

Constitutionalism and the Judiciary: A Perspective from Southern Africa

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Introduction

The countries in Southern Africa forming the Southern Africa Development Community (SADC)¹ include Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Madagascar, Mauritius, Mozambique, Namibia, South Africa, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe. They have a lot in common. Most of them were colonized by western powers before they attained self-rule. In recent times these countries adopted progressive and democratic constitutions during what has frequently been described as the third wave of democratization. However, for most of them attaining democratic dispensation and adopting democratic constitutions has proved to be the easier part. The most difficult part has been entrenching constitutionalism, sometimes giving a paradox of constitutions without constitutionalism.

There are fears that the democratic gains of the first decade of democratization are eroding at an alarming rate. The euphoria that accompanied the third wave of democratization is on the wane, and with it the prospects of entrenched constitutionalism. Constitutionalism in Southern Africa today leaves us with more questions than answers. How are these difficult questions going to be answered? Is it through a robust law reform agenda or through a strong and independent judiciary that plays a central role in constitutionalism? What about other role players; do they demonstrate a commitment to constitutionalism? This paper laments the apparent rise and fall of constitutionalism in Southern Africa and wonders what the prospects for the future are. The paper expresses the view that the judiciary has a central role to play in providing appropriate enforcement mechanisms for constitutionalism. Yet the ruling elite appear to be narrowing the scope of the role of the judiciary by the day. There appear to be deliberate attempts by the ruling elite to weaken and alienate the judiciary in the minds of society in so far as the running of government affairs is concerned.

Recently the operations of the SADC Tribunal were suspended by Summit, the political organ of SADC. The suspension of the SADC Tribunal, the judicial organ of the regional grouping, is quite telling. Among other things, it demonstrates how disregard for the rule of law at national level can manifest itself at the regional level through influential members of the regional grouping.

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¹ SADC has a membership of fifteen countries.

Nonetheless the paper recognizes that there remains a glimmer of hope when some countries like South Africa remain a shining example for the Southern Africa region, and beyond, regarding commitment to tenets of constitutionalism through support for a well-functioning and respected Constitutional Court. South Africa provides useful lessons on transformative constitutionalism which goes beyond discourse among constitutional experts and the elite, but cascades down to ordinary citizens especially through upholding of economic, social and cultural rights. South Africa appears to lead by example and to resist any bad influence from some influential members of the Southern Africa region of eroding the rule of law and decelerating the entrenchment of constitutionalism in the region.

The Constitution

A constitution of a country is the organic and fundamental law of the country or state, establishing the character and conception of its government and laying down the basic principles to which its internal life is to be conformed. As a set of rules governing a state and the supreme law upon which a state is founded, it embodies the rights of the people. All other laws of the country derive their validity from it. A country's constitution spells out how the functions of its different departments or organs are to be distributed and limited. A constitution is sometimes described as a mirror reflecting the national soul; the identification of the ideals and aspirations of a nation and the articulation of the values binding its people, while ensuring that government never oversteps its mandate as provided for in the constitution. A constitution must reflect the social and political development of a nation and must diminish friction in the political machinery. Thus a constitution is regarded as a living instrument capable of growth. The courts must breathe life into the constitution from time to time.

A state without a constitution is a failed state. I would suggest that a state whose constitution is undermined or not respected by the very people whom it binds is a failed state. A constitution represents the will of the people and must be characterized by a representative and responsive government, especially in Southern Africa where the majority are illiterate, poor and politically inexperienced. Such people must never be taken advantage of and manipulated by the ruling elite who seek to serve their own interests.

The countries of Southern Africa adopted progressive and democratic constitutions at the dawn of multi-party democracy that swept the entire continent in the 1980s and 1990s. Each of such constitutions incorporated the principle of separation of powers, the rule of law, protection of human rights and tenets of democratic governance, among many other principles. Indeed principles of an open and accountable government were entrenched. The judiciary was given the responsibility of interpreting and enforcing the constitution in an independent and impartial manner.² The judiciary is the guardian of the constitutions with respect to all the constitutions of the countries of Southern Africa. The independence of the judiciary is guaranteed. The judiciary has the power of judicial review provided for in the constitutions. This is the power to review any action of the state organs and any law for its conformity with the constitution and to declare any action or law invalid to the extent of its inconsistency with the constitution. The judiciary is as much subject to the constitution and the law as is any other organ of state or government.

² Section 9 of the Republic of Malawi Constitution is an example.

