

**LAW  
DEMOCRACY  
& DEVELOPMENT**

**Understanding, Protecting, Promoting and  
Entrenching the Rule of Law – What  
Individuals, Constitutional Institutions,  
State Entities and Civil Society must do**

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*Dean's Distinguished Lecture delivered at the Faculty of Law, University of the Western  
Cape, Bellville, South Africa*

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**ABSTRACT:**

The UWC Law Faculty in 2019 celebrated its 40 year existence as an independent faculty. The Law Faculty became an independent faculty on 1 January 1979 when the Faculty of Commerce and Law was divided in two: the Faculty of Economic and Management Sciences and the Faculty of Law. The Dean's Distinguished Lecture was initiated in 2015, with the following judges as speakers: Moseneke (2015), Pillay (2016), Cameron (2017), and Ngoepe (2018). Justice Mahomed Navsa, who presented the lecture in 2019, obtained the BA (law) degree from UWC in 1978 and the LLB degree in 1980. In his lecture, Justice Navsa emphasised the importance of consolidating the gains of the struggle against apartheid through the establishment of the rule of law. In an age where the Constitution is under attack from many sides, Justice Navsa emphasised the importance of fulfilling the promises of that Constitution, not only by government and public officials, but by each citizen.

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## LECTURE:

A few decades after the dawn of a constitutional era, our beloved country is not a particularly happy place. The title of Alan Paton's celebrated novel, *Cry the beloved country*,<sup>1</sup> has never been more relevant as we painstakingly attempt to rebuild our country to meet the needs of all who live in it. Unemployment, as at 15 May 2019, was measured at 29 per cent (6.7 million people). Amongst the youth it was even higher, namely, 55.2 per cent.<sup>2</sup> Our growth rate makes for grim reading,<sup>3</sup> and growth is essential to ensure sustainable development and social cohesion. A number of State-owned enterprises are in crisis.<sup>4</sup> Scores of our people are steeped in poverty and exposed to the indignities that accompany it. South Africa has had more than its fair share of corruption scandals and other instances of misappropriation, in relation to public funds, which might otherwise have been channelled towards building a more egalitarian society. Racial polarisation is on the rise. We are a society that has lost all tolerance and our public debates are inflamed by resentments and accusations that are often devoid of rationality. There is a distinct lack of grace in the manner in which we disagree and in how we debate issues of national importance. If we are honest with ourselves, we have to face up to the fact that we have not collectively, ie as a nation, done enough to build a unified country and to ensure that an opportunity is available to the vast majority of our people to develop to their full potential. The gap between rich and poor is such that social cohesion is threatened. Many commentators are concerned about political instability. Is the dream of a rainbow nation imperilled?

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<sup>1</sup> Paton A *Cry the beloved country* London: Vintage Publishing (2004).

<sup>2</sup> See the report by the Department: Statistics South Africa available at [www.statssa.gov.za/?p=12121](http://www.statssa.gov.za/?p=12121) (accessed 13 August 2019).

<sup>3</sup> According to the Department: Statistics South Africa, the country experienced an average growth rate of approximately five per cent in real terms between 2004 and 2007. However, during the period 2008 to 2012 it only recorded average growth at just above two per cent, largely as a result of the global economic recession. South Africa's gross domestic product (GDP) growth rate decreased by 3,2 % in the first quarter of 2019.

<sup>4</sup> In an article published by BusinessTech, available at <https://businesstech.co.za/news/government/331313/eskom-bailout-is-credit-negative-for-south-africa-moodys/> (accessed 02 October 2019), rating agency Moody's has warned that South Africa's plan to bail out South Africa's power utility, Eskom, is "credit negative". In a notice published on 24 July 2019, Moody's said government's room to manoeuvre was "extremely constrained". It went on to state: "Additional support to Eskom in the special appropriation bill will adversely pressure the government's fiscal position, given its limited room to absorb the extra cost." During June 2019 South African Airways asked government for a R4 billion bail-out.

South Africa is not alone. Worldwide there is large-scale discontent of people who feel excluded by State institutions and who are disenchanted with public representatives. Scores of people across the world are struggling to make ends meet and are becoming more vocal about their disillusionment with democratic institutions. Their needs, they assert, are being ignored and the most marginalised are being further marginalised. Regrettably, one is seeing the concomitant rise of populism, with yet more promises being made to those who yearn for the opportunity to live with dignity and feed their families. Immigrants, non-citizens, and even citizens seen as “others”, are irrationally and sometimes violently railed against.

It is against this stark reality that the vital importance of the rule of law has to be viewed. A meaningful discussion of the subject must encompass not merely an esoteric legal discourse, but rather a comprehensive appreciation of what this concept means, both notionally and practically, and will include a conversation on the concrete steps that must be taken if we are to ensure that the rule of law is preserved, protected and popularised, so as to have a material impact on the quality of life of all our people and of everyone within our borders. Before broadening our understanding of the concept, however, a necessary point of departure, in my view, is an agreement on the fundamental principles that attach thereto.

The Constitution of the Republic of South Africa, 1996 (Constitution) is the basis of our democracy and it sets out emphatically the place of the rule of law in our legal system. Section 1 sets out the values on which our new democratic order has been founded. They are:

- “(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) *Supremacy of the constitution and the rule of law.*
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.” (My emphasis.)

What is meant by “the rule of law”? Constitutional democracies, like ours, proclaim that their constitutional orders are based on the rule of law. United States Supreme Court Justice, Sonia Sotomayor, stated that she believed it to be “the foundation for all of our

basic rights”.<sup>5</sup> But what does the concept entail? One will not find any authoritative, all-embracing, universally accepted definition that explains what is meant by the rule of law.<sup>6</sup> One will, instead, find copious references to its importance and to certain of its facets. It is spoken of mantra-like and often provides a useful sound bite. Indeed, it is regularly employed in sloganeering across the political spectrum.

The rule of law concept is sometimes explained by reference to what it can be contrasted with. So, Dwight D Eisenhower said: “The clearest way to show what the rule means to us in everyday life is to recall what happened when there is no rule of law.”<sup>7</sup> He clearly had in mind fascist regimes, tyrannical and despotic rulers and rule *by law*<sup>8</sup> without moral content. In the latter regard, Nazi Germany, Italy under Mussolini and apartheid South Africa are ready examples.

