

## CONSTITUTIONALISM AND THE RULE OF LAW IN THE THIRD MILLENNIUM

"The Life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy avowed or unconscious, even with the prejudices which judges share with their fellow men, have had a great deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it can not be dealt with as if it contained only the axioms and corollaries of a book of mathematics" (Oliver Wendell Holmes, Jnr, Associate Justice, US Supreme Court, Soldier, Jurist and Philosopher, 1841-1928).

### 1. INTRODUCTION

It is with a profound sense of humility and trepidation that I rise to deliver this, my inaugural lecture. Humility because this momentous occasion marks the culmination or watershed of my intellectual odyssey which started in the winter of 1961 when I started with my elementary education. Trepidation because this once in a life time experience symbolizes, in a sense my claim to have indeed arrived to that small and dwindling family of full professors. It is also an edifying experience for me and my family, for as the ancient Chinese sages taught us, a journey of a thousand miles starts with one, single step. For me that single, tentative step into academy was taken in the winter of 1961 when I enrolled in sub-standard A.

Mr Campus Rector Sir, distinguished guests, ladies and gentleman, before I plunge into the subject matter of my lecture, allow me to acknowledge my debt of gratitude to those great many people without whose inspiration, encouragement and support I would not be here tonight. I understand that most of them would prefer to remain anonymous. However, I trust that the rest will forgive me if I single out for mention the following to whom I owe a particular/nay special debt.

First and foremost, I am immensely indebted to my wife, Gertrude, who has been a pillar of strength and support for more than twenty seven years. To our children, Dr Melvin Mbao Jnr, Messrs Wamuwi, Chabala and Mundia Mbao, I am more than indebted for your love, all round support and tolerance of my "marriage to books".

Secondly, my late parents, Joseph Lufwendo Mbao and Alice Monde Mwala, who nursed and nurtured me when it mattered most; who taught me from a very young age the virtues of hardwork, honesty, integrity, respect and empathy for my fellow human beings; the joy of inquiry, the value of doubt, the distrust of certainty and the pleasure of learning. Much later in life, my parents' teachings have been fortified in me by the philosophy of Richard Rorty, one of the greatest thinkers and most interesting philosophers of our time and an exponent of pragmatism<sup>1</sup>. Rorty teaches us that "a good pragmatist is someone who embraces the necessary "contingencies", --- someone who appreciates that there are no constraints on inquiry, save conversational ones, someone who knows that it is useless to hope that objects will constrain us to believe the truth about them"<sup>2</sup>.

It was my late father who introduced me to the rich mosaic and tapestry of the culture of our people, the Malozi people of Barotseland; of the bio-diversity of the flora and fauna of the Barotse Plains; of the medicinal values of the plants and trees of the tropical forests of Barotseland, and of the symbiotic relationship between our people and their physical environment.

Thirdly, I wish to acknowledge the contribution of my sisters Esther and Joyce and of my late brothers Charles and Bruce. In particular Brother Charles' Lecture notes on Criminal Law and Procedure from the West Riding Constabulary Detective Training School, Yorkshire, 1966 England, introduced me to the study of Law. It is particularly sad for me that my parents and two brothers who had been so instrumental in my life never lived to see the fruition of their labours.

I also owe a particular debt of gratitude to the Government and people of the Republic of Zambia who paid for my education from elementary school up to the University of Zambia. I am also very indebted to the Cambridge-Livingstone Trust and the Committee of Vice-Chancellors and Principals, United Kingdom, whose very generous financial support made it possible for me to successfully and comfortably pursue my masters and doctoral studies at Cambridge University, United Kingdom. I am particularly indebted to Mr R.F. Holmes, the then Secretary to the Cambridge Livingstone Trust and Cambridge Commonwealth Trust and Deputy Registrar of Cambridge University and Mr Trevor Gardner, Treasurer of Cambridge University and former Treasury Secretary, Government of Northern Rhodesia, for the most generous financial support which made our stay in Cambridge very manageable.

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<sup>1</sup> Ward, I, "Bricolage and low-cunning: Rorty on pragmatism, politics and poetic justice", (2008)28. No2. Legal Studies, pp281-305.

<sup>2</sup> Ward, *Ibid* n.1 at 284-285.

Fourthly, I am very grateful to all my teachers at primary and secondary school; all my lecturers, tutors and professors in the University of Zambia who taught me the formal discipline underpinning the articulation of ideas and thoughts; how to formulate these ideas in a logical form; how to express them in a manner appropriate for others to follow and understand; how to relate to others and to the professional degree of Bachelor of Laws.

Some of the most profound impressions in my intellectual development and later outlook on life were laid down at this stage. For instance, it was in my first year of study in the University of Zambia that I was introduced to some philosophers and sages who have left an indelible mark on my conscience. To mention but a few: Cicero, Ulpian, Solon, Seneca, Plato, Aristotle, J.J. Rosseau, Thomas Hobbes, Tocqueville, Edmund Burke, Alexander Hamilton, James Madison, Rudyard Kipling, Noam Chomsky, John Locke, Karl Marx, Friedrich Engels, Vladimir Lenin, Frantz Fanon, Andre Gunder Frank, Jean Paul Sartre; Antonio Gramsci; Ernesto Laclau and Father (Dom) Helder Camara, Angela Davis, Adam Smith, Herbert Spencer, etc.

Camara, the late Archbishop of Recife and Olinda, Brazil, who was internationally acknowledged as a “man of God and a defender of the poor”, the father of Liberation Theology, embodied the Church’s option for the poor and defined, through his actions, the intimate relationship between love and justice<sup>3</sup>. From his teachings I learned that charity was not enough. What was needed was social justice. This, in turn, required empowering the poor to be the agents of social change. That poet, mystic and missionary, who brought the ideas of God to the hearts of the people, has had a profound influence on my understanding of the intimate relationship between poverty and human rights, between development and the ravages of growing social inequalities of our time.

One other social scientist who I met in my first year social science readings on cognitive psychology and the study of language, Noam Chomsky, a prominent intellectual, political activist and a stern critic of the United States Foreign Policy, also has had a profound influence on my appreciation of how states and governments behave in the contemporary world. His writings on “Rogue States” and on “the War on

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<sup>3</sup> Dom Helder Camara – Poet, Mystic and Missionary, <http://www.xaviermissionaries.org/M-Life/NL – Archives/99 -N-Lett/BR-Heder Camara/11/3/2008>.

Terror” have had a lasting influence on my understanding of power and its potential abuse for self-interest in inter-state relations<sup>4</sup>.

It was also during my student days in the University of Zambia that I was first enchanted by the travails and mysteries of the ancient calling of law; by the intricacies of the language and nuances employed by the great legal minds whose judgments became our staple diet: What is law? What is Justice? What does duty or obligation mean? Morality? Liberties? Claims? Ownership?<sup>5</sup>

It was much later in my Law School days that I was to appreciate that there was nothing mysterious about law. I was to learn from the legendary Justice Oliver Wendell Holmes, Justice of the USA Supreme Court that:

When we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people then out of court ---. People want to know what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out what this danger is to be feared. The object of our study, then, is prediction of the incidence of the public force through the instrumentality of the courts<sup>6</sup>.

