



CONSTITUTIONALISM & RULE OF LAW: BRAINSTORMING & EXPANDING THE AU DOCTRINE ON UNCONSTITUTIONAL CHANGES OF GOVERNMENT & TO ENGAGE STAKEHOLDERS IN PROMOTING & IMPLEMENTING THE AFRICAN CHARTER ON DEMOCRACY, ELECTIONS & GOVERNANCE

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(BY MOGOENG WA MOGOENG – CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA & VICE PRESIDENT OF THE CCJA)

That Africa has been oppressed, exploited, marginalised, ignored, and stigmatised to perpetuate stereotypes that work against her well-being and in the furtherance of foreign interests and the interests of a few greedy and self-indulgent Africans, seems to be an irrefutable historical fact. But this workshop provides a platform not to lick those wounds or examine the depth and width of those scars. It provides the much-needed moment for self-reflection on the numerous opportunities we have had, to undo the harm caused by imperialism, how we have missed out on some of those opportunities as we took full advantage of others. It is also the time to identify what needs to be done to improve on our achievements in relation to the promotion of constitutionalism the observance of the rule of law and human right as well as the entrenchment of democracy by, among other things, holding credible, free and fair elections at constitutionally set intervals.

Decades ago, Africa committed herself to the total eradication of colonialism in those parts of her territory that were still governed by foreign powers. To many, it must have sounded like an unreasonable and unattainable lofty ideal or dream, given the fact that most of those in charge of the command structures and the economy of the world, were themselves the very imperialists

sought to be unseated. There was no comparison between the power wielded by the imperialists and the influence they had individually and collectively on the one hand, and those of the whole of Africa put together on the other.

But because the commitment to free the rest of Africa from her misery was a noble objective driven by the desire to do what was for the good of all as opposed to greed or self-aggrandisement, and because those selfless commitments were undergirded by the integrity of leaders of solid character, painful sacrifices were indeed made by many African leaders to bring to fruition the freedom of Zimbabwe, Namibia and South Africa. Freedom for the African people is one of the greatest achievements of Africa for Africa and her people. And this came at a huge and at times the ultimate price. The socio-economic development of countries like Tanzania, Zambia, Botswana, Ghana, Nigeria and many others were compromised, military airstrikes and other life-threatening attacks were also endured, just so, that fellow Africans could also vote, enjoy a semblance of dignity and participate meaningfully in the economic and political lives of their respective countries. Now that political freedom has been achieved for all African countries, the time has come to honour all those sacrifices through the entrenchment of constitutionalism, the protection of human rights, the observance of the rule of law, the holding free and fair elections at regular intervals and the inculcation and promotion of the all important culture of good governance.

I am privileged to speak on behalf of the Judiciary of this great continent. And is fitting therefore that some reflections be shared on the kind of Judiciary that would help Africa take forward this self-imposed and undoubtedly noble mission which, when accomplished, would help Africa shed itself the scales of marginalisation, shame and stigmatisation and claim her rightful place in the community of nations.

Article 3(5) alludes to the importance of separation of powers which, from a judicial perspective, finds reinforcement in Article 2(5) which highlights the promotion and protection of the independence of the Judiciary as one of the set objectives of the African Charter on Democracy, Elections and Governance. Additionally, we as the Conference of Constitutional Jurisdictions of Africa (CCJA) recall in the Preamble to our Statute that the Constitutive Act of the African Union records the commitment of the Heads of State and Government of the Union “to promote and protect human and people’s rights, to consolidate institutions and democratic culture, to promote good governance and the rule of law.” We also undertake to supplement the AU mechanisms to consolidate the rule of law, democracy and human rights. Finally, we make a profound observation in our Statute as the CCJA, that the achievement of these noble objectives of the AU is “closely linked to the independence and impartiality of Judges.”

The doctrine of separation of powers presupposes the ability of the Judiciary to exercise its constitutional power impartially and fearlessly to all persons alike and at all times. A key requirement for that possibility is the individual Judge independence and the institutional independence of the Judiciary. History bears out the fact that of the three arms of the State, the proclivity for interference invariably gravitates towards the Judiciary. Everything possible must thus be done to insulate the Judiciary from extraneous influence, because absent judicial independence, it will not be possible to guarantee constitutionalism and the rule of law, democracy, free and fair elections and good governance.

A human being has the innate and generally dormant desire to dominate all others. Where this obsession with power has come to full manifestation, greed, the oppression of others to have it your way and the corruption or suppression of laws, including the supreme law, and the manipulation of people in positions of authority and institutions that undergird constitutional democracies as well as the rigging of elections and, other forms of unconstitutional regime change are pursued relentlessly.

