



**OPENING REMARKS AT THE FOURTH
CONGRESS OF THE CONFERENCE OF
CONSTITUTIONAL JURISDICTIONS OF AFRICA
(CCJA)**

BY

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Programme Directors, Justices Zondo and Khampepe, the President of the Conference of Constitutional Jurisdictions of Africa, Madame Justice, Mary Madeleine Mborantsuo, Dr Buquicchio, the President of the Venice Commission, in charge also for the Secretariat of the World Conference of Constitutional Justice, the President of the Constitutional Court of Georgia, and the President of the Conference of European Constitutional Courts, Justice Tavadze, Dr Gebali, the Vice President of the Supreme Constitutional Court of Egypt, who is also the Secretary General of the Union of the Arab Constitutional Courts, Justice Sanha, the President of the Supreme Court of Guinea-Bissáu, who is also the President of the Conference of Constitutional Jurisdictions, of the Portuguese-Speaking countries, Chief Justices and Presidents of Constitutional Jurisdictions in this great continent, the former President of the CCJA, Honourable Dossou, Deputy Minister of Justice and Constitutional Development, Mr John Jeffery, Judicial Colleagues, Heads of Chapter Nine Institutions, the Secretary General of the CCJA, the Secretary General of the Office of the Chief Justice, the Deputy Secretary General of the CCJA, Esteemed guests, Ladies and Gentlemen, I greet you.

It would make no sense whatsoever for us to be gathered in this manner at great expense and deal with judicial independence and the rule of law in a manner that is quite divorced from the challenges that confront Africa right now. Because in any genuine constitutional democracy there are three Arms of the State. And the Judiciary is not merely an incidental arm, an inconsequential arm but it is a very critical component of any genuine as opposed to a fake democracy or a mobocracy. For that reason, when Judges in this great continent marred by a wide range of challenges from political to economic and social, and even health challenges,

whatever they take so many days at such great expense to deliberate upon, must be designed to contribute towards the resolution of the many challenges that confront Africa. And it is against this backdrop that whatever I say, whether it is immediately obvious to you or not, what its relevance is to the theme of the conference, pay attention to it, because it is indeed relevant, the knots will be tied up together in due course.

A man by the name of Loren Cunningham gave a breath taking account of the beauty of the natural resources and tourist attractions of Africa, ranging from the Sahara Desert as the greatest in the world, with its rolling dunes, to the Kalahari natural resource, the Nile River, the Congo River, and the 1600 miles long, Zambezi River, the Victoria Falls and the Serengeti, the Kilimanjaro, whereafter he had the following to say about our continent:

“Our great artist God has displayed these and other wonders in Africa. He hid more gold here, more diamonds, platinum and copper than in any other place on earth. Africa has enough arable land to feed large portions of the earth. The continent has more hydro-electric potential than all the rest of the world put together as well as an abundance of coal and oil. Wisely used, by and for Africans, the continent’s resources could contribute significantly to the new wealth and prosperity. Unfortunately, for too long Africa’s people have been enslaved, raped, abused, dismissed by prejudice, hatred or just ignored. Their rich resources have been collected and used by others, even stolen with little, if any benefit going to the Africans. Instead their value has attracted foreign exploitation and enriching dictators and warlords, bringing bloodshed, starvation and even modern forms of black on black slavery”.

So our independence at this early stage requires that we be alive that there is a possibility of it being compromised by foreign interests, by warlords and by modern day dictators. Now to give context to this, a reference must be made to how Africa was viewed as far back as 1835. And for this account, I turn to what Lord Macaulay said on the 2nd of February 1835, addressing Parliament in Britain:

“I have travelled across the length and breadth of Africa and I have not seen one person who is a beggar, who is a thief, such wealth I have seen in this country by a country meaning Africa, such high moral values, people of such calibre that I do not think we would ever conquer this country, unless we break the very backbone of this nation which is her spiritual and cultural heritage and therefore I propose that we replace her old and ancient education system, her culture, for if the Africans think that all that is foreign and English is good and greater than their own, they will lose their self-esteem, their native culture and they will become what we want them, a truly dominated nation”.

