The challenges of promoting the rule of law in Southern Africa

Extracts from an address by Constitutional Court Justice TH Madala, delivered at the SADCLA conference in Mbabane, Swaziland, on 29 March 2003.

Constitutional democracy and the rule of law

For me, the components of democracy are most starkly revealed in comparison to its antonym, totalitarianism. What democratic societies promote—and repressive ones do not—are the rights of citizens and their participation in decision-making about the rules by which they will be governed. Democracy promotes choice, voice and access to rights. Totalitarianism promotes none of those. On the other hand it represses both choice and voice and denies access to rights. The effectiveness of the rules or rule-makers any given democracy generates may vary, but their defining similarities will be a commitment to rights and to participation.

Constitutional democracy implies a development in the concept of democracy which started at the end of the eighteenth century but which has gained universal recognition only very recently. Constitutional democracy recognises the more ancient democratic principle that the government of a country is subject to and legitimated by the will and consent of the governed (or more accurately the will and consent of the majority of the governed) which is determined by regular multi-party elections based on universal adult suffrage. Furthermore, constitutional democracy limits this older principle by making the democratically elected government and the will of the majority subject to a written constitution and the norms embodied therein, which constitution is enshrined as the supreme law of the country in question.

The rule of law restrains and civilizes power. It is not the enemy of liberty but its partner. The South African Constitution and indeed most of the SADC region’s constitutions have entrenched this concept as one of the fundamental values underlying our democratic societies.

Corruption and maladministration are inconsistent with the rule of law and the fundamental values of a Constitution. They undermine the Constitutional commitment to human dignity, the achievement of equality and the advancement of human rights. They are in fact the antithesis of the open accountable democratic government and, unchecked, these pose a threat to a democratic state.

In Commissioner of Police v Commercial Farmers’ Union 2000 (9) BCLR 957 (Z) the question of what the rule of law is dealt with. Chinhego J of the Zimbabwean High Court said this of the rule of law:

‘The rule of law must in my opinion be viewed as a national or societal ideal. The rule of law to me means everyone must be subject to a shared set of rules that are applied universally and which deal even-handedly with people and which treat like cases alike. It means that those who are affected by official inaction should be able to bring actions, on the basis of the official rules i.e. the law, to protect their interests.’

The rule of law, separation of powers and constitutionalism

The separation of powers doctrine seems to be one of the essential aspects of the rule of law. Mahomed CJ in an address on the ‘Role of the Judiciary in a Constitutional State’ published in 1998 (115) SALJ at 112, had this to say about the independence of the judiciary:

‘The exact boundaries of judicial powers have varied from time to time and from country to country, but the principle of an independent judiciary goes to the very heart of sustainable democracy based on the rule of law. Subvert it and you subvert the very foundation of the civilization which it protects. What judicial independence means in principle is simply the right and the duty of the judges to perform the function of the judicial adjudication, on an application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any other person or institution.’

It is inevitable that healthy tensions may develop between the three branches but they must not be elevated to the level of a struggle for power because if the relations between any branches break down the rule of law will suffer and with it the administration of justice.

Respect for the rule of law is one aspect which is crucial for its maintenance and sustenance. It ought not to be negotiable in a democracy.

And so the Constitution, while also embodying the principle of the separation of powers but, in consequence of the bitter lessons of constitutional history, has come to accept the vital need to impose checks and balances on the three arms of the state. Their powers are defined in the Constitution. The judicial power requires courts to interpret and uphold the Constitution, and this inevitably gives rise to a potential tension between the courts and the other arms of government. The tension exists in all cases where the legislature or the executive has made choices that are challenged in the courts. This tension has to be managed by the courts and in South Africa the Constitutional Court has said that it will be necessary to develop a doctrine of separation of powers that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the other hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest (De Lange v Smuts 1998 (3) SA 785 (CC); 1998 (7) BCLR (CC) at para 60).

I think a similar approach may have to be adopted here in Swaziland.

Courts and the legal profession have an important role to play in the transformation demanded by our constitutions. In so doing this they need to be sensitive to the role of the legislature and the executive in a democratic system of government and to the difficulties...
inherent in governing a country with a history such as ours, where resources are limited and demands are multifarious. But similarly the executive and the legislature should be sensitive to the position of the judiciary and the imperative that it must maintain the rule of law. How can I maintain the rule of law and what kind of justice am I going to mete out tomorrow if I am told in no uncertain terms that judgments I make will not be respected?

