What is the Rule of Law?

by

Leon Louw

at the

African Regional Meeting

of the

Mont Pelerin Society
Nairobi, Kenya
26-28 February 2007

The rule of law, as I (admittedly a long retired old lawyer) understand it, refers to a structural exercise of rule as opposed to the idiosyncratic will of kings and princes. Even where the latter may express itself benevolently the former is morally and politically superior. Where the rule of law does not apply, rulers assume entitlement to rule; the rule of law, on the other hand, places the emphasis upon structured responsibility and obligation.

Nelson Mandela

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1. Universal 'Triumph' of the Rule of Law

1.1 The rise and fall and rise of the rule of law

Why another paper on the rule of law? There are at least two good reasons: firstly most descriptions of the rule of law are too vague or ambiguous for practical purposes, and secondly, much or most of what has been written defines it inaccurately. The first objective of this paper is to define the rule of law in sufficiently unambiguous and concrete terms to be used as a practical aid in drafting, analysing and implementing laws; the second is to critique the tendency to use the term as a synonym for whatever anyone espouses. The lack of clarity on when laws and practices violate the rule of law has become so extreme that one of the most important institutions of free and prosperous societies is in danger of becoming, so to speak, 'void for vagueness'.

Since the end of the Cold War, it has become politically imperative for governments and politicians of every persuasion to declare themselves to be for 'the rule of law' regardless of what they mean by it or what their ideology may be. Most modern politicians, from Robert Mugabe in Zimbabwe to Tony Blaire in Britain, and from Saddam Hussein in Iraq to George W Bush in America, say they espouse it. Since every government is now for the rule of law, and those who oppose it have vanished in an immaculate misconception, an alien researcher would conclude after interviewing world leaders that the rule of law has triumphed conclusively.

A typical example is that "In the Islamic Republic of Iran, many politicians say 'rule of law' when they mean rule of sharia. Sometimes they say 'Islamic law' while at other times they say 'rule of law' for brevity; however, if asked, they explain that all laws have to be in agreement with sharia."[1] In a Statement before the Eleventh UN Congress on Crime Prevention and Criminal Justice (18-25 April 2005), Ayatollah Ghorbanali Dorri Najafabadi, Attorney General of Iran, declared, for instance, "We do believe that the rule of law and integrity of the judicial system in any society guarantees, and is a prerequisite for, the health and efficiency of the whole public system and governmental bodies as well as private sector (sic)".[2] Robert Mugabe is adamant that everything he does is in accordance with the rule of law. He argues that he does not violate the Constitution, and that media censorship, land seizure, political detentions, Operation Cleanup, violations of human rights *et al* are all in terms of legislation properly passed in a democratically elected parliament.

This new universal endorsement of the rule of law is in sharp contrast to the 'progressive' orthodoxy amongst social scientists during the intellectually and ideologically whimsical 1960s. The rule of law was denounced by a host of words and terms that labelled whatever was not intellectually chic. It was regarded as an anachronistic 'counter-revolutionary', 'conservative', 'reactionary', 'regressive', 'anti-democratic', 'elitist' or whatever constraint on 'people's power'. It was a surreptitious bourgeois stratagem to perpetuate capitalist imperialism. In accordance with Marxist-Leninist doctrine, far from courts being independent under the 'separation of powers' component of the rule of law, they ought (as practised in a

[1] www.un.org/webcast/crime2005/statements/23iran_eng.pdf
[2] *ibid.*

growing number of socialist and communist countries), as agents of 'the party', to engage in legal 'activism' for 'the people'. Their purpose was to advance 'people's democracy' and 'the revolution'. The purpose of government institutions generally was to appoint (or elect in sham elections) 'legitimate' leaders and officials to govern 'in the public interest' by administrative fiat rather than by way of powers and functions rigidly divided between supposedly complex, costly and cumbersome legislative, executive and judicial branches of government.[3]

There were differences of degree but not substance between 'radicals' and 'moderates', but there was no fundamental difference between the 'soft' and 'hard' left and right. Both sides of the false left-right dichotomy opposed the classical liberal desire for rigid application of the rule of law.

When the rule of law was mentioned positively, it was usually as a synonym for law *per se*, regardless of its nature, the purpose being, as now, of those in power to legitimise maximal power. In this sense, there was, at least, the redeeming positive incentive of power elites being subjected to the same laws as their subjects.

Those in power were supposed not to be 'above the law', but it left them free to make *any* law by *any* means. This is generally what modern governments in all countries have in mind when they say they uphold the rule of law. This myopic meaning does not have philosophical content. It reduces the rule of law to a mere technicality: whether government operates in accordance with whatever laws it happens to make. It certainly does not connote such classical liberal values as the separation of powers, due process, general application, impartiality, natural justice, prospectivity, presumed innocence, rationality and the like.

One of my concerns is that when classical liberals, such as members of the esteemed Mont Pelerin Society, use the term as a synonym for liberty, they unwittingly endorse and legitimise prevailing misconceptions about its true meaning and importance.[4]

En passant it should be observed that the rule of law is also used as a synonym for the absence of corruption or the presence of law and order. Although these are not the issues founding fathers of the rule of law, the great eighteenth and nineteenth century western philosophers, had in mind, they are legitimately part of the rule of law in the very specific sense that there can obviously be no rule of law if well-crafted law, properly conceived, is ignored. In other words, the rule of law is primarily a reference to *substance*, and secondarily a reference to *application*.

[3] For a Marxist critique of the rule of law see Olufemi Taiwo, *Legal Naturalism: Marxist Theory of Law*, Cornell University Press, 1995. For a survey of Marxist theories of law see Robert Fine, *Democracy and the Rule of Law, Marx's Critique of Legal Form*, Blackburn Press, 2002.
[4] There have been many MPS papers, some of which are available on its website, in which the 'rule of law' is used in this inaccurate and counter-productive sense.

1.2 New rule of law opportunities and threats: 'development' *versus* the 'war on terrorism'

The first big shift in post-colonial growth and development orthodoxy was from the passion for 'aid' to developing countries during the 1970s and early 1980s to 'neo-liberal' or 'Washington consensus' economic policies of the late 1980s and 1990s, which saw the panacea as poor countries getting market-friendly macro-economic 'fundamentals in place'. That early aid was a manifestation of Cold War hegemony is an important consideration as far as interrogating the supposed logic of modern aid. There is, for instance, an apparently genuine desire to reverse the perverse correlation between aid and stagnation. It became increasingly obvious that aid not only failed to achieve growth or development, but Africa, which got most aid *per capita*, was getting poorer, and individual countries with more aid were getting poorer fastest.

Macro-economic conservatism ('Structural Adjustment'), though less calamitous, was also not achieving desired results. Accordingly, the prevailing strategy shifted during the past ten to fifteen years to a new development prescription. Now poor countries – called 'developing' even when they regress – are now encouraged to uphold 'the rule of law' and respect 'property rights'. Now that all countries claim to be doing so, and in the absence of effective criteria for establishing whether they do[5], there is an obvious need for protagonists of jurisprudential rectitude to provide clear definitions of the rule of law, guidelines on implementation in practice, and simple criteria for assessing compliance. This paper suggests that the triumph of the rule of law in rhetoric is *potentially* a profound victory for the planet, more so for its poor billions than its rich millions, provided classical liberals succeed in getting it properly defined and applied.

As far as development is concerned, the evidence suggests[6], that the integrity of the legal system[7] is probably the single most important determinant of peace, prosperity and development. The ideal is, of course, to identify and apply *all* policy characteristics that distinguish 'winners' from 'losers'. First World leaders are understandably exasperated about the persistent stagnation or decline of most Third World countries. Instead of concluding that what poor countries need is the *comprehensive* adoption of proven policies, publicity-seeking Robin Hood-like First World politicians with short memories about the fact that financial aid has already been tried and failed, have a renewed obsession with aid, supported, as before, by an entourage of pop-stars, and plunder their citizens to fund foreign despots. Mercifully, they have not replaced emphasis on sound legal institutions with aid, but are adding a new wave of financial aid that is likely to be as counter-productive as past aid.

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[5] There are various measures, mostly proxies, for property rights and the rule of law, but, as this analysis argues, there are no sufficiently unambiguous definitions or criteria for assessment. The effect is not just that published indices may not be accurate indicators of compliance, but that governments have difficulty in knowing what precisely they ought to do, and, more importantly, *not* do.

[6] See Leon Louw, *Habits of Highly Effective Countries*, Law Review Project, Johannesburg, 2006, which identifies policy variables that characterise countries with the best and worst scores respectively on standard 'policy objectives'.

[7] The 'integrity of the legal system', it is suggested, is a suitable catch-all term for all *jurisprudential* principles of good law.

The new popularity of the rule of law, in rhetoric if not in reality, may be the most positive classical liberal development in the new millennium. There is, however, a daunting countervailing tendency to compromise the rule of law throughout the world, not just on both sides of the 'war on terrorism', but also in neutral countries (especially after the US Embassy bombing in Nairobi, and terrorism against tourists in Bali). Phoney and legitimate anti-terrorism measures manifest themselves in many contexts, especially the invasion of privacy (by way of measures against 'money laundering' and 'interception and monitoring' of communications), liberty (intensified restrictions on international travel) and property (arbitrary asset forfeiture), to mention a few examples.

Erosion of the rule of law is legitimised by the claim that extraordinary measures are needed in extraordinary circumstances. Classical liberals are deeply divided on this issue. At one end there are those of a more conservative disposition who regard anti-terrorism measures that are in conflict with the rule of law as an integral aspect of the 'war' itself. At the other end there are those of a more libertarian disposition who doubt that values can be defended by compromising them. Whilst the arguments both ways are compelling, they are ominously reminiscent, for a former anti-apartheid activist like me, of the defence of the extent to which apartheid compromised the rule of law supposedly to defend South Africa against socialism and communism. The lesser of two evils is evil, but, rightly or wrongly, it was and is argued that the real world does not allow people the luxury of choosing between good and evil, that it forces them to choose the lesser of evils.

