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Rule of Law and African Development

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# Rule of Law and African Development

*Joseph M. Isanga*

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B. Conclusion

I. Introduction

The African continent has seen astounding economic growth since the 1990s. Despite an economic downturn globally, the Sub-Saharan African economy bounded ahead at a 5% growth rate, recently slowing to a rate of 4.25%.

However, most of this growth is unsustainable and tenuous. Africa is far from a genuine economically developed region, and there is no room for complacency regarding the struggle for establishing a true foundation for sustainable economic development, particularly the rule of law. An analyst points out:

The Rule of Law, by providing the framework for protecting private property and individual freedom, creates the stability and predictability in economic affairs necessary to promote entrepreneurship, saving and investment, and capital formation. It is nonsensical to expect economic development in Africa without addressing the institutional factors, such as the lack of Rule of Law, which are responsible for Africa’s failure to develop in the first place.

In many African countries, rule of law has not marched in tandem with economic growth. According to the World Justice Project’s rule of law index, most Sub-Saharan countries are

3 Id.
5 Id.
positioned near the bottom of the global rankings. It is observed that “[t]he persistence of Africa’s problems despite democratization, privatization, and . . . reforms is puzzling except when viewed as the logical outcome of a lack of checks and balances.”

This article argues that Africa’s economic growth needs to be premised on the intrinsic and inseparable relationship and synergy between rule of law and sustainable economic growth, a proposition that African law and judicial institutions are not properly recognizing. To this end, Part II of this article presents the arguments for and against the rule of law as well as the underlying theoretical justifications thereof. Part III of this article examines the forces behind the surging African economic growth. Part IV presents the sufficiency, or lack thereof, of laws and jurisprudence from African regional judicial institutions regarding the connection between the rule of law and economic development. Part V presents laws and jurisprudence from select African countries regarding the interface between rule of law and development in those countries. Part VI presents recommendations (as well as conclusions) to strengthen the rule of law and create the necessary, even if insufficient, conditions for continued economic growth.

II. Rule of Law

This section addresses some of the arguments for and against the proposition that adherence to the rule of law is a necessary, even if insufficient, condition for development. It also addresses some definitional issues relating to the rule of law. The role of the rule of law in development is contested and some failures of this strategy are well-documented. This article would be remiss if it did not address some important counterarguments regarding the connection between rule of law and development. For example, Carothers

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9 Critics argue that rule of law is a foreign top-down approach that is likely not to gain support from ruling elites. Critical legal studies scholars even challenge the notion of law itself, which they argue is an instrument of oppression which can be used to advance, legitimate, and entrench the interests of ruling elites. R.P. Peerboom, China’s Long March Toward Rule of Law 126 (2002).
observes:

China . . . the largest recipient of foreign direct investment in the developing world happens to be a country notorious for its lack of Western-style rule of law. It is clear that what draws investors into China is the possibility of making money either in the near or long term. Weak rule of law is perhaps one negative factor they weigh in their decision of whether to invest, but it is by no means determinative. 10

Similarly, there are other important counterarguments against advocating for adherence to the rule of law as a vehicle for development that deserve discussion. 11 It suffices to mention that


11 Critics of the role of the rule of law in development point to the successful development of some countries that have focused on trade while downplaying the rule of law. For example, during the years of rapid economic growth, China relied in part on the so-called “credible commitments argument” and the closely associated “performance legitimacy” (rather than ‘procedural legitimacy’) of the Chinese government. Jing Leng & Michael Trebilcock, The Role of Formal Contract Law and Enforcement in Economic Development, 92 V.A. L. REV. 1517, 1556 (2006). According to this argument, all the Chinese regime needed to do was sustain employment expansion and raise the living standards of the Chinese population by delivering positive economic outcomes driven by high growth rates, with the implicit assumption “that the [Chinese citizenry] will not press vigorously for more democratic forms of government if [the Chinese government] delivers high levels of economic growth and prosperity.” Id. China saw this “development model as offering the best blueprint for Africa’s own economic emergence.” David Haroz, China in Africa: Symbiosis or Exploitation?, 35 FLETCHER F. WORLD AFF. 65, 68 (2011). “[M]any [African] leaders see Beijing’s model of development as one that could be replicated successfully in Africa.” Uche Ewelukwa Ofodile, Trade, Empires, and Subjects – China-Africa Trade: A New Fair Trade Arrangement, or the Third Scramble for Africa?, 41 VAND. J. TRANSNAT’L L. 505, 537–38 (2008). Critics of the role of the rule of law also argue that the strategy of attaching rule of law preconditions to development aid given to developing countries has failed. These critics conclude that Africa needs to transition from being “a destination for charity to a place for business.” Alex Perry, China’s New Focus on Africa, TIME (June 24, 2010), http://www.time.com/time/specials/packages/article/0,28804,2000110_2000287_2000276,00.html [https://perma.cc/2JRY-V9UF]; see also Yoweri K. Museveni, President, Republic of Uganda, New Year’s Message 2011 (Dec. 31, 2011), http://www.statehouse.go.ug/media/speeches/2011/12/31/new-years-message-2011 [https://perma.cc/2AMC-L4QN] (emphasizing that Uganda was moving away from “aid dependency,” and “towards investment”). In addition, the “claimed beneficial consequences of both democracy-promotion and state-building for development are questioned by the structural view, emphasizing the role of deep drivers of human security reflecting fixed and enduring conditions, irrespective of the type of regime in power.”
in a number of African countries there is evidence that suggests that neglecting the synergy between rule of law and sustainable economic growth is shortsighted.\textsuperscript{12} China’s involvement with Angola, for example, may have benefited Angola’s ruling elites, but it did not make life appreciably better for average Angolans. \textsuperscript{13} Recent reports of increasing labor strikes at foreign businesses operating in China demonstrate that the synergy between sustainable economic development and rule of law cannot be ignored.\textsuperscript{14}

\textbf{Pippa Norris, Making Democratic Governance Work: How Regimes Shape Prosperity, Welfare, and Peace} 3 (2012). But these counterarguments ignore certain realities. Even in China, law played a role, however basic, in economic growth, even without a full-fledged and thriving rule of law. John K.M. Ohnesorge II, \textit{The Rule of Law} 19 (Univ. of Wis. Legal Studies Research Paper No. 1051, 2007), http://ssrn.com/abstract=1006093 (observing that China conducted legal modernization efforts, although this did not go hand in hand with fundamental political reform); see also Leng & Trebilcock, supra, at 1562 (observing that “China has experienced dramatic growth in civil litigation over the past decade,” leading some commentators to claim that Chinese courts “appear to play an increasingly significant role in dispute resolution during the reform period.”). Advocates of the role of the rule of law and the protection of human rights, which is an important aspect of the rule of law, argue that “a market economy requires freedom of economic association, the free flow of information, and transparency in rule-making and in the application of rules, all of which are hallmarks of a (liberal) democracy. In their absence, authoritarian regimes are likely to adopt misguided policies that undermine economic growth. Moreover, without democratic elections, there is no way of holding authoritarian regimes accountable.” \textit{Peerenboom}, supra note 9, at 520. In sum, the rule of law promoters such as “Thomas Carothers, Larry Diamond, Morton Halperin, Michael McFaul, Joseph Siegle and Michael Weinstein, among others,” argue that “deepening and consolidating the principles and procedures of liberal democracy will have intrinsic benefits, reinforcing human rights around the globe, as well as instrumental payoffs.” \textit{Norriss}, supra, at 3. Indeed, commentators like “Simon Chesterman, James Fearon, Francis Fukuyama, Samuel Huntington, Stephen Krasner, David Laitin, and Roland Paris have all advocated \textit{state-building} in postconflict societies”—“a school of thought that generally acknowledges the normative value of democracy as an abstract ideal, but recognizes the pragmatic benefits of strengthening governance institutions as the overarching priority.” \textit{Id.}

\textsuperscript{12} See, e.g., Sabelo Gumede, \textit{The Nepad and Human Rights}, 22 S. Afr. J. on Hum. RTS. 144, 160 (2006) (arguing that “[r]espect for human rights is undoubtedly one of the most important conditions for sustainable development”).

\textsuperscript{13} For example, in “2006, Angola earned more than $30 billion from oil exports, yet more than two-thirds of the population lived on less than $2 per day. And Angola’s reputation for corruption and inefficiency is almost unparalleled.” Patrick J. Keenan, \textit{Curse or Cure? China, Africa, and The Effects of Unconditioned Wealth}, 27 \textit{Berkeley J. Int’l Law} 84, 97 (2009).

\textsuperscript{14} See Austin Ramzy, \textit{A Labor Strike in Southern China Offers Hope for a More Democratic Future}, \textit{Time} (Jul. 8, 2012), http://world.time.com/2012/07/08/a-labor-strike-
Law can only function as a tool of development if it functions—as it ought to—by “imposing meaningful restraints on government actors and in limiting arbitrary state action.” Critics of rule of law tend to focus on its past failures in regard to economic development. But while the rule of law is not the magical solution to all development issues, this article argues the rule of law, properly implemented, is a critically important step in the process of African development, especially in regard to its potential to hold ruling elites accountable. Fifty years since the establishment of the Organization of African Unity (reconstituted as the African Union in 2002) and since most African countries gained political independence, Africa’s development continues to be hindered by rampant and almost intractable corruption. It is imperative that at a time when Africa is experiencing unprecedented growth, scholars rethink the role of rule of law in Africa’s development efforts, especially as ever-increasing levels of corruption are undercutting opportunities for further growth. This idea of the need to revisit paradigms adopted by African states has been recognized by the African Union as well. Consultations conducted by the African Union in pursuit of its Agenda 2063 have come to the conclusion

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15 Peerenboom, supra note 9, at 128.

16 “A majority of people in 34 African countries condemn their governments’ anti-corruption efforts, according to Afrobarometer surveys of more than 51,000 people between October 2011 and June 2013.” Africa: Most Africans Condemn Govt’s Over Anti-Corruption Efforts, ALLAFRICA (Nov. 13, 2013), http://allafrica.com/stories/201311130879.html. There are a few exceptions like Cape Verde, Mauritius, Rwanda, Botswana and Seychelles where there is limited corruption. Chantal Uwimana, CPI 2013: Rule Of Law Vital For Africa’s Development, TRANSPARENCY INT’L (Dec. 3, 2013), http://blog.transparency.org/2013/12/03/cpi-2013-rule-of-law-vital-for-africas-development/ While it is worth noting that corruption is not a problem that is unique to African and undemocratic countries, it seems fair to indicate the willingness and institutional capacity to combat it may depend on the degree to which countries are democratic. European Commission, Report From the Commission to the Council and the European Parliament: EU Anti-Corruption Report, COM (2014) 38 final (Feb. 3, 2014). The latest report of the European Union indicates European countries are not immune from this problem and it reiterates the view, that “deep-rooted corruption . . . hampers economic development, undermines democracy, and damages social justice and the rule of law.” Id. at 2.

that there is a “need to have capable developmental states, based on strong institutions, with a robust and inclusive constitutional order and in which the rule of law is strictly observed.”

Theoretically, African Union leaders embrace the idea that the rule of law is vital for development. However, disconnect between theory and practice remains. For example, while most postcolonial African states adopted progressive constitutions and held elections, the judiciaries, for the most part, are not independent and cannot rule on constitutional issues against the wishes of ruling elites.

Ruling elites operate on the basis of political patronage, rewarding a small group of loyal clientele and ignoring the overall development of the country. In this context, no matter how progressive the national constitutions may be, there can be no real rule of law.

