

'Shrinking Civic Space – The Role of the Legal Profession'

Some Remarks by Don Deya¹

At the 20th Annual Conference & General Meeting of

The Southern African Development Community Lawyers Association (SADC LA)

Under the theme: Supporting Strong Institutions for equal access to justice for all (SDG 16)

Elephant Hills Resort Hotel, Victoria Falls, Zimbabwe

Thursday 8 to Saturday 11 August 2019²

Some prefatory remarks

- **A special thank you to the International Centre for Not-for-Profit Law (ICNL), and to Irene Petras, Advocate,** who has enabled PALU and its members to scale up a sustained conversation on the role of the legal profession in the context of protecting the civic space of our people: -
 - April 2019, Livingstone, Zambia, on the sidelines of the Annual Conference of the Commonwealth Lawyers Association (CLA)
 - July 2019, Lomé, Togo, during the Annual Conference of the Pan African Lawyers Union (PALU)
- This discussion, also co-sponsored by the Zimbabwe Lawyers for Human Rights (ZLHR) is the third in this deliberately designed series of engagements. It will be followed by a fourth discussion at the 2019 Annual Conference of the East Africa Law Society (EALS), in November 2019, in Kigali, Rwanda.
- There are some parallels and interlinkages with the issue of **independence of the Judiciary and of the legal profession**, BUT the focus here is different: how are we protecting the space for **everyone else**: to be informed, to be able to express themselves, associate and assemble: physically and virtually.
- Civic space is under attack, DELIBERATELY, across the world, including in Africa. **The idea of being an active citizen is under attack. Our governments want robots, who do what they are told, work hard on the assembly line, pay taxes and shut up.**
- OUR GOVERNMENTS LEARN BAD MANNERS FROM EACH OTHER VERY EFFICIENTLY AND EFFECTIVELY
 - **Laws**, which Linda Kasonde has described as **legal authoritarianism**: especially media laws; CSO registration and supervision laws; countering violent extremism (CVE) laws e.g. anti-terrorism laws, countering terrorist financing and anti-money laundering laws; cyber-security laws; defamation laws (including laws proscribing defamation online and in social media); also the 'old', 'traditional' treason and sedition laws, and laws like 'insulting the President", etc.
 - **Regulators**, especially of the media and of CSOs; but also **financial regulators**, who use laws around money-laundering, terrorist financing, or economic crimes to silence citizens and CSOs.
 - **Attorneys General, Public Prosecutors**: prosecution as a form of persecution.

¹ Chief Executive Officer, Pan African Lawyers Union (PALU, www.lawyersofafrica.org); Chair of the Board, Pan African Citizens' Network (PACIN, www.ccpau.org); Chair of the Steering Committee, International Coalition on the Responsibility to Protect (ICRtoP, www.responsibilitytoprotect.org)

² Presentation made on Saturday 11 August 2019

- **Judiciaries**, e.g. through **inordinately huge** awards of Costs that are calculated to inflict a **chilling effect** on active citizenry; Contempt of Court; illogical Judgments, Rulings or Orders e.g. on defamation, criminal defamation, etc all of which have a chilling effect on active citizenry.
- **Security sector** through surveillance, including online: infiltration, cyber-attacks, cyber-bulling, and in the context of e-citizenship (“Source-of-all-truth registration”), by “switching off” citizens
- **Private sector**, especially big IT companies who profile, manipulate and bully civic actors, e.g. *Cambridge Analytica, etc*
- **BUT THE STATES ALSO JUST BRIBE, SHOOT, ABDUCT, DISSAPPEAR, ARREST, PROSECUTE AND PERSECUTE CITIZENS** e.g. Tundu Lissu

● **As lawyers, we need to: -**

- **Protect the rights of other citizens to seek information, express themselves, associate and assemble, INCLUDING online**
- **DEMONSTRATE to the governed and the governors that without civic health: testing the truth of information, facts and data; contestation of ideas, policies; ensuring the rule of law, democratic governance, etc OUR ECONOMIES will fail or will falter**

What can the legal profession do to foster this?

- *Starting from the farthest to the nearest*

#	Category	Some perspectives
1.	International Lawyers' Associations	<p><u>What they do</u></p> <ul style="list-style-type: none"> ● In times of crisis: Petitions; Statements; Letters (Open and Closed); Fact-Finding/ Solidarity Missions; Trial Observations; <i>Amicus</i> Briefs, etc <ul style="list-style-type: none"> ○ ABA, IBA, EALS, ICJ, PALU and SADC LA: Joint Mission into Tanzania in October 2017. The REPORT exists <ul style="list-style-type: none"> ▪ <i>I suggest that we undertake a ceremonial presentation of the Report to Tundu Lissu, at the end of this Session or at the Annual General Meeting (AGM) this afternoon.</i> ● Engaging international institutional architecture for rule of law and human and peoples' rights, especially the “Geneva” architecture, e.g.: - <ul style="list-style-type: none"> ○ Committee on Enforced Disappearances ○ Special Rapporteur for Independence of Judges and Lawyers ○ Special Rapporteur for the Freedoms of Peaceful Assembly and of Association ● RECOMMENDATION: Develop a long-term approach to having a sustained dialogue with the legal profession: individuals and institutions, beyond moments of crisis

