



PUBLIC PROTECTOR
SOUTH AFRICA

Speaking notes for Deputy Public Protector Adv. Kevin Malunga at the welcoming ceremony for two masters programmes at the Centre for Human Rights to be held on

Friday, 03 February 2017 at the University of Pretoria.

Thoughts on the African lawyer's role in globalising the rule of law, integrity and economic advancement/justice".

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Programme Director;

Fellow panellists;

Distinguished guests and student;

Ladies and gentlemen;

Good day!

Let me take this opportunity to thank the organisers of the event for extending an invitation to my office to take part in this distinguished event. It is indeed an honour and privilege, for me, to be here today.

1. INTRODUCTION

The Constitution provides the basis for the character of the state that is envisaged for the realisation of the constitutional vision of our country, to the extent of dictating that the state must be democratic, uphold the rule of law and operate on the basis of openness, transparency and accountability ethical standards which the executive should uphold and which include acting in the public interest.

The Rule of law is described by some experts as the exercise of state power using, and guided by, published written standards that embody widely-supported social values, avoid particularism, and enjoy broad-based public support.

We can never take the rule of law for granted. It is never a given, especially not in times of crisis like today, when geopolitical pressure threaten to overwhelm us, economic uncertainty frightens us, and social tensions convulse some of our members.

In all too many places across the world and Africa today, we see alarming tendencies emerging. And as happens frequently in times of crisis, it is members of minorities - be they racial, religious, ethnic or other - who are the first to be singled out. It starts with imperceptible signs, then grows into illiberal temptations, and even into talk in certain quarters, of 'illiberal democracy'.

This is why the protection of our fundamental values, of fundamental rights, democracy and the rule of law, has taken a new significance today. Because we realise that the rule of law is fragile and, if we are not vigilant enough, can suffer threats – anywhere. The rule of law is seen as such a given that it is more vulnerable today than before.

The challenges to tolerance and mutual respect in our societies, reinforced by the current crises, are real and serious. The forces of bigotry and populism, of racism and xenophobia are on the rise, and we simply cannot let them gain ground.

In Europe the EU faces a real problem in the post-communist region: Three out of four Visegrad countries are now single-handedly ruled by populist parties that show disrespect for the rule of law and the values of liberal democracy. ¹

In **Poland** the Law and Justice party Law and Justice which came to power in 2015, has been passing laws that critics, among them prominent voices in Brussels, say neuter the judiciary and hobble the free press.

Russia brutally violated international law, treaties, and obligations by forcibly invading Ukraine. There is no doubt that Russia planned this violation in advance, as Russian President Vladimir Putin recently confirmed. The world has watched and debated what to do about this blatant disrespect for the rule of law by a civilized nation. Men, women, and children have died and cities have been destroyed while the debate continues.²

In our continent, President Obiang, Africa's longest-serving head of state and the leader of **Equatorial Guinea** since 1979, maintains an absolute grip on political and economic power in the country. Major human rights abuses reported included a disregard for the rule of law and due process, denial of basic political rights including freedom of speech and press, and widespread official corruption

¹ Jiri Pehe political analyst, global professor at New York University's Center for European Mediterranean Studies and director of NYU Prague

² Ukraine, Russia, and the Rule of Law: A Lawyer's View from Inside Ukraine

Gambia

Closer to home in **Swaziland** a Report by International Commission of Jurists on 18 February 2016 concluded that King Mswati III's absolute monarchy '*ultimately is incompatible with a society based on the rule of law*' The Commission further noted that

'Swaziland's Constitution, while providing for judicial independence in principle, does not contain the necessary safeguards to guarantee it. Overall, the legislative and regulatory framework falls short of international law and standards, including African regional standards

In **the United States**, long regarded as the guardian of democracy and the rule of Law, It is reported that the President's lawyers have long been working on strategies and that would allow him to take decisions at an executive level without the approval of congress, to whom he is accountable. Reports in the Ney York Times and other authoritative publications are raising real concerns about the level of respect (or disrespect) for the Rule of Law that is evident from the recent actions of the President, including exerting pressure on Ford Motor Co. to give up its expansion plan in Mexico, using the FCC to fine his critic, Rich Lowry, and to "open up libel laws" to punish critical news media. He successfully cowed Washington Post owner Jeff Bezos after threatening antitrust action against Amazon.com. By helping the manufacturer Carrier secure special subsidies in Indiana, he has shown a willingness to bestow favors on those he likes. Nominating major donors to positions of power in his administration and using his office to enrich his and his children's businesses are also causes for concern.

2. THE ROLE OF LAWYERS IN PRODUCING THE RULE OF LAW

There is general consensus that development depends on people being able to enjoy basic legal rights The literature that has developed in recent years argue that

the judicial arena is an integral part of development defined by the presence of rule of law.

Within a rule of law framework, then, law and legal institutions are understood as operating independently from both state and society. Law stands outside these processes, and this distance enables it to play the role of both a neutral arbiter and a negative constraint on state power. The UN Basic Principles on the Role of Lawyers requires governments to ensure that lawyers –

- (a) *are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference ... and*
- (c) *shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”*

In addition, “Lawyers ... are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization.”

