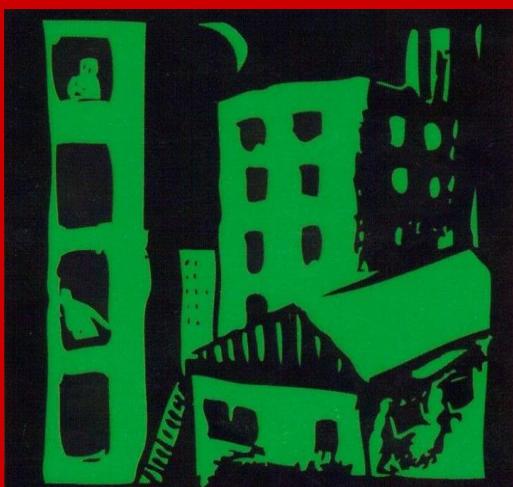


# LAW DEMOCRACY & DEVELOPMENT



**VOLUME 27 (2023)**

DOI: <http://dx.doi.org/10.17159/2077-4907/2023/ldd.v27.18>

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## **Democracy and the rule of law: Comparative lessons between Uganda and South Africa**

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### **ABSTRACT**

*The importance of democracy and the rule of law cannot be overemphasised, as they create an environment in which a country can promote development, protect its citizens, and ensure equal access to justice for all. The two are closely linked to each other: the rule of law is necessary for any democracy to function. However, the degree to which these ideals are achieved varies from country to country and depends on numerous internal and external factors. This article explores the extent to which Uganda and South Africa have achieved these ideals and the comparative lessons that the two countries could learn from each other. It begins by placing the concepts of democracy and rule of law in proper context, after which it explains the rationale for comparing the two countries, provides historical context, and looks at the current realities in these countries. Comparative lessons are then drawn. The general conclusion is that the experiences of Uganda and South Africa demonstrate the importance of maintaining the rule of law and ensuring democratic accountability. It is further concluded that they highlight the challenges to, and opportunities for, promoting democracy and the rule of law.*

**Keywords:** democracy; rule of law; human rights; constitution; accountability; comparative lessons

## 1 INTRODUCTION

Democracy and the rule of law are interlinked because each needs the other to function. They are important because they create an environment in which a country can promote development, protect its citizens from human rights abuses, and ensure equal access to justice for all. However, the degree to which these ideals are achieved varies from country to country and depends on numerous internal and external factors.

Uganda is a country with a long history of political instability and human rights violations, and it thus has many challenges relating to democracy and the rule of law. Despite the country's 1995 Constitution, which provides for a multiparty democratic system,<sup>1</sup> the Ugandan government has been criticised for suppressing opposition parties and violating human rights. Additionally, corruption is a major problem in Uganda, and the country ranks poorly on Transparency International's Corruption Perceptions Index.<sup>2</sup>

South Africa, on the other hand, has a more stable political system and has made significant progress in protecting human rights since the end of apartheid in 1994. The country has a robust democratic system, with generally free and fair elections and a well-developed system of checks and balances. South Africa's Constitution is regarded as one of the most progressive in the world, and it protects all categories of human rights, including civil, political and socio-economic rights. However, the country is not without its challenges, such as high levels of crime, corruption, and racial and socio-economic inequalities.<sup>3</sup> Despite South Africa's progressive Constitution, the electoral system has been criticised by many as not being democratic and representative enough. Several other factors are also beginning to impact negatively on the democratic process and the enjoyment of human rights.<sup>4</sup>

The experiences of Uganda and South Africa offer valuable comparative lessons on democracy and the rule of law. In discussing these experiences and lessons, this article

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<sup>1</sup> Articles 69–71 of the Constitution provide that the people of Uganda shall have the right to choose and adopt a political system of their choice through free and fair elections or referenda. They also lay out three political systems: a movement political system, a multiparty political system, and any other democratic and representative political system. The multiparty system in Uganda came into being only after a national referendum in 2005.

<sup>2</sup> In 2022 Uganda was ranked 142<sup>nd</sup> out of 180 with a score of 26 out of 100. See Transparency International "Corruption Perception Index 2022" available at <https://www.transparency.org/en/cpi/2022> (accessed 13 February 2022).

<sup>3</sup> Nicolas B "Local inequality and crime: New evidence from South Africa" 2022 (89) 22 *Passauer Diskussionspapiere – Volkswirtschaftliche Reihe* 1 at 2.

<sup>4</sup> Human Rights Watch "World Report 2019" available at <https://www.hrw.org/world-report/2019/country-chapters/south-africa> (accessed 4 August 2023).

begins by placing the concepts of democracy and the rule of law in proper context. This is followed by an explanation of the rationale for the comparison between the two countries. A historical context is then given, after which the article looks at the current realities in the two countries. Comparative lessons are drawn, after which it is concluded that the experiences of Uganda and South Africa demonstrate the importance of maintaining the rule of law and ensuring democratic accountability. It is further concluded that the experiences of both countries highlight challenges to, and opportunities for, promoting democracy, the rule of law, and human rights, and can provide valuable insights for other countries seeking to strengthen these institutions.

## 2 CONCEPTUAL CONTEXT

Context is everything, it is usually said. It is also usually said that different concepts may mean different things to different people at different times and in different circumstances. In order to make any meaningful comparison between Uganda and South Africa regarding their levels of democracy and the rule of law, it is important to place these concepts into proper context, as we hereby do.

### 2.1 Democracy

There are various definitions of the concept “democracy”. What is important, however, is that most, if not all, of those definitions have “people” as the focal point.<sup>5</sup> Hence, democracy is usually simplistically defined as a “government of the people, by the people and for the people” – a definition that was initially advanced by US President Lincoln in 1863 and subsequently adopted by scholars and politicians across the globe.<sup>6</sup> A more sophisticated definition is that democracy entails:

*inclusive, collective (or at least collectively accepted) will formation and decision making, aiming at political responsiveness – in the sense of effective transformation of citizens’ preferences into policies and outcomes – while ensuring political rights and liberties via constraints of the will of the people.*<sup>7</sup>

All definitions of democracy reveal three important tenets:

*[first, that democracy is a form of government in which all adult citizens have some share through their elected representatives; secondly, that in a democratic society all citizens treat each other as equals without any discrimination; and thirdly and most importantly, that democracy means a form of government which encourages, allows, promotes and protects the rights of its citizens.]<sup>8</sup>*

In that sense, democracy is mainly characterised by free and fair elections, the rule of law, protection of individual rights and freedoms, and government accountability to the people. Other characteristics include separation of powers between different branches

<sup>5</sup> Mubangizi J “Democracy and development in the age of globalisation: Tensions and contradictions in the context of specific African challenges” (2010) 14(1) *Law, Democracy and Development* 1 at 4.

