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The Helen Suzman Memorial Lecture **2016**

Shades of the rule of law and social justice

“SHADES OF THE RULE OF LAW AND SOCIAL JUSTICE”

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Introduction and salutations

I am privileged to deliver the Annual Helen Suzman Memorial Lecture. I owe my presence here to Francis Antonie and the Helen Suzman Foundation (HSF). I thank the HSF for the opportunity to pay homage to one I admired in life and now only in respectful memory.

A little more than seven and half years ago, on 1 March 2009 at the Wits Great Hall, many in our land gathered to celebrate the life of Helen Suzman shortly after she had passed on. Again, I was privileged to be asked to pay homage. Part of what I said then bears repetition:

> “I heard of the name Helen Suzman in my township of birth Atteridgeville, in Tshwane. The adults often in hushed tones said she was different from them. They never said who “them” were. Then all liberation movements had been banned. Their leaders were in jail or in exile. I was only 15 years of age and yet I had just become [a] child soldier against apartheid and colonialism. As a teenager I had already resolved like many other youth of my time that apartheid was a monster that we must brawl and destroy in our lifetime. The remarkable thing to us as fiery child activists was that Helen was a woman and the

only member of her party in Parliament and yet she often and openly, inside and outside of Parliament, said apartheid was a monster that must be destroyed.

We shared the passion to destroy apartheid and yet our worlds, I thought, were indeed miles apart. She did not seem to think so. Soon, members of our underground cells were arrested charged and convicted in a mass political trial before the Supreme Court at the Synagogue in Pretoria. Sentences imposed ranged from life imprisonment and five years. I earned myself ten years on Robben Island. Within days of the conviction, Helen Suzman rose in Parliament to express her disapproval and disgust for dispatching so many student activists against apartheid straight to jail in circumstances where no acts of violence were proven. Frankly, she was the only one in Parliament who cared to demur publicly.

Her impatience with the increasing apartheid repression soon became legendary. In the same year, in 1963, Robert Mangaliso Sobukwe, the President of the Pan Africanist Congress, had just finished his jail term after his conviction arising from the pass protest of 1960. John Vorster, the Minister of Justice of the time, brazenly moved Parliament to authorize Sobukwe's indeterminate detention on Robben Island. In a monumental speech of protest Helen Suzman reminded Parliament, our country and the world that no one should be detained without trial; that Parliament is not a court of law and may not itself impose criminal sanction; that no one should be condemned without being heard; that only courts of law bear that power and that, even so, only after due process and a fair trial; that no one may be imposed an indeterminate sentence of imprisonment; and that, in any event, the protest for which Sobukwe was convicted was legitimate because pass laws invaded the dignity, the right to equal worth and to free movement and the right to work of all disenfranchised African people. The National Party majority arrogantly booed her and ignored her. Parliament passed the Sobukwe

detention clause every year for eight years and every year for eight years Helen Suzman renewed her objection to its passage.

For every year she paid a visit to Robert Sobukwe at his solitary residence of detention. She visited Nelson Mandela and the Rivonia trialists in solitary confinement on Robben Island regularly. Besides my mother who came for those notorious 30 minute visits, every 6 months, and Ms Lettie Marsh, Helen Suzman was the only other woman I set my eyes on Robben Island. She had the guards to insist that she wanted to see the actual cells where political prisoners were kept. She had an abiding concern for the lot of political captives. She raised constant questions in Parliament about their condition and supremely for me personally, she supported our right to study whilst in prison.

Once out of prison a virtual love affair developed between Helen and me. We served together in a committee that raised funds to finance the further study of political prisoners still on Robben Island. We served together on the first IEC that ran our elections in 1994. My wife, Kabo, and I have had a good few dinners at her residence. She insisted that I must have at least one whisky a day. “It gives you long life”, she claimed. When I became Chancellor at Wits University she sat in the front row next to my mother in the Great Hall.

We must wonder and admire this Helen Suzman in full flight. She interceded for a fellow citizen in distress for no immediate gain but certainly moved by the highest tenets of human decency which today form the bedrock of our adorable Constitution.”

That is the Helen Suzman of my world. Her life was filled with courage of principle and prompts me to ask difficult questions about shades of rule of law in our democracy.

The rule of law: basic principles

But what is the rule of law? I think it is the philosopher Thomas Hobbes who foreshadowed the need for the rule of law when he warned that life outside a social contract is "nasty, brutish and short". Interestingly, there is no universally agreed definition. Albert Venn Dicey, the British jurist and constitutional theorist, is often associated with the early formulation of the rule of law principle. He argued that the protection of basic rights was the purpose of the rule of law, and that government was required to act within the law.[1] In his view, the rule of law embodied three concepts: supremacy of the law, equality of all citizens before the law, and the principle that the rights of individuals must be established through court cases.[2] Then, these were revolutionary thoughts in a world of monarchs and feudal lords.

