence, Selznick points out that the thicker vision of the rule of law speaks to more than abuse of power; rather it should address values that can be realised and not merely protected within the system that include respect for the dignity and moral equality of persons and groups.²⁰ Thus, in 1961, the

¹⁴ Henderson (1991), p. 382 explains authoritarianism as meaning unquestioning obedience to authority, blind obedience or obedience to traditionally constituted authorities out of attitude or acceptance. It has at least two different meanings: one simply of unquestioning obedience to the authority, and one of obedience combined with the use of authority to repress, punish and oppress human beings.

¹⁵ Lord Bingham (2007), p. 75.

¹⁶ Rosenfeld (2001), p. 13 14.

¹⁷ Ellis (2010), p. 194.

¹⁸ Endcote (1999), p. 3.

¹⁹ Ellis (2010), p. 195.

²⁰ Selznick (2005), p. 32.

International Commission of Jurists supported the evolution of the rule of law when it stated that the rule of law is a dynamic concept, which could be developed to safeguard the political rights of the individual and to establish socioeconomic conditions under which the individual may attain their dignity.²¹ In various jurisdictions the rule of law has developed to provide for the peaceful settlement of disputes.²² The varying development of the rule of law in different places merely displays levels of varying depth and thickness of the rule of law, but does not change its core ideal which pertains to the set of safeguards against the abuse of power.

3 Constitutionalisation of the rule of law

Constitutionalisation entails the subjection of all government actions to the structure, processes and values of the constitution.²³ Accordingly, the constitutionalisation of a value or principle should make it dominant and prevalent in a particular democracy. In this process, the state strengthens its intentions and aspirations regarding the prevalence and protection of the constitutionalised value or principle. Thus, constitutionalisation of the rule of law entails that it is no longer an ideal but has been incorporated into the constitution. Constitutionalisation demands that the rule of law should be accorded high priority. Loughlin further points out that constitutionalisation aims at ensuring that public power is exercised in accordance with the canons of rationality and proportionality and by means that involve the least instructive interference with the enjoyment of the individual's basic rights.²⁴ The question then arises as to whether the state's practice in constitutionalising the rule of law manifests in its stronger protection. In responding to this question, the prevalence or non-prevalence of the rule of law in modern democracies is explored.

4 Application of the rule of law in selected jurisdictions

4.1 Britain

Although, traditionally, the British constitution is unwritten, the principle of the rule of law is an integral part of this constitution. Hence, Lord Bingham points out that the rule of law constituted the characteristic of constitutionalism long before it was incorporated

²¹ De Vos and Freedman (2014, p. 79).

²² Selznick (2005), p. 32.

²³ Loughlin (2010), p. 47.

²⁴ Ibid. at 62.

in the UK statutes.²⁵ Lately, Britain has explicitly enshrined the rule of law in its statutes.

Despite the enshrinement of the rule of law in the British constitution, case law demonstrates that Britain flouts the rule of law in various ways. In the 2005 judgment in *Hirst v United Kingdom*,²⁶ the European Court of Human Rights found that the United Kingdom Representation of the People Act,²⁷ which provided for a blanket ban on prisoners being allowed to vote during elections violated the prisoners' human rights and was thus illegal.²⁸ However, Britain, refused to enforce the ruling. Only 12 years later did Britain undertake to partially implement the court judgment by allowing prisoners on temporary release and at home under curfew only the right to vote.²⁹ The role of the judges as independent arbiters and interpreters of the law is an integral part of the of the rule of law. Therefore, failure to enforce the court's decisions compromises judicial independence and offends the rule of law.³⁰

In the Supreme Court case of *R v Lord Chancellor*,³¹ the court found that the Employment Tribunals and Employment Appeal Tribunals Fees Order,³² which introduced the payment of fees in respect of any claim presented to an employment tribunal was contrary to the enshrined constitutional rights of access to justice or access to the courts.³³ It thus had the effect of preventing people from bringing claims, and therefore offended the right of individuals to access courts.³⁴

In the Supreme Court judgment of *Alson Young: R Evans v Attorney General*,³⁵ acting in terms of the Freedom of Information Act,³⁶ which entitled a member of the executive

²⁵ Lord Bingham (2008), p. 223 states that the predominant characteristics of the constitutionalism of the United Kingdom includes commitment to the rule of law and recognition of the Queen in parliament as the supreme law-making authority of the country.

²⁶ *Hirst v United Kingdom* (2005), p. 681.

²⁷ S 3(1) of the United Kingdom Representation of People Act, 1983, provides that a convicted person during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any parliamentary or local government election.

²⁸ Art 3 of the European Convention on Human Rights provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

²⁹ Bowcott (2017).

³⁰ Hoexter (2007), p. 131.

³¹ *R v Lord Chancellor* (2017), par. 51.

³² S 3 of the Employment Tribunals and Employment Appeal Tribunals Fees Order 2013.

