

Madiba would have agreed: “The law is for protection of the people”*

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PROLOGUE

Reflections on the Occasion of the Acceptance of the Degree *Doctor Legum Honoris Causa* from the University of Pretoria

Deputy Vice-Chancellor and Vice-Principal Professor Pretorius; Dean of the Faculty of Law Professor Boraine; Director of the Centre for Human Rights Professor Viljoen; staff members of the University of Pretoria; my colleague Justice Nkabinde of the Constitutional Court; my previous boss former Judge President of the Gauteng High Court and now member of the African Court and Chancellor of the University of South Africa, Justice Ngoepe; deputy vice-chancellor of the University of Cape Town, Professor Visser; students from all over Africa receiving doctoral and master's degrees, to whom today belongs; representatives of universities and countries in Africa and elsewhere, brothers and sisters –

On this occasion in these days of mourning and memories I pay tribute to our father and leader, President Nelson Mandela. The last time I saw him in person and shook his hand was in the hall right next to this very venue, when he received an honorary doctorate from the University of Pretoria several Decembers ago. I am proud to have been the one who nominated him for it. Without his life and work, we might not have been here today. I remember his words from my mother-tongue when he departed from politics and said good-bye to the nation: “*Mooi loop!*” And I say: “*Mooi loop, Madiba. Dankie vir die saamloop en voorloop. Ek dra hierdie beskeie bydrae aan u op.*” (Go well Madiba. Thank you for walking with us and leading us. I dedicate this modest contribution to you.)

It is an enormous honour to receive an honorary doctorate from this University where I spent much of my life. I am deeply thankful to those at the University who worked to make it possible; who educated me; and who were colleagues and friends, willing to share my dream that we could play a role in the shaping of a new democratic South Africa as part of Africa. I welcome my dear friends who are present and thank you for your interest and support over the years. I thank and pay tribute to my family for their support, inspiration and love: my dear wife Saro; my children Alexander, Dassie and Vincent; my sister Minda, her husband Thys and their family; and my brother-in-law Dr Radha Persaud from Toronto. I cannot help but spare a thought for my deceased mother and father: Anna, who tried to teach us to work hard, excel and save money, that God commands one to obey the Bible and the government and that almost everything enjoyable is dangerous or sinful; and Vincent, who worked for

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the apartheid government, but wrote beautiful Afrikaans poetry and prose, talked about human rights and undermined everything – bad and good – the Afrikaner establishment stood for, long before deconstruction became fashionable.

1 Introduction

The oldest question in legal philosophy is the one most lawyers never think of: What is law and why is it there? In 1970 legendary singer Kris Kristofferson released his song "The Law is for Protection of the People". That year marked the end of a decade – the tumultuous sixties – during which the world changed. The Vietnam war started; student uprisings took place in France and Germany, as did the cultural revolution in China; the Berlin wall was built; President John F Kennedy, Bobby Kennedy and Martin Luther King were assassinated; hippies and flower children promoted peace and free love; the Beatles, Rolling Stones and Bob Dylan burst onto the music scene. Conventional notions of law and morality were questioned as they had not been since Nietzsche and Marx challenged and changed Western philosophy. During the fifties and sixties many African countries were liberated from their colonial oppressors and became independent, with mixed success. British Prime Minister Harold MacMillan famously said in the South African Parliament, that "the winds of change (were) blowing in Africa." Last and not least, in 1970 I did my compulsory military service in the South African Air Force, before starting my studies at the University of Pretoria the next year.

The lyrics of the song are:

Billy Dalton staggered on the sidewalk
Someone said, he stumbled and he fell
Six squad cars came screamin' to the rescue
Hauled old Billy Dalton off to jail

'Cause the law is for protection of the people
Rules are rules and any fool can see
We don't need no drunks like Billy Dalton
Scarin' decent folks like you and me, ...

Homer Lee Hunnicut was nothin' but a hippie
Walkin' through this world without a care
Then one day, six strappin' brave policeman
Held down Homer Lee and cut his hair

'Cause the law is for protection of the people
Rules are rules and any fool can see
We don't need no hairy headed hippies
Scarin' decent folks like you and me, ...

