

AFRICA AND THE RULE OF LAW

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- *The problematic rebirth of liberalism in Africa and why the rule of law must be reconsidered to achieve sustainable development* •

ABSTRACT

The rule of law is often seen as a panacea for ensuring a successful, fair and modern democracy which enables sustainable development. However, as Makau Mutua highlights, this is not the case. Using the example of African states, he describes how no African country has truly thrown off the shackles of colonial rule and emerged as a truly just nation state – even though many have the rule of law at the heart of their constitutions. This, he argues, is because the Western concept of the rule of law cannot be simply transplanted to Africa. The concept must be adapted accordingly to take into account the cultural, geographic and economic peculiarities of each state. In order to achieve this, Mutua offers seven core values which the rule of law must reflect in order to achieve sustainable development across the continent.

KEYWORDS

Rule of law | Africa | Sustainable development | Liberalism | Post colonialism

1 • Introduction

Few concepts have been as captivating as the rule of law.¹ The concept stretches deep into antiquity and the Magna Carta. Its genius lies in the subordination of rulers to the law and due process. The modern democracy – which is not possible without the rule of law – is anchored in liberalism, the Enlightenment project, and attempts at the universalisation of its morality. In a historical continuum, liberalism predates and gives birth to political democracy which in turn is universalised in human rights. The common thread that runs through them is the rule of law. But the rule of law is not without complication and controversy. Like political democracy and human rights, it has endured a checkered history and been subject to profound critiques about its normative incompleteness, cultural blindness, Anglo-Saxon imperial complicity, and historical context.² For Africa, the rule of law and related concepts offer hope and caution in an environment replete with extreme complexity and historical trauma.

Distinction ought to be drawn between the “law” and the “rule of law”. The two terms are often conflated. Charles Dickens in *Oliver Twist* popularised the English expression “the law is an ass – an idiot.”³ The reference by Dickens was to the rigidity of the application of the law, not the law itself *per se* as an artifact. The point is that like the donkey, the law is rigidly stupid and obstinate in its application. Stripped to its bare minimum – and shorn of more modern meanings that impute human rights at its core – the rule of law assured fidelity and certainty to its application. The question was not whether the law was just or fair. It is the rule of law – not the law itself – that needs interrogation. Put differently, it is the language of rights – interpreted as the rule of law – that requires scrutiny.

This piece accepts the common view that no viable society can exist today without a credible, legitimate, and widely accepted legal regime. In other words, both the law and the rule of law are indispensable pivots of any legitimate political society. Systems of arbitrary personal rule, or kleptocracies have no place in the modern world. But this paper argues that such a view is only anti-catastrophic and does not answer the challenges of powerlessness that continue to cause and exacerbate human privation. A system governed by the rule of law is more likely to prevent the collapse of social and political order but it may not address deeply embedded inequities. It may provide procedural justice but deny substantive social justice. Indeed, both liberal and even illiberal regimes are governed by the rule of law. But that is not a bar to oppression, exclusion, and marginalisation. This article argues that virtually all African states experience large gaps of legitimacy that the rule of law is unlikely to cure unless deep social transformation is undertaken. The medium of rights is not an adequate tool for human liberation. The piece identifies deficits that the rule of law could address but cautions against the euphoria of solely relying on the law to undo deep societal distortions. Ultimately, the article questions the viability of the liberal project in the construction of a just and humane society. It concludes that market solutions coupled

with income inequality and the powerlessness engendered by social alienation, exclusion, and other post-colonial distortions ought to give the global rule of law communities a pause. Thinking anew the place of the rule of law in a resurgent Africa must be done, but the failed models of yore should not be replanted. The rebirth of liberalism in Africa – if that is what Africans want – must be problematised. But that rebirth must deepen democracy to release the human potential of every African.