In the same essay Holmes went on to pen down these immortal words about the nature of law, to wit:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience<sup>7</sup>.

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<sup>4</sup> Chomsky, Noam (1996 *Perspectives on Power*, Montreal : Black Rose; See also “The Politics of Noam Chomsky, [http://en.wikipedia.org/wiki/politics-of-Noam\\_Chomsky](http://en.wikipedia.org/wiki/politics-of-Noam_Chomsky). 1/8/2010. See further, The Cambridge Dictionary of Philosophy (1999), “Chomsky, Noam,” Cambridge University Press.; Noam Chomsky, by Zoltán Gendler Szabo; Dictionary of Modern American Philosophers, 1860-1960. (<http://www.chomsky.info/bios/2004-h.htm>).

<sup>5</sup> Hart, H.L.A, “Definition and Theory in Jurisprudence” [1954]70 *Law Quarterly Review*. Pp37-60 at p38-39.

<sup>6</sup> Mr Justice Holmes, of the Supreme Court of Massachusetts, at the dedication of the new hall of the Boston University School of Law, on January 8, 1897, reprinted as “Path of the Law”, [1897] *Haward Law Review* at 457.

<sup>7</sup> Mr Justice Holmes, *Ibid*. n.5 at 459.

He went on to add that “the prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by the law”<sup>8</sup>.

It was on these prophetic words that I embarked on my postgraduate work. At Cambridge University, my supervisor at both masters and doctoral levels, Dr C.F. Kolbert, Director of Studies and Fellow of Magdalene College and Her Majesty's Recorder of London provided me with the much-needed intellectual guidance and mentorship; Dr Roger L. Tapp, Tutor for Graduate Students, Clare College; the late Prof Sir David Williams, formerly Rouse Ball Professor of English Law and Vice-Chancellor, Cambridge University (1989-1996); Prof Kurt Lipstein, Prof R.M.W Dias, Mr Collin Turpin, Senior Tutor and Mrs E Freeman, all outstanding scholars, were very inspirational in my studies.

It is against this background that I now approach my main task.

## 2. CONSTITUTIONALISM AND THE RULE OF LAW

For slightly over twenty-seven years now, I have been “involved” with the study, research and teaching, in its various aspects, of one branch of law called Public Law or IUS Publicum. This is the branch of law which regulates the discharge of public functions and the exercise of state power (for good or worse). At a formal level, public law is concerned with the powers and functions of the principal organs or branches of government: the Legislature, the Executive and the Judiciary. Public Law defines or delineates the powers and functions of these organs; it prescribes the manner in which the powers entrusted to these organs are to be exercised and their functions discharged. It also governs the juridical or legal relationships among these branches of government and inter se and their dealing with the individual subject and other legal persons.

At a more profound or deeper level, Public Law deals with the nature of the State, the way in which a particular polity operates and is governed, the power relations within the State and issues of constitutionalism, the rule of law, respect for and observance of the basic human rights and fundamental freedoms of the subjects.

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<sup>8</sup> Mr Justice Holmes, Ibid n.5 at p461. Other judges who have left a lasting impression on me include Lords Atkin, Reid and Denning and Justices Benjamin Cardozo and Learned Hand.

The first part of my lecture is concerned with the notion of constitutionalism, an ideal state of affairs in which the state is founded on the Constitution as the supreme law of the land. The government itself is a creature of the Constitution. Its powers and functions are particularly delineated and circumscribed by the Grund Norm, the Constitution.

In arriving at my understanding of this concept and to the challenges that we face at the turn of the third millennium, my intellectual odyssey took me back to Ancient Greece and Imperial Rome. Without belittling other ancient civilizations, these two civilizations were the first to speculate about the corrosive nature of power. The Greeks in particular venerated the idea of a Constitution and a State founded on the Constitution, for the Constitution gave them prosperity and equality and the pride of freedom, and never questioned the fundamental laws which regulated the enormous power of the Assembly<sup>9</sup>.

I will now refer to a few ancient sages and to their teachings in order to appreciate the immense contribution of ancient antiquity to our contemporary understanding of constitutionalism and constitutional projects.

## 2.1 Legacy of Ancient Greece

Solon (638BC – 558 BC), sometimes referred to as the creator of democracy, was a poet, philosopher, soldier, merchant, practical economist as well as a social critic. He came to power in revolutionary times with a mission to put an end to the cycles of retaliatory violence that had plagued Greece for centuries.

Solon laid down the foundations for a democratic polity and a system of justice based on the rule of and equality before the law. Hence, the genesis of the modern notion of rule of law can be seen in his reforms<sup>10</sup>.

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<sup>9</sup> McMillin, C.H., Constitutionalism, Ancient and Modern Viewed. 1947. New York.

<sup>10</sup> Walter A. Bordenn, "A History of Justice: Origins of law and psychiatry", [1999] 24. No.2. Newsletter of the American Academy of Psychiatry and the Law. Pp12-14. See also Ancient/Classical History, [http://ancient.history.about.com/od/solon/g/052809\\_Solon\\_of\\_Athens.htm](http://ancient.history.about.com/od/solon/g/052809_Solon_of_Athens.htm). 6/12/2009. See also Lord Acton, "An Address to the Members of the Bridgnorth Institute. "February 26, 1877. See also Aristotle, The Constitution of the Athenians, New York, 1999.

One of Solon's laws became specially famous. He taught that in times of political dissension it was compulsory for each citizen to form and express his judgment. Solon also introduced the idea that a man ought to have a voice in selecting those in whose rectitude and wisdom he was compelled to entrust his fortune, his family and his life. To the poorest classes in society, he gave them a voice in electing magistrates from the classes above them, and the right of calling them to account<sup>11</sup>. Herein lies the seed of our modern concepts of accountability and public probity in government.

Thus, by making every citizen the guardian of his own interest, Solon laid down the basis of a democratic polity. He opined that "the greatest glory of a ruler is to create a popular government". Believing that no man could be entirely trusted, Solon subjected all who exercised public power to the vigilant control of those for whom they acted<sup>12</sup>.

Of course, no discussion of the contribution of the ancient Greeks to the discourse of governance can be complete without reference to Plato, and to his student Aristotle, philosophers and scholars on the best form of government.

Plato (428BC – 347BC) was of the view that if his ideal city state was to ever come into being, it had to be ruled by a Philosopher King or an aristocrat (aristos. "best" and "Kratên" to rule). This dream was captured in this famous passage:

Unless either philosophers become kings in the cities, or those who are now called kings and rulers sincerely and adequately get to philosophize, and there can be found in the same person both political power and philosophy, the crowd of those who are nowadays driven by their nature toward either one exclusive of the other having been forcibly set aside, there can be no end – to the evils in cities, nor me thinks, to those of humankind<sup>13</sup>.

The basis or foundation of Plato's theory of philosopher – kings was the reason of the philosophers as wise and superior beings who, through divine wisdom, knew what was in the common good and who

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<sup>11</sup> Lord Acton, The History of Freedom, Ibid. No 9 at p.3.

<sup>12</sup> Lord Acton. Ibid. n.9 at p.3.

