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A South African Perspective on the Independence of the Judiciary in the Promotion of Human Rights for the Advancement of the "Rule of Law" in Africa (Part One)

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Abstract

This part lays the framework on the importance of the "rule law" as a key principle of the independence of the judiciary in the protection of human rights that is to be discussed in Part Two of this article. Its importance follows the fall of the apartheid dispensation in 1994 when South Africa attained its ever-democratic system of governance. Since this period, the country has made significant progress in the development of the regulation of State authority that is influenced by human rights. Of particular importance was the adoption of the Constitution of the Republic of South Africa, 1996, (the Constitution) that laid the foundation that shaped the aspirations of the new democracy. This development saw the emergence of the principle of the "rule of law" and independence of the judiciary as essential principles on the functioning of the new democratic order. This article acknowledges the great strides that have been attained, which are particularly attributed to the role undertaken by the

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Constitutional Court that has since its establishment ensured a generation of rights-inspired jurisprudence. The infusion of rights-oriented principles has enabled the advancement of the independence of the judiciary in its constitutional adjudicative role. This was also a response to the prescripts of the community of nations that share the belief in human rights as common norms, standards, and values that had to be domesticated and enforced at the national level to advance the transformative vision of each country. The cross-transmission of these principles provides a framework without which the entire edifice of the new constitutional design will remain a pipedream for the fulfilment of human rights.

Therefore, this article is motivated by the domestication of the universality of the principle of the "rule of law" as a core principle regulating the actions of State authority and its institutions in the Constitution. The article moves from a premise that the centrality of the "rule of law" is foundational to the independence of the judiciary, especially the newly established South African Constitutional Court that has since developed the jurisprudence that is influenced by human rights. The focus on the Court is of further importance as it carries "no legal baggage" of South Africa's historic past that subjected the judiciary to a system of Parliamentary supremacy and serves as a pacesetter for the rights-inspired jurisprudence.

The article starts with a brief historical development and understanding of the "rule of law" within the community of nations. The article outlines the legal framework from contemporary Constitutions that entrench these principles to ensure the implementation of human rights. The author argues that rights jurisprudence has the potential to reshape and influence an accountable system of governance in the generation of human rights. It draws lessons, to a limited extent, from comparative jurisdictions in the development and protection of the principle of the independence of the judiciary. With this argument, South Africa as an epitome of human rights, draws stimulus from Africa that the "rule of law" and independence of the judiciary offer a marker and determinant of the effectiveness of regulating State authority that is influenced by human rights.

Keywords: rule of law; jurisprudence; human rights; judicial independence; transformation; universality

1 INTRODUCTION

After a protracted struggle against the system of apartheid governance in South Africa, the attainment of democracy in 1994 alongside the subsequent adoption of the Constitution of the Republic of South Africa, 1996,[1] laid a new foundation for the regulation of State authority through the promotion and protection of human rights. The Constitution shaped the aspirations of the new constitutional dispensation and saw the emergence of the "rule of law" and independence of the judiciary as essential principles for the functioning of the new democratic order. The emergence was also a response to the prescripts of the community of nations that share beliefs in human rights as common norms, standards, and values that had to be domesticated and enforced at the national level to advance the transformative vision of each country.[2] The cross-transmission of the "rule of law" and independence of the judiciary provides a framework without which the entire edifice of the new constitutional design will remain a pipedream for the fulfilment of human rights. These principles play a fundamental role in ensuring the non-interference in the enjoyment of human rights.

It is no doubt that the new constitutional dispensation in South Africa provided a new lease of

1 The Constitution of the Republic of South Africa 1996, hereinafter referred to as the "Constitution".

2 Randall "Human Rights and Rule of Law: What's the Relationship?" 2005 *UCLA Public Law and Legal Theory Series* 1–151.

life for the functioning of the judiciary as an independent pillar of the State that must exercise its authority fearlessly and impartially. This is so since the judiciary serves as a "watchdog over the enforcement and application of the Constitution and the Bill of Rights entrenched therein."[3] The independence of the judiciary underpins the entire system of fundamental rights that is entrenched in many international and regional conventions, treaties, declarations, and contemporary constitutions and legislations of many countries.[4] South Africa was founded on this vision in the design of the new constitutional democracy. The vision of the new design necessitates building public confidence in all the institutions that are charged with the exercise of public authority in the enforcement of the laws.[5] This vision entails the transformation of the judiciary in the generation of a rights-oriented jurisprudence as opposed to one based on unjust and discriminatory apartheid laws. What prevailed in the past is well articulated and captured in the *Azapo v President of the Republic of South Africa (Azapo)*[6] judgment when the Court held that … "fundamental human rights became a major casualty of this conflict … [and] the legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation."[7]