³³ *R v Lord Chancellor* (2017), par. 91

³⁴ *R v Lord Chancellor* (2017), par 91.

³⁵ *Alson Young: R Evans v Attorney-General* (2015), par. 21.

³⁶ Freedom of Information Act 2000.

to overrule a decision of the judiciary merely because he or she did not agree with it, The Attorney-General had issued a certificate overturning the decision of the High Court that ordered the release of communications between Prince Charles and government ministers. The court held that allowing the executive to overturn decisions of the court would be contrary to the basic principle that a decision of a court is binding and cannot be ignored or set aside by anyone including the executive.³⁷ Thus, the conduct of the executive in overturning the decisions of a court places the executive above the law and offends the rule of law.

4.2 United States of America

Article VI of the constitution of the United States of America declares the constitution as the supreme law of the country. Accordingly, the supremacy of the constitution clause is the extension of the rule of law. The US has a history of struggle for equality and equal protection by the law. The struggles against racism and inequality are evident from the conflicts between labour and capital that occurred during the nineteenth and twentieth centuries and the civil rights movements of the 1960s that strived for equality for all.³⁸ Hence, the US Supreme Court was occupied by disputes involving racial discrimination in violation of the Equal Protection clause of the Fourteenth Amendment to the constitution.³⁹ Despite the court having declared racial discrimination in the public sector unconstitutional in the *Brown v Board of Education* case, other states and school governing bodies opposed desegregation in favour of segregation.⁴⁰ Unlawful discrimination based on racial segregation is still rooted in the US. Recently, contrary to the provisions of the Fair Housing Act that prohibits discrimination based on race, colour and related grounds, it is reported that in the major urban centres minorities are still excluded by discriminatory segregatory housing

³⁷ *Alson Young: R Evans v Attorney-General* (2015), par 91.

³⁸ Selznick (2005), p. 33.

³⁹ In the Supreme Court case of *Batson v Kentucky* (1986), the accused who was tried and convicted for burglary and receipt of stolen goods challenged the exercise of peremptory power by the prosecutor who removed all African Americans from the jury pool. The court ruled that the use of peremptory power by the prosecutor to remove a jury from the jury pool based on race violated the equal protection clause of the constitution.

⁴⁰ In the Supreme Court judgment of *Brown v Board of Education* (1954), the court declared racial segregation in public schools unconstitutional and ordered that they be desegregated. Despite the court order, however, the governor of Arkansas blocked African American students from attending segregated schools and the school board of Little Rock School approached the court for an order postponing the desegregation plan in public schools. In *Cooper v Aaron* (1958), the Supreme Court ruled that it was unconstitutional to deprive black students of their equal rights under the law.

practices from accessing the housing sector.⁴¹ Moreover, the recent attack on the judiciary by the head of state, President Trump, threatens the existence of the rule of law in the US. After the federal judge had suspended operation of the executive order barring seven Muslim majority countries from entering the US, Mr Trump is reported to have displayed disquiet regarding the powers of US judges to halt a security travel ban law.⁴² He even referred to the US courts as “a joke” and blamed them for the continued terrorist attacks on the US.⁴³ The lawfulness of the blanket ban on people from Muslim majority countries entering the US is currently still being contested before the US Supreme Court.⁴⁴ The recent attitude of President Trump towards the judiciary is likely to threaten the rule of law in the US.

4.3 Turkey

The rule of law forms an integral part of Turkish democracy. The Turkish constitutions have enshrined the principle of the rule of law.⁴⁵ However, since the 1960s, Turkey’s history has been characterised by military governments. The military has during this period staged four coup d’états forcing political leaders to resign.⁴⁶ MacLaren and Cop further point out that the army continues to influence the formation of government. In response to the possibility of a member of the opposition taking control of the Turkish presidency, the Chief of General Staff of the army threatened military intervention.⁴⁷ Military intervention by its nature offends the rule of law because, most coup d’états are either staged against a democratically elected government or they result in a dictatorship – not in free and fair elections.⁴⁸ As late as 15 July 2016, a coup attempt took place in Turkey.⁴⁹ Turkey’s disregard for the rule of law resulted in the International Judges Associations and American Bar Association admonishing Turkey to abide by the international and European Union standards regarding the rule of law because its actions threatened the core of judicial independence.⁵⁰

⁴¹ Pegan and I Lyrio (2015).

⁴² Martha (2018).

⁴³ Martha (2018).

⁴⁴ Hurley (2018).

⁴⁵ Art 2 of the Constitution of the Republic of Turkey, 1982, and Art 2 of the Constitution of the Republic of Turkey, 2012, provide that the Republic of Turkey is a democratic state governed by the rule of law.

⁴⁶ Varol (2013); Mc Laren and Cop (2013), p. 494 point out that in 1960 the military staged a coup and in 1971 and 1997 interventions by the military forced a change of government.

⁴⁷ Mc Laren and Cop (2013), p. 494.

⁴⁸ Varol (2012), p.295.

⁴⁹ Zeller (2017), p. 1.