In an article by J A Bruegger,<sup>9</sup> it is contended that before one turns to consider what is meant by the phrase “Rule of Law”, it is important to understand why the concept is significant in the field of jurisprudence generally. He asks whether it is merely a formal concept, akin to the way legal scholars would describe the concept of law itself, or whether it is substantive, like natural law theory’s description of law. In this regard he noted that natural law theorist, Lon L Fuller, straddled the line between these two positions, laying out eight “principles of legality”. Bruegger goes on to consider Kramer’s

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<sup>5</sup> See the transcript of NPR News “Obama Picks Hispanic Woman for Supreme Court” (27-05-2009) *Morning Edition* available at <https://www.npr.org/templates/story/story.php?storyId=104597440> (accessed 2 October 2019.)

<sup>6</sup> Beinart B “The rule of law” (1962) *Acta Juridica* 99 at 99.

<sup>7</sup> President Dwight D Eisenhower uttered these words on the very first “Law Day” in 1958, slightly more than a decade after the end of World War II.

<sup>8</sup> See Dyzenhaus D “ The pasts and future of the rule of law in South Africa” (2007) 124 *SALJ* 734 at 738 and the reference thereto in De Vos P & Freedman W (eds) *South African constitutional law in context* Cape Town : OUP Southern Africa (2014) at 84. See also the discussion by Beinart (1962) at 100 & 128-129.

<sup>9</sup> Bruegger JA “Freedom, legality, and the rule of law” (2016) 9(1) *Washington University Jurisprudence Review* 81 at 84-85. At the time of writing the article, John A Bruegger was an Adjunct Professor at California, Southern New Hampshire University and at Columbia College. The article originates from the author’s JSD doctoral dissertation completed at Washington University School of Law in 2014.

view<sup>10</sup> that Fuller's "elaboration of the eight principles of legality is a permanently valuable contribution to legal philosophy".<sup>11</sup>

Bruegger rightly regards Fuller's eight principles as a useful starting point for describing the necessary conditions for a formal, non-normative, theory of the rule of law.

They are:

- (i) a generality in making rules,
  - (ii) laws that are made publicly known,
  - (iii) a ban on retroactive legislation,
  - (iv) laws that are comprehensible,
  - (v) laws that are not contradictory,
  - (vi) laws that are not impossible to perform,
  - (vii) some measure of relative stability in the laws, such that constant changes are not being made, and
  - (viii) congruence between the rules as announced and their actual administration.<sup>12</sup>
- Fuller's view is that a failure in any one or more of these criteria results in something that cannot properly be called a legal system.

Three principles may be added to this list. Significantly, Brian Tamanaha, in his work *On the rule of law: history, politics, theory*, takes the view that one should add to the criteria set out above, that the law must apply equally to all persons, regardless of wealth, social status, or power.<sup>13</sup> This is especially relevant in the light of what is set out at the beginning of this address. While modern democracies proclaim that their legal systems ensure this to be so, a reality check will most likely prove otherwise.

Secondly, Bruegger refers to the contention by Professor Joseph Raz, that the rule of law must receive support from certain social institutions, such as, an independent judiciary, fair and open hearings and judicial review of legislative and administrative

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<sup>10</sup> Kramer M *Objectivity and the rule of law* Cambridge : Cambridge University Press (2007) at 103.

<sup>11</sup> Although he opines that "some of Kramer's arguments in support or explication of [these] principles are confused or otherwise inadequate", it is not necessary for present purposes to consider Kramer's criticisms.

<sup>12</sup> Bruegger (2016) at 85.

<sup>13</sup> Tamanaha BZ *On the rule of law: history, politics, theory* Cambridge : Cambridge University Press (2004) at 1359-78.

action. In a State premised on the rule of law, there must be legal enforcement mechanisms.<sup>14</sup>

And, lastly, some proponents of the formal concept of the rule of law also require that law has to be created democratically to be valid. As a formal model for purposes of the present contribution, then, the rule of law may be said to comprise the eight principles expounded by Fuller as well as those of formal equality, social institutions and democratic elections.

Bruegger notes that numerous scholars have criticised the “formal concept” of the rule of law as lacking in substance.<sup>15</sup> He notes that the most well-known alternative to the formal concept is the “rights” concept, advanced by Ronald Dworkin.<sup>16</sup> The latter, whilst adopting the criteria set out above, contends that the substance of law must capture the moral rights of a community for the rule of law to exist.

Tamanaha argues that governments have an affirmative duty to help make life better for people, including engaging in distributive justice. Bruegger points out that the German Rechtsstaat requires the government to effect rules that improve the lives of its citizens.<sup>17</sup>

It is apposite at this stage to pause to consider, briefly, Dworkin’s understanding of an alternative to the merely formal concept of the rule of law which he propagates, namely, a rights concept of the rule of law. In *A matter of principle* he says the following:

“It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable.”<sup>18</sup>

Considering the formal model of the rule of law, on one side of the spectrum, and Dworkin’s conception of a substantive model on the other, and in my efforts to come to grips with what really is an elusive concept, I found an address by Lord Bingham,<sup>19</sup>

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<sup>14</sup> Bruegger (2016) at 85.

<sup>15</sup> Bruegger (2016) at 86.

<sup>16</sup> Bruegger (2016) at 86.

<sup>17</sup> Bruegger (2016) at 86.

<sup>18</sup> Dworkin *A matter of principle* Cambridge MA : Harvard University Press (1986) at 11.

<sup>19</sup> Lord Bingham was an eminent British judge who was successively Master of the Rolls, Lord Chief Justice and Senior Law Lord. In a statement issued on 13 September 2010 on behalf of the Justices of the

delivered at Cambridge on 16 November 2006, entitled “The rule of law”,<sup>20</sup> extremely useful. With reference to the Domestic Constitutional Reform Act 2005,<sup>21</sup> he noted that the legislation provided that its promulgation did not adversely affect “the existing constitutional principle of the rule of law”, or “the Lord Chancellor’s existing constitutional role in relation to that principle”. He observed that the Act did not define the existing constitutional principle of the rule of law, or the Lord Chancellor’s existing constitutional role in relation to it. It is true that in the United Kingdom (UK), as stated by Lord Bingham, as well as in other constitutional democracies, judges routinely invoke the rule of law in their judgments. They rarely explain what is meant by the expression.