<sup>13</sup> Bernard. F. Suzanne, Plato and His Dialogues quoting Republic, V. 473 c – d. See also Plato, The Republic, New York 1901; Cicero (C. 106-43. BC), Internet Encyclopedia of Philosophy <http://www.utm.edu/research/iep/c/cicero.htm>. 6/23/2008.

were not subject to any controls in pursuing it. He further opined that it was only through true philosophy that it was possible to conceive of justice in public as well as private affairs – thus bringing out “the individual and social character of justice, and the fact that justice implies a “divine share”<sup>14</sup>.

From Plato and His Dialogue, the Laws was his last major piece. It is Plato’s most serious and comprehensive contribution to political philosophy. For our purposes, the most important point Plato made was that the city or government of laws would be “second best”; it would always be weak as compared to an arbitrary form of government because it did not have the freedom to do evil; it would also be precluded to some extent, from doing good<sup>15</sup>. He therefore, conceded that in his ideal state, the aristocracy or rule of the best, must give way at times to government of laws, to which all citizens owed obedience. Plato extolled the virtues of a government of laws in this immortal passage:

Where the law is overruled or obsolete I see destruction hanging over the community; where it is sovereign over the authorities and they its humble servants I discern the presence of salvation and every blessing Heaven sends on a society<sup>16</sup>.

Herein lies the genesis of the basic proposition of our “new” constitutional order to the effect that the government must be given authority by a law for an action that it takes, and that it must obey the law. In a sense, Plato’s dream over two thousand years ago has now been entrenched in our 1996 Constitution, in sections 1, 2 and 33. It is submitted that a modern version of that prophetic view is now part of our constitutional jurisprudence as evidenced by this oft quoted passage in the case of Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council<sup>17</sup>.

It is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. --  
-- It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are

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<sup>14</sup> Bernard, F. Suzanne, Ibid. n.12 at p14. (Republic 11, 368 d – 369b; VI, 492e – 493a).

<sup>15</sup> See generally, Pangle, Thomas, L., 1980. The Laws of Plato, Translated, with Notes and an Interpretive Essay, New York, Basic Books.

<sup>16</sup> Laws of Plato, Translated by Taylor, Dent and Sons Ltd. Op. cit. no.14. and <http://en.wikipedia.org/wiki/laws-Plato>. See also Plato, The Republic, New York, 1901.

<sup>17</sup> 1998 (2) 3 A 374 (CC).

constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law<sup>18</sup>.

Aristotle (384-323 BCE), like Plato before him also speculated about the notion of “intelligent government”. In his Politics, Aristotle explored, *Inter alia*, the questions of who should rule, how regimes and political institutions worked and how they should work<sup>19</sup>. The most important principle he adumbrated was that government by laws was superior to a government by men for the simple reason that even the best of persons could be perverted by power<sup>20</sup>. On the other hand, Law had the advantage of being rational and dispassionate. He was the first philosopher to emphasize the importance of law in the conduct of public affairs in these familiar words:

He who bids the law rule may be deemed to bid God and reason alone rule, but he who bids man rule adds an element of the beast, for desire is a wild beast, and passion perverts the minds of rulers even when they are the best of men. The law is reason unaffected by desire<sup>21</sup>.

Having studied a typology of real and theoretical city-state constitutions, Aristotle classified them according to the number of those who ruled, namely:

- Government of one man : Royalty and Tyranny.
- Government of a few (Aristocracy and Oligarchy).
- Government of many (Constitutional Government and Democracy)<sup>22</sup>.

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<sup>18</sup> Fedsure case, Ibid. n.16 at para 58.

<sup>19</sup> A summary of this seminal work was accessed on 9/8/2009 at <http://www.iep.utm.ed./ans-pol>. Books IV-VI.

<sup>20</sup> In his Book 1, Part II, he observes “For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all; since armed injustice is more dangerous” (<http://www.constitution.org/ari/polit -01.htm>). See also Cicero, on the Republic and on the Laws. Internet Encyclopedia of philosophy. <http://www.utm.edu/research/iep/c/cicero.htm>. 6/23/2008.

<sup>21</sup> The Politics of Aristotle, Translated by Jowett, Oxford, 1885:102. See also Schwartz, B “Of Administrators and Philosopher Kings – The Republic, The Law and Delegations of Power”. [1978] 27. No. 4. North Western University Law Review at P444.

<sup>22</sup> Lord, Carnes (1984). Introduction to the Politics, by Aristotle, Trans. Carnes Lord. Chicago : University of Chicago Press. See also The Internet Encyclopedia of Philosophy, <http://www.iep.utm.edu/ans - pol.at> p.5., see further <http://en.wikipedia.org/wiki/Politics-> (Aristotle). at P5, accessed on 9/8/2009.

In his view, the best constitution was one which blended the three forms so that each element of society participated in the system of government. Aristotle's ideas were later refined by and inspired many thinkers who came after him, in particular John Locke and John Stuart Mill. Building on the works of Aristotle, John Locke was able to postulate about separation of powers under which each part of government, as opposed to each social class, should exercise a different function<sup>23</sup>. This doctrine, traceable to Aristotle, received its most famous formulation by the French Jurist, Charles Montesquieu in his book L' Esprit des Lois, (The Spirit of the Laws, 1748 - written in the middle of the Eighteen Century. Montesquieu was the first philosopher to call for separation of powers into three branches: the legislature, the executive and the judiciary<sup>24</sup>. It is common cause that Montesquieu's views were influential to the founding fathers of the US Constitution, Alexander Hamilton, John Adams, John Jay and Thomas Jefferson, (1776)<sup>25</sup>.

The most salutary lesson we can learn from ancient Greece is that democracy is the best form of government and that the fabric of law, which has been the work of generations, is independent of momentary variations in popular will. Another equally important lesson from the Greeks is that government by the whole people, being the government of the most numerous and most powerful classes, is also an evil as one in an absolute monarchy, and that it requires, for nearly the same reasons, institutions that must protect it against itself, and should uphold the permanent rein of law against arbitrary revolutions of opinion, the transient urges and passions of temporary majorities<sup>26</sup>. How prophetic that in many of our countries, we are currently struggling to come up with the best constitutional architecture to guarantee the sovereign will of the people, guaranteed through periodic elections, which are free and fair. I need not give obvious

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<sup>23</sup> Locke, J. Second Treatise on Civil Government. London: Everyman's Edn. 1690. See also Locke, J, "Concerning Civil Government, Second Essay Concerning The True Original Extent And End of Civil Government, 1690.

<sup>24</sup> See in particular Chapter 6 where he wrote: "In every government there are three sorts of powers: [1] the legislative; [2] the executive in respect of things dependent on the law of nations; and [3] the judicial in regard to matters that depend on the civil law (Translated by Thomas Nugent, Revised by J.V. Prichard. London: Bell and Sons).

<sup>25</sup> See, for example, Madison, The Federalist, No. 47: Separation of Powers within The Federal Government on the concept of "Checks and Balances".

