



Address by Deputy Public Protector Adv. Kevin Malunga at the Annual (University of Witwatersrand) School Of Law Prize Giving Ceremony on 17 March 2015 at the University of the Witwatersrand, Johannesburg

Topic: Law Graduates as Architects of Good Governance/ Misgovernance: The South African experience”.

Programme Director

Prof Imraan Valodia, Dean –Faculty of Commerce, Law and Management

Prof Vinond Jaichand, Head School of Law

Esteemed former colleagues at Wits Law School and Wits generally

Prize winners, parents and other family members

Distinguished guests and students;

Ladies and gentlemen;

A very good evening to you all

Let me take this opportunity to thank the organisers of this event for extending an invitation to my office to take part in this evening’s proceedings. It is indeed an honour and privilege, for me, to be here tonight. A bonus is that it is great to see some familiar people, some greyer and rounder than I know them to be.

THE MEANING OF THIS DAY

Let me perhaps start by trying to unpack the meaning of this day. What does it mean to congregate at an esteemed academic institution to receive a prize? That much maligned bane of academic existence Wikipedia has attempted to define what a prize is;

“A **prize** is an award to be given to a person, a group of people, or organization to recognise and reward actions or achievements.^[1] Official prizes often involve monetary rewards as well as the fame that comes with them. Some prizes are also associated with extravagant awarding ceremonies, such as the Academy Awards.

Prizes are also given to publicize noteworthy or exemplary behaviour, and to provide incentives for improved outcomes and competitive efforts. In general, prizes are regarded in a positive light, and their winners are admired. However, many prizes, especially the more famous ones, have often caused controversy and jealousy.

Specific types of prizes include:

- Booby prize: typically awarded as a joke or insult to whoever finished last (e.g., wooden spoon award).
- Consolation prize: an award given to those who do not win.
- Hierarchical prizes, where the best award is "first prize", "grand prize", or "gold medal". Subordinate awards are "second prize", "third prize", etc., or "first runner-up" and "second runner-up", etc., or "silver medal" and "bronze medal". (In some contests, "grand prize" is more desirable than "first prize".)
 - On game shows in the UK, the term is "star prize", while in Australia, it is "major prize".

So quite clearly you're in esteemed company. However, there's a difference. You're not here because of a wager or a bet. You're not here because you bought a raffle ticket and won a trip to the Seychelles, neither am I standing here as Oprah Winfrey about to announce that there's a gift under your seat(although it's worth having a look).

You ladies and gentlemen are here because you have worked hard; you are the invictus in the game of academic endeavor. However, it doesn't end here; remember the self-deprecating joke in his address to Yale graduates in 2001 by former President George W Bush. I quote *“To those of you who received honours, awards and distinctions, I say well done. And to the C students, I say you, too, can be President of the United States”*.

In my own unscientific assessment I see many A students such as the ones sitting here today not maximizing their potential and I also see the average students and the George Bush students going on to run the world. So life is a very unpredictable game. The missing but guaranteed link tends to be drive, passion, often unmitigated risk taking and that approach that says I'm going to do it anyway.

This brings me to why I need to preach to you about good governance

OUR UNDERSTANDING OF “GOOD GOVERNANCE”

Simply Good Governance means. 1. Government; exercise of authority; control.

2. A method or system of government or management. 1325-75; Middle English governance < Old French < Medieval Latin gubernantia

Former UN Secretary-General Kofi Annan has stated that '*good governance is perhaps the single most important factor in eradicating poverty and promoting development*'¹.

In the **South African** context our expectation of the concept of "*good governance*" implies that those that we have elected and authorised to manage the affairs of our country, most do so in a manner that ensures that our hard earned democracy becomes a reality in the lives of every South African and deliver on the Constitutional promise of a better life for all.

Certainly some experts agree that the very essence of "democracy" is based on the premise that those elected to form a government shall govern "so long as they can protect the interest of the people or the trust the people have placed in them" This is how the concepts of democracy, rule by consent, and good governance came into existence in the theory and practice of government. Of course there is also corporate governance which really ascribes to the same principles.