Lord Bingham stated that well-respected authors have thrown doubt on its meaning and value. He cited Joseph Raz’s comment that there is a tendency to use the rule of law as a shorthand description of the positive aspects of any given political system. He referred to John Finnis’s description of the rule of law as the name commonly given to the state of affairs in which a legal system is legally in good shape. Judith Shklar, he pointed out, took the view that the expression may have become meaningless, thanks to ideological abuse and general overuse. She said the following:

“It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.”<sup>22</sup>

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Supreme Court, Lord Hope said the following of him: “The debt we owe to Tom Bingham, the greatest jurist of our time, is immense and incalculable. It is to him, perhaps more than anyone else, that the Supreme Court itself owes its existence – something that he had long believed in and happily was realised during his lifetime. But his real legacy lies in the depth and quality of the many judgments that he delivered, especially during his eight years as the Senior Law Lord. His energy, his unshakeable grasp of principle, the clarity and force of his language and his strong sense of history shone through everything that he said and wrote . . . .”

<sup>20</sup> It was the sixth Sir David Williams lecture. Bingham L “The rule of law” (2007) 66 *CLJ* 67.

<sup>21</sup> The Constitutional Reform Act 2005 changed the Lord Chancellor’s role dramatically. For the first time in 900 years judicial independence was enshrined in law. A duty was placed on government ministers to uphold the independence of the judiciary. Judicial functions were transferred to the Presidents of the Courts of England and Wales. An independent Supreme Court was established separate from the House of Lords and with its own independent appointments system, staff, budget and building. An independent Judicial Appointments Commission, responsible for selecting candidates to recommend for judicial appointment to the Secretary of State for Justice, was established.

<sup>22</sup> Bingham (2007) at 68.

Jeremy Waldron, commenting on *Bush v Gore*,<sup>23</sup> in which both sides invoked the rule of law, recognised a widespread impression that utterance of the “magic words” meant little more than “Hooray for our side!”. Lord Bingham also had regard to the view of Brian Tamanaha, who described the rule of law as an exceedingly elusive notion giving rise to a rampant divergence of understandings, and analogous to the notion of the Good, in the sense that everyone is for it, but all have contrasting convictions about what it is.<sup>24</sup>

The view of Waldron and Tamanaha is somewhat corroborated, and best illustrated, by reliance on the rule of law in present-day America, by both the administration and its opponents, in relation to the manner in which immigration should be dealt with in that country.

I pause to reflect that those who maintain that the content or substance of law should be left to political and electoral processes without scrutiny and judicial oversight, or without legislation or executive decisions having to comply with certain minimum criteria, should have regard to why there is widespread, almost universal, disenchantment with political processes and why populism is on the rise.

Returning to Lord Bingham’s address, he noted that the rule of law as a concept has evolved over time and will continue to do so. Having regard to its entrenchment in the UK and in modern democracies worldwide, as the very foundation of their legal systems, he was adamant that judges were not free to dismiss the rule of law as meaningless verbiage.<sup>25</sup> At its nucleus, according to Lord Bingham, is that all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts. He accepted that there might well be exceptions or qualifications. As an example, he referred to in-camera hearings which he urged should be justifiable only in very limited circumstances. Lord Bingham would have us break up the core principal into eight sub-rules, although he readily conceded that scholars would likely be able to provide additional sub-rules, or be more economical with the division. The sub-rules are set out below.

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<sup>23</sup> 531 US 98 (2000).

<sup>24</sup> Bingham (2007) at 68.

<sup>25</sup> Bingham (2007) at 69.

In the first instance, the law must be accessible and, as far as possible, intelligible, clear and predictable. He expounded on this as follows:

“This seems obvious: if everyone is bound by the law they must be able without undue difficulty to find out what it is, even if that means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it.” In this regard he referred, inter alia, to the decision of the European Court of Human Rights in *Sunday Times v United Kingdom*,<sup>26</sup> wherein the following was said:

“[T]he law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case . . . a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”<sup>27</sup>

It is worth noting that Lord Bingham was as concerned with “legislative hyperactivity” then as we – his judicial equivalents in this country – are now. In his view this is compounded by parliamentary draughtsmanship, which depends heavily on cross-referencing and incorporation, which, in his words, “on occasion . . . baffle”.<sup>28</sup> In this regard he was concerned with both accessibility and clarity.

Lord Bingham’s reservation regarding the lack of clarity and precision, was not only in respect of legislation. He was concerned, also, with the prolixity of modern judgments. In this regard, he referred to a concern about a series of concurring judgments. While not advocating against them, he referred, with approval, to an address by Lord Reid, and thereafter said the following:

“A single lapidary judgment buttressed by four brief concurrences can give rise to continuing problems of interpretation which would have been at least reduced if the other members had summarised, however briefly, their reasons for agreeing. And a well-constituted committee of five or more, can bring to bear a diversity of professional and jurisdictional experience which is valuable in shaping the law.”

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<sup>26</sup> (1979) 2 EHRR 245, 271, s 49.

<sup>27</sup> Bingham (2007) at 69-70.

<sup>28</sup> Bingham (2007) at 70.

