



**THEME The Rule Of Law**

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**Freeway**

**Policy or police ?**

Policy or police – where lies the key to prosperity? In Zambia today we place little confidence in the police force, which is often seen as corrupt. Instead we demand new and better policies.

But policies follow political fashion: socialism, humanism, nationalization, privatization, subsidies, protective tariffs, a strong currency, tax changes, poverty alleviation, economic empowerment, a new constitution. Policies come and go as politicians seek popularity. Poverty continues.

What is the answer? When policies fail to produce improvements perhaps we should look to police, in the sense of 'the rule of law'. What is the rule of law? It signifies security of person and property, ready access to justice, the inviolability of contracts and the freedom of every individual to follow his or her own purposes without fear or the need for favours.

“The rule of law, as I understand it”, said Nelson

Mandela, a former lawyer, “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 structural responsibility and obligation.”

Today Africa in general lacks the rule of law. Ours could be described as the lawless continent. Even in peaceful Zambia we lack an efficient and dependable legal system. Nor can we rely on the day to day trust and confidence between individuals which is the foundation of successful business enterprise. The rule of law, in the broad sense of that term, is fundamental to freedom and prosperity. Give us 'police' rather than policy.

**The Rule of Law**

- Murray Sanderson

We all want personal self-government – the freedom to live our lives without interference. That

requires a national government to maintain a secure and orderly society. Should this national authority be personal or impersonal, controlled by the rule of man or the rule of law? The rule of man means handing over authority to human beings, who then may act in ways that are self-centred, arbitrary and oppressive. The rule of law is impartial, and therefore greatly to be preferred.

All countries have some rule of law, but its adequacy is often hard to assess. For this we need a clear understanding of its nature and of the structures needed to maintain it.

First, its nature: the rule of law is a situation in which people are protected and are free to conduct their lives as they wish, provided they do not interfere with the freedom or the interests of their fellow men. They need of course to observe the laws of the land. But those laws must themselves be just; otherwise they will not be, and ought not to be, respected and obeyed. Hence the old Latin maxim, 'Lex injusta non obligat' – 'An unjust law need not be obeyed'. Can a law be unjust? That sounds like a contradiction. But we have only to think of the persecution of the Jews in Nazi Germany, and, more recently, of 'apartheid' in South Africa, to know that laws can be unjust and oppressive. So the 'rule of law' is not a simple concept.

Clearly laws themselves are essential to the rule of law. But what does the word 'law' cover? In Zambia we have three types of law, 'public law', 'private law' and 'constitutional law'.

'Public law' includes the Penal Code, which specifies offences and lays down penalties for committing them. Its other branch is statute law, consisting of legislation passed by parliament as and when need arises. Also included are 'statutory instruments', often called 'subsidiary legislation'. This consists of regulations on matters of detail, which each minister is empowered to draw up and submit to parliament for approval.

'Private law' concerns breaches of contract, or any other form of harm between persons, which are civil rather than criminal matters.

The third kind of law is 'constitutional law'. Some countries with historical links to Britain have no written constitution, but depend, like Britain, on traditional 'common law'. The great majority, however, have a constitution or basic law, usually

approved by a national referendum. Its main purpose is to protect the citizens against over-powerful governments. For governments which are not strictly limited can easily become dictatorial and oppressive. Constitutional law aims to prevent this.

So much for legal origins. But laws by themselves are powerless without provision for enforcement. The executive arm of government has the duty to restrain law breakers and prosecute them before a court of law. It is then for the court to examine the alleged offence, to see if the law has been broken, and to pass judgment. Those who man the courts of law must be trained professionals, independent and completely impartial as between government officials and persons accused of breaking the law. Impartiality is also essential when judging between plaintiff and defendant in civil cases.

The promulgation of laws, the prosecution of perceived offenders, and the impartial adjudication of court cases require a system with a clear and distinct 'separation of powers' between legislature, executive and judiciary. The legislature must enjoy complete independence from the executive arm of government, both in the electoral process and in its ability to vote on measures submitted for approval by the executive – notably government budgets. And the judiciary must enjoy similar independence, so it can decide cases with full impartiality.