The importance of the constitution cannot be overemphasized. National constitutions play an important role in building and guiding democracies. Modern and progressive constitutions have become transformative in nature, providing socio-economic tools to address transformative issues in emerging democracies.³

Constitutionality

Constitutionality is the state of conforming to a given constitution. It refers to something relating to or controlled by the constitution. All laws of a country must draw their validity from the constitution if they are to be constitutional. Similarly all governmental action, executive, legislative or judicial, must draw their validity from the constitution, otherwise they will be unconstitutional and declared invalid. The supremacy of the constitution entails that all governmental action must remain within the confines of the constitution and no government should act outside the constitution or set itself above the constitution, otherwise it will be acting unconstitutionally. A constitution must be interpreted as a whole and no part of it must ever be interpreted so as to abrogate another part. Rather, every provision of the constitution must be interpreted in such a way that it complements and support the other provisions. For this reason I seriously doubt if any provision of a given constitution can ever be said to be unconstitutional, vis-à-vis the same constitution.

The idea of constitutionality is viewed as a way of checking the validity of the law or governmental action in accordance with the letter of the law. Thus the emphasis in constitutionality is on formal validity.

There continues to be a debate in relation to the constitutions of most of the Southern African states, which debate borders on questioning the validity of the constitutions themselves. This debate is engaged in despite that the constitutions have been widely acclaimed to be good and progressive democratic constitutions. The debate is rooted in constitution-making processes which some scholars argue were flawed. It is often argued that these constitutions which bear close resemblance were hurriedly adopted during the euphoria of change from autocratic rule to democracy. They were adopted in a copy and paste and pure conformist fashion to meet demands of western governments. The argument goes on to suggest that the constitutions mostly contain western notions and values of democracy and good governance , with little or nothing of African cultural values and the idea of African democracy. Consultations before the adoption of the constitutions were limited and for the most part excluded civil society and the general population whose constitution it was meant to be. This debate though not concluded, has had serious consequences on constitutionalism in Southern Africa. To begin with the commitment to constitutionality and constitutionalism among the ruling elite becomes less apparent. The ruling elite put this up as justification for ignoring some constitutional provisions or even for crying foul. The second unfortunate consequence is that some constitutions in Southern Africa are probably the most amended in the world within a short space of time. Mostly amendments to the constitution are done piece-meal and at the convenience of the ruling elite, perhaps only where those in power see an advantage to them for the amendment.

³ See the speech of South Africa's Deputy Minister of Justice and Constitutional Affairs, Mr. Andries Nel, MP, on the occasion of Official Opening of the Conference on African Constitutionalism: Present Challenges and Prospects for the Future at the University of Pretoria, on 1st August 2011.

While the debate on flaws in the constitution-making process is useful, I suggest that it must only be used to improve an existing constitution and not to question its validity and destroy it. We may not talk of the constitutionality of a constitution, for a constitution is a supreme law from which all other laws derive their validity. A state without a supreme law would amount to a failed state.

The Rule of Law

The rule of law envisages that everyone is subject to the discipline and sanctity of the law. No one shall set himself above the law no matter what position they occupy in society. Actions of all and sundry must conform to the law. The rule of law is the antithesis of the existence of wide, arbitrary powers in the hands of the executive or the legislature. Society is required to observe the rule of law if it is to be orderly. Rulers have an even greater obligation to observe the rule of law at all times in order to reinforce the rule of law and eliminate the possibility of the emergence of the rule of men. The rule of law is predictable. The rule of men is unpredictable. The mechanism of judicial review ensures that the rule of law is adhered to by all those performing public functions. Executive decisions and legislative enactments which fall outside the framework of the rule of law must be declared invalid if the executive and the legislature must be compelled to observe the rule of law. This will ensure enjoyment by the individual of the rights and liberties guaranteed by the constitution. Thus an independent judiciary is a critical element to the rule of law.

The constitutions of the countries of Southern Africa are firmly founded on the rule of law. The constitutions bind everyone in the country, including the ruling elite. The rule of law is meant to be a cornerstone of well- functioning democracies in Southern Africa and elsewhere. As a bulwark of society the rule of law is regarded as a reliable long term bulwark against abuse of state power⁴.

Constitutionalism

There are many theories about constitutionalism. Generally, constitutionalism refers to a system of government based on a constitution, a government which demonstrates adherence to the principles of the constitution. Within the concept of constitutionalism is the idea of limited, open, transparent and accountable government which must truly represent the will of the people and not simply smoke-screen the will of the people. Constitutionalism is there to tame wayward governments that see no limits to their powers or simply ignore such limits in the guise of pursuing a common or greater good. Constitutionalism ensures that governmental powers are limited beyond theory, and in practice.