What has this got to do with us as Judges? Until we are alive to the challenges that confront Africa, in much the same way as the Germans go out of their way to ensure that their Judges are, by exposing them to a teaching on economics and politics, we are going to be an irrelevant third Arm of the State. Let me just highlight some of the key issues that are required for any country and by extension, the Judiciary, to make a profound and meaningful contribution to the economic success of that nation. When Loren Cunningham was invited by President Mathieu Kerekou of the Republic of Benin in 1996, to workshop him and his cabinet on leadership, one of the cabinet ministers reportedly said to him, why is the Republic of Benin so poor? And the cabinet minister answered himself and said it is because we only have 5 minerals in this country. But he said to him, and this applies to all of us, is

that Switzerland is just a small, and hardly have any mineral resources to boast of, or to boast about, and yet it is very rich. That is so because the Swiss are men and women of integrity and of good character. Meaning, oh in fact I must quote him in full, he says: "You need a critical mass of people who have integrity, who have character. Benin will have prosperity when it has enough people with this kind of character." It is out of people of integrity and a solid character that judges must be appointed. Until we get to the point where as Africans we can proudly say that a critical mass of African people in their respective countries are a people of integrity and a solid character, we will have Judges whose independence is questionable.

I am in the habit of citing an example by one of the former Chief Justices of this country, Pius Langa who was commissioned to look into the challenges of one of the African countries, and he said, before long one of the Judges said to him why don't you ask us why we are corrupt? And obviously you can't be corrupt if you are truly independent. And the Judges one by one, in this continent explained why they were corrupt. And of course we are aware of some of our countries where Judges and Magistrates had to be interviewed all over again to test their integrity, their character and commitment to judicial independence. So as the African continent, I am glad Lord Macaulay saw us as one. He referred to us as a nation, he referred to us as a country, for we are indeed one. We have got to ensure that integrity and good character defines who we are. For far too long we have been taken for granted as Cunningham said, we have been hated, ignored and marginalised and it is only when the Judiciary of this continent assumes its rightful position as a third Arm of the State, at a country level, at a regional level and at a continental level, that the lost glory of Africa, so well-articulated by Lord Macaulay, would be restored.

So Africa has not always been the so-called dark continent. Well I only have ten minutes, let me drive my point home. Governments can be a threat to judicial independence. In case you doubt, I understand that in March 1904, when Theodore Roosevelt was the President of the United States of America, he won a case against JP Morgan's Northern Securities and he proudly said the following: "The case demonstrated the fact that the most powerful men in this country were held to accountability before the law", and that happens all the time. Whoever wins, even government praise the Judges, the Judiciary for being truly independent. But two years later, in 1906, he lost the case. And this is what he had done before he had lost the case: He made sure that one of the new additions to the US Supreme Court was his old Harvard friend, Oliver Wendell Holmes Jr. But Justice Holmes disappointed him. He dissented. He, notwithstanding the assurance that the President had been given, even by a certain senator that no, "Justice Holmes Jr is in our pocket, he is one of us, he was not independent", he preferred judicial independence, integrity and character over the favours that politicians might dish out to those who are weak and are prepared to have the system corrupted.

And listen to what the same man who was praising the Judiciary not so long had to say. After they had invalidated the Employer's Liability Act of 1906, he said that you know, this new Judge is so weak and without a backbone that if I were to carve out a banana, I would find a judge with a stronger backbone out of it. So part of the threat comes as I said, from the politicians, both in the Executive and the Legislative arms of Government. If they can find a Judge who is so hungry for power and prestige, that he is prepared to do anything to be elevated, even if it

means protecting the corrupt, they will zoom in on that one, and give him or her favours so as to compromise the third Arm of the State. And for as long as some among us are in love with corruption for the sake of personal benefit, or promotion or positions, we are not going to go back to that position that so impressed Lord Macaulay that he had to articulate the position of Africa in the manner that he did.