<sup>26</sup> See also Crump, D et al; Cases and Materials on Constitutional Law, New York, Mathew Bender and Company, 1989 pp16-17; Aristotle's Politics, Book VII; The Internet Encyclopedia of Philosophy, <http://www.cep.utm/ans-pol> - Where Aristotle after studying a number of real and theoretical city - state constitutions, classified them according to various criteria. On one side stand The True (or good) constitutions, which are considered such because they aim for the common good, and on the other side the perverted (or deviant) ones, considered such because they aim for the well being of only a part of the city. The Constitutions are now sorted according to the "number" of those who participated to the magistrates: one, a few, or many (from Royalty, Tyranny, Aristocracy, Oligarchy, Constitutional government, Democracy).

examples, but with the exception of a few well managed countries, elections in the vast majority of African countries are often followed by endless cries of election rigging and court petitions.

## 2.2 Republican Rome And Constitutionalism

Like the Greeks before them, the Romans also speculated about the nature of power and in particular the best possible form of government. It is to Republican Rome, after the collapse of the Monarchy, that the idea of a balanced, mixed constitution emerges; that each principle of government standing alone could be abused or carried to excesses and in due course provoke a reaction, namely that monarchies hardened into despotism; aristocracies contradicted into oligarchies and democracies expanded into the supremacy of numbers (or anarchy)<sup>27</sup>.

The Romans, therefore, taught that by combining each element with the others, that would avert the natural process of self-destruction and endow the state with perpetual youth.

Niccolo Machiavelli, notorious for The Prince, in his Discourses Upon The First Ten Books of Titus Levy<sup>28</sup>, was of the view that the distribution of power could be classified into three ways: power exercised by one is a Monarchy, by a few, an Aristocracy, and by many, a Democracy. He went on to assert that there were “good and bad versions of each of these”, and reserved these terms for the good forms, and introduced “Tyranny”, “Oligarchy” and “Anarchy” “for the bad version of rule by one, the few and the many respectively”<sup>29</sup>. His solution for the corruption and oppression of power was in the idea of mutual “checks and balances”<sup>30</sup>. He wrote:

I say, therefore, that all these kinds of government are harmful in consequence of the short life of the three good ones and the viciousness of the three bad ones. Having noted these failings, prudent law – givers rejected each of these forms individually and

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<sup>27</sup> See Plato’s Republic, <http://www.friesian.com/plato.htm.page.10>, accessed on 9/8/2009. See also Plato, The Republic, New York, 1901; Aristotle; The Constitution of the Athenians, New York, 1999.

<sup>28</sup> The Prince by Nicollo Machiavelli, with selections from The Discourses, translated by Daniel Donno, Bantam, 1981, as quoted in <http://www.friesian.com/plato.htm>.

<sup>29</sup> Machiavelli, Ibid n.27 at p.10. See also <http://www.Constitution.org/mac/disclivy> - htm accessed on 10/7/2009.

<sup>30</sup> Machiavelli; The Discourses, Op.cit. n.27 in Book 1 Chapter II where he wrote: “in fact, when there is combined under the same constitution a prince, a nobility, and the power of the people, then these three powers will watch and keep each other reciprocally in check”.

chose instead to combining them into one that would be firmer and stable than any, since each form would serve as a check upon the others in a state having monarchy, aristocracy, and democracy at one and the same time<sup>31</sup>.

Machiavelli's romanticization of the idea of mutual checks and balances, and the teachings of great jurists like Sir William Blackstone (1723-1780) helped shape the intent of the Framers of the United States' Constitution and many other constitutional projects which followed, almost two thousand years later, including our own in South Africa<sup>32</sup>.

Our discussion of the genesis of Constitutionalism will be incomplete if we do not refer to the Middle Ages and the Renaissance. The prevalent idea at that time was that original power was located in God<sup>33</sup>. The government was regarded as having a divine origin and its main function was to apply and interpret pre-ordained law, not to create it. Obedience to law was part of man's obedience to God whereas bad government was God's way of punishing sin.

Medieval legal scholars were of the view that good governance was rooted in the idea of the ultimate supremacy of the law. For instance, the thirteenth century English Jurist, Henry de Bracton, 1210-1265, writing on kingship, argued that a ruler should only be called "King" if he obtained and exercised power in a lawful manner. He went on to observe that: Ipse autem rex non debet esse sub-homine sed sub Deo et sub Lege, quia Lex facit regem, "or" the King must not be under man but under God and under the Law, because the law makes the king --- for there is no rex where will rules rather than lex"---<sup>34</sup>.

In a similar vein, Sir Edward Coke (pronounced "Cook", 1 February 1552 – 3 September 1634), a jurist, Member of Parliament and Lord Chief Justice of England, staunchly defended the rule of law in the face of royal absolutism. He supported individual liberty against arbitrary government and sought to ensure

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<sup>31</sup> The Prince by Nicollo Machiavelli; with Selections from the Discourses, translated by Daniel Donno, Bantam, 1987 as quoted by Kelley L. Ross, History of Philosophy, <http://www.friesian.com/plato.htm> at p11.

<sup>32</sup> Charles Montesquieu, L' Esprit de Lois, 1748, Book XI. Chap.VI. London. Alexander Hamilton, James Madison, The Federalist Papers No 47 Op.cit. n.24. South African Constitution, 108 of 1996.

<sup>33</sup> Lord Acton., History of Freedom In Antiquity, op.cit.

<sup>34</sup> Bracton, Henry de – Vol 2 p.33, also quoted at [http://en.wikipedia.org/wiki/Henry-de\\_Bracton\\_at\\_P7](http://en.wikipedia.org/wiki/Henry-de_Bracton_at_P7). accessed on 9/15/2009. See also Sir William Blackstone's Commentaries on the Laws of England, from the Avalon Project at Yale Law School (1765-69). See Cicero (.106-43- B. C). Internet Encyclopedia of Philosophy. <http://www.utm.edu/research/iep/c/cicero.htm>. 6/23/2008.

that the King's authority was circumscribed by law, observing that "the King is subject to God and to the Law, not to man"<sup>35</sup>.

In one of his most famous judgments, in *Dr Bonham's Case*, (1610) & Co. Rep 107a, 114a – 3, Coke opined:

It appears in our books that in many cases the Common Law will control acts of Parliament, and sometimes adjudge them to be utterly void, for when an act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void<sup>36</sup>.

Coke's commitment to the supremacy or primacy of the ordinary law over acts of Parliament and as a restraint against the arbitrary rule of the rulers spawned the concept of judicial review of legislative acts and administrative actions, immortalised by Chief Justice John Marshall in the leading case of *Marbury v Madison* 5 U.S. (1 Cranch) 137, 2 L. Ed 60 (1803). Writing for a unanimous Court, Marshall wrote that "it is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it"<sup>37</sup>. He added that "certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void"<sup>38</sup>.

Marshall asserted that only the judicial branch of government could be entrusted with the task of determining the constitutionality of legislation passed by the two Houses of Congress: "It is emphatically the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the court must decide on the operation of each"<sup>39</sup>. Marshall was writing at the beginning of the Nineteenth Century. Today, almost two hundred years later, we see the principle of the primacy or supremacy of the Constitution being

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<sup>35</sup> Sir Edward Coke (1 February 1552-3 September 1634), as quoted in [http://en.wikipedia.org/wiki/Sir Edward Coke](http://en.wikipedia.org/wiki/Sir_Edward_Coke), at P2. Accessed on 9/15/2009.