The effect of this history was similarly highlighted by Coniglio[8] as he points out that:

> the judiciary was provided with opportunities to make decisions constraining executive power, though disappointingly the [C]ourts tended to ratify executive action and legitimize the sweepingly broad powers granted to the government. Judges rarely used the common law remedies that were available to them and shared a formalistic view of the judicial role. They embraced a conservative judicial activism, leading to the judiciary strictly limiting itself to enabling broad executive power. Because the judiciary ratified the power of the authoritarian regime, it truly added "*steel to the hand that crushed the people*"[9] [author's emphasis].

Against this background, this article is motivated by the domestication of the universality of the principle of the "rule of law" as a core principle regulating the actions of State authority and its institutions in South Africa's Constitution. The article moves from a premise that the centrality of the "rule of law" is foundational to the independence of the judiciary, especially the newly established South African Constitutional Court that has since developed the jurisprudence that is influenced by human rights. The focus on the Court is important as it serves as a pacesetter for the rights-inspired jurisprudence and carries "no legal baggage" of South Africa's historic past that subjected the judiciary to a system of Parliamentary supremacy.

The article starts with a brief historical development and understanding of the "rule of law"

3 *S v Mamabolo* (*Mamabolo*) 2001 (5) BCLR 449 (CC) para 19.

4 See, for example, the Universal Declaration of Human Rights 1948; Convention on the Elimination of All Forms of Racial Discrimination 1965; International Covenant on Civil and Political Rights 1966; International Covenant on Economic, Social and Cultural Rights 1966; Convention on the Elimination of Discrimination Against Women 1979; Convention on the Rights of Child 1989; African Charter on Human and Peoples' Rights 1981; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; Constitution 1996; Zambia Constitution 1991 with amendments through 2016; Constitution of the United Republic of Tanzania 1977 as amended to 2005; Namibia's Constitution of 1990 with amendments through 2010.

5 See Kriegler J in *Mamabolo*.

6 1996 (b) BCLR 1015.

7 *Azapo* para 1. See also the *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (3) BCLR 241 (CC) para 37.

8 Coniglio "Methods of Judicial Decision-making and the Rule of Law: the Case of Apartheid South Africa" 2009 *Boston Univ Int'l LJ* 497–527.

9 Coniglio *Boston Univ Int'l LJ*, all footnotes omitted. See also Madala "Rule under Apartheid and the Fledgling Democracy in Post-apartheid South Africa: the Role of the Judiciary" 2000 *North Carolina J IL* 743–748 as he shares the sentiments that "[…] the judiciary, in general, … did not have the option to review and reverse unjust laws; rather, the [C]ourts and all the other institutions had to implement and administer such laws."

within the community of nations. It also outlines the legal framework from contemporary Constitutions that entrenched these principles to ensure the implementation of human rights. The author argues that rights jurisprudence has the potential to reshape and influence an accountable system of governance in the generation of the language of human rights. The article draws lessons, to a limited extent, from comparative jurisdictions in the development and protection of the principle of the independence of the judiciary. With this argument, the article draws inspiration from Africa in that these principles offer a marker and are determinant of the effectiveness of regulating State authority that is influenced by an epitome of the human Africa that serves as a "beacon of hope" in advancing the principles of the new dispensation.

2 THE FUNDAMENTALS OF THE UNIVERSALITY OF THE "RULE OF LAW"

The "rule of law" is not an easy concept to define, but in 2004 the Secretary-General of the United Nations contextualised it as:

> the 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.[10]

In light of the above definition, the "rule of law" is grounded on (i) accountability of the public and private sectors under laws which are; (ii) clear, certain, just and protect the fundamental rights of everyone; (iii) administering and enforcement processes that are accessible, impartial and efficient; and (iv) entails timeous delivery of justice by competent, ethical and independent representatives, supported by adequate resources and reflect the institutions they serve.[11] Simply put, the "rule of law" involves procedural conception that necessitates the putting of proper measures in place in the delivery of the law and substantive conception that involves the translation of the law into reality that is grounded on the supremacy of the Constitution. It must be adjudicated by an independent judiciary consistent with national and international human rights laws and entails the avoidance of arbitrariness in its application and interpretation.[12]

The history of the "rule of law" is traceable to John Locke (c.350 BC),[13] but the framework for its basic principles as conceptualised by Dicey AV in 1897 points out that it is grounded on three fundamental principles. These principles entail (i) the supremacy of the law; (ii) equality before the law and its equal application; and (c) the law of the constitutions.[14] In agreement with Dicey's understanding of the "rule of law", Burnay[15] contends that the principle "found its expression in the idea that the law could act as the most efficient and legitimate barrier against the exercise of discriminatory and arbitrary power of the ruler."[16] This means that the governed is regulated

10 UN Secretary General "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General" (S/2004/616) para 6 1–24 https://digitallibrary.un.org/record/527647?ln=en (accessed 15-07-2022).