2 • Africa's History of Trauma

Africa has young states even though it is an old continent. Perhaps no other continent has suffered more trauma than Africa over the last 500 years. The Arab and European/American trade in enslaved Africans stands out for its brutality and legacy on the peoples of the continent. The slave trade was closely followed by the Scramble for Africa in which African societies, institutions, and norms were wrecked by European imperial powers. The plunder and theft of Africa's resources for the benefit of the West stands out in the era of colonialism. Independence from colonial rule starting in the 1950s brought little relief as the hopes of a resurgence were consumed in the cauldron of the Cold War and a scandalous international economic order.⁴ Opaque and oppressive one-party states and military dictatorships proliferated the continent. African ruling elites failed to implant the promise of the liberal constitution and to cohere the state. The transition from colonialism to an independent, viable post-colonial state proved exceedingly challenging. Elites chose first to consolidate their own power. They stifled dissent, dismantled liberal constitutions, retreated to ethnic loyalties, and buttressed the patrimonial state.⁵ Corruption and crony capitalism became a culture. Infrastructures collapsed, societies fragmented, religious, civil, and ethnic conflicts became all too common. A number of states entirely collapsed.⁶ The transition from colonial rule to a viable post-colonial state proved more challenging than was expected. Building and sustaining state institutions – including in the justice sector – was undermined by the lack of internal cohesion, ethnic rivalries, cultural dissonance, and external interventions.

Every arm of the state – executive, legislature, and judiciary – experienced contraction, dysfunction, or collapse. An overbearing executive was often the culprit. The men in power usually corralled the legislature and turned it into a rubber stamp. The Africanisation and indigenisation of the judiciary failed to transform the justice sector from a colonially racist, anti-people, and oppressive instrumentality. Judges became extensions of the executive and served at its whim. Instead of becoming fountains of justice, courts were used to instill fear in the populace at the behest of the executive. The courts were used to crush political dissent and curtail civil society.⁷ Under this climate it was impossible to even think of reconciling competing legal regimes within the state. Formal and informal justice systems – civil and common law, Muslim and sharia law, African dispute resolution and justice regimes, and Hindu law – co-existed without coordination. The result was a confused hodge-podge, a stew of legal regimes

in which justice was often the casualty. Legal pluralism, otherwise a source of strength and vibrant diversity, instead subjected citizens to often unequal, and discriminatory treatment. This was especially true for women and girls. As a result, courts and the wider legal sector were rarely viewed as legitimate institutions where citizens could seek justice. Judges were viewed with disdain, contempt, or fear in most African states. This is why today the law, courts, and the legal sector are viewed with suspicion by most Africans. Judiciaries are not perceived to be the guardians of legality or impartiality. To be sure, the illegitimacy of the justice sector extended to all the other arms of the state.

But even with these challenges Africa has been a resilient continent. The ravages of the Cold War started to retreat with the collapse of the Soviet bloc in the late 1980s. Africans arose as one to demand freer societies across the continent. Civil society was reborn. Political opposition found its voice and mobilised to take power. The entire continent, except Arab North Africa, was rocked by a wave of political liberalisation not seen since the Independence Decade.⁸ It would not be until the fall of the Ben Ali kleptocracy following mass protests in Tunisia that the phenomena known as the Arab Spring ousted one dictator after the next in Arab North Africa.⁹ A cauldron of revolutionary protests consumed long serving despots in Egypt, Yemen, Libya, and besieged others in Syria and Bahrain. In Africa, virtually all states have given in to political reforms. In Africa in particular, new social compacts, usually in the form of a rewritten, or new constitution, became the norm. Central to the new compacts between the state and citizens were the key tenets of the liberal tradition. These were the rule of law, political democracy through multipartyism and open, contested elections, checks on executive power, judicial independence, separation of powers, and a guarantee of individual rights. This wave of remaking the African state was known as the Second Liberation.¹⁰ South Africa shed off Apartheid. To signal a new era, in 2001 African states transformed the Organization of African Unity, an organ formed to complete decolonisation, to the African Union (the “AU”). One of the key objectives of the AU spoke to this new compact. It states clearly that the AU shall “promote democratic principles and institutions, popular participation and good governance.”¹¹