But also business interests, foreign interests are another threat to our independence and the observance of the rule of law. If you allow anybody to entice you with speaking engagements in some of the prestigious institutions outside of your country, to profile you through abundant media coverage, even if you say nothing, it is made to look like something profound that nobody has ever said before. If you are that weak, as a Judge, you are a candidate for compromising judicial independence and the observance of the rule of law. Corruption will be perpetrated in your country, you will have one opportunity after the other to say no, as is the responsibility of the Judiciary, but because you are hungry for power, for prestige, for a position and even money, you will forget about the suffering of the millions of people in Africa. Suffering because of poor education, poor health facilities, just the abject poverty that Africa, though rich in natural and mineral resources have been characterised by.

As I close, let me just say this: You know, many years ago, I am told there was a man by the name of Jethro. He visited his son-in-law Moses, and found that this man who was really adjudicating on a number of cases, was dealing with every case that that nation had to deal with, and he said to him no, no, no, Judges have to be appointed, and he said but, to have a credible Judiciary in place, you need

able men and women. In other words, competent people. You can never enjoy judicial independence if those occupying position in the Judiciary are incompetent. The institution will lack the credibility that is so crucial for its survival because we don't control the purse, we don't control the army. It is our high moral ground that ensures that we are respected and our orders are complied with. So able people, and two, in its own way he said, people who fear God. But what does that mean if you are not, if you don't believe in any God? It means people who will uphold the Constitution and the law. Not people who will play games with the Constitution and the law. And the third requirement was people of truth. Not people who will corrupt facts and the truth. And finally he said people who hate bribes.

I was talking to one of us at some meeting, a highly placed Judge, and he was telling me how they were paid in his country, and one statement that shook me to the core was when he said you see, that is why you know, Judges tend to be corrupt. Meaning that is why we are corrupt in our own country. So as we reflect, part of those that we must look at is what is it that must be done to ensure that only competent people get appointed? Only people who are committed to their affirmation or oath of office, are appointed, only people who will not play games with the truth are appointed, only people who hate bribes and corruption are appointed. We have got to look at the way Judges are appointed. It can't be that a politician just wakes up one day and say I like that one, not that one. Why? No, no, no, I just like him.

There has got to be systems in place to authenticate the suitability of those who assume judicial office, their competence must be tested and we have got to look

at, Colleagues, the renewability of terms of office of Judges, because if terms of office are renewable, the question is how do you qualify for renewal? How must you behave yourself so that you can be favourably looked upon for the extension of your term of office? So terms of office must be long and non-renewable.

We also have to look at the remuneration packages of Judges as well as their retirement benefits, because you know, human beings will always be human beings. If you earn far too less, less than your country can afford, in other words if your country is able to pay you more, but they pay you less, that is something that is worrisome and we have got to articulate principles at this gathering, that will guide or point to the appropriate way that Judges, and by extension Magistrates must be remunerated, so that the temptation to corrupt themselves is not there.

We have got to look at the institutional independence of the Judiciary. We have got to look at any other aspect that is relevant to ensuring that the possibility of being beholden to other players in the State or outside of the State are reduced. I am not naïve. When I visited Ghana, I was shown blood stained stones somewhere in the court building, and they said Judges were shot dead because they were men of integrity and their bodies were picked up somewhere at the river, and the blood stained stones at the court building, bore the blood of those Judges who refused to bow down to any form of pressure. And who chose to be truly independent, knowing that they are there not to serve themselves and their families, but more the nation and by extension, the continent. So when you become a judge, know that there are risks. But remember that most of the African countries are free because people had to die. So if you have to die for the sake of the many, so be

it. Rather than corrupt yourself and live with a guilty conscience because you are unprincipled, and people have to suffer because you pretend to be a Judge, when in fact you are a puppet. You are a toy. Your family members may be threatened, favours may be extended to you.

I trust that when we leave this place, we would have come up with principles that undergird judicial independence, and that would ensure that no one ever thinks that because of the position they occupy, or the resources at their command, or the connections they have, can tell a judge how to resolve any case. We are a very wealthy continent and to create an investor friendly climate, we require stability in every sphere of life and the Judiciary has a crucial role to play in ensuring that the climate that will allow our economies and our constitutional democracies to thrive in this continent becomes a practical reality.

I apologise for taking longer than I should.

I thank you