11 Stein "What Exactly is the Rule of Law?" 2019 *Houston LR* 185.

12 *Ibid.*

13 *Stanford Encyclopedia of Philosophy* "The Rule of Law" 22 June 2016 https://plato.stanford.edu/entries/rule-of-law/ (accessed 20-07-2022).

14 Dicey "Introduction to the Study of the Law of the Constitution" 7 edn, 1908 179–201 cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/abs/2012-un-declaration-on-the-rule-of-law-and-its-projections/8ED8AB8FB7CC4D50A49E815617A0E9A7 (accessed 16-07-2022).

15 Burnay "The Rule of Law: Origins, Challenges, and Prospects" 2013 *Belgian Review of Int'l L* 299.

16 *Ibid.*

by law and the governor makes decisions according to the law whilst also subjecting themself to the law as well.[17] This further means that the "rule of law" (i) functions as the ultimate bar against the rule of a person that wields power; (ii) provides citizens with concrete instruments to force State organs to act within the limits set by the law; and (iii) provides a good balance in the promotion of the principles that are envisaged in the doctrine of separation of powers between the powers exercised by various branches of the State.[18] The case of *S v Makwanyane*[19] was a ground-breaking judgment and evidence of the rejection of the application of arbitrary laws in the South African context. *Makwanyane* upheld and freed principles of the "rule of law" from arbitrary action by the State in conformity with national and international human rights laws, norms, and standards by declaring the death penalty invalid as a legitimate form of punishment in the fight against the eliminations of all forms of violent crimes.

Thus, the centrality of the "rule of law" as a principle embraced by the community of nations, including the United Nations, opens new avenues for dialogue and co-operation between various legal systems and legal traditions.[20] It is one of the fundamental values of the United Nations that capture the content of an effective system of governance that promotes accountability consistent with international human rights laws.[21] The "rule of law" also found expression in the Universal Declaration of Human Rights (UDHR),[22] which became a model for many other international treaties, conventions, and declarations that were adopted to affirm the language of human rights.[23] The UDHR expresses that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the 'rule of law'."[24] Although the International Convention on Civil and Political Rights (ICCPR)[25] and International Convention on Economic, Social and Cultural Rights (ICESCR),[26] which are aligned with the UDHR as the three instruments that encompass the International Bill of Human Rights are not prescriptive of the principle of the "rule of law". The latter principle is indirectly infused by the protection of many other fundamental rights that are directed to uphold the "rule of law" as an important principle of regulating State authority. It is for the "rule of law" to protect human rights in eliminating any opportunity for tyranny in respective countries. Without the "rule of law" integrated into the system of human rights, the entire system of regulating State authority is unlikely to be a source of stability within the

17 See Akanbi "The Rule of Law in Nigeria" 2012 *Journal of Law, Policy and Globalization* 1–9, contextualised Dicey's principles on the rule of law that:
(a) all acts must be in accordance with the law to be valid.
(b) that government activity must be conducted within a framework of defined rules and regulations.
(c) that disputes involving legality of government actions must be decided by Courts independent of the government.
(d) there should be no undue privileges and discrimination in the society and
(e) that no one should suffer punishment outside the authority of the law.

18 Burnay *Belgian Review of Int'l L*.

19 1995 (6) BCLR 665.

20 Elliasson "The Role of the UN in Promoting the Rule of Law: Challenges and New Approaches" December 2012, No. 4 (XLIX), *Delivering Justice* https://www.un.org/en/chronicle/article/role-un-promoting-rule-law-challenges-and-new-approaches (accessed 07-08-2022).

21 See United Nations "What is the Rule of Law" https://www.un.org/ruleoflaw/what-is-the-rule-of-law/ (accessed 18-07-2022).

22 Adopted by the United Nations General Assembly in Paris on 10 December 1948.

23 Glendon "The Rule of Law in the Universal Declaration of Human Rights" 2004 *Northwestern J Int'l HR* 1–19.

24 See preamble of UDHR, para 3.

25 Adopted 16 December 1966 and entered into force on 23 March 1976.

26 Adopted 16 December 1966 and entered into force on 3 January 1976.

community of nations.