Those are the structural foundations of the rule of law: having the laws in place and providing for their enforcement by an efficient executive through independent courts. Yet that by itself is not sufficient. Of equal importance is the manner in which the laws and their ensuing regulations are administered. This is where the rule of man can, and often does, undermine the rule of law. In theory all persons are equal before the law, which is administered impartially on a 'first come first served' basis. But in many countries, Zambia included, this rarely happens. Instead, ordinary citizens are commonly kept waiting and waiting for the service, the licence or the benefit to which they are entitled. Progress depends, all too often, on finding some 'friend' or 'contact' who will favour the applicant, provided the favour is reciprocated. And so, through the civil servant's 'discretion', corruption makes inroads into the rule of law, which thus becomes debased into the very thing it is meant to replace, namely the rule of man.

The rule of law is the only sound foundation for liberty and democracy. It also provides the enabling environment for creating wealth and prosperity. No rule of law, no economic development. Potential investors, both local and foreign, have many requirements and many questions. Are the promises of civil servants dependable? May labour laws or tax regimes be changed at short notice? Is corruption common? In the event of a court case, could justice be denied or delayed? An uncertain rule of law generates insecurity. A country's prosperity depends on many factors: geographical position, climate, land, water, raw materials, educational facilities, human resources. All these are of great importance; but the most important factor of all is the rule of law.

Author: Murray Sanderson is Exec. Secretary, ZIPPA.

## ‘ Efficiency in court !’

**Rodger M.A. Chongwe, S.C.**

It is time that the country and our government came to terms with the fact that our legal system is in tatters, and we looked at what can be done to speed up delivery of real justice to the people.

At close to seventy years of age I am now the oldest practising State Counsel in this country. I recall quite clearly that, when I was admitted to practice in 1969, the courts in this country were by and large, orderly, well maintained and clean, both practically and metaphorically.

For numerous reasons there are today far too many failures in the delivery of justice, including, as is already being talked about, the corrupt practices of some judges, some lawyers and some litigants. This should not surprise anyone, as this is an endemic national problem, but it is time to look at the things that can be put right easily.

Our judges and magistrates, amongst whom are decent and dedicated people, are being let down by lack of the modern support to which they are entitled.

For instance, to speed up cases through the courts it is essential that we have court reporters to record proceedings. In the year of our Lord (and the second century of Bill Gates) 2008, is there any reason why we have reverted to the antique system of a judge or magistrate undertaking a large scale trial while having to record in long hand with pen and paper all the proceedings? Judges are not scribes, but this is the work being done by judges today. If you are a young lawyer you may imagine that this is has always been so. But soon after independence the government brought in court reporters from the West Indies and Ceylon, and Zambians were trained to take over these positions. With court reporters all parties can obtain copies of the proceedings on the day. There is a time benefit, and the parties know what the bench has or has not recorded.

Our Registry is seen as you drive up to the Supreme Court, and it is noticeable because files are rammed up against the blinds with papers dropping out every where against the windows. This is a portent of what is behind. If the courts are to proceed in a quick and orderly fashion the registries must be properly resourced and computerised.

Over the years there has been a totally inexplicable resistance to the setting up of small claims courts. We need this to reduce the time spent by judges on matters that could be dealt with expeditiously under such a system. The Attorney General's Chambers may also have its own role in reducing clogging of the Courts. There are claims against the State brought by citizens in which the government is clearly liable even to its own lawyers. Must the State vigorously defend matters that it could decently settle out of court?

Certainly the big things must be dealt with, but the small things are the easiest, so why not get these done? For instance, our main court buildings even lack adequate toilet facilities. The day the Intercontinental Hotel decides to close its lavatories off from the lawyers and litigants of Lusaka will be a hard one indeed. Just as judges need support from the judicial system, so do lawyers, and a quick way to show that the courts respect themselves is in the practical facilities provided.

