



the global voice of  
the legal profession®

# African Regional Forum News

Newsletter of the International Bar Association Legal Practice Division

**VOLUME 8 NUMBER 1 APRIL 2014**





CPD/CLE  
HOURS  
AVAILABLE

# IBA African Regional Forum Conference: Rising to the Challenge of Africa's Economic Growth – The Role of the Legal Profession

25–27 June 2014

Accra International Conference Centre, Accra, Ghana

A conference co-organised by the IBA African Regional Forum and the Ghana Bar Association

## Topics will include:

- The business of law practice: emerging law firm management issues in the African context
- Emerging practice areas to meet the needs of Africa's economic growth
- Dispute resolution in frontier and emerging economies: the challenges of resolving business disputes in Africa
- Hot topics in human rights

## Who should attend?

Lawyers, both private and in-house, judges, policy makers and bankers who are interested in the African region.



the global voice of  
the legal profession

London

São Paulo

Seoul

The Hague

Washington DC

4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom  
Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 [www.ibanet.org](http://www.ibanet.org)

## IN THIS ISSUE

<b>From the Co-Chairs</b>	4
<b>From the Editors</b>	5
<b>Forum Officers</b>	5
<b>Meet the Officer</b>	
Forum Co-Chair Olufunmi Oluoyede shares her thoughts on the legal profession	7
<b>ARF Scholarship Competition</b>	9
<b>IBA Annual Conference, Tokyo 19–24 October 2014: Our Forum’s Sessions</b>	10
<b>Legal Updates</b>	
Changes to Angola’s Forex regulations <i>Claudia Santa Cruz</i>	11
Changing the narrative on prolonged pretrial detention in Africa: guidelines to the rescue <i>Stanley Ibe</i>	12
<b>Articles</b>	
The proposed Nigerian national arbitration commission: will it benefit the arbitration process? <i>Offornze Amucheazi and Nneka Amucheazi</i>	13
Case management in federal courts in Nigeria: recent developments <i>Chukwunyere Ugwor</i>	16
<b>The Lex:lead Scholarship 2013</b> <b>Student essays on how the rule of law can reduce poverty and foster economic growth</b>	
<i>Anthony Peter Njau, Tanzania</i>	18
<i>Galindo Ruhyyah Aliyo, Uganda</i>	21
<i>Christopher Sengoga, Rwanda</i>	25
<i>Milan Dipakkumar Desai, Zambia</i>	30
<i>Soreti Berhanu Workneh, Ethiopia</i>	34
<i>Muchinda Muma, Zambia</i>	37
<i>Gloria Ludigo, Uganda</i>	42

**Contributions** to this newsletter are always welcome and should be sent to the Publications Officer, Professor Olanrewaju Fagbohun, [fagbohun@elri-ng.org](mailto:fagbohun@elri-ng.org), and Newsletter Editor, Anne Bodley, [annebodley@yahoo.com](mailto:annebodley@yahoo.com).

## International Bar Association

4th Floor, 10 St Bride Street

London EC4A 4AD

Tel: +44 (0)20 7842 0090

Fax: +44 (0)20 7842 0091

[www.ibanet.org](http://www.ibanet.org)

© International Bar Association 2014.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without the prior permission of the copyright holder. Application for permission should be made to the Director of Content at the IBA address.

### Terms and Conditions for submission of articles

1. Articles for inclusion in the newsletter should be sent to the Newsletter Editor.
2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
3. Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Director of Content at [editor@int-bar.org](mailto:editor@int-bar.org).
4. The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

### Advertising

Should you wish to advertise in the next issue of the African Regional Forum newsletter, please contact the IBA Advertising Department: [advertising@int-bar.org](mailto:advertising@int-bar.org)

This newsletter is intended to provide general information regarding recent developments in Africa. The views expressed are not necessarily those of the International Bar Association.

# From the Co-Chairs

**Olufunmi  
Oluyede**

TRLPLAW, Lagos  
olufunmi@trlplaw.com

**Barnabas  
Tumusingize**

Sebalu & Lule  
Advocates, Kampala  
brt@sebalulule.co.ug

**D**ear Colleagues,  
A warm welcome to the first quarter of 2014 – and to our very first newsletter of the year!

With our newly appointed team of officers, we're hitting the ground running, forging ahead to complete momentous projects commenced at the inception of our tenure, along with other novel undertakings. These initiatives, all geared toward raising the significance of the forum globally, are itemised below...

## Publications

- The forum's book proposal *Reassessment of the Role of Law in the Transformation of Africa* spearheaded by our own dear erudite Professor Lanre Fagbohun.
- Our quarterly newsletters which continue to attract glowing accolades within and beyond the IBA.

## Communication

- A much-improved, fully revamped website for wider, global reach and influence.
- A forum weblog laudably moderated by Anthony Atata as an effective, motivating tool for interaction and exchange of ideas amongst members.

## Membership

- The Forum scholarship scheme – arrangements for which will be finalised shortly.
- Our active recruitment, retention and the enrichment of partisanship in all regions of the continent, which now positively translates into an increased presence and the participation of African lawyers in all activities of the IBA.

## Programmes

Save the dates, all! The Forum is actively involved in planning of various events of exceptional global import, including:

- The 6th World Women Lawyers' Conference, 8–9 May at the Paris Marriott Opera Ambassador, Paris, France
- The IBA Mid-Year Bar Leaders Meetings, 21–24 May at Hotel Le Plaza, Brussels
- IBA African Regional Forum Conference 2014, 26–27 June 2014, Accra, Ghana
- Conference on Mining In Africa: Opportunities And Legal Challenges, 8–10 September 2014, Dar es Salaam, Tanzania
- IBA Anti-Corruption Seminars
  - Kampala, Uganda – 24 September 2014
  - Kigali, Rwanda – 25 September 2014
- IBA Annual Conference 2014, Tokyo, 19–24 October 2014, featuring *inter alia*, the following must-attend forum sessions (see p 10 for more details):
  - Swiss Vereins – 21st Century Global Platform or Just the Latest Fad?
  - The ICC-Africa Agenda: A Legitimate Check on Impunity and Rights Abuses Or Crass Misconception Of African Polity And Persecution Of African Leaders?
  - Forum Roundtable presentation on Asian-African Investments at the IBA APC Showcase session titled: The World Invests in Asia & Asia Invests in the World
  - Forum Annual Breakfast/Business Meeting
  - Forum Annual Luncheon
- From BRICS to MINT: Challenges and Prospectives, London, February 2015

If yet to do so, we again urge you to come aboard with us without further ado and strive to make your membership of the IBA African Regional Forum a worthwhile investment this year through active participation in these exciting ventures. All input will be cordially welcomed.

Finally, kudos to Anne and the IBA Editorial Content team for a job extremely well-done on yet another magnificent publication. We, as usual, look forward to feedback from all and sundry.

Enjoy your newsletter!

With our best compliments, Funmi and Barnabas.

## Olanrewaju Fagbohun

Nigerian Institute  
of Advanced Legal  
Studies, Lagos  
fagbohun@elri-ng.org

## Anne Bodley

The Lex:lead Group,  
London  
annebodley@  
yahoo.com

# From the Editors

## The rule of law and its impact on economic development

For our first issue of 2014, we include the seven winning essays of the Lex:lead Group's most recent competition in which law students from less developed countries, Ethiopia, Rwanda, Tanzania, Uganda and Zambia all provide answers to the question: how can the rule of law reduce poverty and foster economic growth? The answers are wide ranging, insightful, personal and well-studied. Each of the students featured here was awarded a US\$500 prize towards their studies in their universities of registration.

The Lex:lead Group would like to thank its donors (Allen & Overy, the Claude Moore Charitable Foundation, Cliffe Dekker Hofmeyr, Webber Wentzel, the Law Council of Australia and DLA Piper) for supporting the competition, which reaches out to the

world's least-developed countries to answer these questions of law and development, and the IBA African Regional Forum for accepting the essays for publication. Launched with partial funding from the IBA Foundation, information about Lex:lead can be found at [www.lex-lead.org](http://www.lex-lead.org).

## From our members

This newsletter also features articles on legal trends and updates in the African region: arbitration in Nigeria; changes to Angola's Forex regulation; streamlining pretrial detention procedures; and case management in Nigerian courts.

As always, contributions to the newsletter are welcome, be they legal updates, conference reports or research. In the meantime, we hope you enjoy this edition.

# Forum Officers

## Co-Chairs

Olufunmi Oluyede  
TRLPLAW, Silver Springs, Maryland  
olufunmi@trlplaw.com

Barnabas Tumusingize  
Sebalu & Lule Advocates, Kampala  
Tel: +256 (41) 233 063  
Fax: +256 (41) 230 521  
brt@sebalulule.co.ug

## Vice-Chair, West

Olumide Akpata  
Templars, Victoria Island  
Tel: +234 (1) 461 1889  
Fax: +234 (1) 461 1294  
olu.akpata@templars-law.com

## Vice-Chair, South

Glenda Emily Benson  
Sandton, Johannesburg  
Tel: +27 (11) 302 3291  
gbenson@ens.co.za

## Vice-Chair, East

Evans Monari  
Daly & Figgis Advocates, Nairobi  
Tel: +254 722 514 633  
monari.e@daly-figgis.co.ke

## Membership Officer

Nankunda Katangaza  
Law Society of England and Wales, London  
Tel: +44 (20) 7320 5772  
nankunda.katangaza@lawsociety.org.uk

## Newsletter Editor

Anne Bodley  
The Lex:lead Group, London  
annebodley@yahoo.com

## Publications Officer

Olanrewaju Adigun Fagbohun  
Nigerian Institute of Advanced Legal Studies, Lagos  
Tel: +234 803 402 0086  
fagbohun@elri-ng.org



## FORUM OFFICERS

### Corporate Counsel Forum Liaison Officer

Nechi Ezeako  
EL-Values Advisory, Lagos  
Tel: +234 802 304 7970  
nechi70ng@yahoo.com

### Young Lawyers Liaison Officer

Kimathi Kuenyehia  
KIMATHI & PARTNERS, Corporate Attorneys, Accra  
Tel: +233 (0) 302 770 447  
Fax: +233 (0) 302 766 870  
kimathi@kimathilegal.com

### Discussion Forum Moderator

Anthony Atata  
Hallblack Law Firm, Lagos State  
Tel: +234 805 617 5160  
aoatata@yahoo.co.uk

### Advisory Board Members

Olufunke Adekoya  
AELEX Legal Practitioners & Arbitrators, Lagos  
Tel: +234 (1) 463 0580  
Fax: +234 (1) 461 7092  
oadekoya@aelex.com

Sena Anthony  
Chief Sena Anthony & Associates, Lagos  
Tel: +234 803 300 3959  
chiefsenad@gmail.com

Daisy Danjuma  
South Atlantic Petroleum, Lagos  
Tel: +234 (80) 3402 2237  
Fax: +234 (1) 271 3717  
daisydanjuma@yahoo.com

Michael Greene  
A&L Goodbody, Dublin  
Tel: +353 (1) 649 2000  
Fax: +353 (1) 649 2649  
mgreene@algoodbody.com

Peter Leon  
Webber Wentzel, Johannesburg  
Tel: +27 (11) 530 5240  
Fax: +27 (11) 530 6240  
peter.leon@webberwentzel.com

Sternford Moyo  
Scanlen & Holderness, Harare  
Tel: +263 (4) 702 5618  
Fax: +263 (4) 700 826  
moyos@scanlen.co.zw

Christopher Ojo  
Bayo Ojo & Co, Abuja  
Tel: +234 (9) 413 7250  
Fax: +234 (9) 413 7251  
cabayoojo@aol.com

Sam Okudzeto  
Sam Okudzeto & Associates, Accra  
Tel: +233 (32) 668 114 / 666 377  
Fax: +233 (32) 668 115 / 666 545  
okudzeto@ghana.com

Gbenga Oyebode  
Aluko & Oyebode, Lagos  
Tel: +234 (1) 462 8360  
gbenga.oyebode@aluko-oyebode.com

Jacob Saah  
Saah and Company, Accra  
Tel: +233 (21) 228 886  
Fax: +233 (21) 230 084  
jsaah@saahpartners.com

Ashwin Hirjee Trikamjee  
Garlicke & Bousefield, Umhlanga  
Tel: +27 (31) 570 5300  
Fax: +27 (31) 570 5309  
ashwin.trikamjee@gb.co.za

Dorothy Ufot (SAN)  
Dorothy Ufot & Co, Lagos  
Tel: +234 (1) 271 6348  
Fax: +234 (1) 463 1724  
dorothy.ufot@dorothyufotandco.com

### LPD Administrator

Charlotte Evans  
charlotte.evans@int-bar.org

# Meet the Officer

## Olufunmi Oluyede

*TRLPLAW, Co-Chair*

In this edition of the IBA African Regional Forum Newsletter, we find out more about the Forum's Co-Chair Olufunmi Oluyede in our new 'Meet the Officer' feature.

If you have a question for the officers of the ARF, please email [editor@int-bar.org](mailto:editor@int-bar.org) with your question, name, firm, city and position in the IBA.

### How did you get into law?

I got into the law primarily in response to my late father's counsel to the effect that a girl-child from my part of the world must be trained and equipped for a profession – as opposed to just any vocation – for her to not only survive, but to hold her own amongst her peers in the patriarchal African society. Growing up in London, England, my obvious options in my early years were a career in the sciences as a medical practitioner, an accountant or a legal practitioner. I could have excelled in any of the three – but was more favourably inclined towards the latter.

Right from my adolescence, young as I was, I took to heart the aphorism that 'lawyers are learned'. Realising that a lawyer is trained to be knowledgeable and proficient in all spheres, I reckoned as a lawyer I could give both the accountant and medical practitioner a run for their money if needs be! Seriously speaking, I recognised early on that the legal profession is a laudably versatile one – with a numerous, ever-expanding range of prospects and top-notch career options. It is as intellectually stimulating as it is glamorous. Ours is a noble profession, widely esteemed as a hallmark of prestige and epitome of success – and rightly so! More importantly, however, being a social engineer, lawyers are provided an inimitable opportunity to effect global transformation in every sphere of human endeavour, positively impacting their world as nothing else can, and I wanted to do just that.

Lawyers in my jurisdiction are not initially trained to specialise in any one particular area of the law; they often choose to do so as postgraduates after their bachelor of law degrees. My area of practice was accordingly

determined. At TRLPLAW, our areas of expertise became evident and more clearly defined (as an international commercial firm of high repute) with the colossal growth of the firm from a one-man/woman practice back in 1980s to the thriving enterprise it has become today.

### If you were not a lawyer, what would you do?

I've never really given this a thought. Law is, and has always been my first love career-wise. I had, however, embraced the arts and classics as a child and, on those lines, could have ended up as a classical multi-instrumentalist in some eminent, world-class symphony orchestra – or an accomplished linguist or diplomat of sorts.

### What advice would you give to someone new to your area of practice/ new to your jurisdiction/ new to being a lawyer?

Literarily, I'd say...

...Welcome to the most coveted, most resourceful profession in the world! A career in the legal profession – as an international commercial lawyer can (as you've most likely heard) be intellectually stimulating, financially rewarding and personally fulfilling. This, however, does not come without a price. A new entrant to legal practice must have a clear vision of what can be achieved plus a resolute determination to see it accomplished.

More often than not, there will be long, tedious workdays, hours of legal analytical research, case preparation etc, without opening and closing times; demanding, stressful business meetings and trips when your social and familial obligations must



## MEET THE OFFICER – OLUFUNMI OLUYEDE

take a back seat; complicated cases and problematic clients may together produce such highly charged work atmosphere as may exert an additional emotional toll on the most efficient of lawyers. ... There will be hurdles to cross – just as there are prerequisites to gain. The good news is that the latter far outweighs the former. The training you will acquire from your work as a commercial lawyer is invaluable no matter where your career ends up. It will, in essence prepare and guide you through life itself!

### **How has your role changed post-financial crisis?**

My responsibilities would usually change as deemed necessary to meet the demands and requirements of my firm's clientele at any given period. This has been the case in the aftermath of the global financial crisis. Post-financial crisis, we have been at the forefront of actions to protect vulnerable businesses, especially those lured by the banks into gambling with significant portions of their capital on the stock exchange through illegal margin accounts. Our work has in effect led to new regulations codifying the custom and particularly the requirement for margin calls.

### **What area of your work do you enjoy the most?**

I definitely enjoy ADR (alternative dispute resolution) the most. Nothing gives me more of a thrill, more fulfillment, than the joy of seeing two hitherto rancorous, opposing litigant clients walk out of a settlement conference cheerful, content and go on to become even greater business partners/friends than when they started out.

### **What are the current challenges facing your area of practice?**

In general, challenges abound in virtually every area of the profession currently. Of utmost significance to my area of practice globally are: globalisation/multijurisdictional practice considerations (including outsourcing of legal services to foreign entities *et al*); economic pressures – propelled by societal changes occasioned by the global economic decline – whereby clients today determine, *inter alia*, what services are required and at what cost; rapidly evolving technological advancement,

which continually increases the pace of practice and client expectations and forces lawyers to either adapt or face gradual extinction; regulation of the profession involving a re-evaluation of traditional ethical rules, guidelines etc; and the challenge of having to undertake the training of new lawyers for real-life practice and to develop entrepreneurial skills.

### **What has been the biggest challenge of your career?**

There have been several over the years, all depending on the circumstances at the prevailing time. In general, however, the biggest, most constant, has been the inadequacy of time to accomplish set targets. Somehow 24 hours in a day seems no longer sufficient to get things done.

### **How did you overcome it?**

Delegation. I've had to learn to entrust others with tasks I would otherwise have had to accomplish by myself; there's only so much one can accomplish unaided. From all indications, however, I'm still not doing enough of this... consequently, that challenge is not yet completely surmounted – but I'll get there, with time.