Most Southern African states have good and progressive democratic constitutions. However, a good constitution does not of itself guarantee constitutionalism. Neither does constitutionality guarantee constitutionalism. A half-hearted democrat who is armed with a good democratic constitution will not necessarily be committed and will not practice constitutionalism. In fact half-hearted democrats will seek to find fault even with the very best democratic constitution

⁴ See "Globalization and the Rule of Law" by Professor Jeffrey D. Sachs, a Galen L. Stone Professor of International Trade at Harvard University, Remarks delivered at Yale Law School, October 16, 1998.

they may be required to operate under. Again it is not enough to adhere to the formal validity or the constitutionality of laws or governmental action. Constitutionalism goes beyond a good constitution and beyond constitutionality of governmental action or a country's laws. Commentators and the Commonwealth have urged that the discourse on the constitution must move beyond pre-occupation with formal validity of governmental action or laws to constitutionalism.⁵ It is true that focusing on formal validity of the laws and governmental action is unlikely to facilitate constitutional development, an essential ingredient for a constitution as a living instrument. Yet the courts in Southern Africa are tasked with constitutional interpretation and constitutional development.⁶

Now, where there is a good constitution without constitutionalism, the ruling elite, though apparently committed to the principles of the constitution, disregard the provisions of the constitution at their convenience in the pursuit of selfish goals in the name of the poor and illiterate majority. It is only through entrenched constitutionalism that a country's constitution may truly serve as the supreme law, reflecting and regulating government in the interest of the people. Professor Fombad of the University of Pretoria, a leading constitutional law expert, recognized that an important bulwark of constitutionalism is the existence of an efficient and effective mechanism controlling and compelling compliance with the letter and spirit of the constitution.⁷ He contends that there can be no constitutionalism in terms of respect for the constitution and values and principles that underlie it if there is no secure review mechanisms, whether by ordinary courts or other specialized courts or bodies, that can independently enforce the provisions of the constitution, while checking and controlling any abuses of its provisions. Indeed some Southern African states have made provision in their constitutions for specialized constitutional courts. No doubt the South African Constitutional Court has led the way in the region in its role of entrenching constitutionalism and it remains a shining example in the region on the central role the judiciary can play in entrenching constitutionalism in the region. Most will agree that the judiciary has a central role to play in entrenching democracy in modern democracies. Keith Whilling⁸ observed that the courts should be active guardians of the constitution, the legislature and the executive and ultimately the popular majorities who elect them as these may constitute threats from which constitutionalism needs to be protected.

Southern African states are characterized by executive dominance and continue to slide towards the "big-man" rule. In some countries there appear deliberate efforts to discredit and alienate the judiciary from society with a view to render the judiciary ineffective or compliant.⁹ For these reasons, and others, constitutionalism in Southern Africa is particularly challenging. As we will see below the challenge is epitomized by the suspension of the SADC Tribunal, which is the

⁵ Commonwealth Human Rights Initiative, *Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa*, Recommendations to Commonwealth Heads of Government, 1999.

⁶ Section 11 of The Republic of Malawi Constitution engenders the judiciary to develop principles of constitutional interpretation which reflect the unique character of the constitution.

⁷ Charles Manga Fombad "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa", www.saifac.org.za/docs/respapers/RPS%20NO%2018.pdf, accessed 6th June 2011

⁸ Keith Whilling, "Situating Judicial Review", Fall 2005

⁹ President Museveni once said the role of the judiciary was to try cases of theft of chickens and goats not to meddle in the affairs of state. See "The Place of the Independence of the Judiciary and the Rule of law in Democratic Sub-Saharan Africa" by Justice R.R. Mzikamanda, 2007, p58, a SAIFAC document on the web.

judicial organ of SADC, at the behest of Zimbabwe. That suspension is symptomatic of Summit's attitude towards rule of law and constitutionalism, both at regional and at national level.

The role of the courts is very challenging indeed. As Justice Michael Kilby¹⁰ observed in his work "Comparative Constitutionalism: An Australian Perspective" when reflecting on the lessons of the Australian experience, the text of the constitution is obviously central to the work of the courts. Yet there are other features of national and legal life that can sometimes be just as important, such as the existence of strong democratic and judicial institutions working in general harmony with each other, the existence of independent judges who strive to apply the law neutrally and within a culture that seeks to do justice according to law. Admittedly in constitutionalism courts go beyond enquiring into the constitutionality of laws. Courts play a vital role in ensuring that the constitution continues to have relevance to society, often breathing life into the text of the constitution and render it relevant to cotemporary circumstances. Upholding the rule of law, as the courts do, is not just for the popular and dominant majority. A constitution would serve no useful purpose if it failed to protect the weakest, poorest and most vulnerable including the minority. The test of strong or entrenched constitutionalism is whether it protects the weakest and the minority in the same way it does the elite, the powerful and the popular and dominant majority. The powerful will be assured of protection when the constitution effectively protects the weak and the minority.

Nkhata¹¹ makes a case for a trust-based approach to constitutionalism. However he does recognize the central role the courts would play in entrenching constitutionalism. Nyondo¹² invites the judiciary to make its long term project to adopt transformative constitutionalism for social transformation in Malawi. He draws lessons from South Africa where transformative constitutionalism has taken root and has proved successful. The work of both Nkhata and Nyondo demonstrates the centrality of the judiciary in constitutionalism.