The last two decades have seen a steady rise in Africa’s growth in virtually every sector – justice, economic, social, and political. Africa today has some of the world’s fastest growing economies.¹² To be sure, there have been horrible reversals in some states, and a stubbornness to crises in others. The most desperate cases are driven by the collapse of social order, the failure of governance, and the persistence of privation. But the denial of citizens of the right to map their own fate has been at the centre of misery in the few states that have not joined the caravan of freedom. Even in those states that opted for a return to political democracy within the last two decades, many problems persist. Social inequities, economic deprivation, discrimination along every cleavage, and the lack of social justice are manifest. Either democracy has not been deepened, or a culture of justice has not penetrated the bone marrow. Challenges to entrenching systems of governance that give meaning to citizenship remain. Many

populations are still excluded from political participation and economic opportunity. It is clearly not enough to write great constitutions and enact good laws. Nor do elected legislatures and executives automatically usher a culture of justice, or create a human rights state. Judiciaries remain beholden to powerful and vested interests in politics and the economy. Power is still concentrated within very few hands, regions, or groups. The rule of law – understood as adherence to good laws – is not enough of a panacea for Africa’s complex problems. There is no doubt that Africans must unpack the concept of the rule of law within a democratic polity to respond to these challenges.

3 • The Rule of Law as a Terrain of Contest

Its checkered history notwithstanding, the rule of law remains a pillar of good governance. It has evolved over time to contain within it the core values of human rights. Over time, the understanding of the concept – including its normative reach, scope, and content – has become more sophisticated. Soon after Africa’s independence, cadres of Western academics and policy-makers believed that Africa’s new states would be “civilised” by the rule of law. Western thought viewed pre-colonial Africa as pre-law, and thus argued that emergent states needed formal Western legal regimes to enter modernity. No credit was given to pre-existing African legal systems, which were often referred to as “customary law,” “traditional,” “savage,” or “uncivilised”. Such views were common in the colonial Church which often was practically fused to the colonial state. A pithy example is that of Shropshire, a British missionary in what is present-day Zimbabwe. He wrote of “unlettered Natives” who “were in the technically barbaric and pre-literary stage of cultural and social development.”¹³

European, or white, predestination over black, brown, or yellow peoples has a long history. Shropshire’s worldview was part of the fuel for the colonial project. It is a philosophy that grounded the civilising mission, the justification for Empire, and the attendant Christian conquest over “barbaric” peoples. Rudyard Kipling, the English poet, captured it well in the *White Man’s Burden*:

*Take up the White Man’s burden, Send forth the best ye breed
Go bind your sons to exile, to serve your captives’ need;
To wait in heavy harness, On fluttered folk and wild—
Your new-caught, sullen peoples, Half-devil and half-child.*¹⁴

Kipling was not writing about Africa here, but his exhortation of the United States of America to take over and civilise the Filipino natives is a classic. His command to white men to colonise native peoples for their benefit is a duty of the race. It is impossible to understand the colonial project and the movement of modernity absent Kipling’s worldview. Nor is it possible to comprehend the Westernisation of the Global South through the mediums of the modern state with the apparatuses of concepts such as the

rule of law and human rights.¹⁵ Much of it was a negation of existing norms – an attack on accumulated wisdom. It was the murder of the spirit of so-called native peoples.

This is the context in which the West viewed the rule of law in Africa during colonial rule and especially in the aftermath of decolonisation. These erroneous notions were partially fueled by another erroneous assumption – that pre-colonial Africa was devoid of law, or that so-called African customary law was a downwind on the African state. The initial law and development movement sought to implant Anglo-Saxon legal norms in emergent states through the establishment of law schools, the training of legal professionals such as judges and lawyers to support a market economy and budding political institutions. No attempts were made to view law in the wider social context both domestically and internationally. How could law be used to transform deeply embedded social and economic injustices? Was there a difference between due process and procedural justice, as opposed to substantive justice? Would law play any role in freeing Africa from an unjust international economic order? Would the rule of law combat illiberalism or bad governance by rulers and elites bent on husbanding their privileges? In a word, how could law be used as a tool for social justice? These questions, which are central to the rule of law, went largely unanswered. As a result, many of the same academic proponents of the initial rule of law movement for development declared it a failure by the early 1970s.¹⁶ Thereafter, the concept of the rule of law and development endured ridicule. Academics and policymakers realised how complex, and arduous, the process of creating viable and legitimate states would be. The early optimism died. Over time, there was realisation that rule of law understood in a more liberating idiom would play a key role. Thus its centrality in the rethinking and practice of social reconstruction, nation-building, spurring economic development, and good government never went away. The reason is that Africans understand, and do not want to imagine, let alone live in, a society devoid of the rule of law. It is the meaning and practical effect of the rule of law, not its importance or necessity, that remains a terrain of contest. What is clear is that the concept is rapidly evolving and is being re-imagined by thinkers and practitioners.¹⁷ Even so, it still has its ardent critics and fervent defenders.¹⁸