The adoption of the specific Declaration on the Rule of Law by the General Assembly of the United Nations at its Sixty-Seventh Session on 24 September 2012, was of great importance.[27] The Declaration establishes the intrinsic relationship that exists between the "rule of law", human rights, and democracy as mutually reinforcing and belonging to the universal core values of the United Nations. The Declaration captures various principles and values that constitute the "rule of law" as a response to building sustainable peace in countries in conflict, including addressing prevention, resolution, and post-conflict situations. It stresses the need for the international community, including the United Nations, to assist and support such countries upon their request, for the challenges they may face during their transition.[28]

The "rule of law" in the UDHR is transmitted to the 2030 Agenda for Sustainable Development Goals (SDGs),[29] which is classified as a decade of action within the global, local, and peoples' actions.[30] It is viewed not just as a value, but a means to achieve the 2030 Agenda in the fulfilment of human rights. The "rule of law" is meant to operationalise the 17 SDGs into tangible deliverables in the respective areas of focus, in particular the elimination of poverty as a first primary goal to be achieved by 2030 and the achievement of equal access to justice for all.[31] It further finds endorsement in the 2063 Agenda of the African Union "Africa that We Want".[32] The 2063 Agenda is classified as a "master plan and blue print for transforming Africa into a powerhouse for the [sustenance of the evolution of human rights]."[33] The Africa Agenda alongside the UN 2030 Agenda are designed for the achievement of sustainable development in many areas of human rights, such as the fulfilment of the right to gender equality and equal access to justice. The achievement of the latter two principles is interrelated and fundamental to the transformative ideals of South Africa's constitutional identity. These ideals touch on the core content of the "rule of law" and how governments all over the world respond to the socio-political challenges faced by communities today.

The "rule of law" is broader in its approach because it is an all-encompassing principle that permeates and regulates both public and private spheres of good governance. It was the General Assembly of the UN Resolution that identified human rights and the "rule of law" as one of the four thematic areas that require an integrated approach towards the attainment of a peaceful, prosperous, and democratic world.[34] It is the "rule of law" that extends the sharing of common values in ensuring the sustenance of development in the regulation of State authority. The broader conception of this principle entails the collective symbolism of the most important features of the democratic system of governance that is encapsulated in the concept of "government of the people by the people and for the people."[35] The "rule of law" is an integrated goal towards an effective system of regulating State authority that infuses the importance of human rights in

27 See Declaration adopted at the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels https://www.un.org/ruleoflaw/files/37839_A-RES-67-1.pdf (accessed 18-07-2022).

28 See Art 18 of the Declaration.

29 Adopted in 2015 by United Nations Member States https://unstats.un.org/sdgs/report/2022/The-Sustainable-Development-Goals-Report-2022.pdf (accessed 07-08-2022).

30 See United Nations "Sustainable Development Agenda" https://www.un.org/sustainabledevelopment/development-agenda/ (accessed 07-08-2022).

31 See Goal 16.3 of the 2030 Agenda.

32 African Union "Agenda 2063: The Africa We Want" https://au.int/en/agenda2063/overview (accessed 25-08-2022).

33 *Ibid.*

34 See Art 16 of the Sixtieth session 60/1. 2005 World Summit Outcome https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf (accessed 12-08-2022).

35 Nwogu "The Rule of Law and Governance in Nigeria" 2010 *JILI* 187–201.

Africa.

3 THE "RULE OF LAW" IN CONTEMPORARY CONSTITUTIONS

The "rule of law" is a principle of universal validity as evidenced by its prominence in the Constitutions of many jurisdictions all over the world.[36] The reference to the "rule of law" in these Constitutions is essential, especially for Africa. Africa has been subject to arbitrary power in the regulation of State authority with South Africa further devastated by the impact of colonial rule and apartheid rule.[37] Significantly, South Africa included the "rule of law" in the Constitution 1996 not only as a foundational value[38] but as a legitimising tool of the post-apartheid democratic system of governance. The inclusion further enabled the domestication of many international human rights laws that have shaped and maintained the constitutional identity of the new democratic dispensation.[39]