It is by no means being suggested here that the judiciary is the only role player or stakeholder when it comes to constitutionalism. While the author does subscribe to the view that constitutionalism is a dynamic evolving process involving a range of role players and stakeholders with specific mandates tied together by and based on the national constitution¹³, he finds it difficult to accept the extreme views of theorists of popular constitutionalism who seek to do away with the power of judicial review and give the courts no role to play in constitutionalism on the ground that judges are not elected individuals.

¹⁰ An eminent Australian Judge and international jurist.

¹¹ Nkhata, Mwiza Jo, "Rethinking Governance and Constitutionalism in Africa: The Relevance and Viability of Social Trust-Based Governance and Constitutionalism in Malawi", LLD Thesis 2010.

¹² Nyondo, JM201 "Constitutionalism in Malawi 1994-2010: A Critique on Theory and Practice, LLM Dissertation; see also Mwaungulu, Dunstan Fipamutima, "Governance, Democracy and Constitutionalism in Africa: The Malawi Experiment", *Commw. Law Bull.* Vol. 32 No. 2,267 (2006)

¹³ See the speech of South Africa's Deputy Minister of Justice and Constitutional Affairs, Mr. Andries Nel, MP, on the occasion of Official Opening of the Conference on African Constitutionalism: Present Challenges and Prospects for the Future at the University of Pretoria, on 1st August 2011.

Separation of Powers

The constitutions of Southern African states recognize the principle of separation of powers to varying degrees as an important tenet of liberal democracy and good governance. Under the principle of separation of powers, the powers and functions of the state are distributed among the legislature, the executive and the judiciary, with no single organ of state or government exercising complete authority. As Justice Chipeta once put it, no organ of government is more government than the others.¹⁴ The three organs must complement each other. In 1748 in his book “The Spirit of the Laws”, Montesquieu put it aptly when he wrote:

“Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another... There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers.”

The principle of separation of powers is designed to prevent arbitrary or tyrannical rule and to protect the governed. Under this principle the judiciary adjudicates on disputes. It interprets and enforces the constitution. Through judicial review and enforcement of human right the judiciary acts as guardian of the constitution. It has a sensitive and crucial role to play in controlling the exercise of power by the organs of state and safeguarding the principle of separation of powers.

The Role of the Judiciary

The role of the judiciary within its constitutional mandate is spelt out in most constitutions of Southern Africa. The traditional role of the judiciary is the adjudication of disputes between citizens *inter se* and between citizens on the one hand and the state on the other. It is the role of the judiciary to uphold the law and the legal system. This means the judiciary must show commitment to the rule of law and to justice according to law. Justice according to law unfortunately does not always coincide with the ordinary or popular concept of justice. This gap has been used by ruling elites to publically put the courts in bad light with society, for society to lose faith in the institution of the courts generally. Although courts try to bridge the gap by tending to move away from technical justice to substantial justice, the courts remain committed to the principle of justice according to law.

Following the process of democratization in Southern Africa and elsewhere, the courts play a pivotal role in upholding the rule of law and strengthening democratic governance. Constitutions of some Southern African states clearly spell out that the judicial function is exclusively for the judiciary although others are not clear on exclusivity of judicial functions. Whether a constitution provides for exclusivity of the judicial function to the judiciary or not, the debate remains as to the scope of the role of the judiciary in constitutionalism. Some favour widening the scope while others favour narrowing it. An extreme position favours no role at all for the judiciary in constitutionalism and democratic governance on the ground that these are complex matters which must be left to elected politicians. The fear is that giving such a role to the courts may

¹⁴ “ Judicial Independence vis-à-vis the Executive and the Legislature”, by Honourable Justice Chipeta, a seminar paper presented in 2005

create room for tyranny of the judiciary which would be more dangerous than tyranny of the executive or tyranny of the legislature. Fears of this nature appear unfounded.

For those who favour giving some role to the judiciary in constitutionalism and the strengthening of democratic governance several approaches are advocated. The Montesquieu approach perceives the role of the judiciary as technical and a-political, applying the law as it is and deferring to the legislature when the law is silent or unclear. Thus the courts would be concerned more with constitutionality and less with constitutionalism. There is also the democracy-reinforcing view of the role of the judiciary which conceives it as equivalent to a referee in sports, who must simply make sure that there is a level playing field and rules of the game are followed. Another view of the role of the judiciary sees the courts as political forums in a democratic society, where people, especially the marginalized, are given opportunities to have their interests heard and respected.

Constitutional interpretation

Principles of constitutional interpretation require that a constitution be interpreted expansively rather than restrictively. As a living document which must also apply to future generations, a constitution requires that the court breathes life into it from time to time. Section 11 of the Republic of Malawi Constitution for example engenders the judiciary to develop principles of interpretation of the constitution to reflect the unique character and supreme status of the constitution. The courts must employ in constitutional interpretation values that underlie an open and democratic society. The flexibility with which courts interpret the constitution provides the courts with an opportunity to play a central role in constitutionalism.