### **What are the ethical issues facing your area of practice?**

There are plenty of ethical issues. Of particular interest to commercial and transactional lawyers (whose clients might face litigation) would be issues avoiding conflict of interest situations, lawyers' communication/language, aggressive and deceptive discovery tactics, dealing with fact witnesses, litigants' claims, settlements, courts and the like.

### **If you could put together a wish list of changes you would bring about in the profession, or to your area of practice, what would you include?**

Top on the list of the salutary changes I would like to see in the profession (within my jurisdiction) would be a complete overhaul of the values system and the reward of actual positive contributions without the current need for lobbying and corruption, which has facilitated the triumph of mediocrity generally.

**What do you do in your free time?**

Usually I spend my free time with family, away from the hustle and bustle of Lagos, Abuja and the big cities, to some serene, country village-like suburb with no clients in sight, no phones, laptops etc, for days on end!

On business trips, I am also wont to stay one or two days extra (after work) in my hotel room, unwinding, doing absolutely nothing.

**What were your parents' professions?**

My late father was an academic lecturing in economics in the UK prior to his demise. My mother is also a retired educationalist. Given the opportunities provided to me, they wanted me to climb much further up the ladder in my educational pursuits than they ever did. My father often openly expressed the view that I could and would become a top-notch, world-renowned success in whatever I chose to do. He unfortunately didn't live to see that happen.

**Do you have children? If so, have you, or would you, encourage them to pursue a career in the law?**

Yes, I do have two wonderful, extremely brilliant, children. Their father (my husband) is also a lawyer, as is his father and various other relatives. My children have been surrounded by lawyers and law-related people throughout their formative years; it would have been the most natural course of events should they have chosen a career in law, but they did not.

We would not, and have never, pressurised them to do anything other than what they have a passion for. They call the shots in that respect. My eldest child chose to pursue a first degree in government/political science –and is only now considering going to law school in the United States. My younger one has a master's degree in tumour biology from Georgetown University, USA, and is now on her way to medical school.



CPD/CLE  
HOURS  
AVAILABLE

## IBA African Regional Forum Conference: Rising to the Challenge of Africa's Economic Growth – The Role of the Legal Profession

25–27 June 2014

Accra International Conference Centre, Accra, Ghana

The African Regional Forum is delighted to announce that scholarships will be awarded to lawyers who wish to participate in the African Regional Forum Conference ([www.surveymonkey.com/s/ARF2014](http://www.surveymonkey.com/s/ARF2014)), but who are unable to do so owing to financial constraint. The IBA therefore invites interested persons to apply for a scholarship, which will provide:

- waived registration fee to attend the AFR Conference in Ghana, 26–27 June 2014; and
- a contribution towards travels expenses to attend the conference, and accommodation while attending.

Your completed application form must be accompanied by a supporting essay written on the topic below:

'The role of law in sustainable economic development and poverty alleviation: The Africa experience'

The essay you submit must be:

- typed in English;
- double line spaced;
- in MS word file format; and
- no less than 2,500 words.

All applications received by **Monday 12 May 2014** will be submitted to the scholarship judging committee who must be satisfied that the applicant has convincing reasons for wishing to attend the conference, and cannot finance themselves.

For further information and application details, please visit [www.ibanet.org/Document/Default.aspx?DocumentUid=10fddcd8-4841-481f-a630-92ebad46d172](http://www.ibanet.org/Document/Default.aspx?DocumentUid=10fddcd8-4841-481f-a630-92ebad46d172).

# TOKYO 19–24 OCTOBER 2014

## ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



### African Regional Forum's sessions

#### Tuesday 0800 – 0930

##### **Open committee business meeting and breakfast**

*Presented by the African Regional Forum*

A business meeting and breakfast of the African Regional Forum, open to all forum members and guests, will be held to discuss matters of interest and future activities of the forum.

#### Wednesday 0930 – 1230

##### **The ICC–Africa agenda: a legitimate check on impunity and rights abuses, or crass misconception of African polity and the persecution of African leaders?**

*Presented by the African Regional Forum*

When, *ab initio*, several African countries acceded to the Rome Statute of the International Criminal Court, little did its leaders know that it would come back to haunt them. Statistically, the trial history of the ICC now lends credence to the view that Africa is being particularly targeted for victimisation.

What precisely is the role of the ICC in promoting good governance globally? In executing this duty, is the court out of touch with actual realities within the African continent? Should Africa renounce membership of the ICC or is the ICC what Africa needs to end human rights abuse and high-level impunity on the part of its leaders, especially given the inability of local judicial and quasi-judicial institutions to perform this role?

##### **The world invests in Asia and Asia invests in the world – forum and networking**

*Presented by the Asia Pacific Regional Forum, the African Regional Forum, the Arab Regional Forum, the European Regional Forum, the Latin American Regional Forum and the North American Regional Forum*

Asia has exceeded the performance of the global economy in the last 20 years. Foreign direct investment (FDI) into Asia has grown substantially and stands at about US\$400bn. In the next 10 years, global GDP will increase by more than 70 per cent and exceed US\$100tn, during which time Asian economies will triple from US\$10tn to US\$34tn. Two of the world's largest five economies

are currently Asian. By 2030, Asia will have three economies in the top five and the largest economy in the world will be Asian. This session, organised jointly by the Asia Pacific Regional Forum and all of the IBA's regional fora, will explore global FDI into Asia and Asia's FDI globally. It will be in a roundtable format, designed for members of the audience to project their experience of cross-border FDI into and out of Asia and to outline their practice and profile to other members of the audience.

#### Thursday 0930 – 1230

##### **Asian investment in mining in Africa and Latin America**

*Presented by the Mining Law Committee, the African Regional Forum, and the Asia Pacific Regional Forum*

Asian investment in mining, especially in Africa and Latin America, has been steadily increasing over the last decades. Investments includes, among others, necessary large infrastructure projects such as power facilities, railways, highways, ducts, and bridges. This session will analyse the most efficient ways in which Asian investment has been structured, addressing real examples, the legal challenges that arise and how they may be successfully addressed.

##### **Swiss Vereins – 21st century global platform or just the latest fad?**

*Presented by the African Regional Forum*

Global consolidation is finally gaining grounds significantly in the legal industry, the driving influence being the availability of a structural vehicle that helps firms deal with the legal and functional hurdles of international mergers. Through such Verein structures, a collection of law firms, organised under different partnership formations in different countries, presents itself internationally as a single organisation and thereby, conveniently avoids regulations regarding the qualifications of law firm owners, the necessity of member firms filing multiple tax returns around the world and other such problems.

Is there real leverage and benefit for African law firms within Swiss Vereins? Will the Verein strip firms of their identity and make them puppets to international firms who want to enter Africa at an arm's length, or will firms continue to strive for independence and success on their own terms? Is integration of firms both regionally and globally the way forward?

## Legal Updates

**Claudia Santos Cruz**  
AVM Advogados,  
Lisbon  
csc@  
avm-advogados.com

# Changes to Angola's Forex regulations

### Recent liberalisation of the existing rules may strengthen the kwanza and stimulate investment in the country itself

Over the past few years, the Angolan authorities have been making a concerted effort to limit the dual US dollar monetary regime that has developed in the country over the past few decades. While the country has its own currency (the kwanza), owing to the strength of its oil and gas industry, it also has a parallel currency – the US dollar.

This fact may have made it easy for the West to turn to Angola for immediate and generous capital gains, but in the process it has created a complex and diverse financial regime.

### 'Invisible' operations

Critical to continuing the development and growth of Angola's national currency has been the introduction of new foreign exchange ('Forex') requirements. These focus on current invisible operations which refer to payments for everything other than goods. These new regulations, effective as of 5 September 2013, not only constitute part of a more general revision of the Angolan Forex regulations that began two years ago, but many have also been influenced by the 2012 Forex regime, applicable to entities operating in the oil and gas sector.

There have already been moves to catch foreign operations by making people establish domestic companies within Angola, open bank accounts and operate locally. However, as many of these 'invisible' transactions occurred abroad, they did not benefit Angola, even if the services were being provided within the country. Therefore, historically there was a great deal of tax that was not paid to the Angolan government.

With the new Forex changes, the Angolan Central Bank (BNA) has defined rules and procedures to be considered for payments

for services and transport contracts and salaries, and the use of Forex for travel and educational purposes by Angolan residents. The general rule was that if a company wanted to transfer funds outside Angola, they had to seek permission from the BNA after receiving them in a local bank account. However, the number of those exempted from having to receive prior authorisation has been extended to include payments under contracts for services to the Angolan oil and gas sector, with a value not exceeding US\$3m, and services to other sectors with a value not exceeding US\$1m – both of which had a previous limit of just US\$300,000.

### Future implications

As a relatively young economy growing at a fast pace, the introduction of more flexibility also allows for Angola's financial system to evolve alongside economic growth. Without referring to the country's political climate, the new systems that have been set up in Angola – the new information technology and the restructuring of various ministries – all mean that commercial banks are now better organised as there is cross-checking and better control when registering these operations.

For a country in which export and investment are the main driving factors for economic growth, loosening the current restrictions has generally been welcomed by the Angolan and international business community. There has been a move away from a dramatic situation where everybody was trying to do business outside Angola, to having stringent laws that mean lawyers are now trying to help clients gain approval for contracts that did not fit within the limits.

Now they are seeing an increase of those limits, which will help clients who struggled with the US\$300,000 transfer threshold.

**Stanley Ibe**

Open Society Justice Initiative, Abuja

stanibe@yahoo.com

# Changing the narrative on prolonged pre-trial detention in Africa: guidelines to the rescue

**P**rolonged pre-trial detention can have devastating consequences for the person detained: loss of liberty, access to family and employment, a predisposition to torture, disease, etc. However, the consequences do not end with the detainee: everyone loses.

The detainee's family loses access to its relative and sometimes the resources they can provide. The criminal justice system loses because confidence in its ability to preserve the principle of presumption of innocence is eroded. The country loses whatever contribution – political, social or economic – the detainee could make. In one word, pre-trial detention, when prolonged or arbitrary, is wasteful.

The waste extends to the sheer numbers of individuals locked out of productive enterprise by their detention, which themselves require external support to stay afloat. In Nigeria, Africa's largest country by population, about 77 per cent of an estimated 47,000 prisoners belong to this category.

Globally, pre-trial detention affects some three million people on any given day. Over the course of one year, about ten million would have been through it. Unfortunately, even these figures do not provide the full picture. Criminal suspects held in police detention facilities across the world are not included. Neither are the substantial numbers of individuals held in unofficial detention facilities.

Statistically, Africa has the highest average percentage of pre-trial detainees as a proportion of total prison population in the world. At 41.3 per cent, Africa's pre-trial detention average is worse than that of Asia (38 per cent), the Americas (27.8 per cent) and Oceania (24.3 per cent), and double that of Europe (20.3 per cent). Africa also has the unenviable reputation of producing six of the top ten countries where pre-trial detainees make up at least 70 per cent of the total prison population: Benin, Central Africa Republic, Congo Brazzaville, Democratic Republic of the

Congo, Liberia and Libya. Numbers are not the only problem; the time spent in pre-trial detention is also an issue.

In a recent study conducted by the Open Society Foundations Open Society Justice Initiative and the United Nations Development Programme (UNDP), pre-trial detainees in Ghana, Guinea and Sierra Leone were found to have been detained for 20 months on average. An audit in Zambia concluded that the average detention period was 51 days.

At this point, one may ask: so what is being done or can be done to change this? Stakeholders across Africa seem to have carefully considered either or both of these questions and come up with a continental initiative to begin tackling the problem of arbitrary and prolonged pre-trial detention – the Guidelines on the Use and Conditions of Police Custody and Pre Trial Detention in Africa (the 'Guidelines').

The Guidelines initiative began with an acknowledgment of the scale of the problem of pre-trial detention on the continent and a desire to take small but determined steps to address them. Led by the Office of the Special Rapporteur on Prisons and Places of Detention at the African Commission on Human and Peoples' Rights, the initiative has generated a groundswell of support over the last two years leading to the adoption by the Commission of Resolution 228 of October 2012, which essentially empowered the Special Rapporteur to develop guidelines on conditions of police custody and pre-trial detention in Africa.

Following Resolution 228, the Special Rapporteur worked with the African Policing Civilian Oversight Forum (APCOF), the United Nations Development Programme (UNDP) and the Open Society Foundations to organise four sub-regional consultations on the draft Guidelines in 2013 in Johannesburg (for Southern Africa); Nairobi (for Eastern Africa); Dakar (for West and Central Africa); and Tunis (for North Africa). These

consultations drew participation from national, regional and international civil societies, from police institutions, prisons, academia, justice ministries, human rights institutions, bar associations and from the United Nations. Participants provided valuable input into the draft Guidelines.

The draft Guidelines have been divided into eight parts and provide guidance on arrest and police custody, decisions and procedural safeguards on the use of police custody, decisions and procedural safeguards on the use of remand detention, disappearances and deaths in custody or pre-trial detention, conditions of detention, vulnerable groups and persons with special needs, remedies and accountability as well as implementation. These provisions are based on existing regional and international human rights instruments and seek to

consolidate in one document some of the more important of these instruments.

For the next phase of the Guidelines process, inputs were collated and a revised draft was scheduled to be ready by the end of January 2014. The revised draft was then to be submitted to the African Commission for debate and possible adoption. The process of review might lead to changes in the structure and to provisions of the draft Guidelines but will hopefully retain the spirit behind the process.

The process provides an opportunity to change the narrative on prolonged pre-trial detention in Africa. It deserves the support of all stakeholders within and surely beyond the justice sector across the continent. This is important because a reformed and properly functioning justice system is a bulwark against Africa's escalating safety and security concerns.

## Feature Articles

### Offornze Amucheazi

National Institute for Legislative Studies, Abuja  
offornze@yahoo.com

### Nneka Amucheazi

Hermon (Barristers & Solicitors), Lagos  
nneka@hermonlaw.com  
namucheazi@gmail.com

# The proposed Nigerian National Arbitration Commission: will it benefit the arbitral process?

It is common practice for parties involved in international commercial transactions or those averse to litigation to seek resolution through alternative dispute resolution (ADR) processes, of which arbitration is one type. Arbitration is an ancient resolution process that has transcended time and history, where parties have the autonomy to choose their judge, their laws and their venue. As societies developed, litigation emerged as a more formal way of settling disputes. With the formalised structure of litigation, arbitration has gradually come to be preferred given its characteristics of party autonomy and the preservation of business relationships.

In some states of Nigeria, the arbitral process, renamed the pre-trial conference,<sup>1</sup>

is employed to give proposed litigants the chance to resolve their issues amicably before resorting to litigation. Litigation is traditionally regulated by the Rules of Court in both the lower and higher courts of Nigeria. The current National Assembly bill (HB 283) to establish a commission to regulate arbitration is adverse to the foundations of arbitration. The question is: has litigation successfully resolved disputes amicably in the same way as arbitration? If not, is there any need for another bureaucratic layer of government regulation like the proposed bill? Should the bill not be for the funding and the development of arbitration rather than its regulation? This article attempts to answer these questions.



## Scope

The National Arbitration Commission Bill 2009 is intended to establish the National Arbitration Commission as a corporate body, charged with advising the federal and state governments on all aspects of arbitration and the general development of arbitration in Nigeria.<sup>2</sup> The development and regulation of arbitration will be carried out through arbitral centres across the country. The establishment of these centres will create employment and bring arbitration closer to the people; but at what cost to arbitration? These centres, and the personnel who will staff them, will be funded so as to enable them to carry out their functions. Where this happens, the overhead cost for the parties to arbitration may become very expensive as the prescribed fees to be paid by parties seeking arbitration will form part of the funds that would be used to fund the arbitral centre.

Apart from an increase in fees, the establishment of arbitral centres may engender bottlenecks of bureaucracy, since parties who wish to go down the route of arbitration may be required to:

- inform the centre of their wish to arbitrate;
- pay for filings and statutory fees; and
- work with the centre's timetable for their case as against choosing the venue and arbitrators at will.

Where all this bureaucracy exists, it will contribute to destroying the foundations of arbitration – party autonomy, flexibility and independence, which are crucial elements of ADR and which constitute major reasons for opting against litigation.

The Bill consists of 15 sections;<sup>3</sup> of interest to this article is section 4, which provides that the functions of the Commission shall include:

- advising the president and the state governors, through the Ministry of Justice, on arbitration in Nigeria;
- preparing, after consultation with the state governors, the Attorney-General, the Arbitration Association of Nigeria and other relevant bodies, a periodic master plan for the balanced development of arbitration in Nigeria, which would include general programmes for states through the Ministry of Justice, on arbitration in Nigeria;
- making such other recommendations to the federal and state governments relating to arbitration as the Commission may consider to be in the national interest;

- advising the federal government on financial needs both recurrent and capital, of arbitration in Nigeria and in particular to investigate and study the financial needs of arbitration research and ensure that adequate provision is made for this.<sup>4</sup>

## Constitutional powers

Items 34<sup>5</sup> and 53<sup>6</sup> of the exclusive legislative list of the Constitution<sup>7</sup> empower the National Assembly to legislate on arbitration as concerns specific matters but not to enact laws on arbitration as a whole. It follows that the legislative act of the National Assembly on this Bill, particularly with regard to section 4, is unconstitutional since the National Assembly is not empowered to legislate on arbitration as a whole save in specific areas. Since enacting the Bill is unconstitutional, the National Assembly should instead proceed to enact a bill that will promote the development of arbitration, given that legislating for the peace, order and good government of the federation<sup>8</sup> is a core function of the National Assembly. The establishment of a commission to regulate arbitration is not only going to destroy the foundation of arbitration but will impede its development. As there is an existing regional arbitration centre in Lagos, the National Assembly can then pass a bill instead for its development in furtherance of its bid to legislate for the peace, order and good government of the federation.