## The law poor

Again, it is time Zambian lawyers stopped wearing the abandoned robes of 17th century England. The practice is uncomfortable and intimidatory of the average Zambian litigant. It is also a complete waste of the young lawyers' money. If it has to be kept, at least let the robing rooms be properly maintained, secure and useable. We should also adopt a zero tolerance policy towards dirt, decay and loiterers. Let our court buildings be seen as a place where all who work mean business.

When I was briefly Minister for Legal Affairs I discovered that there were computers stored in the conference room of the then High Court. They were being kept under lock and key to prevent their illicit use. These machines were viewed as dangerously subversive, yet they were tools that even then would have been immensely useful. As late as 2004 I was in court when a younger lawyer produced a laptop to refer to some notes. The judge asked him what he was doing, and when he saw it was a laptop he said that he was not having that thing in his court and to put it away. We cannot take such Jurassic views forward into the next decade. We must as a nation do everything we can to modernise our courts.

I also draw attention to the unhealthy practice of conducting all sorts of matters in judge's chambers. There must at all times be adequate court rooms for judges to use, and they should use them in the interest of transparency. Apart from being offices for our judges, chambers are meant for conducting legal business between litigants in cases of little or no public interest. They are not a comfort zone for judges who are reluctant to work under the public gaze. Along with the very good salaries and conditions which judges already have, a businesslike working environment must also be provided for them if they are to perform well.

These suggestions merely skim the surface. I offer them as an elder ready to retire my wig in the hope that others younger and stronger will add to this list and be motivated to improve our legal system to the benefit of our nation.

(This is a shorter version of an article published in 'The Post' in January 2008)

Author: Rodger Chongwe, S.C. is a former Minister of Justice.

From The Economist print edition of 5th June 2008

Two in every three people on the planet—some 4 billion in total—are “excluded from the rule of law.” In many cases, this begins with the lack of official recognition of their birth: around 40% of the developing world's five-year-old children are not registered as even existing.

Later, people will find that the home they live in, the land they farm, or the business that they start, is not protected by legally enforceable property rights. Even in the rare cases when they can afford to go to court, the service is poor. India, for example, has only 11 judges for every 1m people.

These alarming statistics are contained in a report from a commission on the legal empowerment of the poor, released on June 3rd at the United Nations. It argues that not only are such statistics evidence of grave injustice, they also reflect one of the main reasons why so much of humanity remains mired in poverty. Because they are outside the rule of law, the vast majority of poor people are obliged to work (if they work at all) in the informal economy, which is less productive than the formal, legal part of the economy.

The commission was born out of the theories of Hernando de Soto, a Peruvian economist whose books, “The Other Path” and “The Mystery of Capital”, proved unexpected best-sellers—albeit controversial ones. For a long time there was such disagreement among the commission's members—ranging from Ernesto Zedillo, a former Mexican president; and Lawrence Summers, a former American treasury secretary; to Shirin Ebadi, an Iranian human-rights activist and winner of the Nobel Peace prize; and Anthony Kennedy, a justice on America's Supreme Court—that it seemed they would be incapable of producing an agreement.

Perhaps reflecting the need for compromise, the report takes a much broader view of legal empowerment than Mr de Soto's focus on property rights. These are just one of four “pillars of legal empowerment”—the others are access to justice and the rule of law, labour rights and business rights (which make it easier for poor

people to start, own and pass on businesses).

Unfortunately, the report does not attempt to rank its recommendations—again, the desire for consensus may have got in the way. Nor does it suggest how to measure the progress towards legal empowerment. However, both Kemal Dervis, the head of the UN Development Programme, and Robert Zoellick, president of the World Bank, are enthusiastic about legal empowerment, so the report is likely to be taken further. Madeleine Albright, a former American Secretary of State, who chaired the commission with Mr de Soto, says she hopes that legal empowerment will now become part of policymaking jargon, much as “sustainable development” did after it first appeared in a similar report three decades ago.

## The Secrets of Intangible Wealth

Ronald Bailey

A Mexican migrant to the U.S. is five times more productive than one who stays home. Why is that?