<sup>6</sup> See Ambrose BP *Democratization and the protection of human rights in Africa* (1995) London: Praeger at 16.

<sup>7</sup> Müller-Rommel F and Geißel B “Introduction: Perspectives on democracy” (2020) 61(2) *Polit Vierteljahrsschr* 225 at 227.

<sup>8</sup> Mubangizi J *The protection of human rights in South Africa: A legal and practical guide* (2013) Cape Town: Juta & Co. at 8.

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of government, an independent judiciary, a free media, and respect for freedom of speech and expression. More broadly, in a democracy, there should be active citizen participation and engagement, respect for diversity and pluralism, and peaceful transfer of power through regular and competitive elections.

Seen from this perspective, there is no doubt that human rights and the rule of law are necessary components of any democratic society. Accordingly, democracy is an ideal towards which all civilised nations should strive.

### 2.2 Rule of law

As with the notion of democracy, many definitions and meanings are ascribed to the concept of the rule of law; and as with democracy, the definitions of the rule of law range from the basic to the elaborate. In its basic form, “the rule of law means that government officials and citizens are bound by and abide by the law”.<sup>9</sup> Of all the elaborate definitions, the United Nations’ understanding of the concept is, in my view, the clearest and most appropriate. For the UN system:

*the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.<sup>10</sup>*

What this means is that all individuals and institutions, including government officials and entities, are subject to and must abide by the law. This requires that laws be applied equally and fairly to everyone, without favouritism or discrimination, and that legal processes be conducted in a transparent and predictable manner. The rule of law also requires that laws be clear and accessible to all, and that they be enforced in a manner which is consistent with human rights and fundamental freedoms.

Flowing from the above are what could be referred as the main features or characteristics of the rule of law. They include “supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.”<sup>11</sup>

Two observations can be made from the above. First, some of the main features of the rule of law overlap with those of democracy. That means that the concepts are mutually reinforcing. You cannot have one without the other. Secondly, it is unlikely that all of these features and characteristics will be robustly present in any country, whether developed or underdeveloped. This does not necessarily mean that the rule of law is not present in a country. What it means is that the rule of law is a relative concept, the

<sup>9</sup> Tamahana B “The history and elements of the rule of law” (2012) *Singapore Journal of Legal Studies* 232 at 233.

<sup>10</sup> United Nations “What is the rule of law?” (undated) available at <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (accessed 14 February 2023).

<sup>11</sup> See United Nations (undated).

presence and observance of which is higher in some countries than in others – hence the need for a comparative approach. It should be mentioned that human rights play a fundamental and essential role in both democracy and the rule of law. They serve as the cornerstone of a just and equitable society by providing individuals with protection, dignity, and the ability to participate fully in the governance and legal processes of their country. The interplay between human rights, democracy, and the rule of law creates a system where people's freedoms and dignity are upheld, promoting a more inclusive, fair, and stable society. The comparative discussion on democracy and the rule of law in Uganda and South Africa takes this into account.

### 3 RATIONALE FOR COMPARISON

The choice of Uganda and South Africa for comparison is based on several factors. Although the two countries differ in many respects, they have much in common. Both adopted new constitutions in the mid-1990s after disturbing histories that were characterised by apartheid, oppression and repression in South Africa, and colonialism and military dictatorship in Uganda. Those constitutions provide for multiparty democratic systems and contain bills of rights.<sup>12</sup> As mentioned earlier, however, the multiparty system in Uganda came into being only after a national referendum in 2005. At the same time, there are pronounced differences between Uganda and South Africa. In terms of their economies, South Africa is the more developed of the two countries, with a higher GDP per capita (USD 468.56 billion in 2022),<sup>13</sup> a more diverse economy, and a well-developed infrastructure. Uganda's economy is heavily dependent on agriculture and foreign aid, with a lower GDP per capita (USD 45.56 billion in 2022)<sup>14</sup> and less developed infrastructure. South Africa has a more advanced financial sector, with a well-regulated stock exchange and a large banking sector, while Uganda's financial sector is less developed.

Furthermore, as mentioned earlier, Uganda's political system has been characterised by a history of authoritarian rule and human rights abuses. The current president has been in power since 1986, and his government is accused of suppressing opposition, restricting freedom of speech and assembly, and using violence to maintain its hold on power.<sup>15</sup> Although South Africa also faces challenges, such as corruption, high levels of inequality, and social unrest, it has a more open and democratic political system.

Another important rationale for the comparison between Uganda and South Africa is that “there are many benefits to be gained from cross-national studies – including a

<sup>12</sup> Section 1 and Chapter 2 of the South African Constitution and Preamble and Chapter 4 of the Ugandan Constitution.

<sup>13</sup> The World Bank “GDP (current US\$) – South Africa” available at <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=ZA> (accessed 4 August 2023).

<sup>14</sup> The World Bank “GDP (current US\$) – Uganda” available at <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=UG> (accessed 4 August 2023).

<sup>15</sup> See Kakuba SJ “State repression and democratic dispensation in Uganda 1996–2016” (2021) 11(3) *SAGE Open* available at <https://journals.sagepub.com/doi/epub/10.1177/21582440211030638> (accessed 5 August 2023).

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deeper understanding of how different countries do things in the context of differing political, cultural and socio-economic circumstances".<sup>16</sup> Comparative studies serve to identify similarities and differences between countries, societies or systems; moreover, they can provide a more holistic view of the issues under discussion. This approach allows researchers to examine multiple dimensions of particular issues and understand how they interact. In short, comparative case studies are an important research method for understanding different issues and enabling researchers to suggest and recommend comparative lessons. Finally, the choice of Uganda and South Africa for comparison is based on the research interests of the author of this article.