## Issues

If the bill for the establishment of an Arbitration Commission that will regulate arbitration is passed, it will add bureaucracy to a dispute resolution process that enjoys flexibility and consensual processes between parties. This bureaucracy will hinder arbitration as party autonomy and the preservation of relationships are fundamental to arbitration.

It should be noted that there is really no need for a National Arbitration Commission since Nigeria already has the Arbitration and Conciliation Act,<sup>9</sup> which is a product of the United Nations Commission on International Trade Law (UNCITRAL)<sup>10</sup> and Nigeria is a member of the United Nations and a contributor to the Model Law and Arbitration Rules of UNCITRAL of 1976. The federal government has even made use of the UNCITRAL Rules<sup>11</sup> and cannot, through

the National Assembly, seek to establish a commission that would regulate arbitration. Since the Regional Centre for International Commercial Arbitration exists in Lagos,<sup>12</sup> it is important that it should be funded as it serves the Asian-African region, perhaps because of the current increase in trade between the African and Asian continents.

Apart from the fact that the commission's function to regulate arbitration will affect the fundamental characteristics of arbitration, it may also cause the arbitral process to take a longer time before the arbitral award is made and executed therefore becoming more synonymous with litigation. This will in turn affect commercial relations as most parties involved in high net-worth transactions are averse to interference from any government arm.

It should also be noted that a body known as the Arbitration Association of Nigeria (AAN) referred to in section 4(b) of the Bill does not exist, unless the National Assembly plans to establish such association through the Bill.

### Conclusion

There is no law that expressly prohibits the National Assembly from passing a bill for further funding of the already-existing arbitration centre in the country. Better funding will enable the centre to be more prominent, to have the manpower to handle arbitration cases and to promote continuous professional education for arbitrators in Nigeria and in the region. This will also position it further to attract foreign investment of which an efficient arbitral process is an integral part.

The current state of Nigerian courts is not of international repute. Reform is required in this area. It is suggested that since the National Assembly is passionate about expediting the legal process, targeted funding of the Nigerian Council of Legal Education and other affiliated bodies to implement and develop the legal process in

the country may be a better course. Barring this, the uniqueness of parties being allowed to have their say on how, when, where and who should be involved in their own particular arbitral issues need not be stifled by bureaucratic layers of regulation.

Finally, should the National Assembly proceed to enact the Bill for the National Arbitration Centre, they would have acted contrary to the tenets of federalism and as such would be acting unconstitutionally.

### Notes

- 1 Rules of High Court, Lagos State, Order 3, Rule 11. The Rules of Courts in this respect are targeted at enabling parties to resolve the issue at a pre-trial conference and not to proceed to litigation, thereby saving relationships and giving the judiciary more time to focus on other cases.
- 2 National Arbitration Commission Bill, 2009, C2475 Hb. 283: A Bill for an act to set up the National Arbitration Commission As A Body Corporate Charged With the Responsibility of Advising the Federal and State Governments on all Aspects of Arbitration and the General Development of Arbitration in Nigeria.
- 3 [www.nassnig.org/nass2/legislation2.php?search=283&Submit=Search](http://www.nassnig.org/nass2/legislation2.php?search=283&Submit=Search) accessed 19 February 2013.
- 4 Section paraphrased and shortened. The entire Bill can be found at [www.nassnig.org/nass2/legislation2.php?search=283&Submit=Search](http://www.nassnig.org/nass2/legislation2.php?search=283&Submit=Search) accessed 19 February 2013.
- 5 Item 34 of the Exclusive Legislative List, under the 1999 Constitution (as amended), confers on the National Assembly the exclusive authority to legislate on labour matters, 'including trade unions, industrial relations; conditions, safety and welfare of labour; industrial disputes; prescribing a national minimum wage for the federation or any part thereof; and industrial arbitrations.'
- 6 Item 53 of the Exclusive Legislative List empowers the National Assembly to legislate on matters concerning settlements of disputes between the federation and public service officers.
- 7 Second schedule, Part 1 and Part 11 of the 1999 Constitution of Nigeria.
- 8 See above, nn 6 and 7.
- 9 2004.
- 10 A model law on international commercial arbitration.
- 11 [www.nigeria-law.org/Nigerian%20National%20Petroleum%20Corporation%20V%20Lutin%20Investment%20Ltd%20%20anr.htm](http://www.nigeria-law.org/Nigerian%20National%20Petroleum%20Corporation%20V%20Lutin%20Investment%20Ltd%20%20anr.htm) accessed 19 February 2013.
- 12 Enacted by the Regional Centre for International Commercial Arbitration Act, No 39 of 1999.



**Chukwunyere Ugwor**

Thompson Okpoko & Partners, Delta State  
ugwor@thompsonokpoko.com

# Case management in federal courts in Nigeria: recent developments

**A**s a federation, Nigeria's legal system has both federal and state courts. The federal courts in Nigeria include the Federal High Court, the National Industrial Court, the Court of Appeal and the Supreme Court of Nigeria.

There have been recent developments in case management in some of the federal courts to fast-track proceedings. In 2013, the Federal High Court Practice Direction (Amendment) 2013 (FHCPDA) and Federal High Court (Criminal) Practice Direction 2013 (FHCCPD), the Court of Appeal Practice Direction 2013 (CAPD) and the Supreme Court (Criminal Appeals) Practice Direction (SCCAPD), were issued in the Federal High Court, Court of Appeal and Supreme Court respectively. These are positive steps to eliminate or reduce unnecessary delays in the conduct of cases and appeals.

These practice directions apply to cases involving terrorism, kidnapping, trafficking in persons, rape, corruption or money laundering. The new system of case management is aimed at eliminating delay and expense for the parties involved in the court justice system.

## Case management pre-2013

As English jurist Justice William Blackstone wrote, justice delayed is justice denied. Before 2013 there was a loose system of case management in these courts that resulted in delays in cases and appeals. Trials lacked focus as the Rules of Court did not make parties focus on matters genuinely in issue: time was spent on interlocutory matters; settlement or mediation had no place before matters proceeded to hearing; hearings were stalled by the unpreparedness of either the court or the parties. On appeal, there were delays in proceedings; interlocutory applications and objections used to clog hearings and the determination of appeals; latitude as to applications that could be taken; hearing

dates that were not respected; unlimited amendments to notices of appeal and other causes. The result was delay, frustration and an increased cost of litigation.

In 2013 a wave of developments substantially improved case management in these courts, particularly in relation to the aforementioned matters. The developments came in the form of these four (as yet unimplemented) practice directions.

## Court of Appeal Practice Direction 2013

The first to come into force was the CAPD, which took effect on 1 April 2013. This practice direction gives priority to criminal appeals originating from or involving the Economic and Financial Crimes Commission (EFCC), the Independent Corrupt Practice Commission (ICPC), or (as with all of the practice directions we examine) where the offence relates to terrorism, rape, kidnapping, corruption, money laundering or human trafficking. The practice direction also prioritises interlocutory appeals that challenge rulings of the court below.

Creating a fast-track procedure in these areas, provisions include:

- Priority is given to the categories listed on appeal and certain times and days may be reserved for them.
- Cases in these categories must be heard on the day and at the time listed and the court will not entertain more than two applications for adjournment per party.
- Applications for adjournment will not be considered on the day of hearing, and in general no party is allowed more than two amendments to the notice of appeal.
- Where a party seeks to change counsel during an appeal, not more than one adjournment will be granted in doing so.
- Where the court is of the opinion that the grounds of appeal lack merit, the court will invite the parties within 15 days of transmission of the record to address why the appeal should not be struck. If this fails, the matter is struck.

- No party may serve an application or a notice of preliminary objection on an adverse party on the date of hearing; such applications must be served not later than two days prior to the date of the hearing.
- A respondent may give notice not to contest an application served upon him or her, in which case upon such notice the application may be heard in chambers.
- The court may use electronic means to inform counsel of urgent court and case events.
- Other rules have been adopted relating to the transmission of records and court proceedings to expedite hearings and the rendering of a decision.

The practice direction aims to fast-track trials, appeal records and the hearing and determination of appeals. If implemented, it will deal a heavy blow on lawyers and litigants who use interlocutory appeals to frustrate proceedings.

#### **Federal High Court (Criminal) Practice Direction**

The second practice direction to come into force was the FHCCPD of 3 June 2013. Relating to the same crimes, the practice direction aims to fast-track cases prosecuted by the EFCC, the ICPC, as well as State Secretary Services (SSS). In addition to some of the foregoing, salient provisions include:

- The complainant shall not file a change unless accompanied by an affidavit that all investigations have concluded and, in the opinion of the prosecutor, a prima facie case exists against the accused.
- The prosecutor must present the accused in court at arraignment.
- Where there is a preliminary objection challenging the jurisdiction of the court to hear a case, the court shall deliver its ruling on the issue within 14 days.
- The prosecution shall serve copies of the evidence and documentary exhibits upon the defence (at least) seven days before arraignment, and shall provide a written case summary on the evidence as it stands.
- The defence must specify in writing the defence being raised and those aspects of

the prosecution case that are in dispute. The defence must also specify in writing which witnesses are required for cross-examination and for what purpose.

- Case hearings to be scheduled from day to day, especially cases prosecuted by the EFCC, ICPC and SSS or cases relating to terrorism, kidnapping, rape, corruption, trafficking in persons, money laundering.
- Counsel shall ensure that they are present in court and ready to proceed with their case at all times.

Again, this is a great improvement on the justice delivery system. If implemented, less time will be spent on trials and the conduct of cases. If cases are not yet ready to proceed there will be no need to bring them to court and congest the cause list.

#### **Supreme Court (Criminal Appeals) Practice Direction**

This practice direction was followed by the SCCAPD on 15 July 2013. Similar to the other practice directions, provisions include:

- Notices of application shall not be served on another party on the hearing date.
- A notice of preliminary objection must be served not later than seven days prior to the scheduled hearing date.
- The court may use electronic means to inform counsel of urgent court and case events.
- Records of appeal are to be transmitted within 15 days, failing which it becomes mandatory for the appellant to compile and transmit the records of appeal within 15 days.
- An application to amend notices of appeal will not be taken on the scheduled hearing day without the leave of court.
- The court shall not permit more than two amendments per party for interlocutory applications and appeals challenging the Court of Appeal's rulings on an interlocutory application.

These are certainly positive developments. If properly implemented, they will go a long way towards fast-tracking cases and bringing relief to litigants.



## Lex:lead Group scholarship competition 2013

The following articles – from law students in Ethiopia, Tanzania, Uganda, Rwanda and Zambia – were winning submissions in the 2013 Lex:lead Group scholarship competition. The annual essay competition is open to a majority of the world's least-developed countries and judged by a panel of leading judges, lawyers and academics. For more information, please visit [www.lex-lead.org](http://www.lex-lead.org).

**Anthony Peter Njau**

University of Dar es Salaam, Dar es Salaam  
paixelmondo@gmail.com

# Essay 1: Meet Daniel: how can the rule of law reduce poverty and foster economic growth?

### Introduction: setting the discourse

This essay is, in part, a portrait of a man called Daniel. He is 28 years old, and the sole breadwinner of his household, averaging US\$1.90 a day from his job as a security guard for himself, his wife and four children. Poverty, though happily not absolute, is a constant shadow over his life and is beyond the moral or political facets (left- or right-wing) that always have an effect on national and international development programmes and policy discourses, as well as in the media.<sup>1</sup> For Daniel it is a human phenomenon: there is nothing formal or positive about it. He is an ordinary man from almost any developing country.

Using indices such as the Human Development Index (HDI) and the Multidimensional Poverty Index of the United Nations Development Programme (UNDP), we know that the less developed countries are those worse off; regionally, with some exceptions, the rule is that developing countries have larger populations living below the poverty line with a purchasing power of less than US\$1.25 each day. With around 65 cents a day more than this, Daniel is therefore one of the lucky few!

Daniel rents a small, single room, where he stays with his family, and hates rent day, as most days there is nothing left to pay. They had owned land before, but a government land acquisition programme to build a new road (that hasn't yet materialised) has left them with a small amount of compensation

that has long since been spent. The class action against the decision to evict them from their land has been in the courts for nearly six years and is a constant drain on his meagre income. He tries not to be bitter.

Studying him, I am disillusioned and see that poverty is not one-dimensional topic; it has branches, more like symptoms, such as a lack of basic health and other human needs such as food or shelter, along with 'deprivations of choice and opportunity'<sup>2</sup> such as inequality in gender or education, which need not be visible to be any more valid. And it is not only about the lack of income alone: many families with able-bodied working members, like Daniel, manage to rise above the poverty line but can still be considered poor. Others, often, drop down again to level that barely qualifies as subsistence.<sup>3</sup>

Daniel imagines his country's legislature sitting down to pass a new bill into law. As one of the separate powers of state, the legislature has a duty to operate under the doctrine of the rule of law, a concept popularised by the Victorian jurist, A V Dicey, and studied by every first-year student in law faculties the world over.

The theory can be interpreted and reinterpreted, and has been by many theorists and organisations such as the World Justice Project and the IBA. The International Commission of Jurists has taken it to mean that the core idea of governance is that the state must also follow legal principles such

as no one being above the law, regardless of status.<sup>4</sup> This can also mean, in the words of the World Justice Project, that the government has a duty ‘to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized’.<sup>5</sup>

There are four universal principles underlying the doctrine of the rule of law and encompassing a duty of the state to ensure, *inter alia*:

- accountability of the government and its institutions under the law;
- a clear promulgation and application of laws;
- the fair and efficient enactment and administration of the law; and
- the timely and independent delivery of justice.<sup>6</sup>

The office of a member of parliament, for example, therefore purports a higher calling as a representative citizen voted into office: implicit to the office is a duty to tackle the nation’s deepest issues, of which poverty reduction is one of the most important, at least in the eyes of the author. As such, the judge’s bench, too, should be warmed with fervour, to protect socio-economic rights, especially in administrative and judicial review processes.

This stately obligation, for all organs, is reflected in international law whereby – starting with Article 2(1) of the International Covenant on Economic, Social and Cultural Rights – contracting states have an obligation to take ‘all appropriate means, including particularly adoption of legislative measures’ to ensure and respect the rights of those therein enshrined. This raises the question whether there is a right against poverty, notwithstanding that the Covenant does provide a right to an adequate standard of living, to a standard of physical and mental health as well as to education. These principles address some of the most harrowing effects of poverty on families, and on society.<sup>7</sup>

The UN Millennium Declaration forms the international community’s expression of intent to do something about some of the world’s worst problems, and there we find poverty reduction as the primary goal under its Article 19. This soft law specifically targets income poverty, hunger and water sanitation, among other things.

Like John Locke – a 17th century philosopher who, in his time, concerned himself with government by consent – a jurisprudential reflection on the use of the law for poverty reduction, rather than

reviewing different schools of thought, should in the opinion of the author take a more holistic approach to ascertain and ensure the basic needs of the individual are met, which are protected as economic, social and cultural rights. Their improvement would surely result in the economic betterment of the poor.<sup>8</sup> Yet this is seldom done.

The idea that law has the potential to influence society is self-evident. As a scheme or a collection of binding rules and statements imposing rights and obligations, positive or negative or just setting out how things are to be done, this reformation machinery is limited in scope only by the speed at which it passes through parliament and, depending on the legal system of a country, is amenable to judicial law-making and review (I am referring to the English common law legal system).

The thing to remember, in my view, is the individual: Daniel. Having a concept of the person is, I believe, very important. Daniel’s story is just one of many. And, in almost every developing (and, in some, instances developed) nations, having a framework where the interests of the populace are placed above those of government, and where no one can act arbitrarily and all are subject to the law, is paramount. This brings into focus what can serve as indicators of such a state of being – of the rule of law.

### Indicators of the rule of law

Despite the wide definition of the term, there are several factors that are considered aspects or measurements of the rule of law. These include limited government powers, an absence of corruption, order and security, fundamental rights, open government, regulatory enforcement, civil justice, criminal justice and informal justice, as stated by the World Justice Project and widely accepted.<sup>9</sup>

It is these elements that touch the daily lives of citizens and other actors; for example, the existence of secret state contracts in mining that facilitate the expropriation of a nation’s natural resources or the requirement of paying a bribe or ‘facilitation fee’ to access even the most basic social services, such as the ability to see a doctor. And it is within these factors that the potential lies for addressing poverty reduction and fostering economic growth.

It goes without saying that the nexus between improvements in the rule of law is correlated to a reduction in poverty and improved well-being of the people. The author



notes the Governance and Social Development Resource Centre (GSDRC) report *Evidence on Rule of Law Aid Initiatives*,<sup>10</sup> reporting, inter alia, that there is a relationship between ‘strong institutions and economic growth’ but that this relationship is ‘complex and unknown’.

It also reports that other factors conducive to poverty reduction include property rights, the enforcement of contracts, the localisation of processes, access to law and strong institutions, especially that of an independent judiciary; among other factors these enable a building-up of the environment, socially and/or economically, which leads to the reduction of poverty.<sup>11</sup>

For the purposes of this essay, the foregoing is assumed to be true; beyond that, common sense speaks to a positive correlation.

### **So how can the rule of law reduce poverty and foster economic growth?**

To the author, reducing poverty and increasing economic growth are two similar but distinct objectives. Some economies that witnessed economic growth as measured by an increase in GDP but have flat-lined or have even seen an increase in poverty, an assertion substantiated by research conducted in Azerbaijan, which concludes with recommendations that the development of the rule of law be used as a strategy to combat poverty.<sup>12</sup>

Therefore we are looking at two things. Having met Daniel, and understanding that poverty and the rule of law are multidimensional subjects, the difficulty is in providing how the rule of law can reduce poverty without sounding generic or regurgitating the salient features of each. So instead I imagine myself in our portrait’s shoes and attempt to answer from that perspective.