⁵⁰ Zeller (2017), p. 7.

Contrary to the assumption that Europe and North America are communities where the rule of law prevails, the case study shows that full compliance with the rule of law remains a global challenge.

4.4 Egypt

The 1971 constitution of Egypt promised the sovereignty of the law for the freedom of individuals and for the sole basis of the legality of authority.⁵¹ Subsequent constitutions further provide that the Egyptian political system be based on the principles of the rule of law as well as respect for human rights and freedoms.⁵² Moustafa argues that despite the enshrinement of the rule of law, the prevalence of corruption and abuse of government power evoked the January 2011 revolution that forced a change in President Mubarak's government in Egypt.⁵³ The absence of the rule of law included distortion of the constitution, non-enforcement of judicial decisions and a prolonged state of emergency.⁵⁴ According to the International Bar Association, states of emergency have become the norm in that Egypt has ruled under a state of emergency for more than fifty years.⁵⁵ The Egyptian government have used the state of emergency to stifle academic freedom, with a pervasive police presence on university campuses and the intimidation of students using scare tactics.⁵⁶ The civilians are subjected to the jurisdiction of the military courts, although there are no guarantees of judicial independence in these courts.⁵⁷

4.5 Nigeria

In Nigeria, the constitution is the supreme law of the country.⁵⁸ Like Turkey in Europe, Nigeria has a history of military rule through series of at least four coup d'états between

⁵¹ Preamble to the Constitution of Arab-republic of Egypt 1971

⁵² Art 6 of the constitution of Arab-Republic of Egypt, 2012. The rule of law is further enshrined in the Constitution of Arab Republic of Egypt, 2014 respectively provides that the political system of Egypt is based on the principles of democracy, the peaceful transfer of powers and the rule of law as well as respect for human rights and freedoms..

⁵³ Moustafa (2011), p. 182 states that prior to the January 2011 revolt Egypt was characterised by widespread corruption, police brutality, and unaccountable government.

⁵⁴ Eldakak (2012), p. 264.

⁵⁵ International Bar Association (2011), p. 14.

⁵⁶ Human Rights Watch (2005), p. 23

⁵⁷ International Bar Association (2011), p. 15.

⁵⁸ S 1(1) of the Constitution of the Federal Republic of Nigeria of 1999.

1966 and 1996.⁵⁹ Disregard for the rule of law is further manifested in the failure of the executive to abide by court decisions. In the case of *Attorney-General of Lagos State v Attorney-General of the Federation*,⁶⁰ Contrary to the provisions of the constitution of Nigeria that requires the federal government to pay allocations for local government into the state's accounts.⁶¹, the president of the federal government directed the minister of finance not to release statutory allocations from the federal account. The Supreme Court ruled that the president had violated the constitution by withholding allocation of funds to Lagos state. Despite the Supreme Court ordering the federal government to pay the allocations due to Lagos state the federal government refused to comply and neglected the court order.⁶²

Flagrant disregard for the rule of law is further evident from the abuse of powers by the law enforcement agencies. In the judgment of the *Attorney-General of the Federation v G.O.K. Ajayi*,⁶³ an officer of the state security services seized Ajayi's passport at the airport, preventing him from attending a conference of the International Bar Association in Scotland. The court ruled that the seizure of Ajayi's passport was unlawful and amounted to the violation of fundamental rights.

Furthermore, Nigeria's police force is reported to be the nation's most corrupt public institution.⁶⁴ According to Okekeocha, corruption involving Nigerian police is evidenced by conviction and sentence of the Inspector-General of police on charges of theft involving more than 100 million dollars of public money.⁶⁵ Academics further decry the illegal arrests, detentions and trials, banning of trade unions and harassment of civil rights campaigners, and the extra-judicial killings that are prevalent in Nigeria.⁶⁶ For these reasons, Okekeocha concludes that Nigeria has degenerated into a lawless society.⁶⁷ The high level of corruption, pointing out that the Nigerian government is

⁵⁹ Okekeocha (2013), p. 5.

⁶⁰ *Attorney-General of Lagos State v Attorney-General of the Federation* S.C. 70/2004.

⁶¹ S 162(5) of the Constitution of the Federal Republic of Nigeria provides that each state is required to maintain a special account called a "state joint local government account" into which shall be paid all allocations to the local government council of the state from the federal account.

⁶² John (2011), p. 213.

⁶³ *Attorney-General v G.O.K. Ajayi* (2000), p. 509.

⁶⁴ Okekeocha (2013), p. 22.

⁶⁵ Okekeocha (2013), p. 22.

⁶⁶ John (2011), p. 213. This view is reinforced by Dada (2012, p. 69), who points out that extrajudicial killings, unjustifiable torture of detainees by security agents and curtailment of freedoms are still witnessed in Nigeria.