<sup>36</sup> *Dr Bonhams Case*, (1610) & Co Rep 114 a-c

<sup>37</sup> *Marbury v Madison* 1 Cranch. 137 2 L. E.d. 60 (1803) at P9.

<sup>38</sup> *Marbury case*, *Ibid.* n.36 at P10.

<sup>39</sup> *Marbury case*, *Ibid.* n.36 at P10.

entrenched in sections 1 and 2 of our Constitution. The rule of Law and the notion of supremacy of the Constitution are also foundational values of our Constitution<sup>40</sup>.

The late Chief Justice Mahomed underscored the primacy of the Constitution with characteristic grandiloquence in the case of the Speaker of the National Assembly v De Lille and Another,<sup>41</sup> in these words:

[I]t is supreme. Not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide, or eminent its membership; no President however formidable be his reputation, or scholarship, and no official, however efficient, or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution<sup>42</sup>.

The well-known case of De Lille concerned the purported suspension of an opposition Member of Parliament, Patricia De Lille, as a kind of punishment for making a speech on the floor of the House which did not obstruct or disrupt the proceedings in the Assembly but which was nevertheless considered objectionable and unjustified by the Majority of the Assembly. That sort of punishment was not provided for by any national legislation or by the rules or standing orders of the House. In a unanimous opinion, the Supreme Court of Appeal held that the suspension of De Lille in those circumstances did not have constitutional authority and was, therefore, void.

I now move to the second leg of my lecture, that of the notion of "rule of law".

### 3. THE RULE OF LAW: FROM DICEY TO THE CONTEMPORARY ERA

From the Fedsure case cited above, (at P.8), it is evident that our constitutional democracy is founded, inter alia, upon the rule of law. At the heart of this rule is a basic proposition that the government's power is controlled and limited by law. This limitation takes three forms:

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<sup>40</sup> Section 1 of the Constitution, 108 of 1996.

<sup>41</sup> 1999 4 SA 863 (SCA).

<sup>42</sup> At 868, H – J and 869 A.

- A material limitation, related to the respect for and guarantee of fundamental freedoms and basic human rights of the subjects.
- A functional limitation, in the form of the separation of powers.
- A temporal limitation, expressed as the periodic renewal of the sovereign will of the people through free and fair elections.

Of course no discussion of the concept of the rule of law can be complete without reference to the teachings of that great Victorian lawyer, Sir Albert Dicey who, in his book The Law of the Constitution<sup>43</sup>, first published in 1885, wrote that the idea of the rule of law embraced three kindred conceptions, namely that no one should be punishable or could lawfully be made to suffer in goods or body except for a distinct breach of the law, established in the ordinary legal manner, before the ordinary courts of the land; that everyone, whatever his rank or condition, was subject to the ordinary law of the land and amenable to the jurisdiction of the ordinary courts; and that the general principles of the Constitution, including the civil liberties of the subjects, were part and parcel of the ordinary law of the land as developed by the ordinary courts.

Dicey was writing in the twilight of the Victorian age of laissez-faire. He has had his fair share of criticism. The late Professor Stanley de Smith, in his book Constitutional and Administrative Law<sup>44</sup>, was of the view that Dicey's ideas, rooted in Whiggish Libertarianism, were very influential for two generations. Today they no longer warrant detailed analysis. Another harsh critique of Dicey came from the English historian, writer, socialist and peace campaigner, E.P. Thompson, in his polemic entitled: Whigs and Hunters : The Origin of the Black Act<sup>45</sup>. Employing the Marxist tradition, Thompson viewed law as an instrument of class rule, arguing that "law was by definition a part of a superstructure, adapting itself to the necessities of an infrastructure of productive forces and productive relations. As such, it is clearly an instrument of the de facto ruling class : It both defines and defends these rulers' claims upon resources and labour power --- It says what shall be property and what shall be crime – and it mediates class relations

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<sup>43</sup> Dicey, A.V., An Introduction to the Study of the Law of the Constitution, 10<sup>th</sup> ed. London Stevens & Co. 1982.

<sup>44</sup> de Smith, S.A., Constitutional and Administrative Law, London, Penguin, 1999.

<sup>45</sup> Thompson, E.P., Whigs and Hunters : The Origin of the Black Act, London: Allen Lane, 1975.

with a set of appropriate rules and sanctions, all of which ultimately, confirm and consolidate existing class power. Hence the rule of law is only another mask for the rule of a class" ---<sup>46</sup>.

With the greatest hesitation, it is almost axiomatic that some general conception of the "rule of law" is generally used as a yardstick against which laws and administrative actions affecting the liberties of the subjects are measured. As pointed out earlier, the rule of law is one of the foundational values of our Constitution. It is evident from the cases of Pharmaceutical Manufacturers Association of South Africa, In Re Ex Parte President of the Republic of South Africa<sup>47</sup>; Carmichelle v Minister of Safety and Security and Another<sup>48</sup>, and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism<sup>49</sup>, that the conduct of all spheres of government must be consistent with Constitutional values and that the values inform and animate all the obligations and powers conferred by the Constitution upon the State<sup>50</sup>.

In practical terms, by binding the State to the rule of law, organs of State are prevented from using their coercive power without being authorized to do so by the law and the Constitution. A poignant example of this can be found in the case of Billy Lesedi Masetlha v President of the Republic of South Africa and Another,<sup>51</sup> where the cardinal question was whether the President of the Republic had the power to unilaterally alter the term of office of the applicant so as to terminate his appointment earlier than its original expiry date. The majority of the Court, per Moseneke, D.C.J. held, *inter alia*, that since the President had the constitutional and statutory power to appoint and dismiss the applicant, this power included the power to alter the term of office of the applicant. In a tightly argued dissenting judgment, Ngcobo, J., (as he then was) was of the view that the exercise of the power to alter the term of office was constrained by the principle of the rule of law, in particular, the doctrine of legality. In his Lordship's view, the conduct of the President in unilaterally altering the term of office of the applicant was in breach of the principle of the rule of law and thus inconsistent with the Constitution<sup>52</sup>.

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<sup>46</sup> Thompson, E.A., Whigs and Hunters: The Origin of the Black Act pp258, 209.

<sup>47</sup> 2000 (2) SA 674 (CC).

<sup>48</sup> 2001 (4) SA 938 (CC).

<sup>49</sup> 2004 (7) BCLR 687 (CC).

<sup>50</sup> See also S v Makwanyane 1995 (3) SA 391. (CC); Samuel Kaunda And Others v President of RSA, 2005 (4) SA 235 (CC).

<sup>51</sup> 2008 (1) SA 566 (CC).

<sup>52</sup> See para 108 at pp55-56, para 139 at 70. See also Para 174 where the learned Judge is fortified by the earlier decision in Affordable Medicines Trust and Others v Minister of Health and Others, 2006 (3) SA 247.