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

"*Good governance*" is identified by a number of characteristics or pillars rather than a single all-encompassing concept, including-

- a) Constitutional compliance and the rule of law
- b) Participation
- c) Accountability
- d) Checks and balances that include constrained and diffused power
- e) Transparency, backed by freedom of the media

¹ Kofi Annan, *Partnerships for Global Community: Annual Report on the Work of the Organisation* (UN, 1998)

- f) Equality and inclusiveness
- g) Attention to human development
- h) Integrity with no tolerance of corruption in dealing with state resources

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

Transparency - Michael Johnston of the Department of Political Science, Colgate University put it in simple terms that a transparent government makes it clear what is being done, how and why actions take place, who is involved, and by what standards decisions are made. Then, it demonstrates that it has abided by those standards.

Accountability refers to the obligation to provide an explanation or justification, and accept responsibility for individual and institutional events or transaction and for individuals and institutional actions in relation to events or transactions.² It is fundamental to the democratic system of governance that those, to whom powers and responsibilities are given, exercise them in the public interest justifiably and according to the law, and more importantly, are answerable to the public for the actions of government.

The concept of **Ethics** In addition to accountability and transparency is gaining prominence in the discourse about governance today as a means to restore a measure of trust and **integrity** in public institutions and officials, to safeguard democracy and promote better governance.

The concept of “integrity” often operates as a conceptual opposite to ‘corruption’. Yet, I am not sure if justice is done to describe the concept of integrity and ethical behaviour as the opposite of “*combating corruption*,” or the natural consequences or by-product of accountability and “*good governance*” because it would imply that “*integrity*” would be automatically achieved or attained when accountability and anti-corruption measures are in place and effective. Australian Chief Justice Spigelman explained that institutional integrity goes beyond a narrow concept of illegality. “*First,*

² *Strengthening the governance structures in order to enhance transparency, accountability and oversight in the public sector* 2011 APAC Conference: 1st and 4th of October 2011 in Northern Cape.

the maintenance of fidelity to the public purposes for the pursuit of which an institution is created. This would imply certain ethical duties on the part of public office bearers and officials alike, that they have a responsibility to act impartially when carrying out a program established by law, that they are acting as trustees for the entire citizenry, and therefore they have a fiduciary responsibility not to abuse.

In a Constitutional democracy, the framework of Constitution and law exemplifies essential elements of good governance and accountability by, inter alia -

- a) Prescribing the powers of government and the procedure of exercising powers.
- b) Ensuring equal treatment and equal protection of law.
- c) Guaranteeing protection against arbitrariness of government and excess of administrative powers.
- d) Creating accountability mechanisms for the exercise of powers and formulation of policies to the people/ representatives of the people
- e) Ensuring procedural transparency of exercising all administrative powers.
- f) Providing remedies against any kind of mal-administration and injustice done to the aggrieved citizens, as well as institutional mechanisms to redress grievances.

The correlation between the concept of good governance, the law and the legal profession

Our view as the Public Protector South Africa is that the government has what are arguably the best policies, programmes and plans, including the NDP. It is our view that all these instruments have what it takes to deliver the constitutional dream of an improved quality of life for the people of South Africa and a freed potential of each person in the country. In addition, as a nation, we have nearly enough resources to deliver this dream to our people. We also have the stated political will to deliver the dream.

However, we are equally concerned about the impact of maladministration, bad governance and corruption on the sustainable development of the goals that we have set for ourselves, and the South Africa that we promise to our youth. We often find, in the execution of our constitutional mandate, that these noble policies,

programmes and plans get undermined through acts of maladministration, indifference and corruption, among other things. I must hasten to indicate, however, that it is not all people in government that engage in actions that amount to these maladies. The average public servant does the best they can and have the country's best interests at heart. It is only a few bad apples that have been caught with their hands in the till or failing to live up to the Batho Pele principles in their interactions with members of the public.

There is general consensus that development depends on people being able to enjoy basic legal rights. The literature that has developed in recent years argue that the judicial arena is an integral part of development defined by the presence of rule of law.