The context and thesis of this paper is accordingly that:

- The rule of law has lost its meaning, and the challenge is for classical liberals is to be clear about what it is and is *not*, on one hand, and to resurrect it as a living aspect of jurisprudence on the other.
- The new millennium is buffeted between the countervailing forces of the realisation that the rule of law is a precondition for development and prosperity, and the desire to compromise it as part of the war on terrorism.

2. Towards coherence

Historically, the rule of law graduated during the twentieth century from being an English, and perhaps French and Dutch, concept to being regarded as a global imperative. Its journey has been as instructive as it has been complex. The element of most current relevance is the extent to which attempts at defining it have been characterised by assertions that there is no precise definition – or that that it cannot be defined – and that its meaning has evolved, often in divergent directions as it spread across the planet. The assumption tends to be that it was conceived by wise jurists, and propagated successfully, albeit inconsistently, whereas spontaneous order scholarship, especially that of Hayek, prefers the view that it is more of an omnipresent phenomenon enjoying varying degrees of veracity in different societies and times since the dawn of civilisation.

Revisiting the literature for present purposes left this author with the impression that it is not so much that what it means is vague or has changed, but that writers have had difficulty explaining what they have in mind. It is reminiscent of Kenneth Clark's celebrated *Civilisation* in which he writes that he cannot define 'civilisation', but he knows it when he sees it.[8] So it is with the classical liberal conception of the rule of law. Unlike civilisation, which is recognised when we see it, it is the *absence* of the rule of law that tends to be recognised by those few who espouse it, even if they cannot always define what is missing. The problem with its apparent global triumph is that very few people seem to know it when they see it, or its absence. For rhetoric to become living reality there is an obvious need for clarity on what willing politicians, government officials and statutory drafters must do differently to uphold the rule of law. They need to be equipped in their daily activities readily and confidently to identify laws and practices that are inconsistent with the rule of law, and eschew them.

The rule of law is usually coupled with 'property rights',[9] often as if they are two sides of a proverbial coin. They are not. There are separate words for the usual good reason that they are distinctive concepts, and there are important ideological reasons to respect these linguistic and conceptual distinctions. It may, for instance, be possible to get people who do not respect property rights to, at least, collaborate in promoting the rule of law.

Even so, since property rights also enjoy increasing rhetorical support, there is a corresponding need for clarity on what 'property rights' are, so that those who make policies and implement them know when property rights are being violated. There is almost no jurisprudence on this, apart from excellent analyses of what constitutes 'takings' (eminent domain and expropriation).[10] There is insufficient clarity that regulation *per se* is an erosion of property rights. This is not the place to elaborate, but it is worth observing that few people realise that the essence of economic regulation is the erosion of property rights.

So much has been written during the past three centuries on the rule of law that is, at best, distressingly vague and ambiguous, and at worst simply wrong. The term is usually used as if it is simply a synonym for whatever jurisprudential order the author concerned espouses. The combined effect is that there is a great deal of confusion, even among experts, about what the rule of law is. At times it seems as if establishing what the rule of law is *not*, may be more important than establishing what it is.

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[8] Hermann, Boston, 1974.

[9] As in 'the rule of law and property rights'. Examples abound of which these are a representative cross-section: Akbar Ali Kha, *Rule of Law and Property Rights: How Do they Affect Development in Bangladesh?* (www.sdnpbd.org/sdi/issues/governance/governance/ruleof_lawand_property_rights.pdf); World Bank theme *Legal Reform, Property Rights and the Rule of Law* (http://rru.worldbank.org/PapersLinks/Reducing-Business-Risks/); the measurement of 'institutional quality' as 'attempts to measure property rights *and* governance' (http://pgpblog.worldbank.org/archive/2006/11/term/259); Chris Pounds, *Property Rights and the Rule of Law*, (www.fte.org/capitalism/lessons/02/).

[10] See especially Richard Epstein's scholarship on the matter, such as his seminal classic, *Takings: Private Property and the Power of Eminent Domain*, Harvard, 1985.

3. What is Law?

3.1 Fuller's Eight Principles of Law

For law to 'rule' there must firstly be law *per se*. What, precisely is law? The term is used in many senses. The rule of law is obviously not about scientific laws, such as the 'law' of gravity or Newton's 'laws' of motion. Nor is it about mathematical laws. Laws of economics, such as the 'law of supply and demand' and 'Say's law' are not, like scientific laws, immutable. They are, more accurately, general *rules* of human conduct. Jurisprudentially, 'law' refers to the *regulation* of human conduct. The term 'law' in other social sciences and in natural science is *descriptive*.

In this sense, laws will be '*good* law' if they:

- follow from the nature of law,
- are required by a country's constitution,
- are required by the rule of law.

For what purports to be 'law' to be law in reality, it must, at the most fundamental level, have some prospect of being observed or enforced. This is not usually cited as a requirement of the 'rule of law'. It should be for the simple reason that *law* cannot otherwise be said to 'rule'. The standard literature, perhaps inadequately, usually defines the 'rule of law' only by reference to enactment and substance.

Assuming a government operating under a constitution, for 'law' to be law, its adoption, content and implementation must be 'constitutional'. Since this is a technical country-specific matter, constitutionality is not addressed here in detail. Where detail is appropriate, reference is made to the South African constitution, not just because it is the constitution with which I am most familiar but also because the rule of law is a 'foundational' provision in the first section of the South African constitution. Being 'foundational' raises the interesting prospect of the constitution itself having unconstitutional provisions if they violate the rule of law.[11]

Eminent liberal jurist, Lon Fuller, describes '*Morality that Makes Law Possible*'.[12] He identifies eight ways to fail to make law, which he illustrates through the allegory of King Rex, who decided to scrap his country's corrupt and inefficient legal system. However good his intentions, he failed not only to reform the law, but also to make any law at all. How did he fail?[13]

He started by repealing existing laws and procedures, but did not replace them with new ones. The people, in Fuller's allegory, protested, so he created a code for himself, that would enable him to make decisions that cohered with the code. However, the people protested again as they wanted to know what the rules were.

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[11] Some provisions of the South African Constitution, like provisions of most constitutions, may well violate the rule of law, such as provisions allowing the executive branch of government to make 'subsidiary legislation' and for discrimination in favour of people previously disadvantaged by 'unfair' discrimination.

[12] Also called the 'Implicit Laws of Law Making' from Anatomy of the Law (1968) reprinted in Kenneth I Winston ed., *The Principles of Social Order*, Selected Essays of Lon L Fuller, Duke University Press, Durham, 1981.

[13] Lon L Fuller *Morality of Law* pp 33-38, revised ed., New Haven, Yale University Press, 1969.

This he corrected by the use of the insight that it is always easier to decide matters after the case, with the use of hindsight. Thus he undertook that at the beginning of each year he would decide all the cases of the previous year and lay down the rules for that year as well as his reasons for the decisions taken for that year. However, the reasons were not meant to lay down rules of law for the next year, for that would defeat the benefit of hindsight.

Again the people protested wanting to know their rules in advance so that they could act according to them, rather than simply being judged by them after the fact. Rex again attempted to meet the needs of his people and undertook to create a code that laid out the rules in advance. However his code was unintelligible. Not even lawyers could make sense of it. And again the people protested. With the help of a commission of lawyers Rex was able to make a clear code. However, the result was a code full of loopholes and contradictions. There were more protests.

Rex became angered and frustrated with the people and commissioned a coherent but extremely strict and impossible set of legal rules to follow (no sneezing, a duty to report to the King within ten seconds of being summoned, etc.). The people protested again that 'To command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no purpose but confusion, fear, and chaos'.[14]

Rex responded by making the code, not only clear and coherent, but also fair in the sense of not requiring more of his subjects than what was within their power. However, the socio-economic conditions of his people had significantly changed in the period since the beginning of his code. Rex then undertook daily to amend the code to bring it up to modern conditions. The people protested claiming, 'A law that changes every day is worse than no law at all.'[15]

This state of affairs began to cure itself over time. However, as it did, Rex undertook to sit as judge once again, for he mistrusted the judiciary in its application of the law. Rex was no longer afflicted with the inability to set down general rules of law in his judgements and he constantly referred to the code as the touchstone of the law, the basic supreme law of the kingdom. However, when the volumes of his opinions became open to public scrutiny, it became clear that his judgements bore no relation to the rules of law laid down in the code.

It is important to keep in mind that according to Fuller, Rex did not fail to make 'good law'. Neither did he create 'bad law'. He failed to make any law at all. Rex's eight failures can be summarized as follows:

1. a failure to make general law,[16]
2. a failure to make the laws known,
3. making law retroactively,
4. a failure to make the law understandable,
5. enacting contradictory laws,

[14] *Ibid* at 37.
[15] *Ibid*.
[16] I take this also to include the notion found in Aquinas, that laws are to be for the common good, and not simply for private interest. Fuller would support this position.

6. enacting laws that are impossible to follow,
7. changing the laws too often for one to be able to orient one's conduct to them, and
8. a failure of congruence between the promulgated laws and their administration.

For law to 'rule' there must be law, and for law to exist in any coherent sense, it must comply with Fuller's minimum conditions. When it does so, much of the rule of law is in place.

3.2 Putative Law

There may not be real world examples of King Rex in that there are no countries in which the ruler has repealed all 'bad' law without substituting new law. However, there are thousands of examples of bad law in every country.[17] The best-known example of pseudo-law may be the fact that prostitution operates openly, so to speak, in many or most countries purporting to ban it. South Africa, like other African countries, but less so than most, has laws that are virtually unknown and never applied, one of which is the supposed prohibition of prostitution. Others are less 'sexy', such as the Marking of Prices on Goods regulation.[18] In response to enquiries as to who in the department concerned was responsible for it, the Law Review Project[19] was told that no one there knew it existed.