Our courts have gone beyond the narrow confines of legality to demand that decisions should not only be legally authorized but also that they must, in addition, conform to certain minimum standards of justice or what Justice Ngcobo referred to in the Masetlha case (supra) as Fundamental Fairness<sup>53</sup>. In practical terms, fundamental fairness means that governmental authorities should not abuse their powers. In other words, the exercise of public power should not be arbitrary; it must be rationally related to the purpose for which the power was given; it must be procedurally fair; it imposes a duty on decision-makers to act fairly<sup>54</sup>. The holder of public power must act in good faith and should not misconstrue the scope of his/her powers<sup>55</sup>. Power should not be used irrationally, that is, in situations where decisions are manifestly absurd, or defy logic or are plainly stupid; where irrelevant considerations were taken into account and relevant ones ignored; whether the decision-maker fettered his discretion by self-created rules of policy or contractual undertakings or situations involving abdication of responsibility by unlawful sub-delegation<sup>56</sup>.

Thus, the law is used to limit, contain and control the use of state power, to safeguard our civil liberties and fundamental freedoms. At the same time, it is absolutely important to note that our freedoms can exist only within a constitutional framework anchored on constitutionalism and enforceable law administered by an independent judiciary and enacted by an independent parliament. In a recent case involving the Law Society of the Northern Provinces v Mogami<sup>57</sup>, the Supreme Court of Appeal cogently observed that for the rule of law to be upheld, both the judiciary and the legal profession itself have to conduct themselves in a manner which promotes public confidence<sup>58</sup>. In the context of the emotive debate about transformation of the judiciary and perceived threats to the rule of law, Justice Kriegler has posed the question: Can Judicial Independence Survive Transformation?<sup>59</sup>. Important as that question is, it is only of tangential interest to the main thrust of this Lecture.

It suffices to note that our constitutional democracy, and together with it the culture of constitutionalism and of respect for the law, are still in their infancy. As Justice Holmes observed in the

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<sup>53</sup> At Para 179.

<sup>54</sup> Per Ngcobo J at Paras 179-183.

<sup>55</sup> President of RSA v SARFU 2000 (1) SA 1(CC).

<sup>56</sup> Bato Star Case – [2004] 7 BCLR 687 (CC).

<sup>57</sup> 588/08/2009, ZASCA 107/22 September 2009.

<sup>58</sup> See also Centre for Constitutional Rights, Cons Alert, 10/10/2009.

<sup>59</sup> Justice J. K Kriegler, "Can Judicial Independence Survive Transformation", A public Lecture delivered at the Wits School of Law, 18 August 2009.

quote at the beginning of this paper, “the life of the Law has not been logic. It has been experience”<sup>60</sup>. In the fullness of time these will take root and flourish. In that milieu, the peoples’ sovereignty will not be subdued by abuse of the State’s authority. Government should be based on the sovereign will of the people by a representative body answerable to the people<sup>61</sup>. Furthermore, as Chief Justice Marshall rightly observed in Marbury v Madison (supra), “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury—<sup>62</sup>”. Thus in our constitutional democracy, a subject who is wronged by the state and its agencies must have an effective remedy; an accused person must have a fair trial which involves certainty of criminal law; the presumption of innocence; reasonable rules relating to arrest, accusation and detention pending trial; the right to legal advice, public trial, the right to appeal and the absence of cruel and unusual punishment<sup>63</sup>.

Shelton has perceptively observed that in a practical sense, democracy, the rule of law and respect for human rights are indivisible and interdependent because democracy without human rights and the rule of law is oppression; human rights without democracy and the rule of law is anarchy and the rule of law without democracy and human dignity is tyranny<sup>64</sup>.

Students of Jurisprudence will, of course, be familiar with Lon Fuller’s theory of the inner morality of law in which he makes the powerful argument that law by its nature, must embody certain, basic procedural aspects of morality. Fuller sets eight conditions that laws must satisfy to be worthy of being called “law” namely:

- **Publicity :** The rules of laws must be generally applicable, not a bunch of ad hoc improvisations.

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<sup>60</sup> Justice Holmes (1882).

<sup>61</sup> See further, Doctors for Life International v The Speaker of the National Assembly And Others, 2006 (1) SA 524 (CC); Matatiele Municipality And Others v President of RSA And Others, 2006 (5) BCLR 622 (CC) (1). 2007 (1) BCLR 47 (CC) (2).

<sup>62</sup> At P4.

<sup>63</sup> Section 35 of the Constitution; See Justice S v Makwanyane, 1995 (3) SA 391 (CC); Miranda v Arizona, 384 US 436 (1966). The International Commission of Jurists, meeting in New Delhi, India, 1959 restated these minimum essential contents of the rule of Law. They were reaffirmed at the African Conference on the Rule of Law, Lagos, Nigeria, 1961. See also J. Raz, “The Rule of Law and Its Virtue”, 93 Law Quarterly Review, 195 at Pp200-201.

<sup>64</sup> UN, Note by Secretariat; Corruption and Maladministration; The Right to Development: Study on Existing Bilateral and Multi-Lateral Programmes and Policies for Development Partnership. E/CN.4/Sub.2/2004/15. See also UN, Commission on Human Rights, Interdependence between Democracy and Human Rights, E/CN.4./2005/58, 18 March 2005.

- Prospectivity: rules of law must be announced to those affected by them;
- Comprehensibility: rules of law must be comprehensible;
- Consistency: rules of law must be consistent; they should not contradict each other;
- Possibility: rules of law must not require the impossible;
- Stability: rules of law must not change so frequently as to make reliance on them pointless; law is a constant state of flux is confusing and unsettling.
- Reality: rules of law as they are actually applied must conform to the rules as they are announced<sup>65</sup>.

This lecture is not a learned disquisition on legal theory but the point Fuller is making - which is at the heart of this lecture - is that law is a two-way process: In exchange for the citizen's promise to obey a rule of law, the law-maker promises that the stated rule really is the rule by which the citizen's conduct will be judged. Thus, the citizen's moral duty of obedience is intimately connected to a law maker's moral duty to go by the book in enforcing them.

Of course, the very antithesis and direct opposite of constitutionalism and the rule of law is the pervasive and insidious evil of corruption. Corruption in its many and multifaceted forms, ranging from routine cases of bribery or petty abuse of power to grand corruption involving the amassing of personal wealth through embezzlement of public resources or other dishonest means, distorts good governance and undermines the rule of law and the administration of justice<sup>66</sup>. In the case of South African Association of Personal Injury Lawyers v Heath and Others<sup>67</sup>, the Constitutional Court cogently observed as follows:

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<sup>65</sup> Lon Fuller., The Morality of Law, New Haven, Yale University Press, 1969 Pp33-94  
Cultural Rights, Report by Special Rapporteur, E/CN.4/Sub.2/2004/23.

<sup>66</sup> Mbonu, C, Corruption and Its Impact on the Full Enjoyment of Human Rights in particular Economic, Social and Cultural Rights, E/CN.4/Sub.2.2004/23.

<sup>67</sup> 2001/7 BCLR77.

Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the anti-thesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state<sup>68</sup>.

In similar vein, in the case of Schabir Shaik and Others v The State<sup>69</sup>, the Supreme Court of Appeal made this very important observation:

the seriousness of the offence of corruption can not be overemphasized. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country, we have travelled a long and tortuous road to achieve democracy. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send an unequivocal message that corruption will not be tolerated and punishment will be appropriately severe<sup>70</sup>.