Prof Robert Gordon of the Yale Law School states that lawyers, as builders of the Rule of Law, act as agents for the promotion of three kinds of liberalisation:

- First, lawyers are agents of **legal liberalisation**; they build the specifically-legal institutions and culture of the Rule of Law supervised by an independent judiciary for both official and private violence, predation and corruption;
- Second, they are agents of **political liberalisation**, by defending the basic frameworks of rights to speech, press, assembly, petition, free elections and political party organization, protection against arbitrary arrest and imprisonment; and the protection of minorities from persecution and discrimination.

- And third, they are agents of **economic liberalisation** - achieved by construction of (at a minimum) legal regimes sustaining the basic institutions of liberal capitalism: markets, property rights, contract enforcement, efficient forms of business organisation.

3. THE ROLE OF LAWYERS IN PROMOTING THE RULE OF LAW

For the legal profession and in particular our colleagues welcomed here today, our responsibilities towards the globalising the Rule of Law include a number of key aspects:

Defining and understanding the law

“The Rule of Law is not a technology, a module of specific legal practices that can simply be implanted in a society and expected to start working as advertised, grinding out predictable enforcement of legal rules which in turn generates compliance with those rules. Legal systems that are relatively impartial and capable of efficiently enforcing their judgments are exceedingly rare in the world..”

(Prof Robert Gordon, Yale School of Law)

The declaration of the law is a basic element in the operation of the rule of law. Much depends on the terms in which the law is framed and on the manner in which it is applied. An application of laws which trample on basic human rights and ignores good governance principles of accountability and transparency may be the very opposition to the rule of law.

Rule of law does not mean *under the rule of law* because any state, even corrupt and repressive regimes can after all, can legislate at will and enact laws. British Attorney-General, Lord Goldsmith QC³, said that the rule of law –

3 “Government and the Rule of Law in the Modern Age” in the LSE Law Department and Clifford Chance Lecture series on Rule of Law 22 February 2006.

“is not simply about rule by law. Such a proposition would be satisfied whatever the law and however unfair, unjust or contrary to fundamental principles, provided only that it was applied to all. Instead it seems to me clear that the rule of law comprehends some statement of values which are universal and ought to be respected as the basis of a free society.

Genuine Rule of law, by contrast, requires harmony between the state and society, and is an *outcome* of complex and deeply rooted social processes. Wrongdoers face not only legal penalties, *but also social sanctions such as criticism in the news media, popular disapproval, and punishments from professional and trade associations.* An approach that relies solely upon detection and punishment may work for a time, but will do little to integrate laws and policies with social values, or to create broader and deeper support for the system.⁴

The legal profession works at the cutting edge of the rule of law and the principles of good governance. To perform their appointed function, the members of the practising profession must be knowledgeable in the law and competent in its application.

Honourable Sir Gerard **Brennan** AC⁵ stated in respect of the role of the legal profession in the promotion of the rule of law and good governance that:

“It is not sufficient to be mere technicians, familiar with the words of a statute or a precedent. There may be a need to understand the underlying purpose of the statute or the principle to which the precedent is giving effect. The law develops organically and incrementally, and the legal profession usually provides the stimulus to its growth.”

Outside the Court, the legal profession has a role to play in the framing of our laws. Individually and institutionally, the legal profession can seek to ensure that our constitutional values, including the principles seeking to promote and enhance good governance, are preserved.

Maintaining public confidence in the law

4 **Good Governance: Rule of Law, Transparency, and Accountability**, by Michael Johnston Department of Political Science, Colgate University

5 The Hon Sir Gerard **Brennan** AC, **“Role of the Legal Profession in the Rule of Law”**, Supreme Court, Brisbane, 31 August 2007

We as lawyers know that laws, practices and procedures provide the safeguards which maintain public confidence in the rule of law and governance systems.

Public confidence in the law and governance systems will diminish when the conventional safeguards of law and the legal process are dismantled or reduced so that the public sense that justice according to law is no longer assured to all people within the jurisdiction. According to the Sir **Brennan** also reiterated that this will “weaken *the unity and fabric of society and exposes us to danger from those who do not share a respect for the rule of law.*”

Sir Brennan continued to emphasise that one of the most critical aspects of the lawyer’s public role is to advocate the importance of preserving the safeguards of the rule of law.

Being part of civil society

While all the Constitutional checks and balances are important, it is important to note that the concept of governance is broader in scope than the government. While government deals with the allocation of values by the state, governance presupposes that values are defended by structures other than the government or the state. It must also be understood that development should be the pursuit of everyone with the state primarily acting as an enabler and regulator.

The public administration and the administration of the law are public functions and public scrutiny of these proceedings provide an assurance of integrity in the application of the rule of law and the principles of good governance.

By reminding ourselves of characteristic features of good governance and the rule of law, we as lawyers can identify the risk to our freedom and our democratic system which is posed by any law or public practice which eliminates or diminishes those features.

Access to justice

The extent to which legal systems facilitate access to justice is an important governance concern. It is generally agreed that for access to justice to be meaningful, it must involve individuals a) recognizing and understanding their legal entitlements, and b) having realistic access to some institutional setting for the adjudication and remedying of disputes over those entitlements.