The crisis of legitimacy of the rule of law has not dimmed its star. In fact, the current re-imagining of the African state is not possible without the rule of law. Concepts of transparency and accountability – which are central to the rule of law – lie at the centre of efforts by civil society, the political opposition, the press, and the judiciary to penetrate and reform the deep state. The writing, or revision of new constitutions, place at the centre the use of the rule of law to promote equity and protect the citizen and her resources from plunder. It is the norm used to justify why power must be decongested – deconcentrated – from the centre and brought closer to the people. The emerging clamour for devolution as a legal and constitutional device to address official impunity and create less opacity and accountability in smaller units embeds the rule of law as one of its key weapons. In an era where social media makes each citizen an “eye of the people”, access to timely information and official documents permits the audit of the state by the

public. However, such an audit is not possible if government is not open and subject to law. The ability of marginalised communities to participate in politics and economic development depends on access to information. So is the delivery of services, access to justice, and health care. Individuals and communities are able to mobilise themselves for political action, or planning for development, if they can freely organise. Dialogue with, or protest against, local and central authorities is not possible without the rule of law.

4 • Rethinking Development

Africa must think anew about how to address many of the deep-seated questions that continue to bedevil state and society. The crises facing the continent do not have easy solutions. The problem is not the diagnoses of the malaise, but in the prescription to overcome them. Two variables, which are related, are often thought to be at the centre of these crises. The first, and perhaps the most important, is the nature of the African state itself. The illegitimacy of the imposed colonial state and its resistance to democratisation are key reasons for its dysfunction. The African state is reflexively repressive and generally disdainful of civil society. It has trouble performing the basic functions of statehood. Its proclivity for corruption is well known. These problems stand at the centre of the crisis. The second variable is Africa's relationship with the international legal, political, and economic order. International institutions, hegemonic states, and the culture of international law have at best been negligent, and destructive at worst. Internally, Africa has attempted to answer the first challenge by rewriting the constitutional order to create a more transparent and responsive state. This attempt to reinstitute the original liberal promise of the early post-colonial state has born unsteady but visible results. On the second challenge, which is external, Africa has become more assertive with a resurgent economy.

The problem of development – underdevelopment – has been a major challenge for Africa. Different global, continental, and national initiatives have been tried. While there have been some successes, no one can dispute the persistence of poverty even in the best endowed and most developed countries on the continent. Large populations continue to live in dire poverty. Inequality, discrimination, and violations of the most basic human rights are endemic. Bad governance and corruption eat away at the fabric of society. Some global initiatives, such as the much-touted Millennium Development Goals (the “MDGs”), have come and gone. While the MDGs were laudable, and some progress was made under them, the overall record has been mixed. Some critics argued that the MDGs were vague and lacked sufficient input from the Global South.¹⁹ The legitimacy of the MDGs was questioned. Critics charged that the constituencies targeted by MDGs were treated as passive recipients, not actors with agency. Neither the rule of law, nor human rights, were explicit in the agenda.²⁰ It is now clear that accountability and transparency – nationally and internationally – are essential to meaningfully transform societies. The post-2015 Sustainable Development Goals (the

SDGs), a more refined global initiative, seeks to remedy some of the deficits of the MDGs. Will the SDGs do for Africa what the MDGs could not?