I am sure it should start with his seized land and properties. If we could trace where it all started to go wrong, this might be it. This isn’t a discussion of whether it was illegal as such since the government was legally empowered by the very same law, under statute, for compulsory land acquisition.

This would seem contrary to his fundamental rights, specifically his property rights and, however, distinguished his scenario is, there is an underlying message that there was a need for due process, for equality in treatment and a guarantee of fundamental human and peoples’ rights.

This extends, moreover, to the civil court case filed by the residents affected by the land

grab, which has lasted for years in court. It shows a situation where the interests of the people are subjugated, unnecessarily and, perhaps, unfairly to those of the state. And it shows a situation of an over-reaching executive.

How the rule of law in this case could have helped reduce his poverty is by ensuring that the above didn’t happen without a non-governmental check and only as provided under law. At another level, some may say that the content of the law itself is immaterial, but I beg to differ, especially in respect of laws or executive undertakings that infringe upon the individual.

I submit that things would be a lot better in a climate where Daniel could quickly and effectively, without resorting to corruption, challenge the government’s decision, without fear of being evicted and his property rights violated, without facing impediments to his search for justice, and having to pay impossible amounts in bribes and legal fees.

This monologue takes me back to the factors as stated by the World Justice Project and expounded upon by sub-factors in the aforementioned 2013 index,<sup>13</sup> where satisfaction of them raises the standards of well-being and indirectly leads to improvements in poverty.

And I imagine where Daniel still has his property. The rule of law in this instance could have helped ensure that his properties were protected through the enforcement of contract (fundamental requirements for any investor), and the absence of corruption as a silent tax on enterprises.

### **Ending the discourse**

I imagine Daniel participating in that consultation process on how the rule of law can help him and his family, lifting them out of poverty and achieving that dream of prosperity. I see him as the head of his family, the smallest of social units. And I do worry that his answers would be nothing like what has been presented in this essay. I return to the conception of the person that I believe is lacking from much of the current discourse and literature review, particularly in respect of poverty reduction.

However, at the end of the day, I hope to have shown that the rule of law, in its distinct sense, can help to reduce poverty and foster economic growth. In practise, especially in African countries, third-party interests cloud the issues and such progress is often slowed or even reversed. The role of projects

such as those run by the United Nations Development Programme (UNDP) or the World Justice Project and other NGOs helps to provide civil society intermediation that would otherwise not be achieved.

Daniel is still waiting for that consultative process.

The donor supporting Anthony Peter Njau's scholarship at the University of Dar es Salaam is Cliffe Dekker Hofmeyr ([www.cliffedekkerhofmeyr.com](http://www.cliffedekkerhofmeyr.com)).

#### Notes

- 1 Ruth Lister, *Poverty* (Polity 2004).
- 2 United Nations, *Indicators of Poverty & Hunger*, [www.un.org/esa/socdev/unyin/documents/ydiDavidGordon\\_poverty.pdf](http://www.un.org/esa/socdev/unyin/documents/ydiDavidGordon_poverty.pdf).
- 3 *See generally*, United Nations, World Summit on Social Development, Copenhagen 1995, A/CONF.166/9 available at <http://www.un.org/documents/ga/conf166/aconf166-9.htm> (last viewed 30 March 2014).
- 4 A V Dicey, *An Introduction to the Study of the Law of the Constitution* (1885).
- 5 International Commission of Jurists, Declaration of Delhi, 1959.
- 6 World Justice Project, *The World Justice Project: Rule of Law Index 2012–2013* (ISBN 978-0-9882846-3-0).
- 7 Arts 11, 12 and 13 of the International Covenant on Economic, Social and Cultural Rights, December 1966.
- 8 David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007) (ISBN 978-0-19-920491-5).
- 9 World Justice Project, *The World Justice Project: Rule of Law Index 2012–2013* (ISBN 978-0-9882846-3-0).
- 10 Governance and Social Development Resource Centre, 'Evidence on "rule of law" aid initiatives', 2013, retrieved from <http://reliefweb.int/sites/reliefweb.int/files/resources/HDQ1008.pdf>.
- 11 *Ibid*.
- 12 E Afandi, 'The effect of economic growth on poverty – a case study of Azerbaijan', 2006.
- 13 *Ibid* 9.

**Galindo  
Ruhyyah Aliyo**

Uganda Christian  
University, Mukono  
[ruhiyyahgia@  
yahoo.com](mailto:ruhiyyahgia@yahoo.com)

## Essay 2: How can the rule of law reduce poverty and foster economic growth?

**E**conomic growth may be defined as an increase in the capacity of an economy to produce goods and services, comparing one period of time to another.<sup>1</sup> This essay explores the link between economic growth and the rule of law in its alleviation of poverty. Over time, different notions of the meaning of the 'rule of law' have been exploited. It is perhaps from this confusion that we see the significance of discussing how the rule of law can promote economic growth. For the reason that many conceptions of this doctrine exist, a particular theory ought to be analysed in order to establish the link between these concepts.

Economies around the world have established effective institutions in promoting economic growth. Reforms in the implementation of institutional law in developing countries have often been overseen by bodies such as the World Bank or the International Monetary Fund. These two organisations have sometimes been able to secure improvements by conditioning

financial assistance to developing countries. Government and non-government agencies have also promoted rule of law initiatives. Economists, through their economic studies on the relationship between the state of legal institutions and economic growth in developed and developing countries, have also endeavoured to delve into the link between economic growth and the rule of law. The rule of law has become important in economics: it has become the motherhood and apple pie of development economics.<sup>2</sup>

The interest in this nexus between the rule of law and economic growth and the exploration of its validity is what was referred to as the 'law and development movement'. This led to developing countries devoting significant resources to reform their legal institutions to enshrine the rule of law. The scarce resources used in implementing the rule of law are found elsewhere, warranting their use in development for the rule of law. To affirm its use in the advancement of the rule of law and consequently of economic



growth, measurable benefits need to be observed. Economic growth, as a result, can be said to be one of these benefits.

It should be noted, however, that promotion of economic growth was not the primary purpose for which the rule of law was developed. Historically, the creation of a state of liberties and freedoms, not the promotion of economic growth, was the concern of rule of law theorists.<sup>3</sup> While the rule of law may be helpful in building the basic framework to support a market economy, legal reforms alone are inadequate to address the economic growth problem in developing countries. It is only when coupled with other institutional reforms, formal and informal, that the rule of law has discernible benefits on economic prosperity.<sup>4</sup>

For the United Nations, the Secretary-General defines the rule of law as:<sup>5</sup>

‘A principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’<sup>6</sup>

The rule of law embodies the basic principles of the equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights; it is founded on a predictable, transparent legal system with fair and effective judicial institutions to protect citizens against the arbitrary use of state authority and lawless acts of both organisations and individuals.<sup>7</sup> Two theories have been developed in this regard: the Narrow Conception and the Broad Conception. The former rationalises the implementation of an institutional framework for protecting citizens against the arbitrary exercise of the state’s powers. The latter, on the other hand, is an expansive concept, inextricably linked to liberty and democracy. It stresses the importance of guaranteeing and protecting basic freedoms and liberties for individuals and guaranteeing democratic representation. It is important to examine these concepts in detail. It is also

important to note that these facets include security of the person; security of property and the enforcement of contracts; checks on the government; and checks on corruption and private capture. These elements of the rule of law, as mentioned above, each operate interdependently to promote economic growth, as will be discussed below.

The rule of law endorses the supremacy of law as opposed to the supremacy of government, the individual or individuals. The ‘law’ in this regard is in relation to the supreme law of the land, often referred to as the constitution. Other laws subordinate to it, such as customary law, common law and case law, to the extent they are consistent with the constitution are also embraced. Many countries have enshrined this aspect into their constitutions thus embodying the rule of law. Article 2 of the Constitution of Uganda<sup>8</sup> for example brings out the supremacy of the constitution in regard to all matters in the country. It is thus only logical to assert that a legal framework operational on this doctrine should guarantee fairness in regard to laws relating to the economy. Where redress is given fairly and equally, and thus where no man is above the law, the economy is said to grow with the creation of conditions that foster business development. Entrepreneurs and business owners are thus self-assured, as the laws governing the establishment of their businesses and the relationships therein are clear.

Not only does the supremacy of the law secure the protection of individuals and basic political and human rights in placing these individuals equally before the law, it also provides stability and predictability in economic affairs required for these entrepreneurs to enter into business. It does this by ensuring that policies are in conformity with the rule of law. If indeed the law was secondary, many discretionary and ad hoc decisions by the judiciary in favour of individuals would cultivate instability in the economic environment. With this said, it is clear that business relations are typically regulated by the interaction of formal and informal norms. That is to say certain laws have been enacted to control business relations and it is consequently due to this control that the business sector is seen to advance. Such laws include but are not limited to those in relation to contracts, the sale of goods, companies, employment and labour. Accordingly, it is prudent to note that if all individuals were not subject to these norms, economic retardation would be

evident owing to the lack of a well-built system for the promotion of the economy.

Similarly, the rule of law propounds that formal or procedural justice should be construed from the legal sense rather than external factors such as politics, morals or religion. To expand on this, one ought to put in mind the justice system in its implementation of laws governing the running of the economy. If these laws were influenced by other factors, especially politics, as often observed in developing and least developed countries, not only would certain sectors of the economy be favoured, but also, the favoured portions would be seen to grow, leaving other parts of the economy behind. Consequently, the imbalance created would lead to the inadvertent disintegration of the economy, especially since the favoured fractions are often marginal.

The rule of law furthermore ensures that the rights and freedoms of individuals are protected by the state. This is by laying down norms for the protection of inherent rights. These include rights such as the right to life, to self-determination, the rights of freedom of speech and expression, and others. For the reason that the rule of law sets the law as supreme, these standards are subject to respect by all individuals, whether law-makers or law-abiders alike. Consequently, entitlements such as property rights and the freedom of contract embodied in the rule of law foster conditions of economic and social progress and development as many people, with the realisation of their rights, venture into economic activity. Social, economic and cultural conditions that allow development result.

The doctrine often referred to as the independence of the judiciary is yet another component of the rule of law. It is critical to economic development as high quality courts enforce contracts and protect property. This in turn encourages investment, as many people feel secure enough to put money into businesses that develop the economy. It is sometimes argued that the independence of the judiciary is a consequence rather than a cause for economic development. This may be because the competent role of the judiciary in enforcing contracts and property rights is often ignored.

Equality before the law is another facet of the rule of law that ought to be explored in its relation to economic growth. This element simply asserts that every person should be treated equally before the law. Many norms,

often described as inherent rights, have been enforced in the laws of various nations – including the right to a fair hearing, the right to legal representation and other rights. Any such person brought before the law is subject to these rights. Many developing and less-developed countries, however, have sadly resorted to selective justice. This vice, also known as selective prosecution, is where the justice system discriminates in its trial processes, choosing those against whom it will take action. This mentality is habitually associated with corruption. Accordingly, the populace loses trust in the government created to represent it, and consequently resorts to fraudulent and dishonest ways to get along. In this regard it is palpable to state that where there is crime there is no development.

With equality before the law, however, a clean system is observed, as justice is attained through the accurate and correct means of the law. With the right people working to develop the economy – and the wrong people rightfully behind bars – an economy can grow without these hinderances. This is evidently discerned from the comparison between developed countries and those least developed, or developing. The former countries are characterised by effective justice systems, and the latter clearly depict corruption, inequality and unfairness. The rule of law is thus the linchpin to eradicate corruption, crime, inequality and poverty, some of the main problems plaguing developing countries globally, such as Jamaica.<sup>9</sup>

Essentially, accountability before the law embraces the notion that leaders, or any such persons placed in positions of leadership, ought to be answerable, not just to the law, but to the people. This system is a measure to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices.<sup>10</sup> With the eradication of these crimes, a more fair distribution of resources is evident, as they are not spent on the selected few, and all government funds are accounted for, and used appropriately for development.

Fairness in the application of the law plainly affirms that any person brought before the law ought to be treated fairly. This notion is firmly based on the natural justice principles often regarded as common-sense justice. These principles include the Latin expressions *audi alteram partem* and *nemo iudex in causa sua*, which, translated, means: no one should be condemned unheard and



no one should be a judge in their own cause respectively. These factors alleviate bias, as justice must not only be done, but must also be seen to be done. Just as with many of the elements of the rule of law, fairness in the application of the law, in its defence of the natural justice principles, clearly lays out a mechanism in which the justice system combats crime and upholds peace. With this in place, the country can concentrate on developing not only politically, but socially and economically as well. Although this is the intention, many countries have been plagued with bias, unfairness and arbitrary decisions that are often coupled with ultra vires tendencies. Many of these countries have a retarded economic system.

Separation of powers divides the state into branches, each with independent powers and areas of responsibility so that the powers and areas of one branch are not in conflict with the powers associated with the other branches.<sup>11</sup> These branches of the state include the executive, legislature and the judiciary. This is the most ancient and enduring element of the rule of law, which fosters socio-economic development through democracy and good governance. In countries where these branches are seen to meddle in each other's functions, political, selfish and corrupt interests are frequently the cause. These countries distinguish between the branches of government in theory rather than practice. Countries, however, with a high degree of separation of powers in their constitutions including Italy, Latin America and the UK. These countries are well developed economically, socially and politically. This is chiefly because each branch concentrates in cultivating its area of governance, rather than attempting to control the whole.

Scores of countries have purported to encompass the will of the people in their constitutions. The law recognises that power belongs to the people inasmuch as they exercise their rights in conformity with the constitution. Participation in decision-making is therefore of utmost importance, and this is through exercise of democratic rights and privileges. These rights are merely a fragment of a much larger picture that embraces such aspects as free and fair elections, equal representation and proper consideration of the needs and opinions of the people. Decision-making is the core of the individuals' interest because the problems faced by a nation are essentially

the problems faced by the people. It is thus their input and ideas that help their leaders to come up with new strategies for the improvement of the nation for their well-being.

A simple analogy would be that of an organisation that goes into a rural area to build a bore hole for the community, without consulting them about their needs. After a while, the organisation notices that none of the members of that community is using the bore-hole. Upon inquiry, members of that community tell the organisation that the women prefer to walk long distances to fetch water, as they desire each other's company on the long walk. What this community needed instead was better health facilities and schools, which the organisation would not have known without consulting them. From this we understand that through consultations, opinion polls and conferences, leaders can attain vital information to help develop a nation, for development accrues from the needs of the people.

Another central requirement for the rule of law is legal certainty. This is a principle of jurisprudence, which maintains that a judicial decision ought to be predictable, and thus should eliminate randomness. It is strongly connected to the principle of avoidance of arbitrariness, as the verdict reached by the judge should be substantially right. This is also known as the demand of acceptability. This principle, along with the principle of legality, is somewhat of an attempt to safeguard overriding public interests. If this system is as effective practically as it is theoretically, a good judicial system is built. This system would then effectually control the criminal and civil features of the country. It holds in itself that a good judicial system cultivates the smooth running of a country's affairs, which inadvertently leads to economic development.

With respect to the rule of law, the claim is that it fosters a market-friendly environment in which economic exchanges and other wealth-creating activities can occur.<sup>12</sup> This is mainly because it leads to the creation of efficient legal institutions for all citizens.

With the proper enforcement of the rule of law, a stable and orderly society that supports the conduct of productive economic activities is created. Essentially, the rule of law is said to promote economic development because it fosters stability in the investment environment, promotes predictability in the application of rules and signals to investors

the extent to which the host country is serious about protecting foreign investment.<sup>13</sup> This simply means that the more stable an economy, which stability is attributable to the application of rule of law, the higher the levels of foreign direct investment. Foreign investors are interested in judicial independence in the states in which they wish to invest and that a strong indication of judicial independence is presented when courts vigorously enforce human rights against their governments.<sup>14</sup>

It is evident from the aforementioned illustrations of the rule of law that the principle in itself endeavours to put the interests of the people at its heart. It thus follows that the right to development, supported by the rule of law, proliferate economic development of a nation, and ensue the eradication of poverty.

The donor supporting Ms Galindo Ruhiyah Aliyo's scholarship at Uganda Christian University is Allen & Overy, London, UK.

#### Notes

- 1 [www.investopedia.com/terms/e/economicgrowth.asp#axzz1kxr3g8EJ](http://www.investopedia.com/terms/e/economicgrowth.asp#axzz1kxr3g8EJ) accessed 23 December 2013.
- 2 O Chikwumerije, 'Rhetoric Versus Reality: The Link between the Rule of Law and Economic Development' (2009) 23 *Emory International Law* 1–54.
- 3 *Ibid.*
- 4 See n 2 above.
- 5 [www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3) accessed 26 December 2013.
- 6 *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004).
- 7 See n 2 above.
- 8 Constitution of the Republic of Uganda, 1995.
- 9 [http://m.jamaicaobserver.com/mobile/columns/promoting-and-enforcing-the-rule-of-law\\_15084841](http://m.jamaicaobserver.com/mobile/columns/promoting-and-enforcing-the-rule-of-law_15084841) accessed 27 December 2013.
- 10 Objective XXVI, Constitution of the Republic of Uganda, 1995.
- 11 [http://en.m.wikipedia.org/wiki/separation\\_of\\_powers](http://en.m.wikipedia.org/wiki/separation_of_powers) accessed 27 December 2013.
- 12 See n 2 above.
- 13 *Ibid.*
- 14 *Ibid.*

#### Christopher Sengoga

National University of Rwanda, Butare  
ndahirochris12@gmail.com

## Essay 3: How can the rule of law reduce poverty and foster economic development?

### Introduction: the concept of the rule of law

The rule of law in its most basic form was put forward by Thomas Paine in his 1776 pamphlet *Common Sense*, in which he says that the rule of law is a principle wherein 'no one is above the law' in free and republic states; but in monarchical states the king himself is the law save the case of England after the issuing of Magna Carta, which reduced these powers.<sup>1</sup> He contends that law should act like death, which spares no one and is thus respected owing to its supremacy, echoing Aristotle who wrote that 'law should be final sovereign and personal rule whether exercised by a single person or a group of person'.<sup>2</sup>

Though Paine tried to further define the concept, it had been earlier advanced by Samuel Rutherford who was the first

modern author to give a theoretical principal foundation of the rule of law in *Lex, Rex* in 1644. The concept was built upon by French philosopher Montesquieu in *The Spirit of Laws* in 1748.<sup>3</sup> These writings influenced the formation of continental European laws and modern Anglo-American thinking, hallmarks of which are adherence to the rule of law, commonly including a structural separation of powers.

