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Legal Pluralism and the Rule of Law in Sub-Saharan Africa

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Abstract

Since the 1950s, many Sub-Saharan African countries have adopted constitutional governments after gaining independence. However, many of their institutions are plagued by corruption, meaning that attempts to enforce the rule of law have often failed. This has led to a justice system with a lack of substantive rule of law values and weak social justice. This article suggests that rather than relying on ineffective state legal systems to uphold the rule of law, a more promising solution would be to encourage legal pluralism. Since these jurisdictions have prevalent non-legal social orderings, such as indigenous laws and family structures, state law is often less influential in informing popular behaviour and normative values. The law should recognise where indigenous practices complement human rights better than state adjudication and give precedence to aspects of non-legal social systems which protect rule of law values. Since popular behaviour is heavily influenced by tradition and custom, instilling the rule of law into domestic cultures in socio-historical terms makes it more likely that these values will be adopted on a grass-roots level. Promoting the rule of law also has positive implications for the future economic development of these countries, since it would ensure checks on governments and uphold individual rights to property and security, encouraging business activity. This essay will compare the systems of South Africa and Ethiopia, assessing the success of each country in integrating indigenous law with international law and impacts on human rights and economic growth.

Introduction

The rule of law has persistently presented itself as an issue in post-colonial Sub-Saharan Africa. According to the 2016 Ibrahim Index of African Governance Report, there has been a concerning drop in safety and rule of law which has affected 33 out of the 54 African countries since 2006. Post-independence, Sub-Saharan countries have generally been unsuccessful in promoting the rule of law within their state legal systems. Prior to colonisation, native laws were used to regulate local populations. The establishment of colonial governments led to customary and religious norms being incorporated into state laws. Moreover, village tribunals were given jurisdiction over certain local matters (Tamanaha, 2011, p. 6). Thus, legal pluralism emerged as a functioning method of regulating populations and solving disputes. Following decolonisation, great efforts have been made by international organisations, such as the World Bank, non-governmental organisations, and primarily Western governments to reinforce

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constitutional government in the newly sovereign African states. However, whilst national constitutions are intended to act as stable legal frameworks which enshrine concepts like the rule of law, this does not reflect the reality.

Weak legal systems and authoritarian government practices allow public bodies to act arbitrarily and enable elitism that prevents the affluent from facing legal repercussions. Poor governance has led to social injustice within these populations, such as endemic corruption, frequent military coups, and the one-party rule (Gebeye, 2019, p. 337). Consequently, non-state legal orders may be more suited to satisfy rule of law requirements where the state legal system is unable to. This essay will explore the relative merits of indigenous laws as a means of promoting the rule of law in African states compared to state law. It will conclude that a suitable way forward to uphold the rule of law is to embrace legal pluralism. It will further offer practical solutions which encourage the coexistence of state laws, indigenous laws, and international standards.

Before progressing any further, it is worth defining legal pluralism and the rule of law. Whilst these are complex and contested concepts, I will attempt to simplify them. Legal pluralism is defined as the co-existence of multiple legal systems within a state. For the purposes of this essay, the conception of the rule of law that will be adopted includes both substantive and procedural requirements. As Lord Bingham wrote in his seminal book 'The Rule of Law' (2010), these rule of law requirements include accessibility, equality before the law, checks on arbitrary public power, protection of fundamental human rights, and compliance with international obligations. This conception of the rule of law is closely intertwined with notions of democracy and good governance. Therefore, promoting the rule of law in Sub-Saharan Africa will be essential in attaining social justice and individual rights.

Indigenous laws have several advantages when it comes to enforcing the rule of law compared to ineffective state legal systems. The central benefit of local courts is that they fulfil the procedural rule of law requirement of accessibility more successfully than state courts. These forums of dispute resolution tend to enforce customary law reflecting traditional or religious norms which have developed over time and are known intimately by the community. According to Pimentel (2010, p. 1), local systems are "home-grown, culturally appropriate, and embraced by the communities they serve." Local institutions, such as village tribunals, informal courts or councils, are often led by elders or community leaders (Tamanaha, 2011, p. 7). This means that those in charge of decision-making will have local values and interests in mind when adjudicating and resolving disputes. Thus, local interventions and forums of mediation reflect an engagement with local knowledge in ways that state law does not. In comparison, state legal systems are often regarded as the domain of the elite and may or may not be incomprehensible to minority communities who communicate using their native dialects. Furthermore, state legal systems, particularly in states with strongly divided populations, may be dominated by religious or ethnic subgroups of society. As a result, state systems are often perceived by local communities as incapable of serving the needs of the wider population (Tamanaha, 2011, p. 3). It can be inferred that many people identify more closely and are more familiar with indigenous laws. This is reflected in the statistics on public interaction with the law. The UK Department for International Development estimates that "in many developing countries, traditional, or customary legal systems account for 80% of total cases" (Golub,

2006, p. 106). Not only does this seem to imbue indigenous laws with greater legitimacy than state law, but its greater scope of influence suggests that it is better equipped to promote the rule of law. At first sight, it is not difficult to present the argument that local courts that employ indigenous law are better placed to promote rule of law requirements.

