

The Constitution and the Rule of Law

What is the “Rule of Law?”

Our current Constitution states that public officers owe a duty to everyone in Zimbabwe to observe and uphold the rule of law [section 18(1a)], and the “Kariba Draft” Constitution contains a similar provision. However, most people — including lawyers — have only the vaguest idea of what the expression “rule of law” means. This is understandable because it is an elastic concept. Fundamentally it means that people’s rights and obligations must be determined by laws rather than by individuals or groups of individuals exercising an arbitrary discretion. From this fundamental concept several principles are derived:

- **Principle of Legality:** People must not be deprived of their rights or freedoms through the exercise of wide discretionary powers by the Executive. Rights and freedoms should be curtailed only by the ordinary courts applying the law.
- **Principle of Equality:** No one is above the law and everyone is subject to the jurisdiction of the ordinary courts. State officials, and even the State itself, are subject to the law. Everyone is equal before the law and is equally entitled to be protected by the law. And following on from this principle:
 - laws should be enforced impartially;
 - as a rule, laws should apply generally and not just to particular individuals or classes of people.
- **Separation of Powers:** There must be a separation of powers between the Legislative, Executive and Judicial branches of government. If the Executive makes the law and enforces it, we have the rule of man, not the rule of law; and the same applies if the Legislature enforces its own laws or if the courts make the law rather than determine rights and duties under the law. In practice, the different branches cannot be completely separate because there has to be some cooperation between the different branches, so the concept of separation of powers may be defined more precisely as a governmental system of separated institutions sharing power.
- **Independence of the Judiciary:** The judiciary must be independent of the Executive and the Legislature. If judges and magistrates are dependent on the Executive or the Legislature, or are members of a ruling political party, they are unlikely to give objective judgments on the law.
- **Laws must be Certain [i.e. clear and definite]:** It must be possible for people to establish relatively easily the content of the law and the extent of their rights and duties under it. And arising out of this:
 - **Laws must be Accessible:** If people are expected to obey laws they must be able to obtain copies of them. The Government must ensure that all laws are published and that they are always available for people who want to read them. Laws should be drafted in language that ordinary people can understand. In the Zimbabwean context, that means that laws should be translated into all the vernacular languages.
 - **Laws must not be Retroactive:** Laws should apply only to the future and should not attempt to change rights and duties retrospectively. It is futile for anyone to find out what his or her rights and duties are under the law if a future law can convert what was lawful at the time it was done into something unlawful.

- **Laws must be Objective:** so far as possible laws must leave no discretion to the persons who are to apply them.

Fundamental to the concept of the rule of law is the idea that all the three branches of government must operate within their own particular spheres: the Executive is restricted to administration, the Legislature to enacting laws, and the Judiciary to adjudicating legal disputes and interpreting the laws. All three branches are subject to the law.

The rule of law in relation to the new constitution

How does the rule of law relate to the new constitution that is being prepared by COPAC; or, more precisely, can the new constitution ensure that the rule of law will apply within Zimbabwe? It can, through the following means:

Limited government: For the rule of law to prevail the powers of each branch of government must be limited. If the new constitution provides for a powerful executive with extensive discretionary powers then there cannot be the rule of law.

Government must be subject to the law: Everyone, including government officials and the State itself, must be subject to the law. This should be stated expressly, but in addition it should be reinforced by provisions giving ordinary people the right to sue the State and its officials for infractions of their rights. Section 24 of the present Constitution goes some way towards this by giving people a right to apply to the Supreme Court for redress for infringements of their rights under the Declaration of Rights. No immunity should be given to any State official, from the highest to the lowest. If, for example, it is felt that the work of government might be impeded if the President could be sued personally in the courts, then the President's immunity from legal action should be lifted as soon as she or he leaves office.

Separation of powers: The separate roles of the different arms of government must be clearly stated in the Constitution, and there should be a statement that, as a general principle, their powers should be kept separate. It should be clear, for example, that a law such as the Presidential Powers (Temporary Measures) Act is contrary to constitutional principles. The Executive's power to appoint members of the legislature, either directly or indirectly, should be removed or severely curtailed.

Independence of the judiciary: A mechanism must be established to ensure that members of the judiciary — magistrates as well as judges — are appointed by an independent body. The Judicial Service Commission established under the present Constitution is inadequate for this purpose since most of its members are appointed by the President. It would be better if its members were appointed after public hearings by a select committee of Parliament; better still if judges were selected by the Judicial Service Commission and appointed by the President after being approved by Parliament [this could be a useful role for the Senate].

Impartial enforcement of laws: The Attorney-General should remain responsible for deciding whether or not to enforce the law through criminal prosecution. He or she should, however, be appointed by an impartial body in the same way that judges of the High Court are appointed. He or she should not be a member of Parliament or the Cabinet and like judges should not make public his or her party affiliation.

Apart from the judiciary, the enforcement of the law is mainly in the hands of the

police. Their impartiality could be improved, if not ensured, by giving the Police Service Commission power to oversee the operations of the Police Force and to institute measures to improve its efficiency and impartiality. And a police complaints office could be enshrined in the constitution.

The defence and intelligence services should have nothing whatever to do with the enforcement of the civil law.

Acceptance of internationally-recognised fundamental rights and freedoms: Respect for human rights is not a necessary ingredient of the rule of law — they are different concepts — but nonetheless if fundamental human rights and freedoms are recognised and enforceable under the Constitution then the government is more likely to respect the rule of law. The constitution might well provide that international conventions become part of Zimbabwean law once they have been ratified by Parliament.

Making of good laws: A constitution cannot ensure that all laws passed by the Legislature are good laws, but it can go some way towards this end, such as by:

- Prohibiting the enactment of legislation which retroactively deprives people of vested rights or which retroactively criminalises conduct [there is such a provision in section 18(5) of the present Constitution].
- Providing that no law can be passed, by Parliament or by any other authority, unless there has been adequate consultation with interested parties. The precise method of consultation would not be stated in the Constitution, but in the case of Parliament it could consist of the publication of white papers, the holding of hearings by portfolio committees, and so on.

A final point

At the beginning of this bulletin, we mentioned section 18(1a) of the current Constitution, which states that all public officers have a duty towards every person in Zimbabwe to act in accordance with the law and to observe and uphold the rule of law. The importance of this provision should not be underestimated. In the clearest terms it states that all public officers — and the term encompasses State employees from the President downwards — have a duty to act in accordance with the law, and that the duty is owed to “every person in Zimbabwe”. What this means is that if, for example, a police officer fails to investigate a politically-motivated assault, then everyone — not just the victim — can sue the officer for breach of duty. And if the Registrar-General’s Office illegally removes someone’s name from the voters’ roll then everyone, not just the voter, can apply to court for the person’s name to be restored to the roll. The traditional view, that only people who have a material interest in a matter can apply to a court for redress, no longer applies in relation to breach of duty by public officers [though it probably continues to apply to applications direct to the Supreme Court under section 24 of the Constitution].