But what does the rule of law mean and what role, if any, does it play with regard to development? Theoretically, the rule of law does not mean exactly the same thing from an economic point of view as it does from to the legal perspective. Even within the legal perspective, there are two versions of the rule of law—substantive and formal. According to Brian Tamanaha, “the substantive version of the rule of law is the idea that there are legal limits on the government: there are certain things the government cannot do, even when exercising its sovereign lawmaking power...[t]his version...ensures the ‘rightness’ of law in accordance with a preexisting higher standard.” In contrast, the formal version of the rule of law “is the idea that the government is bound to abide by legal rules that are publicly set forth in advance, are certain and stable, and are applied equally to all in accordance with their terms...[t]his version of the rule of law ensures the predictability of law.”

The two versions of the rule of law are not antithetical: ideally they share the basic proposition that the government and

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18 Id.
19 “Political developments in Africa...have demonstrated repeatedly...that only have constitutions ‘failed’ to regulate the exercise of power, but...‘few governments have valued them other than as rhetoric.’” H.W.O. Okoth-Ogendo, Constitutions Without Constitutionalism: Reflections on an African Political Paradox, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 66 (Douglas Greenberg et al. eds., 1993).
20 Id. at 71.
22 Id.
its officials, as well as citizens, operate within legal limits and are bound to follow legal rules. The basic difference is that the former version sets limits on the permissible content of law, whereas in the latter version the law can be whatever the law maker desires, as long as it satisfies the formal requirements set out above.\textsuperscript{23}

Both versions inform the understanding of rule of law in this article.

The relationship of rule of law and economic development will now be elaborated upon. Seth W. Norton emphasizes that “[p]roperty rights are an essential prerequisite for growth.”\textsuperscript{24} Norton elaborates further saying,

If the political regime facilitates contracting via private property rights, then wealth-maximizing behavior through detailed specification of property rights and the resultant economic growth are more likely. If the political regime retards contracting via private property, then wealth maximizing behavior through the entrepreneurial specification of property rights and the attendant economic growth will likewise be less likely.\textsuperscript{25}

Norton observes that there is:


Norton examines empirical research that demonstrates that “better specified property rights are associated with higher levels of human development.”\textsuperscript{27} Even more relevant is that “there is compelling evidence that strong property rights significantly reduce the deprivation of the world’s most impoverished people and there is some evidence that weak property rights increase the deprivation

\textsuperscript{23} Id.


\textsuperscript{25} Id. at 234.

\textsuperscript{26} Id.

\textsuperscript{27} Id. at 238.
of those people.” In more concrete terms, Norton points to the fact that “the proportion of people not expected to live to age 40 is about 6 to 9 percent for regimes with strong property rights and more than 25 percent for regimes with weak property rights.”

Even more strikingly, Norton notes that in “the case of adult illiteracy, where people are deprived of the benefits of knowledge and communication associated with literacy, the illiterate adult proportion of poor countries is about 13 percent in regimes with strong property rights and about 43 percent in those regimes with weak property rights.”

According to Brian Tamanaha, “certainty, predictability, and security” play a key role in economic development:

In addition to enhancing liberty . . . market-based economic systems benefit from these qualities in two different respects, the first related to contracts and the second to property . . . One can enter into a contract with some assurances of the consequences that will follow if the other party fails to live up to the terms of the contract. This encourages the creation of contracts with strangers or parties at a distance, which expands the range and frequency of commercial interactions . . . Second, the protection of property (and persons) conferred by legal rules offers an assurance that the fruits of one’s labor will be protected from expropriation by others.

Tamanaha further argues that “one function of the rule of law is to impose legal restraints on government officials, in two different ways: a) by requiring compliance with existing law; and b) by imposing legal limits on law-making power.” The latter type of restraint insists that even if made by a legitimate law-making authority, actions cannot be legally allowed.

Beyond those generic features of the rule of law, the specific elements have been analyzed in considerable detail. Joseph Raz is arguably the foremost protagonist of definitional efforts. He

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28 Id. at 239.
29 Norton, supra note 24, at 243.
30 Id.
32 Id.
33 Id. at 3.
identifies eight principles of the rule of law:

(1) laws should be prospective, open and clear; (2) laws should be relatively stable; (3) the making of particular laws (legal orders) should be guided by open, clear, general rules; (4) the independence of the judiciary must be guaranteed; (5) the principles of natural justice must be observed; (6) courts should have review powers over the implementation of the principles of the rule of law in respect of administrative action and legislation; (7) courts should be easily accessible; and (8) the discretion of law enforcement agencies should not be allowed to pervert the law.34

Recently, the World Justice Project ("WJP") focused on the principles identified by Raz and their significance in economic development efforts.35 As the WJP notes, “[u]neven enforcement of regulations, corruption, insecure property rights, and ineffective means to settle disputes undermine legitimate business and drive away both domestic and foreign investment.”36

According to WJP, the Rule of Law encompasses four universal principles:

(1) The government and its officials and agents are accountable under the law; (2) The laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property; (3) The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; (4) Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.37

Speaking specifically with regard to the second principle regarding protection of fundamental human rights, Nobel Peace Prize winner Amartya Sen acknowledges that it is “certainly true that some relatively authoritarian states (such as . . . Singapore and post-reform China) have had faster rates of economic growth than many less authoritarian ones (including India, Costa Rica and Jamaica),”38 But Sen rejects the thesis that “freedoms and rights

35 World Justice Project, supra note 7.
36 Id. at 11.
37 Id. at 10.
38 AMARTYA SEN, DEVELOPMENT AS FREEDOM 149 (1999).
hamper economic growth and development,” observing that it is based on “very selective and limited information, rather than any general statistical testing over the wide-ranging data that is available.”

According to Sen, “[s]ystematic empirical studies give no real support to the claim that there is a general conflict between political freedoms and economic performance.” Sen further notes, “there is rather little general evidence that authoritarian governance and the suppression of political and civil rights are beneficial in encouraging economic development.” Instead, the WJP asserts that adherence to the rule of law “appears to be positively correlated with per capita income.”

With regard to Africa, the WJP Rule of Law Index 2011 report, which covered eight countries in Sub-Saharan Africa (“SSA”), indicates that apart from regional leaders South Africa and Ghana, “the rest of the countries are positioned at the bottom of the global ranking” for Rule of Law. With this in mind, a necessary prerequisite to spur the economic liberalization taking place across much of Africa is the establishment of checks and balances to counter corruption and patrimonial networking.

III. Suring African Economic Growth

This section discusses the unprecedented economic progress that Africa has made in recent years, and whether it can be sustained

39 Id. at 148.
40 Id. at 149.
42 SEN, supra note 38, at 150.
44 Id. at 34.
45 Yeh, supra note 8, at 203.
through better adherence to the rule of law. The African economy, specifically in Sub-Saharan African economy, is growing astoundingly, even in those countries without stellar records of rule of law. According to the International Monetary Fund (“IMF”) the forecast for Sub-Saharan Africa’s (SSA) economic growth for 2015 was 3.8%, contrasted with the Euro area’s 1.5%. Is there evidence that proves (or at least suggests a possible correlation) that African countries will achieve sustainable development if they adhere to the rule of law? A review of the human development index and corresponding rule of law index shows that there is a positive relationship between the two. Thirty-one countries were sampled from 1998 to 2007; during this time fifty-seven instances among the African countries sampled demonstrated an increase in rule of law and an accompanying increase in human development index. Only fifteen instances occurred in which the rule of law declined, and the human development index increased. But a quantitive demonstration that there is a relationship between rule of law and development can only be suggestive since there could be a number of explanatory factors at play, such as availability of natural resources as well the commitment of leadership to national development. With this in mind, a qualitative assessment of the relationship is imperative and that analysis constitutes the remainder of this work. This qualitative assessment consists of a review of judicial decisions as well as legal instruments that pertain to the rule of law in Africa.

IV. Rule of Law and African Judicial Institutions

The African Union, its laws and judicial/quasi-judicial institutions are trying to project belief in and commitment to the Rule of Law as an important aspect of human and economic development. The question is: to what extent have they been successful?

Collectively, the African leaders have increasingly adopted

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46 IMF Regional Economic Outlook, supra note 2, at ix.
48 For full data, see Appendix A.
49 Id.
50 Id.
51 Id.
progressive new legal instruments such as the Constitutive Act of
the African Union and the Africa Charter On Democracy, Elections
and Governance, and established judicial institutions such as the
African Court of Justice and Human Rights. The following
discussion describes these developments and analyzes their
adequacy.

A. Constitutive Act of the African Union

Since the reconstitution of the Organization of African Unity
into the African Union (“AU”), there has been a heightened
emphasis on the rule of law. Some of this effort has had a positive
impact, particularly in regards to AU’s resistance to
unconstitutional change of governments. But in many African
countries the net effect for the Rule of Law has been marginal rather
than substantive.

With that said, the Constitutive Act of the African Union
(Constitutive Act) states that it is premised, among other things, on
the determination to “promote and protect human and peoples’
rights, consolidate democratic institutions and culture, and to ensure
good governance and the rule of law” and to act with “[r]espect
for democratic principles, human rights, the rule of law and good
governance.” At least in terms of the tone, this represents an
improvement relative to the Charter of the now defunct
Organization of African Unity, which barely made any reference to
rule of law. At least in terms of the tone, this represents an
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rule of law.

As if to send the message that the AU is serious about the rule
of law, the Constitutive Act provides that “[g]overnments which
shall come to power through unconstitutional means shall not be
allowed to participate in the activities of the Union.” However, by

52 Africa Charter on Democracy, Elections and Governance art. 2(2) (2007),
[https://perma.cc/BU8F-NA9] [hereinafter ACDEG]; Constitutive Act of the African
Union (Constitutive Act) pmbl., OAU Doc. CAB/LEG/23.15 (entered into force May 26,
2001).

53 Constitutive Act of the African Union (Constitutive Act) pmbl., OAU Doc.

54 Id. art. 4(m).

55 Id. art. 30.
focusing solely on those governments that come to power through unconstitutional means and remaining silent on those governments that perpetuate themselves in power by amending their constitutions, the Constitutive Act does not advance its overarching objective of rule of law.

B. Charter on Democracy, Elections, and Governance

The African Charter on Democracy, Elections and Governance (“ACDEG”) provides that its objective, among others, is to “[p]romote and enhance adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the State Parties.” ACDEG also specifically provides that, among other things, “State Parties shall strive to institutionalize good political governance through . . . [e]ntrenching and respecting the principle of the rule of law.” The ACDEG also says that “State Parties shall take all appropriate measures to ensure constitutional rule, particularly constitutional transfer of power.”

In an apparent reference to the tendency of many regimes to perpetuate themselves in power through constitutional amendments, the ACDEG provides that “State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum,” which would be a substantial improvement if more African countries were parties to ACDEG. Furthermore, Article 23 of ACDEG is critically important as it specifies that “illegal means of accessing or maintaining power constitutes an unconstitutional change of government,” and provides for sanctions from the African Union attached to such conduct, including a suspension of the “State Party from the exercise of its right to participate in the activities of the

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56 ACDEG, supra note 52, art. 2(2).
57 Id. art. 32(8).
58 Id. art. 5.
59 Id. art. 10(2).
61 ACDEG, supra note 52, art. 23.
[African] Union in accordance with the provisions of articles 30 of the Constitutive Act and 7(g) of the Protocol."  

Additionally, ACDEG provides that “[p]erpetrators of unconstitutional change of government may also be tried before the competent court of the [African] Union.”  

Lastly, it expresses that “State Parties shall not harbour or give sanctuary to perpetrators of unconstitutional changes of government.”  

