

“Rule of Law and Elections in Africa – Recent Experiences” by Arnold Tsunga¹

The topic dictates that one has a basic understanding of what the rule of law means as well as what elections mean.

What is the rule of law?²

The “rule of law” broadly reflects the idea that law must be just (i.e. in accordance with human rights norms) and able to protect people from the arbitrary exercise of power. The “rule of law” also implies that the State must develop effective executive, judicial and legislative institutions as checks and balances, to respect, protect and fulfil the human rights of all people and to hold the State accountable when it violates rights.

The rule of law does not imply a static set of rules, but is a dynamic concept that protects against arbitrary power, expands freedoms and embraces justice. A rule of law assumes that everyone is entitled to, without discrimination, their civil, political, cultural, economic and social rights.

The rule of law assumes that everyone in society is equal before the law and protected from human rights violations by the law and in practice; in which those in power are held accountable and brought to justice if they violate human

¹ Arnold Tsunga is the Director of the Africa Programme of the International Commission of Jurists and presented this paper at the half annual general meeting of the Tanganyika Law Society held at Dodoma, Tanzania between 13 and 14 August 2010.

² This is the definition of the rule of law as adapted from the ICJ vision document. www.icj.org.

rights; where victims have access to remedies and justice and those who come before the courts receive a fair trial.

The rule of law requires judges, lawyers and prosecutors to be truly independent, enlightened and courageous, and free to carry out their professional duties.

What are elections? And why elections?

A formal and organized process by which people are selected to occupy public office. In the absence of elections it appears that there is no other viable or civilized way in which people can decide who occupies public office say Parliament on their behalf. Elections give reality to the tenet that in a democracy a government is of the people, for the people and by the people.

What is the test for the quality of elections?

The degree to which the resultant government is viewed and accepted as legitimate by the electorate and the international community. The standard test that has been used over the years is that the elections are either free and fair or not free and not fair. Given my experiences in Zimbabwe a few variations are emerging as between 2000 and 2008 elections have been judged using the following tests:

- Free and fair,
- Reasonably free and fair,
- Reasonably substantially free and fair, or
- Not free and fair but credible.

What are the ingredients or essential elements for elections to be judged to be free and fair?

The array of standards to govern elections and electoral conduct in Africa include human rights standards as enshrined in the international bill of rights (i.e the Covenant on civil and political rights and the Covenant on economic social and cultural rights); the African Charter on Human and Peoples Rights; the African Charter On Democracy, Elections and Governance; and the SADC Principles And Guidelines Governing Democratic Elections as well as Domestic laws (Constitutions and Electoral laws).

In short people need to enjoy fundamental freedoms if they are to meaningfully participate in the civic affairs of their nation. The rights include but are not limited to expression, association, assembly, free movement and the right to be elected into public office without risking bodily, proprietary or other harm.

The implementation gap explaining the mismatch between human rights standards and implementaion in electoral practices is explained on the basis of lack of commitment or lack of capacity on the part of duty bearers. These need to be addressed correctly if the ills associated with elections in Africa are to be adequately addressed.

It is important to reflect a little on electoral systems to the extent that these create not only the framework through which the electorate exercise their right to vote but also that through which people ascend into public elected office.

Electoral Systems briefly

An electoral system is both the framework of delivery and a vehicle for delivery of elections. It is “a method that a given

country adopts for choosing national leaders, It encompasses procedures, rules and regulations for the electorate to exercise their right to vote, and determines how elected MPs occupy their allocated seats in the legislature”³

Common examples of electoral systems are the FPTP and PR systems. There are a number of variations that centre around modifications of these two systems including the MMP but these will not be canvassed in any detail in this paper which will focus for convenience on the FPTP and the PR systems. There is no consensus about which system best produces democratic results and political stability. As typically happens with many issues in Africa the electoral systems generally follow the colonial history in that African countries inherited electoral systems that prevailed before independence.⁴

