

THE AFRICAN EXODUS FROM THE RULE OF LAW AND THE RESPECT OF HUMAN RIGHTS

By Joshua Malidzo

Third year law student

The Israelites are said to have moved from Egypt to the Promised Land, Moses, their leader is documented to have been called by God, when he saw a burning bush that was not being exhausted; Moses was told to go and take the Israelites out of Egypt into the promised land, the promised land is said to be a land where honey flows from it, unlike in Egypt where they were in slavery, the promised land is said to be different. The movement was termed as 'exodus'.

However Africa has now obtained, defined and nurtured its own exodus, an exodus that has not come through a revelation or divine intervention unlike for the Israelites, here an exodus is an African decision.

Rule of law is a principle that has been defined various times by different various times by different people with no agreed definition; however rule of law can be defined along various principles;

- a) government that is duly elected as per the law
- b) government that operates within the law
- c) citizens and those in government being equal before the law
- d) government that respects human rights

The main issues that had had led to the fight for independence have now changed and, in its place, the African 'political gods' or 'the self-converted elites' have replaced the priorities;

greedy for power, greedy for resources and corruption have taken the center stage, this is now the exodus; as **G.W KANYEIHAMBA** notes that

The highest preferred by the new African leaders came to be how to stay in power longest for the sake of self¹

at whatever cost , this new priority has to be achieved ; these ‘political gods’ have been holding positions, changing the law to suit their needs , no matter whether it is infringing of the normal citizens.

in Africa ,human rights are not inherent or rather , they are inherent on paper , in fact they exist on paper but operate in a vacuum ; NO! human rights in Africa operate in a different planet , a planet where the ‘political gods’ sleep, eat and enjoy their lives; to the political gods , **the 1776, Virginian declaration** of rights that *all men by nature are equally free and independent and had inherent rights* ‘ is as a result of good rains but bad planning.

Most countries in the African continent have constitutions and all legal instruments, but these legal apparatus have fallen short of glory, the violation of human rights in post-independence Africa, has not been solely due to the weakness or absence of constitutional and other legal guarantees of those rights but it’s the lack of the will by those ‘political gods’ and in agreement **with Kanyeihamba** who argues and I quote

In a number of commonwealth countries, constitutions are perceived by those in power, not as protectors of the human rights and the liberties of the individuals but as instruments for legitimizing the exercise of power. For the opponents of these rulers, constitutions are understood in terms of the government legitimacy to exercise arbitrary power, to impose

¹ G.W Kanyeihamba .constitutional and political history of Uganda

restriction on certain freedoms and rights and to do whatever the ruling oligarchy deems necessary and in its interest²

In Kenya for example, the freedom of movement was denied in Mpeketoni, Lamu county , when the government imposed unnecessary curfews, but they further legitimized it by saying that it was because of public interest and public security, in Uganda , the security agents used excessive force against the demonstrating citizens , the government had to use the same law to defend its arbitrary rule, the law is then sought , as an afterthought and manipulated to legitimize retroactively the illegal activities of the African government and let the ‘political gods’ hide under the veil of the law. It is the miscarriage of the rule of law and attack to the human nature. Having a bill of rights in a constitution is commendable, but if the same political gods lack the will to respect the same constitution it is absolute nonsense to say that we have a constitution protecting the rights of the citizens

It is true that we may have the best written bill of rights in the world, but if the state organs , institutions and leaders at all levels and every individual in the country are not committed and do not pay serious attention to them , human rights as so guaranteed are not worth the paper(s)they are written on³.

Rule of law, being equal before the law also calls for the respect of court orders, judgment and the separation of powers, but hell no, that cannot happen in Africa; in Nigeria, a bench was composed of the armed forces and police⁴, a citizen was to be judged before such a bench whose impartiality could not be questioned, yet such an accused was expected to enjoy the right of fair

² G.W Kanyeihamba ;constitutional law and government in Uganda, E.A.L.B, 1975 from page 451

³ see Report of the Uganda commission of inquiry into violations of human rights in Uganda pg. 581

⁴ constitutional rights project (in respect of zamani lekwot and 6 others) v Nigeria

trial, in a bench where he was already presumed guilty. In Uganda, an army commander, **General Tinnyefuza** is noted to have stated