Based on these provisions, the ACDEG represents a progressive normative step. The same cannot be said from an enforcement standpoint because of the delay in implementation as well as the paucity of states that are bound by ACDEG.  

While it was adopted on January 30, 2007, the ACDEG only entered into force nearly five year later on February 15, 2012, and even with its entry into force it had been ratified by only twenty-four of the fifty-four African states as of January 4, 2016.  

The lack of political resolve to move to the practical application of these praiseworthy provisions is what renders most of these instruments largely ineffective.

In any case, there is still a problem with regard to the integrity of the electoral system in many African countries.  In 2013, the Economist Intelligence Unit published a democracy index for 2012 in which it compared the state of democracy in 165 countries across the world.  

The report’s democracy index is “based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture."  

Countries are placed within one of four types of regimes: full democracies; flawed democracies; hybrid regimes; and authoritarian regimes."  

The report notes that:

Elections have become a normal occurrence in Sub-Saharan Africa. Since the late 1990s the number of coups has fallen

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62 Id. art. 25(1).
63 Id. art. 25(5).
64 Id. art. 25(8).
65 See ACDEG, supra note 52, art. 44 (stating the requirements in order to implement the charter).
66 See id.
68 Id.
69 Id.
sharply, whereas the number of elections has increased. However, many elections are still rigged. Progress in democracy in the region has been slow and uneven, but nevertheless continues. The number of elections held annually in recent years has increased; since 2000 between 15 and 20 elections have been held each year. Although the holding of elections has become commonplace, not all ballots pass the test of being “free and fair” and many have been charades held by regimes clinging on to power.70

The report further notes that:

Only one state in the region (of the 44 assessed) remains a full democracy: the Indian Ocean island of Mauritius, which has maintained a strong democratic tradition since the country gained independence in 1968. The region has several flawed democracies, including South Africa, Benin, Cape Verde, Botswana, Namibia, Lesotho, Ghana, Malawi and Zambia. There are nine hybrid regimes and authoritarian regimes (24; over one-half of the total) continue to predominate. In 2012 Malawi and Senegal improved from hybrid regimes to flawed democracies. Burundi moved from an authoritarian to a hybrid regime. Mali regressed from a flawed democracy to a hybrid regime.71

C. African Commissions, Organizations, and Courts

1. African Commission on Human and Peoples’ Rights

A discussion of Africa’s commitment to human rights leads inevitably to the African Charter on Human and Peoples’ Rights (“African Charter”).72 From the standpoint of substantive rule of law, the African Charter is not without its flaws. The African Charter must be assessed against the background of prevailing political realities in Africa,73 which dictate the scope of rights

70 Id. at 24.
71 Id.
73 Not without its drawbacks, the African Charter would have an “African” flavor to human rights. Thus, when African Heads of State and Government met in 1979 in Monrovia, Liberia, and adopted a decision requesting the General Secretariat to draft a
articulated therein. Regarding freedom of expression or speech, the African Charter does not define the individual’s right to information and his/her right to freely express and disseminate his opinions. Additionally, regarding democracy, unlike Article 21 of the International Covenant on Civil and Political Rights and comparable provisions of the Inter-American and European human rights instruments, the African Charter’s corresponding provision does not refer to the concept of democratic society, which is a critical component of rule of law at least in terms of political accountability. This is unsurprising in light of the reluctance of most African leaders to embrace genuine democracy, at least at the time that the African Charter was adopted.

Additionally, the African Charter grants rights with one hand and significantly undercuts them with the other because of overbroad limitation clauses—the so-called “claw-back” clauses. For example, Article 9(2) of the African Charter provides that “[e]very individual shall have the right to express and disseminate his opinions within the law.” In this case, “within the law” constitutes a claw-back clause, which prioritizes the provisions of domestic law relative to the human rights entrenched in the African

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74 African Charter, supra note 72, art. 9.
75 Id.
77 African Charter, supra note 72, art. 9(2).
But, over 7,000 delegates who attended the Vienna World Conference on Human Rights concluded, “lack of development may not be invoked to justify the abridgement of internationally recognized human rights.” In an effort to limit the chilling impact of these claw-back clauses, the African Commission on Human and People’s Rights (hereinafter “ACHPR”) has consistently denied the efforts of African states to rely on such claw-backs, holding that the domestic law used to limit the right in question must comply with international standards. But recommendations of ACHPR are not legally binding.

The African Charter provides for the freedom of every individual to take part in the conduct of public affairs, directly or indirectly through freely chosen representatives. The ACHPR has attempted to define the meaning and application of the rule of law, and it has done so extensively, sometimes emphasizing the formal and other times the substantive version of rule of law. But, again,

78 Heyns, supra note 76, at 135.
82 See Constitutional Rights Project, supra note 80.
although the ACHPR comments on the need to protect human rights generally and the rule of law specifically, it is not legally binding on African states.\textsuperscript{83} That said, in its recent Resolution on the Unconstitutional Change of Governments, the African Commission on Human and Peoples’ Rights deplored “the setbacks recorded in Mali and Guinea-Bissau, compared with the significant strides made in fostering democracy and the rule of law on the continent in recent years.”\textsuperscript{84} Beyond this, the ACHPR has extensively commented on the rule of law in its jurisprudence.

In Amnesty International, Comité Loosli Bachelard, Lawyers’ Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan,\textsuperscript{85} the Lawyers Committee for Human Rights alleged that the government of Sudan had undermined the “independence of the judiciary and the rule of law” by establishing “special tribunals, which are not independent.”\textsuperscript{86} The ordinary courts are precluded from hearing cases that are of the exclusive competence of the special tribunals.”\textsuperscript{87} In finding for the applicants, the ACHPR emphasized, “the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law.”\textsuperscript{88}

More recently, in Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v. Zimbabwe,\textsuperscript{89} the complainants prayed that the ACHPR follow the precedent laid by the Inter-American Commission on Human Rights according to which “there must be juridical and institutional systems in which laws outweigh the will of leaders and in which

\textsuperscript{83} See African Charter, supra note 72.

\textsuperscript{84} ACHPR, Res. No. 213, Resolution on the Unconstitutional Change of Governments (2012), http://www.achpr.org/sessions/51st/resolutions/213/ [https://perma.cc/95H4-N2FY].


\textsuperscript{86} Id. ¶ 17.

\textsuperscript{87} Id.

\textsuperscript{88} Id. ¶ 79.

some institutions exercise control over others for the sake of guaranteeing the integrity of the expression of the peoples’ will – rule of law.”

Many African countries adopted progressive constitutions to demonstrate that they are committed to the rule of law. The ACHPR commented on this phenomenon in *Movement burkinabé des droits de l’Homme et des peuples v. Burkina Faso*. The applicants alleged that although Burkina Faso re-established the rule of law by adopting a new constitution on December 11, 1991, rekindling the hope that previous human rights violations would be addressed, the government went on to commit acts that were prejudicial to civil and political liberties.

The ACHPR has had numerous opportunities to address issues related to judicial independence, due process, or mere refusal to honor judgments. In *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, petitioners alleged that the Respondent State was “governed by a military regime, which does not attach the required importance to normal procedures under the rule of law or respect for the country’s institutions.” The ACHPR held that “where the competent authorities create obstacles that prevent victims from accessing the competent tribunals, they would be held liable.”

Similarly, in *Antonie Bissangou v. Congo*, the Congolese civil

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90 Id. ¶ 79.


93 Id. ¶ 2.


95 Id. ¶ 64.

96 Id. ¶ 181.

97 Antonie Bissangou v. Congo, Communication 253/02, African Commission on
division of the Court of First Instance passed a ruling ordering the Congolese Republic and the Municipal Office of Brazzaville to pay damages\(^98\) caused to Antonie Bissangou’s personal property and real estate, following barbaric acts carried out by soldiers, armed bands, and uncontrolled elements of the Congolese National Police Force during the socio-political upheavals that took place in the country in 1993.\(^99\) However, the Minister of Economy, Finance and Budget refused to execute the ruling, for no apparent reason.\(^100\) The ACHPR held that “the refusal by the Minister of the Economy, Finance and the Budget is not based on any specific legislative authority . . . the [African] Commission feels that it was incumbent on the Minister to honour the judgment by virtue of the rule of law.”\(^101\)

In short, the ACHPR has not hesitated to respond to military dictatorships, but its efforts have oftentimes proved futile; military governments often rule by decree and in most cases in blatant and utter disregard for the rule of law and respect for human rights.\(^102\) In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria\(^103\)* the applicants objected to Nigeria’s military government’s decrees, which, among other things, “ousted the jurisdiction of the courts, thus prohibiting them from entertaining any action in respect to the decrees.”\(^104\) The ACHPR held that to

[H]ave a duly instituted court case in the process of litigation nullified by executive decree forecloses all possibility of jurisdiction being exercised by competent national organs . . . The risk of losing the case is one that every litigant accepts, but the risk of having the suit abruptly nullified will seriously discourage

\(^{98}\) Id. ¶ 66.

\(^{99}\) Id.

\(^{100}\) Id.

\(^{101}\) Id. ¶ 71.

\(^{102}\) See infra pp. 22-25.


\(^{104}\) Id. ¶ 5.
litigation, with serious consequence for the protection of individual rights. Citizens who cannot have recourse to the courts of their country are highly vulnerable to violation of their rights.\textsuperscript{105}

In Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l’Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l’Homme v. Mauritania,\textsuperscript{106} it was alleged that a senior military officer headed the section responsible for matters relating to state security in a Special Tribunal.\textsuperscript{107} Two assessors, both military men, assisted him and the Special Tribunal itself was presided over by an army officer.\textsuperscript{108} The ACHPR held that “[w]ithdrawing criminal procedure from the competence of the Courts established within the judicial order and conferring onto an extension of the executive necessarily compromises the impartiality of the Courts, to which the African Charter refers.”\textsuperscript{109} Furthermore, in International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria,\textsuperscript{110} a “State Military Administrator declared that Mr. Saro-Wiwa and his co-defendants had incited members of MOSOP to murder four rival Ogoni leaders.”\textsuperscript{111} The defendants were not allowed to meet with their lawyers, and no information on the charges was provided to the defense.\textsuperscript{112} The trial of the defendants took place before a tribunal composed of three members who were appointed directly by General Abacha, who was then president of Nigeria.\textsuperscript{113} The tribunal condemned the defendants to death, and they were executed even though the defendants had applied to the ACHPR for interim measures for stay of the execution pending

\textsuperscript{105} \textit{Id.} ¶33.
\textsuperscript{106} Malawi African Ass’n v. Mauritania, \textit{supra} note 80.
\textsuperscript{107} \textit{Id.} ¶ 98.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{111} \textit{Id.} ¶ 4.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} ¶ 5.
resolution of their underlying primary application. The ACHPR held, inter alia, that special tribunals, whose members were exclusively from the armed forces, violated “the African Charter, because their composition is at the discretion of the executive branch.” It also held that the tribunal was not impartial or independent as it effectively ousted all possibility of appeal to the ordinary courts. Lastly, in Lawyers of Human Rights v. Swaziland, the ACHPR held that “the Proclamation of 1973 and the Decree of 2001 [which] vested judicial power in the King [of Swaziland] and ousted the jurisdiction of the court on certain matters,” undermined the independence of the judiciary.

In light of these rampant breaches of the rule of law, the ACHPR issued a Resolution on the Respect and the Strengthening on the Independence of the Judiciary, in which it “[r]ecognis[ed] the need for African countries to have a strong and independent judiciar[ies] enjoying the confidence of the people for sustainable democracy and development.” Here, the ACHPR explicitly links respect for the rule of law (independence of the judiciary, in this case) to African development efforts. However, African leaders who understand that the ACHPR does not issue legally binding decisions have not taken most of its recommendations seriously.