Unlike the MDGs, the SDGs have a more expansive and exhaustive catalogue of goals that span the entire scope of the human condition.²¹ The essential elements in all the goals are equity, sustainability, inclusivity, transparency, empowerment, access, and equality. Of all the SDGs, Goal 16 comes closest to articulating a rule of law agenda in the context of development. It calls for the promotion of “peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”. The key language – “provide access to justice for all” – recognises that sustainable development is not possible without functioning and effective institutions to dispense justice without fear or favor to every person. This is the essence of the rule of law. The rule of law is not simply a totem of democracy, but an integral and core element in every aspect of human development. Although it has historically been associated – wrongly – with only civil and political rights, the rule of law is indispensable for the realisation of economic, social, and cultural rights. The segregation of the two canons of human rights was not a labour of the intellect, but a necessity of politics. That is why the chasm of both sets of rights cannot be watertight, and must be collapsed in any true development initiative. This is particularly true for Africa where the violations of one canon of rights (civil and political rights) is a direct result of the denial of the other (economic and social rights). A dynamic understanding of the rule of law in Africa cannot be limited to legal formality and procedure. It must have as its core norm a rejection of oppressive vested property and market interests that use the law to protect ill-gotten wealth and an unjust economic order. Social and substantive justice must be a mission of the rule of law.

5 • Beyond Traditional Liberalism

Development is not a linear process that can be reproduced from country to country. In fact, the contrary is true. Transplanted models of development and politics have fared very poorly in Africa. There is ample evidence, empirical and otherwise, that the traditional tools of the formulaic liberal state are not a panacea for Africa’s ills.²² Africa cannot adopt undigested liberal theories of the state reconstruction if it hopes to benefit from some of the most compelling values.²³ It must identify and rethink many normative tenets of liberalism and thus the rule of law. This is necessary to respond to the particular historical challenges and cultural context of the African landscape. Thus the rule of law cannot be exported to Africa ready-made. The rule must be divorced from its imperialist origins and uses.²⁴ Africans need to identify and isolate those thematic, normative, and sectoral areas most likely to be impacted the most by the language of rights, and use the rule of law to transform them. Many of them are overarching and cross-cutting. The core values are: integrity, transparency,

accountability, equity, equality, access, and participation. No sustainable development – which gives citizenship meaning and every citizen a sense of belonging and allows a culture of justice – is possible without them. Simply put, the rule of law is meaningless without each of these core values which must be addressed in the followings ways:

1 – Devolution

It is unarguable that a thorough reform of the state and its institutions is a condition that is required for development to occur. A key problem has been the concentration of power in the executive, and the concentration of that power in the hands of the head of state. This arrangement begot the patrimonial state and bred impunity and corruption. Power must be decongested and devolved to smaller units within the state. But power should be understood as both political and economic. Thus devolved units must have the ability to plan and expend resources in a locally participatory process. This makes locally elected officials accountable at the grassroots. But care must be taken that the corrupt practices at the centre are not just simply devolved to local powerbrokers. Nor should the local units engage in practices of exclusion and marginalisation along gender, religion, ethnic, or other cleavages. Devolution of power and resources is therefore one of the most effective devices for creating the conditions for sustainable development. The true devolution of power brings government closer to the people because it creates opportunities for popular participation in the projects and institutions of governance, including actors in the justice sector. Done correctly, devolution demystifies the courts and makes justice tangible to citizens. Devolution in this imagination goes beyond process – it is consequentialist and concerned with substantive outcomes and outputs in social justice. Devolution can be a safety valve for ethnic grievances in fractured societies because it permits a degree of regional, or ethnic autonomy, without weakening the central state, or turning into full-blown federalism. It can enhance national cohesion and give pre-colonial loyalties a reason to embrace the post-colonial state to create a national consciousness. In Africa, where virtually every state is hodge-podge of distinct pre-colonial ethno-political societies forced together by the colonial cartographer,²⁵ devolution serves the purpose of forging a common national identity.

2 – Transparency

This is an unarguable condition which is required for inclusive and participatory political and economic development. Without it, any meaningful notion of the rule of law, or a culture of justice, would be a mirage. State brutality, impunity, and corruption grow where the state is opaque. Information about government resources and how they are spent is essential. This requires institutions of oversight at the local and national levels and an unfettered press. Citizen participation in planning – akin to the traditional African *baraza* (public open-air meeting) – allows communities to claim their own development and gives meaning to their agency. This is especially true, for example, in the context of the exploitation of mineral and natural resources.

