THE RULE OF LAW AND THE POWER TO PROSECUTE

It is a great honour to be the first Rabinowitz Fellow for a two special reasons. First, I have the greatest admiration for Bennie and Shirley Rabinowitz - for their many virtues, including their legendary generosity and their lifelong commitment to a just South Africa . The fact that Shirley is a cousin is an interest which, leading counsel have assured me, I have no reason to declare and even if they are wrong it is far too late now to recuse myself from this lecture, as much as you may want to get to dinner sooner rather than later.

Second, it is always just the greatest pleasure to return to my alma mater and this great law faculty. When I was a student here the apartheid apparatus was being ruthlessly constructed and UCT was at the forefront of those who kept alive the values of equality, democracy, human dignity and the rule of law.

Even today those values need constantly to be asserted. There is a great deal of talk about the new imperialism; the foisting on countries with different traditions the so-called 'European' or 'Western' models of governance. What exactly is meant by that? In Europe, or the West, or anywhere else there are, fundamentally, two models of governance when it comes down to it: democracy and tyranny.

Of course there are different versions of democracy and tyranny, suited to a particular country's own customs, traditions and past history.

But we have to remember that when reference is made to European values, many countries in Europe opted for many years for tyranny, rather than democracy. Some still veer in that direction. So you can take your pick of 'European' values. And there really is no middle way. If you are not democratic your are, plain and simple, tyrannical or despotic. That's the choice that Europe offers. And no other continent is any different.

The difference between any tyranny and any democracy (European, Western, Asian, or other) is stark. The fundamental difference is that in a democracy, leaders can not only be voted out every so often (that's just a part of it), but in addition there is a presumption that government is bound to treat everyone with equal respect and to uphold everyone's equal dignity. In a tyranny the highest respect is accorded not to the individual but to the public interest as defined by those who hold power. And one of the most significant differences between tyrannies and democracies is the notion in democracies of the rule of law, proclaimed under section 1 of the South African constitution as a founding value of this country.

Tyrannies often claim that they meticulously abide by the rule of law, but this is a misnomer: they really mean rule by law. China claims that today. It is often said that the old South Africa met the test of legality because its practices were authorised by law. The rule of law does indeed require that everyone shall be held to account only by settled and knowable rules, but it has a richer texture than that by far.

It also insists that power should not be exercised in a way that is arbitrary or irrational. And there is a cluster of other meanings around the rule of law, another central requirement of which is access to justice, so that detention without trial, for example, violates the rule of law by virtue of the fact that the accused have not had the opportunity to challenge their detention in a court of law. Judicial independence is also linked to the rule of law, because how can a trial be fair if the judge is not impartial, or in some way beholden to the person on one side of a case (or to the government, when the government is a party to the litigation).

One of the most interesting recent developments in English law has been the way the rule of law has been read into the exercise of power. It is sometimes

thought that because the UK does not have a codified constitution and therefore is founded on the notion of the sovereignty of parliament, that the rule of law has not part to play. That is not true; it has been firmly established as a constitutional principle which, unless a statute clearly speaks to the contrary, is presumed to apply to the exercise of public power. Thus where prisoner Mark Leech was not permitted by the prison authorities to communicate by letter with his lawyer, he sought judicial review of that decision and when the case came to be decided by the Court of Appeal Lord Justice Steyn, a former graduate of Stellenbosch University as it happens, and the Cape Bar, who later became one of the most distinguished Law Lords, held that, contrary to the constitutional principle of the rule of law, Leech had wrongly been denied access to justice. The justification for the principle under is of course that the rule of law is inherent in any democratic constitution, codified or not.

Does the rule of law require everyone who breaks a law to be held to account? If not, under what conditions may anyone be exempt from prosecution?

[Please note that I am discussing here the prosecutor's discretion <u>not</u> to prosecute, rather than the decision to prosecute, which, if tainted by illegality, can normally be challenged at the trial which follows].

Popular talk has it that there must be 'law and order'. This phrase sometimes has authoritarian connotations, suggesting harsh punishments and even encouraging vigilantism. However, there are also three connotation of 'law and order' which fall squarely under the principle of the rule of law: First, that existing legal rules must be obeyed. This tenet speaks both to members of the public (who are expected to obey the law) and to public officials (who are expected to enforce the law). The second connotation, also within the scope of the rule of law, requires that those who do break the law should not be permitted to do so with impunity. And the third connotation requires that the law must be

enforced "without fear or favour", meaning equally and regardless of the status of the defendant or any threats to the decision-maker or benefits offered.