2. The African Court of Human and Peoples’ Rights and the African Court of Justice and Human Rights

The African Court of Human and People’s Rights, which is planned to be merged with the African Court of Justice into the African Court of Justice and Human Rights (hereinafter “African Court”), breathed fresh air into the African mechanism for the

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114 Id. ¶ 48.
115 Id. ¶ 86.
118 Id. ¶ 54.
119 Id.
121 Lawyers of Human Rights, supra note 117, ¶ 58.
protection of Rule of Law, promising for the first time that African states would have to contend with legally binding decisions, unless they choose not to comply with those rulings.122 A more robust and muscular African Court of Justice and Human Rights would complement the African Commission on Human and People’s Rights which did not issue legally binding decisions. The ensuing discussion will focus mainly, though not exclusively, on the existing African Court of Human and People’s Rights.

But the African Court does not necessarily constitute a radical departure from the past. For example, while Article 30(f) of the Protocol on the African Statute of the African Court of Justice and Human Rights (“African Court Protocol”)123 provides that individuals have access to the court, access is subject to the provisions of Article 8124 which provides that “[a]ny Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the [African] Court [of Justice and Human Rights] to receive cases under Article 30(f) involving a State which has not made such a declaration.”125 Similar provisions are entrenched in the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights.126 This has frustrated those


125 *Id.* art. 8(3).

126 Article 34(6) of the Protocol establishing the African Court of Human Rights provides that “[a]t the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, need
who expected to obtain a new dispensation with the enactment of these African courts because the more muscular aspects of their constitutive protocols are simply not applicable to most African states unless they choose to accept them. For example, in *Michelot Yogogombaye v. The Republic of Senegal*, Mr. Michelot Yogogombaye, a Chadian national, brought a case against the Republic of Senegal, “with a view to obtaining the suspension of ongoing proceedings instituted by Senegal with the objective to charge, try and sentence Mr. Hissein Habré, a former Head of State of Chad”, who was an asylee in Senegal. In its statement of defense, Senegal raised a number of preliminary objections regarding the jurisdiction of the Court and admissibility of the application, and asserted that it did not make any declaration accepting the jurisdiction of the African Court to deal with applications brought by individuals. The court found that, as a matter of fact, Senegal had not submitted the said declaration and, consequently, the Court did not have jurisdiction to hear the application. There is now a growing pattern of cases in which the court has denied that it has jurisdiction on the same ground. The African Court had no difficulty in disposing of *Youssef Ababou v. Morocco*. The applicant alleged that, “the Kingdom of Morocco

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*treaty series number* art. 34(6), Jun. 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III). The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.” *Id.* Article 5(3) of the Protocol provides that “the Court may entitle relevant Non-governmental Organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34 (6) of this Protocol.” *Id.* art. 5(3). To date (Aug.3, 2016), thirty African countries have ratified this protocol and but only seven of them have made the Article 34(6) Declaration. See Ratification Table, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights, [https://perma.cc/E4XN-KSKZ](https://perma.cc/E4XN-KSKZ) (The seven countries that have ratified are: Benin, Burkina Faso, Cote d’Ivoire, Ghana, Mali, Malawi and Tanzania.)

127 *See* African Court Protocol, *supra* note 123.


129 *Id.* ¶1.

130 *Id.* ¶12.

131 *Id.* ¶37.

ha[d] refused, and continue[d] to refuse, to issue him his documents, which include[d] a national identity card and a passport.”

However, citing Article 3(1) of its Protocol, the court stated that because, “this is an application brought against a State which is not a member of the African Union, [that] has neither signed nor ratified the Protocol establishing the Court, the Court concludes that manifestly, it does not have the jurisdiction to hear the application.”

Similarly, the African court ruled that it did not have jurisdiction in *Efoua Mbozo'o Samuel v. The Pan African Parliament* , although on different grounds. In this case “Samuel, domiciled in Yaoundé, Cameroon, brought before the Court, a case against the Pan African Parliament, alleging breach of paragraph 4 of his contract of employment and of Article 13(a) and (b) of the OAU Staff Regulations, and improper refusal to renew his contract.”

The African Court held that,

> [I]t is clear that this application is exclusively grounded upon breach of employment contract in accordance with Article 13(a) and (b) of the OAU Staff Regulations, for which the Court lacks jurisdiction in terms of Article 3 of the Protocol. This is therefore a case which, in terms of the OAU Staff Regulations, is within the competence of the Ad hoc Administrative Tribunal of the African Union. Further, in accordance with Article 29(1)(c) of its Protocol, the Court with jurisdiction over any appeals from this Ad hoc Administrative Tribunal is the African Court of Justice and Human Rights.

Several conclusions can be drawn from the case law presented above. First, the fact that an individual petition is preconditioned

[https://perma.cc/AGX9-MH2A].

133  *Id.* ¶ 1.
134  *Id.* ¶ 12.
136  See *id.* ¶ 6 (stating that “this application is exclusively grounded upon breach of employment contract in accordance with Article 13 (a) and (b) of the OAU Staff Regulations, for which the Court lacks jurisdiction in terms of Article 3 of the Protocol”).
137  *Id.* ¶ 1.
138  *Id.* ¶ 6.
by a state declaration throws a damper on the initial hope that the African Union would impose rule of law on individual countries. Rather, it merely prolongs African states’ strategies of avoidance of legal obligation at the regional level whenever it is not convenient. Second, the African Court has yet to be fully utilized in a serious manner. The cases presented above were dismissed on grounds that were obvious. The result could have been foreseen, yet these cases made their way into the Court’s docket. Third, although the African Court had a slow beginning, there is growing grass-roots support for the institution. Fourth, there is a need to create more awareness among African lawyers about the existence of the African Court and to lobby more African states to make the necessary declarations in order to facilitate individual petitions.

Beyond these strictly judicial institutions, in an attempt to underscore the need to create a climate of adherence to the rule of law, a number of political institutions and mechanisms aim to reinforce the weak role of the African Court. Among these is the New Partnership for Africa’s Development.

3. New Partnership for Africa’s Development

The New Partnership for Africa’s Development (NEPAD) is a program of the African Union (AU) adopted in Lusaka, Zambia in 2001. According to the principles of NEPAD, it is generally acknowledged that “development is impossible in the absence of true democracy, respect for human rights, peace and good governance.” Accordingly, NEPAD’s Democracy and Political Governance Initiative emphasizes “respect for human rights, peace and good governance.” These objectives are premised on the recognition that “[w]hile it cannot be denied that the involvement of


140 “NEPAD constitutes a framework on the basis of which Africa as a continent intends to interact with the rest of the world, particularly the industrialised countries and the multi-lateral global institutions such as the World Bank, the International Monetary Fund and the United Nations (UN).” Evarist Baimu, Human Rights In NEPAD And Its Implications For The African Human Rights System, 2 AFR. HUM. RTS. L.J. 301, 303 (2002).

141 Id. at 306.

142 Id.
foreign elements played a part in hindering the growth of African countries, it is also worth[... not[ing] that poor governance on the part of the African leadership has also played a significant part in [the] under-develop[ment] [of] the continent.”

Additionally, following a NEPAD report in 2001, African Heads of State and Government adopted the Declaration on Democracy, Political, Economic and Corporate Governance, which focuses on the need for the rule of law. This declaration commits African leaders to “increase . . . efforts [at] restoring stability, peace and security in the African continent, as these are essential conditions for sustainable development, alongside democracy, good governance, human rights, social development, protection of environment and sound economic management.”

It is believed that, “since NEPAD is generally accepted to be crucial to Africa’s recovery and since it depends on western aid, African governments may be morally compelled to uphold human rights.” It is noteworthy, however, that “NEPAD is a ‘gentlemen’s agreement’. In a legal sense, NEPAD does not commit any African State but only African leaders,” and thus it “is incapable of generating compliance and implementation.”

NEPAD lies at the margin with regard to efforts to promote human rights and the rule of law. This could be because of its perceived lack of legitimacy due in part because NEPAD had a controversial beginning. Critics of NEPAD view it as a program that was originally “imposed on African countries by their western creditors” as an alternative to the African Union.

143 Gumedze, supra note 12, at 154.
145 Id. ¶ 9.
147 Gumedze, supra note 12, at 156.
148 Id. at 157.
149 NEPAD, supra note 144, ¶ 3.
150 Akokpari, supra note 146, at 464.
151 Id. at 463–64.
4. African Peer Review Mechanism

In addition to NEPAD, African leaders established the African Peer Review Mechanism (APRM) under the auspices of the African Union (AU), designed specifically to promote good governance. The APRM was established in 2003 by the African Union in the framework of the implementation of NEPAD. This is a process by which African states and designated institutions “periodically review and assess the adherence of states to basic or established principles of governance set out by both NEPAD and the AU.”

The APRM is premised on the notion that if “states can voluntarily opt in or out without losing their AU membership . . . African leaders will be more willing to accept and implement recommendations from their peers than from international creditors, whose disfavor with discredited governance practices often translate into aid suspension.” The hope is that “African leaders voluntarily commit themselves to NEPAD and all that it entails.”

So far, the APRM has been anything but a resounding success. Part of the reason is that the “reviewing body has no clearly defined way[] of compelling deviant states to reform.” Another weakness of the APRM is the reluctance of African leaders to condemn their peers. Lastly, criticism of the APRM is that it is a mechanism that has been created within the AU without sufficient thought as to how it interfaces “with the existing institutions and mechanisms.”

But, having multiple institutions is not always detrimental to promotion of the rule of law and the protection of human rights as these institutions can mutually reinforce and augment each other. The proximity of these sub-regional institutions to Member States is certainly an advantage in terms of compelling compliance, if only through marshaling shame.

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152 See id. at 464 (stating the different goals of AU).
154 Akokpari, supra note 146, at 467.
155 Id. at 468.
156 Id. at 465–66.
157 Id. at 468.
158 See id. at 469 (stating that African leaders shy away from condemning their peers).
159 Baimu, supra note 140, at 314.
D. African Sub-Regional Organizations

In addition to the continent-wide organizations like the African Union, a number of sub-regional organizations are dedicated, among other things, to promoting the rule of law and respect for human rights among member states as a precondition for economic development.

1. Southern African Development Community

The Southern African Development Community (“SADC”)—which is composed of the Republic of Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, the Republic of Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe—recognizes the inter-linkage between rule of law and economic development.160 The Treaty of the Southern African Development Community (as amended) provides that SADC is mindful of the “need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law.”161 Moreover, in its operative provisions, this treaty provides that SADC and its Member States shall act in accordance with, inter alia, “the rule of law.”162 The SADC Tribunal—in operation since 2005—has been instrumental in effectuating these provisions and its decisions are “final and binding.”163 In addition, this tribunal has “jurisdiction over disputes between States, and between natural or legal persons and States.”164 This provision gives individuals direct access to the tribunal unlike the African Court.