### 4 HISTORICAL PERSPECTIVES

Understanding the political history of a country is important for understanding its level of democracy and rule of law because this provides context for and insight into the institutions, norms, and practices that have developed over time. As such, the historical context can help to explain the current state of democracy and the rule of law in a country, including any ongoing challenges and potential paths for reform. For example, a country which has experienced long periods of authoritarian rule may have institutions and practices that are not conducive to democracy, such as a lack of independent judiciary or media freedom. In contrast, a country with a history of strong democratic institutions may be better equipped to protect human rights and promote the rule of law. Furthermore, historical events and processes can shape the beliefs and values of a society, including attitudes towards democracy, the rule of law, and human rights. For instance, countries that have experienced widespread human rights abuses may have deeply ingrained attitudes of discrimination or intolerance towards certain groups.

Therefore, understanding a country's political history is crucial for comprehending its present political landscape and evaluating its commitment to democracy, the rule of law, and human rights. It is for these reasons that a brief discussion of Uganda's and South Africa's historical perspectives is undertaken here.

Uganda was administered as a British Protectorate by the United Kingdom from 1894 until 1962.<sup>17</sup> There was no interest in or focus on the protection and promotion of human rights during that period. Instead, the focus was on the creation of a socio-economic and political system that would serve colonial and imperialist interests. Uganda gained formal political independence in October 1962. With it came the first Ugandan written constitution, which was an annex to the Uganda Independence Act passed by the British parliament in August 1962.<sup>18</sup> Surprisingly, this constitution

<sup>16</sup> See Mubangizi JC "A comparative discussion of the South African and Ugandan Human Rights Commissions" (2015) 48(1) *Comparative and International Law Journal of South Africa* 124 at 127.

<sup>17</sup> Kanyeihamba GW *Constitutional and political history of Uganda: From 1894 to present* (2010) Chicago: African Books Collective at 1.

<sup>18</sup> Constitution of Uganda 1962.

featured a chapter that protected a variety of (mostly civil and political) rights and liberties.<sup>19</sup> Many important political events occurred between 1962 and 1966, leading to the promulgation of the 1967 constitution.<sup>20</sup> This constitution included a watered-down version of the previous bill of rights. Human rights violations and abuses escalated substantially, primarily as a result of government attempts to repress rising dissent. As a result, a state of emergency was imposed soon thereafter, and all opposition political parties were outlawed in 1969, thereby creating a one-party state.

Idi Amin Dada took over the government in January 1971, suspending the constitution, dissolving Parliament and other democratic institutions, and unleashing a reign of terror that would last until 1979.<sup>21</sup> During that period, Uganda saw the worst type of military dictatorship, with the country governed by decrees and Amin as the supreme law-maker. His eight-year rule was well-known for its catastrophic economic collapse, extensive social disintegration, and massive human rights violations. More than 500,000 Ugandans are believed to have died in that time, primarily as a result of arbitrary executions and disappearances at the hands of government agencies.<sup>22</sup> In 1979, Idi Amin's administration came to an end and was followed by successive governments, all of which were largely unsuccessful and distinguished by extensive violations of human rights.

In 1986 the National Resistance Army (NRA), commanded by Yoweri Museveni, won state authority after a five-year long guerrilla war.<sup>23</sup> Some stability was restored to the country, and the economic, social, and human rights situation gradually improved. Museveni and the NRM government are still in power. The fundamental political feature of this government for many years was that it was based on the "movement" or "no-party" system, which virtually outlawed political action other than under the Movement itself.<sup>24</sup> There were numerous arguments for and against this political ideology, but it was generally recognised that any political system that restricted or forbade political parties could only be undemocratic.

Ugandans voted in favour of a return to a multiparty political system in a referendum in July 2005.<sup>25</sup> As a result, multiparty elections were held in February 2006, the first in 25 years. Although the NRM (and Museveni) claim to have won the elections, some developments appeared to call their validity into question. This has been the trend for

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<sup>19</sup> Chapter 3.

<sup>20</sup> See Kanyeihamba (2010) Chapter 3 generally.

<sup>21</sup> Butterworth R "Uganda under Idi Amin" 1976 (1)6 *New Zealand International Review* 22 at 22.

<sup>22</sup> Mubangizi JC "The protection of human rights in Uganda: Public awareness and perceptions" (2005) 3 *African Journal of Legal Studies* at 171.

<sup>23</sup> See Mubangizi (2005) at 171.

<sup>24</sup> Makara S, Rakner L & Svåsand L "Turnaround: The National Resistance Movement and the reintroduction of a multiparty system in Uganda" (2009) 30(2) *International Political Science Review* 185 at 187.

<sup>25</sup> See Makara et al. (2009) at 194.

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the last 17 years and three general elections. It is exacerbated by what many consider a gross violation of the Constitution, namely its alteration to remove term limits and ensure Museveni an unlimited tenure in office.<sup>26</sup> He has now been in power for a continuous period of 37 years.

In the democratic and political space, it has generally been more of the same since 2010. In 2011, Museveni was re-elected for a fourth term. From 2012, there were growing concerns about shrinking political space in Uganda. The government enacted a series of laws that restricted freedom of speech, assembly, and association. In 2016, Museveni was re-elected for a sixth term amid allegations of vote-rigging and violence as usual. In 2017, the government amended the Constitution to remove the age limit for the presidency, paving the way for Museveni to run for a seventh term in 2021.<sup>27</sup> During this period, there were growing concerns about human rights violations. In the 2021 general election, Museveni was re-elected for a seventh term, once again amid allegations of voter intimidation and irregularities.