Similarly, the inclusion of the "rule of law" is also evident in the Constitutions of many other countries. The Constitution of the Republic of Malawi[40] provides that "all institutions and persons shall observe and uphold the Constitution and *the rule of law* and no institution or person shall stand above the law."[41] The Constitution of the Republic of Namibia[42] "establishes a sovereign, secular, democratic and unitary [s]tate founded upon the principles of democracy, *the rule of law* and justice for all."[43] The Constitution of the Republic of China also prescribes that "it shall practice law-based governance and build a socialist state under *the rule of law*. … No law, administrative regulation or local regulation shall be in conflict with the Constitution."[44] Further, the Constitution of Egypt 2014 declares Egypt "as a sovereign state, united and indivisible, where nothing is dispensable, and its system is [a] democratic republic based on citizenship and *the rule of law* as it also traces the latter principle to the UDHR."[45] Nigeria[46] and Malawi[47] have made statements to the effect of giving due recognition to the significance of the "rule of law" in the regulation of State authority, which in turn affirms the advancement of human rights.

At the risk of repetition, drawing from the inclusion in these Constitutions and statements made,

36 Etherton "The Universality of the Rule of Law as an International Standard: Lion Cohen Lecture 2018" 2018 *Israel LR* 469–483.

37 Sutton "Authority and Authoritarianism in the New Africa" 1961 *Journal of International Affairs* 7–17.

38 Section 1 of the Constitution provides that:
"[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the Constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

39 See Discussion Paper: Open Society Foundation "South Africa: Justice Sector and Rule of Law" 2005 Open Society Foundation, 15.

40 See s vi of the Malawi's Constitution 1994 with Amendments through 2017.

41 Malawi Constitution 12(vi).

42 Namibia's Constitution of 1990 with Amendments through 2010.

43 See art 1 of the Republic of Namibia Constitution.

44 See art 5 of the Constitution of the Republic of China.

45 See art 1 of the preamble of the Egypt Constitution.

46 See Ajayi Ambassador of the Federal Republic of Nigeria to the Kingdom of the Netherlands on the "Rule of law at the National and International Levels" 76th session of the United Nations General Assembly, New York, 8 October 2021 https://www.un.org/en/ga/sixth/76/pdfs/statements/rule_of_law/06mtg_nigeria.pdf (accessed 13-08-2022).

47 Msosa Permanent Representative of Malawi to the United Nations on Agenda 82 "The Rule of Law" 10 October 2014 New York https://www.un.org/en/ga/sixth/69/pdfs/statements/rule_of_law/malawi.pdf, (accessed 13-08-2022).

the "rule of law" is the catalyst for the assessment of the government's accountability in the provision of an effective, lawful, and uncorrupt administration. The constitutionalised status of the "rule of law" has ensured that it became a global unifier of the international legal order that is characterised by the pluralistic nature of its constituent communities. The "rule of law" also entails the sharing of common values and principles of the diverse characters of the world in their own contexts in regional, continent, and domestic spheres. The sharing of these values captures the content of the universality principle in the domestication of the "rule of law" on a national level.[48] The domestication of the rule of law constitutes a powerful reflection of the interdependence and interconnection of States that are driven by the quest to ensure an integrated system in the regulation of State authority with greater effect on the promotion and protection of human rights.[49] As espoused by Simma,[50] the "rule of law" involves the existence within the community of nations an international law, that is valid and binding on all the States.[51]

The Constitution, 1996 is reflective of the universality of the "rule of law" as envisaged in sections 39, 231–233 of the said Constitution. The domestication of the rule of law was contextualised in the *S v Makwanyane*[52] judgment that dealt with the issue of capital punishment and found the death penalty unconstitutional as it undermines the right to life and many of the fundamental rights that are entrenched in the Constitution. The Court in *Makwanyane* found that the domestication of the universal principles is inclusive of "binding and non-binding law as of value because they analyse arguments … and may provide guidance as to the correct interpretation of particular provisions of [Chapter Two]."[53] The inclusion of the "rule of law" represents South Africa as a "member of the family of nations in upholding its human rights standards and not only as a principle that is pertinent to domestic affairs."[54]

Disappointingly, despite the intended outcome for the inclusion of the "rule of law", the Court in *Makwanyane* "minoritised" the domestication of the universality of the rules including the said "rule of law" as it also held:

> in dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. *We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it*[55] [author's emphasis].

Although the Court's holding in *Makwanyane* is double-edged, it contradicted its own reasoning that comparison is of value and turned around and created doubt on the significance and influence of the international conception of the "rule of law" as a foundational principle towards the advancement of human rights within the framework of regulating State authority.

48 Corder "Rule of Law Protects Even Those Who Scorn It" *The Conversation* 22 January 2022 https://theconversation.com/rule-of-law-in-south-africa-protects-even-those-who-scorn-it-175533 (accessed 20-07-2022).