Oh, so thank your lucky stars, you've got protection
Walk the line and never mind the cost
And don't wonder who them lawmen were protectin'
When they nailed the Savior to the cross

'Cause the law is for protection of the people
Rules are rules and any fool can see
We don't need no riddle speakin' prophets
Scarin' decent folks like you and me, ...

Of course the singer-poet is sarcastic when he says that the law is for protection of the people and refers to "decent folks". Whereas the law is supposed to protect *all the people*, it is often used as a tool to protect the privileged class (who label themselves as "decent"), to bully the weak and marginalised, to suppress free expression and criticism and to lull us into comfortably ignoring the plight of the majority of human kind and the ideal of justice for all. Often we call the practice of law "an honourable profession" and then dishonour it with our greed, self-interest and lust for power.

Assuming that the purpose of law is to protect all the people, I make a few brief remarks on five points: The qualities required for lawyers; independence; equality before the law; law as a tool; and the role of universities.

2 Qualities of Judges and Other Lawyers

Judges and other lawyers must in my modest view have certain qualities to apply and practise law as it should be done. Our Constitution requires judges and the National Director of Public Prosecutions to be "fit and proper persons".¹ For legal practitioners similar standards exist.

In addition to requirements regarding qualifications, citizenship, and so on, lawyers (and judges in particular) need (in no specific order) –

- integrity;
- intellect;
- a strong work ethic;
- respect for people;
- a sound value system;
- independence; and
- a sense of humour.

Integrity is not negotiable. It is the first and the last word. Without it, the other qualities are either impossible (like independence), or dangerous (like intellect and knowledge of the law). Merula allegedly cited a saying that the learning and ability of a lawyer is like a dangerous weapon: It may be misused, but in proper hands it is used to protect those who are oppressed and wronged.² The public must see integrity in action. The ability and willingness to work hard includes the many hours one needs to invest in proper preparation to understand the issues at hand and the applicable law. I do not mention a sound knowledge of the law

1 Ss 174, 179 Constitution of the Republic of South Africa, 1996.

2 Davis's foreword to the 1st Edition of Herbstein & Van Winsen *The Civil Practice of Superior Courts in South Africa* (1954); 3rd Edition (1979) vi.

separately. No one knows all law; one finds it through research and logical thinking.

These seven qualities overlap and operate together. A strong intellect is very helpful. To make up for a limited intellect, one has to work harder. The flip side of this is unfortunately also true. The cleverer one is, the quicker you will understand and the stronger the temptation will be to work less hard, as you can get away with the minimum. But just imagine what you could achieve with a great intellect plus hard work!

The ability and willingness to respect the human dignity of all people and to work with them is crucially important. This applies to colleagues on the bench and in the profession, counsel appearing before courts and frustrating or illiterate litigants. An English Lord Chancellor reportedly once said: "I like my judges to be gentlemen; if they also know a little law, so much the better".³ And a sense of humour is always very useful when one deals with the stress of human relationships and conflict.

The reality is that no-one is perfect. We all sometimes err, stumble, fall, hurt others and get hurt. This is where values come in. In a constitutional democracy like South Africa we are fortunate to have a set of constitutional values and do not have to delve desperately into natural law or universally accepted notions of justice: Human dignity; equality; human rights and freedoms; non-racialism and non-sexism; constitutional supremacy; the rule of law; democracy; accountability; responsiveness; reasonableness; and openness.⁴ These values are not at odds with those of most religious and other ethical systems.

3 Independence

One of these qualities – and my next point – is independence. The Constitution states that courts are independent and subject only to the Constitution and the law, that no one may interfere with the functioning of the courts and that the state must assist and protect the courts. It requires judges to act impartially and without fear, favour, or prejudice and to take an oath that they will do so.⁵

Courts and the judiciary staffing them have to be independent for democracy to succeed. I once heard a senior South African lawyer in a leadership position who was awaiting promotion say at a conference that judicial independence has to be "earned". I was astounded. Earned how and by whom? It cannot be earned by pleasing politicians or any other power. It is given and recognised by the Constitution, like the rights to life and dignity to human beings. A judge who is not independent is not worthy of that title and a court that is not independent is not a true court.

3 *Idem* v-vi.

4 Ss 1, 36 and elsewhere.

5 S 165; s 174(8); Sch 2.

And an independent legal profession is essential for the independence of courts.