If our law enforcement officers fail systemically to prosecute violaters of the law, the rule of law is being violated. But does that mean that law must be fully enforced? Some places do have a policy of full enforcement, often known as 'zero tolerance', in an effort to deter crime.

In parenthesis here let me say, just for the avoidance of doubt, that a 'shoot to kill' policy does not accord with the rule of law. Quite the opposite. In the absence of self-defence, which may justify proportionate violence, a shoot to kill policy flagrantly violates the rule of law as it amounts to an arbitrary and extreme punishment without trial.

Obviously, even with a policy of so-called zero tolerance, it is neither possible, nor even desirable, to have full enforcement of the law. I doubt whether anyone here would want the prosecution of a doctor who had exceeded the speed limit while speeding to the aid of an accident victims late at night on an empty road. And the prosecution process is inevitably constrained by limited resources, not to mention limited prison space.

So what are the conditions which, while upholding the rule of law, nevertheless justify the decision **not** to enforce the law against a person who has violated it?

Before answering that question we must ask what structures are needed to ensure fair and adequate prosecutions. There are two possible models.

In some countries there is complete independence of the prosecutor. This is true not only in countries such as Italy where the prosecution is part of the judiciary and where each prosecutor is individually independent, but also in countries such as Ireland, Israel, India and some Canadian provinces and Australian states.

A second model is that adopted by England and countries such as Australia and New Zealand. In England there is an independant Director of Public Prosecution, who heads the Crown Prosecution Service, and also a Seriou Fraud Office and a Revenue and Customs Prosecution Office with separate directors. However, the the Attorney General has the ultimate responsibility for the decision whether or not to refuse consent for prosecution on the ground of public interest and may direct the other Directors accordingly. The Attorney (now Baroness Scotland) is a member of the government who sits in one or other house of parliament and takes the ruling party whip.

Some argue that there is no need for the prosecutor to be completely independent, as if he were a judge. It is said that where the prosecutor lays a charge, the defendant will later have the opportunity of defence before a judge. And where the prosecutor decides not to lay a charge, he is entitled, as we shall see, to take into account matters of public interest, which inevitably involves the prosecutor in matters of policy. For that reason, it is argued, he should not be completely insulated from political affiliation. On the other side of that argument, however, there is a growing consensus internationally that in a democracy the decision to initiate a prosecution should not be influenced, or seen to be influenced, by partisan considerations. This is because the setting in motion of a prosecution not only adversely affects a person's dignity, status and reputation, but can lead to that person's punishment ,loss of status or loss of freedom. Decisions of that significance to the individual should therefore patently be seen not to be driven by narrow political considerations , but only by an objective consideration of whether the person is likely to have breached the law. Such a decision should therefore best be taken by someone clearly separated from partisan political attachment.

For that reason, there is a lively discussion in UK at the moment about the Attorney General's political role. In favour of that role, it is contended, which

is indeed true, that the UK Attorney General, by long convention, stays at arms length from party politics. Her role is in practice functionally independent in its day-to-day activities. Against that it is argued that, however independent and impartial she is in fact and practice, some of her decisions are vulnerable to being interpreted by the public as driven more by political convenience than law. This may be a matter of perception rather than fact, but is nevertheless important to the integrity of the law and the confidence of the public in the public decision-making process. Baroness Scotland has in large part conceded to that argument against her present political role, and a new Bill in the UK Parliament proposes that the office of the Attorney General be confined to intervening in prosecutorial decisions in future only in relation to matters of national security. [She has, as a matter of interest, not conceded that her other role, that of providing legal advice to government, should be relinquished, despite the controversy over the legal advice on the Iraq war given by her predecessor]

Section 179 of the South African constitution establishes a prosecuting authority, headed by a National Director of Public Prosecution which, by national legislation must exercise its functions without "fear, favour or prejudice". This seems to indicate a model of prosecutor of the independent kind, but is this confirmed by s.179 (6) which states that "The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority"? The National Prosecuting Authority Act also provides for the provision of certain information by the prosecuting authority to the Minister and also accountability to Parliament for powers functions and duties under the Act, including decisions regarding the institutions of prosecutions.

