

The Harare Declaration: The Roles of the Attorney-General and the Judiciary and the Protection of the Rule of Law

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I wish to make a brief statement on the role of the judiciary and the protection of the rule of law.

It cannot be gainsaid that the most powerful institution in a country and therefore the one which is most likely to violate individual human rights and freedoms in general and the rule of law in particular is the State through its public administration machinery. Therefore a country which is disposed to protecting the rule of law has the duty to establish a system which is capable of controlling the exercise of governmental authority and thereby remove arbitrary rule by the executive.

In practical terms, under such a system, there should be laws that are capable of protecting the basic rights and freedoms of persons as against government authority, and when violation do occur, there must be laws which would allow persons who are aggrieved by such abuses to obtain remedies. Such a system underlies the rule of law as opposed to a government of will.

In this connection, the rule of law requires that there should be a judicial system which is both impartial and independent of the executive and legislative authorities. That is, a judiciary that is capable of giving relief when one's rights or interests are infringed by an executive act, without being subjected to extra-legal pressures.

We must not lose sight of the fact that the impartiality and independence of the judiciary can be reinforced and rendered more meaningful by an independent legal profession. That is to say, the independence of the judiciary can have true meaning in a jurisdiction where lawyers are free from official or official-sponsored harassment in pursuit of their profession. In other words, in order to promote the independence of the judiciary, it is equally important that conditions are created under which legal practitioners would have nothing to fear when representing and assisting their clients even if the opposing party is a government institution.

In Namibia two prominent Articles that give constitutional support and practical effect to the principle of the rule of law are Article 18 and Article 78, paragraph (3) of the Namibian Constitution.

Article 18 which is aptly entitled "Administrative Justice" reads:

Administrative bodies and administrative officials shall act fairly and reasonably and com-

ply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court of Tribunal.

Article 18 forms a part of the Bill of Rights of the Namibian Constitution. As the right guaranteed to persons is justiciable, the Article constitutes a firm basis for respect for and the promotion of the rule of law in Namibia. Its provisions are meant to instil in government officials, including Ministers, a sense of justice and fairness in the discharge of their official duties. In this connection, the main object of administrative justice as a justiciable right is to enable the people to rely on the law to ensure that the power of administrative bodies and officials is exercised in a manner compatible with the ideas of fair dealing, good administration and good governance.

The independence of the judiciary which is one of the touchstones of the rule of law is also protected by constitutional provisions. Article 78, paragraph (3) of the Constitution provides:

No member of the Cabinet or the legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to the terms of this Constitution or any other law.

While the independence of the judiciary is vital for the protection of the rule of law, it must be pointed out that the judiciary alone, particularly in the developing countries, cannot ensure the rule of law to any marked degree with respect to the greater majority of our people. The judicial process and procedures remain highly technical, stereotyped and, above all, too expensive thus making the protection of many people by the courts against bureaucratic despotism beyond the reach of the average person in most developing countries. In this connection, it is important for Governments to establish or encourage Non-Governmental Organisation (NGO's) to establish extra-judicial institutions which would expeditiously and cheaply deal with public complaints against government authorities. The Ombudsman is such a body that can be established by Government.