Aspects of independence are often discussed. Institutional independence is important. Courts must be supported properly by all organs of state.⁶ Judges must have security of tenure as well as financial security. Judges must not be interfered with by improper attempts to influence them, by any group, politician, or other individual, even another judge. Governments have to respect the constitution and laws they are subject to. We often hear reports – for example from Eastern Europe – of constitutional courts that are quickly slapped into place by governments who respond to inconvenient judgments by amending constitutions and passing laws to limit the powers of courts. From our own continent we hear judges complaining about inadequate salaries and benefits.

Let us get the obvious out of the way. To be open to bribery and corruption is criminal and a betrayal of all that a lawyer is supposed to stand for.

But there is another dimension to independence, other than bribery and expensive cars for judges and intimidating telephone calls from politicians. It is the inner part, the mental, psychological and emotional attitude of each individual judge and lawyer. We nowadays realise that judges and other lawyers are *people*, not machines. And people do have fears, favours and prejudices. We are the products of our cultural, social and economic backgrounds. We have dreams and aspirations for ourselves, our families, our countries. We want to be successful and to be recognised as such. We have likes and dislikes. The ghosts of pride, spitefulness, grudges, anger, pettiness and strategic thinking sometimes hide in the dark corners of one's psyche and in the windmills of one's mind. Depending on my background and environment, I may well be more concerned about academic criticism, or being branded an enemy of the poor, or of women's or children's rights, or as conservative, than about a telephone call from a minister or a promise of wealth from a powerful commercial entity.

The starting point is of course to realise that we are all human. To deny it, is dishonest. Then we must come to grips with our subjective fears, favours and prejudices and strive to think independently and act fairly.

Does this mean that a judge must be oblivious to or ignore academic criticism, the views of non-governmental organisations, or generally the "*Zeitgeist*" (the spirit of the time)? Does a judge compromise independence by considering how academics, community organisations, or the media may interpret and receive a judgment? Certainly not, in my view. Judges have to be in touch with the problems, needs and aspirations of their societies, like poverty, illiteracy, violence against

6 S 165(4).

women and children and endemic crime. The law is for protection of the people, not of judges. The study of academic literature is essential to understand the law in order to apply it and to avoid changing it clumsily and unintentionally. In order to develop the common law, as the Constitution empowers courts to do,⁷ the first step is to be very aware of what it is. Criticism of judgments from academic and media circles – even based on misinterpretation and ignorance which certainly sometimes play a role – helps to avoid logical errors and to realise the need to write in an understandable way. The accountability of judges is after all in the reasoning of judgments. Legal institutions, despite their state monopoly, must constantly prove themselves.⁸

This is very different from being intimidated or unduly influenced by academic or public opinion though. To judge directly or indirectly motivated by an opportunistic jump at promotion, or by a desire for publicity, popularity, or recognition in the form of invitations to exotic places or seminars in honour of one's work, or honorary degrees, is a breach of the oath of office to dispense justice without fear, favour, or prejudice. And this urge is sometimes difficult to detect and recognise in others and in oneself.

One last word on judicial independence: It is often said in this country that opposition parties and other pressure groups politicise the Constitution and use the courts as a tool by litigating against the government on every possible occasion to fight political battles. We hear that this practice must stop. It is true that courts are often dragged into political disputes. In a young democracy, where the governing party enjoys a very large majority and is unlikely to be voted out of office in the near future, it is to be expected though. Opposition groups will make maximum use of the media, institutions like the Auditor General and Public Protector and the courts to test government action and expose abuse. We know that constitutional law is inherently "political". This does not mean that courts should "play politics". They should leave political disputes to be resolved politically and as far as possible not get caught up in frivolous fights. But courts have to apply the Constitution and the law as objectively and fairly as they can, when these are indeed applicable.

4 Equality Before the Law

The third point is equality before the law. The law should be for the protection of *all* the people. Equality before the law is essential for the rule of law and is protected in our Constitution.⁹ I express two brief thoughts on this.