It is not for me to engage in the detail of the recent controversy on this subject, but it may be helpful to bring to attention recent international guidance on this

topic. At the time of the drafting of the present South African constitution there was very little such guidance on an international level on the prosecutorial role, and there is still no binding convention on the subject, but a growing amount of 'soft law' is now developing, especially by the United Nations and the Council of Europe, including the Council of Europe's Venice Commission, which was formed in 1990 to assist the constitutions of the former Soviet Union. These are not legally binding conventions but 'soft law'.[Of these, the two most important texts are the Council of Europe Rec(2000)19 on the Role of Public Prosecution in the Criminal Justice System, and the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Association of Prosecutors on 23 April 1999.]

This guidance has been drafted largely in response to the new constitutions in the countries of the former Soviet Union. Some of those countries have been tempted to place the prosecutor under the direction of the executive (partly as a reaction to the Soviet office known as Prokuratura, a seemingly independent prosecutorial authority, which was in practice wholly under the thumb of the party apparatus). However, even where this has happened, international guidance requires that the prosecutor be given functional day-to-day independence in relation to particular cases.

That is not to say that the executive branch, or even the legislature, may not have the right, and indeed duty, to lay down general prosecutorial policy. Again, to respect the rule of law in the sense of legal certainty, it is best that these choices about priorities be set out in a policy statement that is open to discussion and then published. Most prosecuting authorities have such policies, as can be found, for example in the Prosecution Policy required under the National Prosecution Authority Act 1998. These policies are developed in conjunction with the executive. However, as was said in the Venice

Commission's Opinion on the draft revision of the Romanian Constitution, prosecution policy should be seen as general guidance, and

" in no way implies that prosecutors are personally issued with specific orders in a given case. Each prosecutor retains freedom of decision, In determining how [policy]should be applied to individual cases, each prosecutor must be independent." [1]

In this respect Rec (2000) 19 of the Council of Europe provides:

> "Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:
>
> > "instructions not to prosecute in a specific case should, in principle, be prohibited".

Similarly, the guidlines issued in 1999 by the International Association of Prosecutors (IAP) require that where prosecutorial discretion is permitted in a particular jurisdiction, it should be exercised independently and free from political interference.[2]

International opinion therefore strongly favours the notion of an independent prosecutor in relation to the decision whether or not to bring charges. In order to ensure that goal, it has also considered the issue of the appointment and dismissal of prosecutors. In its Opinion on the constitution of Hungary, the Venice Commission suggested that non-political experience should be involved in the selection process of prosecutors, and in relation to dismissal it said this :

> "An important element in the independence of the general prosecutor is his protection from arbitrary or politically motivated dismissal. If the government were to have the power to dismiss him at will then he could not discharge his function with the absolute independence which is essential. On the other hand to involve Parliament in the decision to

[1] CDL-AD (2002)12 adopted 5-6 July 2002 at paragraph 61 and 62
[2] Standards paragraph 2.1

> dismiss might draw him into the arena of party politics which would be undesirable. The grounds for dismissal should be stated in the Constitution, eg stated misbehaviour or incapacity. A body whose membership would command public trust should investigate allegations of misbehaviour or incapacity and, if it finds the allegation proved, make a recommendation of dismissal if it considers that dismissal is justified. . . . It would be advisable not to involve the Constitutional Court in the investigation or the dismissal procedure because it is not unlikely that there might subsequently be a legal challenge in that court to the affair, whatever its outcome. Whatever body is selected it is probably better that it be comprised of *ex officio* members rather than be appointed *ad hoc*, in order to avoid suggestions that its members have been chosen so as to obtain a particular result. [3]

Note how different this is from the situation in South Africa, where the President appoints the National Director of Prosecutions and may dismiss him on the ground, inter alia of not being a fit and proper person to hold the office, subject only to the view of Parliament. Similarly in the UK the Attorney General can be simply appointed or replaced through a cabinet reshuffle.

Let me now return to my central question: the extent to which the rule of law permits prosecutions not to be pursued, or to be discontinued.

A first reason not to prosecute is the fact that there is simply insufficient evidence to justify a trial. This is known as the 'evidentiary test', which asks whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful conviction. Factors considered here are the strength of the case, whether the evidence is admissible, the credibility of witnesses, and the availability and reliability of the evidence.