However, it should be noted that local decision-making can be problematic. Local law reflects traditional customs and cultural values which are widely endorsed by local populations. The problem is that many of these norms appear to be archaic and contrary to international substantive values, especially the unequal treatment of women, the infliction of harsh punishments, and the perpetuation of caste systems (Tamanaha, 2011, p. 7). These normative standards are essential to the equal and fair legal treatment of citizens and also form the crux of what we understand to be the rule of law. Therefore, it will be necessary for local systems to uphold fundamental human rights before they can claim to uphold the rule of law. Not only are local courts comparatively inadequate in protecting substantive rule of law values; they are also unable to incorporate important procedural rights. Moreover, state law is not immune to the influence of elitism. Since local decision-makers are widely known members of the communities they serve, high-status individuals within the community are often able to tip the system in their advantage. So, while local legal systems may be more accessible, they are insufficient in protecting other procedural requirements, such as fairness of trials, judicial neutrality and equal application of laws, regardless of status. Indigenous laws in their current state do not satisfy all rule of law requirements and will need to be adapted in order to effectively achieve social justice for Sub-Saharan populations. Nonetheless, these are issues that are also common in weak state legal systems. Overall, local forums are not less effective than the state at promoting the rule of law in these respects and nonetheless still maintain the benefit of accessibility. Therefore, though local courts may have similar disadvantages to state courts, they possess advantages which state legal systems do not. For example, Tamanaha (2011, p.7) argues that local laws are better at holding decision-makers accountable, since their decisions "can be evaluated against shared community standards and expectations." This is another area where local laws promote the rule of law more effectively than state systems.

The benefits of indigenous legal systems are now apparent. This essay will now move to explore how this system tackles rule of law issues in African states. The limited scope and insufficient authority of local legal systems prohibits them from being the sole protectors of the rule of law. Since indigenous laws only operate within a community and derive their legitimacy from community approval, they are not legally binding in the same way as state law. Ultimately, they have no coercive power to hold public officials to account and cannot provide legal checks on arbitrary abuses of governmental power. Furthermore, where state law directly contradicts local law, it is state law that takes precedence. So even if local laws were to provide social justice, their effectiveness would be undermined by the existence of a corrupt and weak legal state system that undermines procedural and substantive rule of law values. For Sub-Saharan states to successfully promote the rule of law, the solution that this essay proposes is to allow state and local law systems to operate simultaneously and compatibly with international obligations. In Berihun Adugna Gebeye's article, 'The Janus Face of Legal Pluralism for the Rule of Law Promotion in Sub-Saharan Africa' (2019), he outlines a two-sided model of legal pluralism. On the one hand, Gebeye describes the need for non-state law (indigenous,

religious, etc) to support state law in upholding internal peace and order, thus "connecting the state to the society". On the other hand, Gebeye introduces the need for state law to conform to international law in order to "connect the state to the international community and consequently shield it from external threat." Therefore, reform is required on two levels.

Firstly, the relationship between state and local law must be clarified. State legal systems should not be strengthened at the expense of indigenous systems. Previous international attempts at legal reforms were focused on refining state systems and procedures, such as drafting and enacting laws, training and equipping legal professionals, and making courts more efficient in handling cases (Janse, 2013, p. 185). However, these state-centred reforms were based on Western conceptions of legal systems and did not sufficiently consider the influence and significance of local legal systems in the everyday functioning of Sub-Saharan Africa.

For truly effective promotion of the rule of law, future reforms should place greater emphasis on fortifying local legal systems. Nonetheless, the legally binding and authoritative nature of state law means that it is valuable when considering reforms that would strengthen the rule of law. Since values which are incorporated into state law are given legal force, they can be enforced with the backing of state sanctions. Therefore, though we should avoid incorporating all indigenous laws into state law to maintain the exclusive benefits of accessibility and local engagement possessed by local courts, the alignment of state and local law should be encouraged where possible. Tamanaha (2011, p. 9) argues that state incorporation of customary law would provide local systems with the "boost of status and authority (and sometimes coercive backing) that follows from state recognition" and give state law more respect from the population by presenting itself as a "forum that serves their needs."