3 – Equity and social justice

These are indispensable to social stability and development. One of the most underdeveloped sectors in African states is the justice sector. Traditionally, judiciaries have been beholden to the executive and corrupt private business interests.²⁶ Courts of law are often not fountains of justice.²⁷ Judges are regularly for sale, and lawyers facilitate the corrupt deals. Large segments of the population that cannot buy justice have no access to the courts. Women and the poor, often the largest segments of the population, are shut out. It is not unusual for litigants to wait for a decade before a case is heard. Lack of access to justice is compounded by the paucity of courts in rural areas where the majority of Africa lives. Yet this is where courts are most needed to settle land disputes and protect the vulnerable such as women who are often disinherited, or subjected to severe exclusion. These conditions create an angry and impoverished population incapable of playing any meaningful part in development. Such marginalised populations cannot defend themselves or take part in the practices and ceremonies of political democracy. These conditions hollow citizenship out. The answer to these dire conditions is to re-establish the institutions of justice and retrain people working in the judicial sector. There are many examples in Africa where the successful recreation of the justice sector is already underway. Access to justice must be an end in itself. But a re-imagining of the justice sector cannot reify the judiciary, or forget to integrate and treat with dignity so-called alternative justice systems. Legal pluralism is a fact of most African states, but the most neglected legal regimes, such as sharia law and African dispute resolution mechanisms, affect millions. A reform of the sector needs to regularise these systems and bring them within the purview of public law while at the same time cross-breeding their most liberating norms with the common or civil law systems.

4 – Culture of governance

Or put differently, the culture and style of politics. In Africa, the culture of governance weighs heavily on the state. Political power is remote from the people. Those who carry the instruments of the state expect to be feared, not just respected. Public officials are masters, not servants of the people. This construction of public power goes against every norm of democratic governance. It stifles citizens, kills dissent, and dulls the public. It puts the state at perpetual loggerheads with the people. It creates deep distrust in the population towards public authority. This culture of dictatorship has been identified by Africans as the greatest hurdle to sustainable development. It breeds impunity and runaway corruption. It is unaccountable. The arrogance of power facilitates the theft of public resources and condones the violations of basic human rights. Great strides to unpack this phenomenon have been made in the last two decades. Intellectually, Africans know that this indefensible culture is the bane of the state. The African press in every country is awash with incident after incident of unacceptable conduct by public officials and their business acolytes. It is a culture that must be directly interrogated

and publicly confronted. Africa will not advance unless these colonial-era mentalities of governance are banished from public life.

5 – Women and citizenship

Gender remains among the thorniest challenges to the rule of law and development. A poisonous mix of culture, colonial-era laws, and religious practices have conspired to consign women and girls to the margins of society. Their exclusion from public life is a stunning fact of African existence. The privation of African women – from domestic violence to exclusions on property ownership are well known. The facts haunt the human conscience. Yet some women have been resurgent of late with many joining the professions, as business entrepreneurs, and within the corridors of public power. But gender biases persist, and those who have escaped marginalisation are but a tiny few. There is consensus that actual and sustainable development will not occur unless women are not only included, but play a manifestly public role. The concept of the rule of law must be transformed by theories of insubordination and multidimensionality – recent understanding of gender and powerlessness that unpacks the complex ways in which multiple identities subject a group to layers of oppression and exclusion.²⁸

6 – Women and Migrants

Another population that is excluded – and often abused – is migrant labour. Though not citizens in the classic sense, many migrant workers have settled permanently in their host countries. Many of these migrants are also women who suffer doubly because of their gender and alienage. As South Africa has demonstrated with recent shocking xenophobic attacks – migrant workers often bear the brunt of the anger generated by the lack of social justice and inequitable development.²⁹ This category of the population is disposed in similar ways like women. However, migrant workers are a norm in Africa. That is why any discussion of the rule of law should not exclude migrant workers, immigrants, and refugee populations in Africa.