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161 Id.
162 Id. at 5.
163 Id. at 16.
In Mike Campbell (PVT) Limited and Others v. The Republic of Zimbabwe\textsuperscript{165} the SADC Tribunal directed Zimbabwe to “take all necessary measures to protect the possession, occupation and ownership of the land of the applicants and to take all appropriate measures to ensure that no action is taken to evict the applicants from, or interfere with, their peaceful residence on the land.”\textsuperscript{166} The SADC Tribunal stated:

It is settled law that the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation . . . Article 4(c) of the Treaty obliges Member States of SADC to respect principles of “human rights, democracy and the rule of law.”\textsuperscript{167}

In Gondo and Others v. Republic of Zimbabwe,\textsuperscript{168} “the applicants [were] victims of violence inflicted upon them by the National Police and/or the National Army of the Zimbabwe.”\textsuperscript{169} The applicants were successful in the Zimbabwe courts and were awarded damages.\textsuperscript{170} However, pursuant to its State Liability Act, which immunized the State from enforcement of judgment debts against it, the government of Zimbabwe refused to pay the judgment award.\textsuperscript{171} The issue before the SADC Tribunal was whether the State Liability Act was compatible with the obligations of Zimbabwe under the SADC Treaty in so far as it “immunized Zimbabwe from enforcement of judgment debts against it, thereby removing any incentive for it to comply with the orders of the Court and, ultimately, the observance of the rule of law.”\textsuperscript{172} The SADC Tribunal stated, “we draw the attention of any Member State of SADC to the adverse effect which its existing State immunity or


\textsuperscript{166} Id. at 58.

\textsuperscript{167} Id. at 26.


\textsuperscript{169} Id. ¶ 1.

\textsuperscript{170} Id.

\textsuperscript{171} Id. ¶ 7.

\textsuperscript{172} Id.
State liability legislation has on the principles of human rights, democracy and the rule of law.”

Regarding enforcement, the SADC Protocol on Tribunal and the Rules of Procedure Thereof (“SADC Protocol”) provides that “[a]ny failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned,” and “[i]f the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.”

This looks impressive on paper, but it takes more than having these provisions on paper, as the following case illustrates. Frustrated by Zimbabwe’s utter disregard for its rulings, in *Fick and Others v. Republic of Zimbabwe*, an application was brought under Article 32(4) of the SADC Tribunal Protocol so that the SADC Tribunal might report the failure by the Republic of Zimbabwe to the SADC Summit for its “appropriate action,” pursuant to Article 32(5) of the SADC Tribunal Protocol. This application was made on the basis of two earlier decisions where the court ruled against Zimbabwe: *Mike Campbell (Pvt) Limited and others v. The Republic of Zimbabwe* and *William Campbell and Another v. The Republic of Zimbabwe*. In the former case, the SADC Tribunal held that Zimbabwe was in breach of Articles 4(c) and 6(2) of the Southern African Development Community Treaty. In the latter case, the Tribunal found that the Zimbabwe had failed to comply with the decision in the former case, and reported such failure to the Summit to take appropriate action in terms of Article 32(5) of the Protocol. Zimbabwe’s Minister of Justice and Legal Affairs had informed the SADC Tribunal as follows:

We hereby advise that, henceforth, we will not appear before the

173 *Id.* ¶ 40.
175 *Id.* art. 32(5).
177 *Id.* at 2.
178 *Campbell I*, *supra* note 165.
180 *Campbell I*, *supra* note 165, at 40.
181 *Campbell II*, *supra* note 179, at 30.
Tribunal and neither will we respond to any action or suit that may be instituted or be pending against the Republic of Zimbabwe before the Tribunal. For the same reasons, any decisions that the Tribunal may have made or may make in the future against the Republic of Zimbabwe, are null and void.\textsuperscript{182}

The response of the SADC Tribunal was that Zimbabwe, [H]as not complied with the decision of the Tribunal. We, therefore, hold that the existence of further acts of non-compliance with the decision of the Tribunal has been established . . . the Tribunal will again report this finding to the Summit for its appropriate action.\textsuperscript{183}

In sum, the SADC Protocol does not spell out the specific consequences the Summit of SADC member states can impose on a non-compliant state.\textsuperscript{184} The SADC Protocol provides, quite ambiguously, that in cases of non-compliance, SADC would “take appropriate action.”\textsuperscript{185} But leaving everything to the political process can be ineffective when there is no incentive for compliance.

2. The East African Community

The East African Community (“EAC”)—composed of Kenya, Uganda, the United Republic of Tanzania, Rwanda and Burundi— is primarily devoted to economic development but it also recognizes that respect for rule of law is a precondition for the achievement of the EAC’s overall objectives.\textsuperscript{186} Thus, the Treaty For The Establishment of The East African Community (as amended) provides that:

[T]he matters to be taken into account by the Partner States in considering the application by a foreign country to become a member of, be associated with, or participate in any of the activities of the Community, shall include that foreign

\textsuperscript{182} Fick, supra note 176, at 3.
\textsuperscript{183} Id. at 4.
\textsuperscript{184} See Admark Moyo, Defending Human Rights and the Rule of Law by the SADC Tribunal: Campbell and Beyond, 9 Afr. Hum. RTS. L.J. 590, 609 (2009) (“This is one of the inherent flaws of international law and states are inclined to disregard the decision if non-compliance bears no imminent threat to peace and security”).
\textsuperscript{185} SADC Treaty, supra note 164, art. 32(5).
country’s . . . adherence to universally acceptable principles of
good governance, democracy, the rule of law, observance of
human rights and social justice. 187

The EAC Treaty also mentions “good governance including
adherence to the principles of democracy, the rule of
law . . . promotion and protection of human and peoples’ rights in
accordance with the provisions of the African Charter on Human
and Peoples’ Rights” 188 among its fundamental principles.

The EAC Treaty additionally provides that:

[A]ny person who is resident in a Partner State may refer for
determination by the Court, the legality of any Act, regulation,
directive, decision or action of a Partner State or an institution of
the Community on the grounds that such Act, regulation,
directive, decision or action is unlawful or is an infringement of
the provisions of the Treaty. 189

Accordingly, individuals with the EAC can apply to the East
African Court of Justice (“EACJ”) to seek redress for breaches of
the rule of law in the event domestic remedies have been
exhausted. 190 Individual litigants can access the EACJ directly on
their own or through legal representation 191 without any
preconditions, which is not the case with the African Court. 192

The EACJ has attempted to enforce the rule of law. For
example, in Callist Andrew Mwatella & 2 others v. EAC, 193 the
applicants challenged the legality of the actions of the EAC Council
of Ministers and Secretariat in assuming control over Assembly-led
Bills. 194 Quite boldly, the EACJ told the Ministers and Attorneys
General that they had overstepped their boundaries and that that was
not acceptable in any democratic institution, holding that as Bills
were already in the Assembly they could not be withdrawn by the
Council of Ministers as the council had purportedly tried to do. 195

187 Id. art. 3(3)(b).
188 Id. art. 6(d).
189 Id. art. 30.
190 See id. art. 23 (stating the role of the court).
192 See EAC Treaty, supra note 186, art. 30.
194 See id. at 6–7 (stating the 17 issues being adjudicated in the court).
195 See id. at 19 (“[T]he Article does not imply that the Council has the power to
Despite its best efforts to be an independent and impartial body committed to promoting respect for the rule of law, the EACJ has experienced some apparent intimidation from the EAC Heads of State. The decision of the EACJ in *James Katabazi and Twenty One Others v. The Secretary General of the East African Community and the Attorney General of the Republic of Uganda*¹⁹⁶ is instructive and particularly pertinent. In 2004, as mandated by the EACJ, the claimants were charged by the Government of Uganda “with treason and misprision of treason and consequently they were remanded in custody. However, on November 16th, 2006, the Uganda High Court granted bail to fourteen of them. Immediately thereafter security personnel surrounded the High Court . . . and the fourteen were re-arrested and taken back to jail.”¹⁹⁷ “On November 24th 2006, all the claimants were taken before a military General Court Martial and were charged with offences of unlawful possession of firearms and terrorism. Both offences were based on the same facts as the previous charges for which they had been granted bail by the High Court. All claimants were again remanded in prison by the General Court Martial.”¹⁹⁸ “The Uganda Law Society applied to the Constitutional Court of Uganda challenging the interference of the court process by the security personnel as well as the constitutionality of conducting prosecutions simultaneously in civilian and military courts. The Constitutional Court ruled that the interference was unconstitutional.”¹⁹⁹ “Despite that decision, the complainants were not released from detention.”²⁰⁰ The claimants then applied to the EACJ with the complaint that since “the rule of law requires that public affairs are conducted in accordance with the law and that decisions of the court are respected, upheld and enforced by all agencies of the government . . . the actions of a Partner State of Uganda, its agencies and the second respondent were in blatant violation of the

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¹⁹⁷ *Id.* at 1–2.

¹⁹⁸ *Id.* at 2.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*
rule of law and contrary to the [EAC] Treaty.”201 The EACJ held that “the intervention by the armed security agents of Uganda to prevent the execution of a lawful court order violated the principle of the rule of law and consequently contravened the Treaty.”202 In that same decision the EACJ underscored that “[a]biding by the court decision is the corner stone of the independence of the judiciary which is one of the principles of the observation of the rule of law.”203

One of the weaknesses of the EACJ system, however, is that although a decision for extending the jurisdiction of the EACJ to include human rights jurisdiction was taken in November 2004, a protocol for the legal framework for this extension is yet to be concluded.204 The EAC Treaty vests in the EACJ, jurisdiction on the issue of human rights.205 However, a more specific protocol would operationalize this jurisdiction. The EAC Treaty says, “[a] Partner State or the Council shall take, without delay, the measures required to implement a judgment of the Court.”206 However, as in the case of SADC, there are no specific consequences for a Partner State that chooses to ignore a judgment of the EACJ.207

3. Economic Community of West African States

The Economic Community of West African States (ECOWAS) is a regional group of fifteen countries—Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo—founded in 1975 to promote economic integration.208 The ECOWAS Protocol on Democracy and Good Governance,209 recognizes that the objectives of the organization cannot be

201 Id. at 2–3.
202 Katabazi, supra note 196, at 23.
203 Id.
204 EAC Treaty, supra note 186, art. 27.
205 Id.
206 Id. art. 38(3).
207 See EAC Treaty, supra note 186 (showing there is no specific provision dealing with member non-compliance).
209 Protocol on Democracy and Good Governance, A/SP1/12/01 (ECOWAS 2001).
effectuated unless ECOWAS complements them “through the incorporation of provisions concerning issues such as prevention of internal crises, democracy and good governance, the rule of law, and human rights.”

The significance of the Democracy and Good Governance Protocol cannot be overstated. Out of the fifteen states in the ECOWAS only two have never experienced a military coup or an unconstitutional change of government.

To ensure that these provisions are not mere platitudes, the Protocol stipulates that “Protocol A/P1/7/91, adopted in Abuja on 6 July 1991, relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter alia, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed.” Before this, the ECOWAS Community Court of Justice (ECOWAS Court) lacked the jurisdiction to hear claims of violations of human rights. However, the Protocol was not perfect. In Afolabi Olajide v. Federal Republic of Nigeria, where the plaintiff alleged a violation of the right to freedom of movement of his person and goods, the ECOWAS Court ruled that it simply did not have jurisdiction to hear this complaint because Protocol A/P1/7/91—under which the plaintiff instituted his action—did not grant direct access to individuals. In the aftermath of this decision, there was debate regarding the need to amend the Protocol to allow for legal and natural persons to have standing before the ECOWAS Court. To effectuate this, ECOWAS adopted a supplementary protocol in 2005.

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210 Id. at preamble.
212 Protocol on Democracy and Good Governance, supra note 209, art. 39.
215 Id.
216 Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9, 22 & 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol (Supplementary Protocol) (2005), http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf [https://perma.cc/7WCB-Y29H] [hereinafter Supplementary Protocol].
Article 3(4) of the Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol (Supplementary Protocol) provides that the “Court has jurisdiction to determine case[s] of violation of human rights that occur in any Member State.” Article 4(d) of the same protocol enables individuals to directly apply to ECOWAS Court for relief regarding human rights violations. The Protocol on Democracy and Good Governance imposes on States the obligation to apply the African Charter on Human and Peoples’ Rights as well as other relevant international instruments.