Justiciability

Whether a particular provision of the constitution is justiciable or not is a debate that is often engaged in with regard to principles of national policy and economic social and cultural rights. It is often argued that these are matters of policy and national aspirations best left to the executive and that courts are ill-equipped to deal with matters of policy. They are therefore non-justiciable. That argument is fast losing ground. The judiciary is a guardian of the entire constitution and there can be no-go areas within the constitution on the part of the judiciary.

Judicial Review

One hallmark of the Southern African constitutions is the power of judicial review given to the courts. This is the power to review executive or legislative action for its constitutionality. This is an important tool for constitutionalism. The question of how far a court can go in its judicial review function remains a vexing one. For example, where the court strikes down a piece of legislation for its not conforming with the constitution, can the judiciary then be said to engage in legislative action? Can the judiciary interpret the invalidated law in such a way that it is consistent with the constitution? In other words, is the court permitted to redraft the legislation in question?

Protection and Enforcement of Human Rights

Constitutions of new democracies invariably embody guarantees of human rights, with the judiciary given the role to protect and enforce the said rights. Other constitutional bodies like national human rights commissions, and office of the Ombudsman share in this role. Governments are considered the worst violators of human rights. When the courts exercise their role protecting and enforcing human rights, they are engaged in an exercise in constitutionalism.

The Rise and Fall of Constitutionalism in Southern Africa

When regional integration began in post-colonial Africa in 1963 with the formation of the Organization of African Unity, it had the objective of co-operation in the economic development of the states on the continent. Later sub-regional groupings on the African continent were formed.¹⁵ The founding documents did not provide for protection and promotion of rights. Currently, promotion and protection of human rights and democracy constitute fundamental principles or goals of the regional groupings, thereby creating a super-national structure. Regional courts now play an important role through the determination of rights cases. Protection and promotion of human rights by regional courts coincides with the role national courts play within a given region. The Southern African Development Community (SADC) has the Summit as the political organ and the SADC Tribunal as the judicial organ.

The SADC Tribunal was established as one of the institutions of SADC with the duty to ensure adherence to and proper interpretation of the SADC Treaty and its subsidiary instruments and to resolve disputes referred to it, much like a national judiciary would do. Although the provision establishing its jurisdiction omits an express mention of jurisdiction on rights, we know that SADC is an institution to promote economic development among its members based on respect for human rights, democracy and the rule of law. It would be incorrect to deny the centrality of respect for human rights, rule of law, democracy and good governance as objectives of modern day SADC. It can be said without doubt that the SADC Tribunal has the potential to contribute significantly to deeper harmonization of law and jurisprudence and to better protect human rights in SADC. The SADC Tribunal has a great potential to contribute to accelerated entrenchment of constitutionalism in the region in the same way as do the ECOWAS Community Court of Justice, the East Africa Court of Justice and the Africa Court.

Against what has been said above is the negative development that occurred on 20th May, 2011 in Windhoek, Republic of Namibia, when the Summit of Head of State and Government of Southern African Development Community suspended the SADC Tribunal pending a review of its mandate, responsibilities and terms of reference for the Tribunal, whose final report will be made to Summit in August 2012. There is a moratorium on receiving any cases or hearing of any case by the Tribunal until the SADC Protocol on the Tribunal has been reviewed and approved.¹⁶ Thus the functioning of one organ, being the judicial organ, has been suspended by the political organ of SADC, much in the same way an executive organ of a state would suspend its judiciary

¹⁵ The Economic Community of West African States, the East African Community and the predecessor to the Southern African Development Community, among others.

¹⁶ Communique of the Extraordinary Summit of Heads of State and Government of the Southern Africa Development Community, Windhoek, republic of Namibia, 20 May 2011, paragraph 8.

when it does not like that judiciary. Some have suggested that when the SADC Tribunal complained to Summit that one of their members, Zimbabwe, was not respecting and complying with the orders of the court, Summit decided to punish the complainant by suspending its operations, and to reward the non-complying party by doing nothing about the orders of the court. The leaders of the SADC had dealt a potentially fatal blow to the rule of law in the region, by ignoring their duty to the citizens of the region and the devastating impact the decision would have on protection of human rights and people's ability to access justice.¹⁷

The implications of the suspension of the operations of the SADC Tribunal constitutionalism in Southern Africa are far-reaching. The suspension signals lack of commitment to and respect for the rule of law. This paper cannot detail out the background to the suspension of the Tribunal. Suffice it to say that the widely publicized land disputes in Zimbabwe and the refusal of Zimbabwe to obey the rulings of the SADC Tribunal have contributed greatly to the suspension.¹⁸ Those who follow the Zimbabwe land grabbing cases will be aware that at the beginning Zimbabwe refused to obey orders of its own courts before the complainants took the matters to the regional court. The Zimbabwe government was widely condemned for progressive erosion of the rule of law in its country. Botswana, Zambia and a few others in the region at some point made scathing attacks on Zimbabwe with President Mwanawasa of Zambia equating Zimbabwe to a sinking Titanic.