In some countries, especially in continental Europe, if the evidentiary test has been passed, then there is a duty to prosecute, and the prosecutor can be sued if he does not proceed. In most common law countries, however, there is discretion to prosecute. This is because it is believed that prosecution should be flexibly pursued in what is called the public or national interest. The ' public

[3] CDL-INF (1996)2, and CDL (1995)73, II.11

interest test' engages, for example, if prosecution would inevitably reveal, during the process of obtaining evidence, secrets about intelligence network that could damage national security. But it can also take into account more intimate issues, such as whether it would be best to implement a non-criminal alternative to prosecution, particularly in the case of first-time or juvenile offenders.

This scope of the public interest test bristles with questions. And indeed, having mentioned the growing need for non-political prosecutors, the extent to which they are equipped to decide the broader question of the public interest. In cases where prosecutors are independent lawyers and not politicians, it is surely all the more important for the prosecutor to assess the public interest after consultation with the relevant government ministers, although that in itself raises issues about how close and cosy the prosecutor should be with government. In the UK over the years there has been debate as to whether there is a duty or power on the part of the Attorney General to consult on individual cases with the government . It is now agreed that she may so consult at her discretion although, in the words of a former Attorney General, in some sensitive cases she would be a 'fool not to do so'.

My view is that in a system, as in SA and UK, where prosecutors have discretion to prosecute, there is no harm in their consulting widely, with whomsoever they wish, including ministers. After all, the public interest is a broad concept based upon material and opinion of a greater range and complexity than is likely to exist either in the head or in the office of a specialist prosecutor. Subject to a very strict proviso that the prosecutors do not and do not consider themselves bound to follow the advice they receive.

How broad is the public interest test?

The South African prosecutorial guidelines which deal with the issue say that once the evidence test is passed, "a prosecution should normally follow, unless

public interest demands otherwise". We see here that the burden of proof is placed on the prosecutor to justify his decision not to prosecute. However, the guidelines go on to say that "There is no rule of law which states that all the provable cases . . . must be prosecuted" and then submits three factors which might justify a refusal to prosecute, in the public interest. These are: The nature and seriousness of the offence (which includes its "effect on public order and morale" and "the economic impact of the offence on the community"); second the interests of the victim and the broader community, and the circumstances of the offender (for example, whether the accused has shown repentance and so on)

These guidelines leave a great deal to the discretion of the prosecutor. Could the public interest test, for example, legitimately take into account the fact that the prosecution of a high official would cause a crisis in the governance of the country? Would it be in order to drop charges against a company because its exports are vital to the economy? What have the courts said about that issue?

In the 1970s in England the public interest test was examined in a case brought by a Mr Gouriet. The British Post Office Union had indicated their intention to boycott all mail to and from South Africa as a protest against apartheid. Such an action was against the law, said Mr Gouriet, but he could only institute a private prosecution with the assistance of the Attorney General (a procedure known as a relator action), who refused his consent to prosecute in the public interest. The House of Lords, England's highest court, held both that it was perfectly proper for the Attorney General to apply the public interest test, and held too that the scope of that test was so wide as not to be subject to review by the courts. This is because the Attorney General should be free to take into account questions of 'policy' such as whether the prosecution would exacerbate an already sensitive industrial situation. Would it be effective or futile? Would it lead to political martyrdom? Would it provoke a national strike? This

utilitarian weighing of political costs and benefits was not best answered by judges.

As Lord Wilberforce said:

> "The decisions to be made in the public interest are not such as courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which courts can resolve"

More recently that totally deferential approach of the courts has changes, at least somewhat. The *Gouriet* case was partly coloured by the fact that the Attorney General was acting under the 'prerogative power' which at that time could not be challenged by judicial review and since has been held to be challengeable, at least if the power to do so is within the institutional capacity of a court.[4] More recent cases in different Commonwealth jurisdictions have opened the door to judicial review of decisions not to prosecute, although on very restricted grounds. For example, in 2002 of the Supreme Court of Ireland (which has an independent public prosecutor), held that the only grounds of review are those where it can be shown that the decision of the prosecutor was taken in bad faith or influenced by an improper policy or motive or where the prosecutor had abdicated his functions. It was further held that the prosecutor did not have to provide reasons for his refusal to prosecute[5].