Turning to South Africa, its history in a political, democratic and human rights context has been equally volatile. It has had five constitutions in total.<sup>28</sup> The first of these was adopted at the founding of the South African Union in 1910. The key aspect of this constitution was that it granted privileges to the white minority while denying fundamental rights to the majority of South Africans, particularly the right to vote. It was also based on the Westminster model, according to which the constitution was not paramount and supreme power was vested in Parliament's sovereignty. The Union of South Africa lasted from 1910 to 1960, during which time the constitutional system of parliamentary sovereignty was in place, as was the ongoing denial of rights to non-white South Africans.<sup>29</sup> South Africa was declared a republic on 31 May 1961, at which point the government adopted the second constitution. This constitution "brought about very few structural modifications other from symbolic tweaks to the form of states".<sup>30</sup> Human rights remained a foreign concept to many South Africans, and oppression and exploitation of the black people by white people continued unabated. This oppressive system, however, gave rise to civil unrest and public violence, as demonstrated by instances such as the 1976 Soweto uprising, which resulted in the deaths of numerous schoolchildren at the hands of security forces.

In 1983, the government passed a new constitution, in part to quell mounting tensions. This went into effect on 3 September 1984, marking the "biggest constitutional change

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<sup>26</sup> See Makara et al. (2009) at 194.

<sup>27</sup> Versteeg M et al. "The law and politics of presidential term limits evasion" (2020) 120(1) *Columbia Law Review* 173 at 206.

<sup>28</sup> See Mubangizi (2013) at 51.

<sup>29</sup> See Mubangizi (2013) at 51.

<sup>30</sup> Venter F *Constitutional comparison: Japan, Germany, Canada and South Africa as constitutional states* (2000) Cape Town: Juta & Co. at 76.

in South Africa since 1910".<sup>31</sup> However, the notion of parliamentary sovereignty was upheld, and non-white South Africans continued to be denied basic human rights. A new political and constitutional dimension was introduced into the mix. The constitution established a tricameral parliament, which meant distinct legislatures for whites, Indians, and coloureds. Black people were still excluded and were automatically granted citizenship in the countries where they were born. The homeland system, which was implemented in 1976, resulted in the loss of South African citizenship for millions of black people. They had no rights outside of their homelands after 1983.

Throughout the mid-1980s, the pressure from the armed struggle intensified. Political pressure groups, black trade unions, and economic sanctions exacerbated the situation. The inevitable effect of this pressure was the commencement of a negotiating process at the end of 1990. A variety of political organisations participated in a series of discussions aimed at negotiating a new constitution. The outcome of the negotiations was the Interim Constitution which was enacted on 22 December 1993.<sup>32</sup> Some of the most essential aspects of this Constitution were that it contained a bill of fundamental rights, created a constitutional state in which the Constitution was to be supreme, and was unique in that it was the result of protracted negotiations involving representatives of political groups with diverse and opposing political interests and aspirations. Moreover, it created certain institutions to support constitutional democracy and protect people's rights, and it provided for the drafting and adopting of a new constitutional text.<sup>33</sup> The new Constitution was drafted between 1994 and 1996 and came into effect on 4 February 1997.<sup>34</sup>

The most essential element of the 1996 Constitution in the context of human rights and democracy was that, like its predecessor, it established a multiparty democracy and foregrounded the protection of basic human rights through a Bill of Rights. It also created a system of government with three branches: the executive, legislature, and judiciary. Since 2014, there have been successive African National Congress (ANC) governments, all democratically elected. In 2019, South Africa held its sixth elections, and the ANC won a majority of the seats in Parliament. The elections were marked by a high level of voter turnout, but also by concerns about corruption and inequality. In 2020, South Africa, like many other countries across the globe, faced a major challenge with the outbreak of the Covid-19 pandemic. The government implemented a strict lockdown to curb the spread of the virus, but this had a major impact on the economy and on people's livelihoods.

The foregoing discussion gives some historical background to Uganda and South Africa and outlines political developments that are relevant to democracy and the rule of law.

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<sup>31</sup> See Venter at 76.

<sup>32</sup> Constitution of the Republic of South Africa (1993) (the interim Constitution).

<sup>33</sup> Chapter 8 of the (1993) Constitution.

<sup>34</sup> Constitution of the Republic of South Africa, 1996.

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It is against this backdrop that the current democratic, rule of law and human rights realities of the two countries are discussed below.

### 5 CURRENT REALITIES

#### 5.1 Uganda

In considering the current realities relating to democracy and the rule of law in Uganda and South Africa, regard has to be had to the characteristics of these concepts discussed earlier under the conceptual context section. These, as was indicated, include, but are not limited to, free and fair elections, government accountability to the people, separation of powers between different branches of government, an independent judiciary, a free media and respect for freedom of speech and expression. They also include active citizen participation and engagement, respect for diversity and pluralism, equality before the law, fairness in the application of the law, and legal certainty.

In so far as Uganda is concerned, there is quite a lot that has been said and written about the state of democracy and the rule of law in the country.<sup>35</sup> True, Uganda is officially a multiparty democracy, with regular elections held every five years at national level and the different local government levels. However, in recent years, there have been concerns about the integrity of these elections and the extent to which they are free and fair. The most recent presidential elections, held in January 2021, saw the incumbent President Yoweri Museveni win a sixth term in office amid allegations of widespread voter intimidation, ballot stuffing, and internet shutdowns.<sup>36</sup> According to the BTI 2022 Country Report:<sup>37</sup>

*The 2021 election was characterised by an internet and social media blackout, the opposition being blocked from accessing radio and television stations and widespread reports of faulty biometric voter machines. Opposition candidates reported numerous cases of irregularities and general dissatisfaction with the process. There were fewer electoral observation missions in 2021; the European Union announced a few weeks into the election campaign that it would not deploy observers and the United States failed to get accreditation for all their observers and as a result announced they would not participate in the exercise.<sup>38</sup>*

There have also been concerns about the shrinking space for political opposition, independent media, and civil society. Human rights organisations have documented

<sup>35</sup> See, for example, Kanyeihamba (2010). See also Oloka-Onyango J "Governance, democracy and development in Uganda today: A socio-legal examination" (1992) 13(2) *African Study Monographs* 91.

<sup>36</sup> See Bertelsmann Stiftung "BTI 2022 country report: Uganda" available at <https://btiproject.org/en/reports/country-report/UGA> (accessed 1 March 2023).

