



***THE ROLE OF THE
CONSTITUTIONAL AND SUPREME
COURTS
IN THE PROTECTION OF
CONSTITUTIONAL ORDER***

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Introduction

Your Excellency, President Hasim Kiliç, the President of the Turkish Constitutional Court and the Association of Asian Constitutional Courts and Equivalent Institutions (AACCEI), your Excellencies Presidents and Chief Justices of Constitutional Courts and Equivalent Institutions, distinguished guests, ladies and gentlemen, I greet you.

I am deeply honoured and humbled by the invitation extended by the AACCEI to the Conference of Constitutional Jurisdictions of Africa (CCJA) to participate in the Second Congress of this august body whose noble objectives set out in Article 4 of the Statute are to promote: the protection of human rights, development of democracy, implementation of the rule of law, the independence of the Constitutional Courts and Equivalent Institutions, through the exchange of information and experiences related to constitutional justice. My presentation is based on theme 4 entitled “*The Role of the Constitutional and Supreme Courts in the Protection of Constitutional Order*”.

Prerequisites for the Capacity to Protect the Constitutional Order

I am persuaded that truly the pre-eminent desire of every human being, barring negligible exceptions, is to be above all others, to dominate, to outclass and to rule over them and a disdain for any dissenting voice. For this reason, when politicians appoint Judges particularly to the highest court in the land, and when members of opposition political parties and a diversity of lobby groups support or seek to discredit certain appointments, it is at times motivated not so much by what is in the best interests of the nation, but by what is in the best interests of the holders of a supportive or opposing viewpoint or the sector they represent.

The ability of the Constitutional and Supreme Courts to protect the constitutional order well, depends to no small measure on the selection of the Judges who are to be appointed to these courts. If Judges so appointed are beholden to any political outfit, or big business or some or other pressure or lobby group or secret organization or even world superpower with vested economic interests, then justice will be adulterated because the justice-

dispensing institutions would be toys remote-controlled by the kingmakers or puppet-masters.

We as Judges need to identify and propose the essential ingredients of a selection and appointment process that is objectively credible and sufficiently transparent to protect the courts from otherwise legitimate and justifiable criticism. I must hasten to state that many younger and smaller democracies that are rich in mineral and natural resources are often criticised severely, by agencies or units sponsored by older democracies whose appointment processes are indefensible in comparison to those under attack. This hypocrisy must be taken into account in the assessment of the legitimacy of the criticism. Some of the essentialia of a Constitutional or Supreme Court capable of protecting and promoting a constitutional democracy follow below.

The competence of Judicial Officers is not negotiable. A demonstrable track-record of fair-mindedness, commitment to human rights, and the rule of law, decisiveness, humility and personal independence are some of the key traits of a personality fit to serve in the highest court in the land.

The institutional arrangements must be such as to facilitate the independence of an individual Judge to decide any case without being unduly influenced by another Judge, a politician (of a ruling party or opposition party), big business or well organised and highly resourced lobby groups. Security of tenure, continuous judicial education, tools of trade, and support systems necessary for a Judge to take his or her own decisions without fear, favour or prejudice, are important.

A Judge should guard against being lured to the point of being compromised by gifts, introduction to exclusive networks that would usher him or her to prestigious clubs or gatherings of the who's who of this world, positive coverage and the maximization of whatever they say or do however miniscule it may be, the ever-flowing praise from certain quarters that may make it difficult for him or her to disappoint them come decision-making time. It is necessary to keep a critical distance from anything or anybody that may compromise one's integrity, impartiality and independent decision-making. A Judge should always be mindful, without being unduly suspicious, of the existence of forces out there vying for the control of the institution in which he

or she serves. These are forces that want to secure your vote or support whenever matters affecting them are before your court.

One of the worst betrayals of the legitimate aspirations of any nation is by a Judge, whomakes decisions, not because he or she believes they are correct, but in order to please a friend, “constituency” or a lobby or pressure group. That is corruption of the worst kind. As functionaries in the Constitutional and Supreme Courts, we must be our Brothers and our Sisters' Keepers. We must establish some informal or formal and yet courteous and effective peer-review mechanism that would allow us to raise concerns with colleagues who appear to be doing a disservice to these courts, that are central to the protection and promotion of our constitutional democracies.

Judges are themselves their best protectors and best guardians of the institutions in which they serve. It will help us all to remember always that power corrupts, and absolute power corrupts absolutely. Judges are human and they individually and collectively wield enormous power. The potential to be corrupted by this power and by those seeking to corrupt the system always looms large.

Let me give some context to the magnitude of this danger based on the powers vested in the South African Constitutional Court. The Constitution of South Africa is the supreme law of the Republic. Any law or conduct inconsistent with it is invalid to the extent of the inconsistency and falls to be set aside by the Constitutional Court. The Constitutional Court is the apex court in all matters and the final arbiter of the constitutional validity of decisions taken by the President, Cabinet Members or Premiers etc and laws made by Parliament and Legislatures. In sum, the Constitutional Court has a say in virtually all matters because the Constitution has a bearing on almost every matter of some importance in our country. The Constitutional Court is the guarantor of our constitutional order. Subject to the separation of powers doctrine, which means what the Court says it means, the power of our Constitutional Court is arguably immeasurable. And this could be very dangerous if not handled with humility, due sensitivity and care.