Legal scholars from the World Justice Project such as Juan Carlos Botero, Robert L Nelson and Christine Pratt understand the rule of law as the underlying framework of rules and rights that make prosperity and justice possible, and signify a system in which no one – including the government – is above the law but where all laws protect fundamental rights and are accessible to all.<sup>4</sup>



In the wider sense, the rule of law is still perceived as a rule under law or rule according to a higher law, conceding that it is an ambiguous term that can mean different things in different contexts. This is expressed by Brian Tamanaha, among others, who says that the rule of law is the most important political ideal today, though it is exposed to many questions and there remains much confusion about its meaning and the scope of its application.<sup>5</sup>

### Characteristics of the rule of law

According to legal theorist Albert Venn Dicey's writings about the rule of law, which hold enduring significance, the characteristics are as follows:<sup>6</sup>

- The law itself is supreme, which means that all persons (both individuals and governments) are subject to the law.
- The law should hold a concept of justice that emphasises interpersonal adjudication, law based on standards and importance of procedures.
- There should be restrictions on the exercise of discretionary power.
- There should be an independent judiciary.<sup>7</sup>
- The law should have a doctrine of judicial precedent.
- Legislation should be prospective and not retrospective.
- There should be complementarities between the exercise of parliament of legislative power and restrictions on the exercise of legislative power by the executive.
- There should be an underlying moral basis for all laws.

### Historical background and the origins of the rule of law

The history of the rule of law goes far back in time and stems from many legal traditions with its theories intertwined with the evolution of law itself. Some sources say that it originated from the Code of Hammurabi, promulgated by the king of Babylon around 1760 BC, one of the first examples of the codification of law.<sup>8</sup> This code was applied to contrary acts of ancient rulers predating the words of Aristotle where he stated that 'the rule of law is better than that of any individual'.

Many legal scholars hold that the rule of law's origins date back to classical Greek thought, following the arguments and

passages of Plato and Aristotle who wrote on, among other things, the concept of democracy, emphasising its basis in the rule of law.<sup>9</sup> In the Arab world, the rule of law was conceived of as the Islamic law notion of supremacy of law as the core principle for holding government authority to account through putting the wishes of the populace before their rulers, who could sometimes be answerable for their acts if found contrary to the populations' expectations.<sup>10</sup> This is found in the main moral and philosophical traditions across the Asian continent including Confucian compatibility with the rule of law.

In the Anglo-Saxon and American traditions, the Magna Carta (1215) became a seminal instrument that came to act as a check on the arbitrary acts of the king and other officials where they overstepped their powers in their respective roles. This development came to be translated into the importance of an (independent) judiciary, together with the role of judicial process as a fundamental characteristic of the law making a reflection on the rule of law.<sup>11</sup>

### Poverty

Although poverty is a far-reaching and deep-rooted problem, its definition remains much contested across social, political and economic boundaries. The term may have a cluster of overlapping meanings depending on the subject area. As Gordon and Sparker said in 1999,<sup>12</sup> if you put five academics or policy-makers in a room, you would get at least six different definitions of poverty; the discussion on poverty has many controversies, with considerable differences of opinion on the definition and measurement of poverty.<sup>13</sup>

Cutting through much of the hubris, in 1975, the Council of the European Union adopted a definition of poverty as 'a state or a situation where individuals or families whose resources are so small to exclude them from the minimum acceptable way of life of the member or state in which they live'. They went further in 1981 to define 'resources' as 'goods, cash income plus service from public and private resources'.<sup>14</sup> Thus, the poor, according to the European Commission in December 1984, shall mean 'persons, families and group of persons whose resources (material, cultural and social) are so limited to exclude them from the minimum acceptable way of life in the member state in which they live'.<sup>15</sup>

In academia, poverty is regarded as being either absolute or relative. Absolute poverty is considered extreme poverty where people lack many of the basic necessities for survival such as clean water, food, housing, sufficient clothing or medicine, and are struggling to stay alive. In the least developed states a magnitude of absolute poverty is sometimes referred to, resulting from a combination of low per capita incomes and the unequal distribution of incomes; the higher the level of per capita income, the lower the number of absolute poor.<sup>16</sup>

In 1995 at the World Summit for Social Development in Copenhagen, the United Nations described absolute poverty as 'a condition characterized by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information as [drawn out] by Sen who considered it to be simply a more severe situation threshold than that explained by Townsend'. Both Townsend's 'relative' poverty threshold and Sen's absolute poverty threshold can be measured in the same cross-sectional survey using methods of low income and low standard of living measurements – the 'absolute' poor will be those who suffer from worse/deeper poverty than the 'relative' poor.<sup>17</sup>

### Economic growth

Economic growth is a sustainable increase in the monetary value of goods and services produced by a country over a given period of time, thus a measure of the 'quantitative' value of goods and services available.

Economic growth may or may not necessarily lead to economic development; many goods and services may be produced without necessarily improving the standards of living of people.<sup>18</sup>

In a country that produces goods and services worth US\$5 million one year rising to US\$7 million the following year, that country has economic growth; this economic growth is measured by real national income figures, particularly by real growth domestic product (GDP).<sup>19</sup> While this sounds fairly universal, Kuznets, in his pioneering book on the subject, suggests in 1966 that economic growth is a relatively 'modern' phenomenon and further advances that economic growth was born after the industrial revolution in Britain.<sup>20</sup> According to Kuznets, there are six elements that characterise economic growth:

1. a high rate of per capita output and population growth;
2. high rates of total factor productivity increase;
3. high rates of economic structural transformation;
4. high rates of social, political and ideological transformation;
5. internal economic outreach; and
6. limited international spread of economic growth.

Kuznets' ideas supported those of classical economists like Adam Smith (1776), David Ricardo (1817) and Thomas Malthus (1798) and much later Frank Ramsey (1928). Allyn Young (1928), Frank Knight (1944) and Joseph Schumpeter (1934) delineated many of the underlying tents that would appear in modern economics such as comparative behaviour and equilibrium dynamics, the role of diminishing returns and its relationship to the accumulation of physical and human capital.<sup>21</sup>

### Views on how the rule of law can reduce poverty and foster economic growth

Poverty is a widely used term and a near-universal concept in the world. In September 2000, around 189 countries with their governments' representatives adopted the United Nations Millennium Declaration and resolved to 'spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty'. This was a reflection of United Nations Resolutions 1995, based on rules that in some sense govern the international community. As such, if states domesticate and implement regulations that are compatible with the rule of law and with favourable political will, populations will almost certainly engage in the production of goods and services that will increase output and improve lives, which in turn will foster economic growth and reduce poverty.<sup>22</sup>

Some socio-legal scholars, such as Filippo Fontanelli, Giuseppe Martinis and P Carrozza in their book *Shaping the Rule of Law through Dialogue* (2000), referred to Lord Mansfield, regarded as the father of English commercial law around 250 years ago who said that 'no one would choose to do business, perhaps involving large sums of money in a country where parties' rights and obligations are vague or undecided thus meaning that in countries where political and economic atmosphere is



recognised by the rule of law following the principles, as a result the population will freely engage in all economic activities, which leads to quantitative output that accumulates sums of money that will uplift peoples' standards of living, reducing poverty and automatically set the state to wonderful change experiencing economic growth.<sup>23</sup>

In spite of some methodology about the challenges of reducing poverty, generations of researchers have now examined the correlations between social and economic factors and it has been asserted that poverty can be curbed through programmes such as educating populations on their best interests, their rights and obligations in society, through granting them economic freedom under the rule of law and allowing them to participate in state activities. Theories posit that individuals should be offered basic education to open their minds about the workings of state. Once this is achieved, healthy people will contribute to GDP through the production process thus improving the quality of goods and the provision of better services, spending their money on productive items and leisure activities, reducing social phenomena and thus the state will realise (or at least improve) its economic growth potential.<sup>24</sup>

Further and probably more seriously, to check whether stability in all aspects of state reforms are compatible not only with the rule of law but also with social and economic institutions, which should justify a just society with equal citizenship and political bargaining as John Rawls said in his book *Theory of Justice* in 1971 determining social benefits in society.<sup>25</sup> This should comply with a number of poverty reduction strategies that were developed two decades ago, which have done much to stimulate and guide policy-makers to consider issues of poverty as an enormous problem in the world's least developed countries. It is a problem that calls for budgetary and administrative constraints to apprehend the legal advice that would allow a free environment towards a comprehensive basic needs of the poor that in turn reduces the burden through economical reliance that increases output promote per capita income hence an uplift in the quantity of goods and services reducing poverty and fostering economic growth.<sup>26</sup>

This results in a situation where citizens of a democratic state can empower the institutions that represent them to make laws that are compatible with the principle of legality and rule of law when applied to all – and

especially to the executives and other officials who should be held accountable in all cases of embezzlement of huge sums of public funds.<sup>27</sup> The Ugandan paper, *New Vision*, suggests the country is losing over UGX 600bn in corruption every year, money which would help the poor to access financial assistance from government institutions and in turn encourage them to engage in productive output and improve their standards of living. By gaining access to capital, people can engage in activities that increase productivity, which will reduce the common phenomena to least developed countries and in turn foster economic growth.<sup>28</sup>

Comprehensive surveys have been undertaken by policy-makers and social academic scholars such as Chris Cox on whether the rule of law enhances economic growth to realise economic development. There were trusted findings on correlations between strong institutions and economic development only if there is consensus about the reforms of all state institutions, especially the legal ones that reflect the rule of law and these will generate knowledge to the local population on activities that will increase output, fetch good estimated incomes that increase the quantity of goods and services, in turn driving their lives to better standards reducing poverty thus enforcing economic growth.<sup>29</sup>

There should be a significant body of evidence to the statutory provisions of least developed states as Caroline Roseveare and William Evans said in their pamphlet 'Rule of law and international development' purposely to protect and promote equality between men and women especially emphasising the rights of women either through omission or commission in forms of laws that discriminate against women and girls. This should be done through giving them opportunities to participate in economic activities that generate moderate if not high income from economic activities that will increase production and raise up their per-capita income. This will help them to contribute to household needs and in the improve their standard of living, reducing poverty and foster economic growth.<sup>30</sup>

## Conclusion

I conclude by quoting Professor Muhammad Yunus in his book *Creating a World Without Poverty* (1975) where he said that 'poverty is not created by poor people but by their

circumstances and the system we built where banks refuse loan service to nearly two thirds of the world's population, every human being is born into this world fully equipped not only to take care of themselves but also to contribute for the well-being of the world as whole'.<sup>31</sup> This means that poverty is not inborn and permanent, thus the government that acts as a unifying entity to all other institutions operating within a state once lays all possible measures favourable to both, those who have the chance to exploit their potential and those who have no means to unwrap the wonderful gifts they were born with can move together in a legal, social, political and economically prosperous pace away from the common hazard of poverty towards a glorified status of economic growth.

The donor supporting Christopher Sengoga's scholarship at the National University of Rwanda is the Claude Moore Charitable Foundation ([www.claudemoore.org](http://www.claudemoore.org)).

#### Notes

- 1 Rule of Law, The Free Dictionary, available at: <http://legal-dictionary.thefreedictionary.com/Rule+of+law> (last viewed 30 March 2014).
- 2 Concept of the rule of law, [www.cyber.law.harvard.edu/bridge/Philosophy/rollor.txt.htm](http://www.cyber.law.harvard.edu/bridge/Philosophy/rollor.txt.htm) accessed 5 November 2013.
- 3 Sarah G Berl, *Rule of Law within European Communities* (2nd edn, New York 2002), 10.
- 4 Definition of rule of law, [www.worldjusticeproject.org/rule-of-law-index](http://www.worldjusticeproject.org/rule-of-law-index) accessed 5 November 2013.
- 5 Brian L Tamanaha, on the rule of law: *History, Politics and Theory* (1st edn, Cambridge University Press 2004), accessed 7 November 2013.
- 6 A V Dicey, 'Rule of Law', *Introduction to the Study of the Law of the Constitution*, 1885, available at: [www.constitution.org/cmt/avd/law\\_con.htm](http://www.constitution.org/cmt/avd/law_con.htm) (last accessed 30 March 2014).
- 7 T Mulisa, Constitutional law, LLBI, class notes, NUR, 2012 (unpublished), 57.
- 8 Claude Hermann Walter Johns, *Babylonian Law – The Code of Hammurabi* (11th edn, Encyclopedia Britannica 1910), 12..
- 9 Tamanaha, n 5 above, 7.
- 10 Eugene Cotran and Adel Omar Sherif, *Democracy: The Rule of Law and Islam* (Vol 6, Brill 1999), 135.
- 11 Sol Goldman, [www.avalon.law.yalejournal.edu/medieval/saxlaw.asp.html](http://www.avalon.law.yalejournal.edu/medieval/saxlaw.asp.html) accessed 14 November 2013.
- 12 David Gordon and Peter Townsend, *The Concept and Management of Poverty* (University of Bristol, The Policy Press 2001), 29, [www.poverty.ac.uk/system/files/poverty-and-social-exclusion\\_chap2.pdf](http://www.poverty.ac.uk/system/files/poverty-and-social-exclusion_chap2.pdf) accessed 16 November 2013.
- 13 *Ibid* 32.
- 14 *Ibid* 30.
- 15 *Ibid*.
- 16 Michael P Todaro, *Economic Development* (7th edn, Pearson Education Ltd, Edinburgh Gate 2000), 170.
- 17 Gordon and Townsend, n 13 above, 35.
- 18 M Asimwe Herbert, *MK Fundamental Economics* (E African, Ed, Mk Publishers, Kampala-Uganda 2009), 353.
- 19 *Ibid* 354.
- 20 Debra J Ray, *Development Economics* (Princeton University Press, New Jersey 1998), 48.
- 21 Robert J Barro and Xavier Sal-I-Martin, *Economic Growth* (2nd edn, V K Batraat Pearl Offset Press, New Delhi 2004), 16.
- 22 Gordon and Townsend, n 13 above, 29.
- 23 Alberto Alemanno, 'The Dialogue Between Judges and Experts in the EU and the WTO', *Shaping Rule of Law through Dialogue*, eds Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza, available [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1526163](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1526163) accessed 2 April 2014.
- 24 Bonne and Bullough, *Poverty, Ethnic Identity and Health Care* (University of California Press 1972), 15.
- 25 'A Theory of Justice', [www2.econ.iastate.edu/classes/econ362/hallam/readings/rawl\\_justice.pdf](http://www2.econ.iastate.edu/classes/econ362/hallam/readings/rawl_justice.pdf) accessed 21 November 2013.
- 26 P Pleskovic and P Sivitanides, 'Priorities for Poor: A Conceptual Framework For Political Analysis' (1993), *Journal of Development Areas*, 184. Extracted from eradicating poverty Studies No 6, United Nations.
- 27 Atukwase Primus Bahiigi, 'Who is Uganda's problem?' (New Vision, 26 November 2013), available at <http://www.newvision.co.ug/news/649878-who-is-uganda-s-problem.html>, last accessed 2 April 2014.
- 28 Cambridge journal on rule of law [www.journals.cambridge.org/action/displayjournal?Rol.htm](http://www.journals.cambridge.org/action/displayjournal?Rol.htm) accessed 21 November 2013.
- 29 Christina Williams, 'General reports of corruption, gender, judicial independence, legal empowerment, poverty and rule of law', <http://reinventingtherules.com/2013/10/25/the-impact-of-rule-of-law-on-poverty-and-development>, last accessed 2 April 2014.
- 30 Rule of law and development, <http://r4d.dfid.gov.uk/Output/192962>, last accessed 2 April 2014.
- 31 D H Wright, 'Creating a World Without Poverty: Muhammad Yunus and the Rise of a People Based Economy' [www.ru.org/economics/creating-a-world-without-poverty-muhammad-yunus-and-the-rise-of-a-people-based-economy.html](http://www.ru.org/economics/creating-a-world-without-poverty-muhammad-yunus-and-the-rise-of-a-people-based-economy.html) accessed on 2 April 2014.

**Milan  
Dipakkumar  
Desai**

University of Zambia,  
Lusaka

milandesai87@  
gmail.com

# Essay 4: How can the rule of law reduce poverty and foster economic growth?

**T**he aim of this essay is to discuss how the rule of law can be used to reduce poverty and foster economic growth. I begin by providing a general definition to a key concept: the rule of law. I then look into the concept of the rule of law in more detail by discussing various definitions or interpretations of the concept today. Each of these definitions is then scrutinised to assess how that particular interpretation can be used to reduce poverty and foster economic growth. Following an analysis of these various definitions, and a practical application of the concepts with a view to fostering economic development and reducing poverty, the essay then concludes with recommendations on how the rule of law can be used to both foster economic growth and to reduce poverty.

## The rule of law

From the outset it must be noted that ‘rule of law’ is a multidimensional concept whose effects permeate nearly all aspects of life in modern-day societies. The concept comprises many meanings, including the principle of legality; the existence of a legal framework to control governments; equality before the law;<sup>1</sup> and predictability of government action. It is these specific manifestations of the rule of law that this essay evaluates, with a view to understanding how the holistic concept of the rule of law can be a means of reducing poverty and fostering economic growth.