⁶⁷ Okekeocha (2013), p. 22.

characterised by an acute disregard for and undermining of the basic fundamental rights.⁶⁸

4.6 Kenya

In Kenya, the constitution is the supreme law that binds all persons and state organs in that country.⁶⁹ The Republic of Kenya is founded on the national values and principles of governance, which among others include good governance, integrity, transparency and accountability.⁷⁰ Despite the enshrinement of good governance and accountability in the constitution, the study of court cases demonstrates that the government of Kenya undermines these constitutional values and flouts the rule of law. In the High Court case of *Centre for Rights Education and Awareness and 7 Others v Attorney-General and Others*,⁷¹ the Supreme Court ruled that the president of Kenya's conduct in appointing only men to the positions of the Chief Justice, Attorney-General, Director of Public Prosecutions and the Controller of Budget thus excluding women, were gender insensitive, discriminatory against women, violated the constitution of Kenya and therefore unlawful.⁷²

In the judgment of *Raila Amolo Odinga v Independent Electoral and Boundaries Commission*,⁷³ the Supreme Court found that the Independent Electoral Commission had failed, neglected or refused to conduct the 2017 presidential elections in a manner consistent with the dictates of the constitution and the law.⁷⁴ Consequently, the court declared the election of President Kenyatta unlawful and ordered a re-run of the presidential elections.

Apart from the court case studies, police brutality is reported to be one of the mechanisms used by government in violating the rule of law. Auro-Odhiambo points out that the police fired live ammunition, killing at least six people and wounding sixty others who were participating in the largely peaceful protests on 23 May and 6 June

⁶⁸ Dada (2012), p. 69.

⁶⁹ S 2 of the Constitution of Kenya, 2010.

⁷⁰ S 4(2) and 10(1)–(2) (C) of the constitution of Kenya, 2010.

⁷¹ *Centre for Rights Education, Awareness, 7 Others v Attorney-General, and Others* [2011] ECLR.

⁷² S 27(1) and (3) of the constitution of Kenya provides that every person is equal before the law and has the right to equal protection and equal benefit of the law; women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

⁷³ *Raila Amolo Odinga v Independent Electoral and Boundaries Commission and 2 Others* [2017] ECLR

⁷⁴ *Ibid.* at par 2.

2016 in the Nyanza region of Western Kenya.⁷⁵ The involvement of police in acts of violence and flouting the rule of law in Kenya is reinforced by Akech, who points out that during the months preceding the 2007 general elections, senior police officers trained a large number of juniors for the purposes of equipping them to act as agents for the ruling party, to disrupt polling and to ensure that government support prevailed.⁷⁶

4.7 South Africa

Supremacy of the Constitution and the rule of law are two of the founding values of South African democracy.⁷⁷ The Constitution further establishes a multilevel government comprising national, provincial and local governments.⁷⁸ All three spheres have original powers that are not only allocated to them, but also protected by the Constitution.⁷⁹

The Constitution further establishes the constitutional principles of cooperative government that instructs all spheres to respect the constitutional status and powers of government in the other spheres, and to exercise their powers in a manner that does not encroach on the functional competence of government in another sphere.⁸⁰ Despite the explicit directives of the Constitution to the spheres to respect each other's autonomy, the provincial government sphere does intrude on the autonomy of the local sphere of government by intervening in, taking over and assuming responsibilities regarding local government;⁸¹ launching investigations for partisan reasons in local

⁷⁵ Auro-Odhiambo in Ambani et al (2007), p. 376.

⁷⁶ Akech (2011), p. 345.

⁷⁷ S 1(a) of the Constitution of South Africa provides that the Republic of South Africa is one sovereign democratic state founded on the values of supremacy of the Constitution and the rule of law.

⁷⁸ S 40(1) of the Constitution provides that in the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

⁷⁹ Schedules 4 and 5 of the Constitution allocates powers to spheres of government.

⁸⁰ Section 41 (1) (e) and (g) of the Constitution

⁸¹ In *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo* (2014), the High court set aside the intervention by Limpopo provincial government in Mogalakwena Municipality.

government,⁸² and dissolving the municipal councils of municipalities.⁸³ Based on the principle of legality, that is, the incidence of the rule of law, courts have reviewed and set aside provincial government encroachment on the functional competence of local government. In this regard, the courts protect the constitutional integrity of the lower spheres of government that have become vulnerable in the hands of the upper spheres.