The answer is not the obvious one: The U.S. has more machinery or tools or natural resources. Instead, according to some remarkable but largely ignored research -- by the World Bank, of all places -- it is because the average American has access to over \$418,000 in intangible wealth, while the stay-at-home Mexican's intangible wealth is just \$34,000.

But what is intangible wealth, and how on earth is it measured? And what does it mean for the world's people -- poor and rich? That's where the story gets even more interesting.

Two years ago the World Bank's environmental economics department set out to assess the relative contributions of various kinds of capital to economic development. Its study, "Where is the Wealth of Nations?: Measuring Capital for the 21st Century," began by defining natural capital as the sum of nonrenewable resources (including oil, natural gas, coal and mineral resources), cropland, pasture land, forested areas and protected areas. Produced, or built, capital is what many of us think of when we think of capital: the sum of machinery, equipment, and structures (including infrastructure) and urban land.

But once the value of all these are added up, the economists found something big was still missing: the vast majority of the world's wealth! If one simply adds up the current value of a country's natural resources and of produced, or built capital, there's no way that can account for that country's level of income.

The rest is the result of "intangible" factors -- such as the trust among people in a society, an efficient judicial system, clear property rights and effective government. All this intangible capital also boosts the productivity of labor and results in higher total wealth. In fact, the World Bank finds, "Human capital and the value of institutions (as measured by rule of law) constitute the largest share of wealth in virtually all countries."

Once one takes into account all of the world's natural resources and produced capital, 80% of the wealth of rich countries and 60% of the wealth of poor countries is of this intangible type. The bottom line: "Rich countries are largely rich because of the skills of their populations and the quality of the institutions supporting economic activity."

What the World Bank economists have brilliantly done is quantify the intangible value of education and social institutions. According to their regression analyses, for example, the rule of law explains 57% of countries' intangible capital. Education accounts for 36%.

The rule-of-law index was devised using several hundred individual variables measuring perceptions of governance, drawn from 25 separate data sources constructed by 18 different organizations. The latter include civil society groups (Freedom House), political and business risk-rating agencies (Economist Intelligence Unit) and think tanks (International Budget Project Open Budget Index).

Switzerland scores 99.5 out of 100 on the rule-of-law index and the U.S. hits 91.8. By contrast, Nigeria's score is a pitiful 5.8; Burundi's 4.3; and Ethiopia's 16.4. The members of the Organization for Economic Cooperation and Development -- 30 wealthy developed countries -- have an average score of 90, while sub-Saharan Africa's is a dismal 28.

The natural wealth in rich countries like the U.S. is a tiny proportion of their overall wealth -- typically 1% to 3% -- yet they derive more value from what

they have. Cropland, pastures and forests are more valuable in rich countries because they can be combined with other capital like machinery and strong property rights to produce more value. Machinery, buildings, roads and so forth account for 17% of the rich countries' total wealth.

Overall, the average per capita wealth in the rich Organization for Economic Cooperation Development (OECD) countries is \$440,000, consisting of \$10,000 in natural capital, \$76,000 in produced capital, and a whopping \$354,000 in intangible capital. (Switzerland has the highest per capita wealth, at \$648,000. The U.S. is fourth at \$513,000.)

By comparison, the World Bank study finds that total wealth for the low income countries averages \$7,216 per person. That consists of \$2,075 in natural capital, \$1,150 in produced capital and \$3,991 in intangible capital. The countries with the lowest per capita wealth are Ethiopia (\$1,965), Nigeria (\$2,748), and Burundi (\$2,859).

In fact, some countries are so badly run, that they actually have negative intangible capital. Through rampant corruption and failing school systems, Nigeria and the Democratic Republic of the Congo are destroying their intangible capital and ensuring that their people will be poorer in the future.

In the U.S., according to the World Bank study, natural capital is \$15,000 per person, produced capital is \$80,000 and intangible capital is \$418,000. And thus, considering common measure used to compare countries, its annual purchasing power parity GDP per capita is \$43,800. By contrast, oil-rich Mexico's total natural capital per person is \$8,500 (\$6,000 due to oil), produced capital is \$19,000 and intangible capita is \$34,500 -- a total of \$62,000 per person. Yet its GDP per capita is \$10,700. When a Mexican, or for that matter, a South Asian or African, walks across our border, they gain immediate access to intangible capital worth \$418,000 per person. Who wouldn't walk across the border in such circumstances?