<sup>37</sup> The report is part of the Bertelsmann Stiftung's Transformation Index (BTI) 2022. It covers the period from 1 February 2019 to 31 January 2021. The BTI assesses the transformation towards democracy and a market economy as well as the quality of governance in 137 countries.

<sup>38</sup> "BTI 2022 country report: Uganda" (2022).

numerous cases of government harassment, intimidation, and arrest of opposition figures, journalists, and activists.<sup>39</sup> According to CIVICUS:<sup>40</sup>

*Uganda has a vibrant media that has often reported on government actions, issues affecting citizens, civil society activity and the views of members of the political opposition. However, reporting by independent media is increasingly being restricted by the authorities and there was a marked increase in attacks on journalists and restrictions on independent media agencies ...<sup>41</sup>*

The government has also passed several laws in recent years that have been criticised for restricting the freedoms of speech, assembly, and association. One such a law is the Public Order Management Act,<sup>42</sup> which severely restricts public gatherings and gives enormous powers, authority and discretion to the police to prohibit such gatherings. The other one is the Anti-Terrorism Act,<sup>43</sup> which, it has been argued, is used to target government opponents and stifle debate on important issues that affect the country.<sup>44</sup> According to one commentator:

*the use of anti-terrorism regulation to suppress dissenting views reflects growing intolerance of criticism of President Yoweri Museveni's regime. Anti-terror law is invoked whenever it suits the authorities to limit individual freedoms of expression as well as freedom of the media.<sup>45</sup>*

Of all the most opprobrious laws passed by the Ugandan government, the Anti-Homosexuality legislation ranks highest. The initial Anti-Homosexuality Act<sup>46</sup> was passed by the Ugandan parliament on 20 December 2013. Its main objective was "to prohibit any form of sexual relations between persons of the same sex (and) ... the promotion or recognition of such relations".<sup>47</sup> This Act was declared illegal by the Ugandan Constitutional Court in August 2014.<sup>48</sup> On 26 May 2023, President Museveni signed a new Anti-Homosexuality Act<sup>49</sup> that was passed by Parliament on 23 March 2023. The Act makes it a crime to be merely identified as lesbian, gay, bisexual, transgender and queer (LGBTQ). It also accords broad powers to the authorities to

<sup>39</sup> See Firmin A "CIVICUS: Addressing civic space restrictions in Uganda: What role for the universal periodic review?" *Foundation for Human Rights Initiative (FHI)* available at <http://www.civicus.org/images/Addressing Civic Space Restrictions in Uganda PolicyBrief Feb2017r.pdf> (accessed 1 March 2023).

<sup>40</sup> CIVICUS is a global alliance of civil society organisations and activists dedicated to strengthening citizen action and civil society throughout the world.

<sup>41</sup> CIVICUS.

<sup>42</sup> Act 9 of 2013.

<sup>43</sup> Act 14 of 2002.

<sup>44</sup> Selnes NF "Anti-terrorism regulation and the media in Uganda" *Verfassungsblog* 10 March 2022 available at <https://verfassungsblog.de/os4-uganda/> (accessed 22 March 2023).

<sup>45</sup> Selnes (2022).

<sup>46</sup> The Anti-Homosexuality Act 2014.

<sup>47</sup> Long title of the Act.

<sup>48</sup> *Oloka-Onyango & 9 Others v Attorney General* (Constitutional Petition No. 8 of 2014) [2014] UGSC 14 (1 August 2014).

<sup>49</sup> The Anti-Homosexuality Act 2023.

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target gay Ugandans, who already face legal discrimination and have been increasingly subjected to mob violence. The Bill also provided for severe penalties, including death for so-called aggravated homosexuality and life in prison for gay sex.<sup>50</sup>

In so far as the rule of law is concerned, there are concerns about issues such as the independence of the judiciary, allegations of corruption and political interference in the legal system.<sup>51</sup> The government has also been accused of using security forces to suppress dissent and opposition.<sup>52</sup> The concerns relating to non-adherence to the rule of law are reflected in several studies, surveys and indices which show that Uganda performs poorly. For example, in 2020, Uganda was the worst country in the East African region for not upholding justice and the rule of law.<sup>53</sup> The 2020 World Justice Project Rule of Law Index<sup>54</sup> ranked Uganda 117th out of 128 countries in the world. At the time, *The Monitor* reported as follows:

*The annual report .... paints a picture of the rule of law in 128 countries across the globe by providing scores and rankings based on eight factors. The factors include constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.*<sup>55</sup>

A year later, Uganda's ranking had not improved. According to the report on the 2021 World Justice Project Rule of Law Index, Uganda's overall rule of law score decreased by less than 1% in that year's Index. "At 125th place out of 139 countries and jurisdictions worldwide, Uganda improved two positions in global rank. Uganda's score places it at 29 out of 33 countries in the Sub-Saharan Africa region and 15 out of 18 among low-income countries," the report said.<sup>56</sup> According to the most recent report,<sup>57</sup> "... Uganda

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<sup>50</sup> See Biryabarema E "Uganda passes a law making it a crime to identify as LGBTQ" *Reuters* 22 March 2023 available at <https://www.reuters.com/world/africa/uganda-passes-bill-banning-identifying-lgbtq-2023-03-21/> (accessed 22 March 2023).

<sup>51</sup> See "BTI 2022 country report: Uganda" (2022).

<sup>52</sup> See "BTI 2022 country report: Uganda" (2022).

<sup>53</sup> The World Justice Project Rule of Law Index 2020 available at <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online 0.pdf> (accessed 22 March 2023).

<sup>54</sup> World Justice Project Rule of Law Index 2020.

<sup>55</sup> Wesaka A "Uganda ranked worst in rule of law, justice" *The Monitor* 21 April 2021 available at <https://www.monitor.co.ug/uganda/news/national/uganda-ranked-worst-in-rule-of-law-justice-3370846> (accessed 22 March 2023).

<sup>56</sup> World Justice Project 2021 WJP Rule of Law Index "Country press release – Uganda ranked 125 out of 139 countries on rule of law, rising two positions" available at <https://worldjusticeproject.org/sites/default/files/documents/Uganda 2021%20WJP%20Rule%20of%20Law%20Index%20Country%20Press%20Release.pdf> (accessed 2 March 2023).