Further, the executive undermines the rule of law by abusing their powers and taking part in corruption. In an incident reminiscent of apartheid-era South Africa, where police shot dead 83 black people and wounded 365 who were protesting peacefully against pass laws at Sharpeville and Langa in 21 March 1961,⁸⁴ police were recently found to blame for the killing of some of the 44 people and the injuring of more than 70 during a workers' strike at Lonmin Mine in Marikana in 2012. These mineworkers were striking for improved living conditions and salary increases. The commission of inquiry that investigated the tragic incident found that many of the killings were the results of blameworthy conduct on the part of the police;⁸⁵ that some of the members of the police who fired at the strikers exceeded the bounds of self and private defence,⁸⁶ and that the decision to use more force was an illegal decision.⁸⁷

Violation of human rights further manifested in the Esidimeni incident where the Gauteng Department of Health terminated its contract with Life Esidimeni Health Care Centre, which had been taking care of chronic mentally ill patients on behalf of the Department. Subsequent to the termination of the contract, an estimated 1371 mentally ill patients were rapidly transferred from Esidimeni to hospitals and non-governmental organisations (NGOs). The Health Ombudsman subsequently found that a total of 94 mentally ill patients died between 23 March and 19 December 2016;

⁸² in the High Court judgments of *City of Cape Town v Premier of the Western Cape* 2008 (6) SA 345 (C) and *Democratic Alliance v Minister of Local Government Western Cape* (2005) (3) SA 576 (C) the courts declared unlawful and set aside investigations instated by provincial governments in municipalities for ulterior purposes.

⁸³ *Mnquma Local Municipality v Premier of the Eastern Cape* (2009) and *Premier of the Western Cape v Overberg District Municipality* (2011) the Court declared unlawful and set aside dissolution of the municipal councils by provincial governments.

⁸⁴ Dube (1981).

⁸⁵ Marikina Commission (2012), par.11

⁸⁶ Marikina Commission (2012), par. 151.

⁸⁷ Marikina Commission (2012), par. 21.

the decision to transfer the patients was flawed with inadequate planning; the transfer was done chaotically, in an environment with no culture of primary mental health care and no basic services or infrastructure. The existing unsuitable conditions in these NGOs were closely linked to the death of the patients and the decision to transfer them was negligent, and a violation of the rights of the mentally ill.⁸⁸

Like Nigeria and Kenya, high-ranking police officers in South Africa who are tasked with law enforcement are responsible for corruption and flagrant disregard of the law. In 2012, the National Commissioner of the South African Police Service (SAPS), Jackie Selebi, was convicted and sentenced to 15 years imprisonment for corruption.⁸⁹ Finally, a commission of inquiry was appointed to investigate complaints about state capture and the capture of government officials, where it is alleged that the Gupta family was involved in the appointment and removal of ministers and directors of state-owned enterprises. This resulted in improper and possibly corrupt awarding of state contracts and benefits to the Gupta family's business.⁹⁰

In light of the preceding discussion and despite the constitutionalisation of the rule of law, military governments, prolonged states of emergency, police brutality, the undermining of intergovernmental constitutional boundaries, corruption and the violation of human rights demonstrate that adherence to the rule of law is still a mammoth challenge in Africa.

5 Significance of the constitutionalisation of the rule of law

It is evident from the case studies discussed above that despite constitutionalisation, full compliance with the rule of law is an unobtainable standard. None of the countries examined in this paper complies with or fully preserves the rule of law. The question then arises as to why states constitutionalise the rule of law. Sweet argues that in constitutionalising conventions and values politicians may wish to constrain other parties when the latter come to power or politicians may be responding to societal demands for enhanced protection of rights and values.⁹¹ The rationale for

⁸⁸ Makgoba (2017).

⁸⁹ *S v Selebi* 2012 (1) SA 487 (SCA).

⁹⁰ Staff reporter (2018).

⁹¹ Sweet (2009), p. 10.

constitutionalising values to respond to societal demand is supported by Govender, who argues that the enshrinement of the Bill of Rights in the South African Constitution demands that government act to deliver the nation from South Africa's inegalitarian past by progressively realising the socioeconomic rights that will ultimately free the potential of all.⁹² Accordingly, given that the rule by law was prevalent in the South African apartheid regime, the enshrinement of the rule of law, arguably, responds to societal demands for the rule of law to be supreme in the new democratic dispensation. However, the enshrinement of a value in the Constitution for the purposes of responding to societal demand without the political will to uphold such a value might be a mere gesture. Furthermore, the constitutionalisation of values and principles for the purposes of constraining other parties when they come to power is evident in the adoption of the first and second constitutions of the new democratic South Africa. The Constitution of the Republic of South Africa, 1993 (the interim constitution) was drafted by parties in the apartheid parliament, liberation movements and other political parties. The interim constitution contained Constitutional Principles that were required to be incorporated in the final constitution.⁹³ The Constitution of the Republic of South Africa, 1996 (the final constitution), was drafted by the first democratic parliament working as the Constitutional Assembly. The final Constitution was required to be certified by the Constitutional Court that it complied with the Constitutional Principles before it could come into effect.⁹⁴ Accordingly, the incorporation of the Constitutional Principles in the interim constitution had the effect of constraining the new parliament in drafting the final Constitution. It should be recognised that parties that come to power may not even share the values that were constitutionalised by the previous government. Consequently, these values would be a mere gesture with no practical influence.

The significance of constitutionalisation may be manifested in the UK, the US, and other African countries where courts have reviewed and set aside government actions that were found wanting and violated the rule of law. However, the doctrine of the rule of law does not require that it be enshrined in the constitution in order to gain legal

⁹² Govender (2013), p. 84.