South Africa has a potentially important law (from a rule of law perspective), the Short Process Courts Act[20]. The supposed purpose of the statute is to expedite and cut the cost of civil dispute resolution, but the Act has never been implemented and the justice department could also not identify anyone who knew of it.

When the Law Review Project informed the Parliamentary Portfolio Committee during hearings on the anti-tobacco bill that core provisions were unconstitutional, and when the police chief had announced that they had no intention of enforcing the law and could not understand it, the departmental representative informed the committee, without recognising the contradiction inherent in his testimony, that it was not the government's intention to enforce it and that its purpose was to 'send a message' to the public about how seriously the government opposes smoking.

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[17] The most comprehensive examples, though compiled by jurists, are humorous rather than scholarly: Harold Faber, *The Book of Laws*, Sphere, London, 1979; Sheryl Lindsell-Roberts, *Funny Laws & Other Zany Stuff*, Sterling, 1999; Paul Dickson (a) *The Official Rules*, Addison-Wesley, 1990, (b) *New Official Rules: Maxims for Muddling through to the Twenty-First Century*, Portland, 1989, (c) *The Official Rules for Lawyers, Politicians and Everyone They Torment*, Walker & Co, 1996; Kathi Linz, *Chickens May Not Cross the Road: and Other Crazy But True Laws*, Houghton Mifflin, 2002; Dick Hyman, *The Trenton Pickle Ordinance and Other Bonehead Legislation*, Penguin, 1984. This author compiled a list of unknown, unenforced and absurd laws in South Africa published as *Bonehead Laws* in the *Sunday Times* (South Africa) during the late 1970s.

[18] Government Notice 413 of 1977.

[19] A South African NGO promoting the principles of good law.

[20] Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991.

One of the more lamentable examples of a refusal to respect the constitution was displayed by the former Minister for Trade and Industry, Alec Irwin, who's response, when told that there was Senior Counsel opinion to the effect that his Liquor Bill was unconstitutional, was that he was aware of the problem, was proceeding with it anyway, and was unconcerned about the prospect of losing a constitutional challenge, which is what happened in due course.

There are often examples of the South African government proceeding with measures known in advance to be of dubious constitutionality. One of the many extraordinary actions of former President Nelson Mandela was his refusal to sign three bills into law because, as a lawyer, he doubted their constitutionality. He did this after the laws had been the subject of many months of preparation; dozens of public hearings and submissions; numerous drafts; lengthy parliamentary hearings, 'readings' and debates; approval by all political parties and in both houses of parliament, and general public enthusiasm. The Constitutional Court agreed with him and ruled all three to be unconstitutional to the extent queried by Mandela.

These and many other examples illustrate the extent to which some 'laws' are not law at all. Unfortunately moribund laws are not harmless. They create opportunities for rogue police, officials and, of course, competitors, to victimise opponents and extract bribes under threat of enforcement. The random way in which anti-prostitution laws are enforced in most countries suggests that they are no more than glorified opportunities for corruption, and that prosecution occurs only when protection money or services are not forthcoming.

South Africa's anti-tobacco law[21] has the predictable effect that compliance is sporadic and what constitutes compliance is unknowable, which violates one of the core requirements of the rule of law. The law requires, for instance, a physical barrier separating smokers from non-smokers in restaurants and prohibition at places of work. The barrier requirement manifests itself as everything from zero (in the majority of establishments, namely those serving low-income communities), through places with a barrier that does not impede smoke (such as arches, a wall with permanently open doors, or a waist-high railing), to comprehensive physical barriers with hermetically sealed areas for smokers. Confusion about the meaning of the law is compounded by the obvious contradiction that restaurants are, for employees, places of work. Many restaurants are in shopping centres and malls where smokers smoke in restaurants with smoking sections even though smoking is theoretically forbidden throughout the greater building. The only real threat of enforcement is a competitor providing sufficient inducement for police to prosecute alleged offenders. Not even anti-smoking fanatics take the law seriously.

The most absurd contradiction is that one of the few places where smoking is still allowed is, arguably, the only place where there really are 'innocent victims', namely private homes with children. If homes have domestic workers they are places of work, which means that, technically, people may not smoke in their own homes. Apart from homes and other places where there are children, the world 'out there' is one in which adults are free to care for themselves by deciding where to work or shop.

[21] Tobacco Products Control Act, 1993.

If property rights are a legitimate aspect of the rule of law, as many assume, anti-tobacco laws are probably the most commonplace violation.

What such real-world examples illustrate is that one of the requirements for the rule of law is for governments to take their own laws seriously. If they do, and they are ruled by their own laws and expect everyone to comply with them, they will be less inclined to adopt laws that are poorly conceived, crafted and implemented. A bonus will be that there will be less real or suspected abuse of power, especially in the form of corruption.

To be rule-of-law-compliant, laws must be certain, objective, accessible and so on. But they must also be enforced. The purpose of due process is to give effect to rule-of-law-compliant laws. There would be no rule of law – people's rights and obligations would not be determined *by law* – unless:

- there is 'law and order' (crime subjects victims to discretionary power of criminals),
- laws are interpreted and applied by impartial judicial officers, and
- there are effective ways of establishing the facts.

All this is a logical derivative or corollary of not being ruled by man (or by person if you prefer).

4. What is the Rule of Law?

4.1 Simple Concept: Profound Implications

The rule of law is essentially a simple concept:

the rule of *law* as opposed to the rule of *man*

(or, androgynously, the rule of *person*).

Classical rule of law philosophers, especially Smith, Locke, Dicey, Montesquieu and Hayek, explained and espoused it as compellingly and eloquently as they did primarily because of the extent to which they had internalised this simple concept. Individual components of the rule of law, properly defined, are essentially derivatives of this definition. The proverbial 'acid test' when deciding whether a measure violates the rule of law is to ask whether rights and obligations are established by fixed and known (or readily knowable) law or by discretion, and whether the law was made in accordance with prescribed formalities entailing *bona fide* checks and balances against making whimsical or arbitrary law.

Implicit in Mandela's quote beneath the main heading above[22] is that the lack of arbitrary discretion must characterise three aspects of law:

1. creation,
2. powers,
3. implementation.

[22] *Annual Open Society Lecture*, delivered at the University of the Western Cape, 5 October 1999.

One of the most important aspects of this conception of the rule of law is that it is not concerned with the substance of law, only that people should be ruled by 'law', not 'man'. It is the 'rules of the game' by which government governs. Specifically, the rule of law is not simply another term for freedom, liberty, property rights, justice or democracy, all of which can be violated *in accordance with the rule of law*. Such terms have distinctive meanings for good reasons and conflating them harms more than merely language.

The 'substance' of laws, in this context, means legitimate policy objectives advanced by it. A policy may be legitimate jurisprudentially even when it is illegitimate in other contexts. The prohibition of alcohol, tobacco, perfume, 'junk' food, sport and trade on the Sabbath, censorship, and so on, may be rule-of-law-compliant despite being violations of personal liberty, bodily integrity or property rights. The rule of law is not *per se* violated by unwise policies, such as inadequate or excessive policing, education, housing or health care. The rule of law does not require government to protect or neglect the environment, or mandate or prohibit child labour. Clarity on what the rule of law is *not* is as important as defining what it is because of the modern inclination for people of all persuasions to claim it as an integral aspect of *their* ideology.

Properly understood, capitalists, socialists, religious fundamentalists and others who might not agree on much, can at least, and often do, agree on the rule of law. A parochial South African example of the kind found everywhere is the impassioned plea for the separation of powers and the rule of law by Professor Shadrack Gutto, generally regarded as on the far 'left', with which, jurisprudentially, every classical liberal will agree.[23] The rule of law is a justiciable (legally binding) 'foundational' provision of South Africa's post-apartheid constitution.[24] That it was agreed to by all parties, from the classical liberal Democratic Party to the Communist Party is entirely appropriate.

Hayek explains in various texts what the rule of law is and points out that it is not itself freedom, but makes freedom much more likely. When the rule of law is violated, as with America's RICO[25] law and South Africa's virtual clone, POCA[26], it is usually to permit violations of personal and economic liberty. The rule of law is violated by these laws by virtue of discretionary power given to the executive branch of government to seize assets arbitrarily on the unproven supposition that they are 'proceeds' of or 'instrumentalities' in the commission of unproven crimes. These measures compromise the rule of law in other ways too. There is, for instance, no

[23] *The Challenges Facing the South African Justice System vis-à-vis Some Constitutional Imperatives*, Centre for Applied Legal Studies, Faculty of Law, Wits University, 10 October 2000, http://www.doj.gov.za/2004dojsite/cfw/colloquium/keynote3.htm.
[24] Section 1, *Constitution of the Republic of South Africa*, 1996: '… South Africa is … founded on … the supremacy of the constitution and the rule of law.' This provision, though assumed by most to be puffery (merely a statement of national values and goals) has been ruled by the Constitutional Court to be binding. Accordingly, all laws and administrative practices must comply with the rule of law.
[25] *Racketeer Influenced and Corrupt Organizations Act*, enacted by section 901(a) of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (15 October 1970), codified as Chapter 96 of Title 18 of the United States Code, 18 USC. § 1961 through 18 USC § 1968.
[26] *Prevention of Organised Crime Act*, No. 121, 1998.

requirement for due process[27]. Victimisation of innocent people[28] under these laws not only exempts government from having to prove criminal guilt, or even to institute action. To the limited extent that there is provision for judicial intervention, there is effectively a reverse burden of proof – victims have to prove their innocence, which is often impossible – and criminal law and procedure is replaced by civil law and procedure under the bogus pretext that 'asset forfeiture' is a civil matter, and that assets rather than people are targeted. Targeting assets is known in many legal systems as *in rem* (literally, against the thing).