Within a rule of law framework, then, law and legal institutions are understood as operating independently from both state and society. Law stands outside these processes, and this distance enables it to play the role of both a neutral arbiter and a negative constraint on state power.

For the legal profession and in particular our newly graduated colleagues celebrated here today, our responsibilities towards the promotion of good governance include a number of key aspects:

Defining and understanding the law

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

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

“is not simply about rule by law. Such a proposition would be satisfied whatever the law and however unfair, unjust or contrary to fundamental principles, provided only that it was applied to all. Instead it seems to me clear

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

that the rule of law comprehends some statement of values which are universal and ought to be respected as the basis of a free society.

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

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

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

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

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

Maintaining public confidence in the law

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

Public confidence in the law and governance systems will diminish when the conventional safeguards of law and the legal process are dismantled or reduced so

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

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

that the public sense that justice according to law is no longer assured to all people within the jurisdiction. According to Sir **Brennan** also reiterated that this will “weaken *the unity and fabric of society and exposes us to danger from those who do not share a respect for the rule of law.*”

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

Being part of civil society

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

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

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

Access to justice

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

THE ROLE OF THE PUBLIC PROTECTOR AS AN ARCHITECT OF GOOD GOVERNANCE

Constitutional mandate of the Public Protector

Established under chapter 9 of the Constitution, the Public Protector has the power under section 182 of the Constitution to strengthen and support constitutional democracy by:

- a) investigating any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- b) to report on that conduct; and
- c) to take appropriate remedial action.

The Public Protector's mandate covers all organs of state at national, provincial and local levels, including local government and extends to state owned enterprises, statutory bodies and public institutions. Court decisions are excluded.

Section 182(4) enjoins the Public Protector to be accessible to all persons and communities

The Constitution anticipates mandate expansion through legislation, and legislation passed since establishment 15 years ago has resulted in the Public Protector being a multiple mandate agency with the following 6 key mandate areas:

- a) Maladministration and appropriate resolution of dispute the Public Protector Act 23 of 1994(PPA). The maladministration jurisdiction transcends the classical public complaints investigation and includes investigating without a complaint and redressing public wrongs(Core);
- b) Enforcement of Executive ethics under by the Executive Members' Ethics Act of 1998(EMEA) and the Executive Ethics Code (Exclusive):
- c) Anti-corruption as conferred by the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCAA) read with the PPA(Shared);
- d) Whistle-blower protection under the Protected Disclosures Act 26 of 2000. (Shared with the Auditor General and to be named others;
- e) Regulation of information under the Promotion of Access to Information Act 2 of 2000;(PAIA) and

- f) Review of decisions of the Home Builders Registration Council under the Housing Protection Measures Act 95 of 1998.

Except under the EMEA, anyone may lodge a complaint with the Public Protector against any organ of state and the service is free. The complainant need not be a victim of the alleged improper conduct or maladministration. The Public Protector may institute an investigation on own initiative and does not need to receive a complaint.

The Constitutional mandate of the Public Protector to investigate and report on improper conduct or improprieties in state affairs translates to a multi-pronged approach to handling complaints to ensure

- a) correction of transgressions by organs of State,
- b) a proper diagnosis and correction of any administrative inadequacies, including systemic failures,
- c) that proper redress is provided in cases requiring remedial action.

The Public Protector understands its mandate as involving righting administrative wrongs of the state by redressing service and conduct failure.

- **Service failure** usually involves general maladministration in the form of service delayed or service denied. The case load covers the entire span of the classical definition of maladministration which includes: undue delay; abuse of power; unfair, capricious or discourteous behaviour and the violation of a human right.
- **Conduct failure** includes integrity issues such as unethical behaviour; dishonesty or improper dealings in respect of public money; improper enrichment and receipt of improper advantage; abuse of power; abuse of resources and ultimately; **fraud; and corruption**