⁹³ Schedule 4 of the Constitution of The republic of South Africa, 1996, contained the Constitutional Principles that would bind the drafters of the final constitution to ensure that the constitution complied with these principles.

⁹⁴ In the Certification of the Constitution of the Republic of South Africa, 1996, par.1, the Constitutional Court held that it was required to pronounce whether or not all the provisions of the South Africa's new Constitution complied with certain principles contained in the current interim constitution.

status, as it is a well-grounded and enforceable doctrine even when a constitution or legislation is silent on it. The principle of legality, which is an incident of the rule of law, was always a common law ground for review of government action.⁹⁵ At a minimum, significant constitutionalisation of the rule of law can be attributed to the radical judicial review of government actions in the UK, the US, and other African countries. However, the attitude of the executive has not changed with regard to respect for the rule of law. The prevalence of military governments, prolonged states of emergency, corruption and extrajudicial killings, despite the constitutionalisation of the rule of law in other countries, negate any effect of the constitutionalisation.

Some of the reasons for failure of the rule of law in modern states are, firstly, that there are those states that totally disregard the rule of law and apply the rule of men. States that are characterised by coup d'états such as Turkey in Europe and Nigeria in Africa can hardly preserve the rule of law side by side with undemocratic military governments. Similarly, the rule of law cannot prevail in regimes where the government leaders once elected to government, turn to dictatorship.

Secondly, some states are characterised by nominal constitutions that are merely organisational. Minimal constitutions are collection of rules, which organise but do not restrain the exercise of political power.⁹⁶ Arguably, Turkey's government fits squarely into these kind of states, where the army controls civilian government in such a manner that the chief of the army threatens military intervention in the event that opposition parties takes over government by democratic means.⁹⁷ Thus, the constitutionalisation of the rule of law in Turkey does not have the effect of restraining government powers.

Thirdly, other countries are characterised by fake constitutions that have the appearance of true constitutions, but are disregarded in that they are dead on the techniques of liberty and fundamental rights.⁹⁸ These constitutions are fake in that they have all the requirements of a constitution that restrains government powers, but are not applied.⁹⁹ Thus, instances of police brutality in Kenya and excessive use of force

⁹⁵ Hoexter (2007), p. 116 states that in the pre-democratic South African era the principle of legality – the idea that administrators and other public actors had to act lawfully – was inferred from what it had been held that administrators must not do. This clearly shows that the rule of law was a common law ground of review before the principle was incorporated in the constitutions of modern states.

⁹⁶ Sartori (2005).

⁹⁷ McLaren (2013), p. 494.

⁹⁸ Sartori (2005), p. 861.

⁹⁹ Sartori (2005), p. 861.

in South Africa may be indicative of the executive undermining or not fully upholding the rule of law. However, the Kenyan and South African constitutions cannot be described as dead since the judiciary is active in reviewing the executive action and the executive itself appoints commissions of enquiry and other institutions like the Public Protector and the Health Ombudsman are investigating and pronouncing on the lawfulness of the actions of government officials.¹⁰⁰

Arising from the conclusion that full compliance with the rule of law is not achievable, Some academics argue that the rule of law may not be necessarily desirable in all democracies, more particularly in a close-knit homogeneous society which is deeply religious and ruled by leaders who are believed to have direct access to divine commands.¹⁰¹ It is further argued that in a theocracy as opposed to a constitutional democracy, instructions imparted by religious leaders would be paramount and leave no room for the rule of law.¹⁰² Saint Paul seems to reinforce this view where he states that in the Christian religion, true Christians have been released from the law, so that they serve in the new way of the Holy Spirit and not in the old way of the written code.¹⁰³ Scholars of theology raise questions as to whether Paul meant that the law has no role in the lives of believers.¹⁰⁴ However, Paul qualifies his statement where he further clarifies that the law is good if one uses it lawfully.¹⁰⁵ Adeyemi explains that lawful use of the law means that the law was given for the aggressors.¹⁰⁶ Accordingly, despite the unreachable standard of fully complying with the rule of law, the rule of law is an essential pillar of any democratic state. Therefore, modern states should adopt measures to improve and maximise the prevalence of the rule of law.

6 Constitution as social contract

The implication of democracy is that the state should not only observe the constitution, but also fully comply with all the provisions of the constitution.¹⁰⁷ The application of the

¹⁰⁰ The report of the Public Protector that gave rise to the removal of the SAPS Commissioner for undermining the law. The report of the Health Ombudsman on the death of mentally ill patients who were unlawfully transferred to NGOs with appalling conditions is also discussed above.

¹⁰¹ Rosenfeld (2001), p. 1310.

¹⁰² Ibid.

¹⁰³ Romans 7:6 (New International Version)

¹⁰⁴ Adeyemi (2007), p. 57

¹⁰⁵ 1 Timothy 1:8 (New International Version)

¹⁰⁶ Adeyemi (2007), p. 57.

