

The Role of Government Lawyers In enhancing Democratic Governance and the Rule of Law

Peace and democratic government under a rule of law founded on equality of human rights has long been the hope and goal of all peoples and every nation. In 1948, some three years after two world wide wars in 40 years, the General Assembly of the United Nations proclaimed a new start on this goal with the Universal Declaration of Human Rights.

It commences with the assertion that the recognition of the dignity and rights of all members of the human family is the foundation of freedom, justice and peace in the world and the implementation of these rights must constitute the goal, the “*common standard of achievement for all peoples and all nations.*” It calls for all, for every individual, everybody, and every organ of society to strive for the universal and effective observance of these rights. To secure that purpose, to overcome tyranny and oppression, those rights must be protected by the Rule of Law.

The Rule of Law is a primary concept of political philosophy and jurisprudence. From the times of ancient Greek and Roman civilizations to the present, men have advocated rule under laws that provide for the rights and duties applicable to all, rather than laws that entrench authority and advantage to the few.

A modern summation of the Rule acknowledged by all United Nation member states was set out by the Secretary-General in a report to the General Assembly in 2004.

“ 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 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.”

(S/2004/6/16) Report of Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies

The overall acceptance of these principles, through laws adopted by a nation to be administered through government departments and institutions accountable under law by a professional, ethical public service make for good governance.

But describing principles does not establish Good Governance or the Rule of Law. The reality of these comes in the quality of the laws that are promulgated and how those laws promote the, and most importantly is their effective implementation and acceptance by the governed.

A Constitution records a compact by the people that they will be ruled by and abide by the fundamental principles as expressed in laws that reflect their aspirations for equality, peace and justice. Ideally, the laws of a nation should reflect the values and traditions of its people. Laws based on a consensus of these can only provide greater confidence in those laws and the institutions that implement them. Similarly it will be long term, impartial administration of such laws and processes that enhances acceptance and respect for them.

The starting point then, is a constitution under which all are accountable. A constitution that declares a commitment to the promulgation of human rights establishes clear and open procedures for democratic government and insists on an independent judiciary. These, as well as background laws and processes that enable and encourage participation in the life of the nation by its citizens.

Each of the countries represented here today has its own constitution consented to by its citizens. Here in Papua New Guinea the Constitution was prepared in consultation with the people. A Constitutional Planning Committee traversed the country seeking acknowledgment that its provisions reflected the traditions and values of all before it was formally adopted at Independence.

This Constitution declares that the source of all authority lies with the people. *“All power belongs to the people acting through elected representatives,”* It declares the basic human rights and provides for every citizen, everybody to have equal rights of participation in the political, economic social, religious and cultural life of the country. It calls for equal access to legal process and public services. For all of Papua New Guinea’s natural resources to be conserved for the collective benefit of all citizens.

It establishes the National Government; Parliament, the Judiciary and Executive and declares the doctrine of separation of powers.

“In principle the respective powers and functions shall be kept separate”
(Section 99 Constitution)

Below the Constitution, are the Organic laws and the statutes that provide the processes governing all the other multifarious activities of a nation.

With these laws constitutionally promulgated, what then is the role of government lawyers? What is their responsibility for good democratic governance?

Simply stated, the role of government lawyers is to be the frontline guardians of the Rule of Law. They must be advocates and teachers responsible for ensuring that the rights of citizens are maintained. They must also be executives in the processes of government and government institutions, constitutionally established. Essentially, they are trustees of the Rule of Law.

The scope of the duties, and authority of the Attorney – General, the Solicitor – General, Public Prosecutor and Public Solicitor are sufficiently defined by the laws creating them, that they need no further analysis here.

Likewise government lawyers under those statutory officers take their primary role from them. As lawyers in practice, with the Government the only client they provide legal advice, acting for the State in litigation and in commercial matters, prosecution and legal representation in trial of offences.

But as well as those officers, there are also lawyers engaged in a country's many government departments and institutions that are responsible for administration and development of the country in pursuit of the National goals and directives.

They are at interface of governance and people. They are public officers critical to ensuring that the country's laws work; and the people are served as intended. While they are officers of the executive government and committed to the department in which they are engaged, they are, nonetheless, like all public officers, constitutionally responsible to the people; particularly to those who seek government services.

They must ensure that the processes of the statutes and regulations administered by their department actually work and are adhered to. They see that granting of licences, permits and contracts, are fairly and honestly carried out compliant with the governing statute. Even more fundamental is the need for ensuring integrity of electoral processes. They provide the means for the expression of the will of the people.

Prime examples of the processes that lawyers should protect can be found in those departments or organizations that deal with tendering for supply of goods and services to the government. Departments that are entrusted with applications for the disposition of state land, for residential or commercial purposes, public housing, the grant of licences or permits such as for timber, fisheries, mineral exploration and mining.

The importance of these processes lies in the fact that they validate the grants, licences, permits, contracts and other exclusive advantages they provide from dealing with the State.

Failure to ensure compliance with the procedures appropriately not only leads to dishonest acquisition of State assets property or other advantage but also provides that person with claims of legitimacy when resisting efforts by Government to overturn a discovered wrongful grant. As well as the inevitable loss to the State, there is, importantly, the serious loss of the People's confidence in the rule of law.