To these observations, Lord Bingham added three important caveats. The first is that judges should recognise a duty to ensure that there is a clear majority ratio. Without this, no one will know what the law is until Parliament or a later judgment lays down a clear rule. Secondly, whilst accepting the value or legitimacy of judicial development of the law, judges should avoid excessive innovation and adventurism. In his words : “ It is one thing to alter the law’s direction of travel by a few degrees, quite another to set it off in a different direction. The one is probably foreseeable and predictable, something a prudent person would allow for, the other not.” He warned that judicial activism, taken to its extreme, can spell the death of the rule of law. The third caveat is that all these points apply “with redoubled force” in the criminal field. This relates, particularly, to directions given to a jury. He warned that judges are not free to create new offences or widen existing offences, for this would infringe the fundamental principle that a person should not be punished for an act not criminally proscribed at the time of commission.<sup>29</sup>

The second sub-rule is that questions of legal right and liability should ordinarily be resolved by application of the law and not through the exercise of discretion. In this regard he referred to Dicey’s insight, namely, that the broader and more loosely-textured a discretion is, whether conferred on an administrative functionary or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the very antithesis of the rule of law. It follows that a discretion should, as a matter of course, be narrowly defined and its exercise capable of reasonable justification. There ought to be no discretion as to the facts on which a decision is based. He pointed out that even the least constrained of judicial discretions, namely, the award of costs, is governed by principle and practice.<sup>30</sup>

The third sub-rule is that the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation. This ought hardly to be contentious. Lord Bingham dismissed the notion that this sub-rule should be treated as only of antiquarian interest. On this aspect, he pointed to the treatment of non-nationals, both domestically and elsewhere in the world. A national’s right of abode and a non-national’s being subject to removal in terms of the law, was the only justifiable distinction, so he contended. Differentiation irrelevant to that distinction was unwarranted. As

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<sup>29</sup> Bingham (2007) at 71.

<sup>30</sup> Bingham (2007) at 71-72.

illustrative of that point, Lord Bingham points to what was said by Lord Scarman in *R v Secretary of State for the Home Department, Ex parte Khawaja*:<sup>31</sup>

“Habeas corpus protection is often expressed as limited to ‘British subjects’. Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic ‘no’ to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others.”<sup>32</sup>

Further on this score, Lord Bingham pointed to deplorable legislative measures, both in the UK and the United States of America ( USA), in dealing with non-nationals relative to the threat of terrorism. In warning against seeking to sustain an unwarranted differentiation, which is inimical to the rule of law, Lord Bingham quoted an observation of Justice Jackson in the Supreme Court of the United States in 1949:<sup>33</sup>

“I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.”<sup>34</sup>

Lord Bingham took the view that, more than just a salutary doctrine, this should be considered to be a pillar of the law itself.

Turning to his fourth sub-rule, which is that the law must afford adequate protection of fundamental human rights, Lord Bingham quoted Joseph Raz:

“A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution may, in principle, conform to the requirements of the rule of law better than any of the legal

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<sup>31</sup> [1984] AC 74 at 111-112.

<sup>32</sup> [1984] AC 74 at 73-74.

<sup>33</sup> Bingham (2007) at 74-75.

<sup>34</sup> *Railway Express Agency Inc v New York* 336 US 10, 112-113 (1949).

systems of the more enlightened Western democracies. . . . It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law . . . . The law may . . . institute slavery without violating the rule of law.”<sup>35</sup>

Whilst recognising “the logical force of Raz’s contention”, Lord Bingham would not himself accept it. He said the following:

“A state which savagely repressed or persecuted sections of its people could not in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside were the subject of detailed laws duly enacted and scrupulously observed. So to hold would, I think, be to strip the existing constitutional principle affirmed by section 1 of the 2005 Act of much of its virtue and infringe the fundamental compact which, as I shall suggest at the end, underpins the rule of law.”<sup>36</sup>

He was, of course, dealing with the distinction between the “rule *by* law”, the most striking examples of which are Nazi Germany and Apartheid South Africa, as opposed to the “rule of law” alluded to earlier, which I, like Lord Bingham, would urge must be normative.

In relation to moral content Lord Bingham referred to the preamble of the Universal Declaration of Human Rights,<sup>37</sup> which recites that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”. He also pointed to the European Commission, which has consistently treated democratisation, the rule of law, respect for human rights and good governance as being inseparably interlinked.<sup>38</sup>

Of course, as observed by Lord Bingham, the concept of the rule of law does not have a full range of human rights which are universally understood within its scope. Morality, and how far individual or community rights should be protected, differ from State to State. However, he correctly points out that, in any given State, there ought to be a measure of agreement about where lines are to be drawn; and says that “in the last resort

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<sup>35</sup> Raz J *The authority of law* Oxford : Clarendon Press (1979) at 211 & 221.

<sup>36</sup> Bingham (2007) at 76.

<sup>37</sup> 1948.

<sup>38</sup> See, for example, *Commission Communication to the Council and Parliament*, (12-03-1998), COM (98) 146, European Government available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A4-1998-0411+0+DOC+XML+V0//EN&language=EN> (accessed 04 April 2020).

... courts are there to draw them”.<sup>39</sup> He concludes by saying that “[t]he rule of law must, surely, require legal protection of such human rights as, within that society, are seen as fundamental”.

Lord Bingham’s fifth sub-rule is that measures must be provided for resolving, without prohibitive costs or inordinate delays, bona fide civil disputes which the parties themselves are unable to resolve. This is what we know as access to justice. Lord Bingham sees it as “an obvious corollary of the principle that everyone is bound by and entitled to the benefit of the law that people should be able, in the last resort, to go to court to have their rights and liabilities determined”. In this regard he gave vent to the following:

“But I have a fear that tabloid tales of practitioners milking the criminal legal aid fund of millions, and more general distrust of lawyers and their rewards, may have enabled a valuable guarantee of social justice to wither unlamented.”<sup>40</sup>

He was, of course, referring to legal aid for criminal cases in the UK. Lord Bingham is emphatic that legal redress should be an affordable commodity and that it should be available without excessive delay. He regarded this as so obvious and intrinsic to the rule of law as to make any elaboration unnecessary.

The sixth sub-rule is what we know as the principle of legality. It is expressed by Lord Bingham as follows:

“It is that ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers. This sub-rule reflects the well-established and familiar grounds of judicial review. It is indeed fundamental.”<sup>41</sup>

In relation to curbing executive power, he had the following to say:

“ The historic role of the courts has of course been to check excesses of executive power, a role greatly expanded in recent years due to the increased complexity of government and the greater willingness of the public to challenge governmental (in the broadest sense) decisions. Even under our constitution the separation of powers is crucial in guaranteeing the integrity of the courts’ performance of this role.”<sup>42</sup>

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<sup>39</sup> Bingham (2007) at 77.