¹⁰⁷ Malherbe and Van Eck (2009), p.209 explained that in a constitutional democracy the state is required to comply meticulously with every constitutional obligation imposed on it.

provisions of the constitution largely depends on personal orientation.¹⁰⁸ If the state officials view the constitution as binding on the citizenry, but not binding on the state, then the state would not respect the constitution. However, if the state officials were oriented to upholding the constitution, they would respect the limitations placed on government by the constitution because they would accept that it does not only bind the citizenry, but also binds the government itself.¹⁰⁹ The state may comply with the provisions of the constitution on the basis of the social contract doctrine, in terms of which the constitution reflects an agreement between the state and the citizens. Thus, both the state and citizens will comply with the obligations and limitations imposed by the constitution on each other.¹¹⁰ The social contract theory thus demonstrates the importance of citizens' participation and the legitimacy of the constitution. The constitution is legitimate if it creates the command that both government and citizens have a moral duty to obey and be constrained by the constitution.¹¹¹ Accordingly, both government's and citizens' orientation to the constitution as social contract would make the values in the constitution dominant and promote respect for the constitution.

7 Independent judiciary

The independence of the judiciary is essential for the preservation of the rule of law in a democratic state. A court operating under the control of the executive may not rule and protect individuals from flagrant disrespect of law by government. Carlin correctly argues that "in democracies, the judiciary protects the constitution from the tyranny of the majority by reviewing the laws and decrees passed by elected agents".¹¹² Judicial independence enables a judge to make decisions without undue influence from

¹⁰⁸ Van Heerden (2009), p. 50 argues that the application of authority depends on the personal orientation of the government officials.

¹⁰⁹ Barnett (2003), p. 115 points out that the constitution does not purport to bind the citizenry, rather it binds the government.

¹¹⁰ Malherbe and Van Eck (2009), p. 213 points out that based on social contract doctrine, it may be argued that in a democracy the state's authority originates from the people it governs, as the people confer on the state the authority to govern. Thomas Hobbes' theory has been modified to accommodate people creating government by agreeing to sovereignty, but not negotiating away their natural rights. John Locke modified Thomas Hobbes' social contract by insisting that although people create government by agreeing to a sovereign, people cannot negotiate away their natural rights and government is obligated to protect people's rights. Hence, Allen argues that Locke's social contract entails that the state must protect the physical integrity of individuals as people's contract for mutual reciprocal protection of their rights; Lermack correctly argues that Locke's theory allowed the evolution of the social contract to become associated with rights, and limits on government

¹¹¹ Barnett (2003), p. 116.

¹¹² Carlin (2012), p. 155

internal and external actors.¹¹³ An independent judge exercises his/her powers independent of interference from other branches of government and from other judges. Arguably, South African and Kenyan judges have demonstrated the value of the courts in preserving the rule of law. The Kenyan Supreme Court has reviewed and set aside the election of the country's president that was conducted contrary to the prescripts of the law.¹¹⁴ Likewise, the South African Constitutional Court has declared the conduct of the President of the Republic inconsistent with the Constitution and ordered the president to pay back to government the amount of money that was unlawfully used for upgrading the President's private residence.¹¹⁵ Accordingly, the preservation of judicial independence would strengthen the dominance and respect for the rule of law.

8 The role of the African value of Ubuntu

Arowolo argues that colonisation of Africa introduced Western culture into the African socio-cultural milieu.¹¹⁶ With Africa subdued by the European, the African ways of doing things became primitive.¹¹⁷ After Africa regained her identity, the need arose for Africa to revive some of her values including the African philosophy of Ubuntu.¹¹⁸ Revitalisation of African values does not demand that Africa should go back completely to its pre-colonial starting point, but there may be a case for reviving indigenous values such as the elements of Ubuntu.¹¹⁹

Some academics have criticised the notion of Ubuntu for being vague and inappropriate for constitutional democracy because of its traditional origin. However, Metz correctly points out that the notion of Ubuntu is not static, it can be refashioned

¹¹³ Siyo and Mubangizi (2015), p. 818

¹¹⁴ See the Kenyan Supreme Court judgment of *Raila Amolo Odinga v Independent Electoral and Boundaries Commission and 2 Others*(2017).

¹¹⁵ In the Constitutional Court judgment of *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly 2016* (3) SA 580 (CC), a complaint was lodged with the Public Protector concerning aspects of the security upgrades that were being effected at the President's private resident. The Public Protector found that several improvements made at the president resident were non-security features and directed the President to pay apportion proportionate to the undue benefit that had accrued to him and his family. The Constitutional Court found that the President violated the constitution by ignoring the findings of the Public Protector and ordered the president to pay back the money unlawfully used for non-security upgrades in his home.

¹¹⁶ Arowolo (2010), p. 2.

¹¹⁷ Arowolo (2010), p. 21.