The idea is that 'things' exist apart from owners, which is self-evidently nonsense. The illusion that assets exist apart from owners is facilitated by misleading shorthand to describe rights and regulations. 'Property rights' does not mean that property has rights. More accurately we should speak of 'rights of people in and to property'. Laws and government agencies do not, in truth, regulate financial markets, agricultural products, vehicle safety or pollution. They regulate people operating in financial markets, people dealing with agricultural products and so on. Popular parlance obscures the fact that all government laws and policies are targeted at *people*. All controls are people controls and all property belongs to people. The violation of rights facilitated by the violation of the rule of law under RICO, POCA *et al*, has the effect that the state becomes a thief in all but name.[29]

Hayek's view is that the violation of rights occurs routinely under these laws because the erosion of liberty is more likely when the rule of law is compromised. It is conceivable, but unlikely, that such laws could or would be adopted if the rule of law prevails in all respects.

The most celebrated rule of law text in the English-speaking world is AV Dicey's monumental *Introduction to the Study of the Law of the Constitution* (1885). In his view, which formed the basis of the modern doctrine of the rule of law, the rule of law means that: 'No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.'[30]

4.2 Mugabe's Rule of Law

Consider Zimbabwe's Robert Mugabe. His most publicised treachery has been the seizure and redistribution of white-owned farms.[31] The rule of law *per se* does not

[27] Defined in 4.4 below.
[28] Innocence here refers to the presumption under the rule of law of innocence until guilt is proven in accordance with credible laws of criminal procedure.
[29] Debate about the legitimacy of these laws is complex and this is not the place to address it fully. Anyone wishing to explore the matter can do so by testing the specific provisions of RICO and POCA, and the actions of the agencies spawned by them, against the rule of law criteria in the text of this paper and in the checklist in the Appendix. The principal objective of RICO, POCA and their counterparts in other countries is to dispossess people, presumed to be innocent in the absence of having been proven guilty, of their property. Where victims of the law have been convicted and the punishment of the criminal court 'fits the crime', the purpose of these laws is to enable the state to exact further punishment arbitrarily.
[30] AV Dicey, *The Law of the Constitution* (8th ed.), p. 198 *et seq*.
[31] Less publicised actions, such as the confiscation of street vendor merchandise, detention of political opponents, restrictions of trade union and media freedom *et al* have impacted many more people, often more severely, than white farmers.

prevent nationalisation (also known as expropriation, eminent domain and takings) of farms, nor granting state-owned land to 'war veterans'.[32] It does, however, require that it be done in accordance with (a) **objective criteria** in terms of laws that are (b) **prospective** and of (c) **general application**, implemented (d) **impartially**, in terms of (e) laws **properly legislated** by (f) a **separate legislature**, for execution to be (g) strictly in accordance with the law, (h) by the **executive alone**, for (i) enforcement to be (j) **exclusively** by (k) an **independent** and (l) **impartial** judiciary, and so on. The Hayekian insight about the rule of law making liberty more likely suggests that, were Mugabe to comply with the rule of law, the primary incentive for the measure would be removed. He would, for instance, be prevented from discriminating arbitrarily:

- against farmers,
- against people on account of their presumed (but not formally classified) race,
- against targeted victims within those groups,
- in favour of selected supporters,

He would, however, be free (under the rule of law properly understood), to redistribute land according to laws of general application, objective criteria and the like. He is unlikely to want to do so under such constraints.

What Mugabe means when he says he abides by the rule of law is that he complies with the law – he does what the law, *his* law, mandates. His view is not aberrational. Lamentably, the same view is widely held in liberal democracies. When officials in the 'free world' unwittingly violate the rule of law, they are at pains to demonstrate meticulous compliance with empowering legislation. They will, in short, provide the same justification offered by Mugabe, Castro and Chavez. This is the reigning error that makes it necessary to clarify and popularise the profound distinction between 'the law' and 'the *rule* of law'.

That the rule of law is no synonym for free markets is stated explicitly by the United Nations in an article entitled *World Bank Urges Greater State Role*.[33] According to the article:

> 'Countering earlier conceptions of economic reform that included "an overzealous rejection of government," the World Bank now argues forcefully that a focused and capable state remains central to economic and social development. 'Development without an effective state is impossible," declares the Bank's World Development Report 1997, which this year addresses the theme of "The State in a Changing World." … The general lack of independent judiciaries, secure property rights and the rule of law tend to discourage entrepreneurs from investing, thus hampering economic growth.'

There is some theoretical truth in this perspective beyond the fact that the UN appears to delight in the prospect of the World Bank espousing more government. The truth lies in the point that the rule of law does not prescribe which economic or

[32] There are, of course, other grounds, such as 'property rights', for objecting to 'land reform', but they are not an essential ingredient of the rule of law.
[33] *African Recovery*, www.un.org/ecosocdev/geninfo/afrec/vol11no1/wbank.htm

political system a country should have, only that whatever system there is, it must be implemented in accordance with the rule of law. It is flawed in that it presupposes that 'independent judiciaries, secure property rights and the rule of law' necessitate a 'greater state role'. A reduced state role is more likely to coincide with the three objectives of 'effective' government mentioned in the quotation, because they imply *less* state machinery interfering with the judiciary (or usurping its role by way of 'administrative justice'), with property rights, or exercising arbitrary power. It is one thing to suggest that what little the state does ought to be done properly, and quite another to suggest that the 'role' of the state needs to be increased for that to happen. The world's experience is that countries with smaller governments with fewer functions out-perform those with bigger 'overzealous' governments.[34]

4.3 Rule of Law Philosophers

For Dicey, the rule of law entails:

> '… the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative or even a wide discretionary authority on the part of the government … Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals … Our constitution, in short, is a judge-made constitution … Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge … The essential point, that the discretion left to the executive organs wielding coercive power should be reduced as much as possible … under the Rule of Law the government is prevented from stultifying individual efforts by ad hoc action. Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts … The difference between the two kinds of rules [the specific and the non-specific] is the same as that between laying down a ... Highway Code, and ordering people where to go; the formal rules tell people in advance what action the state will take in certain types of situations, defined in general terms, without reference to time and place or particular people. They refer to typical situations into which anyone may get and in which the existence of such rules will be useful for a great variety of individual purposes. The knowledge that in such situations the state will act in a definite way, or require people to behave in a certain manner, is provided as a means for people to use in making their own plans.'

In Friedrich Hayek's (1899-1992) words in his best-selling *Road to Serfdom*, 'The Rule of Law implies limits to the scope of legislation: it restricts it to the kind of general rules known as formal law, and excludes legislation directly aimed at particular people.'

[34] Diverse sources cited herein. See especially charts below.

The English-speaking world pays inadequate homage to the contribution of French rule of law philosophers, and there are probably great contributions from elsewhere, the most profound of which may have been the great Dutch jurists (Grotius, Voet, Van der Keessel *et al*). Dicey's French counterpart, Jean-Jacques Rousseau (1712-1777) asked rhetorically 'How can it be that all should obey, yet nobody commands, that all should serve, yet have no master? These wonders are the work of the law. It is to law alone that men owe justice and liberty. The first of all laws is to respect the laws.'

One of the most under-rated philosophers is another Frenchman, Friedrich Bastiat, who regarded the state as 'that great fictitious entity by which everyone seeks to live at the expense of everyone else'. He wrote a devastating critique of arbitrary law in *The Law*.[35] He does not mention the rule of law by name, but attacks law, however made, which is intended to serve the interests of some at the expense of others. This process he sees as the 'complete perversion' of the essential objective of law, which is to protect life liberty and property, that the liberty of people to transact freely and for their property to be secure. 'The law … has acted in direct opposition to its own purpose … placed the collective force at the disposal of the unscrupulous … converted plunder into a right … converted lawful defence into a crime …'[36]

Even less recognised is the great Italian scholar, Bruno Leoni, who wrote eloquently on the rule of law in *Freedom and the Law* who provides an insightful summary of the history, and of differences and similarities, of conceptions of the rule of law and its continental and US variants (known by such terns as *Reichtsstaat* in Germany.[37] It is unclear to me why such widespread clarity on the meaning of 'the rule of law' dissipated during the past century instead of expanding in sympathy with the march of democracy and civil liberties. Clearly, there are formidable vested interests in eroding it, but they are omnipresent. It has been observed that people tend to value what they have, less than what they lack; they value freedom until they have it, just as they value water when they are thirsty and air when they suffocating, but seldom think about them otherwise. If this is true, the erosion of the rule of law in the 'free world' under the 'war on terrorism' might have the effect of resurrecting effective interest in and understanding of the rule of law. Its relative absence in the rest of the world does not seem to me to result in superior appreciation.

The most prominent French advocate of the rule of law is generally regarded as philosopher, Baron de Montesquieu (1689-1755). Important aspects are also attributed to British philosopher, John Locke (1632-1704).

The rule of law, though not by that name, has informed jurisprudence for millennia, back to Pharonic Egypt. One of the most striking contrasts between rule of law and rule of man paradigms is to be found in the Platonic *versus* Aristolean conflict of visions. Plato (427-348 BC) saw no need for the rule of law, provided unbridled arbitrary power is vested in philosopher-kings. They can be trusted, he thought somewhat naively, to be virtuous at the expense of self. He was the earliest

[35] Originally a 1850 'pamphlet' republished by *inter alia* the Foundation for Economic Education, New York, 1998.
[36] Bastiat pp 4-5, 1998.
[37] William Volker Fund, Los Angeles,1961, IHS 1972 ed, pp59-76, republish*ed* in an expanded 3rd edition by Liberty Fund, Indianapolis, 1991.

great totalitarian philosopher still studied in standard curricula. His nemesis was Aristotle (384-322 BC) for whom:

> "The Rule of Law is preferred to that of any individual … He who bids the law rule may be deemed to bid God and reason alone rule, but he who bids a man rule adds an element of the beast; for desire is as a wild beast, and passion perverts the mind of rulers, even when there are the best of men. The law is reason unaffected by desire."