Who are these fellows' judge(s)? The judges have no power to order the army .the army will not accept this business of being ordered by the judge⁵

The lack of respect for the rule of law and human rights in Africa can be attributed to the poor forms of governance, e.g. The military rule, one party dictatorship or even democracy, as **lawyers committee** reported

For many years in Malawi, expulsion, detention, sexual abuse, theft of food rations was never revealed. The reason being, Malawi was a one-party dictatorship with no free press, no human rights organizations and no possibility for uncovering or criticizing official misdeeds⁶

In Africa, civil wars, revolutions and counter-revolutions is like Sabbath, and in such a period, a country is always in a turmoil and it would be of great insanity for one to expect respect for human rights during such a time; the civil wars are normally characterized by a massive violation of human rights, it may be because of constitutional inadequacy that has led to coups, civil wars and ethnic cleansing in Africa under which no human rights can be respected. **Justice A.**

Akintula Aguda decries this form of changing government and he states that

in these dangerous games of revolutions and counter-revolutions , which became the most popular and accepted forms of changing government , the judiciary has had on many occasions , the unenviable duty of upholding the repressive and barbaric laws on the pain of dismissal or in some cases of liquidation. The fact of course is that most government founded upon the wielding

⁵ Daily monitor newspaper : 3 February 2006

⁶ a Report of the Lawyers committee for human rights , July 1995

*of the gun, or upon the palpable...can hardly be expected to have much regard for legality and the rule of law ...most principles and the rule of law are rough-shod ridden as if they do not exist or as if they are obstacles to be crushed*⁷

It is therefore not prudent to expect respect for human rights in a country like DRC, a country which is at war with itself, where the political gods are in competition for power. It is discouraging and a sad event that the courts are used to rape and defile justice, the courts have been used to rubberstamp the executive decisions, both the legislature and the judiciary are on a payroll of the executive, the executive gives those peanuts and they diverge from their co mandate as in the words of **Kanyehamba**

*Courts have been making political decisions, courts should provide legal sanctuary and succor to victims of violations of human rights*⁸

In Africa , for some countries , it is a ritual act for a leader to contravene or kill his own citizens ; whatever happened in Burundi , if it is to be reckoned: the shooting of the demonstrators by the security agents, who were working on an order ‘ from above’, it was a government killing its own citizens , funny enough the African union, did not intervene; maybe the killing of the citizens was justified, because what happened in Burundi happens everywhere in Africa ; Senegal is no better, DRC ,Kenya, Uganda is no better.

every African must have welcomed the passing away of colonialism where there were inexplicable killing, arbitrary arrests and detentions of thousands of innocent people; they hoped for a better future where there will be respect for the rule of law and human rights but unfortunately , we may not have seen government officials killing its own citizens , raping by the

⁷ Essays on third world perspectives in jurisprudence

⁸ G.W Kanyeihamba, kanyeihamba's commentaries

government officials as it is now seen after post-colonialism ; the post-independence governments have turned themselves into vultures and turning their states as personal as personal properties , a principle shared by **professor Nsibambi**, in his words

We regret to point out that some of our post-independence governments have disgraced the continent of Africa by devaluing life and property and by treating their states as personal properties⁹

In Africa, it is the elite who rape the constitution, defile the other legal apparatus with no shame at all. As **Lawrence M Muite** says,

When state elites adulterate constitutionalism and constitution-making, the masses are left wondering, how it is ever possible for their political leaderships to change so dramatically from fervent espousal of adherence to constitutionalism and the rule of law to contempt for its principles¹⁰

It has now become a duty and an obligation of the international community to remind and rebuke African governments on the importance of respecting human rights; in Kenya for example, the government wanted to repatriate the refugees of Somali origin to their country while contradicting **article 33 of the 1951 UN CONVENTION AND ARTICLE 11(3) OF THE OAU CONVENTION. Ban Ki Moon, UN SEC-GEN** had to intervene; in Angola they ordered all people of the west to leave.

in May 10, 2000, it took law society of Kenya to intervene on what was going on in Zimbabwe, the president of LSK had to write to the president of Zimbabwe blaming his government of the