7 S 39(2).

8 Auerbach *Justice without Law? Resolving Disputes without Lawyers* (1983) 142.

9 S 9(1).

The first relates to the widely recognised problem of economic inequality. The poor can either not afford legal advice and representation at all, or only modest legal assistance. The wealthy and well-connected are able to instruct teams of senior and junior counsel and attorneys – which the media would call “high-powered” – to represent them in court, not necessarily because each member of the team contributes to eloquent and well-prepared argument, but also to create atmosphere, impress and intimidate.

I do not claim to have the solution for this worrying lack of equal access to justice which no doubt undermines the legitimacy of a constitution and legal system. Legal aid, *pro bono* work and other possibilities have been discussed at length. I express only one wish, namely that wealthy lawyers would seriously consider lowering their fees to reasonable and realistic levels when representing the poor and marginalised. There is no need for a successful practitioner to arrive at an informal settlement or traumatised community of mine or other workers in the newest model Range Rover or sports car, to prove that he is successful. Or is there?

My *second equality* concern is that *reasonable public perceptions of bias* and unequal treatment by courts and before the law must be avoided. The harshest examples probably relate to the criminal justice system, especially sentencing by courts and the serving of prison sentences. Perceptions of favouritism and prejudice based on race, wealth, or political affiliation can poison a constitutional democracy. Of course public opinion – genuinely, misguided, or mischievously – does not always understand and appreciate legitimate differences between people and cases. But when for example a glaring possibility emerges that race or political connectivity made a crucial difference in a decision about parole, authorities have to explain exactly how the law was applied in the particular case; not only in the interest of equality before the law, but also because the constitutional values of transparency and accountability demand it.

5 Law as a Tool

The fourth of my five points is that the law is a powerful instrument in the hands of a very small group of us, privileged to have been educated and trained in it. We could either use it to intimidate, oppress and further marginalise those who are not as privileged as we are; or to inform, educate and empower, indeed to protect, the people.

In this, legal language plays an important role. Lawyers are notorious for the way they write and speak. Why do we say “same” in attorneys’ letters instead of “he”, “she”, or “it”? Why do we write “where” when we mean “when” or “if” and “shall” when we mean “must”? Why do we draft legislation like the “Nuts Order” and article 25(1)(a) of the Namibian

Constitution?¹⁰ Stark¹¹ wrote in the *Harvard Law Review* "... 'legal writing' has become synonymous with poor writing; specifically, verbose and inflated prose that reads like – well, like it was written by a lawyer" and: "Every time lawyers confound their clients with a case situation, a 'Heretofore', or an 'in the instant case', they are letting everyone know that they possess something the non legal world does not".

Thus, lawyers use language as an instrument to protect the need for and status of their profession. He concludes:

Perhaps most damaging, however, is lawyers' frequent use of language as an instrument of deception. Face it: if lawyers know they have a losing case – and half the time they should – confusing the court may be the best they can do for their clients. Indeed, attorneys may be our most respected con artists; after all, their job in many cases is to try to make something out of nothing. Again, there is nothing necessarily wrong with that: lawyers may simply be victims of the role society has created for them. But lawyers recognize their role as deceivers and understand that language is the means by which they work their magic. And after a while, they begin to lose faith in the honesty of words. Language is a human invention, one designed to bring people closer together. But after a lifetime of using words to strangle communication, lawyers begin to view speech as a barrier that separates them from others and others from the truth.

We could all try to use simpler, plainer, more easily understandable language in legislation, judgments, argument, opinions and correspondence. Our Constitution and hopefully some Constitutional

10 The "Nuts Order" was once listed in the *Guinness Book of Records* as the world's most incomprehensible legal provision:
"In the Nuts (underground) (other than ground nuts) Order, the expression nuts shall have reference to such nuts, other than ground nuts, as would but for this amending Order not qualify as nuts (underground) (other than ground nuts) by reason of their being nuts (underground)."

Article 25(1)(a) of the Namibian Constitution states:
"Save insofar as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid."

11 Stark "Why Lawyers Can't Write" 1984 *Harv LR* 1389 1392.

Court judgments contain examples.¹²

This does not mean that there is no place for some poetic or prosaic charm in legal writing. A little flavour and colour could help to brighten up dull and boring texts, provided that clarity and accuracy are not sacrificed.