49 Symonides *A Guide to Human Rights: Institutions, Standards, Procedures* (2003) 215.

50 Simma "Universality of International Law from the Perspective of a Practitioner" 2009 The *European JIL* 265–297.

51 *Ibid*.

52 *Makwanyane* 1995.

53 *Makwanyane* paras 34–35.

54 See Ntlama "The South African Constitution and Immigration Law" Chapter 3 in Khan (ed) *Immigration Law in South Africa* (2018).

55 *Makwanyane* para 39.

4 THE "RULE OF LAW" AND THE DIVISION OF STATE AUTHORITY

It has been emphasised that the "rule of law" is foundational to the regulation of State authority. The application of this principle within the framework of the division of State authority amongst the three branches of the State, namely the legislature, the executive, and the judiciary offer a good example as a determinant of the prescription of its values. It need not be repeated that the division of authority entails the importance of the "rule of law" as a standing principle of good governance and "not rule by law" with the latter having the potential to flout the basic principles of upholding the law. Meyerson correctly captures the distinction between the "rule of law" and "rule by law". He explains that the "rule of law" stands for the supremacy of the law as opposed to the will of the individual that is captured by "rule by law".[56]

It is not the intention of this section to trace the historic development of the principle of separation of powers, but to acknowledge that the Constitution 1996 does not define what constitutes the separation of powers. It is evident from the way the Constitution is structured and each branch of the State is constitutionally protected with accorded responsibilities attached to it.[57] The protection of each branch of the State seeks to eliminate any over-exercise of authority by either of the branches over the other two and is important for the democratisation of the country, particularly with its founding values on the protection of human rights. The balancing act on the division of authority serves as a guiding principle towards the advancement of the "rule of law". This division was endorsed during the *Certification of the Constitution of the Republic of South Africa*[58] (the *First Certification Judgment*). In this case, the Court emphasised that "… there is no universal model of separation of powers and in [a] democratic system of government in which checks and balances results in the imposition of restraints by one branch of government upon another, there is no separation that is absolute."[59] The Court in the *First Certification Judgment* went on to express that the principle of separation of powers entails the "functional independence of each branch … [and] is not a rigid constitutional doctrine because it is given expression in many different forms and is made subject to checks and balances of many kinds."[60]

The principle of separation of powers sets the tone for the overhaul and transmission of the "rule of law" in taking its rightful place as the cornerstone of South Africa's constitutional democracy. As noted above, the rightful place is entrenched in the supremacy of the Constitution and its foundational values.[61] It is the significance of the "rule of law" that extends protection to the legislative, executive, and the judicial branch of the State. It is also worth mentioning that the legislative authority of the Republic of South Africa is vested in Parliament as an independent and representative body that is entrusted with its own authority to regulate its own processes.[62] The executive is accorded the same status and the President is enjoined to develop, prepare, and implement national policy and legislation and coordinate the functions of State departments and the public administration.[63] The judiciary, as it will be termed, holds the "wielding axe" over the functioning of the other two branches of the State in promoting the principles of accountability in the advancement of human rights. The judiciary is accorded an

56 Meyerson "The Rule of Law and Separation of Powers" 2004 *Macquarie LJ* 1–6.

57 See Chs 4, 5 and 8 of the Constitution 1996.

58 1996 10 BCLR 1253 (CC).

59 *First Certification Judgment* para 108.

60 See *First Certification Judgment* paras 109–111.

61 See ss 1 and 2 of the Constitution 1996.

62 See s 44 of the Constitution 1996.

63 See s 85 of the Constitution 1996.

independent status and requires the other two branches of the State to ensure its independence.[64] The said status within the framework of separation of powers in the transmission of the "rule of law" was contextualised in the *South African Association of Personal Injury Lawyers v Heath* (*Heath*)[65] judgment. In this case, the Court pronounced that:

> the separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. Although parliament has a wide power to delegate legislative authority to the executive, there are limits to that power. Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and seen to be independent.[66]

It is drawn from *Heath* that the "rule of law" is founded on the said context in ensuring the balancing of public power in the exercise of State authority. This balance was articulated in the same case in *Heath* that:

> the separation required by the Constitution between the legislature and executive on the one hand, and the [C]ourts on the other, must be upheld otherwise the role of the [C]ourts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights, and other provisions of the Constitution, will be undermined.[67]