By aligning state and local law while keeping them distinct, the population benefits from stronger legal systems which are more equipped to protect the rule of law. To avoid the legal uncertainty that might arise from the co-existence of multiple legal systems, it would be desirable to give each system its own area of jurisdiction. This would enable them to operate simultaneously but separately. One solution would be to grant state law authority over national affairs such as the economy and serious crimes. Meanwhile, local tribunals would adjudicate over ordinary social disputes within their respective regions according to the normative expectations of the community. Tamanaha (2011, p. 9) points out that this "de facto division" already exists in many rural and urban locations. In this way, state law retains its authority and conflict over decision-making is avoided.

Secondly, local customary law must be reformed where it contradicts substantive rule of law values. By incorporating substantive rule of law values into local customs, these developments will reflect in local decision-making and establish the rule of law as a normative element of local governance and social behaviour. The speech given by Chief Justice Ismail Mahomed of South Africa and Namibia at a conference on "The Rule of Law and its Constitutional Organs" (2 October 1994) is important in this regard. He states that

"[t]o survive meaningfully, the values of the constitution and the rule of law must be emotionally internalised within the psyche of citizens … Without [this], the law and the ruler become alienated from the ruled … A maturing society premised on the rule of law therefore urgently

requires the support of national ethos of human rights conscientiously and methodically propagated, legitimised and activised by all organs of civil society."

Embedding the rule of law into local culture will, undoubtedly, be a lengthy and arduous task, but it is feasible through social education. Efforts have already been made by international organisations to engage with local communities. A prime example is the World Bank's Justice for the Poor Program which runs woman empowerment programmes to influence local gender attitudes. (Janse, 2013, p. 181). Since local courts systems are currently, and will likely continue to be, the dominant form of dispute resolution in developing countries, utilising local laws to engage with populations at a grass-roots level increases the likelihood that the rule of law will become entrenched in the country's legal culture. Solutions should involve requiring customary law to evolve alongside international obligations rather than attempting to replace customary systems with state alternatives. Doing so would also allow indigenous tradition and cultural identity to remain relevant in the modern world.

Thirdly, state law must conform to international human rights obligations. Several instruments can be used to encourage conformity. The most relevant ones include treaties such as the African Charter for Human and Peoples' Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). International organisations may use their powers of investigation to publish reports on human rights violations and hold states publicly accountable before the global community. Admittedly, since the international legal system operates upon the voluntary consent of member states, international law can only go so far as deemed permissible by government. Still, the fact that almost all Sub-Saharan African states are already members of these treaties demonstrates their potential willingness to work with international organisations in order to uphold the rule of law (Shivute, p. 217). Additionally, external pressure from non-governmental organisations and media can be effective in pressuring states to observe international standards. This range of methods will help to ensure that international norms are internalised into domestic legal systems.

Lastly, the long-term success of the rule of law relies upon creating reforms that are implemented by political institutions. The removal of corrupt political practices is essential to ensure that procedural rule of law requirements such as equality before the law and checks on arbitrary power are protected. Only when opaque and undemocratic governance is tackled will the rule of law truly embed itself in a state's legal culture. This is no easy feat, but it is not outside the capabilities of international organisations and can be achieved by applying external pressure. One appropriate solution suggested by Yeh (2011, p. 287) is to grant UN inspectors, who are immune from coercion by powerful African elites, the capacity to investigate, expose, and check for corruption within these states. Equally necessary is the existence of independent and impartial judiciaries and legal professionals who are unafraid to apply the law equally even against governmental officials. This shift in judicial mentality can be achieved through training from international practitioners that emphasises legal rightness and fair outcomes.

The empirical benefits of embracing legal pluralism to promote the rule of law in Sub-Saharan African states can be observed by comparing South Africa to Ethiopia. In South Africa,

indigenous laws co-exist alongside strong state commitment to international human rights and multi-party democracy (Gebeye, 2019, p. 350). As a result, the World Justice Project's 2016 Rule of Law Index ranked South Africa among the best performers for upholding the rule of law in Africa. In contrast, Ethiopian indigenous laws help to maintain internal law and order, but they contravene international obligations by violating human rights and holding unfair elections (Gebeye, 2019, p. 351). Unsurprisingly, according to the same 2016 index, Ethiopia is among the bottom of the global rule of law performers.

In conclusion, the rule of law is practically achievable in Sub-Saharan African states. Whether this goal will be realised depends upon efforts made by international organisations and the willingness of national governments to adopt reforms. This is a task that requires continuous effort and attention but is essential in securing social justice. Therefore, it is of the utmost importance.

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