2.	Continental and Regional Lawyers' Associations	<p><u>What they do</u></p> <ul style="list-style-type: none"> • Petitions; Statements; Letters (Open and Closed); Fact-Finding/ Solidarity Missions; Trial Observations; <i>Amicus</i> Briefs, etc • Engaging their institutional members, including at Annual Conferences and General Meetings • Engaging regional and continental institutions: political, judicial, quasi-judicial. This includes the African Union (AU) and various Regional Economic Communities (RECs)/ Regional Organisations (ROs) • Focus on: - <ul style="list-style-type: none"> ○ Litigation in continental and regional judicial and quasi-judicial courts and tribunals e.g. <ul style="list-style-type: none"> ▪ East African Court of Justice (EACJ): Mpale Kaba Mpoki, Jeremiah Mtobesya ▪ African Commission on Human and Peoples' Rights (AComHPR): Zimbabwe Lawyers for Human Rights (ZLHR), consistently for over 2 decades ▪ African Court on Human and Peoples' Rights (AfCHPR): Wesley Mwafulirwa, Arnold Tsunga (ICJ-Africa), Dzimababwe Chimbga (OSISA) for a new case ○ Engaging regional Parliaments <p><u>RECOMMENDATIONS</u></p> <ul style="list-style-type: none"> • Find ways of holding their members to account >>> an annual reporting by the National Lawyers Associations (NLAs) on what they have done over the past year • In Lomé, Togo (July 2019), we committed to work towards a reporting template, where Presidents of NLAs will report annually on what is going on in their countries, and, MORE IMPORTANTLY, what they are doing about it
3.	National Lawyers' Associations – Regulators and Representatives	<ul style="list-style-type: none"> • There was a golden age when NLAs led civic action from the front. In many countries, unfortunately, this has passed. We have passed the baton to CSOs and mostly abandoned them. • In some countries, the NLA is itself a violator of rights and a restrictor of civic space, including of their own members. • Revisit and reconceptualise the Bar Association/ Law Society as a vehicle of transformation of the lives of our people

		<p>RECOMMENDATIONS</p> <ul style="list-style-type: none"> • Sustained, long-term approach to protect civic health of the country. Conscious and long-term; not <i>ad hoc</i>, arbitrary or episodic • Capacity-building on litigating and advocating for rights, especially civic rights. CLE Seminars. <ul style="list-style-type: none"> ◦ Example of the Tanzania Human Rights Defenders Coalition (THRDC) training seminars • Working in a respectful and symbiotic relationship with CSOs, including progressive parts of the private sector/ Private Sector Organisations (PSOs) • Accountability in how this is done • SOLIDARITY with each other • PEER REVIEW
4.	<p>Other National Lawyers' Associations</p>	<ul style="list-style-type: none"> • Examples: Women Lawyers' Associations; Young Lawyers' Associations; Human Rights Lawyers' Associations; National Chapters of International Lawyers' Associations such as <i>Avocats Sans Frontieres</i>, International Commission of Jurists, etc • COMPLEMENTARY ways of doing what NLAs should be doing • Malawi Women Lawyers Association has applied to be <i>Amicus Curiae</i> in the greatest legal question facing their country at the moment, i.e. presidential election petitions. • Zimbabwe Lawyers for Human Rights (ZLHR) • Chapter One in Zambia (<i>in formation</i>) • <i>I could give other examples</i>
5.	<p>Individual Lawyers</p>	<p>What they do</p> <ul style="list-style-type: none"> • Defence and legal representation, including <i>pro bono</i> • Engaging in public advocacy: Op Eds, Articles, Statements, Petitions and online/ social media <p>RECOMMENDATIONS</p> <ul style="list-style-type: none"> • As Tundu Lissu said: NOISE SAVES LIVES • We are called upon to be conscious in what is going on around us • Engage in Social Movements, online and offline • Consider public office: Parliament, independent constitutional commissions e.g. NHRIs, NACCs, Ombudsman, Public Protector • Engage in advocacy and DO NOT limit it to trial advocacy. Include and prioritise Parliaments and law reform, etc • Spirit of <i>pro bono</i> – which exists – focus it to this critical area

	<ul style="list-style-type: none"> • Bringing back the Silks. In many countries, the burden has been left to young lawyers, many working in – or supporting – NGOs
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Interactive Session

<p>Counsel from Botswana</p> <ul style="list-style-type: none"> • Information we access confidentially 	<ul style="list-style-type: none"> • PALU Code of Ethics on Anti-Corruption and Compliance in Business Relations: a commitment to balancing – within the law and our professional commitments – the interests of our clients and the greater good • Advocacy for law reform so that laws are more comprehensive and holistic, especially in natural resource extractive industries
<p>2nd gentleman</p> <ul style="list-style-type: none"> • Civic Space, human rights: what are their definitions, when did they start? 	<ul style="list-style-type: none"> • Human Rights did not begin in 1948. These are inalienable rights that came with our humanity. In any case, the 1948 codification was not the first codification of human and peoples’ rights. Earlier examples include: - <ul style="list-style-type: none"> ○ Sundiata Keita’s Charter, the Kouroukan Fouga, in the Kingdom of Mali in the early 1200s ○ Magna Carta, in 1215 • DEFINITION: Civic Space is the space of the citizen, as an INDIVIDUAL. Or if s/he chooses to associate with others, then the space for that association or assembly as well.
<p>Brian Kagoro</p> <ul style="list-style-type: none"> • If you join a constitutional commission in a State that is captured, would you be capturing or captured? 	<ul style="list-style-type: none"> • Depends on the context. I concede that NOT all contexts commend themselves to direct participation. But, adopting a long-term approach, in many contexts, you could have an effect of moving a peoples’ conversation forward from one stage to the other, within a specific time block
<p><u>Tundu Lissu</u></p> <ul style="list-style-type: none"> • Lawyers wear 3 hats: - <ul style="list-style-type: none"> ○ Pleaders of our clients’ causes ○ Officers of the Court ○ Citizens • Let us focus on our roles, first and foremost, as citizens! 	

Linda Kasonde

- Be conscious of advocate-client confidentiality
- Should courts embroil in political matters? Judiciary as a last line of defence.