¹¹⁸ Metz (2011), p. 533 points out that former president of South Africa, Mr Mbeki called for the invocation of Ubuntu to African leaders

¹¹⁹ Mokgoro (1997), p. 3.

in the light of our best current understanding of what is morally correct.¹²⁰ Ubuntu is an African philosophy that is defined in terms of the proverb “Umuntu ngumuntu ngabantu” in the Southern African Nguni languages and “motho ke motho ba batho babangwe” in the Sesotho languages. Literally translated it means a person can only be a person through other person.¹²¹ Mokgoro defines Ubuntu as a philosophy of life that represents personhood, humanity, humanness and morality, a metaphor that describes the group solidarity that is central to the survival of communities with a scarcity of resources.¹²² The characteristics of Ubuntu are further defined as the potential to value the good of the community above self-interest, collective respect for human dignity and the striving to help people in the spirit of service.¹²³ Maswanganyi argues that the practical part of the philosophy of Ubuntu is seen in a willingness to carry another’s burden without necessarily putting profit or reward as the driving force.¹²⁴

The question then arises how relevant than is the philosophy of Ubuntu to the preservation of rule of law? In explaining the relationship between the philosophy of Ubuntu and human rights, Maswanganyi states that human rights values and human dignity need to be protected from arbitrary authority of tyranny and Ubuntu implies that human beings should be treated with dignity.¹²⁵ Mokgoro reinforces this view further where she argues that the founding values of democracy, that is, human dignity, the promotion of human rights and freedoms, accountability and the rule of law coincide with some key elements of Ubuntu such as human dignity itself.¹²⁶ If Africa revives Ubuntu, the extrajudicial killings, the taking over of governments by the military and corruption would be minimal on the continent.

9 Conclusion

Preservation of the rule of law remains a global challenge, albeit in different degrees and in kind. Disregard for court judgments, overruling of court decisions, attacks on

¹²⁰ Metz (2011), p. 530.

¹²¹ Idomboye- Obu Ayo Whetho (2013), p. 232 explain that the word Ubuntu is from Southern Africa Nguni speaking languages and its equivalent in Shona is Hunhu. Mokgoro (1997) at 2 adds the Sesotho proverb that gave birth to the word Ubuntu.

¹²² Mokgoro (1997), p. 2.

¹²³ Idomboye-Obu Ayo Whetho (2013), p.232.

¹²⁴ Maswanganyi (2012), p. 227.

¹²⁵ Maswanganyi (2012), p. 234.

¹²⁶ Mokgoro (1997), p 8.

the judiciary, the taking over of democratic governments by the military and corruption involving law enforcement and executives, demonstrate the attitude of modern states in constitutionalising the rule of law but having no consciousness of the output process. Furthermore, the undermining of the constitutional principles of cooperative government that restrain and regulate the intergovernmental exercise of powers; violation of the rights of mentally ill patients and allegations of state capture, arguably demonstrate the parochial political culture of constitutionalisation with no understanding of the consequences of the government system created by the constitution. Judicial independence without the political will to abide by and enforce court judgments negates any intent to preserve the rule of law and ultimately constitutionalisation becomes nothing other than a political culture. The rule of law is enshrined in the constitution and based on beliefs and feelings that it should be incorporated in line with the culture of embellishing the constitution with values. It has become a good practice; writing a constitution that is attractive on the face of it and which paints a picture of democratic state that abides by the rule of law.

While it should be recognised that in some countries constitutionalisation has promoted radical judicial review based on the rule of law, radical judicial review itself is fruitless if the executive does not abide by court judgments. Furthermore, constitutionalisation of the rule of law for reasons including responding to societal demand and restraining parties when they come to power, other than promoting the prevalence of the rule of law, does not contribute to the sustainability of the rule of law. States' failure to adhere to the rule of law therefore shows that constitutionalisation of the rule of law is symbolic in that it lacks substance; it merely creates legal order, but does not replace authoritative and arbitrary power. Thus, states remain authoritative despite such constitutionalisation. Accordingly, the conclusion can be drawn that the constitutionalisation of the rule of law is done by the drafters of the constitution for political reasons – to embellish the constitution and attract the public – but has little real effect. Thus, it does not have material consequences but is mere gesture politics.

Lastly, I wish to thank the Almighty God for this moment in my life, for all that the Lord has done and continues to do in my life

I thank the Acting –Vice Chancellor for welcoming our guests to this occasion

I am grateful to Professor EFJ Malherbe who was my both LLD supervisor and mentor

I am also grateful to the previous Executive Dean of the College of Law, Professor Songca, sitting in the audience for creating the environment that enabled me to unleash my potential in academic

I would also like to make special mention of my late wife Lindiwe- Makhoza. I owe a deep sense of appreciation to her for her love, support, patience, unselfishness, understanding and encouragement during trial periods

Many thanks go to my children, Fanele, Muzi and Sphelele who have always believe and stood by me

I also thank my family, pastors and the congregation- Evangelical Church

Finally, I would like to thank my colleagues at the University of South Africa, distinguished guests, friends and you the audience for your presence and attention.