The confidence people have in the laws that govern them is closely linked to their knowledge of them and the respect they have for the institutions administering them. When people know the law they are quick to recognize breaches and corruption of those laws and expect appropriate response by the administrator. Failure of adequate proper response leads to contempt of the laws.

At its worst is corruption of the processes due to the connivance of public officers. How often have the people learned of licences granted without statutory notice calling for public tender; or without any recognizable merit or qualification in the licensee, or unbelievable claims and even more incredible settlements negotiated by public officers. Many public enquiries have so often shown government departments and or government officers have not met their obligations to protect the funds of the State or to advise and defend the interests of the State to an acceptable standard

Failures by Departments to respond to claims have resulted in Default Judgments by the Courts in favour of the claimant. A Default Judgment converts any writ no matter how outrageous into a judgment debt. This means that any uncontested unmeritorious claim, which should have been tested in Court by cogent evidence, by failure act in time or to respond at all, is turned into a public debt.

“The effect of entry of judgment for liability, is that it resolves all questions of liability for the matters pleaded in the statement of claim. Once default judgment is entered the facts as pleaded-----must be regarded as proven.”

(WS 1232/98 Kapil v.Police & State. Per Lay J.)

Claims have thus been legitimised without any challenge or question as to whether they were founded on fact or fiction. But worse, even with court orders for damages in those cases to be assessed by the Court, because it is open to parties to determine damages themselves, the Court orders have been by-passed with claimant and government officials agreeing to a compensation figure themselves. They thus avoid any examination of facts or court assessment; yet obtain the Court seal of authority by filing consent orders for endorsement of the agreed sum.

It is not surprising that such procedure has been used or misused to enable claims that should have failed, to succeed, simply by lack of opposition by the public officers tasked to do so.

Watching for and prevention of such abuses of process is integral to the role of the government lawyer. Of course government lawyers are not the only officers involved in these processes and may not be personally responsible for them. However, with their knowledge of the law, commitment to professional ethics, and simply their authority as government officers they are front-line guardians. They are able to play a crucial, role not just ensuring the standards are upheld, securing compliance with the law but also taking opportunity to make the law better known to the people.

The great majority of public officers demonstrate high ethical standards and sound professional ability determined to carry out their duties impartially and with integrity, despite the frustrations of observing unchecked corrupt behaviour by some fellow officers.

Reluctance to challenge and report misconduct or to enforce discipline is plainly caused by uncertainty of support and fear of retribution. Those concerns can be addressed by statutory protection for those who confront corruption and enforce rules of conduct.

It is gratifying to learn that here in Papua New Guinea such legislation will soon be put before the Parliament. A whistleblowers act will be an important weapon in fighting corruption. But it will not change or replace the fundamental duty of all officers - and particularly lawyer officers – to confront corrupt practices whenever they arise.

With Good Democratic Governance, every citizen, everybody and anybody has the right and opportunity to participate in the life of the nation under the protection of the Rule of Law. The corresponding duty for all is that everybody has the responsibility to honour the law. Nobody is exempt.

There is a parable, which may be an apt summary of the responsibilities of citizenship. It is a shortened version of a poem by Charles Osgood, which is appended to these notes. The parable, with slight amendment speaks as follows: -

The Parable of Responsibility

Everybody, Somebody, Anybody and Nobody were members of a certain group of citizens. There was an important job to be done. It was the upholding of the Rule of Law and **Everybody** was asked to do it.

Everybody was sure that **Somebody** would do it.
Anybody could have done it but **Nobody** did it.
Somebody got angry at that, because it was **Everybody's** job.
Everybody thought **Anybody** could do it, but
Nobody realized that **Anybody** wouldn't do it.
It ended up that **Everybody** blamed **Somebody**, when **Nobody** did what **Anybody** could have done.

It seems to me therefore, that the role of the Government Lawyer is joint with **Everybody** to uphold the Rule of Law, and to be the **Somebody** who **will** do so, if **Anybody** falls down on the job even if there is **Nobody** else. I commend all government lawyers to this role.

Appendix

A Poem about Responsibility

There was a most important job that needed to be done
And no reason not to do it, there was absolutely none
But in vital matters such as this, the thing you have to ask
Is who exactly will it be who'll carry out the task?

Anybody could have told you that everybody knew
That this was something somebody would surely have to do
Nobody was unwilling; anybody had the ability
But nobody believed it was their responsibility,

It seemed a job that anybody could have done
If anybody thought he was supposed to be the one,
But since everybody recognized that anybody could,
Everybody took for granted that somebody would.

But nobody told anybody that we are aware of,
That he would be in charge of seeing that it was taken care of,
And nobody took it on himself to follow through,
And do what everybody thought that somebody would do.

When what everybody needed so did not get done at all,
Everybody was complaining that somebody dropped the ball.
Anybody could see that it was an awful crying shame,
And everybody looked around for somebody to blame.

Somebody should have done the job,

And Everybody should have,
But in the end Nobody did,
What Anybody could have.