Aristotle's is a glorious vision of dispassionate law that soars above and constrains 'even … the best of men' whom he sees as innately beastly. Today only a small cadre of naïve intellectuals doubt Lord Acton's trite observation (1904) that 'power tends to corrupt and absolute power corrupts absolutely', yet, because they do not have a clear conception of what the rule of law is and the case for it, intellectuals tend to be unwitting opponents when they support the adoption of measures that compromise the rule of law, especially the separation of powers.

5. Why the Rule of law: Theory and Practice

5.1 Theory: Concentration of Power, Due Process

The preceding analysis provides insights into the *raison d'etre* for the rule of law without 'spelling it out' in detail. The principle objective of this paper is to define, not motivate it, but comprehending the case for an idea is a considerable aid to understanding what it is, just as knowing the etymology of words is an aid to understand their meaning.

Two principal arguments for the rule of law in the literature are:

1. **Over-concentration of power.** The most commonly cited view is that there should be no over-concentration of power; that for power not to be abused, it must be subjected to effective checks and balances of which separation of power is one of the most important. The idea is that a sufficiently independent executive and judiciary will be a bulwark against the notorious excesses of politicians, that they will guard their 'turf' jealously; that the legislature and the judiciary will protect against the insatiable appetite of the executive for power, status and resources; that the executive and legislature will be guardians against the judiciary seizing power through judicial activism.
2. **Due process.** There are many elements to 'due process' (below). It is hard to say which are most important; equality is usually highest on the list because of the natural inclination of people to have favoured individuals and groups. Due process refers, in this context, to all three stages of law: how laws are made, implemented and adjudicated. Due process is intended to increase the likelihood of fairness and to minimise abuse and corruption. George Bernard Shaw is reputed to have observed that 'A government which robs Peter to pay Paul can *always* depend on the support of Paul' (my emphasis). This rings true because it exposes the triumph of expediency over values in daily life.

5.2 Practice: The Rule of Law is More Efficient, Less Corrupt

Efficiency

There is, for me, a truly remarkable *lacuna* in what has been written, namely the unglamorous fact that the rule of law is **practical and efficient**. This is rarely mentioned. On the contrary, one of the commonest excuses for compromising the rule of law is the fallacy that it is costly and cumbersome.

Why this virtue has been neglected is unclear. Since people are seldom persuaded by abstract philosophical arguments one might have expected elaboration of 'hard facts' in its favour. If the practical advantages of the rule of law were appreciated, many of the arguments for eroding it would fall way. The most common argument for creating a parallel pseudo-judiciary in the executive by way of a plethora of 'administrative' courts and tribunals is that the regular courts (that is the judiciary) are regarded as slow, costly and inaccessible. This idea is captured in the celebrated and cynical observation of Justice Sturgess (1928) that 'Justice is open to everyone, in the same way as the Ritz Hotel.' The solution is presumed to be shifting judicial functions from the judiciary to the executive.

The practical problem, which eludes virtually every participant in the public discourse, is that the executive is simply not geared to perform judicial functions. It is inherently unsuited to the task in almost every respect, ranging from the way in which appointments are made to the physical structure of its buildings. It either has to go to absurd lengths and costs to replicate the judiciary – in which case it has nothing to contribute – or it subverts justice. There are good reasons why the judiciary functions as it does, why it has law reports, precedent, tenure for judicial officers, court rooms designed for function, elaborate mechanisms for appointment and qualification of judicial officers, prosecutors and the like. The entire complex, often subtle, paraphernalia of the judiciary is absent from the executive. Executive pseudo-courts invariably lack the detail that increases the efficacy of the judiciary. Provision may be made for public access to records and proceedings, but the need to get verification for hearsay evidence may be overlooked. Presiding officers usually have neither tenure nor fixed terms, which means they are political appointees subject to reappointment only if they please their political superiors.

This is merely a dipstick glimpse of the magnitude of how impractical it is to for the executive to usurp judicial functions. The same is true of it performing legislative functions. Legislatures are set up in extraordinarily elaborate fit-for-purpose ways. They have properly constructed legislative assemblies, with caucus rooms, and rooms for public hearings. They have sophisticated mechanisms for publishing legislation, scrutinising and debating it, and much more, all of which is designed to improve the quality of laws. None of these benefits are at the disposal of the executive, even if it fakes public participation and accountability by having hearings and receiving submissions. There are very good reasons for legislation to follow the supposedly costly and complex process specified, usually in detail, in every country's constitution. Everything that goes into creating a proper judiciary and legislature is by-passed and subverted when the separation of powers is breached.

And that is *the* reason for doing so. The assertion that it is an incontrovertible fact that a rigid separation is impractical or impossible is an excuse for second rate

law-making and adjudication. There is absolutely nothing about the modern world that makes separation of powers less feasible. On the contrary, modern technology and resources provide less reason than ever to abrogate the rule of law. The late Nobel economist, Milton Friedman, queried the notion that 'the modern world' is 'complex'. He pointed out that, in every significant sense, it gets simpler. It is increasingly easy and cheap to do almost everything imaginable. The case for violating the separation of powers (and all other aspects of the rule of law) gets less rather than more defensible as countries become wealthier and more technologically sophisticated. Making life simpler and complex things more affordable is, after all, the sole purpose of increasing technology and wealth.

There is absolutely no reason why short-cut, low cost procedures in the executive cannot be implemented in the legislature and judiciary, except that they are by-passed precisely in order to implement inferior alternatives. Note that judicial functions in the executive have particularly perverse implications. The executive is not a single entity, like the legislature or judiciary. The duplication and subversion of the functions of the other two branches of government occurs in *every* department. There may be thirty pseudo-courts, each operating in its own uniquely inferior way, and every department at every level of government ends up with its own inferior way of making laws. Far from the executive overcoming the cost and complexity of the other branches of government, it compounds the problem exponentially. Just one of countless manifestations of the problem is that new cadres of experts are needed for each. Knowing how to handle cases in the courts does not equip one to handle a Competition Commission case. Knowing how to participate in the law-making process in Parliament does not mean that one knows how to contribute to a new law under consideration by agency X or department Y.

On the issue of practicality, the apparently cumbersome and costly aspects of the legislature and the judiciary are (usually) there for good reasons. This does not mean that they cannot be improved. The point is that these branches of government should function efficiently and they alone should perform the functions for which they exist.

According to South African Constitutional Court Judge, Kate O'Regan: 'The nature of their work [officials] does not permit considered reflection on the scope of constitutional rights or the circumstances in which the limitation of those rights is justifiable.' In other words, non-judicial officials are fundamentally unsuited by virtue of 'the nature of their work' to perform the functions of the other branches of government. O'Regan could have added that they are also unsuited to the task of identifying or appointing officials.

The proverbial 'proof of the pudding is in the eating' in that countries which are more rule-of-law-compliant have higher scores on almost all published indices. The rule of law is not just 'efficient' in the *practical* sense described here, but also in the *economic* sense that there is greater economic efficiency when there is superior rule of law observance.

Corruption

There is much feigned or real anguishing about corruption, especially in poor countries.[38] High-corruption countries, most of which are 'developing' countries, are urged to 'fight' corruption in order to facilitate development. There are high-profile anti-corruption conferences annually where political leaders ceaselessly repeat being 'tough' on corruption mantras as they promise new or intensified anti-corruption measures. The common denominator in virtually every contribution is an assumption that corruption is the consequence of insufficient policing or 'political will'.

The conspicuous correlation between corruption and absence of the rule of law[39] is seldom mentioned, and when it is, there is paltry understanding about the causal link between the two – corruption is usually presumed to occur at the expense of the rule of law rather than to be an inevitable consequence of its absence. Countries have points deducted in rule of law indices and assessments by virtue of being more corrupt, as if rising corruption precedes falling observance of the rule of law. If countries reduce corruption by 'fighting' it, they are presumed mistakenly to be more rule-of-law-compliant, which they are, but only in the limited tautological sense that people are not 'ruled by law' when there is corruption.

The problem with the standard analysis is two-fold: firstly, that corruption tends to be regarded as being unrelated to the rule of law, and secondly, that when they are linked, there is either an implicit assumption that there is no causal link, or the direction of causality is reversed. A rare example of the two being addressed conterminously was an address by Yurii Lutsenko, Minister of Interior of Ukraine, when he addressed the Carnegie Endowment for International Peace on *Establishing the Rule of Law and Fighting Corruption*.[40] Despite the promising title of his address, he 'stressed the need to observe the law in investigating and prosecuting corruption' rather than the extent to which Ukraine's laws violate the rule of law by endowing officials and politicians with discretionary powers.

The causal link between corruption and the rule of law is so elementary that it should be obvious: when laws are inconsistent with the rule of law they create discretionary power, which increases the likelihood of corruption. Put simply, if objective criteria or economic freedom are replaced by arbitrary discretion, real or suspected corruption is inevitable. Corruption can and should be understood as a simple trade-off:

Less rule of law = more corruption

The perception that government is usually on one side of the corruption equation is no coincidence. The principal reason for this perception is that it is correct. Most corruption entails bribery of *government* officials or politicians – intra-private corruption is so rare that it is seldom considered in the corruption discourse. When it is, it is usually a feeble attempt to absolve officialdom of blame by focussing on

[38] The most widely recognised indicators of corruption are produced by Transparency International. See especially TI's *Corruption Perceptions Index* (CPI) and its annual *Global Corruption Reports*, http://www.transparency.org/publications/gcr.
[39] Louw, *Habits of Highly Effective Countries*.
[40] http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=852&&prog=zru.

bribers rather than bribees, or an even feebler attempt to suggest that there is a comparable corruption problem within the private sector.