With respect to the important requirement of equality before the law, corruption undermines the poor's access to justice because they can not afford to offer or promise bribes. Most importantly, corruption engenders the culture of impunity since illegal actions are not consistently punished and laws are not consistently upheld. A Nigerian Judge has made this telling observation:

A corrupt judge is more harmful to the society than a man who runs amuck with a dagger in a crowded street. He can be restrained physically. But a corrupt judge deliberately destroys the moral foundation of a society and causes incalculable distress to individuals through abusing his office, while being referred to as "Honourable"<sup>71</sup>.

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<sup>68</sup> Ibid n.66 at p80 E – F.

<sup>69</sup> 2006 (1) SCA 134.

<sup>70</sup> Ibid n.69 at p223.

<sup>71</sup> As quoted by Mbonu. Op.cit. Note 66 and E/CN.4/Sub.2/2005/18, 22 June 2005 at P. 5 quoting Judge Justice Uwaito of the Supreme Court of Nigeria.

#### 4. THE RULE OF LAW ON THE INTERNATIONAL PLANE

On the international plane, the Law of Nations (or Public International Law) has been striving to produce an ordered, and to some extent, just system of international relations. Since the end of the Second World War, the scope and subject matter of Public International Law has not only changed quantitatively but also qualitatively so as to embrace new challenges to our common humanity, including fundamental challenges to the traditional concepts and values underpinning the international legal order<sup>72</sup>.

The challenges demand an international response as individual state action proves inadequate and deficient. These challenges include absolute poverty and its impact on human rights; the HIV and AIDS Pandemic, international terrorism, militarization of the cosmos, human and drug trafficking, humanitarian calamities as evidenced by the devastating earthquake in Haiti. Global warming and its associated problems of climate change and natural disasters. Due to constraints of time and space, I shall refer to but a few.

- Absolute Poverty

Absolute Poverty has been defined as the absence of one or more factors enabling individuals and families to assume basic responsibilities and to enjoy fundamental rights. It is a composite of income poverty, (that is income below a minimum level barely sufficient to meet the basic needs), human development poverty (that is deprivation of food, health, education, housing and social security needed for human development) and social exclusion (that is being marginalized, discriminated against and left out in social relations ---)<sup>73</sup>.

In today's world of prosperity, growth and technological progress, the existence of extreme poverty is considered as an affront to universal moral values and a most pervasive violator of human rights and a major obstacle to their realization. Although some progress has been made on the conceptual level in

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<sup>72</sup> Elias, T.O. New Horizons in International Law; London, Martinus Hijhoff, 1992. A Cassese, International Law, Oxford: Oxford University Press; 2001; Dugard, J. International Law: A South African Perspective, Cape Town, Juta & Co 2005. Of course the Copenhagen Climate Summit on Global Warming, December 2008, failed to come up with a comprehensive, binding treaty on the subject – see <http://www.zeenews.com/CopenhagenSummit09/Story-12/8/2009>.

<sup>73</sup> Arjun Sengupta, "Human Rights and Extreme Poverty", report of an independent expert, UN Commission on Human Rights, E/CN.4/2006/43. See also A Sen, Development as Freedom New York: Knopf, 2000 pp10-11. See also The World Summit on Social Development, 1995.

respect of economic, social and cultural rights, a lot remains to be done to achieve the realization of these rights<sup>74</sup>.

- Prolonged Unresolved Conflicts

These conflicts, especially in the Horn of Africa and the Great Lakes Region, pose a particular threat to human security, dignity and freedom. Human security here is conceived in broad terms as embracing much more than the absence of military threats but including the security against economic deprivation. It offers a guarantee of fundamental rights. It recognizes linkages between environmental degradation, population growth, ethnic conflicts and population movements or dynamics, including the refugee problem<sup>75</sup>.

- The Rise of International Terrorism and Religious Fundamentalism

The issues of international terrorism and the rise of religious fundamentalism are some of the most intractable problems of our time. The fundamental question is how the international community in general and the countries directly targeted by international terrorists can respond to these threats while at the same time respecting and protecting human rights and fundamental freedoms, including those of the suspected terrorists? In the wake of 9/11, we saw the Bush Administration adopting high-handed unilateralism, with the assistance of the so-called "Coalition of the Willing" to invade Iraq and Afghanistan, in the name of "war on terror". In this Bush Doctrine of the Pre-Emptive Strike, there was no middle way: "You are either with us or against us"; the USA reserved the right to seek and, smoke out their enemies in alleged self defence; the UN was for wimps and International Law meant nothing unless the United States saw itself as bound by it<sup>76</sup>. The main elements of the Bush Doctrine were as follows:

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<sup>74</sup> Kofi Annan, formerly Secretary General of the United Nations, In Larger Freedom, A/59/2005; ILO, World Employment Report, 2004-2005.

<sup>75</sup> See Axworthy, L., "Human Security: An Opening For UN Reform", in Price, R.M., and Zacher, M.W., United Nations and Global Security, London: Macmillan, 2004.

<sup>76</sup> National Security Strategy of the United States published on September 20, 2007. The White House (<http://georgebush-whitehouse.archives.gov/NSS/2002/index.html>. 10/13/2009).

The security environment confronting The United States to-day is radically different from what we have faced before. Yet the first duty of the United States Government remains what it always has been: to protect the American people and American interests. It is an enduring American principle that this duty obligates the government to anticipate and counter threat, using all elements of national power, before the threats can do grave damage. The greater the threat, the greater the risk of inaction – and the more compelling the case for anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. There are fewer greater threats than a terrorist attack with WMD. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defence<sup>77</sup>....

In an address to cadets at the USA Military Academy at West Point, on 1 June 2002, George Bush stated:

We can not defend America and our friends by hoping for the best. We can not put our faith in the hands of tyrants, who solemnly sign non-proliferation treaties, and then systematically break them. If we wait for threats to fully materialize, we will have waited too long – Our security will require transforming the military you will lead – a military that must be ready to strike at a moment's notice in any dark corner of the world. And our security will require all Americans to be forward-looking and resolute, to be ready for pre-emptive action when necessary to defend our liberty and to defend our lives<sup>78</sup>.

Fortunately, Bush and his fellow “neocons” are now out of the White House and President Obama has signaled the new administration's desire to change course, “America will defend itself, respectful of the sovereignty of nations and the rule of law”. It has also pledged to revert to multilateralism in dealing with global challenges<sup>79</sup>.

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<sup>77</sup> National Security Council, March 2006, Summary of National Security Strategy 2006. (<http://georgebush-whitehouse.archives.gov/nsc/2006/print/sectionV.html>. 10/13/2009.

<sup>78</sup> President Bush Delivers Graduation Speech at West Point, 1 June 2002 – ([http://georgebush-whitehouse.archives.gov/news/release/2002/06/print/2002\\_06\\_01-3.html](http://georgebush-whitehouse.archives.gov/news/release/2002/06/print/2002_06_01-3.html) - 10/13/2009.

<sup>79</sup> See for example, Council on Foreign Relations, Obama's Speech in Cairo, Egypt, 4 June 2009 (<http://www.cfr.org/publication/19564>, accessed on 6/12/2009.