7 – Land ownership, access, and reform

Even though the last four decades have seen a historic surge of Africans moving to urban areas, the largest African populations still live in rural areas. Agriculture remains the backbone of African economies, even where mineral wealth is abundant. Land, in a word, remains the surest source of wealth and livelihood. And yet land ownership – and access – remains highly exclusive, inequitable, and a great source of conflict. No issue is more volatile in Africa. Land is the source of water, pastures for livestock, and the basis of Africa's family economy. But large populations have historically been excluded from land ownership, or access to land. Much of the alienation from land is traceable to colonial expropriation – and evictions of so-called “natives” from their ancestral lands. These historical injustices have largely been uncorrected by successor regimes. They are the source of many clan, inter-

ethnic, and inter-communal conflicts. Successor regimes oftentimes exacerbated alienation by allocating land formerly owned by colonialists to favored ethnic elites, or cabals and cartels close to the regime. Land is a powder keg in Africa. The cases of Zimbabwe, South Africa, Kenya, and virtually most African states attest to land policies fraught with challenge and often catastrophe. This is complicated by the exclusion of women from land ownership, although they are the ones who are primary tillers of land. The law has been a diligent and faithful servant to corrupt cartels that illegally “grab” land often with fake or forged documents.³⁰ The rule of law as a vehicle for equitable development must address land as a key bottleneck to Africa’s stability and growth.

8 – Africa and the world

No discussion of Africa’s development is complete without an exploration of the continent’s relationship with the outside world. Much of that history is tortured, but there are many positive aspects of it. Ali Mazrui, the renowned Kenyan intellectual, spoke of the richness and paradox of this phenomenon as “Africa’s triple heritage”,³¹ a reference to the complex alchemy of Africa, Europe, and the Muslim world in Africa’s identity. External forces have both ravaged and enriched Africa. But it is the inequitable structure and disequilibrium between Africa and the world that needs to be addressed as an integral part of Africa’s march towards a greater global destiny. Africa’s voice in shaping and influencing international norms, institutions, and practices needs to be enhanced. Inequity in international markets and biases towards Africa must be eradicated. A new global order without superiors and subordinates – where Africa sits at the bottom – must be one of the primary outcomes of the SDGs. This is a large conversation covering trade, geopolitics, migration, and defence.

6 • Conclusion

The difficult South African experiment with democracy is proof that using rights discourse alone without a deep restructuring of the political economy can exacerbate powerlessness among the most vulnerable populations.³² Law does not exist in a vacuum. Nor can law and rights language by themselves transform society. But what is unarguable is that no society can achieve sustainable development without infusing in its mainstream a culture of justice grounded in the core norms of the rule of law. However, these core norms must grapple with Africa’s unique history and be adopted to its historical circumstances to achieve cultural legitimacy. Even more important, the rights language and the bed of political democracy, on which it rests, cannot be swallowed by Africa unchewed. Otherwise, the rebirth of the liberal project will die again – on the vine.