Recently, the devastating impact of the COVID-19 pandemic caught the global community and subjected governments in various jurisdictions to intense scrutiny by the judiciary on the management of the balance of competing rights and/or interests amongst the branches of the State not only in South Africa. In this instance, the judiciary had to tread carefully in striking a balance in strengthening accountability, promoting the "rule of law" and human rights. The court rejected any "rule by law" as evidenced by the enforcement of the COVID-19 regulations, that were grounded in the Disaster Management Act 57 of 2002. The Disaster Management Act was a direct response to curbing the spread of the virus on the one hand, whilst seeking to protect many of the fundamental rights such as the right of access to healthcare, life, and socio-economic survival on the other hand. Various court judgments, as argued elsewhere,[68] are indicative of the balancing act in the preservation of the relations between the branches of the State without each branch trampling on the authority of the other except for the determination of the reasonableness of the adopted measure.[69]

The application of the "rule of law" within the context of the division of State authority remains critical for strengthening the reforms that will in turn promote accountability in the upholding of the values of the new dispensation. It is the "key feature of the new constitutional dispensation and the Court has, since its establishment, shown its awareness of its own constitutional

64 See s 165 of the Constitution 1996.

65 2001 1 BCLR 77.

66 *Heath* para 25.

67 *Heath* para 26.

68 Bidie, Ntlama-Makhanya, and Phela "The Role of the Judiciary to Construct a Concise and Balanced Judgment on the Right to Life *vis-à-vis* Economic Life of Persons: Some Thoughts on *Mohamed v President of the Republic of South Africa* 2020 7 BCLR 865 (GP) and *De Beer v Minister of Co-Operative Governance and Traditional Affairs* 2020 11 BCLR 1349 (GP)" 2022 *JLSD* 1–25.

69 See the further affirmation of the rule of law in the regulation of state authority in *Masetlha v President of the Republic of South Africa* 2008 1 BCLR 1 (CC).

obligations"[70] in the advancement of human rights as to be argued in Part Two of this article. An increased understanding of the "rule of law" in capacitating national institutions and oversight bodies in Africa will directly contribute to the alignment of human rights with international human rights laws, particularly in areas of good governance in relation to the elimination of all forms of discrimination.

5 "RULE OF LAW": CLOUDED IN PLURALISTIC RIGHTS?

Up until this far, the article has celebrated the Constitution and the lessons from other contemporary Constitutions in the advancement of human rights. However, on closer scrutiny, there are traces of regress from the progress made thus far. A closer analysis of the Constitution 1996 to effect social change raises serious concerns as an effective instrument in constitutionalising the "rule of law" through human rights, particularly the reflection on its pluralistic character. The scrutiny is of most importance for Africa as the continent shares a common history and values that should today be aligned with the prescripts of the new constitutional dispensation.

It is worth mentioning that the highly commended Constitution is the source of division on the recognition of the various systems that are applicable in the Republic. This division is first, evident from section 8(3) of the Constitution dealing with the application of the Bill of Rights, which is not inclusive of customary law although it requires the Courts to develop it in light of section 39(2) of the Constitution, 1996 to ensure its compliance with the Bill of Rights.[71] Second, the other division is drawn from the hierarchy and constitutional structure of the judiciary by unearthing the traditional courts from the "other" status to be established by legislation.[72] This legislation has not yet been adopted since the first tabling of the Traditional Courts Bill in 2008 and the "other" is subject to different interpretations and may mean different institutions to the citizenry.[73]

Third, section 211(3) of the Constitution obligates the Courts to apply customary law, but this application is internally qualified by being made subject to applicable law which is subject to the Constitution. The application entails its determination within its own context, including the remedies to be provided in line with the transformative vision of the Constitution. Although *Bhe v Khayelitsha Magistrate* (*Bhe*)[74] is highly celebrated for its transformative contribution to the right to gender equality, the Constitutional Court misplaced the principles of inheritance and succession in customary law. These principles are well articulated by Ngcobo J (as he then was) in his minority judgment outlining that the former principle entails equal access to property the latter gives effect to succession to the status of the deceased.[75] The Constitutional Court in the *Bhe* case left a void in the leadership and management of family law relationships by infusing the distinct principles under the name of promoting gender equality in customary law. It further imported the common law conceptions of succession that are entrenched in the Intestate Succession Act 81 of 1987 in remedying the discriminatory effect of the rule of customary law of male primogeniture on inheritance.

The distinction is also evident by the limitation of customary law to the people that observe

70 See Parpworth "The South African Constitutional Court: Upholding the Rule of Law and Separation of Powers" 2017 2 *Journal of African Law* 273–287.