<sup>57</sup> World Justice Project Rule of Law Index 2022 available at <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIIndex2022.pdf> (accessed 2 March 2023).

ranks 128th of 140 countries surveyed. The lack of protection of fundamental rights and widespread corruption have dragged the country down in the index.”<sup>58</sup>

Many Ugandan court cases have shown Uganda’s non-adherence to the rule of law. The best examples include Kizza Besigye’s presidential election petitions, in which Kizza Besigye, a leading opposition figure, contested multiple presidential elections, including in 2001, 2006, 2011, and 2016. He and his supporters alleged electoral irregularities and voter suppression in some of these elections, which raised questions about the fairness and transparency of the electoral process. Those petitions include *Rtd Col Dr Kizza Besigye v Electoral Commission, Yoweri Kaguta Museveni*,<sup>59</sup> and *Kiiza Besigye v Attorney General*,<sup>60</sup> along with many other such cases.

Other court cases that reflect on Uganda’s state of the rule of law include *Major General David Tinyefuza v Attorney General*.<sup>61</sup> In 2013, General David Sejusa (formerly known as David Tinyefuza), a high-ranking Ugandan military officer, released a letter raising concerns about an alleged plot to assassinate senior government officials who opposed the idea of President Museveni’s son succeeding him. Sejusa was subsequently charged with offences related to his letter and faced a court martial. The case raised questions about freedom of expression, military justice, and the handling of dissenting voices within the military.

Another relevant case is *Stella Nyanzi v Uganda*,<sup>62</sup> in which Stella Nyanzi, a prominent Ugandan activist and academic, was arrested and charged with “cyber harassment” and “offensive communication” for criticising President Museveni and the First Lady on social media. Her case brought attention to issues related to freedom of expression and the use of vague legal provisions to stifle dissent.

The Uganda Human Rights Commission (UHRC) has regularly commented on the rule-of-law challenges in the country. In its 25<sup>th</sup> Annual Report, for example, the Commission stated as follows:

*It is observable that the country is still challenged by effective implementation of all the legal standards for lack of rule of law and resources. Uganda has good laws which largely remain on paper and not put to proper use.*<sup>63</sup>

<sup>58</sup> Hille P “Rule of law globally under assault” available at <https://www.dw.com/en/rule-of-law-globally-under-assault/a-63560500#:~:text=According%20to%20the%20latest%20Rule,country%20down%20in%20the%20index> (accessed 2 March 2023).

<sup>59</sup> Election Petition No. 1 of 2006 [2007] UGSC 24 (30 January 2007).

<sup>60</sup> Constitutional Petition No. 13 of 2009 [2016] UGCC 1 (29 January 2016).

<sup>61</sup> Constitutional Petition No. 1 of 1996 [1997] UGCC 3 (25 April 1997).

<sup>62</sup> Criminal Appeal 79 of 2019 [2020] UGHCCRD 1 (20 February 2020).

<sup>63</sup> Uganda Human Rights Commission “The 25<sup>th</sup> Annual Report on the State of Human Rights and Freedoms in Uganda in 2022” available at <https://www.uhrc.ug/download/25th-uhrc-annual-report/?wpdmdl=1946&refresh=64dbd133c6fd01692127539> (accessed 18 August 2023).

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Human rights play a fundamental role in both democracy and the rule of law, as mentioned earlier. Detailed accounts of the state of human rights in Uganda are regularly provided by organisations such as Amnesty International, Human Rights Watch, and the United States Department of State. According to these organisations' reports, the main human rights issues that characterise the current state of human rights in Uganda include restrictions on the freedom of expression, including censorship of the media, the closure of media outlets critical of the government, and harassment and intimidation of journalists and activists.<sup>64</sup> They also include political repression, arbitrary arrests, and detentions and torture and mistreatment of detainees.<sup>65</sup> There have been reports too of extrajudicial killings by security forces in Uganda, particularly in the context of the government's efforts to suppress dissent.<sup>66</sup>

Of particular concern is the issue of discrimination. There have been reports of discrimination against certain groups in Uganda, including LGBT people, women, and ethnic minorities. In some cases, such discrimination is sanctioned and supported by law. This is particularly so in the case of discrimination against LGBT people if the Anti-Homosexuality legislation discussed earlier achieves its objectives.

### 5.2 South Africa

Several people have written about the state of democracy and the rule of law in South Africa.<sup>67</sup> All commentators agree that South Africa is a constitutional democracy with a relatively robust legal system and independent judiciary. At the same time, South Africa has a vibrant civil society and active media that play an important role in holding the government accountable and advocating for democratic reforms. Elections in South Africa are held every five years, with national and provincial elections held simultaneously and municipal elections held two years later. The electoral system is based on party-list proportional representation, which means that parties are represented in proportion to their electoral support as determined by each party.<sup>68</sup> This system has been fiercely criticised, mainly because it tends to lessen accountability

<sup>64</sup> Amnesty International "Uganda (2021/2022)" available at <https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/uganda/report-uganda/> (accessed 22 March 2023). See also Human Rights Watch "World Report 2022 (Uganda)" available at <https://www.hrw.org/world-report/2022/country-chapters/uganda> (accessed 22 March 2023) and U.S. Department of State "2021 country reports on human rights practices: Uganda" available at <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/uganda/> (accessed 22 March 2023).

<sup>65</sup> Amnesty International (2021/2022).

<sup>66</sup> Amnesty International (2021/2022).

<sup>67</sup> See, for example, Southall R "The state of democracy in South Africa" (2000) 38(3) *Journal of Commonwealth & Comparative Politics* 147–170. See also Botha H, Schaks N & Steiger D "The current state of democracy in South Africa" in *Law and Politics in Africa, Asia and Latin America* (2015) 259–262.