Furthermore, courts must be accessible and transparent. But we do not have to do away with all courtesy, tradition and ceremony. On a day like today we once again realise that a society needs myths, legends, heroes and symbols to bind and keep it together and also to foster respect for a legal system, without which it cannot do. Deconstruction is essential to get rid of false assumptions and harmful stereotypes and myths; but reconstruction is then often necessary; and preservation is sometimes preferable, not only of rhinos, old buildings and documents, but also of the dreams and symbols needed by humanity.

Auberbach¹³ wrote:

The luster of the legal process radiates the promise of justice. People are persuaded that law will protect their rights, preserve their liberty and secure their property. When disputes cannot be reconciled litigation structures the melodrama of human conflict within a precise set of procedures State authority is reinforced by the deference afforded to official symbols of law and order.

6 Universities

My last point relates to the role of universities. When I studied at this University and for quite some years of teaching here, it produced eminently able scientists, researchers, teachers, lawyers, artists and actors. It had a famous choir, excellent rugby players and athletes and very attractive rag queens. (It still has these, as far as I know, even with a premier league soccer team added.) But it was an all-white Afrikaans institution, largely dedicated to support the apartheid ideology and regime. It was referred to as “the Voortrekker University” and “the largest Afrikaans university in the world”. When an academic was pointed out on campus as “the best in the world in his field”, the “world” often referred to the space between Lynnwood Road, University Avenue, Park Street and Duncan Street.

Law professors taught us that draconian security legislation permitting indefinite detention without trial was necessary to fight the evil total onslaught of communism. The main exam question in a course called

12 See eg Van der Westhuizen “Legal Language: Instrument of Deception or Empowerment? (Notes on Plain Language and the Constitution) 12 September 2013” available at [http://www.constitutionalcourt.org.za/site/judges/justicejohannvanderwesthuizen/TALK-TO-LAW-CLERKS-OF-THE-CONSTITUTIONAL-COURT-PLAIN-LANGUAGE-AND-THE-CONSTITUTION\(2\).pdf](http://www.constitutionalcourt.org.za/site/judges/justicejohannvanderwesthuizen/TALK-TO-LAW-CLERKS-OF-THE-CONSTITUTIONAL-COURT-PLAIN-LANGUAGE-AND-THE-CONSTITUTION(2).pdf) (accessed 2013-12-01).

13 *Op cit* vii-viii.

"Bantu Law" (nowadays probably African customary law) was: "What is a Bantu?" in terms of the Bantu Administration Act of 1927. The concept of human rights was never mentioned in a very detailed course on Criminal Procedure. At my final year law dinner the guest speaker was ... the prosecutor of Nelson Mandela and his co-accused in the Rivonia Trial! The trialists were relieved when they were sentenced to life imprisonment, as the death penalty was called for and expected in many circles. A former colleague in the faculty referred to rape as "a crime of enjoyment" in his lectures – and no one complained.

When it became possible to invite black speakers to conferences, permission had to be requested by filling in forms. One of the questions was whether the visiting professor or community leader was likely to use a university toilet during the visit. When student leader Christof Heyns and his colleagues wanted to invite the famous singer David Kramer to the campus, they thought he was coloured and I presume they filled in the forms. The University of Pretoria even made the law reports, but not only because some of its graduates were judges. It sued a film producer for defamation of the University, when a film depicted a coloured rugby player in the famous white TUKS colours!¹⁴

Today this University and Law Faculty have much to be proud of. It has a Centre for Human Rights, internationally acclaimed for its leading role in Africa. It was a privilege to be part of its founding and development. The University's experts are widely recognised. It has been highly successful in transforming itself to serve all the people of our country and our continent. I hope and trust that its academic research and teaching standards will reach even greater heights, to compete with the very best, matching its Olympic gold medals.

I congratulate the graduating students and their families, as well as the University of Pretoria. I am sure you will continue to protect and strengthen constitutional democracy in our country, on our continent and in the world. Please go forth and try to ensure that the law is for the protection of the people. Unfortunately history has shown that democracy and respect for human rights is not necessarily a natural attribute of human kind. We have to continually work for it.

The Freedom Charter, adopted in 1955 by the Congress of the People at Kliptown, Johannesburg, states: "These freedoms we will fight for, side by side, throughout our lives, until we have won our liberty". Perhaps we should add: "and forever after!"

I think Nelson Rolihlahla Mandela would have agreed.

14 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T).