The World Bank study bolsters the deep insights of the late development economist Peter Bauer. In his brilliant 1972 book "Dissent on Development," Bauer wrote: "If all conditions for development other than capital are present, capital will soon be generated locally or will be

available . . . from abroad. . . . If, however, the conditions for development are not present, then aid . . . will be necessarily unproductive and therefore ineffective. Thus, if the mainsprings of development are present, material progress will occur even without foreign aid. If they are absent, it will not occur even with aid."

The World Bank's path breaking "Where is the Wealth of Nations?" convincingly demonstrates that the "mainsprings of development" are the rule of law and a good school system. The big question that its researchers don't answer is: How can the people of the developing world rid themselves of the kleptocrats who loot their countries and keep them poor?

*Mr. Bailey is Reason magazine's science correspondent.*

## Quotations of the month

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**Where the laws are most numerous, there is the most corruption.'** - Tacitus

*'The rule of law is a foundation both for our liberties and for order. The rule of law respects us as equals. It allows us to organize our lives, plan our futures, and resolve disputes in a rational way.'* - Stan Rule

*'We are not going to give up our country for a mere X on a ballot. How can a ballpoint pen fight with a gun?'* - Robert Mugabe

## How to cause inflation and get away with it

**Eustace Davie**

Causing inflation is a no-brainer. Getting away with it is even easier. The only small hiccup is having to callously disregard the somewhat dire consequences for your fellow-citizens. Clear that hurdle and you qualify for the job. But qualifying does not mean you will get it - not many qualifiers have cronies who will give them the nod. There are even fewer who have the presence to bull\*\*\*\* the whole nation and get away with it.

Gideon Gono in Zimbabwe has given us a wonderful demonstration of how to go about inflating a currency and causing minute-by-minute price rises. He has been printing money at such a rate that the presses have been running white-hot. He has printed so much that by 23 June 2008, the value of the Zimbabwe dollar had fallen to 21,888,000,000 pre-2007 Zimbabwe dollars per 1 US dollar. The largest denominated note was then 50 billion Zimbabwe dollars, and some estimates put the rate of price increases at something like 400,000 per cent per annum. However, Gono still has some way to go to beat the 1994 Brazilian, the 1923 German, and, daddy of them all, the 1946 Hungarian inflation which had prices doubling every 15 hours. If he keeps up the good work, he'll beat the record without much difficulty.

On its website, the Reserve Bank of Zimbabwe swears to uphold the values of honesty, integrity and uprightness. It also claims that its primary goal is "the maintenance of the internal and external value of the Zimbabwean currency." According to the bank, the interest rate is 6,500 per cent, CPI 974,925,192.9 (now don't forget the .9) and the year-on-year inflation rate is 100,580.2 per cent. Gono doesn't even claim the 400,000 per cent. You see, you can be a master inflationist and still be a little modest about your achievements. What a smooth operator!

What the Zim experience is showing us is that even with such a spectacular demonstration of inflation-creation most commentators continue to believe that printing too much money does not cause rapid and general price increases. This means as a country's inflationist, you are home free. Commentators, who fortunately include a whole raft of economists, will blame things like the increase in the oil price, executive salary increases, the greediness of shop owners, the current account deficit, the phases of the moon, or some other such concrete phenomenon, leaving you free to "do your own thing" while everyone continues to smile on you.

Semantic confusion enables inflationists to do the job and avoid being nailed. A century ago, the word inflation meant an untoward increase in the quantity of money in circulation and even non-economists knew that this caused general price increases. They knew that debasement of the currency meant a reduction in its purchasing

power and they would get fewer goodies for their bucks. Alternatively, they had to hand over more bucks for the same quantity of goodies. According to pedantic economists the word "inflation" meant an excessive increase in the money supply (the cause), which always resulted in general price increases (the consequence). Then some genius (it must have been a budding inflationist) thought of the clever idea of calling general price increases "inflation". Give the consequence the name of the cause and even economists no longer know their A's from their E's – absolutely brilliant!