71 See Ntlama "The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa's New Constitutional Dispensation" 2012 *PELJ* 24–44.

72 See s 166(e) of the Constitution. See also Ntlama "The Constitutional Divide of Post-apartheid South Africa in the Jurisdiction of the Traditional Justice System" 2014 *SAPL* 282–293.

73 See Ntlama and Ndima "The Significance of South Africa's Traditional Court's Bill to the Challenge of Promoting African Traditional Justice Systems" 2009 *Int'l J African Renaissance Studies* 6–30.

74 2005 1 BCLR (CC).

75 See *Bhe* paras 168–172.

it, which in this instance, is black people. This limitation has negative consequences for the respect and integrity of the institution of traditional leadership that serves as a reservoir and treasurer of customs and practices in the regulation of traditional authority. The consequences are likely to be evident in enforcing traditional justice. For example, a non-observing person of customary law principles would find it easy to escape the arm of justice to be enforced by the institution of traditional leadership for offences that are committed in their areas of jurisdiction. It cannot be overemphasised that the application and implementation of traditional principles are enforced in largely rural areas, with large tracts of land, forests, and grazing land. In these areas, there is a greater potential for people not subscribing to the system of customary law to defy the rules and practices of the system with the consequent result of undermining the authority of the institution itself.

Nwauche argues very strongly for limiting the application of customary law as applicable only to black people. He questions why other racial groups do not have their own systems of customary law but recognised one that is limited to black people as adherents of the system that may extend to the sharing of common values as envisaged by the "rule of law".[76] He substantiates his contention by pointing out that:

> a non-racial understanding of customary law is important for a more beneficial understanding of 'communities' in South Africa. Associating customary law with the black community assumes that the black community is substantially and qualitatively different from other communities in South Africa. This difference is pejorative and degrading since it is conceived in a traditional pre-modern manner. South African blacks are different from other communities just as other communities are different from them. However, all these communities live in a post-modern state and there does not appear to be any reason why they ought to be treated differently in a post-apartheid state. An equal treatment of communities according to their distinct characteristics is consistent with a non-racial nation which is the objective of the [Constitution]. The Constitution does not deny the racial identity of South Africans by declaring that South Africa shall be a non-racial nation. Rather what is prohibited is a society in which biological ancestry is the fundamental ordering.[77]

However, Nwauche has also argued that based on practice, there is no conclusive proof that customary law is limited to black people. This is because the Constitution recognises the existence of various linguistic and cultural groups that are also worthy of protection as is the case with the customary law of black people.[78] However, the source of what appears to be confusion on the protection of customary law is the Constitution itself, which has transmitted to the manner that the judiciary, for example, has given effect to the interpretation of customary law.

South Africa's pluralistic character that is envisaged in the preamble to ensure the establishment of a just society following the divisive past, the remnants of the past continue to manifest themselves today under the camouflage of the progressive Constitution. The pluralistic character endorses the "rule of law" as a legitimising principle of the system of governance that should extend protection to all groups without distinction. It cannot be overemphasised that the "rule of law" is a catalyst for the extension of the principles of the law of the country to all legal systems that are applicable in the Republic. The link of the "rule of law" with human rights has the potential to enrich and flourish South Africa's constitutional democracy by enhancing the analysis of the law and its application to ensure compliance with adopted rules and international

76 See Nwauche "Distinction without Difference: the Constitutional Protection of Customary Law and Cultural, Linguistic and Religious Communities – a Comment on *Shilubana and Others v Nwamitwa*" 2009 The *Journal of Legal Pluralism and Unofficial Law* 67–85.

77 *Ibid.* 82.

78 Nwauche "Affiliation to a New Customary Law in Post-apartheid South Africa" 2015 *PELJ* 569–592.

human rights law in building an integrated legal system for the community of the world.[79] The domestication of the universality principle of the "rule of law" in contemporary Constitutions in Africa enhances the relations within the community of nations. The "rule of law" requires that all persons without exception must be subject to law that is lawfully enacted and administered fairly and impartially. All legal traditions, philosophers, and practitioners embrace these two principles as mundane and essential for ensuring accountability in governance, peace, and stability in democratic societies. Only absolute tyrants and dictators will find comfort in their void. It is this framework that is founded on the centrality of the "rule of law" that will enable institutions, such as the judiciary "not to drop their guard'" in advancing the principles of the new constitutional dispensation as to be continued in Part Two of this article.

79 United Nations Secretary-General "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies" 23 August 2004 6, UN Doc.S/2004/616.