Pursuant to Article 3(e) of the Supplementary Protocol, the ECOWAS Court has the ability to adjudicate any dispute relating to, inter alia, the provisions of the Treaty, Conventions, Protocols, regulations, directives and decisions of ECOWAS Member States. In Moussa Leo Keita v. The Republic of Mali, the ECOWAS Court reaffirmed its competence to adjudicate on cases of human rights violations in accordance with Articles 9(4) and 10(d) of its Supplementary Protocol.

In Koraou v. Republic of Niger, Koraou was sold as a slave
and forced concubine to El Hadj Slouleymane Naroua.\footnote{Id. ¶¶ 8–12.} Freed nine years later, she decided to leave his home, but Naroua refused to let her go upon the grounds that she was, and remained, his wife.\footnote{Id. ¶ 14.} After lengthy and numerous appeals and a separate lawsuit, Hadidjatou eventually applied to the ECOWAS Court, alleging discrimination, enslavement, and unlawful detention, demanding the adoption of new laws which are more protective of the rights of women against discriminatory customs.\footnote{Id. ¶ 28 (The original case asserting the applicant’s freedom from slavery went through all channels of appeals in the courts in Niger. The applicant was also arrested for having married another man and was jailed while her appeals were ongoing.).} Awarding reparations, the ECOWAS Court acknowledged that the applicant was a victim of slavery who could not benefit from the protection of the administrative and judicial authorities that the Government of Niger was supposed to provide her.\footnote{Id. ¶ 92.} Unfortunately, the ECOWAS Court also “affirm[ed] that its role is not to examine Community Member States’ laws in \textit{abstracto}.”\footnote{Id. ¶ 60 (emphasis in original).}

In \textit{Manneh v. Gambia},\footnote{Manneh v. Gambia, ECW/CCJ/APP/04/07, Community Court of Justice of the Economic Community of West African States (June 5, 2008), http://www.worldcourts.com/ecowasccj/eng/decisions/2008.06.05_Manneh_v_Gambia.html [https://perma.cc/NM8G-6ML3].} the ECOWAS Court held that detaining the applicant for over a year without trial and without proper and distinct justification, constituted an unreasonable period of detention, contrary to the rules enshrined in Articles 6 and 7(1) of the African Charter on Human and Peoples’ Rights.\footnote{Id. ¶ 41; see also Supplementary Protocol, supra note 218, arts. 6–7(1).}

Like other sub-regional courts, one of the greatest challenges of the ECOWAS Court is that of implementation.\footnote{ECOWAS Court Laments Non-Execution of Judgement by Member States, \textit{Vanguard Nigeria} (June 28, 2016 4:03 PM), http://www.guadiannewsng.com/index.php?option=com_content&view=article&id=81945:ecowas-court-laments-implementation-challenges&catid=1:national&Itemid=559 [https://perma.cc/R53G-9SNB]} The ECOWAS Court has reportedly “decried the attitude of the Nigerian
government for not honoring any of its 10 rulings” against Nigeria, while praising the government of Niger for being the first country in ECOWAS to have executed its judgment.\(^\text{232}\) Article 24 of the Protocol of ECOWAS Court does not provide any consequences for failure of a Member State to comply with the court’s decision, beyond stating that judgments that have financial implications for nationals of Member States are binding.\(^\text{233}\) Without effective enforcement of judgments, all provisions relating to protection of human rights and the rule of law are mere platitudes. Additionally, because non-exhaustion of local remedies does not form part of the conditions of admissibility for cases of human rights violations brought before ECOWAS Court,\(^\text{234}\) it is remarkable that the ECOWAS Court has dismissed a significant number of human rights applications in its few years of existence.\(^\text{235}\)

4. Common Market for Eastern and Southern Africa

While the Common Market For Eastern And Southern Africa (COMESA)—which is composed of Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda,


\(^{233}\) ECOWAS Treaty, supra note 216, art. 24.

\(^{234}\) Essien v. Republic of The Gambia, ECW/CCJ/APP/05/05, Community Court of Justice of the Economic Community of West African States (Mar. 14, 2007), http://www.worldcourts.com/ecowasccj/eng/decisions/2007.03.14_Essien_v_Gambia.html [https://perma.cc/99HE-2WTN] (holding that exhaustion of local remedy is not applicable in human rights applications before it having regard to the provisions of the Supplementary Protocol of the court); A.O. Enabulele, Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice, 10 U. BOTSWANA L.J. 57, 74 (2010) (It is argued, however, that ECOWAS Court “cannot adopt the view that what is not expressly mentioned in a treaty is deemed to have been excluded.”).

\(^{235}\) Ugokwe v. Fed. Republic of Nigeria, ECW/CCJ/APP/02/05, Community Court of Justice of the Economic Community of West African States (Oct.7, 2005), http://dev.ihrd.org/doc/ecw.ccj.jud.03.05/view/ [https://perma.cc/8RHG-DWNK] (ECOWAS Court dismissed application because it is not an appellate Court of national courts, therefore, it cannot re-examine a decision made by the Nigerian Courts let alone order a stay of their execution); Keita, supra note 30 (holding that the application was inadmissible because even if the Applicant complained of the malfunction of the justice system of his country, the ECOWAS Court had no jurisdiction to adjudicate on a judgment delivered by the court of a Member State).
Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe—is principally an economic body aimed at creating a preferential trade area, the COMESA treaty premises this objective on the promotion of “principles of liberty, fundamental freedoms and the rule of law.” Member states adhere, among other things, to the principle of “recognition and observance of the rule of law.” The COMESA Court of Justice has not had the opportunity to rule on these provisions. Thus, it is not possible to assess how this court would deal with issues of the rule of law and human rights within the context of its specialization.

V. Rule of Law: Select African States

Individually, several African states have adopted new constitutions, some of them explicitly entrenching the rule of law as a core value in constitutional governance. These states have also constituted courts with the jurisdiction to conduct judicial review, thus ensuring a system of checks and balances to reign in executive overreach. Several African states provide in their constitutions for the rule of law. But, as on a continuum, there are varying approaches to the rule of law depending on the history and political context of each country.

A. South Africa

South Africa is a beacon of hope for the region in regards to how the rule of law can be instrumental to development. Even in South Africa however, issues have arisen with regard to the extent the executive is willing to embrace the concept of the rule of law. The South African Constitution provides that “[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values . . . Supremacy of the constitution and the rule of law.” But while South African Courts have pronounced themselves on the

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237 Id. art. 6(g).

238 See discussion infra Part V.

239 Id.

240 Id.

241 S. Afr. Const., Ch. 1(c.), 1996.
scope of the rule of law, judges have not been as unanimous with regard to its meaning and scope. The notion of rule of law was at the heart of the decision in *Masethla v. President of the Republic of South Africa.*\(^{242}\) At issue was procedural fairness as a requirement of the rule of law.\(^{243}\) Reading for the majority, Justice Moseneke ruled that the requirement of procedural fairness had been met because the President’s constitutional power to appoint the head of each of the intelligence services was concomitant with the power to dismiss.\(^{244}\) Therefore, Masethla’s argument that the President was required to adhere to the *audi alteram partem* principle by affording him a hearing before deciding to dismiss him was without merit.\(^{245}\) The majority insisted that the exercise of executive power should not be constrained by a procedural requirement.\(^{246}\) The court asserted that the only constitutional limit to the exercise of this power was the principle of rationality.\(^{247}\) Justice Ngcobo’s dissent, however, differed slightly in analysis, with the Justice insisting that the rule of law requires legality or non-arbitrariness, that is, that public power be exercised in compliance with the law and within the boundaries set by the law.\(^{248}\)

South Africa’s Constitutional Court is an example of a court that has combined both the formal and substantive versions of the rule of law, serving as a regional lighthouse for other African governments and courts. In *Fedsure Life Assurance Ltd v. Greater Johannesburg Transitional Metropolitan Council,*\(^{249}\) the court held that legality, as an aspect of the rule of law, was implicit in the interim Constitution, and that although legality was not explicitly mentioned, “the legislature and executive in every sphere are constrained by the principle that they may exercise no power and


\(^{243}\) Id. ¶ 179.

\(^{244}\) Id. ¶ 86.

\(^{245}\) Id. ¶74

\(^{246}\) Id. ¶78


\(^{248}\) *Masethla,* supra note 242, ¶184.

perform no function beyond that conferred upon them by law.”

This is an example of adherence to the formal version of the rule of law. In President of the Republic of South Africa v. South African Rugby Football Union, however, the court adopted a more substantive approach to the rule of law, insisting that the “requirement of procedural fairness, which is an incident of natural justice, though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power . . . What procedural fairness requires depends on the circumstances of each particular case.”

B. Botswana

Botswana exemplifies an African nation where, to a large extent, adherence to the rule of law has resulted in economic development:

For many years Botswana has been one of the world’s fastest growing economies, with an average economic growth rate of 7.7 percent. Without much foreign aid, and in the absence of a large state, Botswana has gone from being the third poorest nation of the world in 1965 to an upper middle-income nation today.

“[E]conomist Scott Beaulier has found that the rule of law and comparatively free economic institutions are the major explanations for Botswana’s greater success at economic development [relative to other similarly situated] African countries.” Beaulier remarks that at independence, Botswana was beset by the typical problems of poor African countries—famine, illiteracy, lack of adequate portable(sic) water, minimal health facilities, and a lack of other social amenities—and had virtually no infrastructure.

But “Botswana grew because its ruling elite made deliberate choices to increase economic freedom, and . . . avoided engaging in...

250 Id. ¶ 58.
252 Id. ¶ 219.
253 Curott, supra note 4, at 17.
254 Id.
predatory practices. For some reason, Botswana’s leaders were not interested in lining their own pockets.”256 Respect for the rule of law allowed for entrepreneurship, economic development, and social development.257

Botswana is exemplary in many respects. In order to provide for a system of checks and balances, critically important to the rule of law, the Constitution of Botswana implicitly provides for the separation of powers by dealing with each organ of government in separate and distinct provisions.258 It is important to note that judges of Botswana’s High Court and Court of Appeal are appointed on permanent, pensionable terms, and hold office until they reach compulsory retirement at the age of seventy.259 Additionally, several constitutional provisions refer to an “independent and impartial” court or tribunal,260 and various acts of parliament provide for independence and immunity of the judiciary261.