<sup>40</sup> Bingham (2007) at 77.

<sup>41</sup> Bingham (2007) at 78.

<sup>42</sup> Bingham (2007) at 78.

He noted that when the British government lost a case before the courts, it was on occasion driven, like every other litigant, by a belief in its own cause and that the public interest would be best served by its success. He goes on to speak nostalgically of a past where ministers, however critical of a judicial decision, and exercising their right to appeal against it or resorting to legislation to reverse it, “forbore from public disparagement of it”. That convention, he was adamant, has “worn a little thin in recent times”. He thought this to be unfortunate since, “if ministers make what are understood to be public attacks on judges, the judges may be provoked to make similar criticisms of ministers, and the rule of law is not, in my view, well served by public dispute between two arms of the state”.<sup>43</sup>

We have observed very recent examples, in two of the world’s established democracies, of attacks by the executive against decisions which went against them with a contrived and clearly reluctant “acceptance” being mouthed.

Lord Bingham, in correctly accepting that there should be a manageable tension between the different arms of government, was wary of it being dramatically displaced in times of national crises – this relates especially to times of war and perceived threats to national security. He found cause to have regard to the cautionary words of Justice Brennan of the United States Supreme Court:

“There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to national security . . . . After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.”<sup>44</sup>

The seventh, and penultimate, sub-rule is that adjudicative procedures provided by the State should be fair. Lord Bingham insisted that the rule of law would require no less. He pointed out that the general arguments in favour of open hearings are familiar. This is

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<sup>43</sup> Bingham (2007) at 79.

<sup>44</sup> Lord Bingham was referring to William J Brennan Jr “The quest to develop a jurisprudence of civil liberties in times of security crisis” (1988) 18 *Israel Yearbook of Human Rights* 11.

captured by the dictum in the UK, that justice must manifestly and undoubtedly be seen to be done,<sup>45</sup> and on the American side, that democracies die behind closed doors.<sup>46</sup>

He ventured that the application of this last-mentioned sub-rule to ordinary civil processes is hardly problematical. It is more difficult within the context of the criminal justice system, or in areas, such as, deportation, precautionary detention or refusal of parole. In his view fairness would ordinarily require, first and foremost, that adjudicators are independent and impartial: independent in the sense that they are free to decide on the legal and factual merits, free of any extraneous influence, and impartial in that they are, as far as humanly possible, open-minded and unbiased. In addition, certain core principles have to be accepted as part of this sub-rule. A matter should not be finally decided against any party until he or she has had an adequate opportunity to be heard. Secondly, a person subject to any liability or penalty should be adequately informed of what is said against him or her, and an accuser should make adequate disclosure of material helpful to the counterparty or damaging to itself. Furthermore, where the interest of a party cannot be properly protected without professional assistance, that assistance should be provided, and, where it cannot be afforded, public assistance should be made available. Moreover, an accused party should have an opportunity to prepare an answer against what is preferred against him and his innocence should be presumed until guilt is proved.

The eighth and last of the sub-rules is that the State must comply with its obligations in international law, whether deriving from treaty or international custom and practice. As to how governments have, in the past, dealt with “niceties”, Lord Bingham referred to the time of the Suez invasion of 1956, when the then Prime Minister remarked that Sir Gerald Fitzmaurice, the very distinguished Legal Adviser to the Foreign Office, who had strongly and consistently advised that the British action was unlawful, should not be informed of developments: “Fitz is the last person I want consulted”, he said. “The lawyers are always against our doing anything. For God’s sake, keep them out of it. This is a political affair.” Lord Bingham carefully refrained from expressing a view on the legality of Britain’s involvement in the 2003 war on Iraq.

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<sup>45</sup> In this regard see *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256 at 259.

<sup>46</sup> *Detroit Free Press v Ashcroft* 303 F 3d 681at 683 (6<sup>th</sup> Cir. 2002).

The concluding part of his address is well worth repeating:

“[I]t seems to me that the rule of law does depend on an unspoken but fundamental bargain between the individual and the state, the governed and the governor, by which both sacrifice a measure of the freedom and power which they would otherwise enjoy. The individual living in society implicitly accepts that he or she cannot exercise the unbridled freedom enjoyed by Adam in the Garden of Eden, before the creation of Eve, and accepts the constraints imposed by laws properly made because of the benefits which, on balance, they confer. The state for its part accepts that it may not do, at home or abroad, all that it has the power to do but only that which laws binding upon it authorise it to do. If correct, this conclusion is reassuring to all of us who, in any capacity, devote our professional lives to the service of the law. For it means that we are not, as we are sometimes seen, mere custodians of a body of arid prescriptive rules but are, with others, the guardians of an all but sacred flame which animates and enlightens the society in which we live.”<sup>47</sup>

In *British Columbia v Imperial Tobacco Canada Ltd*,<sup>48</sup> (*Imperial Tobacco*) the Canadian Supreme Court said of the rule of law, after referring to previous decisions, that it is “ a fundamental postulate of our constitutional structure”, recognition being observed in the preambles to both of their Constitution Acts, ie of 1867 and 1982. According to the Canadian Supreme Court, the concept has three essential incidents – supremacy of the law over all; the creation and maintenance of an actual order of positive law; and legally regulated relationship between State and individual.

The Court referred to the “considerable debate” that surrounds the question of which additional principles, if any, the rule of law might embrace and the extent to which they might invalidate legislation based on content. In this regard, it considered the views of Hogg and Zwibel :

“Many authors have tried to define the rule of law and explain its significance, or lack thereof. Their views spread across a wide spectrum. . . . T.R.S. Allan, for example, claims that laws that fail to respect the equality and human dignity of individuals are contrary to the rule of law. Luc Tremblay asserts that the rule of law includes the liberal principle, the democratic principle, the constitutional principle, and the federal principle. For Allan and Tremblay, the rule of law demands not merely that positive law be obeyed but that it

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<sup>47</sup> Bingham (2007) at 84-85.