In 2003 Supreme Court of Fiji, in *Matalulu v DPP* similarly refused to uphold a challenge to a decision not to prosecute, saying:

> "The polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither

[4] Council of the Civil Service Union v Minister of the Civil Service [TBC]

[5] *Eviston v DPP[2002] 3 IR 260,*

> the constitutional function nor the practical competence of the courts to assess their merits."[6]

Nevertheless, the Fiji court held that the power would be reviewable if it were made in excess of the prosecutor's constitutional or statutory grant of power, when he had acted under the direction of another or in bad faith or fettered his discretion by a rigid policy. However, it was held that the decision could not be reviewed

> "by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice."

In 2006 the matter was considered in an appeal to the Privy Council, which serves as final court of appeal for a number of Commonwealth Countries, against a decision not to prosecute by the Director of Public Prosecutions of Mauritius. It cited the Matadulu from which I have just quoted from Fiji and adopted its approach entirely.

In 2008 the House of Lords itself endorsed the approach of the Fiji case, which it cited with warm approval.

The case concerned the following, which may be familiar to you: In December 2006 the Director of the Serious Fraud Office ("the Director") decided to abandon an investigation into allegations of bribery and corruption by BAE Systems Ltd. ("BAE"), in relation to contracts for Al-Yamamah military aircraft with the Kingdom of Saudi Arabia. The Director had yielded to a threat from Suadi officials (one in particular, Prince Bandar bin Sultan bin Abdul Aziz of

[6] *Matalulu v. DPP* [2003] 4 LR*C 712, 735-36.*

al-Saud) that if the investigation were to continue the Saudi government would cancel a proposed order for Eurofighter Typhoon aircraft and withdraw security and intelligence co-operation with the United Kingdom.
Both the Director and the Attorney General had previously stood up to the urgings of the Prime Minister and the Foreign and Defence Secretaries of State to drop the investigation. The Director again held firm when the Attorney General considered that the investigation was not justified by the available evidence. Just at the point when the trail of investigation was extended to Swiss bank accounts, the Director was persuaded to drop the case on the advice particularly of the British Ambassador to Saudi Arabia that national security ("British lives on British streets)"would be imperilled if the threat were carried out. The Director's decision was challenged through judicial review by Corner House Research Ltd and the Campaign Against the Arms Trade.

In the House of Lords Lord Bingham[7] began by indicating clearly that the courts should be "very slow to interfere" in prosecutorial decisions outside of "exceptional cases". This was because, first, respect should be accorded to the independence of the prosecutor. Secondly, as was said in the Supreme Court of Fiji:

> "The polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits."[8]

Explicitly guided by this highly deferential approach to the exercise of broad discretion by a prosecutor (reminiscent of our administrative law in the middle of the last century), Lord Bingham acknowledged that the discretions conferred on the Director were not unfettered, at least to the extent that:

[7] With whom Lords Hoffmann, Rodger, Brown and Baroness Hale agreed.
[8] *Matalulu v. DPP* [2003] 4 LR*C 712, 735-36.*

> "He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice." (para.32)

Note that Lord Bingham's list of administrative imperatives is sited firmly in the ground of judicial review known as 'legality'. Surprisingly, it omits reference to the need to make a decision which is within the "range of reasonable responses" (as the old *Wednesbury*[9] test has now evolved)[10]. Nor does it address the question of the degree of scrutiny (light or heightened) that may be appropriate for a case such as this, or whether the more rigorous test of proportionality ought to be engaged. The ultimate question for the House was said simply to be:

> "whether in deciding that the public interest in pursuing an important investigation into alleged bribery was outweighed by the public interest in protecting the lives of British citizens, the Director made a decision outside the lawful bounds of the discretion entrusted to him by Parliament" (para.38)

And it was unanimously held that the Director had acted within his power's lawful bounds.

I want to argue that this hands-off attitude of the courts to the public interest is simply too deferential and outmoded for three reasons. First, there is no logical reason to confine the categories of review of the prosecutorial decision to those mentioned (bad faith etc) and to exclude fundamental categories of review such

[9] *Associated Provincial Picture Houses Ltd. v.Wednesbury Corp.* [1948] 1 KB 223,229-30.
[10] For examples of that reformulation see Woolf, Jowell and le Sueur, *de Smith's Judicial Review* (2007), para. 11-024.

as the taking into account of relevant considerations, or even unreasonableness. This approach presumes that prosecutors will inevitably subordinate party or partisan interest to a wider national or public interest. With respect, experience shows the opposite, that there are great pressures, whatever the formal structures of the office of prosecutor, to conflate the interest of the nation with that of the party in power. There seems too no reason why the courts should exclude themselves from scrutinising the concept of national interest. For example, whether it permits non prosecution on any of a number of doubtful grounds, well short of bad faith, such as economic interests, to which I have already alluded.