One of many examples was a report by David Bruce on the Eighth International Anti-Corruption Conference (IACC) in Lima, Peru for the Centre for the Study of Violence and Reconciliation.[41] Bruce reported that acknowledgement that 'state involvement in the economy may be conducive to corruption', but that 'it is not necessarily the case that, because corruption has negative consequences for the poor, marketisation will serve their interests. It is not sufficient to motivate for marketisation in the name of the poor merely in relation to its apparent benefit of reducing opportunities for corruption.'

He reported the 'trend at the conference' to be 'an apparent shift towards expanding the definition of corruption to include "private-to-private" corruption.' This was a departure from the fact that 'in the past the concept of corruption has generally been understood to refer exclusively to the corruption of public officials while comparable practices in the private sector were not regarded as "corrupt".' The fact is that private-to-private corruption is rare because people who stand to lose their own money when, say, buyers pay so-called 'kick-backs' establish more elaborate checks and balances to avoid corruption than public officials who face no competition and use other people's money. More profoundly, people in the private sector have no discretionary power over others, so there is nothing in return for which to pay bribes.

Dictionary definitions reflect the reality that corruption is overwhelmingly a manifestation of government. Dictionary definitions cover a wide range of meanings for 'corruption' and 'corrupt', most of which are not germane in this context. Those that are, tend to assume that government, officialdom or politicians are always implicated. Encarta Dictionary, for instance, defines corruption as 'dishonest exploitation of power for personal gain'. The Oxford Dictionary defines it as 'Perversion or destruction of integrity in the discharge of public duties by bribery or favour; the use or existence of corrupt practices, esp. in a state, public corporation, etc.' South Africa's former Minister of Justice, Penuel Maduna, addressing the Ninth International Anti-Corruption Conference in Durban (1999) expressed concern about corruption within the private sector, primarily in the form of being willing to pay bribes, but stressed that 'we should not lose sight of the fact that corruption is the primary responsibility of government and public institutions'.[42] Unfortunately, despite being a lawyer by training, he did not identify *why* this is so. This paper suggests that the reason is that the county's laws confer too much discretionary power on officials and politicians in violation of the rule of law.

Once it is acknowledged that corruption is synonymous with government, it should be easy to realise that corruption in government occurs primarily in the exercise of discretion. All that needs to be done to reduce corruption to a tiny fraction of the level that occurs in most countries is to draft all laws in accordance with the rule of law. It really is that simple.

[41] http://www.csvr.org.za/articles/artperu.htm
[42] http://www.info.gov.za/speeches/1999/9910221112a1007.htm

Having observed the virtual absence of discourse on corruption that recognises the extent to which it is a consequence of the lack of the rule of law, it should be noted that there are a few contributions where the causal link is addressed. Michael Walker of the Fraser Institute in Vancouver, Canada, in an unpublished presentation in South Africa a few years ago showed a series of impressive slides depicting powerful correlations between weak rule of law and high levels of corruption. The causal link is also addressed in a few scholarly and instructive papers on the United Nations website.[43] There are other publications touching on the issue, but none of which I am aware assert directly and unambiguously that the lack of the rule of law, specifically the presence of discretionary power, is the most significant determinant of corruption.[44]

6. Components of the rule of law

6.1 General

Components of the rule of law that flow from its essence – the rule of law as opposed to the rule of man - are implicit in standard definitions, such as Mandela's above. Some components are obvious, such as the need for certainty and objectivity, whereas others, such as the separation of powers, due process and criminal justice are not obvious.

For this paper the standard literature was surveyed and the concrete components crystallised into Checklists (Addenda C and D). These are not confined precisely to the rule of law, but include a few additional elements so as to establish whether laws comply with all the jurisprudential principles of good law. They do not establish whether they comply with, for instance, left- or right-wing conceptions of good law. They are criteria with which laws of virtually any ideological paradigm can and should comply.

Dicey identified three very specific rule of law principles:

1. Supremacy of established law as opposed to arbitrary discretion,
2. Equality at law, and
3. Enforcement and interpretation of the law by impartial courts.[45]

Unaccompanied by the elaboration in his text, this formulation, like others, seems too imprecise for a drafter of municipal by-laws governing street vendors to know whether inspectors should be obliged to give receipts for confiscated goods, or whether a taxi licensing law may authorise licences only in 'the public interest'. The answer can be found if the implications of not having the rule of person (arbitrary discretion) are thought through.

The rule of law permits restrictive taxi licensing where free market liberalism does not. The free market idea is that there should be no *economic* regulation –

[43] http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN005786.pdf; http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN010193.pdf.
[44] In the absence of empirical research to this effect, it must, for now, remain an *a priori* hypothesis.
[45] *Law of the Constitution*, 10th Ed, 1959, p 187 *et seq*.

government should not be a gatekeeper deciding who may enter the taxi industry. Regulating safety, on the other hand, is not generally regarded as economic regulation, and is therefore regarded as consistent with markets being 'free'.[46] Typically, these two distinct control domains will fall under different departments or agencies, one presupposing officialdom knows better than 'the market' how many taxis there should be, and how they should charge and operate; the other presupposing that commuters would be excessively endangered in the absence of minimum standards. The rule of law does not provide guidance on whether either idea is correct. It merely prescribes how either or both types of law may be adopted and implemented. The rule of law 'comes to the party' by requiring that:

1. The law must specify objective criteria (for entry and/or safety) and not leave the matter to the whim of officialdom, to use Mandela's words.
2. The substantive part of the law must be legislated by legislators in a legislature, not made by bureaucrats in smoke-free rooms.
3. Disputes must be settled by judges or jurors in a judiciary, not by pseudo-courts and tribunals in the executive.

6.2 Separation of Powers

The world appears to be indulging in an orgy of 'administrative law'. The term used to mean no more than the law governing the state's purely administrative functions. It has been extended to the point where some countries now have a parallel legislature in the executive branch of the state. What used to be called 'regulation' is now called 'subsidiary legislation' and similar euphemisms for law by decree. Hayek predicted this half a century ago when he suggested that 'it is in the technical discussion concerning administrative law that the fate of our liberty is being decided'[47]. The point is that, if the 'technical discussion' about what law can legitimately be made by the executive branch of government has the effect of shifting the power to make substantive law to the executive, a core element of the rule of law, the separation of powers, will have been lost. This will have happened without philosophical debate about the profound implications of the erosion of the rule of law, but in 'technical' discussion about administrative law'. The process is surreptitious in that the cumulative impact of many relatively small shifts that seem innocuous by themselves will be that the rule of law has been fatally compromised without it being obvious at any stage among the way.

Hayek raised this threat to the rule of law in the context of suggesting that the rule of law 'had fully conquered the minds if not the practice of all the Western nations', so that 'few people doubted that it was destined soon to rule the world.48 Italian jurist, Bruno Leoni, would not 'go so far … I would prefer to say that this fate [to the rule of law] is also being decided in many other places—in parliaments, on the streets, in the homes, and, in the last analysis, in the minds of menial workers and of

[46] This is not to suggest that safety regulation does not have serious economic consequences and is the legitimate realm for economic analysis. The point is merely that the *motive* for regulation differs fundamentally.
[47] FA Hayek, *The Political Ideal of the Rule of Law*, Fiftieth Anniversary Commemoration Lectures, National Bank of Egypt, p 2, Cairo 1955. The idea was subsequently argued at length *inter alia* in Hayek's *The Constitution of Liberty*, and in *Law, Legislation and Liberty*.
[48] *Ibid.*

well-educated men like scientists and university professors. I agree with Professor Hayek that we are confronted in this respect with a sort of silent revolution'.[49]

Another foundational value of the South African constitution is the separation of powers between legislative, executive and judicial functions. This principle is followed in all democratic states in the modern world, but ignored consistently in undemocratic states. The principle of division of powers requires that the making of laws, the interpretation of laws and the day-to-day administration of laws should be done by three separate and essentially independent arms of government – the legislature, the executive and the courts.

The justification of this principle (validated by long experience) lies in the fact that each of these functions requires very different procedures to be undertaken by people with different qualifications. Legislation should be devised by direct representatives of the people. The process must be transparent. It can, and indeed should be comprehensive, allowing for ample debate and deliberation. Executive action, on the other hand, is carried out mostly by public servants. It must above all be swift, which means that we accept less transparency and less deliberation with respect to the executive. The third arm of government, the judiciary, needs people with special qualifications who follow specialised procedures and who are, above all, independent and impartial.

The preceding analysis might give the mistaken impression that the rule of law is 'in bad shape' in South Africa. On the contrary, it has amongst the world's highest rule of law and related ratings. High and low rule of law ratings are amongst the most significant factors distinguishing top from bottom performing economies respectively.[50] On all except one (crime), South Africa has substantially better ratings than the top twenty GDP growth performers, and its ratings are only slightly lower (ave. 88.2%) than the world's twenty freest economies, but much lower for crime (46.1%) (Table 1 below) It has substantially higher ratings (ave. 226.7%) than the world's twenty least free economies in all areas, and is much closer to them (120%) on crime (Table 2).[51]

South Africa ranks 89th (out of 208) countries on the World Bank's *Rule of Law* index, which includes law and order proxies. On other 'governance indicators' it does significantly better: 68th (215) on *Voice and Accountability*; 51st (217) on *Governance Effectiveness*; 66th (210) on *Reg Quality*; 62nd (211) on *Corruption Control*.[52]

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[49] Leoni, Chapter 3.

[50] Sources cited in text and footnotes above *inter alia* Louw, World Bank, Fraser and Heritage.

[51] Fraser, *Economic Freedom of the World*, 2004. Areas '2A' etc refer to jurisprudential indicators in EFW, and are defined fully in the *Economic Freedom of the World: 2006 Annual Report* freely downloadable from the Economic Freedom Network website (www.freetheworld.com/).