A distinction can be drawn between formal and substantive notions of the rule of law. A formal articulation of the rule of law translates to, first, the existence of a rule-oriented legal system and, second, adherence to these rules. This approach emphasises the existence of formalised norms rather than their purpose and substance. On this take, the threshold for good law is superficial and low. The rule must be law properly adopted by a competent authority; the law must be made public. It must be clear and understandable and must ordinarily regulate future conduct. On this notion of the rule of law, the substance of the law is immaterial and the fairness of outcomes it produces is irrelevant. This shade

[1] Currie & De Waal *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2005) at 10.
[2] Mbaku "Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law" (2013) 38 *Brooklyn Journal of International Law* at 983.

of the rule of law is animated by legal positivism. Its adherents refuse to take the intellectual and practical responsibility for the outcomes of bad law, however unfair. This legal fundamentalism leads to the familiar escapism that "the law is the law, even if it is an ass." Well plainly, the law should never be an ass. At a bare minimum, law must be rational.

The apartheid legal system was a prime example of legal positivism that had gone wrong. A legal system that trampled on fundamental rights and freedoms, that was devoid of normative content, that was unjust; and yet its legal theorist still claimed that to be in accordance with the rule of law. Apartheid judges too escaped from their judicial consciences by claiming a duty to enforce unjust laws. In effect, rule of law had been replaced with rule by law.[3] The law authorised racism, inequality, indignity and social and economic exclusion.[4]

In our democratic project we make a different jurisprudential election. We have, open-eyed, picked a substantive shade of the rule of law that focuses, not on the existence of rules, but on their content, purpose and impact. More explicitly, the content of the rule, the purpose for which it is harnessed and the impact it has, direct or indirect on inhabitants, must not offend the normative scheme of our supreme law. In particular, all law and conduct must be respectful of constitutional constraints and injunctions.

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[3] Devenish "The rule of law revisited with special reference to South Africa and Zimbabwe" (2004) 4 *TSAR* 675 at 738.
[4] Id.

The substantive notion of the rule of law within a democracy is not high science. All law, whether in the form of the Constitution or other law, is an expression of the democratic will. It is enacted to further public good and the public interest. Its proper observance furthers and deepens the democratic project. In turn, its violation diminishes all of us in some way. It undercuts the promises that we have made to each other as inhabitants of the state, through legislative and other measures.

The United Nations definition of the rule of law provides a ready example of the substantive approach.[5] The rule of law—

> "refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency."

This stance on the rule of law is mirrored not only in the constitutions of individual African nations, but in African Union protocols that apply across our continent.[6]

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[5] As defined by the United Nations, and available at http://www.unric.org/en/unric-library/29067.

[6] To provide just a few examples, the preamble of the Constitutive Act of the African Union states that the member countries are determined "to ensure good governance and the rule of law". Article 4(m) of the Constitutive Act states that the African Union must function in accordance with "respect for democratic principles, human rights, the rule of law and good governance". The African Charter on Human and Peoples' Rights entrenches the equality of all persons before the law. And perhaps most significantly, the African Charter on Democracy, Elections and Governance commits member states to rule of law principles. These include adherence to the "principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order", the independence of the judiciary,[6] and the "constitutional transfer of power". Clearly, as a normative matter, the rule of law has an honourable place in African legal systems.

The rule of law is not, as some argue, a post liberal fetish or a mere artifice to entrench domestic and global economic inequality. It is an entitlement of all Africans. It is a principle that Africans have demanded from colonials and their governments time and again, and one that our citizens deserve. In the mid-1980s and early 1990s, mass demonstrations led by grassroots organisations occurred across Africa, with the purpose of ousting dictatorial regimes and implementing democratic reforms.[7] In demanding political transformation – comprising functioning institutions, public accountability, an end to corruption, an enabling environment for economic growth, and peaceful coexistence between religious and ethnic groups – these men and women were in essence rejecting arbitrary rule by men and women in favour of the supremacy of law.[8]

Africa reflects varying levels of commitment to the rule of law. As we have seen, the existence of a formalistic rule of law does not guarantee respect for basic human rights. Constitutionalism requires more than the mere existence of a constitution. In order for democratic government to take root, the constitution must be fully implemented. This means that its provisions must be respected by all, and upheld by the courts. Where this does not occur, troubling consequences sometimes follow.