General features of each system

In many former British colonies the FPTP system is predominant. 18 out of the 53 AU states use the FPTP system.⁵ In this system a country is divided into roughly equal constituencies. Each constituency then produces an MP elected through popular franchise. It’s a winner take all approach. There is a belief that this system allows for direct

³ **Khabele Matlosa:** Review of electoral systems and democratization in Southern Africa: Electoral Models for South Africa: Reflections and Options: **Konrad Adenauer Stiftung: Second Edition 2007.**

⁴ Khabele (supra) at p53. See also **Bertha Chiroro:** Trends in Electoral Systems reforms in Southern Africa: Electoral Reform in Africa: Challenges and Opportunities: **The Kenyan Section of the International Commission of Jurists: 2009** at page 11.

⁵ Khabele (supra).

accountability of the elected representative to the electorate. The candidate though endorsed by a party stands in an individual capacity.

The PR system usually takes the whole country as one constituency. There is no delimitation of constituencies. It is “not constituency based system but an opinion based system.”⁶ The parties produce a candidates list and the candidates owe allegiance to the party. Candidates do not contest elections as individuals but as party candidates appearing on a prepared party list. PR system will not allow for independent candidates to contest. Voters elect political parties and not individuals. The criticism is that there is no direct accountability to the electorate by the elected official.

Electoral systems and outcomes

It is important to analyse electoral systems efficacy in supporting and strengthening democracy, democratic practices and political stability based on an assessment of the intended and unintended outcomes.⁷ When society perceives electoral outcomes as just and democratic, there is a likelihood of political stability and democratic growth. The leadership that emerges out of this process has political legitimacy and this helps in fostering political stability.

Over the years the FPTP system has generally produced what are perceived as unjust electoral outcomes. There is a

⁶ Chiroro (supra) and Khabele (supra)

⁷ **Wambui Kimathi and Lawrence Mute:** Kenya’s Electoral System: A Statistical View of the 2007 Election Results focusing on the Unintended and Intended Effects of our Budding Democracy: **The Kenyan Section of the International Commission of Jurists: 2009** at page 103

propensity for wasted votes and disproportionate representation when election results are processed to allocate seats of parliament in the FPTP system.

E.g Lesotho 1993 BCP's 74.7% of popular vote translated to 65 seats while the opposition BNP 22.4% popular vote translated to 0 seats in Parliament. In 1998 LCD's 60.7% popular vote translated to 79 seats while BNP's 24.5% popular vote translated to 1 seat in Parliament. This led to serious legitimacy issues and culminated in a system review. In 2002 elections were held in Lesotho under a different system called Mixed Member Proportional representation LCD's 54.8% popular vote translated into 77 seats while BNP's 22.4% translated to 21 seats. This shows that the PR system does not waste votes⁸. Similar analysis applies with equal force to Botswana and Zimbabwe electoral experiences.

Quest for power as a negative force and driver of electoral malpractice

The winner take all approach of the FPTP system has engendered feelings of frustration and unfairness and a sense of invincibility about the incumbency that has been a source of political instability in many African countries. In the face of strong opposition, it has also created a sense of insecurity about power retention in the ruling and political class making elections a zero sum game where the end is often seen as justifying the means. Elections as a zero sum game result in a quest for power at any cost.

The post colonial African state and the Identity Crisis

⁸ Khabele (supra) at p56

Is there consensus on what the value system of the post colonial African state is? I doubt. The practices of the African political class have been divergent at most times to the values as enshrined in international instruments and national constitutions. Too many African lives have endured untold hardships at the hands of an African political leadership that seems to be devoid of values and any conscience. The mantra and rhetoric of attacking the West has lost all its appeal in the face of demonstrable harm that these leaders have caused to their own people for the sake of power retention.