[52] D Kaufmann, A Kraay, and M Mastruzzi, *Governance Indicators: 1996-2005*, World Bank, 2006

6.3 Specifics

What follows is a detailed list of specific elements of the rule of law. It is, hopefully, comprehensive and is followed by an explanation of why they constitute the rule of law and what their practical implications are.

6.3.1 Legality

The doctrine of legality is that all laws must be lawful in terms of the constitution, and adopted according to prescribed procedure.

6.3.2 Rationality

The rationality principle is that there must be a rational connection between the law and its objective, which must be clear. South Africa recently passed a *National Credit Act* last year, which has two stated objectives: to increase 'access' to credit and to increase 'protection' for credit-receivers. What might violate the rationality principle is that a measure which raises the cost and risk of granting credit necessarily *reduces* access. These two objectives in a single bill are inherently contradictory, and therefore irrational.

6.3.3 Non-discretion

The most elementary aspect of the rule of law is that there should be little or no administrative discretion. People should be ruled by laws, not men.

6.3.4 Clear objectives

Where, for whatever reason, there is discretion, as in judicial proceedings and staff appointments, there should be two distinct and easily confused qualifications. Firstly, the purpose for which the power is conferred must be articulated clearly – to what end is the power created? What outcome does the legislature want?

6.3.5 Objective criteria

Secondly, there must be objective criteria according to which the power is to be exercised. If an immigration law, for instance, confers the power to grant immigration rights, it should state that its purpose is to attract technical skills, or protect people with skills from foreign competition, or whatever. It should then specify criteria, such as the procedure to be followed, ideal qualifications to attract or exclude, and so on.

6.3.6 Certainty

Laws should prescribe clearly and unambiguously that with which citizens must comply, rather than leave them at the mercy of arbitrary or discretionary officialdom. It should be as easy as possible for everyone to know what the law is, and when they are complying with or transgressing it. Uncertainty in law creates real or suspected injustice.

6.3.7 Precedent (*stare decisis*)

Certainty implies that rulings for comparable facts will be consistent, to which end there must be access to court records and subsequent

judgements must follow preceding judgements. The lack of precedent amounts to the rule of person in that presiding officers are not bound by law, which includes precedent – because earlier judgements purported to be manifestations of the law.

6.3.8 Prospectivity (*nullum crimen, nulla poena sine praevia lege poenali*)

The requirement that the law should be clear and objective implies that laws should not be retroactive. Retrospectivity should be considered only in extreme circumstances, such as the need to correct the unintended consequences of erroneous drafting where the original intent can be presumed to have been unclear to all concerned.

6.3.9 Division of powers:

For sound tried and tested reasons (examples above) a democratic order requires a genuine separation of powers: legislative, executive and judicial. The legislature alone should legislate; the executive alone execute, and the judiciary alone adjudicate. Almost every judgment and publication on the rule of law has judges and writers asserting axiomatically and erroneously that there can be no 'rigid' separation of powers, never giving sound reasons why not. Helen Yu and Alison Guernsey (University of Iowa) represent the unfortunate norm. In *What is the Rule of Law?* they assert, as if it is incontestable, that 'The rule of law does not have a precise definition, and its meaning can vary between different nations and legal traditions.'[53] Paradoxically, they go on to provide precise and perfectly adequate criteria, which, though not comprehensive, suffice for the purpose of establishing whether a given law or action is consistent with the rule of law.

6.3.10 Due process and natural justice

The concept of 'due process' is also a sophisticated concept. The purpose of due process is to ensure that 'justice is not only done, but seen to be done'. Due process is part of the rule of law to the extent that it increases the likelihood of proper decisions according to law, that is, people being ruled by laws not discretion. For there to be due process various factors must be present, some of which are prescribed in many constitutions. This is an illustrative list of elements of due process, each of which lends itself to elaboration, but is provided here without comment because book-length analysis would be necessary to do justice to all items:

1. administrative justice (that all administrative action must comply with the rule of law, regardless of the legislation under which it falls).
2. the right to be heard (*audi alteram partem*)
3. the right of to be aware of evidence being considered;
4. the right to be present and cross-examine witnesses;
5. no trial or *quasi*-trial without formal charge;

[53] www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml

6. the right to written reasons for administrative and judicial decisions;
7. the right of appeal on the merits to a truly independent tribunal (ultimately to an independent judiciary);
8. the right to judicial review of judicial and administrative decisions;
9. access to relevant information particularly that in the hands of the state;
10. recusal or dismissal of officials with conflicts of interest, or who are otherwise compromised.

6.3.11 Craftsmanship

All laws and guidelines should be carefully, professionally and skilfully drafted. Legal drafting is a distinctive skill seldom taught in law courses. For laws to be clear, objective and unambiguous considerable care and skill is needed. To this end, all people responsible for drafting laws should not only be conversant with the principles of good law but also, with the precise meanings of words used and the general craft of legislative drafting. Draft legislation should be reviewed and edited by independent experts.

6.3.12 Stability

For society to be stable, its laws, as far as possible, need to be stable. Laws changing constantly promote instability and uncertainty. They discourage long-term planning and investment. They discourage the attainment of enduring institutions and values. Laws should be formulated for the long-term and not on the premise that they can be revisited, repealed or replaced endlessly. Lack of stability is particularly deleterious for the economy. Frequent changes to the law result in costly and time-consuming changes to the nature of business.

6.3.13 Presumption of innocence

Everyone is presumed innocent 'until proven guilty'.

6.3.14 Double jeopardy (*res judicata*)

No one should face more than one procedure for one alleged offence or tort/delict. Additional proceedings or retrials only on the basis of substantial new evidence not previously available to accusers and prosecutors. .

6.3.15 Equality at law

Everyone to have the same rights and obligations; no *unfair* discrimination on such grounds as status, religion, sexual orientation, political affiliation, gender, race, age and so on. According to Montesquieu 'law should be like death, which spares no one.'

6.3.16 *Habeas corpus* (*ad subjiciendum*):

This translates as 'have the body (to be subjected to examination)'. It also means that everyone is entitled to be free until convicted, unless, on examination, there are exceptional grounds for detaining a supposedly

innocent person. It implies 'no detention without trial', and not necessarily even if there is a proper charge.

6.3.17 Information:

Everyone arrested, charged or accused has a right to know of what wrongdoing they are suspected, and the right to all relevant documentation and other information.

Comprehensive criteria are in the Appendices, which presuppose that users are familiar with this text. The principal derivatives to the central concept are:

1. Separation of powers
2. General application (equality at law)
3. Due process
4. Prospectivity
5. Objective criteria (for discretionary power)
6. Specified objectives (for discretionary power)

7. Conclusions

The rule of law has triumphed in rhetoric globally, but there is insufficient clarity about what it means in practice. It is not a synonym for other concepts, it is what it is, the rule of law, not man. It is nothing else. The practical reasons for the rule of law have been overlooked. It is suggested that everyone dealing with law making should have a readily available checklist of the kind in the Appendices against which every provision of every law should be checked, and according to which every administrative practice can be judged.

The rule of law is the single most important characteristic of winning nations, and the area of biggest difference between winners and losers, which suggests that it should be every government's top priority.

8. Appendices

8.1 Addendum A – Table 1 – Top 20 Rule of Law countries

20 Freest economies	Econ, freedom	2A Judicial independence	2B Impartial courts	2C Intellectual property protection	2D Military interference	2E Legal system (crime)
Hong Kong	8.7	7,0	7.9	6.6	8.3	7.5
Singapore	8.5	7.3	8.1	8.4	8.3	8.3
USA	8.2	7.5	7.4	9,0	6.9	8.3
New Zealand	8.2	8.4	8.3	7.8	10,0	10,0
Switzerland	8.2	8.4	8.2	8.5	10,0	8.3
Ireland	8.1	8.4	7.7	7.7	10,0	10,0
UK	8.1	8.3	7.8	8.5	10,0	9.7
Canada	8.0	7.6	6.9	7.5	10,0	10,0
Luxembourg	7.9	8.3	8.1	7,0	10,0	10,0
Iceland	7.9	8.1	8.3	7.9	10,0	10,0
Australia	7.8	8.4	7.6	7.8	10,0	10,0
Austria	7.7	8,0	7.8	7.6	10,0	10,0
Finland	7.7	8.1	8.1	8,0	10,0	10,0
Unit. Arab Em.	7.7	5.3	5.2	5.5	8.3	8.7
Estonia	7.7	6.2	5.9	5.5	8.3	8.7
Netherlands	7.7	8.4	8.2	8.2	10,0	10,0
Germany	7.6	8.8	8.2	8.8	10,0	8.3
Denmark	7.6	8.7	8.9	8.2	10,0	10,0
Japan	7.5	7.2	6.4	7.2	8.5	8.3
Portugal	7.4	7.7	5.1	6.7	10,0	8.3
Average	7.9	7.8	7.6	7.7	9.4	9.1
South Africa	6.7	6.5	7.4	6.7	8.3	4.2
Difference %	84.8	83.3	97.4	87.0	88.3	46.1
Ave. 2A-D	88.2					64.1

8.2 Addendum B – Table 2 – Bottom 20 Rule of Law countries

20 Least free economies	Econ, freedom	2A Judicial independence	2B Impartial courts	2C Intellectual property protection	2D Military interference	2E Legal system (crime)
Dom. Rep.	5.4	2.3	2.4	3.0	5.0	3.3
Syria	5.4	-	4.9	-	3.3	8.3
Ukraine	5.4	2.1	3.2	2.6	8.3	6.7
Mozambique	5.4	2.5	2.6	2.9	3.3	5.0
Gabon	5.4	-	4.7	-	3.3	5.0
Malawi	5.3	5.5	4.2	2.4	6.7	5.0
Niger	5.3		3.9	-	5.0	3.3
Chad	5.2	1.5	2.0	1.6	4.7	4.0
Nepal	5.2	-	4.1	-	1.7	-
Togo	5.0	-	3.8	-	1.7	5.0
Rwanda	4.8	-	4.0	-	0.0	0.0
Centr. Afr. Rep.	4.8	-	3.0	-	4.7	4.0
Burundi	4.7	-	2.9	-	0.9	-
Algeria	4.6	3.0	4.1	2.4	2.2	4.0
Guinea-Bissau	4.6	-	3.3		2.6	3.9
Venezuela	4.4	0.5	1.1	2.3	0.8	4.2
Congo Dem. R.	4.1	-	2.5	-	0.0	1.7
Congo Rep.	4.1	-	3.5	-	0.0	3.3
Myanmar	3.3	-	2.7	-	0.0	5.0
Zimbabwe	2.8	1.8	2.6	4.0	5.0	2.2
Average	4.7	1.8	3.3	4,0	2.9	3.5
South Africa	6.7	6.5	7.4	6.7	8.3	4.2
Difference %	142.6	362.1	224.2	167.5	237.1	120.0
Ave. 2A-D	226.7					120.0

8.3 Addendum C - Good Law Checklist Part 1 – Constitutionality

The questions in Parts 1 and 2 apply to *all* laws (legislation and regulations) made for any purpose whatsoever. Most answers must, as indicated, be "Yes". In some cases "No" can be justified by very special Constitutionally valid circumstances.