Other factors can also dilute the rule of law. Among the most important is the lack of resilient and effective democratic institutions including an independent judiciary and a vibrant civil

[7] Mbaku above n 2 at 996.
[8] Mbaku above n 2 at 996-7.

society formation. While our continent as a whole has faced significant social, economic and political upheaval during the post-independence period and the decades that have followed, some countries have weathered the storm more effectively than others. In many African nations, independence was limited to political and civil rights, with the stark omission of human rights. In others, political, civil and human rights were constitutionally guaranteed but not enforced. And still, others fell prey to dictatorships where substantive legal rights were almost non-existent.

While some nations face significant obstacles to realising the rule of law, others provide grounds for genuine optimism. The emergence of a democratic South Africa, for example, has inspired countless people in our continent and around the world. Our Constitution breathed new life into the rule of law by entrenching it as a founding value.[9] The rule of law is now a standard against which conduct and law can be tested in South Africa,[10] and has both procedural and substantive elements. In terms of procedural compliance, legislation must be expressed in a clear, accessible and reasonably precise fashion.[11] Substantively, there must be a rational relationship between the legislation and a legitimate government purpose.[12] And legislation of general application may limit a fundamental right only when it is reasonable to do so in a democracy of our kind.

[9] Section 1(c) of the Constitution.
[10] Nienaber "Appointment" in *LAWSA* 2 ed (2003) vol 2(2) at para 181.
[11] Joubert "The Rule of Law" in *LAWSA* 2 ed (2012) vol 5(3) at para 20.
[12] Id.

But here is the rub and what I truly want to talk about today. There is another shade of the rule of law that is inspired by the quest for social justice. This version of the rule of law is looked at askance by lawyers and others who often cherry pick the benefits of the substantive version of the rule of law but resist or choose to ignore the social justice promises of our supreme Constitution.

Social justice is a vital component of this shade of the rule of law. It is inspired by the genesis and scheme of our Constitution. Its starting point is that the Constitution is a post-conflict pact. It was crafted on the ashes of the devastation of colonial rule and apartheid that had erected vast inequality and social inequality. At the start of the democratic project the newly enfranchised were poor, landless, unskilled and without means of production. The ruling elite of apartheid had all that. The plain design of the Constitution was not to perpetuate inequality but combat it as it inducted social reconstruction. In other words, ours is a transformative Constitution. Its mission was never to entrench the social devastation of the past. It set up “social justice” in the preamble as one of its objects. In its founding values the Constitution requires us to strive for equality. In the equality clause it authorises restitutionary measures; the state is required to take legislative and other measures to grant progressive access to health, housing, education, water, social grants and other social goods. In short, the democratic project must entail a marshal plan on multiple fronts to push back the frontiers of racism, poverty and inequality.

But these core and essential claims of social justice do not engage the courts as much as they should. At the outset, courts developed admirable jurisprudence on equality and on an assertion of socio-economic rights and on claims on restitution of land rights. Claims of this sort in the courts have nearly died down. I am not suggesting that struggles for social claims belong only to the courts. What I am suggesting is that courts tend to give one a peep into the kinds of societal strives that are likely to be prevalent.

Outside the familial disputes, criminal justice and commercial contestations, *lawfare* has assumed the form of party political contestation and indeed intra-party rivalry. Even public interest litigation groups appear to have shifted their focus on misgovernace rather than on issues of social distance, economic growth and unemployment and resultant inequality. Plainly, courts have become sites of resolving disputes on political power and rivalry absent other credible sites for mediating political strive. A properly functioning democracy should eschew lumbering its courts with so much that properly belong at other democratic sites or the streets. We will over time over-politicise the courts and thereby tarnish their standing and effectiveness. That is true also of manifold and costly commissions of enquiry headed by judges only to give respite to dithering political or state functionaries.

Perhaps we should again, as we did at the advent of democracy, engage courts and other institutions of democracy on issues of social justice. We must revert to engaging the rule of law for social advancement. We must find causes that are likely to alter the social fabric for those who will never afford to step into any court.

Even more pressing I think, our country needs increased social mobilisation. Social movements are already doing good work but I think much more grassroots mobilisation is warranted on carefully selected social struggles close to vulnerable communities. Issues on land equity, homelessness, access to healthcare and to liberating education; safety security, violence and access to adequate policing function; issues on the environment and sustainable energy and on access to public information. Social movements should be careful not render powerless communities they hope to support. Out of those struggles a progressive resort to the rule of law will emerge.

This is another way of saying we have to go on a fresh search for personal agency and indeed collective agency. After all, in the end, the highest form of public accountability is not in the courts, or in the work of the Public Protector or of the Auditor General, but it is electoral accountability which would be useful only when communities understand and embrace what is truly in their interest.

Thank you for listening and good night.

God bless.
Dikgang Moseneke