Public Protector's role in promoting good governance

Public Protector's relationship with the promotion good governance has a number of dimensions:

a) **Providing information:**

Making information and analysis available to a wide range of stakeholders, in order to stimulate reflection on a situation to which society and government may have got used to. A simple, yet potentially powerful catalyst for building accountability relations is the provision of relevant and accessible information, as that builds the capacity of citizens to have the knowledge and be aware of their rights. This is essential to build accountability relationships.

b) **Reconciling citizens with the State**, especially in situations in which government – citizen relations are weak, broken down or even non-existent. A more ambitious role, beyond brokering, is where changed institutional practices are promoted and facilitated, reflecting sustainable mechanisms and practices for channelling relations between state and citizens.

c) **Support change processes:**

Beyond brokering, external actors can promote those institutional practices, which create space for the development of accountability relations.

d) **Monitoring compliance with and respect for the Rule of law.**

From a rule of law perspective, complaint handling by the Public Protector bolsters the notion that government is bound by rules, and that there can be an independent evaluation of whether there has been compliance with the rules. Government accountability and the right to complain go hand in hand.

e) **Holding the State accountable for unlawful conduct.**

The outcome of most investigations is also concerned with whether there is legal compliance by government. For the Public Protector it is in fact the starting point for an evaluation of the proper approach to administrative justice as envisaged in section 33 of the Constitution, as well as PAJA, which give legislative expression to the fundamental right to administrative action “that is lawful, reasonable and procedurally fair”.

f) Remedying injustice suffered at the hands of the State

The Public Protector often acts as mediator between aggrieved individual and public institutions to ensure fairness and legality in public administration. The Public Protector has an important role in remedying government's administrative injustices or failures and reconciling the people with the state, which helps to divert, dilute and mitigate the anger and extreme frustration.

CONCLUSION

So you see there is a huge difference between this prize giving and those who have won the lottery. Like Atlas those who are here have the burdens of the world on their back. I have probably written 500 or so fit and proper recommendations for those who want to be lawyers and advocated sadly a lot of governance mischief in South Africa is committed by people who are in law who should know better, from falsifying qualifications to other forms of malfeasance. Indeed many of our most shameful findings have the visible or hidden hand of lawyers in their midst. Here I want to include a lot of the things such as indifference, systemic service failure, non-compliance, corruption, overbilling, overcharging, false billing and scope creep in state contracts or tenders.

Many of these people involved are lawyers who are in good standing with the Law society and General Council of the Bar as attorneys and advocates. Surely the lawyers we found to have looted the North West Treasury of R15m should by now have been disciplined. Over the weekend I participated in a conference at the University of Stellenbosch where I discovered that the University Of Cape Town Faculty Of Law requires final year law students to do 60 hours of community service. Prof I think that this is an excellent idea which you should emulate and we would even partner with you as we are already accepting many South African and some international interns. We need to re-engineer the law student's thinking from that *Me, Me, Me* mentality to one that says what can I do for humanity.

The concept of "good governance" is essential for fulfilment of constitutionally promised quality of life for all people in South Africa, particularly through delivery on socio-economic rights and Millennium Development Goals (MDGs);

Maladministration and corruption are key factors derailing service delivery thus delaying fulfilment of our constitutional dream, which includes redressing apartheid imbalances, gender inequalities and other inequalities.

From the overview of the legislation it is evident that government has put in place a comprehensive and regulatory framework to combat corruption, but reports by the Auditor General and research by oversight bodies such as the PSC by has consistently shown a decided weakness in implementation of the framework.

The next phase of the anti-corruption effort should be focused on the successful institutionalization of principles of accountability, integrity and responsiveness in public service, anchored in stewardship service ethos.

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

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

Further let me conclude by saying that you as future custodians of the law wherever your career trajectory takes you owe a much more stringent fidelity to this continent and country. If you of all people fall asleep at the switch we are doomed for lack of a better word. My advice is that trailblazers do not go the road often travelled. Let quote the last stanza of Robert Frost's famous poem *The Road Less Travelled/Not Taken*.

*I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I
I took the one less travelled by,
And that has made all the difference.*

Indeed you too can make that difference.

Thank you.

Adv. K. Malunga

Deputy Public Protector