<sup>48</sup> 2005 SCC 46.

embody a particular vision of social justice. Another strong version comes from David Beatty, who argues that the ‘ultimate rule of law’ is a principle of ‘proportionality’ to which all laws must conform on pain of invalidity (enforced by judicial review). In the middle of the spectrum are those who, like Joseph Raz, accept that the rule of law is an ideal of constitutional legality, involving open, stable, clear, and general rules, even-handed enforcement of those laws, the independence of the judiciary, and judicial review of administrative action. Raz acknowledges that conformity to the rule of law is often a matter of degree, and that breaches of the rule of law do not lead to invalidity.”<sup>49</sup>

At para 62, the following wry statement appears:

“This debate underlies Strayer J.A.’s apt observation in *Singh v Canada (Attorney General)*, [2000] F.C.J. No. 4, [2000] 3 F.C. 185 (C.A.), at para 33, that ‘[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be.’”

The Supreme Court of Canada in *Imperial Tobacco* was ultimately unimpressed with the appellants’ contentions based on the rule of law. It said the following:

“First, many of the requirements of the rule of law proposed by the appellants are simply broader versions of rights contained in the *Charter*. . . Second, the appellants’ arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court – most notably democracy and constitutionalism – very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms). Put differently, the appellants’ arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box . . . The rule of law is not an invitation to trivialize or supplant the Constitution’s written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution’s text, and apply, by whatever its terms, legislation that conforms to that text.”<sup>50</sup>

How do our commentators and courts view the rule of law?

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<sup>49</sup> Hogg PW & Zwibel CF “The rule of law in the Supreme Court of Canada” (2005) 55 *UTLJ* 715 at 717-18, cited at para 61.

<sup>50</sup> Paragraphs 65-67.

Writing in 1962, during the time of the apartheid regime, Beinart, in dealing with what he called the distinction between the mechanics or the structures of the legal system and its substance, put it thus:

“It need hardly be emphasised that both mechanics and substance play an important role in a legal system, and that too much reliance should not be placed by society on the method or technique of legal organisation alone.”

A little later he went on to say: “A combination of the two is no doubt the desirable ideal for every legal system. It is far better to have the Rule of good law than the Rule of bad law.”<sup>51</sup>

In *South African constitutional law in context*<sup>52</sup> the authors point out, as I did at the commencement of this address, that in our Constitution the rule of law is a foundational constitutional value which, together with the Constitution, is declared supreme. Its prominence, so the authors declare, is “evidenced by the manner in which the courts have invoked the rule of law as a mechanism primed to limit, regulate as well as give more precise meaning to how governmental power is to be exercised”. They go on to state:

“As such the rule of law has emerged as a powerful *practical* principle that can be invoked by our courts to ensure that the exercise of state power conforms to basic minimum criteria. The rule of law, as a constitutional principle has been invoked in many cases where it has been raised as the basis of a constitutional challenge against Acts of Parliament or the executive. This has occurred in cases where the actions of the legislature or the executive were not challenged on the basis that these actions somehow infringed on any of the rights contained in the Bills of Rights.” (My emphasis.)

De Vos *et al* refer to the oft cited decision of *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others (Fedsure)* where the following was said:

“The rule of law – to the extent at least that it expresses [the] principle of legality – is generally understood to be a fundamental principle of constitutional law .... It seems central to the conception of our constitutional order that the legislature and the executive

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<sup>51</sup> Beinart (1962) at 103.

<sup>52</sup> De Vos & Freedman (eds) (2014) at 81.

in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.”<sup>53</sup>

The authors point out that *Fedsure* and many cases that followed it ensured that the principle of legality has become the most often invoked incident of the rule of law. They insist that it has practical effect.

Rationality has increasingly been turned to as a means to control not only the exercise of power by administrative functionaries, but also of the executive. *Lesapo v North West Agricultural Bank and another Lesapo*<sup>54</sup> is an example of a case in which the rule of law was invoked to regulate public power so as to render nugatory the arbitrary and non-rational exercise of power by public officials. In *Lesapo* the Court held that self-help was inimical to the rule of law.

I have little hesitation in accepting Lord Bingham’s exposition of the core components of the rule of law and all of his sub-rules. I might be tempted to expound on them, put a gloss on them and perhaps even qualify them, but I accept the essence of each. I do not subscribe to the merely formal concept of the rule of law. I believe in the majesty of law; in how it should reflect our better selves. We live in a world where, despite a proliferation of international human rights instruments, inhumanity abounds and cruelty persists. In this technologically advanced age where there are instantly available means of video communication we are subjected on an almost daily basis by the media to graphic scenes of brutality, the bombing of children, the deplorable treatment of minorities, of rape as an instrument of war, of the ruthless persecution of dissidents, and of how might is seen as right. We see powerful nations, professing to be models of democracy, preaching to nations they consider to be aberrant, yet dictating by dint of their wealth and power an exemption for their nationals from local laws, no matter how grave the transgressions. This is particularly so when they have a military presence in such countries. We see “great” democracies being glib about the deaths of innocents, which occur on the basis of “unavoidable” collateral damage.

We cannot claim to be an evolved species until there is some understanding, at least between States who claim to be democracies, of minimum criteria for such a claim to be

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<sup>53</sup> 1999(1) SA 374 (CC) at paras 56 & 58.

<sup>54</sup> *Lesapo v North West Agricultural Bank and another* 2000 (1) SA 409 (CC)

made. After all, at least notionally, an understanding of a universal morality in certain areas is given meaning by the adoption of treaties. There are international instruments which bear on the treatment of children, discriminatory practices, climate change, etc. Many such instruments reflect a co-mingling of the formal and substantive aspects of the rule of law. Countries that claim to have a legal system based on the rule of law must understand that unless that system ensures, or at the very least attempts to ensure, that it exists for the benefit of all within their territories, social instability and discontent will endure. In this shrinking global village, in which the divide between the haves and have-nots continues to widen exponentially and where there is growing discontent with those who wield political power for the benefit of a few, the rule of law, properly understood and applied, is crucial to avoid catastrophic results.