4. THE ROLE OF LAWYERS IN GLOBALISING INTEGRITY

Public interest in the legal profession is promoted, to a considerable degree from its closeness to the state and role in public affairs. The public sees them, more than any other professionals, in public forums and tribunals. There is also a wide perception that lawyers are critical to access state institutions, especially institutions of justice, and therefore to the protection of the rights, freedoms and liberties depend on the integrity and activism of the legal profession.

Our transformative Constitution requires the judiciary to instil public confidence and express itself with such authority and integrity that the public will always respect its opinions and decisions. The judiciary must capture public imagination, not through its outdated poise and ritual, but rather through the rigour of its jurisprudence.

“The integrity of the rule of law and the impartial enforcement and protection of the law depend on the integrity, knowledge and skills of the lawyers.”

Pheroze Nowrojee, Senior Counsel, Advocate of the High Courts of Kenya

Writers such as a George Kegoro, Anita Nyanjong and Janet Milongo stress that it is important to recognize the distinction between professionalism and ethics at the outset, even though they go hand in hand. The ethical rules are mandatory and acts as black letter standards that establish the minimum level of conduct. Failure to abide by the rules may result in disciplinary sanction. Professionalism, however, is grounded in aspirational goals and traditions that seek to encourage the bar and the bench, towards conduct that preserves and strengthens the dignity, honour, and integrity of the profession. *Lawyers must temper bold advocacy for their clients with a sense of responsibility to the larger legal system, which strives to provide justice for all.*

Case law demonstrates that the courts have generally frowned upon attempts by lawyers to disregard professional etiquette in the course of their professional duties. In a nutshell, a lawyer owes a further duty to his/ her profession. The have a duty to maintain and preserve the independence and uphold the dignity and integrity of the

profession. In order to play its role in the administration of justice, the legal profession must remain independent at all times. From this independence stems its strength to uphold the cause of justice without fear or favour

For these reasons, the legal profession through the Bar and Law Societies developed and adopted codes and rules of conduct and practice that forge and govern legal professional ethics which illustrate the high standards on which reputations for professionalism are designed. These codes and rules help reassure the general public of two conditions; that any particular set of professional services is being given not only by

- (i) properly qualified or academically expert persons but also
- (ii) (ii) by persons whose professional standards merit the high degrees of public trustworthiness which are typically required of professionals

5. ECONOMIC ADVANCEMENT/JUSTICE

The Constitution acknowledges the critical importance of the rule of law to the achievements of the objectives of the Constitution: social justice, inclusion, participation, human dignity and basic social and economic needs and show how the access to justice and courts is critical to the achievement of these objectives. A fundamental constitutional value is social justice which is impossible to achieve without an impartial judiciary and access to it.

The Government recognizes access to justice as a critical pillar for economic development and poverty reduction through policy initiatives. These policies and documents such as the NDP recommended that access to justice must be responsive, affordable, accessible and speedy in promoting sustainable economic development.

While it is appreciated that these policies recognise the relevance of access to justice in economic development, recognition is one thing and implementation is another. In many respects the barriers for the poor in accessing law constitute, therefore, not just a legal crisis, but rather a political, economic and moral question.

The drafters of our Constitution and other Constitutions in Africa realized that this problem cannot be resolved successfully unless law is used wisely to restore balance to the economic structures and remove the causes of economic inequality. The Constitution has attempted to respond to this situation by proposing mechanisms that can support access to justice, fair hearing, fair administrative actions, and ensuring rule of law is upheld as well as equal rights between the rich and the poor.

6. CONCLUSION

The legal profession is in the midst of a dramatic transformation, due to many factors, which calls for an understanding of the forces that are changing the foundations of the profession. The top challenges include economic turbulence due to societal and economic changes; adaption to new technology; compliance and ethical issues; and continuing professional development.

Clients continue to demand efficiency and responsiveness from their lawyers for less cost. Clients expect their lawyers to focus more on the outcome and less on time spent on a legal matter.

These require the legal profession to keep abreast of the changes so that they are prepared to assist, counsel, and advise their clients. Lawyers also must be aware of these challenges so that they can take advantage of the opportunities for those prepared for what lies ahead. The legal profession faces unprecedented economic pressures. It faces competitive pressures from accountants, realtors, financial advisors, and others – and the Internet is making it easier for them to compete.

While all the Constitutional checks and balances are important, it is critical to mention that it should not be left to the state to ensure good governance. It must also be understood that development should be the pursuit of everyone with the state primarily acting as an enabler and regulator. However, as a developmental state our state must directly engage in the delivery of basic needs such as water, health, education, infrastructure and to a limited extent, housing."

Worldwide there is increasing recognition that citizen involvement is critical for enhancing democratic governance, improving service delivery, and fostering empowerment.

I want to conclude in the words of Sir Brennan that

“The legal profession is a profession of service. ... it gives vitality to the peace and order, the freedom and the decency, of the society in which we live. Sometimes that may be an anxious duty, sometimes difficult to perform. But that has long been the experience of a robust and proud profession.

Thank you.