## Kindred concepts of the ‘rule of law’

It has been propounded that rule of law is a concept based upon the supremacy of the law or ‘the security given under the English Constitution to the rights of individuals, looked at from various points of view’.<sup>2</sup> Although the principle was adopted to apply to the English legal dispensation, it is of general benefit to almost all common law jurisdictions because most common law

jurisdictions benefit from some form of constitution or another. British jurist A V Dicey goes on to dissect the principle of ‘supremacy or the rule of law’ as comprising ‘distinct though kindred conceptions’.<sup>3</sup> It is generally accepted by economists that the ‘core theoretical mechanism linking law to economic development runs through property rights and contract enforcement... [as well as]... the role of institutions’.<sup>4</sup> This means that where the law accords protection of rights – as well as the granting of liberties – which leads to economic and social development.

## The principle of legality

The first concept of the rule of law is the principle that no man is punishable, or may be made to suffer or pay a penalty (either in body or in goods), except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.<sup>5</sup> This first concept, termed ‘the principle of legality’, requires that:

‘every government authority which does some act which would otherwise be a wrong (such as taking a man’s land), or which infringes a man’s liberty (as by refusing him planning permission), must be able to justify its action as authorized by law... [E]very act which affects the legal rights, duties or liberties of any persons, must be shown to have a strictly legal pedigree’.<sup>6</sup>

Thus, there is a need for every state action to be consonant with the law. If any act is not cloaked with some semblance of legal authority, the act may be declared invalid by a court of competent jurisdiction for that territory.<sup>7</sup> However, this is not to say that as long as an action has a legal basis it would be valid. There is a further elaboration to this ‘limb’ of the definition of the rule of law: the prevention of unrestricted discretionary power on the part of the state. Dicey argues that in a republic, ‘wherever there is

discretion there is room for arbitrariness... discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects'.<sup>8</sup> This first definition of the rule of law can be applied to modern situations to mean that whenever an action of government is being executed, such action must be supported by some form of legal authority. It therefore follows that where this aspect of rule of law prevails, it is presumed that government action is less likely to be arbitrary. In economic terms, there has been a 'classic time-inconsistency problem that governments not only have the power to renege on their commitments but incentives to do so'.<sup>9</sup> Therefore, the rule of law ensures the existence of basic, entrenched, and fundamental property rights; and ensures that the sanctity of contractual obligations is respected. As Hoggard argues, 'property rights and contract enforcement cannot be credible unless there are effective limits on executive power'.<sup>10</sup>

Furthermore, the necessity of having a system that requires a legitimate legal basis for any state action is perfectly embodied in instances where a state exercises its power of eminent domain. This power is (arguably): 'deemed inherent in sovereign states, to take private property for public use, subject to making reasonable compensation, as distinct from mere seizure... The power of taking private property for public uses generally termed the right of eminent domain belongs to every independent government. It is an incident of sovereignty'.<sup>11</sup>

If such power of eminent domain were to be used arbitrarily, little faith would remain in the economic climate of a country. Even a nation's own citizens would live in fear of a despotic tyrant who may seize their property without considering the need to compensate proportionately. This fear would hinder development and would eventually lead to even greater poverty. There is a much greater need to give limits to a state's power of eminent domain and thus ensure protection of property rights in general.

Constitutional provisions must also be reinforced to ensure protection and promotion of the right to property, and other human rights in general. If the rule of law is strengthened, the economy is more likely to develop.

One particular group of scholars, the New Institutional Economists (NIE), argue that one of the hallmarks of developed modern economies is the existence of well-specified

and well-enforced property rights: rights that developing economies lack.<sup>12</sup> Hence, a nation seeking to foster economic development using the rule of law must ensure that the government adheres to the need to respect the right to property and all ancillary rights thereto. If the subjects of a republic are to be motivated to invest more, and to produce more, there must be a protective mechanism to ensure that their hard work does not become the property of the state overnight without compensation.

There is a need to expressly guard the right to property in order to lure more investors to a nation. With special considerations for developing countries, the need to promote a sound investment climate is fundamental to the development of any state. In order to develop economically, and reduce poverty levels, a state must endeavour to have, as its bedrock, a principle of legality – the first concept in the rule of law. These formal, legal rules would be the *means* by which individuals could enter into predictable economic transactions that would ultimately lead to economic growth.<sup>13</sup>

### Equality before the law

The second definition, or concept, of the rule of law is the principle that 'no man is above the law but... that... every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'.<sup>14</sup> This is what is termed 'equality before the law'. The gist of this assertion is that disputes as to the legality of government action must be decided by an independent and impartial judiciary, which is in no way influenced by the executive.<sup>15</sup> Therefore, it has been suggested that everyone, from a colonial governor, a secretary of state, or a military officer, to all subordinates are as responsible for any unlawful act as any private individual would be; the aim is that the law must be seen as the controlling entity that regulates all action.<sup>16</sup> Furthermore, it has also been said that: the true contrast to a reign of status is the reign of general and equal laws, of the rule that laws are the same for all, or, we might say, of the rule of *leges* in the original meaning of the Latin word for laws – *leges* that is, as opposed to *privi-leges*.<sup>17</sup>

The effect of such equality would be that public officials are held accountable individually for their actions and, in turn, thereby creating a system of checks and



balances to government discretion and arbitrary power. Some of the economic implications of having equality before the law have been argued by Santos to be ‘a better, more transparent, accountable, and, in the end, more democratic type of government’.<sup>18</sup> Such equality would also root out the weed of corruption that eats away at the very economic fabric of many developing nations today. For example, a 2010 report by Sequeira and Djankov estimates that, on average, bribes represented 14 per cent of the shipping costs for a standard container passing through the port of Maputo, Mozambique, and four per cent of shipping costs for a container passing through Durban, South Africa.<sup>19</sup> This may be evidence of how a decline in the rule of law can lead to corruption, and subsequently, to an increased cost of goods and services.

The economic impact of corruption is twofold. First, it increases the cost of government goods and services. Secondly, it creates additional efficiency costs through distortions. This is where officials cannot steal cash directly, but instead use a variety of techniques to extract the monies – which induces inefficiencies, thereby increasing the cost of a product or service, and hindering economic growth.<sup>20</sup> If the concept of equality before the law is observed, then the rule of law will ensure accountability of agents of the state, and will also endeavour to wipe out corruption; both of which ensure more transparency in the governance of a country. If a country is seen to be transparent in both its governance and its fiscal sectors, it is likely that it will attract more donors, investors and partners. The net result would be of great economic benefit to the country as a whole.

The enforcement of equality before the law would mean that law breakers – particularly those of considerable means (government officers, police, military) – would be equally punished for transgressions. Consequently, corruption would then be reduced in most developing nations. It has been stated that ‘corruption in Africa is a development and social issue which becomes an impediment to change and a serious constraint on economic growth and poverty reduction... [it] implies a breakdown of the rule of law and in most instances a loss of state legitimacy’.<sup>21</sup>

### The ‘instrumental’ version of the rule of law

It has also been argued by the likes of Friedrich Hayek that, in fact, the rule of law exists in an instrumental version – different

from those propounded by Dicey and Wade. Hayek argues that the rule of law provides a system of rules put in place to govern and guide productive activity. Because such a system of rules exists, individuals are empowered with the foresight to see with certainty how the government would use its coercive power in a given set of circumstances, and thus, plan their affairs accordingly.<sup>22</sup>

Hayek argues that it is the element of *predictability* that gives the rule of law its *raison d’être*: the rule of law is not concerned with whether government action is legal ‘in a juridical sense. These actions may be legal but inconsistent with the Rule of Law’.<sup>23</sup> Hayek proposes that, in order for an economy to develop, the rule of law must be the guiding principle that allows for the predictability of state action. Specifically, the role of the judiciary is highly emphasised, by according it the role to assess, ‘not only at whether the executive has acted within its power – whether the authority was legally entitled to act – but also whether the substance of administrative action fell within the government’s powers or impinged upon the citizen’s private property’.<sup>24</sup>

The gist of this *instrumental* version of the rule of law is to use the judiciary and rule of law as a system of controlling state power. Hence, in order to foster economic development, and reduce poverty, more enforcement by the judiciary is required. In order to develop quickly, nations must devote large amounts of resources and manpower to ensuring the existence of an impartial and robust judicial system that will not shy away from striking down illegal or irregular state action. If the judicial system promotes certainty and predictability of the law, it would automatically follow that private property rights are more likely to be enforced objectively – thereby creating a more suitable climate for businesses and the economy to thrive. If the economy begins to flourish, conditions are created to reduce poverty.

### The absence of the rule of law

It has been argued that ‘the economic effect, in different formulations, of the absence of rule of law [includes]... anarchy... extortion... private predation... and simply... lawlessness’.<sup>25</sup> It is clear that most scholars do not dispute the importance the rule of law plays in every society. It is considered a necessary tool to ensure a system of checks and balances on both the government, as

well as its citizens. Ringer concludes that ‘the rule of law must be construed as a means of development rather than one of its fully-fledged ends’.<sup>26</sup> It is from this viewpoint that the concept of the rule of law will then be viewed: the rule of law more as a means to development, and less as an end in itself. Indeed, the rule of law provides a valuable tool to fostering economic development, and will prove to be an effective weapon in reducing poverty in societies today.

The following quotation in my view best summarises the consequences of a deficiency in the rule of law, of particular application to socio-economic situations:

‘a deficiency in the rule of law encourages high rates of corruption, with further devastating consequences on the confidence of economic actors. This lack of investment, in turn, slows economic growth and consequently deprives the governments of resources to invest in education, social safety nets, and sound environmental management, all of which are critical for sustainable development.’<sup>27</sup>

## Conclusion

This essay has proposed three diverse, but interrelated, concepts of the rule of law and explored how each of those concepts can be used to foster economic development and reduce poverty. It must be noted that there exists a common thread between all the concepts of the rule of law; that of property rights, security, predictability and the protection of private wealth. It has been observed that, because of the causal connection between the rule of law and economic development, it is imperative that the private wealth of investors and individuals be protected in order to foster more growth. There is a need, borrowing from the first concept of the rule of law (the principle of legality), to have a rigid system of rules and regulations, which provide, in clear terms, the penalties and breaches that one would suffer in a given jurisdiction. It is a requirement of the doctrine of the rule of law that no person be made to suffer ‘in body or in goods’ for a wrong that has not been conscripted to a part of the law. The aim of this is to prevent the arbitrary abuse of power, primarily on the part of the state.

The second concept – equality before the law – can be used by a state to foster economic development and to reduce poverty by holding all members of government

accountable in their individual capacities for breaches of the law. This includes instances where power has been misused, or where corruption has taken root. If the law does not favour one individual over another, the general assumption would be that no person is immune from the reach of the law. Equality before the law would allow credibility to build within a government; encourage transparency; and act as a powerful incentive for investors to plough large sums of money into a given economy. The fear of having a government with unbridled power is greatly curtailed through the rule of law. If government officers are punished for acts of corruption, there is a strong argument that the cost of goods and services would reduce greatly, along with a corresponding increase in government efficiency. This reduction in cost would allow a wider scope of utilisation for the precious resources that every developing nation possesses. It would allow further investment into healthcare, social security and empowerment projects – with the aim of lifting citizens out of poverty.

The third rule of law concept provides for an instrumental application of the rule of law. It requires a system of rules and regulations that govern productive activity. This system of rules and regulations allows for an element of predictability of state action. The ability to foresee potentially devastating economic state actions towards one’s property or investments is an invaluable tool that allows enterprises to plan for the future. Coupled with this foresight is the strength of the judiciary that keeps governmental power in check. This third rule of law concept can be used to foster economic development by requiring governments to ensure that all actions follow a prescribed path; there is little room for arbitrary state action. Should a state fail to follow the rules, it would be punished by its own judiciary.

In addition, if more resources are channelled towards ensuring an independent judiciary, with continued training and monitoring of members of the judiciary, this third concept could bring valuable contributions to economic growth. Furthermore, this concept requires that legislation is drafted in a clear, precise manner, and is adhered to by the government in power. If the intention of the legislature is honoured, it would follow that citizens can predict all manner of state action. The ability to predict regulates the personal and business lives of the community, and promotes a sense



of security for anyone wishing to invest in a nation. Once again, the link between the rule of law, property rights and the ability to lure investors and donors is cardinal to the fostering of economic development, and the reduction of poverty.

The donor supporting Milan Dipakkumar Desai's scholarship at the University of Zambia is Webber Wentzel, Johannesburg ([www.webberwentzel.com](http://www.webberwentzel.com)).

**Notes**

- 1 H W R Wade, *Administrative Law* (Oxford: Oxford University Press 1988), 23–25.
- 2 A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, London: Macmillan and Co Limited 1927), 180.
- 3 *Ibid* 183.
- 4 Stephen Haggard and Lydia Tiede, 'The Rule of Law and Economic Growth: Where are We?' (2011) 39(5) *World Development* 674, available at <http://dx.doi.org/10.1016/j.worlddev.2010.10.007> accessed 26 December 2013.
- 5 Dicey, n 2 above, 183–184.
- 6 Wade, n 1 above, 23.
- 7 *Ibid*.
- 8 Dicey, n 2 above, 184.
- 9 Haggard and Tiede, n 4 above, 674.
- 10 *Ibid*.
- 11 Fredrick S Mudenda, *Land Law in Zambia: Cases and Materials* (Lusaka: UNZA Press 2007), 473.
- 12 Thom Ringer, 'Development, Reform and the Rule of

- Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and its Place in Development Theory and Practice' (2007) 10 *Yale Human Rights & Development LJ* 178, available at [www.law.yale.edu/documents/pdf/LawJournals/ringer.pdf](http://www.law.yale.edu/documents/pdf/LawJournals/ringer.pdf) accessed 26 December 2013.
- 13 Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development', at 260, available at [www.utexas.edu/law/faculty/pubs/as8448\\_pub.pdf](http://www.utexas.edu/law/faculty/pubs/as8448_pub.pdf) accessed 26 December 2013.
- 14 Dicey, n 2 above, 189.
- 15 Wade, n 1 above, 25.
- 16 Dicey, n 2 above, 189.
- 17 Ringer, n 12 above, 178.
- 18 Santos, n 13 above, 260.
- 19 Benjamin A Olken and Rohini Pande, 'Corruption in Developing Countries' (2011) 4(1) *Annual Review of Economics, Annual Reviews* 7, accessed 26 December 2013, [www.nber.org/papers/w17398.pdf?new\\_window=1](http://www.nber.org/papers/w17398.pdf?new_window=1).
- 20 *Ibid* 15.
- 21 Gbenga Lawal, 'Corruption and Development in Africa: Challenges for Political and Economic Change' (2007) 2(1) *Humanity & Social Sciences Journal* 3, available at [http://idosi.org/hssj/hssj2\(1\)07/1.pdf](http://idosi.org/hssj/hssj2(1)07/1.pdf) accessed 26 December 2013.
- 22 Santos, n 13 above, 263.
- 23 *Ibid* 264.
- 24 *Ibid* 265.
- 25 Haggard and Tiede, n 4 above, 674.
- 26 Ringer, n 12 above, 178.
- 27 Sachiko Morita and Durwood Zaelke, 'Rule of Law, Good Governance, and Sustainable Development', Seventh International Conference on Environmental Compliance and Enforcement, 16, accessed 26 December 2013, available at [www.inece.org/conference/7/vol1/05\\_Sachiko\\_Zaelke.pdf](http://www.inece.org/conference/7/vol1/05_Sachiko_Zaelke.pdf).

# Essay 5: How can the rule of law reduce poverty and foster economic growth?

**Soreti Berhanu Workneh**

Jigjiga University, Jigjiga  
 soretiberhanu@gmail.com

**Introduction: the concept of the rule of law**

The general definition of the rule of law refers to the principle that all citizens, government officials and agents are subject to the law of the land. The rule of law in its general sense is a political ideal that has widespread global agreement in its support.<sup>1</sup> Besides, there is wide agreement with regard to understanding, as the notion of the rule of law is a set of ideas that a respective society strives to achieve. Yet the rule of law is an elusive concept, which can mean different things to different people in different contexts.

While some define the rule of law only in its formalist aspect – which dictates law to adhere only to principles of equal applicability, certainty, proactiveness, generality and related traditional technical elements – others strongly argue a mere government by law with no substantive values and justice does not show the existence of the rule of law in one country. According to the substantive version of the rule of law, the content of the law matters for the existence of the rule of law. They articulate that citizens have moral rights and duties against the state in general in which the latter is expected to recognise

and protect the rights in positive law. The protection of the rights in turn requires one to specify what those rights are, which in fact involves the determination of the substantive content and scope of those rights. Thus, they continue to question those with substantive conception saying whether or not individuals will have a moral right, in a court of law, to receive what they demand if laws in a country are fundamentally unjust.<sup>2</sup> To this end, they refer to the common law adjudication, which involves the application of rules and principles that will often require courts to have recourse to consideration of substantive justice and fairness, which is obviously beyond the formal conception of the rule of law.<sup>3</sup> Such a notion of substantive justice to be rendered by judicial decisions in the absence of predetermined governing law and/or in case absurd decisions could be made is highly transplanted to many legal systems.

The above mentioned substantive conception of the rule of law that involves addressing the substantive aspect of the law seems convincing and acceptable in the present modern society. The contents of a law in the substantive conception includes protection and entrenchment of fundamental rights, justifiability of the rights before courts or similar institution and the overall substantive fairness and justness of a law as measured by extra-legal principles and acceptable political ideals. Besides, the constitutional rights guaranteed in many modern constitutional states are embedded within the substantive conception of the rule of law that is intimately bound up with democracy and the legitimate exercise of government power. Hence, it has become axiomatic that adhering to the formal requirements of the rule of law alone will make the protection of rights and constraining power less achievable. Taking in to account the fact that the rule of law has formative and substantive aspects as already discussed, I will discuss how the rule of law plays a role in fostering economic growth and reducing poverty.