Our own Tito Mboweni was just getting up steam last year in June when the year-on-year increase in M0 (the monetary base, which includes notes, coins, and bankers' deposits with the Reserve Bank) hit a peak of 22.65 per cent; his conscience then got the better of him and he took his foot off the pedal. He is obviously not callous enough to be a true inflationist. You have to have a hard heart to erode the purchasing power of the savings of old-timers, widows and orphans, and others on fixed incomes. When you start issuing new money like it's going out of fashion, you reduce the purchasing power of all the money already in circulation. It's a steal, of course, if nobody blames you, but you can't afford to let twinges of conscience affect your inflationist performance.

Give it time. In South Africa, there are people after Tito's job who think he's been a fuddydud for sticking to the Reserve Bank's primary objective to "protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic" as required by the Constitution. For people burdened with the injunction to act with "honesty, integrity and uprightness" that could be a problem, but as Zimbabwe has shown, there are ways around mere words in constitutions. No thoroughbred inflationist will be deterred by semantics.

Citizens will love the lower interest rates that result when you first increase the money supply. They'll borrow money to buy property and all sorts of goodies that they've always wanted but couldn't afford. Banks'll throw money at them and many will borrow as much as they can and spend it. When everyone starts blaming everyone else for price increases, your pals in government will talk about and even introduce price controls,

labour unions will clamour for inflation-plus wage increases, and eventually some curmudgeons may even start dragging your name into the blaming business.

When the red alert flashes it's time to act. Don't breathe a word about money supply! Come down hard; give the usual long list of reasons for the price rises and declare that excessive spending has to be curbed. Consumer behaviour must change; inflation expectations must be expunged from their minds; those that borrowed all that nice lolly from the banks and spent it must suffer the consequences; they must be choked by having to pay so much interest that they have nothing to spend on other things. Ratchet up the interest rates, then everyone will complain but tell you how responsibly you are acting. What a life! You'll probably get a medal for your noble efforts.

**Author:** Eustace Davie is a director of the Free Market Foundation.

## Delays workshop

Can speeding up performance delivery slow down corruption? That was the idea behind the ZIPPA/TI workshop held in Lusaka on 20<sup>th</sup> June. The 44 participants contained disappointingly few from government. But they included representatives from the institutions which have so far published charters promising timely performance, namely the ZRA, the Ministry of Lands and (for PACRO) the Ministry of Commerce, Trade & Industry. These surely are the ones with which to start up the dialogue between civil society and the civil service which the Secretary to the Cabinet is keen to promote. Those involved will need to bear in mind that, to quote Harold Geneen, "words are words... promises are promises, but only performance is reality."

## A working wiki

Zippawiki.org is up and running. It now contains interesting information and stimulating views on well over 100 subjects ('pages' in wikispeak) from Africa Fighting Malaria to Zimbabwe. Browsers

can find Book reviews, Corruption, Education, Internet, Land reform, Mo Ibrahim Foundation, Rural development, Talking economics, Transportation and many more. ZIPPA members are welcome to make additions and amendments, as with Wikipedia, which uses our software! If that's new to you, click on 'help' for guidance. Just contact the Secretary at [zippamail@gmail.com](mailto:zippamail@gmail.com) to get registered. We have had to follow this route to keep out spamvertisers.

## Disclaimer

*The views expressed in this newsletter are those of the authors. They are not necessarily shared by members or by ZIPPA, which has no official view.*

## Next Theme

*Theme for the next journal?*

*What subject would you like the October issue to discuss? Please email your suggestions to The Editor - [zippamail@gmail.com](mailto:zippamail@gmail.com) for consideration at the next board meeting on 19th July. And if you would like to contribute an article yourself, don't hesitate to volunteer.*

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# **ZAMBIA INSTITUTE FOR PUBLIC POLICY ANALYSIS**

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