<sup>68</sup> See Mhlongo L "A critical analysis of South Africa's system of government: From a disjunctive system to a synergistic system of government" (2021) 42(2) *Obiter* 257 at 264.

between representatives and their constituencies as such representatives are not directly elected by the voters in those constituencies.<sup>69</sup>

In so far as the rule of law is concerned, the 2020 World Justice Project Rule of Law Index<sup>70</sup> ranked South Africa 45th out of 128 countries in the world. It was ranked fifth out of 31 countries in the sub-Saharan Africa region.<sup>71</sup> In 2021 South Africa ranked 52 out of 139 countries worldwide and in 2022, 54th out of 140 countries worldwide, falling two positions from the previous year.<sup>72</sup> Despite its reasonable level of democracy and relatively high ranking in terms of the rule of law, South Africa, like many young democracies, still faces challenges in consolidating its democratic institutions and upholding the rule of law. One of the main challenges facing the country is corruption, which has become pervasive in government and business. This has eroded public trust in democratic institutions and led to a perception that the rule of law is not being applied equally to all citizens. The Zondo Commission, a public inquiry into state capture and corruption,<sup>73</sup> exposed the extent of corruption in the country's political and business elites, but it remains to be seen whether its findings will lead to meaningful accountability and reform.

Another challenge facing South Africa is socio-economic inequality, which is closely linked to the country's history of apartheid. With a Gini coefficient of 63, South Africa is the most unequal society in the world.<sup>74</sup> Despite progress in reducing poverty and expanding access to basic services, many South Africans still lack access to decent housing, education, and health care. This has fuelled social unrest and political polarisation, which have at times threatened to undermine the country's democratic stability.

In the specific context of human rights, mention was made earlier of South Africa's Constitution being regarded as one of the most progressive in the world because it protects all categories of human rights including civil and political rights and socio-economic rights. Indeed, the country's Constitution also provides strong protections for those human rights, including freedom of speech and the press, and an independent judiciary that has at times pushed back against government overreach. The South African judiciary has innovatively and proactively interpreted and applied the

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<sup>69</sup> See Mhlongo (2021) at 271.

<sup>70</sup> World Justice Project (2020).

<sup>71</sup> World Justice Project Rule of Law Index 2020.

<sup>72</sup> World Justice Project Rule of Law Index 2022 available at <https://worldjusticeproject.org/rule-of-law-index/global/2022/South%20Africa/> (accessed 22 March 2023).

<sup>73</sup> The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (the Zondo Commission) was established in January 2018 by former President Jacob Zuma to investigate allegations of state capture, corruption, and fraud in the public sector in South Africa.

<sup>74</sup> The Gini coefficient measures the deviation of the distribution of income (or consumption) among individuals or households within a country from a perfectly equal distribution. A value of 0 represents absolute equality, a value of 100, absolute inequality.

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Constitution in a way that instils confidence and belief among the people.<sup>75</sup> However, the challenges of inequality and corruption, together with high levels of crime, among others, present a real threat to the protection and enjoyment of human rights in South Africa.

### 6 COMPARATIVE LESSONS

There are several lessons that Uganda and South Africa could learn from each other in relation to democracy, rule of law and human rights. The first lesson that Uganda could learn from South Africa is the importance of a strong, independent judiciary. South Africa has a relatively strong and independent judiciary, which has played a key role in upholding the rule of law and protecting citizens' rights. It acts as a check on the executive and legislative branches of government, ensuring that they do not abuse their power. Uganda could learn from this and work to strengthen its own judiciary to ensure that it is independent and able to provide a check on the power of the executive and legislative branches of government.

Another key lesson relates to the importance of a free and independent media. South Africa has a relatively free and independent media,<sup>76</sup> which play a crucial role in holding government officials accountable and providing citizens with accurate information. It should be acknowledged that Uganda could learn from this and work to ensure that its own media is free from government interference and able to report on issues of public interest without fear of reprisal. Uganda could do this by, among other things, strengthening its legal framework to ensure that freedom of the press is enshrined and protected. It could also create an independent regulatory body along the lines of the Communications Authority of South Africa (ICASA), which regulates broadcasting and telecommunications.

South Africa has also taken steps to decriminalise defamation, allowing for a more open environment for media organisations to carry out investigative reporting without the fear of facing criminal charges. Uganda could revisit its defamation laws to strike a balance between protecting individual reputations and allowing robust journalism. Like South Africa, Uganda should make efforts to promote media diversity by encouraging a diverse range of media outlets and preventing excessive concentration of media ownership.

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<sup>75</sup> Through landmark judgments such as *S v Makwanyane and Another* [1995] ZACC 3, *Minister of Health v Treatment Action Campaign* [2002] ZACC 16, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6, *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) and *Mohamed v President of the Republic of South Africa* [2001] ZACC 18, to mention but a few.

<sup>76</sup> See O'Regan V "SA's media relatively free, but Africa remains the most dangerous continent for journalists" *Daily Maverick* 21 April 2021 available at <https://www.dailymaverick.co.za/article/2021-04-21-sas-media-relatively-free-but-africa-remains-the-most-dangerous-continent-for-journalists/> (accessed 4 August 2023).

Another lesson Uganda could learn from South Africa is the importance of protecting human rights. As discussed earlier, South Africa has a strong legal framework for protecting human rights, including a Bill of Rights in its Constitution. The Bill of Rights contains all categories of human rights including first, second and third generations of human rights. Uganda's Constitution, on the other hand, pays minimal attention to the protection of socio-economic rights. Only a few of these are protected. The bulk of them are laid down in a part of the Constitution entitled "National Objectives and Directive Principles of State Policy", making them unenforceable.<sup>77</sup> Uganda could learn from South Africa and work to ensure that its own legal framework adequately protects all categories of human rights, including socio-economic rights and the rights of minorities and other marginalised groups.