### **The role of the rule of law in fostering economic growth and reducing poverty**

The achievement of economic growth and poverty reduction are directly related concerns as the attainment of the former normally leads to the realisation of the latter. Economic growth refers to an increase in production and consumption of goods and

services as well as an increase in real gross domestic product. But having economic growth in one country on its own will not necessarily bring poverty reduction and an improvement in people's standard of living. It is when the economic growth of one country is designed to improve the quality of life of its people that poverty will be reduced – thereby development is achieved. This leads to the question as to the role of the rule of law to ensure development.

There is no inextricable causal relationship between the rule of law and the reduction of poverty and economic growth. Because economic growth can occur in the absence of the rule of law, there is no proof that countries without it cannot also foster economic growth.

Notwithstanding such uncertainty with regard to the direct cause/effect relationship of the rule of law to economic growth and poverty reduction, they have a correlation whereby one is vital to the other. Both the formal and substantive versions of the rule of law have a significant role in boosting economic growth and reducing poverty; they are indispensable when it comes to accelerating stable economic growth and reducing poverty. Because when we promote or uphold the principle of the rule of law it entails the protection of substantive values and principles of justice including protecting fundamental human rights such as security of person, property rights and equality, social justice, ensuring a good living standard and condition as well as controlling corruption. In its formal version, it protects fair procedures, avoids arbitrariness and consolidates the separation of power, supremacy of the law and institutional strength; it guarantees general laws so that the governed will have certainty about the legal system.

All these elements are key factors for economic growth and poverty reduction. If there is effective application of the rule of law in one nation, citizens and other stakeholders will lead peaceful and stable lives, and place their trust in the government's ability to uphold the law and protect their rights and security. A legal system with a weak rule of law protection that does not have the capacity to protect property rights would not attract foreigner direct investment; rather it discourages even domestic investors. Similarly, security of individual and human rights protection in general is a basic question in an investor's decision on where to invest. Hence, adopting



a rule of law that accommodates procedural and substantive elements matters greatly for the proliferation of investment and other commercial transactions. This clearly shows that an absence of the rule of law in one country is one of the worrisome barriers to economic growth and the reduction of poverty. While its presence encourages efforts on economic growth and poverty reduction, its absence could have the opposite effect.

Corruption has a negative impact on economic growth and poverty as it represents a clear harm to economic growth. For this reason, government officials, private business and investors are subject to government regulation or law in a country that adopts the rule of law in its full sense. In doing so, procedural fairness and equal treatment are key elements. They are the basic principles of the rule of law. Procedural fairness and equal treatment limit not only state discretion but also private power since in corruption cases the parties to be involved are government officials, on the one hand, and private investors and related persons, on the other hand. If the corruption rate of the country, which will be created because of a problem in the protection of the rule of law, is high it inhibits economic growth and the reduction of poverty. Moreover, corruption and the rent-seeking launch policy misrepresentation constitute a barrier to fostering economic growth and poverty reduction. This is also a clear indication to assert that the rule of law is essential for economic growth for the excesses of corruption can be controlled provided that there is a strong protection of the rule of law.

On top of the procedural and substantive elements embodied under the law, appropriate enforcement institutions such as an independent judiciary are essential for the effective implementation of the laws. Allowing alternative dispute resolution mechanisms to the extent possible is also among the necessary components of the rule of law, as they are helpful in attaining development and economic growth by saving time and money. Thus as institutional guarantees are necessary for the effective application of rule of law, they will have an immense contribution to economic growth and the reduction of poverty. Institutional weakness, on the contrary, is a fundamental barrier to economic growth for there will not be an institution that will play check and balance for the possible excesses of administration such as corruption, a clear antidote to economic growth. An absence

of basic institutions that support vibrant market economies is also seen as a major reason why developing countries do not get faster economic growth or remain poor. The existence of the effective application of the rule of law helps consequential and incidental pitfalls to be rectified easily and fairly. Next comes economic growth. Effective judicial institutions to protect citizens from the arbitrary use of state authority and lawless acts of both individuals and government are also an essential part of good governance as the accountability, and transparency of the government could not be ensured in its absence. Public participation in national laws and economic policies as part of good governance has an incremental advantage for economic growth. This encourages the general public and specific stakeholders to have faith in the legal system of the country and then be attracted to becoming involved in intensive economic activities. All these things play an important role in fostering economic growth and reducing poverty.

### Conclusion

The rule of law, fundamental rights and democracy are interrelated terms in which one includes the other depending on the context of their use. If one is missing, the whole is not fit for the intended purpose. In light of this, the rule of law, which consists of values such as fundamental rights and democracy, in addition to its formative aspect, is an essential ideal to ensure economic growth, and is crucial for poverty reduction and improved living conditions in society. Building institutional trust, predictability, the absence of corruption and the strong protection of property rights are the driving forces of economic growth by means of the rule of law. Nevertheless, it does not mean that the rule of law is a mere means to achieving economic goals. Besides being an end in the sense of its characteristics of substantive justice such as ensuring good living standards and social justice, it is also a virtue for its other elements and needs to be respected independently. In both of its facets, it has a prominent role in the broader range of economic development and poverty reduction. The rule of law is a key to achieving an open market economy since it guarantees equal opportunities for all individual citizens, prohibits corrupt practices by authorities and protects businesses from the abuse of local and government powers.

The donor supporting Soreti Berhanu Workneh's scholarship at Jigjiga University is the Law Council of Australia, Canberra ([www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)).

## Muchinda Muma

University of Zambia,  
Lusaka

[muchindamuma@  
rocketmail.com](mailto:muchindamuma@rocketmail.com)

# Essay 6: How can the rule of law reduce poverty and foster economic development?

'Long cherished by liberal political philosophers, today the rule of law is increasingly viewed as a necessary requirement, or even a silver bullet, for economic development'

Tor Kreyer<sup>1</sup>

**T**his essay aims to discuss how the rule of law can reduce poverty and foster economic growth. It begins by defining the concept of the rule of law and identifying its essential elements. It then defines the concepts of poverty and economic growth. This is followed by a discussion of the role of the rule of law in poverty reduction and fostering economic growth. Finally a conclusion is offered.

The rule of law is a multidimensional concept with a number of different meanings. A classic exposition is that of A V Dicey,<sup>2</sup> who propounds that 'its primary meaning is that everything must be done according to law... every government power i.e. every act which affects the legal rights, duties, or liberties of any person, must be shown to have a strictly legal pedigree'.<sup>3</sup> The concept, however, demands more than this, hence its secondary meaning that 'government should be conducted within a framework of recognised rules and principles which restrict its discretionary power'.<sup>4</sup> A third meaning of the rule of law is that 'disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the

## Notes

- 1 Brian Tamanaha in his work on the rule of law clearly asserted as there is no the single political ideal that have ever achieved global endorsement providing his concur with the sincerity of some of the avowed commitments to it, Brian Tamanah, *On the Rule of Law: Politics, History, Theory* (Cambridge University Press 2004), 3.
- 2 P P Craig, *Administrative Law* (5th edn, Sweet and Maxwell 2007), 106–108.
- 3 *Ibid* 109.

executive'.<sup>5</sup> And lastly, a fourth meaning is that 'the law should be even-handed between government and the citizen'.<sup>6</sup>

A more expansive definition has been given by the World Bank, which provides that: 'the government itself is bound by the law; every person in society is treated equally under the law; the human dignity of each individual is recognised and protected by law; and justice is accessible to all'.<sup>7</sup>

Poverty is easily identifiable by those who see it; however, defining it is more complex. This is because, as argued by De Beers and Swanepoel, 'poverty is a relative concept'.<sup>8</sup> There are various ways in which poverty can be classified. One is by 'classifying it according to the level of disadvantage experienced: namely absolute and relative poverty'.<sup>9</sup> Absolute poverty is defined as: 'a situation where incomes are so low that even a minimum standard of nutrition, shelter and personal necessities cannot be maintained. In other words, absolute poverty means a person is so poor that his/her next meal may mean the difference between life and death'.<sup>10</sup>

Relative poverty, on the other hand, is defined as 'an expression of the poverty of one entity in relation to another. For example: in relation to South Africa, Lesotho is poor; in relation to the United States of America, South Africa is a poorer country'.<sup>11</sup>

Like the concepts of the rule of law and poverty, economic growth is also a multidimensional concept. Economic growth refers to 'the increase in the amount of



goods and services the whole economy can produce over and above what is produced over a period of time'.<sup>12</sup> Greene argues that while the definition of economic development may differ from country to country and context to context, especially to the extent that it depends on priorities... certain principles arguably support economic progress – namely, the enforcement of legitimate bargains, the encouragement rather than discouragement of investment in useful enterprises, the creation rather than dissipation of legitimate and the useful employment opportunities, and increase rather than shrinkage in the production of valuable goods and services.<sup>13</sup>

A relationship exists between economic growth and poverty reduction. This emanates from the benefits of economic growth, which include, first, high levels of production and consequently higher levels of income, which can be enjoyed by more people if equitably distributed.

Secondly, economic growth means high levels of consumption for all to enjoy. A third benefit is that high levels of output can probably be achieved using less labour and so people may benefit from shorter working weeks and longer holidays. Lastly, rising incomes means more tax revenue for government, which can be spent on schools, hospitals, roads and many other social amenities.<sup>14</sup>

While the relationship between economic growth and poverty reduction subsists, the rule of law also has an important role to play in ensuring reduction in poverty and fostering economic growth. 'Recently, there have been a number of strands of research that have related economic growth and development to aspects of the [legal] environment, both directly and indirectly.'<sup>15</sup>

### **An historical perspective**

The role of the rule of law in fostering economic growth can be traced through history. Historically, the market economy of Europe was linked to the rule of law, reducing the discretionary power of state authorities to interfere with private economic activities. This gave rise to the laissez-faire market system, and eventually a capitalist society. It was this shift in the law, minimising government intervention in economic activities, that saw the rise of the industrial revolution, spiralling economic growth throughout Europe.<sup>16</sup>

In relation to communist and developing countries, the concept of the rule of law also played a significant role in their economic transition. Premised on communism, the state played an important role in steering the economy, in the production of goods and in service delivery. The aspiration to be the main producer of goods and services delivery was lost as the state took over the role of providing an enabling environment for a functioning market; this was to be done by providing a sound legal framework ensuring legal and judicial framework securing private economic action.<sup>17</sup>

### **The role of the rule of law in economic growth and poverty reduction**

The various principles that underlie the concept of the rule of law can each be shown individually to contribute to economic growth and subsequently poverty reduction.

#### *Formal legal rules to regulate the market*

The principle of the rule of law that everything must be done in accordance with the law implies the existence of formal legal rules. In relation to economic activity, these rules must exist to regulate the market. Formal legal rules for the market, regardless of the parties involved, contribute to making framework conditions for economic activity more transparent and reliable.

Sherman proposes three purposes of formal legal rules with respect to economic growth:

'first, it may be employed to define the goals of the... state through regulations and legislation. This would involve clarifying the underlying norms, strategies, and policy objectives regarding the relationship between the state and the market. Second, law may identify tools for achieving these goals, such as enforcement methods for inducing compliance. Third, law may establish the institutional framework with which to structure the... state as well as new relationships between public and private actors.'<sup>18</sup>

Additionally, the rules ensure the regulation of competition among businesses as well as protection of consumers against harsh market practices. Therefore, the rule of law ensures the existence of formal legal rules that regulate market forces. The said rules must be accessible, clear, certain and understandable

to all those whose interests may be affected by the business environment that they regulate. This is important for economic growth as it ensures efficiency in the marketplace and prevents chaos among traders and the government even in the collection of taxes.

#### *Limitation of discretionary power of the government*

Another principle underlying the rule of law is that there must be limitation of discretionary power of the government. In relation to economic growth, it provides that economic growth can be best achieved if the state stays out of the economy except to the extent provided by the law. Therefore where the law provides that the role of the government is to provide the institutions needed for the functioning of the market, which include guarantees for property rights, enforcement of contracts, and protection against arbitrary use of government power and regulation,<sup>19</sup> then the role of the state should not exceed this mandate. The idea is that policies, when packaged in this way, would stimulate domestic growth and attract foreign investment.

In order to achieve this, it is not enough to assign to the state its role; particular attention must be paid to legal institutions responsible for the administration of the rule of law. Trubek observes that:

‘Subsequent practical experience suggested that reform efforts could not stop with policies designed to shrinking the state and liberalise and privatise economies... it turned out that a lack of attention to institutions generally, especially legal ones, placed substantial limits on the reforms as a means to promote economic development and poverty reduction.’<sup>20</sup>

The importance of limitation of government interference is increasingly recognised. Stephan argues that for the existence of a healthy financial sector, which is indispensable to attaining economic growth, there must be a healthy legal system, which guarantees protection against risk of government contract modification. Additionally, limited government interference promotes the doctrine of the freedom of contract. While the state has the authority to enact legislation to regulate the business environment, this discretion must be exercised in such a way that it does not permeate into and affect the bargaining power of private individuals. This is a

condition necessary for entrepreneurship and the creation of new businesses that are necessary for increasing economic productivity.<sup>21</sup> To this effect, the World Bank has set up mechanisms such as the *Doing Business Reports*, ‘to assess whether a jurisdictions’ laws and regulations enhance or hinder business activity’.<sup>22</sup>

Therefore, specific attention must be given to the operation of the legal system by ensuring that the discretionary power of the state is limited as this is essential to poverty reduction and development.

#### *Even-handedness and the equal distribution of resources*

Poverty is mostly a rural phenomenon affecting mainly the landless, the near-landless, female-headed households and children.<sup>23</sup> In addition, ‘women generally have less access to education, formal sector employment, social security and government employment programs. These factors combine to ensure continued poverty and deprivation’.<sup>24</sup> A principle of the rule of law that can be used to address this is that of equality and even-handedness. This means that once there is an increase in economic productivity and income generation, laws must be put in place to ensure equal distribution so that there is a trickle-down effect of resources even to the poorest in a society.

Two schools of thought support this proposition: first, according to formalist thinking, the rule of law creates a framework for the efficient allocation of resources; and, secondly, in robust neo-liberal economic thought, distributional issues are inevitable effects of all legal rules and institutions.<sup>25</sup> Therefore, laws can ensure that revenue generated from the economy by a state can be channelled to priority sectors for poverty reduction, which include targeting the rural poor and empowerment of female-headed households as well as addressing the needs of children. Further, equal protection of human rights of individuals is necessary for economic growth to take place. Trubek argues that ‘support for rule of law projects that deal with labour rights, women’s rights and environmental protection are essential to economic development... such values as human dignity, equality and fairness that are embedded in the idea of the rule of law’<sup>26</sup> are a condition precedent to economic growth and poverty reduction. In



addition, Wolfensohn, a former president of the World Bank, noted that ‘without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible’.<sup>27</sup>

### *Settlement of disputes by independent and impartial judiciary*

That there must be an independent and impartial judiciary to settle disputes is another principle of the rule of law. It has been argued by Greene that the rule of law is a tradition of decision-making embodying at least three indispensable elements: that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful day in court; that deciding officers shall be independent in the full sense and free from external direction; and that day-to-day decisions shall be reasoned and rationally justified.<sup>28</sup>

Today, rule of law principles are seen as positive factors for economic and market-oriented development. Formal legal rules for the market, systematically enforced by judicial institutions regardless of the parties involved, contribute to making framework conditions for economic conditions more transparent and reliable. This makes judicial decisions about private disputes – and thus private behaviour – predictable and puts competitors on an equal footing, although their economic power might differ.<sup>29</sup>

In order to promote economic growth, special emphasis must be placed on the administration of justice. ‘This includes the efficient management of cases, increased access to justice through the construction of alternative dispute resolution mechanisms, enhanced means of enforcing judicial decisions, and the promotion of judicial independence.’<sup>30</sup> Economic activity is more likely to be stimulated where there is a competent judiciary to enforce contracts and business agreements.

Moreover, the provision of alternative dispute resolution mechanisms is necessary for economic activity as they are generally much faster and cheaper, attributes desirable for investment and economic growth. Additionally, issues of corruption in business transactions are better dealt with where there is an independent judiciary. The absence of corruption in turn encourages investment and economic growth. In other words, the effectiveness of the legal system’s operation is more important for economic development than the content of the law itself.<sup>31</sup>

### **An international perspective**

It is recognised that economic growth cannot occur within the confines of a state without interaction with the international community. The increasing integration of national economies into expanding international markets is referred to as globalisation.<sup>32</sup> Greater global economic integration, and foreign investment and export-led growth, are beneficial to economic growth.

The question then becomes: what role does the rule of law play in promoting economic growth at an international level? In response, it is argued that a primary goal for the rule of law is to make national economies more attractive to foreign investors. To that end, property and other economic rights should be protected and government intervention limited. At the same time, this vision stresses the importance of legal harmonisation and elimination of any discrimination against foreigners so that national economies can be more easily linked to larger global or regional economic entities.<sup>33</sup>

### **Challenges of promoting poverty reduction and fostering economic development through rule of law**

It has been argued that the rule of law can foster economic development and subsequent poverty reduction through implementation of its various principles; this, however, does not go without challenges.