NOTES

- 1 • Brian Z. Tamanaha, *On the rule of Law: History, Politics, Theory* (New York: Cambridge University Press, 2004).
- 2 • Pietro Costa, Danilo Zolo and Emilio Santoro, eds., *The rule of law: Theory and criticism* (Dordrecht-Boston-London: Springer, 2007).
- 3 • Charles Dickens, *Oliver Twist* (New York: Schocken Books, 1970), 489. The term "ass" is the colloquial English name for a donkey, not to be confused with the American use of the same word.
- 4 • Mohammed Bedajoui, *Towards a new international economic order* (New York: Holmes & Meier, 1979).
- 5 • See, for example, Makau Mutua, *Kenya's quest for democracy: taming leviathan* (Boulder, CO: Lynne Rienner Publishers, 2008); John W. Harbeson and Donald Rothchild, eds., *Africa in world politics: reforming political order*, 4th ed. (Boulder, Colorado: Westview Press, 2008).
- 6 • Paul Tiyambe Zeleza and Philip J. McConaughay, eds., *Human rights, the rule of law, and development in Africa* (Philadelphia, PA: University of Pennsylvania Press, 2004).
- 7 • See Willy Mutunga, *Constitution-making from the middle: civil society and transition politics in Kenya 1992-1997* (Nairobi: Sareat & Mwengo, 1999).
- 8 • Makau Mutua, "African Renaissance," *New York Times*, May 11, 1991.
- 9 • Scott Peterson, "Egypt's revolution redefines what's possible in the Arab world," *Christian Science Monitor*, February 11, 2011.
- 10 • Makau Mutua, "Human Rights in Africa: the Limited Promise of Liberalism," *African Studies Review* 51, no. 1 (April 2008): 17-39.
- 11 • The Constitutive Act of the African Union, Article 3(g).
- 12 • See Elena Holodny, "The 13 Fastest-growing Economies in the World," *Business Insider* (UK), June 12, 2015, accessed May 5, 2016, <http://uk.businessinsider.com/world-bank-fast-growing-global-economies-2015-6?r=US>.
- 13 • Denys W. T. Shropshire, *The Church and Primitive Peoples* (London: SPCK, 1938), xiii.
- 14 • Rudyard Kipling, "The White Man's Burden: The United States and the Philippine Islands," Rudyard Kipling, *Rudyard Kipling's Verse: Definitive Version* (New York: Doubleday, 1929).
- 15 • David Kennedy, "The International Human Rights Movement: Part of the Problem?" *Harvard Human Rights Journal* 14 (2002): 101-126.
- 16 • David Trubek and Marc Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States," *Wisconsin Law Review* 4 (1974): 1062.
- 17 • David Trubek and Alvaro Santos, eds., *The New Rule Of Law And Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006).
- 18 • Kevin Davis and Michael Trebilcock, "The Relationship between Law and Development: Optimists vs. Skeptics" *American Journal of Comparative Law* 56 (2008): 895.
- 19 • Samir Amin, "The Millennium Development Goals: A Critique from the South," *Monthly Review* 57 (2006).
- 20 • Severine Deneulin and Lila Shahani, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (Ottawa: IDRC, 2009).
- 21 • United Nations, "Sustainable development goals," *Sustainable Development Knowledge Platform*, accessed May 15, 2015, <https://sustainabledevelopment.un.org/sdgsproposal>.
- 22 • Mutua, "Human Rights".
- 23 • Abdullahi A. An-Na'im and Francis M. Deng, eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washington, DC: The Brookings Institution, 1990).
- 24 • William Alford, "Exporting the 'Pursuit of Happiness,'" *Harvard Law Review* 113 (2000);

Karl Klare, "Legal Theory and Democratic Reconstruction," *University of British Columbia Law Review* 25, no. 1 (1991): 69-103.

25 • See Ian Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopaedia* (London: C. Hurst & Co. Publishers, 1979); Makau wa Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry," *Michigan Journal of International Law* 16, no. 4 (1995): 1113-1176.

26 • Jillo Kadida, "CJ Vows to Fight Corruption in the Judiciary," *Daily Nation*, June 20, 2011.

27 • Makau Mutua, "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya," *Human Rights Quarterly* 23, no. 1 (2001): 96-118.

28 • Kimberly Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum* (1989): 139 (arguing black women are excluded from feminist theory and antiracist policy because both fail to reflect interaction of race and gender). See generally Kimberly Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," *Stanford Law Review* 43, no. 6 (1991): 1241 (exploring race and gender

dimensions of violence against women of color); Athena D. Mutua, "Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm," *University of Miami Law Review* 53 (1999): 1177 (arguing that groups on bottom of various hierarchical structures shift depending on issue or group involved).

29 • "Three powerful myths that fuel xenophobia," *Mail & Guardian*, June 24, 2015, accessed June 26, 2015, <http://www.msn.com/en-za/news/other/three-powerful-myths-that-fuel-xenophobia/ar-AAc1Rmd>.

30 • See, for example, Roger Southall, "The Ndungu Report: Land & Graft in Kenya," *Review of the African Political Economy* 32, no. 103 (March 2005): 142-151 [reviewing the Report of the Commission of Inquiry on into the Illegal/Irregular Allocation of Public Land in Kenya].

31 • Ali A. Mazrui, *Africans: The Triple Heritage* (Boston, Massachusetts: Little Brown & Co, 1986).

32 • Kevin Durrheim, "Race Trouble: Identity and Inequality in Post-Apartheid South Africa," *Theory and Psychology* 22, no. 5 (2011); Makau wa Mutua, "Hope and Despair for a New South Africa: The Limits of Rights Discourse," *Harvard Human Rights Journal* 10 (1997): 63-114.

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