I return to Lord Bingham's core principle and sub-rules. That everyone is bound by the law, which must be readily ascertainable and subject to public adjudication by independent courts, is something no self-respecting democracy can operate without. Our Constitution guarantees its observance either by way of specific guarantees in the Bill of Rights or by the foundational principle of the rule of law.

Of course we should agree that the law must be easily accessible so that people can find out what the strictures are and regulate their conduct. In a country such as ours, where poverty abounds, we must ensure that especially the vulnerable and the poor are able to assert their rights and seek the protection of the law. Government working with civil society should make every effort to ensure representation, not only in criminal cases, but indeed in all cases where fundamental rights are implicated. Communities and individuals without recourse will ultimately find other, unpleasant means in their quest for justice.

Statutes should be written not only for lawyers to understand, but should be crafted to be easily understood by the populace at large. Too many statutes are steeped in unnecessary complexities and legalese. Insofar as judgments are concerned, we as judges should strive for clarity and precision. Litigants want to understand why they won or lost. Judgments should not be shrouded in mystery. We should heed Lord Bingham on what judges in appellate courts should strive towards. Judgments of appellate courts are intended to be a guide for the courts below them. If they are unclear and opaque they will not serve that purpose. There should, at the very least, be clarity and majority of ratio,

and where we differ the difference should be clearly spelt out. Predictability of result relative to the facts is an essential feature of a legal system based on the rule of law.

Most importantly our jurisprudence should show cohesion. We must ensure consistency and a body of judgments that reflect that we have established easily discernible principles and that the law has developed accordingly. I agree that it is for the legislature and the executive to dictate on the basis of policy and sound governance what the country's priorities should be, how money is to be spent and what our foreign relations should comprise. All of course within the constitutional bounds. There can also be no doubt that courts do have a significant role to play in the development of the law but within the constraints of the role of the judiciary. When the common law is developed, we would do well to heed Lord Bingham's warning in relation to the regularity and extent of legal development by the courts. The anti-majoritarian arguments will become louder and more vociferous in the event that this warning is not heeded. This, of course, does not mean that we must shirk from our responsibility to fearlessly hold the other arms of government to account.

How, then, do courts build and retain public confidence, maintain their credibility and independence, and promote the rule of law, all of which lie at the heart of our constitutional order? In an address delivered at the first orientation course for new judges, the late Chief Justice Ismael Mahomed spoke on the role of the judiciary in a constitutional State. He recognised that unlike Parliament or the executive, the judiciary did not have the power of the purse or the army or police to execute its will. He was emphatic that its ultimate power must rest on the esteem in which the judiciary is held in the psyche and soul of a nation. This would depend on its independence and integrity. After dealing with institutional support and the criteria for the appointment of judges, and measures to ensure that judges are accountable, he considered the qualities that judges should possess and said the following :<sup>55</sup>

“More than twenty such qualities seem relevant. They are: Experience. Scholarship. Dignity. Rationality. Forensic skill. Some measure of humility. Capacity for articulation. Discipline. Diligence. Intellectual integrity. Intolerance of injustice. Emotional maturity. Courage. Objectivity. Energy – both intellectual and physical. Rigour. Wisdom. Efficiency.

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<sup>55</sup> Mahomed I “The role of the judiciary in a constitutional state” (1998) 115 *SALJ* 111 at 115.

A sense of relevance. The moral ability to distinguish right from wrong and sometimes the more agonizing ability to weigh two rights or two wrongs against each other.”

In relation to Lord Bingham’s comments on discretionary power, it must be so that the legislature should attempt as far as possible to restrict public law outcomes that are dependent largely on the exercise of discretionary power. The same should apply to courts exercising too much discretionary power. It makes outcomes dependent on personal inclinations and often leads to arbitrariness. What is just, then, depends on the view of an individual repository of power. If there has to be a discretionary power then the bases on which it is to be exercised must be clearly delineated.

Of course, as stated by Lord Bingham and as demanded by our Constitution, the law should apply equally to all with only objective factors potentially justifying differentiation. Beinart said the following:<sup>56</sup>

“A further consequence of the rule of law is that the law must be observed. Every person, whatever his position or status must do so, whether he be a private citizen or a member of government or of parliament, and those who transgress the law must be brought to book according to the laws adjudicated upon by the courts.”

The protection that our legal system extends to its citizens should apply equally to all those who find themselves within its jurisdiction, save where the rights that attach to citizens and residence rights apply and justify differentiation. We cannot have a refined system where we treat our neighbours and visitors in a manner we would not be willing to be subjected to.

Emergencies, or when the safety of the State is threatened, leads to the temptation to do away with civilised rules. We ought to be slow to abandon rules, as Lord Bingham warns, and then to ensure where in limited circumstances it is necessary to do so, that they are not permanently abandoned. Those who wield power are more often than not inclined to want to increase their powers and are reluctant to give up any newly acquired powers.

Our Constitution dictates an observance of certain fundamental rights and obliges us, when any right is sought to be restricted, to have regard to what pertains in an open

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<sup>56</sup> Beinart (1962) at 121.

and democratic society based on human dignity, equality and freedom.<sup>57</sup> Courts and other fora are required, in interpreting the Bill of Rights, to have regard to international law and to foreign law.<sup>58</sup> Significantly, section 39(2) of the Constitution provides that “[w]hen interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. As can be seen, our legal system does not resort to a neutral formalism without a moral substantive basis. The values that are universally regarded as attaching to open and democratic systems based on basic freedoms dictate a clear philosophical approach. Our system is a guarantee against the “Rule of bad law”.

Delay in enforcement and adjudication for obvious reasons are to be deprecated. Justice delayed is often justice denied.

The principle of legality is a cornerstone of our and other democracies. As shown above we regard the principle as a key and inextricable incident of the rule of law. So, too, with rationality. Every exercise of public power must, according to our system, be justified.

It is important in this age of populism that we take note of Lord Bingham’s warning that repeated public criticisms by the other arms of government against decisions of courts weaken a democracy. It is important that politicians recognise that they are transient repositories of power. Legal systems and institutions must be preserved for the future. Today’s wielders of power might well face the improper exercise of power tomorrow. Who will then be able to protect them if the courts have been weakened and have no legitimacy in the eyes of the populace?