Nothing about the conduct of Judges, their public statements, decisions, the trend in decision-making and the potency or otherwise of the reasoning, should give any grouping, any sector

of society, any political formation or any class of people, a sound reason to believe that groups or associations which hold certain world-outlooks are always guaranteed a favourable outcome. For that would be a danger to a constitutional order and a recipe for a dictatorship or anarchy, anarchy with time depending on who is on the receiving end of the real or perceived injustice.

When the highest court in the land gives a portion of the population a legitimate reason to believe, that it is not true to its constitutional mandate, but is in the pocket of some powerful or influential personalities or institutions, then public confidence in them, respect for them and their moral high ground would be undermined. When it ceases to be or begins to look like it is not the genuine conscience of the nation, but a tool, at the beck and call of some, then it becomes easy to disregard its orders and to openly renounce it on solid grounds and at times persuasively.

Courts that have given stakeholders reason to believe that they are favourably disposed to some illegitimate interests, because they fear the venomous bite of the power wielded by those they favour, are in no position to protect any constitutional order. Such courts lack the capacity to fulfil their role described by the late

Justice Black of the United States Supreme Court, in the following terms:

“Under our constitutional system, courts stand, against any winds that blow, as a haven of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement.”¹

Historically, the Executive has been the most powerful institution of governance. The tendency by the Executive to downplay the authority of the Judiciary has been universally observed throughout the ages, with great concern. This is what drove Chief Justice John Jay of the United States Supreme Court who served as Chief Justice for five years from 1789 to 1795, to resign from the position of Chief Justice, because he believed that the position lacked prestige, to become the Governor of New York.

¹*Chambers v Florida*, 309 U.S 227, 241 (1941). Also see *The Supreme Court: Reflections on the Constitutional Protection of Human Dignity*, Earl L Neal

The South African Constitutional Court and the Protection of Constitutional Order

The South African Constitutional Court has done a lot to protect and promote our constitutional order. Laws that were passed without affording the affected public the opportunity to participate meaningfully in the law-making process, were set aside. Many Acts of Parliament were declared constitutionally invalid by reason of their inconsistency with the Constitution. Several decisions of the President and Members of Cabinet suffered the same fate owing to their constitutional invalidity.

Educational, housing, employment and social welfare opportunities or related matters were addressed by our Constitutional Court to give the nation a sense that their constitutional democracy is safe in the hands of a truly independent Constitutional Court.²

²See for example, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); *MEC for Education v KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amicus Curiae)* 2010 (3) SA 454 (CC); *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC); *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae)*, *Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580.

The Constitution vests judicial authority of South Africa in the courts.³ It further provides that these courts are independent and subject only to the Constitution and the law, which they must apply impartially. And this is the freedom that the South African Judiciary has been left to enjoy.

Section 38 of the Constitution entitles any person to approach a competent court, including the Constitutional Court, to vindicate his or her constitutional rights. It does not have to be the aggrieved person herself who approaches the Court. Anyone may act on behalf of another who cannot act on his or her own approach the Court. Additionally, anyone acting in the public interest may approach the Constitutional Court for the same reason.⁴

As part of its efforts to enhance access to justice, the South African Constitutional Court, has over the years assisted indigent and unrepresented litigants, whose papers are incoherent by approaching bodies like the Legal Aid South Africa, public interest

³Section 165 of the Constitution of the Republic of South Africa, 1996.

⁴*The Minister of Health and Others v the Treatment Action Campaign case (2002 (5) SA 721 (CC)) is but one of the cases where civil society approached the courts acting on behalf of HIV positive mothers and children who were denied by the government access to medication prescribed to curb mother to child transmission of HIV.*

litigation institutions, the General Council of the Bar and the Law Society of South Africa to assist in prosecuting their matters for free.

All of these achievements and much more were facilitated by the independence enjoyed by our courts, including the Constitutional Court, to decide cases without any interference whatsoever from any quarter.

Conclusion

The judicial function is seen by many as the last bastion in the defence of individuals.⁵ The Judiciary is the third branch of Government, the third arm of the State. There simply can be no State or government without an independent Judiciary in a genuine constitutional democracy.⁶

Appointment to the apex court of any constitutional democracy is a special honour and rare privilege indeed. It must be treasured and allowed to infuse in us an ever-abiding consciousness of the

⁵ Justice B Ngoepe, Vice President of the African Court: *Judicial Dialogue between the African Court and National Judiciaries*, Arusha, Tanzania, 18-20 November 2013.

⁶ *The Rule of Law in South Africa; Measuring Judicial Performance and Meeting Standards*. The Hon. MogoengMogoeng, Chief Justice of South Africa: Chair SuellaFernandes, Chair of Trustees, Africa Justice Foundation, 25 June 2013

awesome responsibilities that rest on our shoulders for the benefit of our nations, the vulnerable, the voiceless and the forgotten poor. We are the bearers of the legitimate hopes and aspirations of the millions that approach our courts daily, trusting that as final arbiters of what is right or wrong, what is constitutionally valid or invalid, we will refuse to be moved by the power, influence, fame and wealth commanded by any of the parties or sympathetic lobby or pressure groups in matters before us. We will "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law."⁷

The Judiciary should never be "imperialised", "adulterated" or corrupted for any reason including the advancement of corrupt, illegitimate or sectoral agendas. We owe our honour, our credibility, our moral high ground and status as guarantors of any constitutional order and as the conscience of our respective nations, to always frown at all illicit attempts to corrupt our independence as well as our jurisprudential and philosophical outlook.

⁷*Schedule 2 of the South African Constitution*

I THANK YOU.