What would be cause for concern in relation to constitutionalism and the rule of law in Southern Africa is that the critical voices on lack of respect for human rights and rule of law in Zimbabwe are getting faint by the day.¹⁹ The influence of a culture of lack of respect for the rule of law appears to be gaining momentum in SADC with the **"big-man"** rule taking root. During the time President Thabo Mbeki was leading negotiations on Global Political Agreement in Zimbabwe fears were expressed of what was described as the Zanufication of the African National Congress,²⁰ being the ruling Party in South Africa. In fact the term Zanufication even within Zimbabwe is used more in a derogatory rather than a complementary way. It is corrupted from the name ZANU-PF which is what might be described as the ruling Party in Zimbabwe. It is associated with defiance to court orders and lack of respect for the rule of law and tenets of democracy. In a Second Regional Legal Consultative Meeting on the SADC Tribunal Review Process organized by the International Commission of Jurists, SADC Lawyers' Association and the Southern Africa Litigation Centre in Johannesburg on 28th July 2011 one leading professor of Law at the University of Pretoria feared for the Zanufication of SADC²¹. What one seems to see is that a culture of defiance to the rule of law and lack of respect for tenets of democracy in one

¹⁷ "By sabotaging the Tribunal, SADC leaders have shown exactly where their loyalties lie- in protecting their friend, President Mugabe, from the consequences of his regime's illegal activities rather than defending the rights of SADC's 200million citizens", Nicole Fritz, Director of the Southern Africa Litigation Centre quoted by OSISA accessed 28th October, 2011.

¹⁸ *ibid*

¹⁹ President Kikwete of Tanzania talking to reporters after the suspension of the SADC Tribunal is quoted as having remarked that Summit had realized that in the SADC Tribunal SADC had created a monster for itself, obviously after persuasion from Zimbabwe.

²⁰ Cronin warned of Zanufication of the ANC in 2002 and in 2007 Mbeki and the ANC were accused of Zanufication of South Africa, www.osisa.org/.../Security%20sector%20in%20Zimbabwe%20... Accessed 18th October, 2011

²¹ Professor Michel Hansungule who presented a paper on "Effects of the Decision of the SADC Summit on the Rule of Law and Human Rights in the SADC Region"

Southern African state has the potential of becoming a bad influence on the rest of the region, particularly where that state is quite influential.²² And that gives cause for concern as to whether constitutionalism can ever be entrenched in Southern Africa.²³

One other fear is that by suspending the Tribunal, SADC has set itself at odds with other regional communities in Africa such as the Economic Community of West African States and the East Africa Community who have their regional courts intact and who recognize that regional courts, just like national courts, are critical to protecting human rights and the rule of law and to encouraging socio-economic growth.

Despite the gloomy picture of constitutionalism in Southern Africa as portrayed by the suspension of the SADC Tribunal, a judicial organ of the SADC, and the far reaching implications on constitutionalism, I suggest that there is a glimmer of hope through the leadership of some Southern African countries who refuse to be swayed by the influence of others in abrogating the rule of law with impunity. For example, South Africa with its robust constitutionalism, led by the South African Constitutional Court²⁴, remains a beacon of hope for the region. The lessons through the South African experience since the adoption of a constitutional democracy should be useful for any Southern African state serious about constitutionalism.

Challenges and Prospects of Constitutionalism in Southern Africa

Constitutionalism in Southern Africa faces numerous challenges of varying degrees. Below is an attempt to highlight some of those challenges.

Commitment to constitutionalism and the Rule of Law.

It is true that the wave of constitutionalism that has swept across the African continent in the past 20 years brought with it a promise of a prosperous Africa, stronger democracies, enhanced

²² See “Sabotaging the SADC Tribunal for Mugabe’s Sake” www.osisa.org/law/region/mugabe’s-sake accessed 27th October, 2011; “Desperate Mugabe Dispatches Cronies to SADC Leaders, Begging...”(on the issue of the SADC Tribunal), www.thezimbabweanmail.com/Zimbabwe/8079-mugabe-begs-sadc-html, accessed 27th October, 2011.