Inheritance of a system, architecture and infrastructure of oppression and exclusion partly explains this dilemma. The often narrow interpretation of security to mean national as opposed to human security has resulted in many instances in law enforcement agents being converted into a force to protect incumbency against perceived external and internal threats, the legitimate opposition being viewed as internal threats.

Some manifestations of how this view of security is problematic and anti-ordinary African people is seen in the way the AU is responding to international criminal justice efforts against some of the political class such as Bashir and Habre and the unquestioning support for Mugabe despite the hardships that he has subjected Zimbabweans to through demonstrable human rights violations predominantly against ordinary African people.

Elections without human rights and the rule of law in Africa

Elections are supposed to create a platform for the highest collective expression of the peoples will. Instead elections have turned out to be a real nightmare in a significant number of African countries.

1. Despite the fact that the African continent has made significant progress in institutionalising electoral democracy, elections have continued to be a major source of armed conflicts, political violence and institutional instability, which nurture gross human rights violations.
2. Patterns of election-related human rights violations that have been a cause for concern in several Africa countries range from abuse of public resources by ruling parties; monopoly of the public media by the ruling parties; unindependent election management bodies; gerrymandering of constituencies to give unfair advantage to ruling party (Lesotho, Zimbabwe, Sudan); inability of the judicial system to resolve electoral disputes fairly, effectively and efficiently (Malawi, Nigeria, Ethiopia and Zimbabwe); violence and impunity; politicisation of humanitarian assistance (e.g food distribution); vote buying (Nigeria, DRC, Zimbabwe, Malawi, Ethiopia, Chad); politicisation of the law enforcement agencies to support the incumbency and creation of pseudo NGOs (GANGOs, GONGOs, MONGO's FONGO's, PONGO's) to observe and monitor and validate elections (Sudan, Ethiopia) among others.⁹
3. In many Africa states, electoral processes do not constitute an opportunity for the people to exercise fundamental human rights but an occasion to endure violence, property destruction, enforced disappearances, internal displacements and extra-judicial executions. In essence, African elections have turned out to be periods during which human rights and the rule of law have been overturned.

⁹ Clement Mavungu: ICJ Project Lawyer written submissions to the ACHPR. May 2010. www.icj.org

4. Poor management of elections consistently pose a serious threat to political stability of African states, even those that have long been considered stable and peaceful countries (Kenya, Ivory Coast, Lesotho, Zambia and Zimbabwe).

5. Election-related violence has resulted in violations of a number of human rights guaranteed in the African Charter on Human and Peoples' Rights and several other international, regional and sub-regional human rights instruments binding on African states such as the right to personal integrity, equality and dignity, the right to participate freely in public affairs, the right to vote or be voted for, without any kind of discrimination, the right to free association and to peaceful assembly, the right to freedom of movement, the right to freedom of expression, and the right to timely and effective judicial remedies for electoral malpractices. Rule of law institutions have failed to protect these rights during electoral periods.

6. Violence between political parties before and during Nigeria's flawed elections in April 2007 caused more than 200 deaths. The major concern is the failure to prosecute the perpetrators of violence and the fostering of a climate of impunity.

7. The December 2007 elections in Kenya set off a nationwide political, economic and humanitarian crisis leaving more than 1,500 dead and 300,000 displaced. Concerns of re-arming were reported in the international media (BBC in 2009) with arms traders reporting brisk business in the Rift Valley. One hopes that this is false and that the successful constitutional referendum has given a great sense of hope that the events of December 2007 will

never be repeated in Kenya. However the failure to prosecute the perpetrators of violence has created a climate of impunity and this is a matter for concern given the cyclical nature of election related violence and feelings of deprivation and marginalisation over the years in Kenya. The seeming general acceptance of local judicial institutions inability or unwillingness to prosecute and reliance on the ICC to break the cycle of impunity is also a cause for concern in many circles.