Courts in Botswana have forcefully protected human rights and conducted judicial review of legislation, indicating that there is a level of respect for the rule of law that escapes most African countries. For example, in Attorney General v. Unity Dow,262 the Court of Appeal of Botswana determined that citizenship laws allowing only male citizens to pass citizenship status onto their children amounted to sexual discrimination and invalidated the law.263

Furthermore, the courts have not hesitated to strike down laws

256 Id. at 5.
257 Id. at 11.
258 CONSTITUTION OF BOTSWANA, secs. 30-56 (executive); secs. 57-94 (legislature); secs. 95-107 (judiciary) (Sept. 30, 1966).
259 Id. § 127(8)
260 Id. §§ 10(1), 10(9), 14(4), 16(2)(c).
261 See, e.g., Customary Courts Act, § 47 (granting indemnity to officers acting judicially for official acts done in good faith and while executing warrants and orders); High Court Act, c. 04:02, sec. 25(1) (stating that a judge shall not be sued in any court for any act done by him or ordered done by him); Penal Code Act, sec. 14 (1986) (stating that a judicial officer is not criminally responsible for anything done or omitted in good faith in the exercise of his or her judicial functions).
263 Id. ¶ 7(v) (The court reprimanded the government stating, “Botswana seeks to avoid violating international law where possible.”)
that were deemed inconsistent with the constitution or other more primary legislation. In *Botswana Motor Vehicle Insurance Fund v. Marobela*, \[264\] “the Court of Appeals declared section 7(1)(a)(iv) of the Motor Vehicle Fund Regulations . . . null and void for its inconsistency with the spirit and intent of . . . the Motor Vehicle Insurance Fund Act of 1986.” \[265\] In *Maauwe and Another v. Attorney-General*, \[266\] regulation 75(1) of the Prisons Regulation was found to have no legal effect because it prevented condemned prisoners from consulting with their legal representatives out of the hearing of prison officers, which was considered to be beyond the scope of the provisions of the Prisons Act. \[267\] “[J]udicial control over executive action is [also] exercised regularly to protect citizens against the unlawful acts of government officials or departments.” \[268\] Accordingly, Botswana courts “have on several occasions nullified governmental acts that they considered to be unlawful.” \[269\] In *Students’ Representative Council of Molepolole College of Education v. Attorney-General*, \[270\] “[t]he Court of Appeal held that a college regulation, which required [that] pregnant women [take a] leave from college for at least one year,” was void because it was contrary to the constitution. \[271\] In a recent case, *Matsipane Masethanyane & Gakenyatsiwe Matsipane v. The Attorney General*, \[272\] the government of Botswana evicted the


265 Id. at 29.


267 Id. at 2.


271 Id.

272 Matsipane Masethanyane v. Attorney Gen., Civil Appeal No. CACLB-074-10, ¶
Bushmen from their ancestral land in 2002 after diamond deposits were discovered on the land, making life difficult for the Bushmen by banning access to water on the land. But the Court of Appeal unanimously ruled that the government’s ban on access to water amounted to degrading treatment of the Bushmen. This decision was hailed as a victory for the rule of law over powerful economic interests.

Still, Botswana is far from perfect. The Constitution of Botswana, for example, provides that “[t]he President shall be ex-officio a member of the National Assembly, and shall be entitled to speak and to vote in all proceedings of the National Assembly.” The Constitution of Botswana provides for sixty one members of parliament, and “[w]ith a total of eighteen ministers and assistant ministers, the executive constitutes nearly one-third of the members of parliament,” ensuring that the “government rarely loses a vote.” However, this apparent weakness in the system of checks and balances must be viewed in light of the fact that the Constitution of Botswana also requires that each member of the cabinet shall be responsible to parliament “for all things done by or under the authority of the President, Vice President or any Minister in the execution of his office.” “This allows parliament to control the conduct of cabinet members, and to check abuses of office, misconduct, mismanagement, and incompetence.”

Like many other African countries, Botswana is “marked by elements of personal government under an increasingly ‘imperial’ president, who heads the Botswana Democratic Party (BDP), which


273 Id. ¶ 22.

274 See generally Amelia Cook & Jeremy Sarkin, Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development, 19 TRANSNAT’L L. & CONTEMP. PROBS. 453, 474 (2011) (pointing out, for example, that Botswana’s constitution provides the President with unrestrained powers, authorizing him to make many decisions without input and that there is marginalization of ethnic minorities).

275 CONSTITUTION OF BOTSWANA, supra note 259, sec. 58(1).

276 Fombad, supra note 264, at 321.

277 CONSTITUTION OF BOTSWANA, supra note 258, ch. IV, § 50(1)).

278 Fombad, supra note 264, at 325.
has monopolized power since independence.”

“...This has raised questions about whether the apparent separation of powers provided for in Botswana’s constitution is anything more than the hegemony of the executive over the other two branches of government.”

While Botswana is hailed as a regional rule of law powerhouse, it has sometimes not taken the importance of compliance with judicial decisions seriously. For example, in *Kenneth Good v. Republic of Botswana*, the President’s used the Immigration Act to expel a non-citizen with no right to challenge the decision in court, yet no duty was imposed on the president to give reasons for his decision when it came under scrutiny. The African Commission on Human and People’s Rights (ACHPR) urged Botswana to ensure that its immigration laws conform to international human rights standards. Botswana’s government argued that the Immigration Act’s ousting of the courts’ jurisdiction to review the president’s decision was justified because it served the public interest, however, the ACHPR rejected this line of argument. In response, Botswana’s Minister of Foreign Affairs said, “[w]e are not going to follow . . . the recommendation made by the Commission. It does not give orders and it is not a court. We are not going to listen to them. We will not compensate Mr. Good.”

Previously, Botswana had disregarded the African Commission’s ruling in *John K. Modise v. Botswana*, which also involved citizenship and immigration issues. This does not bode well for Botswana’s standing as a model of good governance and

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279 *Id.* at 303.

280 *Id.*


282 *Id.* ¶ 1–4.

283 *Id.* ¶ 244(2).

284 *Id.* ¶¶ 146–47.


the rule of law in Africa.

C. Uganda

Uganda’s 1995 Constitution is premised on the recognition that one of the duties of every Ugandan is to “promote democracy and the rule of law.”\(^\text{287}\) Specifically, the purpose of the Ombudsman, the Inspector General of Government, is to “promote and foster strict adherence to the rule of law.”\(^\text{288}\)

Unlike South Africa, Ugandan courts have tended to approach the rule of law from a substantive perspective, evidenced in their willingness to look to values outside of the strict letter of the law. The preamble of the Ugandan Constitution refers to the historical circumstances influencing this methodology, as it recalls a “history which has been characterised by political and constitutional instability,” and it recognizes the “struggles against the forces of tyranny, oppression and exploitation.”\(^\text{289}\) Unsurprisingly, these circumstances weigh heavily on courts’ approach to the rule of law, which have strongly emphasized political stability and deference to executive will in certain cases.

In *Col. Dr. Besigye Kizza v. Museveni Yoweri Kaguta, Electoral Commission (“Besigye”),*\(^\text{290}\) Chief Justice Benjamin Odoki remarked that for the presidential election challenger Dr. Besigye Kizza to resort to the courts, rather than take up arms “symbolised [sic] the restoration of democracy, constitutionalism and the rule of law in Uganda,”\(^\text{291}\) adding that the “outcome of the petition would have far reaching consequences on the peace, stability, unity and development of Uganda.”\(^\text{292}\) In *Attorney General v Paul K. Ssemogerere and Anor.,*\(^\text{293}\) the majority of the judges of Uganda’s Supreme Court indicated that they saw themselves as custodians of

\(^{287}\) *CONSTITUTION OF THE REPUBLIC OF UGANDA, Directive Principle XXIX (f) (Oct. 8, 1995).*

\(^{288}\) *Id.* art. 225(1)(a).

\(^{289}\) *Id.* pmbl.


\(^{291}\) *Id.* at 7.

\(^{292}\) *Id.*

stability in a country that is emerging after many years of chaos.294

However, overemphasis on stability can jeopardize efforts
to develop the rule of law, and with it respect for human rights, which
are important preconditions for development. Justice Tsekooko, in
his dissent in Besigye, warned that “if a presidential election is won
through fraud, cheating or through the flouting of the law and the
constitution, dissatisfied candidates and their followers may create
instability and disaffection among the population.”295

Even in a few cases where the justices have ruled against the
government, the executive has not been particularly receptive and
in some cases has been openly defiant. In Charles Onyango Obbo
and Andrew Mujuni Mwenda v. The Attorney General, the Supreme
Court held that “[m]eaningful participation of the governed in their
governance, which is the hallmark of democracy, is only assured
through optimal exercise of the freedom of expression. This is as
true in the new democracies as it is in the old ones.”296 While
signaling that the executive would ignore the striking down of the
“false news” law in this case, President Museveni warned that the
government and its military would not tolerate the court’s ruling in
connection with groups, whether political or otherwise, that
represented credible political threats to the government’s grip on
power.297 Ostensibly in a veiled response, Chief Justice of Uganda,
Benjamin Odoki wrote:

[A]s regards the Judiciary, its independence means that it is not in
a position to consult or compromise with any of the other two
organs of the State in making judicial decisions. The Judiciary
has taken this constitutional role seriously in adjudicating
constitutional and other issues. This has sometimes provoked
undue and harsh responses from the executive . . . The three arms
of the State must learn to respect the functions and powers of each
other . . . Each organ must avoid intimidation . . . Unless such

294 See id.
295 Besigye, supra note 290 at 218.
(In the decision in which freedom of speech (expression) was at issue, the appellants
challenged the constitutionality of §50 of the Penal Code which prohibited the publication
of “false news.”).
297 Risdel Kasasira, I Won’t Tolerate Sectarianism in UPDF, Says Museveni, DAILY
MONITOR (Dec. 28, 2009), http://www.monitor.co.ug/News/National/-688334/831798/-
/format/xhtml/—cop8tz/—index.html [https://perma.cc/TR4R-CZAK].
tendency is avoided, it may create a dictatorship of one organ against the rest, and the entire country. 298

D. Kenya

Kenya has a history of a corrupt judicial system that was subjugated by repressive governments. Before the new constitution of 2010, the law was unable to “restrict the President’s ability to make decisions without consulting the cabinet or undermining the independence of the judiciary.” 299 “The constitutional amendments of the 1960s, which sought to enhance the powers of the President, had in turn weakened the judiciary,” thus undermining a vital “require[ment] for the rule of law to thrive in Kenya.” 300 The public lost confidence in their court’s decisions in politically charged cases, such as Republic v. Judicial Comm’n of Inquiry into the Goldenberg Affair. 301

Aware of this history, Kenya’s new Constitution is awash with references to the rule of law, references that the courts have regularly emphasized as necessary for the economic and political development of Kenya. 302 The Constitution of Kenya is premised, inter alia, on the recognition of “the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.” 303 The Constitution uniquely provides that “[e]very political party shall . . . promote the objects and principles of this Constitution and the rule of law.” 304 Additionally, the constitution provides that the

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300 Id. at 376.
301 Republic v. Judicial Comm’n of Inquiry into the Goldenberg Affair (2006) L.L.R. 1, 3–4 (H.C.K.). The outcome demonstrated that the court was an enabler of corruption because it quashed the findings of a commission into allegations of abuse and decided that George Saitoti, a Minister of Finance, could not be prosecuted. Akech, infra note 311, at 376. The Court also held that, should criminal charges be brought against Saitoti, he would not be able to receive a fair trial, and that because many years had passed, Saitoti’s constitutional right to a fair trial within a reasonable time would be violated. Id. at 382. In sum, the court reasoned that because Saitoti had already been tried in the legislature, it would amount to double jeopardy if he were to be tried in a court of law. Id. at 376–82.
303 Id. at pmbl.
304 Id. art. 91(1)(g).
“national values and principles of governance . . . bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution.”305 Even the interpretation of the constitution itself must be conducted in such a manner so that it “advances the rule of law, . . . human rights and fundamental freedoms in the Bill of Rights.”306 Values like national security are trumped by the values of the rule of law and respect for human rights; for example, the constitution provides that “national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.”307