²³ In an article titled “*SADC Adopts a Rule of Lawlessness*”, posted on Legal Matters, Carmel Rickard wrote on the suspension of the SADC Tribunal that “ The human rights community and civil society are still in shock, and rightly so, for it could hardly get worse: thanks to Mugabe’s influence, SADC’s principal judicial body has been shut down, along with its judges; the region’s acceptance of the rule of law and judicial independence has been exposed as a farce; and individuals have been given notice that they should expect no regional protection against human rights or other abuses under the mandate of any new- and inevitably sanitized- court”. www.101.co.za/...1.../sadc-adopts-the-rule-of-lawlessness-1.1091293. accessed 27th October, 2011

²⁴ See Wiechers, Marinus PhD, “Guardian of the Constitution- Constitutional Review and the South African Constitutional Court”, Address at the Internationales Fachgesprach on Verfassung und Politik in Africa of the GKKE Berlin on 6th May 2009; Roux, Theunis, “*Principle and Pragmatism on the Constitutional Court of South Africa*”, www.saifac.org.za/docs/res_papers/RPS%20NO%2042.pdf, accessed 20th September, 2011

socio-economic development and good governance.²⁵ Yet the euphoria that accompanied the third wave of democratization in Africa appears to be on the decline, and with it commitment to constitutionalism even among Southern African states. Examples abound of ruling elite violating their own constitutions and disregarding the rule of law with impunity. The appearance on the scene of what has by some been described as half-hearted democrats who seek to define democracy their own way has given rise to lowering of commitment to constitutionalism and the rule of law.

Balancing between the rule of law and national development remains one of the main challenges to constitutionalism on the African continent. Certain countries negated constitutionalism on the general grounds that it lacks or has the propensity to impede the emancipation of the people.²⁶

Inadequate guarantees of judicial independence.

Although most Southern African constitutions recognize and guarantee the independence of the judiciary, the principle remains elusive in practice. There is lack of commitment to the principle by some political leaders of Southern African states. Many of the constitutional guarantees for the independence of the judiciary are inadequate. They do not offer adequate protection for the judges, thereby providing room for the manipulation of the judiciary.

Politicization of judicial officers in sub-Saharan Africa

Politicization of the judiciary appears in the form of packing the judiciary with compliant and politically acceptable individuals who can be influenced to do the bidding of the political authorities. It is also manifested through telephone justice where politicians will telephone a judge handling a case and advising him or her the “acceptable” way of deciding the case.

Jurisdiction Stripping

Laws are passed to limit or oust the jurisdiction of courts in order to achieve certain politically favourable results. Some Southern African states which have not liked the decisions of the courts or who have found the courts not to be politically compliant have engaged in the business of changing existing laws or enacting new ones that limit or oust the jurisdiction of the court in the style of clipping the courts wings so that they do not fly. Through the device of the law, the courts are rendered ineffective. Jurisdiction stripping limits constitutional checks and balances in that court orders may be overridden by legislative action.

Disobedience of court orders

One of the challenges that face constitutionalism in Southern Africa today is the rising culture of disobedience of court orders, especially by the executive who then set an example for many the rest to follow. In his research work conducted in 2006 Professor Fidelis Edge Kanyongolo

²⁵ Address by Mr Andries Nel, MP, South Africa’s Deputy Minister of Justice and Constitutional Development on the occasion of official opening of a conference on African Constitutionalism: Present Challenges and Prospect For the Future, University of Pretoria, South Africa, 1st August, 2011.

²⁶ *ibid*

observed that “In recent years, government respect for the constitution and legislation, regulations and internal procedures has been inconsistent”.²⁷ While noting that there had been increased compliance with the constitution and legislation, regulations and procedures in the area of fiscal management with new laws being introduced, he also observed that in contrast, government obedience to the law was more inconsistent in the areas of social and political governance. Such disobedience is displayed more vividly in relation to court orders. In 2002 an investigation by the International Bar Association noted that government disregard for court orders considered to be politically inconvenient.²⁸ One must feel disappointed over the common occurrence of incidents of bad governance, human rights violations and disrespect for the rule of law and court orders.

The examples of disobedience of court orders resonate in the countries of Southern Africa²⁹, with Zimbabwe appearing to have the worst record. Disobedience of court orders in one Southern Africa state becomes contagious and quickly spreads to other state in the region. Other states seem to be learning the culture from the more experienced in undemocratic conduct and lack of respect for the rule of law. Disobedience of court orders may begin in a small way but in time leads to progressive erosion of the rule of law.

General hostility towards the judiciary

Genuine criticism of the manner in which the judiciary conducts its business is part of judicial transparency and accountability. However, there are instances when general hostility to the judiciary is exhibited by the executive, probably with a view to intimidate the judiciary and render it compliant. Attacks on the judiciary are often without justification.³⁰ Sometimes this is done in the face of consistent high ratings of the judiciary by the society. Such general hostility cannot be conducive to a culture of constitutionalism.

Regional Influence

There is some regional influence which hinders accelerated entrenchment of constitutionalism. This is where a culture of disregard for the rule of law and constitutionalism with impunity that develops in one member state provides negative lessons for the other member state to follow. The suspension of the SADC Tribunal, a judicial organ of the region, at the behest of Zimbabwe who refused to comply with rulings and orders of the Tribunal stand out as an example of the regional influence referred to here.