Remember this does not affect only the judges as individuals but the institution of the judiciary itself. Leaders, the executive and the legislature should take the lead in encouraging the observance of the rule of law.

Among the first and foremost challenges which the SADCLA must face and address head on is the legitimacy of the laws in the different countries of the region and the jurisprudence in the perception of the masses upon whom the law impacts. Is the law perceived to be relevant to their lives, and if it is, is it perceived to be an instrument of justice? If it is not, it will forfeit its claim to legitimacy and render a relatively nascent democracy vulnerable to invidious and perilous subversion.

You have as your responsibility the promotion of a society which will be characterised by the restoration of man/woman’s respect for other human beings, a society where racism and sexism are no longer issues of importance, where the supremacy of the Constitution is readily accepted and where all humanity considers itself under, and is ready to uphold, the rule of law. The rule of law constitutes a bulwark against the deprivation of liberty through the exercise of arbitrary power. It encompasses principles of procedural fairness and legality, equality and proportionality. Fully articulated, the rule of law amounts to sophisticated doctrine of constitutionalism, revealing law as the antithesis of arbitrariness or the assertion of power.

**Threats facing our justice systems and ways to improve the situation**

The majority of our people depend on the ability of our legal systems to uphold democracy and the rule of law, assure basic rights and freedoms, and protect minorities and the weakest members of society-in short, to deliver justice. From the perspective of most communities, however, our legal systems do not live up to this promise. Many people cannot afford access to legal assistance, and those who can, are frustrated with its enormous costs, lengthy delays, and unpredictable results. The legal profession, which is responsible for ensuring the fair administration of justice, has increasingly placed self-interest and personal gain ahead of the interests of clients and the public. The independence and impartiality of our courts-conceived as the third branch of government—are being compromised by money and partisan politics.

The administration of law and justice relies in large part on a legal profession which is independent from government, and which puts both the interests of its clients and the public interest in the fair administration of justice ahead of self-interest and personal gain. In addition, people in this region rely on the expertise and integrity of lawyers to help them address such essential human needs as housing, employment, health care and protection from abuse.

To promote higher standards of ethical and professional conduct among lawyers and greater accountability to the public and to clients we should initiate programmes that will make grants to a variety of organisations to:

1. increase the accountability of the profession (particularly legal education to clients and the public;
2. address problems of bias and increase diversity in the profession;
3. increase the number of public service commitments by students, law schools and the private bar/law societies—particularly to under served communities;
4. assist local bar leaders, legal educators and the judiciary to develop strategies and programs to improve professional conduct and values; and lastly;
5. to train lawyers to rethink their roles and focus more on holistic and problem-solving approaches to solving their clients’ problems and arm consumers and the public with more information and advice about the law and how to manage the legal process.

I know that in some countries in West Africa, for example, Mali developed programmes aimed at setting up a series of pilot legal centres so as to help develop the judicial system at the town level, while in our neighbour Madagascar, training has been provided to future paralegals, in the framework of a community initiative project.

**Rule of law and the right to legal representation**

It must always be borne in mind, ladies and gentlemen that you cannot be happy in your work when your neighbour is unemployed; you cannot be healthy when your neighbour lives in the slum and squalor of squatter camps; you cannot enjoy a good social life when those around you have no roof over their heads; you cannot enjoy the fruits of your education when all those around you are illiterate. These are some of the challenges that we as legal professionals and an independent body need to deal head on with. As I mentioned earlier, legal aid should be provided for those who are unable to afford the services of lawyers or have access to courts, for the protection of their rights. Rules which unduly restrict access to courts should be reformed to provide a broad access. Social and welfare organizations should be authorised to bring legal action on behalf of individuals and groups who are unable to utilize the courts. All member states should establish Human Rights Commissions and specialized institutions for the protection of rights, particularly of vulnerable members of society. They can provide easy, friendly and inexpensive access to justice for victims of human rights violations. These bodies can supplement the role of the judiciary, they enjoy special advantages; they can help establish standards for the implementation of human rights norms; they can disseminate information about human rights; they can investigate allegations of violations of rights; they can promote conciliation and mediation; and they can seek to enforce human rights through administrative or judicial means. They can act on their own initiative as well on complaints from members of the public.