It is noted that there is difficulty in establishing what factors exactly cause economic growth. In this vein, establishing and reviewing the effectiveness of the rule of law as a cause of economic development is not easy as the issue of causation could easily flow in reverse, with economic development leading to rule of law reform. For example, certain northeast Asian countries with a weak rule of law have had substantial economic progress.<sup>34</sup> In addition, the existence of informal legal systems also makes causation difficult to determine, for instance a vendor may still honour a bargain merely to maintain his reputation without necessarily being compelled to do so by law.<sup>35</sup>

Further, while it is important to prioritise the rule of law, most developing countries encounter resource constraints. ‘Every dollar spent on judicial reform is a dollar that cannot be spent on other public goods or put towards economically productive private investment.’

## Conclusion

In conclusion, this essay has shown how the rule of law can reduce poverty and foster economic growth. By applying the principles of the rule of law, economic growth can be stimulated and once productivity and resource generation increases the very rules of law can be used to distribute resources equally and thereby reduce poverty. The principles of the rule of law can help foster economic growth in the following ways. By providing formal legal rules to regulate market, the priorities of an economy are made known to investors as well as ensuring competitiveness and consumer protection.

Limitation of government intervention in economic activities except to the extent provided by law also ensures economic stability and attracts investment. The rule of law also ensures that there is even-handedness and equality, which ties in with the protection of human rights. This is vital for economic growth and includes property rights, labour rights and women's rights. Availability of an independent and impartial judiciary is also essential as it guarantees the enforcement of contracts. Lastly, the rule of law is necessary for the integration of international economies and in attracting foreign investment.

It must, however, be noted that there are challenges associated with employing the rule of law in fostering economic development such as difficulties in determining causation as well as the resource constraints of championing the rule of law faced by most developing countries.

The donor supporting Muchinda Muma's scholarship at University of Zambia is DLA Piper, London, UK ([www.dlapiper.com](http://www.dlapiper.com)).

## Notes

- 1 Tor Krever, 'The Legal Turn in Late Development Theory: the Rule of Law and the World Bank's Development Model' (2011) 52(1) *Harvard International Law Journal* 288.
- 2 A V Dicey, *The Law of the Constitution*, Ch IV cited by H W R Wade in *Administrative Law* (6th edn, Oxford: Oxford University Press 1988), 23.

- 3 *Ibid* 23.
- 4 Wade, n 2 above, 24.
- 5 *Ibid* 24.
- 6 Wade, n 2 above, 25.
- 7 Krever, n 1 above, 312.
- 8 Erik De Beer and Hennie Swanepoel, *Introduction to Development Studies* (2nd edn, Cape Town: Oxford University Press Southern Africa 2001), 1.
- 9 *Ibid* 2.
- 10 *Ibid*.
- 11 De Beer and Swanepoel, n 8 above, 3.
- 12 Dan Moynihan and Brain Titley, *Economics: A Complete Course* (3rd edn, Oxford: Oxford University Press 2000), 288.
- 13 Norman L Greene, 'Perspectives from the Rule of Law and International Economic Development: Are there Lessons for the Reform of Judicial Selection in the United States?' (2008) 86(1) *Denver University Law Review* 68.
- 14 Moynihan and Titley, n 12 above, 293.
- 15 Frank H Stephen, 'Laws, Enforcement, Legality and Economic Development' (2008) 26(37) *Journal of Law and Policy* 44.
- 16 Erika Schlaeppli, *Rule of Law, Justice Sector Reforms and Development: Concept Paper* (Berne: Swiss Agency for Development and Cooperation 2008), 9.
- 17 *Ibid*.
- 18 Charles F Sherman, 'Law and Development Today: The New Developmentalism' (2009) 10(9) *German Law Journal* 1270.
- 19 David M Trubek, 'The "Rule of Law" in Development Assistance: Past, Present, and Future', accessed from <http://dev.law.wisc.edu//facstaff/trubek/RuleofLaw.htm> on 25 November 2013: 12.
- 20 *Ibid*.
- 21 Frank H Stephen, 'Laws, Enforcement, Legality and Economic Development' (2008) 26(37) *Journal of Law and Policy* 45.
- 22 Tor Krever, n 1 above, 315.
- 23 De Beer and Swanepoel, n 8 above, 18.
- 24 Michael P Todaro, *Economic Development* (11th edn, New York: Adison-Wesley 2011), 237.
- 25 David M Trubek, n 19 above, 14.
- 26 *Ibid* 20.
- 27 James D Wolfensohn, A Proposal for a Comprehensive Development Framework, 21 January 1999 cited by Norman L Greene, 'Perspectives from the Rule of Law and International Economic Development: Are there Lessons for the Reform of Judicial Selection in the United States' (2008) 86(1) *Denver University Law Review* 74.
- 28 *Ibid* 63.
- 29 Erika Schlaeppli, *Rule of Law, Justice Sector Reforms and Development: Concept Paper* (Berne: Swiss Agency for Development and Cooperation 2008), 9.
- 30 Trubek, n 19 above, 14.
- 31 Frank H Stephen, n 21 above, 51.
- 32 Todaro, n 24 above, 11.
- 33 Trubek, n 19 above, 14.
- 34 Greene, n 13 above, 80.
- 35 *Ibid* 82.

**Gloria Ludigo**Uganda Christian  
University, Mukono  
gloshlucky@yahoo.com

# Essay 7: How can the rule of law reduce poverty and foster economic development?

Start by defining what the rule of law is or is said to be and go on to explain how it should be implemented to reduce poverty and to ensure economic development. The rule of law refers to a set of rules and procedures governing human and institutional behaviour that is autonomous and possesses its own logic. These rules are fundamental to society and provide the guides for all other rules that regulate behaviour. The rule of law argues for legitimacy of the legal system by claiming that all persons will be judged by a neutral and impartial authority and no one will receive special treatment; one of its major components is the due process of law.<sup>1</sup>

History has shown that economists acknowledge the role of the rule of law in economic development, especially after the crumbling of the Washington Consensus in the 1980s, which held the orthodoxy that the way for countries to grow was to get the policies right, but the Asian crisis of 1997–98 shook the confidence of economists in such policies. This notwithstanding, economists have repeatedly found that the better the rule of law, the richer the nation.<sup>2</sup>

The absence of basic institutions that support a vibrant economic system is seen as the major reason why most developing countries remain poor. The central element of stimulating economic growth in developing countries and lifting them from poverty is through establishing an environment in which legal rights, especially contractual rights, are protected. What is often taken for granted are the necessary legal frameworks necessary to support market economies, especially where the legal institutions are ineffective or lacking the need to establish effective institutions.

The issue of economic growth may be largely a question of governance. This raises the question as to what legal reforms are then necessary to ensure economic development and the eradication of poverty in developing countries such as Uganda.

The World Bank and International Monetary Fund are at the forefront of efforts to implement institutional law reforms in developing countries. They do this by conditioning financial assistance to be given to countries on the implementation of law reforms. In Uganda, donor countries such as the Netherlands and United Kingdom conditioned grants on the implementation of a system to curb corruption plus accountability of misused funds with the aim of expanding the rule of law. However, I was disappointed by the donors when they tried to condition financial assistance on the country's refusal to implement laws such as the anti-homosexuality bill, which was supported by the majority of Ugandans because homosexuality is considered contrary to the norms and beliefs of the majority. In a democratic society going against the views of the majority would be contrary to the rule of law as enshrined in Article 2 of the Constitution of Uganda, which states that the law is the view of the people of Uganda. The other critique is the use of economic resources in the implementation of the initiatives for the rule of law yet they would have been used in the direct alleviation of poverty and provision of services to the poor.

The rule of law fosters a market-friendly environment in which economic exchanges take place and other wealth-creating activities can occur. The rule of law promotes stability, predictability and consistency in the enforcement of legal rules affecting the operation of the market.<sup>3</sup> Stability of the market enables people to join the trade knowing their rights are protected and preserved. A case in point is the patent law, which protects patents and inventors in all technological fields, and also the principles of contract law, such as offer, acceptance, consideration, capacity and intention to contract – if met, they will reassure parties that those with whom they are doing business will meet their part of the bargain.

In Uganda, the government has created

policies that are intended to protect prospective investors, thus attracting a large number of investors. Some incentives include provision of an industrial park, tax holidays, subsidised taxes in the case of importation of raw materials and a ready market for their products. Therefore the rule of law with regard to incentives to attract investors has been laid down in Uganda in order to attract investors who will create jobs for the locals, which will in turn reduce poverty and promote economic growth.

Business activities boom in an economy where legal rules are predictable and do not depend on the whim of government officials. The rule of law is therefore important to protect the layman from being exploited by government officials who may use their powers to their advantage and to the detriment of the common man. This will put confidence in the public to work hard knowing they are being protected, thus encouraging economic growth and consequently eliminating or reducing poverty.

The rule of law dictates political stability as one of the pillars of economic development in society. Trade does not expand and develop in a region that is politically unstable because there is no organised economic system during the instabilities and therefore the business mind would not risk trading under such conditions. For example, in the northern region of Uganda, there has been less trade, growth and development compared to other parts of the country, owing to political instabilities there. A case in point is the recent economic strikes in Greece and Spain. Governments should therefore resort to diplomatic means of settling disputes such as mediation and arbitration and court, including war as the last option.

Respect for human rights is an important aspect in fostering economic growth. A country where the rights of the citizens are violated is bound to be under-developed whether the abuse of the said rights is by individuals or by the government. The United Nations Universal Declaration of Human Rights caters for rights such as a right to own property and participation in social, economic and political activities irrespective of gender, colour, race or beliefs and norms. A government that does not respect human rights loses popularity on the international scene thus scaring away potential investors and causing experts to migrate to better countries where their rights will be respected thus curtailing economic growth. Research

has shown that the highest levels of human rights abuse are found in the least developed countries and regions, therefore one of the incentives to ensure economic growth is to curb the abuse of human rights because when people are economically empowered they are able to fight for their rights.

The issue of human rights, however, is not considered as a deal breaker for some investors. A case in point is China. Despite its high level of human rights abuses, this has not affected the rate at which foreigners are investing there. On a case-by-case basis, some human rights violations do not affect returns on investment; therefore some human rights violations do not affect the economy.

In a bid to promote growth and eradicate poverty, it is not enough for governments to provide resources, it is important for them to make the resources accessible to all people up to the grass-roots level. This can be done through the education of the masses of their rights, duties, obligations and entitlements as citizens. For example, it is not enough for governments under the health sector to build hospitals; they have an obligation to make them accessible by equipping them with the necessary medical personnel and supplies, plus providing transport to patients in a critical condition through the provision of ambulances. The government can make them accessible by offering drugs at subsidised prices and ensuring the medical personnel do not relocate resources to their personal clinics. This will improve the provision of services and reduce death rates, especially the maternal mortality rate. Therefore knowledge about the resources and accessibility is a step towards achieving economic growth.

The government should also educate the masses in relation to economic activities and incentives attached thereto. For example, in a country like Uganda, which is mainly agriculture based, the government has and should continue to provide support in the form of start-up capital, tips on good farming methods attained through research and also searching for market for their products.

I would recommend that nations curb vices such as corruption, which is prevalent, especially in the public sector where public workers use public funds for their own benefit, to the detriment of the public. The state should set up good rules and laws plus a strong implementation mechanism, which is lacking in most countries. Corruption is a vice that creates income inequality, therefore a country's GDP may reflect



economic growth yet most of the resources are in the hands of a few people therefore it is important that resources are equally distributed and this can be done through curbing the vice of corruption. On the issue of the implementation mechanism I would recommend that countries follow the example of China, which has managed to reduce cases of corruption, especially the ‘firing squad system’ and even if this system is considered inhumane and a violation of human rights but what is humane about an official entrusted with public funds and property using them for their own benefits to the detriment of the public?

Nations should also slow down the increase in their populations through educating women on methods of family planning such as use of contraceptives and condoms. In countries such as China, which has a high population rate, the one-child policy has been adopted. Although over time this policy has succeeded in reducing population growth, inhuman activities such as murder and untold suffering have been felt by the population. Furthermore, in a society where parents are dependent on their offspring during old age, parents are bound to suffer if their offspring die before them. Therefore I recommend that birth control should be an initiative that both men and women benefit from. In a patriarchal society, where men determine how many children they should have in a family, then the use of birth control methods becomes almost impossible if the woman is left with the responsibility of ensuring birth control therefore it should be a joint effort between the woman and man. There should be voluntary testing for HIV/AIDS so as to control the spread of the virus and ensure the sick are treated because a sick population is a liability not an asset when aiming to ensure economic growth.

The dependency of developing countries on donor aid makes them very vulnerable to debt and manipulation. For example, prior to the current financial budget, Uganda’s budget was substantially funded by donor countries such as the United Kingdom and United States, thus putting the country in debt, yet most of the money was being misappropriated by government officials. A case in point is the GAVI fund saga, where money donated to Uganda’s ministry for health for the treatment of diseases such as tuberculosis and HIV/AIDS was misappropriated. Therefore there is no economic growth and the country is in the

dilemma of having to shoulder a debt that did not help the layman therefore leaving the public in double jeopardy because they have not been given services and they have to shoulder the heavy tax burden to pay back the funds. The rule of law on the use of donations should be upheld and culprits punished if economic growth is to be achieved.

Nations should be prepared for natural disasters especially countries that are more susceptible to natural disasters such as Australia, China, Japan and the United States. These countries are prone to calamities such as tornadoes, floods and wildfires. They should equip their inhabitants with knowledge on how to survive during those times and also equip the departments that are in charge of natural disasters. Uganda should also relocate and resettle landslide victims and also equip the ministry in charge with resources and knowledge and not always depend on international organisations such as the Red Cross and United Nations.

The governments of all nations and their respective law-making bodies should make laws or reforms to already existing laws in line with prevailing economic conditions of the country, for example the law on contracts, property ownership, patents, taxation and revenue. The law-making bodies should make important and essential laws instead of advocating for their own benefits such as increases in salary, iPads and surveillance cameras for the parking lot of the August House – ironically worth billions in a country where the majority of the population is living below the poverty line.

The principle of the rule of law works side by side with the principle of the separation of powers, which is figuratively referred to as the three cooking stones of the executive, judiciary and legislature. The three bodies are autonomous but work hand in hand and do not dictate the activities and powers of the other; however, in Uganda, the executive has a tendency to usurp the powers of the legislature. For example, the executive directed the legislature to strike out the provision on term limits contrary to the rule of law as expected in a democracy. Contrary to the rule of law, the chief justice, with the support of the executive, has remained in power despite attaining retirement age. This is also a common occurrence in the public sector, where public servants are still in office despite attaining retirement age yet there are many unemployed youth who would be instrumental in paving the way forward

towards achievement of economic growth.

On the international scene, the rule of law can be upheld by the elimination of double standards by super powers such as the United States, especially while conducting foreign policies, for example the UN intervention in Iran and Syria. In Syria, on the issue of chemical weapons, they instructed Syria to destroy its nuclear weapons yet other nations such as North Korea and Russia have not been instructed to do the same. This has led to political and social instability, which has hampered Syrian economic growth. The United States has also spent a lot of money on its foreign policies, leaving it in debt.

The failure of nations to draw definite border lines has led to increased instability between nations. A case in point is the conflict between Israel and Palestine over the Gaza Strip, which has led to the failure of the growth and development of the strip socially, politically and even economically. Perhaps therefore the International Court of Justice should decide the dispute so as to give the Gaza Strip a chance to develop.

The question requires that we examine how the rule of law fosters economic growth but I would like to aver and advocate for economic development rather than economic growth

because economic growth is reflected by an increase in GDP yet the majority of the population may still be living beneath the poverty line or in abject poverty. Economic growth does not reflect good or improved standards of living among individuals; it's just a reflection of improved government returns in relation to exports, unlike economic development, which reflects improvement in general standards of living both in government incomes from exports and public standards of living. For example, a country such as China has economic growth while a country such as Switzerland is considered economically developed and that's the standard I would like developing countries such as Chad, Congo and Uganda, to name but a few, to attain through the rule of law.

The donor supporting Gloria Ludigo's scholarship at Uganda Christian University is DLA Piper, London, UK ([www.dlapiper.com](http://www.dlapiper.com)).

#### Notes

- 1 <http://legal-dictionary.the-free-dictionary.com>.
- 2 [www.economist.com](http://www.economist.com), 'economic and the rule of law.'
- 3 Okezie Chukwumerije, 'Rhetoric Versus Reality: the Link Between the Rule of Law and Economic Development' (2009) 23 Emory International Law Review 415–416.

# TOKYO 19-24 OCTOBER 2014

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



the global voice of the legal profession®



**W**ith a population of more than 13 million, the capital of Japan and the seat of Japanese government is one of the largest metropolises in the world. A city of enormous creative and entrepreneurial energy that enjoys a long history of prosperity, Tokyo is often referred to as a 'command centre' for the global economy, along with New York and London. Not only a key business hub, Tokyo also offers an almost unlimited range of local and international culture, entertainment, dining and shopping to its visitors, making it an ideal destination for the International Bar Association's 2014 Annual Conference.

## WHAT WILL TOKYO 2014 OFFER?

- The largest gathering of the international legal community in the world – a meeting place of more than 4,500 lawyers and legal professionals from around the world
- More than 180 working sessions covering all areas of practice relevant to international legal practitioners
- The opportunity to generate new business with the leading firms in the world's key cities
- A registration fee which entitles you to attend as many working sessions throughout the week as you wish
- Up to 25 hours of continuing legal education and continuing professional development
- A variety of social functions providing ample opportunity to network and see the city's key sights, and an exclusive excursion and tours programme

REGISTER BEFORE  
**1 AUGUST 2014** TO RECEIVE  
EARLY REGISTRATION DISCOUNTS

To register, please contact: International Bar Association  
4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom  
Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 [ibaevents@int-bar.org](mailto:ibaevents@int-bar.org)

[WWW.IBANET.ORG/CONFERENCES/TOKYO2014.ASPX](http://WWW.IBANET.ORG/CONFERENCES/TOKYO2014.ASPX)

### OFFICIAL CORPORATE SUPPORTERS