²⁷ AfriMAP project of 2006

²⁸ In February 2006, the government defied a court order that required it to restore the security and other entitlements of the Vice-President after these had been withdrawn on the grounds that the Vice-President had constructively resigned from his position.

²⁹ Swaziland police refusing to implement a court order as reported in www.ibanet.org/Document?Default.aspx?DocumentUId..69d3 accessed 28th October, 2011

³⁰ See R.R. Mzikamanda, “*The Place of the Independence of the Judiciary and the Rule of law in Democratic Sub-Saharan Africa*”, 2007, www.saifac.org.za/docs/2007/mzikamanda_paper.pdf

Weak Constitutional Foundation

Weak constitutional foundation may be characterized by centralized structures that breed and promote the evil rule of the elite and leaving little or no space for other role players and stakeholders in constitutionalism to participate more positively in entrenching constitutionalism.

Judiciary is only reactive to situations and cannot be expected to be proactive.

The judiciary does not go out looking for cases of constitutional violations. It waits to be moved by an aggrieved party. If it is not moved, it cannot do anything about constitutionalism.

Resources for managing the judiciary are controlled by the executive.

Resources for the judiciary are often under the control of the executive. Problems arise when justice is starved of resources at the expense of other matters the executive consider priority. Budgetary provisions for the judiciary are often reduced to a bare minimum, sometimes to a level less than a ministry or government department even though the judiciary is a whole arm of government.

The judiciary as its own enemy by limiting its exercise of judicial functions

Sometimes the judiciary fails to perform its central role in constitutionalism because it is an enemy of itself. It tends to limit its exercise of its judicial functions through its own restrictive notion of what constitute the proper role. Justice Jackson of the United States of America once said that judges sometimes do “exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir.”³¹ Sometimes the general conduct of judges through deficiency in integrity and impartiality erodes public confidence and trust in the judiciary

Lack of Capacity

Lack of training, materials, literature, exposure are some factors that render judges ineffective in the performance of their functions.

The role of other role players and Stakeholders

The discourse on constitutionalism seems to be confined to the academicians and the elite. May be its time we tried advocacy to involve the ordinary person understanding why constitutionalism is important for them and what role they can play to help accelerate its entrenchment.

Recommendations

The need to strengthen constitutional foundations of our constitutions for purposes of constitutionalism in the region cannot be overemphasized. Constitutional reviews involving key role players and stakeholders in constitutionalism need to be undertaken. This is an area where

³¹ Sacher v US 343 US 112(1952)

law reform agencies would play an important part in constitutionalism. The numerous and piecemeal amendments to the constitutions, mostly instigated by the executive do not sit well for constitutionalism.

It is recommended that efforts be made to enlist and strengthen commitment to constitutionalism in the region, a role that would best be performed by those engaged in advocacy such as non-governmental organizations. The media, churches and other religious organization can play an important role in this regard.

It is also recommended that the judiciaries of the region be strengthened and supported so that they play a central role in constitutionalism. Constitutional guarantees of judicial independence need to be strengthened as would provisions relating to resourcing the judiciaries.

It is recommended that deliberate efforts be made to provide space for other role players and stakeholders in constitutionalism for them to make their contribution to constitutionalism. Continuous and robust dialogue in constitutionalism should not be confined to universities, government departments and other organs of state, but, more importantly should engage the citizens of Southern African States. This would ensure that constitutionalism remains highly relevant to the future of the region and the quest to establish stable societies, responsive to the needs of their people, which will allow them to flourish.

Conclusion

The central theme of this paper is the role of the judiciary in constitutionalism as provided for by the constitutions of the Southern African states. The paper suggests that the judiciary plays a central role in constitutionalism in the region. The paper however worries over what appears to be the rise and fall of constitutionalism in Southern Africa where there is a rise of the “big-man” rule and a culture of disregard for the rule of law and tenets of democracy. The euphoria that accompanied the democratization process in Africa seems to have faded, and with it, constitutionalism. The judiciaries are under attack and can hardly perform their function of constitutionalism effectively. There are numerous other challenges to constitutionalism in Southern Africa. Perhaps the answer lies in review of the constitutions and through the law, strengthening the position of the courts. Meanwhile other key role players and stakeholders in constitutionalism need to be given wide space to make their contribution. The discourse on constitutionalism should go beyond academic talk, talk with government officials and non-governmental organizations. It should extend to the ordinary members of society for them to appreciate the full import of constitutionalism and encourage their support for it. There is hope for the region as South Africa stand out as a beacon of entrenched constitutionalism. With hindsight, perhaps this paper should have been better titled “The Rise and Fall of Constitutionalism in Southern Africa: Who is Going to Fix It?”. I hope this conference will provide some answer to the question.

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