The Kenya Section of the International Commission of Jurists v. Attorney General and Another308 is one of the strongest indicators that the Kenyan judiciary is beginning to take the rule of law seriously. In this case, the Kenya Section of the International Commission of Jurists sued the Kenyan government for its refusal to arrest President Al-Bashir.309 Subsequent to the International Criminal Court’s (“ICC”) issuance of the warrant of arrest against Al Bashir, the Registrar of the ICC sent a supplementary request on July 21, 2010, requesting co-operation of all State Parties to the Rome Statute in the arrest and surrender of Al Bashir, should he set foot on their respective territory.310 The Kenyan Government, however, invited and hosted Al Bashir on August 27, 2010, during the promulgation of the country’s new Constitution.311 The applicant therefore sought an order for issuance of a provisional warrant of arrest against Al Bashir.312 Such a warrant was supposed to be served on Kenya’s Minister of Internal Security, to affect the said warrants of arrest, if and when Al Bashir set foot in the territory of the Republic of Kenya.313 In response, the Attorney General of

305 Id. art. 10(1)(a).
306 Id. art. 259(1)(b).
307 Id. art. 238(2)(b).
309 Id. ¶ 2.
310 Id. ¶¶ 27, 33.
311 Id. ¶ 2.
312 Id.
Kenya stated, in part, that Kenya was under the obligation to uphold the decisions and resolutions of the African Union (AU) regarding Al Bashir, which in this case had directed all AU member States to withhold co-operation with the ICC in respect of arrest and surrender of President Omar Hassan Ahmad Al Bashir.\textsuperscript{314} The High Court noted the applicant’s “genuine interest in . . . developing, strengthening and protecting . . . the rule of law and human rights.”\textsuperscript{315} Relying on Article 2(5) of the Constitution of Kenya, and the fact that the Rome Statute of the International Criminal Court had been incorporated into Kenya’s municipal law, the High Court granted the application.\textsuperscript{316}

\textbf{E. Zimbabwe}

Zimbabwe most eloquently illustrates the thesis that the rule of law is an important prerequisite for genuine economic development. This is because “investors are particularly concerned about the prevalence of law and order, the burdens of arbitrary regulation, and the possibility of expropriation. The amount of investment in countries without the security provided by the Rule of Law is severely restricted, limiting the possibility of economic expansion.”\textsuperscript{317} The economy in Zimbabwe began to emerge from a long depression,\textsuperscript{318} but respect for rule of law continued to lag. By casting aside the rule of law to carry out much needed and justified land reform, Zimbabwe’s economy grew worse,\textsuperscript{319} as the judges opted for a formalistic understanding of the rule of law, ignoring the law’s substantive justice.\textsuperscript{320}

\textsuperscript{314} \textit{Id.} at 14.
\textsuperscript{315} \textit{Id.} at 21.
\textsuperscript{316} \textit{Id.} (Article 2(5) of Kenya’s Constitution provides that “[t]he general rules of international law shall form part of the law of Kenya.”).
\textsuperscript{317} Curott, \textit{supra} note 4, at 14.
\textsuperscript{318} The IMF projects that in 2012, the economy of Zimbabwe will grow by 5%. \textit{Zimbabwe and the IMF}, IMF, \url{http://www.imf.org/external/country/ZWE/index.htm} [https://perma.cc/4R7Q-W9DC].
\textsuperscript{320} “The main problem regarding land reform has been lack of resources to buy the land in accordance with the constitutional stipulations.” Michelo Hansungule, \textit{Who Owns Land in Zimbabwe? In Africa?}, 7 \textit{Int’l. J. on Minority & Group Rights} 305, 336 (2000). Mugabe made it clear that he would not respect international law on compensation in the event he did not have the money. \textit{Id.} at 338. \textit{Texaco Overseas Petroleum Co. v. Libya}, 17
The doctrine of separation of powers, which is essential to creating a system of checks and balances in the rule of law, is notably missing in Zimbabwe’s Constitution.\(^{321}\) According to the Constitution, the legislature consists of the President and parliament.\(^{322}\) Although the it has a Declaration of Rights, which is directly enforceable before the Constitutional Court of Zimbabwe,\(^{323}\) most of the rights included have serious derogations attached to them, and the Supreme Court of Zimbabwe has restrictively interpreted the scope of those derogations.\(^{324}\) For example, in *Zimbabwe Township Developers (Pvt) Ltd v. Lou’s Shoes (Pvt) Ltd.*,\(^{325}\) the Supreme Court of Zimbabwe established that the burden was on the litigant to prove that legislation is not reasonably justifiable in a democratic society.\(^{326}\) This “makes it more difficult for a litigant to establish his rights, and even more difficult to defeat a derogation from a right by showing that the derogation is not reasonably justified in a democratic society.”\(^{327}\)

This restrictive approach to human rights, which tends to defer to the Executive, is epitomized in the case of *Tsvangirai v. Registrar General of Elections and Others*,\(^{328}\) where the majority of Zimbabwe’s Supreme Court simply “denied locus standi to challenge laws relating to the presidential election.”\(^{329}\) Specifically,
Tsvangirai alleged that persons who might have voted for him were denied the right to register.\textsuperscript{330} The Supreme Court, however, ruled that even if this allegation were true, the applicant could not approach the court on the voter’s behalf unless they were detained.\textsuperscript{331} Justice Sandura dissented, saying that under the Constitution, any person who is adversely affected by a law inconsistent with the Constitution or the Declaration of Rights has locus standi to challenge it, and that “in the past this Court has taken a broad view of ‘locus standi’ in applications of this nature in order to determine the real issues raised where the applicant has a real and substantial interest in the matter.”\textsuperscript{332} In any case, the Zimbabwean government openly signaled that it would not comply with unfavorable rulings and in some cases the reaction of the executive has been to amend legislation even as the Supreme Court is examining it.\textsuperscript{333}

The historical and political context of Zimbabwe is important in order to understand its rule of law situation. The government’s position is “that human rights litigation is an anti-government activity, and that those who engage in it, whether as litigants or as lawyers, are disloyal to the country.”\textsuperscript{334} This position must be viewed against the backdrop of Zimbabwe’s executive promise to resolutely bring about a long awaited and much needed land reform.\textsuperscript{335}  

\textsuperscript{330} Tsvangirai, supra note 328, at 3.

\textsuperscript{331} Id. at 5.

\textsuperscript{332} Id. at 16.

\textsuperscript{333} Bourbon, supra note 327, at 201.

\textsuperscript{334} Id. at 217.

\textsuperscript{335} “Decades of laws forbidding native Africans from owning or purchasing land while white farmers continued to invest in and develop the land has led to a power struggle between the current owners and the displaced indigenous peoples who believe the land is rightfully theirs.” Nick Dancaescu, Land Reform in Zimbabwe, 15 FLA. J. INT’L L. 615, 616–17 (2003). Land reform was the primary focus for the Mugabe administration, which passed constitutional amendments to allow the government to confiscate land, fix the prices it paid for land, and deny the right to appeal regarding whether compensation paid was just. Id. at 616–20 (citing MARTIN MEREDITH, MUGABE: POWER AND PLUNDER IN ZIMBABWE 122 (2002)). Only improvements upon land would be compensated for. Hansungule, supra note 323, at 322. In December 2000, the Zimbabwe Supreme Court held that the actions of the Mugabe government had repeatedly abused constitutional rights. Dancaescu, supra, at 622. Soon after, the Chief Justice, Anthony Gubbay, resigned in fear for his life after numerous death threats from veterans and Mugabe loyalists. The Justice Minister, Patrick Chinamasa, warned the remaining judges “that he could not guarantee their safety.” Id. Nearly the entire Court resigned, replaced by four Mugabe-
Land issues are not the only area where the government has sought to guide the outcome of decisions in order to ensure conformity with its interests. It has taken similar action with regard to election petitions that seek to challenge its grip on power. These actions are exemplified in Tsvangirai v. Mugabe and Another in which the applicant presented an election petition complaining of undue re-election of the first respondent, President Mugabe on grounds, **inter alia**, that section 158 of the Electoral Act and statutory instruments enacted thereunder were constitutionally invalid; thus, praying that the court declare the President was not duly elected. However, the applicant was met with great obstacles, and was ultimately unsuccessful. This was due at least in part to inordinate delays, followed by formalistic recourse to technicalities, which are “perceived to be a deliberate attempt to avoid making findings against the government.”

VI. Recommendations and Conclusion

A. Recommendations

While Africa is an important frontier in economic development, respect for the rule of law continues to lag in most African countries. The anti-western rhetoric that dominated development strategies prior to the adoption of the Constitutive Act of the African Union has largely diminished, but it has not completely disappeared. The AU continues to emphasize respect for the principle of non-intervention in the internal affairs of member states, which has led the AU to adopt an uncritical stance towards some African states where the rule of law is largely disregarded.

For sustainable development, it is important for African appointed justices who soon after declared the farm seizures in Zimbabwe legal and lifted the moratorium. *Id.* Without an independent judiciary, the rule of law in Zimbabwe was all but gone. Following land invasions, the High Court issued orders against farm invaders and squatters, but these were ignored, and the executive in Zimbabwe “did not carry out the eviction orders even after being cited for contempt.” Hansungule, *supra* note 323, at 323. The farm invasions were condemned by the United Nations, which “called on Mugabe to restore the rule of law in Zimbabwe” to no avail. *Id.*

336 Tsvangirai, *supra* note 328.
337 *Id.*
338 *Id.* at 2.
339 *Id.* at 4.
countries to continue to develop institutions dedicated to good governance and the rule of law. In particular, it is important that judicial independence be assured. At the regional level it is crucial for human rights institutions, like the African Court of Human Rights and the African Court of Justice and Human Rights, to develop into robust and respectable oversight and enforcement institutions. However, this will not happen until the constituent legal instruments for these institutions are amended to ensure that African countries do not have a choice of whether or not to make a declaration accepting the jurisdiction of these institutions regarding individual petitions before them. Additionally, it is imperative that African countries find better mechanisms to assure compliance with court decisions.

As African countries forge business relationships with foreign countries, they must also ensure that the legal instruments embodying those relationships clearly indicate the human rights obligations of foreign businesses operating in Africa. These obligations are already spelled out in some African human rights instruments, making it a state obligation.

It is necessary to realize that legal solutions alone cannot work because legal and judicial solutions are highly dependent on the political climate. First, in order to improve the political environment, there is a need to focus on political leverage by more developed countries in Africa, and elsewhere. The international community, especially the more democratic and developed parts of the world, could use their leverage in Africa to encourage greater respect for human rights and adherence to the rule of law. In far too many countries—like Uganda, Ethiopia, Rwanda, Kenya—developed, democratic countries, such as the United States, condemn their actions and yet continue to work with ruling political regimes who pocket foreign development aid and maintain a repressive grip on power. Second, focusing on local civil society organizations will be imperative to promote change locally. Third, it is vital to recognize and highlight bold judicial decisions across Africa which show there are judicial institutions willing to take on the establishment in order to promote the rule of law, respect for human rights and democracy. Fourth, and relatedly, it is important to highlight those African countries regarded as best practices countries, these would be countries that have consistently promoted the rule of law, respect for human rights and democracy and have had development as a result.
B. Conclusion

An economically strong Africa, can only mean great things for the international community as a whole. Nevertheless, in order to get there the individual African countries must realize the importance of development, the rule of law, and human rights. Countries need to avoid making arguments that perpetuate authoritarianism at the expense of sustainable development, and must “shy away from arrangements that [would] threaten [such important] development.”341 In many countries, judiciaries are not powerful enough to stand up to the executive in order to uphold the rule of law. Until that happens, many African countries cannot make the necessary breakthrough on the path to sustainable development.

341 Ofodile, supra note 11, at 511.
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Legend: HDI=Human Development Index; RL=Rule of Law

Sources: World Justice Project and United Nations Development Program.
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