⁹ in a mimeo published by MISR, makerere university

¹⁰ Lawrence M.Muite, constitutionalism in East Africa ,2004, p.g 4

contribution to the damage done to the rule of law, the cause of democracy and human rights in Africa and in general in Zimbabwe, the commitment of his government to respect human rights and further goes on to state

Over the few weeks, Africa has been bleeding. You can stop this hemorrhage...we write to you because we want to end or banish the conspiracy of silence from the continentWe write to you with full knowledge that all is not well in many African countries...the culture for gross human rights abuses has been led by people who are also the leading opponents of real democracy and who supports repressive and autocratic system of governance¹¹

It is the unwillingness of the African leaders and governments to respect the rule of law and human rights that has led to the violation of those rights and the sufferings, cries witnessed across the continent. The freedom of speech, a fundamental right has been enjoyed selectively , for the pro-government , it is an inherent right /freedom but for the anti-government it is not; in Tanzania , hon Kizito Kabwe, was suspended from the house on the ground that he humiliated the then minister for energy and minerals minister,Hon Nazir Karamagi, the Mp had tabled a motion proposing the formation of a parliamentary committee to probe the contract signed by the minister while in London , the Mp was as a result banished from the house¹², in Uganda it is not different, the opposition leader, DR. KIZZA BESIGYE, has a special room in the jail, he is always in detention for being an ant-government. In Nigeria it is no better, the media is not free¹³, this a tragedy.

In Africa, terrorism has been used to violate human rights, the imposition of curfews and manhandling of residents, at the coast of Kenya, there has been disappearances of sheikhs and

¹¹ as quoted in law society of Kenya, constitution making and democracy in Kenya p.g 32-34

¹² James EC. Jesse; freedom of speech for members of parliament in Tanzania

¹³ Media rights agenda and others v Nigeria

imams, who were thought to be associated with the alshabaab, the shooting of Aboud Rogo. A Muslim imam is yet to be investigated but most of the leaders have termed it as an assassination. Many African nations have taken exceptional measures which have been accompanied by gross abuses of human rights; at the northern parts of Kenya, mass graves have been found, residents have been complaining of rape cases purported to have been committed by the security agents.

Todd Landman, also sees the new security legislations as roadblocks to the realization of the human rights. *'The emergence of hollow democracy and the new security legislation in liberal democracies compromising long-held human right norms'*¹⁴

There is a need, or we must guard these human rights jealously. The Bill of Rights is the most important and integral part of a constitution, which deserves respect as Charles Mwaura notes, *a crucial part of any written constitution is the guarantee of citizens' rights called the Bill of Rights which includes a clear declaration of the Rights of all people such rights precede and transcend the state. They are not granted by the state.*¹⁵

According to *Hinds v The Queen*, The provision of a chapter of human rights in the constitution 'imposes after on the exercise by the legislature, the executive and the plenitude of their respective powers.'

In conclusion; Derek Muhwezi puts it,

'the pillars of a democratic society are, the sovereignty of the people, government based on the consent of the governed, majority rule, free and fair elections, constitutional limits on

¹⁴ TODD LANDMAN, protecting human rights; A comparative study at p.g.3

¹⁵ Charle Mwaura Kamau, Principles of Constitutional Law p.g.117

*government, social, economic and political pluralism; due process of the law; of equality before the law and guarantee of basic human rights.*¹⁶

Africa should stop the exodus, rights and the law cannot be subject to personal and dictatorial manipulations, let us all be guided by constitutionalism, let this dream song of a Kenyan freedom fighter be a reality.

*“We believed that time had come for true freedom in Kenya. The days of exploitation were coming to an end. Those who had plundered the treasury and our country’s resources would be prosecuted. There would be no amnesty for looters and sponsor of ethnic violence. We had seen Canaan, the land of freedom and plenty that the mau mau and other patriots lost life, limb and property to attain it.”*¹⁷

¹⁶ Derek Muhwezi Funding The Constitution of Uganda p.g.80

¹⁷ Kibe Mungai, the Constitution Review Commission: Goals Vs Achievements. In Law Society of Kenya, Constitution Making and Democracy in Kenya p.g8