8. Zimbabwe's June 2008 runoff presidential election resulted in widespread and brutal political violence that left around 200 dead between March and June 2008, hundreds of thousands displaced and many politically motivated sexual assaults, abductions and enforced disappearances. While the Global Political Agreement and the resultant inclusive government of Mugabe and Tsvangirayi has resulted in reduction in levels of violence, some economic revival and normalisation in the way of life, concern continues to mount over the failure of meaningful political reforms. The constitutional process is stalled, the security sector is still embedded with Mugabe's ZANU PF. It needs to be depoliticised. The militias (war vets and youth brigades) have not yet been demobilised even though they are deactivated. The torture camps identified as base stations from which targeted abductions and executions of political opponents were taking place are still intact in the rural areas. There has not been any prosecution of the usually known perpetrators of violence who still roam the streets free in communities that they tormented thereby creating a climate of impunity.

9. In Guinea, on 28 September 2009, a protest meeting of civilians was violently broken up by the army and over

150 civilians were killed. Sadly there has not been prosecution of the perpetrators and a climate of impunity prevails. It is however refreshing that this crisis triggered an electoral process that seems to be resolving the crisis of governance that emerged as a result of the execution of the sitting president and the army chief in late 2008.

10. Elections in the Democratic Republic of Congo, Angola, the Republic of Congo, Uganda, Swaziland, Ethiopia, Chad, Sudan and Zambia have also all in the past been characterized by appalling violence, arbitrary arrests and detentions, defiance of court orders and in some instances the open challenging of the judicial authority as in the invasion of courts by the military in Uganda.
11. In Malawi, Zimbabwe and Zambia the public media is used to prop up the ruling party and there are credible reports that national resources are channeled to support the incumbency.
12. The elections in Rwanda 2010, saw Kagame win over 93% of the vote. In the run up to the elections there were reported cases of execution of an opponent and a journalist . Jean-Leonard Rugambage, a journalist working for the Umuvugizi newspaper, was shot dead on June 24 outside his home in the capital, Kigali. Rugambage had been investigating the shooting in South Africa of the exiled Gen. Faustin Kayumba Nyamwasa. Killed on July 14, was André Kagwa Rwisereka, the vice president of the opposition Democratic Green Party.¹⁰ An American lawyer representing the opposition leader was also

¹⁰ Amnesty International PR.

detained without charge for a while and released on medical grounds. Rwanda denies that these killings, attempted killings or detentions were related to the elections.

13. In Burundi elections in 2010, the opposition pulled out of elections due to intimidation and alleged irregularities. The election had been well anticipated given years of civil war. Unfortunately accusations of fraud, a series of deadly grenade attacks and the withdrawal of the opposition condemned the election into a circus.

14. The elections in the Democratic Republic of Congo are always marred by violence and election management problems due to squandered institutional capacity after years of conflict and absence of political commitment. Over 100 magistrates were arbitrarily dismissed by the President showing the power balance between the bench and the executive is in favour of the executive and therefore compromising separation of powers.

15. Chad, Cote d'Ivoire, Egypt, Guinea-Bissau, Lesotho, Madagascar and Niger are showing possibilities of electoral violence, manipulation, delays and conflicts. In Niger the president fired the Supreme Court and created a basis for the coup that took place in 2009. It seems however that the military junta that took power are preparing for elections in order to return power to the civilian authorities and create a basis for separation of powers without which there cannot be effective democracy.

16. African countries need to go beyond elections as routine rituals and public relations exercises. They need

to demonstrate a genuine commitment to holding free, fair and peaceful elections, within reasonable legal timeframes in fulfilment of the aspirations of the African people.

17. The Law Society has a role to play in elections. It ranges from civic education, election observation and or monitoring, providing legal support to human rights defenders facing persecution for their work in supporting electoral justice, appropriate public interest or impact or strategic litigation, to lobby and advocacy for law and institution reform in order to work towards a situation where elections in Tanzania foster democratic growth, encourage citizen participation and make the political leadership more legitimate and accountable to the electorate.

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