It is instructive to note, here, that the United Nations has correctly articulated that preventive measures, the investigation and prosecution of acts of international terrorism must be founded on the rule of law and based on internationally recognized human rights principles. In its Global Counter – Terrorism Strategy, the General Assembly of the United Nations has underlined human rights as the ‘fundamental basis for the fight against terrorism’ and emphasized that “states must ensure that any measures taken to confront terrorism comply with their obligations under international Law, in particular human rights law<sup>80</sup>.

The strategy reinforces the view that an effective counter-terrorism approach must combine preventive measures with efforts to address grievances and underlying social, economic and political conditions including the dehumanization of victims of terrorism, lack of the rule of law and human rights violations, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance, while recognizing that none of these conditions can cause or justify acts of terrorism<sup>81</sup>.

- Fundamental Standards of Humanity

One of the major achievements of the post-war years has been the imposition of individual responsibility for international atrocities such as war crimes, crimes against humanity, crimes against peace and security of humankind, genocide and aggression<sup>82</sup>. The International Criminal Tribunals For the Former Yugoslavia and Rwanda, The Special Court for Sierra Leone, The Extraordinary Chambers in the Courts of Cambodia, the International Court of Justice’s decision of 26 February 2007 in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) and the operations of the International Criminal Court have also contributed to the genesis of the notion of fundamental standards of humanity, and to the processes of securing protection of

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<sup>80</sup> UN General Assembly, Global Counter Terrorism Strategy adopted at its 60<sup>th</sup> Session, Resolution 60/288.

<sup>81</sup> UN Global Counter Terrorism Strategy, Ibid n.71. See also General Assembly A/HRC/8/13, 2008, AIHQ/8/14, 2008.

<sup>82</sup> The London Charter of 1945 (the Nürnberg International Military Tribunal: The Tokyo International Tribunal, 1946; Prosecutor v Tadic, May 197, 36 ILM913; Prosecutor v Akayesu, September 1998 (371LM 1401).

victims and combating impunity for violations of international humanitarian Law and International human rights law<sup>83</sup>. All these developments are more than welcome in our globalizing world.

## 5. CONCLUDING REMARKS

Mr Campus Rector Sir, allow me to complete this lecture in the same way I commenced: by thanking some of the people who contributed to this epic journey:

- Prof Muna Ndulo, formerly Dean, School of Law, University of Zambia and now Professor of Law and Director of the African Studies Programme, Cornell University, USA who invited me to join the Staff Development Programme and the teaching staff of that University. As a government sponsored student, I was destined for the magistracy and thereafter possible elevation to Puisine Judge of the High Court, and with a bit of extraordinary luck, the Chief Justice of Zambia. I could also have ended up in the Attorney-General's Chambers, hoping to rise to Solicitor-General or even Attorney General if my political connections were right. All that changed when I joined academia on 1 November 1982. With hindsight I have had no regrets and am sincerely grateful to him.
- The University of North West, Mafikeng Campus where I have spent the most productive part of my life (seventeen years to date). I owe a special debt to the Campus Rector, Prof D. Kgwadi for the singular confidence reposed in me. Twice he has sent me on dangerous missions, first to join a senior management team on a team-building exercise to Mt Kilimanjaro in 2006. That life-altering experience changed my outlook on life in a profound way and my appreciation of the value of teamwork and empathy for my fellow human beings. The physical rigours of striving to reach the summit against all odds taught me the triumph of the human spirit over the pain barrier, that nothing is insurmountable if the human spirit is willing and that failure is not an option. The second dangerous mission was when he sent me to India in 2008 to establish possible linkages with some Indian Universities. Although India is the world's largest democracy with one of the longest Bill of Rights, the threat of mindless violence is always there. In fact within weeks of our return the Grand Taj Mahal Hotel in Mumbai, a sister hotel to the one we stayed in, in

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<sup>83</sup> See Statute of the International Tribunal for the Former Yugoslavia, S C Res 827, 48 UN SCOR (B 217<sup>th</sup> meeting), UN Docs/Res 827, 37ILM 1203; Statute of the International Tribunal For Rwanda, SC Res 955, 49 UN SCOR (3452 meeting), UN Docs/Res/955, 1994. 33 ILM 1589; See also Report of the Secretary-General, "Fundamental Standards of Humanity", A/HRC/8/14, 28 May 2008.

New Delhi and one of the markets we visited, were destroyed by suicide bombers, people who were prepared to use random violence to achieve their objectives, with innocent lives lost. It could have been US. But speaking for myself, I firmly believe in Edmund Burke's teaching that "The only thing necessary for the triumph of evil is for good men to do nothing". Ntate Kgwadi, Ke a leboga.

- To all my colleagues in the Faculty of Law, you are like a family to me. Your support and encouragement at very difficult times in my stay on this Campus are very well appreciated. Indeed some of you, young as you are, are like brothers, sisters and daughters to me.
- To all my colleagues in the university and beyond, including Prof B C Chikulo, Robert Kettles, John Baloro, Evance Kalula The Right Reverend Trevor M Mwamba, D.D, Bishop of Botswana, I cherish your brotherhood, mentorship and for just being there.
- To all my students, you have been an inestimable source of inspiration. I want to single out for special mention the following students of mine who have gone on to become distinguished scholars and lawyers:

Prof Kenneth Kaoma Mwenda, Senior Counsel with the World Bank, Washington; DC; Dr Cephas K. Lumina, Dr Maria Mkandawire; Dr O.B. Tshoosa, now a Judge of the High Court of Botswana; Dr T Balule, the late Dr Percy Mosieleng; Dr J.S. Sedumedi; Dr E.J. Uko; Justice J.A. Khumalo; Mr P.J. Ngandwe; Mr A.K. Funnah; Ms Abena Yeboah-Asuamah; Mr Winston M. Seyama; Ms L.F. Rammule; Mr M.R. Phooko and Ms. M.Z. Mhlanga and many more who have made my life in academic worthwhile. Through my involvement with the African Human Rights Moot Court Programme, I have been very fortunate to make friends with students and lecturers from the breadth and length of the African Continent, from Mohamed The First University, Oujda, Morocco and the American University in Cairo in the North, to the University of Cape Town in the South; University of Dar-es-Salaam in the East to the Universities of Cocody, Cotê D' Ivoire and Universite' Gaston Berger De Saint Louis, Sénégal in the West.

I am in regular touch with most of these students and lecturers. Now as I retreat into the twilight of my life and tranquility of old age, I want all my students as part of my extended family to know that I owe you a life-long debt of gratitude. I hope to keep myself alert by indulging in reading the works of some of

the greatest minds on offer such as Jacques Derrida, Friedrich Nietzsche; Jürgen Habermas, Martin Heidegger, Michel Foucault, Jean-Paul Sartre, and many others, including your own works.

To my Secretary, Ms Letty Tow, my research assistant, Portia Motseki and Ms Thandiwe Manong who word-processed this lecture, I am eternally grateful for your assistance.

Mr Campus Rector Sir, with these humble words, I now proceed to lay claim, formally, to my professorship of Public Law and Legal Philosophy, Faculty of Law, Mafikeng Campus, North West University.

*I thank you all!*