NR	QUESTION	YES	NO	IF "NO", THE SPECIAL REASON
1	Does the legislative body for whom the law has been prepared have the power under the Constitution to pass the law?			Must be "YES". (If "NO" the law will be unconstitutional.)
2	Is the proposed law a law of general application, equally applicable to all?			Must be "YES".
3	Is the purpose of the law set out in the long title?			
4	Is the purpose of the law set out in the preamble?			
5	Does the law comply with the requirements of the rule of law:			
	a) Is the law free of provisions which allow the arbitrary exercise of power by any person?			Must be "YES".
	b) Is the law clear?			Must be "YES".
	c) Is the law precise?			Must be "YES".
	d) Is the law unambiguous?			Must be "YES".
	e) Is the law free of retrospective provisions that either impose duties or take away existing rights?			Most likely must be "YES"
	f) Does the law conflict with any existing law?			
	g) If the law conflicts with existing laws, does it identify such laws and amend them?			
	h) Is the law compatible with South Africa's international obligations?			Must be "YES".
6	Does the law avoid limiting the rights in the Bill of Rights?			If No see 7 and 8
7	If the law limits any of these rights, does the limitation comply with any internal limitation set out in the relevant provision?			Must be "YES".
8	If the law limits any of these rights, does it satisfy the requirements of section 36?			Must be "Yes"
9	Does the law uphold the separation of powers			Must be "YES".

	between legislature, executive and judiciary?			
10	If the law authorises any person to make regulations:			
	a) Does it define clearly who may make the regulations?			Must be "YES".
	b) Does it define clearly and limit the purposes for which regulations may be made?			Must be "YES".
	c) Does it give guidelines with which the regulations must comply?			Must be "YES".
	d) Are the regulations restricted to administrative and procedural matters?			Must be "YES".
11	If the law authorises any person to exercise discretion:			
	a) Does it define clearly who may exercise discretion?			Must be "YES".
	b) Does it define clearly and limit the discretion?			Must be "YES".
	c) Does it define clearly the purpose for which the discretion may be exercised?			Must be "YES".
	d) Does it give guidelines as to the manner in which the discretion may be exercised?			Must be "YES".
12	If the law sets up a tribunal:			
	a) Why are the courts not used?			
	b) Is the tribunal free of administrative or executive responsibilities?			Must be "YES".
	d) Does the law define the composition of the tribunal clearly?			Must be "YES".
	e) Does the law define and limit the powers of the tribunal clearly?			Must be "YES".
	f) Does the law require the tribunal to observe natural justice?			Must be "YES".

8.4 Addendum D - Good Law Checklist Part 2 - Feasibility

Unlike the questions in Part 1, these questions are concerned with determining whether a law is suitable for its purpose. The answers are a matter of judgement requiring careful consideration and debate.

It is important to note that a number of the provisions on this checklist are constitutionally required. They will need to have been established under Part 1 of the Checklist before moving on to Part 2. They are repeated and in some cases elaborated here for the sake of the coherence of the present list. Going through the process of Part 2 of the Checklist will also, in many circumstances, strengthen the required constitutional case in Part 1.

All the answers should be "YES". A "NO" answer indicates that insufficient consideration has been given to the law.

A	The General Purpose and Objective of the Law	YES	NO
1	Has the purpose of the law been defined?		
2	Has the importance of the purpose been quantified or evaluated?		
3	Does the importance of the purpose justify legislation?		
4	Has the objective (how the purpose will be achieved) been defined?		
5	Are there good reasons to believe that the law would achieve its purpose?		
6	Has an estimate been made of the benefits expected from the law?		
	a) Is the estimate of the benefits realistic? b) Where the benefit has monetary value, has the value of the estimate been quantified? c) Has the estimate been recorded as matter of public record for later monitoring and performance evaluation? d) For accountability purposes, have the persons (preferably department heads) responsible for the estimation of benefits confirmed their satisfaction with the estimate? e) Has an estimate been made of by when or over what period the benefits are expected? f) Has the estimate of the timing of benefits been recorded as matter of public record for later monitoring and performance evaluation?		
7	Has a list of alternative methods of attaining the purpose of the law been prepared?		
	a) Have the alternative methods of attaining the purpose of the proposed law been considered and rejected for		

	known compelling reasons? b) Has the repeal of existing law which may be causing or exacerbating the problem been considered as an alternative method? c) Is the proposed law clearly the best way of attaining the purpose?		
10	Will it be possible to implement ad administer the proposed law?		
	a) Have all departments and structures responsible for implementing the proposed law confirmed in writing that they have the administrative capacity to do so? b) If not, have adequate arrangements been made for the provision of the necessary capacity before the law is implemented? c) Does the implementation of the law require the diversion of resources from other purposes? d) If so, has adequate provision been made for the continued performance of those purposes? d) Can the law be implemented without additional budgets, or the appointment of more functionaries or officials? e) If not, have the relevant departments, particularly of finance and public services, agreed in writing to the proposed law and its implications? f) Has any special training which may be needed to apply the law been prepared, costed and budgeted?		
10	Will it be possible to enforce the proposed law?		
	a) Have all departments and structures responsible for enforcing or policing the proposed law, particularly the police and the courts, confirmed in writing that they have the capacity to do so? b) If not, have adequate arrangements been made for the provision of the necessary capacity before the law has to be enforced? c) Does the enforcement of the law require the diversion of resources from other purposes? d) If so, has adequate provision been made for the continued performance of those purposes? e) Can the law be enforced without the appointment of more functionaries, police or judicial officers? b) If not, have the relevant departments, particularly of finance and public services, agreed to the proposed law and its implications? c) Has any special training which may be needed to enforce the law been prepared, costed and budgeted?		
12	Will it be possible to comply with the law in the ordinary		

	course of events? , and is widespread compliance likely or achievable in practice?		
13	Is generalised compliance with the law achievable in practice and likely?		
14	Has a cost-benefit analysis been done of the law?		
15	To ensure accountability, has senior person or department head taken responsibility for the accuracy and adequacy of the cost-benefit analysis?		
16	Is the expected cost to the State in all its forms of implementing and enforcing the law justified by the expected benefits?		
17	Is the expected cost to the public for compliance with the law justified by the expected benefits?		
	a) Have the compliance costs for every sector or interest group affected directly by the law been estimated separately? b) Do the compliance costs affect poor and wealthy people fairly in proportion their wealth and income? c) Do the compliance costs affect micro, small, medium and bigger businesses fairly in proportion their wealth and income?		
17	Have all direct and indirect regulatory impacts, including side effects (secondary and unintended consequences), of the proposed law been considered?		
18	Does the expected benefit from the law outweigh likely undesirable side effects?		
19	Have all reasonable measures to minimise undesirable side effects been incorporated in the law?		
20	Is there any mechanism in place to monitor the affect of the law in order to improve its benefits and reduce its undesirable side effects?		
21	Has the inclusion of a “sunset” clause I the law been considered?		
	a) If not, sunset clause is included, has provision been made for monitoring the efficacy of the law in terms of its intended objectives, and anticipated cost and benefits? b) If so, does the sunset clause specify unambiguous criteria for its implementation?		

8.5 Addendum E – Delegated Power and Due Process Criteria

This single-term list is not stand-alone. It accompanies textual explanation.)

7 **Delegated power:**
7.3 Regulation of execution, no substitute for legislation of substantive law)
7.4 Purpose (explicit)
7.5 Objective criteria (specified)
7.6 Separation of powers and functions:
7.6.1 Between three branches of government
7.6.2 Horizontal (tiers)
7.6.3 Vertical (departments, agencies)
8 **Due process** (prescribed explicitly, detailed) entails the right to:
8.3 be heard (audi alteram partem)
8.4 be present
8.5 be charged ('no trial without charge')
8.6 plead
8.7 remain silent
8.8 be released (bail, *habeas corpus*)
8.9 notice (of trial and charge)
8.10 access to information
8.11 representation, assistance
8.12 face accuser
8.13 cross-examine
8.14 summons, subpoena
8.15 recusal of compromised presiding officer
8.16 independence, impartiality
8.17 best evidence rule (no 'hearsay')
8.18 expedition (justice delayed is justice denied)
8.19 transparency.
8.20 review
8.21 appeal
8.22 security
8.23 acquittal (double jeopardy)
8.24 privacy
8.25 a remedy
8.26 presumption of innocence
8.27 trial by jury (and/or independent adjudicators)
8.28 natural justice.