Secondly the rationale for permitting a lax policy in relation to non-prosecution is particularly inappropriate in societies where lawlessness is endemic, as is increasingly the case, alas, in many countries, whether developed or developing (see for example the recent rash of knife crimes in England).

Thirdly, while it may be technically correct, as is set out in the South African prosecution policy that I cited earlier, that 'there is no rule of law which requires prosecution of all cases', it is, as I have said, a profound tenet of the principle of the rule of law that the law should be enforced where possible, and enforced equally. I would also contend that a utilitarian attitude toward the public interest – seeking the greatest good for the greatest number and excusing wrongdoing on the ground of a balance of convenience - sends out signals that diminish respect for legality, encourages lax policing, excuse the duty of those public officials charged with enforcing the law, encourages the lawless, creates anxieties in the lawful, and undermines a culture of legality. It also creates a sense of justified grievance on the part of the ordinary people, who are rarely treated as exceptions to the rule, yet watch with deep resentment when high officials and the masters of industry are exempt from law's strictures.

Please do not misunderstand me on this. I am not submitting that the prosecution process should eschew compassion. Nor that the public interest should not be utilised from time to time so as to promote or protect vital interests – such as those of the terminally ill who genuinely and on their own volition wish to embark in assisted suicide, or where there is a strong likelihood that national security may be threatened by the revelations at a trial. Nor am I suggesting that courts are always well equipped to substitute their view for that of the prosecutor on what the national interest requires.

What I am suggesting is that the courts are these days familiar with ways to examine claims of national interest as they have not been in the past. The late Etienne Mureinik, one of the greatest of South Africa's public lawyers, said that the new South Africa had moved from a 'culture of authority' to a 'culture of justification' and it is this culture that these days subjects most decisions of public officials to more intense scrutiny than in the days when their decisions were basically immune unless grossly unreasonable. In South Africa the fact that decisions not to prosecute are not exempt from review under any or all of the grounds of review under s.6 of the Promotion of Administrative Justice Act (PAJA) gives some hope that this country may once again give a lead in this respect, as the Supreme Court of Appeal has already started to do, in using the tools available to judges not to second- guess these decisions, but to probe their evidentiary basis and rationality to the limit. But old habits of deference die hard, as we have recently seen in England.

In the *BAE* case the House of Lords surely failed to appreciate that there was not just one threat, but two. The first threat was to public safety. In assessing that threat, the Director must indeed consider the risk to 'British lives on British sreets' if the investigation and/or prosecution were to continue. The second threat is, however, of a different order. It is to the integrity of the British system

of justice. Here the Director had to consider the risk of caving in to blackmail to the confidence and resilience of the country's legal structures as a whole – in the same way as a decision would be made as to whether to submit to blackmail, or kidnapping.

If only the first threat (to public safety) were in play, then of course the assessment of risk would, within the limits of reason, good faith, relevant considerations etc, be for the prosecutor to decide. Such a case would, for example, permit the prosecutor broad discretion to evaluate whether an investigation should be abandoned in view of the danger of revealing the names of intelligence officers during the course of the litigation.

The second threat, however, is directed at a fundamental feature of the rule of law, namely that a person's criminal liability must depend on what they have done, and not their power or influence, in their own country or abroad. Another element of the rule of law is that the process of investigation or prosecution should not be influenced by extraneous threats or inducements. Had the threats in this case been made by a British citizen, he would be liable at least to prosecution for perverting the course of justice.

I raised at the beginning the alternatives of democracy and tyranny. The new South African constitution was internationally acclaimed for the fact that it recognised that the new dispensation should reject not only the unjust racial discrimination of the apartheid years, but also the despotic form of government that was employed both to build and enforce apartheid. The new South Africa saw right through the claim that the practitioners of apartheid respected legality. On the contrary, they asserted rule by law, and deliberately shunned the rule of law. The rule of law has many aspects, but at its base is the fundamental tenet that within the bounds of the possible and the compassionate, laws should be enforced and make no distinction between classes and rank. This is one of the rocks on which democracy stands - and which tyranny scrupulously avoids.