That being said, courts would do well to observe the doctrine of the separation of powers. There should in democracies be a manageable tension between the different arms of government. When that tension is not properly calibrated it results in instability and volatility. If we do not observe the principle, the anti-majoritarian criticism merely increases and the position of the courts becomes untenable.

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<sup>57</sup> Sections 1, 7 and 36 of the Constitution and the entire spectrum of the Bill of Rights.

<sup>58</sup> Section 39 of the Constitution.

Due process and fairness in procedure, particularly when substantive rights are threatened, are intrinsic to any civilised system and an indispensable part of the rule of law. We should continue to test the legality of the exercise of power by administrative functionaries and the executive on the basis of rationality. The irrational exercise of power is the very antithesis of a system based on the rule of law. Individuals affected by the improper exercise of power must challenge it.

Compliance with our international obligations is without a doubt necessary if there is to be compliance with the rule of law. Our courts have regrettably had to pronounce on the failure by us as a State to comply with such obligations.<sup>59</sup>

Our Constitution is the supreme law premised on the rule of law. The Constitution demands responsible, accountable and transparent governance.<sup>60</sup> Section 41(1) of the Constitution provides that all spheres of government must “ (b) secure the well-being of the people of the Republic” and “ (c) provide effective, transparent, accountable and coherent government for the Republic as a whole”. That, in my view, is as intrinsic to the rule of law as one can get. The other arms of government must ensure that in the legislative process, in administration, and in setting policy and fixing priorities these principles apply. Corruption and maladministration result when this is not done. The electorate must demand that kind of governance. Civil society and the media must continue to insist on it and continue to expose a lack of adherence to these fundamental principles.

The Constitution provides for public involvement in the legislative process.<sup>61</sup> This constitutional measure must be used by individuals and interested parties. It deepens democracy and promotes the rule of law. Civil society and individuals have an important role to play in elevating the tone and quality of the public debate. The Constitution demands that local government provide democratic government for local communities. Municipalities are required in terms of ss 152 and 153 of the Constitution to give priority

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<sup>59</sup> See *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* 2016 (3) SA 317 (SCA). See also *National Commissioner, South African Police Service & another v Southern African Human Rights Litigation Centre & another* 2014 (2) SA 42 (SCA) and *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & another* 2015 (1) SA 315 (CC).

<sup>60</sup> Section 1(d) and, amongst others, s 41 of the Constitution.

<sup>61</sup> Section 59 of the Constitution.

to the basic developmental needs of the communities they purport to serve. Individual residents and local community organisations are entitled to hold municipalities to account.

Insofar as State owned entities are concerned the media is awash with reports of maladministration and corruption. Government has a duty to ensure that those charged with the administration of these entities are imbued with a sense of public accountability. They are entrusted with billions of rands of public funds. Given the needs of the millions of our poverty stricken citizens we can ill afford to continue putting up with the continued mismanagement of public funds. Corruption has been endemic. The sheer scale of it has been beyond imagination. It must be impressed on those who govern these entities that if they resort to theft, bribery or any other form of corruption they will be met with the full force of the law. We must prosecute with all deliberate speed all forms of corruption to send a strong message that it is no longer business as usual. Whistle-blowers, public vigilance and a free press are essential to clean governance. Ministers and their departments must exercise their oversight roles diligently and consistently.

Trade unions who have fought hard and long for workers' rights are entitled to be heard on matters affecting their membership. They have played a significant role in establishing the rule of law and have a continued role to play in holding government to account and in entrenching and promoting the rule of law. Workers must ensure that their workplace grievances, including conditions of employment, are brought to the attention of the leadership of trade unions.

Chapter 9 institutions as provided for in our Constitution were envisaged to "strengthen constitutional democracy"<sup>62</sup> and consequently, by definition, to advance the rule of law. I do not intend to deal with the listed entities exhaustively. I do intend however to make a few remarks about them. The Public Protector is a guardian of the public weal.<sup>63</sup> The office is designed to hold the legislature and the executive to account. It is imperative that the office be held by someone whose integrity is beyond question and someone who is unflinching in performing the assigned task. It requires an

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<sup>62</sup> Section 181(1) of the Constitution.

<sup>63</sup> See *South African Broadcasting Corporation Soc Ltd & others v Democratic Alliance & others* 2016 (2) SA 522 (SCA).

appreciation and understanding of the constitutional scheme and the bounds of power, within the architecture of the Constitution and applicable legislation.

The Auditor-General's task of ensuring governmental financial accountability is, likewise, a vitally important one. The holder of that office must, once again, enjoy public confidence and have the necessary skill set. All the other Chapter 9 institutions must be comprised of people who have the requisite qualities and who must act in accordance with constitutional prescripts.

Each of these institutions has a role to play in entrenching and promoting the rule of law.

The National Prosecuting Authority (NPA), established in terms of s 179 of the Constitution, comprised of those who are entrusted with duties related to the prosecution of offenders, acting diligently and in accordance with the Constitution and applicable legislation, is an indispensable part of the maintenance of the rule of law. The NPA must ensure that the law is applied without fear or favour. Its task is to ensure that the prosecutions do not exclude the rich and the powerful. The NPA must see to it that offenders are tried swiftly and that where possible ill-gotten gains are recovered.

Universities have a duty to instil in the minds and hearts of their students and teaching staff the practical importance of the rule of law and the vital responsibility of contributing to its preservation and promotion.

Each of us, as citizens, has a role to play in preventing the erosion of the rule of law. We are at a fragile moment in our history, seeking to rebuild our nation so that the promise of the Constitution is not beyond reach. Those who are in public office to benefit only themselves must be rooted out. We must hold each other to account, and must distinguish between fact and rumour. We must learn that our destinies are intertwined and that it really is time to heal the wounds of the past. We cannot afford to fail the poor and the vulnerable. We must ensure that public funds are used to benefit those who most need them. We must all be part of a movement that champions the rule of law, and have a common understanding, that if the rule of law is entrenched and advanced we will be better off as a people. We must insist that government, in each of its arms, exists to see to the wellbeing of all of South Africa.