As mentioned, the Ugandan president has been in power since 1986 – a continuous period of 37 years. On the other hand, South Africa has experienced several peaceful transitions of power, which have helped to cement its democratic credentials. Uganda could learn from this and work to ensure that power regularly changes hands through peaceful and democratic transitions. In other words, power should be regularly transferred through free and fair elections. This requires political will on the part of the current leadership to hand over power. More importantly though, it calls for stronger and effective civil society participation. Indeed, active citizen participation and engagement are an important feature of democracy. In regard to free and fair elections it has been opined that "[a]bove all, government must organise free, fair, and democratic elections based on sound democratic principles and values. The government must respect the will of the citizens by avoiding rigging and ballot stuffing for their favoured candidates."<sup>78</sup>

Democracy and the rule of law are useless in a society where there is no access to justice. South Africa has made significant progress in ensuring access to justice for all its citizens mainly through its Constitution that guarantees fundamental human rights and freedoms and is the supreme law of the land.<sup>79</sup> The country has a legal aid system that provides legal assistance to those who cannot afford it notwithstanding the existence of a means test to access it.<sup>80</sup> Uganda can learn from South Africa by ensuring that its citizens have access to justice by strengthening its constitutional framework and ensuring that all laws and policies are in line with the constitution and that all citizens have access to justice regardless of their socio-economic status.

<sup>77</sup> See Constitution of the Republic of Uganda (1995). See also Mubangizi JC "The protection of human rights in Uganda: Public awareness and perceptions" 2005 (3) *African Journal of Legal Studies* 168 at 181.

<sup>78</sup> Dulu AL "Uganda's ailing democracy hinders its future" *LSE Blogs* 24 November 2022 available at <https://blogs.lse.ac.uk/africaatlse/2022/11/24/ugandas-ailing-democracy-hinders-its-future/> (accessed 7 August 2023).

<sup>79</sup> See chapter 2 and section 2 of the Constitution, respectively.

<sup>80</sup> See Van As H "Legal aid in South Africa: Making justice reality" (2005) 49(1) *Journal of African Law* 54 at 54.

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Despite Uganda's lower levels of democracy, rule of law, and human rights protection than South Africa's, there are, nonetheless, some lessons that South Africa could learn from Uganda. There is no doubt that Uganda has faced numerous challenges in upholding the rule of law, particularly during the long rule of President Yoweri Museveni. However, in recent years, Uganda's judiciary has shown some degree of independence, particularly in certain landmark cases. On 26 March 2020, for example, Uganda's Constitutional Court declared section 8 of the Public Order Management Act 2013 illegal and unconstitutional.<sup>81</sup> Similarly, and as mentioned earlier, in 2014, the Ugandan Constitutional Court declared the initial Anti-Homosexuality Act illegal.<sup>82</sup> In several other cases the Constitutional Court and the Court of Appeal have refused to succumb to political pressure.<sup>83</sup> However, there are signs that the political landscape in South Africa is changing drastically. The rise of militancy by some opposition parties and the disenchantment of the electorate with the ANC are signs of uncertain future political stability. South Africa could learn from Uganda's experience in promoting the independence of the judiciary, particularly in the face of political pressure that may come with political instability.

Although Uganda has been criticised for its human rights record, particularly in relation to the treatment of political opposition, media freedom, and LGBT rights, civil society organisations and human rights defenders have been active in documenting and challenging these abuses.<sup>84</sup> Although there is a vibrant civil society in South Africa too, such civil society does not operate in a hostile political climate as in Uganda. Given the uncertain future political stability mentioned above, South Africa could learn from Uganda's experience in promoting civic activism and engagement in human rights issues specifically in a difficult political climate that may come with political instability.

Mention was also made of South Africa's electoral system of party-list proportional representation, which tends to lessen accountability between representatives and their constituencies as such representatives are not directly elected by the voters in those constituencies.<sup>85</sup> Despite the many shortcomings of Uganda's electoral system, representatives are elected directly by voters in their constituencies. South Africa could learn from Uganda's experience of direct voting in order to promote accountability and

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<sup>81</sup> *Human Rights Network Uganda & 4 Others v Attorney General* (Constitutional Petition 56 of 2013) [2020] UGCC 6 (26 March 2020).

<sup>82</sup> *Oloka-Onyango & 9 Others v Attorney General* (Constitutional Petition 8 of 2014) [2014] UGSC 14 (01 August 2014).

<sup>83</sup> A good example is *Andrew Karamagi and Robert Shaka V Attorney-General* (Constitutional Petition No. 5 of 2016). Here, the Constitutional Court quashed section 25 of the Computer Misuse Act No. 2 of 2011, which had been used against critics of the government.

<sup>84</sup> These include Sexual Minorities Uganda (SMUG), Freedom and Roam Uganda (FARUG), Icebreakers Uganda, Human Rights Awareness and Promotion Forum (HRAPF), and Rainbow Health Foundation (RHF).

<sup>85</sup> See generally Lodge T "How South African electoral system was negotiated" 2003 2(1) *Journal of African Elections* 71.

citizen participation and engagement in the democratic process, particularly at the local level.

As mentioned earlier, democracy is an ideal to which all civilised nations should strive. But so too is development. Many countries have been faced with the dilemma of balancing development and democracy. Uganda has made significant progress in economic development over the past few decades, but some critics argue that this has come at the expense of democratic institutions and practices. South Africa could learn from Uganda's experience in balancing development and democracy, particularly in the face of pressure from external actors such as international financial institutions.

## 7 CONCLUDING REMARKS

South Africa and Uganda can learn various lessons from each other's experiences in promoting the rule of law and democratic participation. However, it is also important to recognise the unique histories and contexts of each country and to understand that such lessons may not be easily adapted or applied. It is for that reason that the article began by placing the concepts of democracy and the rule of law in proper context and explaining the rationale for the comparison between the two countries. It is also for that reason that the article discussed the history of the two countries before looking at the current realities.

The article concludes with a number of comparative lessons that the two countries can learn from each other. These include the importance of a strong and independent judiciary, a free and independent media, and a strong legal framework. They also include the importance of inclusive political processes that entail peaceful transitions of power, the importance of involving civil society in decision-making, and the importance of constitutionalism, access to justice, and respect for human rights and the rule of law.

The importance of balancing these ideals with the need to achieve economic development cannot be overemphasised. Whereas both countries rightly strive to achieve economic development, this must not be at the expense of democracy, the rule of law, and human rights. Instead, they should all be mutually reinforcing. The experiences of Uganda and South Africa highlight the challenges and opportunities for promoting democracy and the rule of law, and can provide valuable insights for other countries seeking to strengthen these ideals and their institutions.

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