Central to the State's ability to curb and end these undemocratic and national image-soiling tendencies is a truly independent Judiciary. The disdain with which the Judiciary is treated by several countries in this continent is a matter of grave concern to the CCJA, and should be of equal concern to all of us. A condescension to the Judiciary by the other two arms of the State, a scant allocation of resources that incapacitate the Judiciary in its role of administering speedy and quality justice to all our people, the inclination to hold on to the budget, personnel and administrative functions so intimidate to court operations that they, under normal circumstances untainted by the dormant or already emerging desire to manipulate the Judiciary, ought to resort under the Judiciary, are all flashing bright red lights. The future of constitutionalism, democracy, human rights and the rule of law as well as good governance is in danger for as long as the suppressed but self-evident desire to muzzle the Judiciary is discernible from one of or the two political arms of the State. It bears repetition, that the adoption and proper implementation of the African Charter on Human and People's Rights, the African Charter on Democracy, Elections and Governance and other progressive AU instruments and protocols, depends on the existence of an independent and impartial Judiciary. To establish that kind of a Judiciary requires the observance of or adherence to the following principles:

a) **Individual Judge independence.**

This is about a Judge's allegiance to the country and an unwavering commitment to uphold the Constitution and human rights and to dispense of justice, sitting alone or with others, without fear, favour or prejudice to all persons alike, in accordance with the Constitution and the law. This is independence from any political interference, undue influence from the rich and powerful and any other influential or powerful lobby group, personality, association or institution.

b) **Institutional independence.**

Just as the other two Branches of Government have separate budget allocations and bear the responsibility to run administrative functions closely-allied to their capacity to deliver on their core constitutional mandates, so should it be with the Judiciary. A truly independent Judiciary requires the possibility to set its strategic priorities, re-order its affairs and resource its projects with a view to enhance its accessibility to the poor and rich alike, deliver quality justice expeditiously, manage its case roll efficiently and effectively, monitor and evaluate its performance and take full responsibility for its ability and inability to deliver quality service to the people.

When individual Judges and Magistrates are free to take correct decisions and the Judiciary as an institution is well-insulated from corruption, manipulation and undue extraneous influences, then the prospects of promoting and entrenching constitutionalism, the rule of law, human and people's rights, the establishment of the culture of holding credible elections and good governance always loom large in the African horizon.

c) **Judicial Accountability**

Judicial accountability comes through timeously finalised cases, and well-reasoned judgments delivered without undue delay. When there are lapses, they must be detectable through the mirror of an efficient case management system, the judicial norms and standards as well as a functional performance monitoring and evaluation system. Independence always assumes responsibility and accountability.

d) **Efficiency and effectiveness.**

To fight and reject corruption in line with Article 2(9) and 3(9) of the African Charter on Democracy, Elections and Governance, to enhance respect for human rights and democratic principles in terms of Article 3(1), as well as to entrench the principle of the supremacy of the Constitution and the protection of the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society in terms of Article 10, the Judiciary must not only be independent but must also be accountable.

e) **Judicial appointment processes.**

Constant review of our judicial appointment processes and their change, if doing so would advance the best interests of all our people, is necessary. The transparency and the defensibility of the process is key.

f) **Tenure.**

Many, but obviously not all, African jurisdictions have determined a long and non-renewable term of office for Judges and Magistrates. This is a good practice for it does away with the undesirable possibility of Judicial Officers having to look over their shoulders come decision time on matters of importance, probably unsettled by the possible impact of

their decision on the renewability of their term of office which is their main source of livelihood, depending on who their decision stands to please or hurt.

It is desirable that short and renewable terms of office be done away with at all levels of the Judiciary.

g) **Remuneration.**

Only Judges and Magistrates free of corruption would be able to reject with the contempt it deserves, any attempt at manipulation and corruption, directed at them. A satisfactory remuneration package that takes account of the enormous responsibilities borne by Judges and the workload they have to discharge, without or only with minimum assistance, would go a long way to insulate Judges from corruption. The package would obviously be determined bearing in mind the economic muscle of a particular country.

h) **Judicial education.**

On-going judicial capacity-building through appropriately designed educational programmes driven by the Judiciary itself, the deepening of the understanding of judicial independence and accountability to what is needed to preserve the Judiciary's unique status and authority as the guardian of a constitutional democracy, freedom and liberties, free and fair elections and good governance, is essential to our future. Appropriate budgetary allocations are required to strengthen this key element in the life of an efficient and effective Judiciary.

i) **Repositioning.**

Not only must the Judiciary assert its role and authority as the third Branch of Government, it must also broaden its vision of its legitimate purpose to extend beyond the confines of its country.

The Judiciary must not only seek to be involved in important matters that affect the Judiciary nationally but also at a regional and continental level.

Regional Courts or Tribunals, like the SADC Tribunal, must come into being, be restructured and have Judges appointed to them in consultation with the Judiciary in a particular Region. This would obviate some of the errors made already in this regard or that could be made in the future. Judges should not only feature in these structures when being considered for possible appointment to these Tribunals. The same principle applies with equal force to equivalent continental structures like the African Court and its future.

The Executive is well organised and represented at AU level. Parliament also has its presence somehow felt through the Pan-African Parliament. The only arm that has consistently been under-resourced, at times made to enjoy nothing more than tenuous independence, the Judiciary, features virtually nowhere in any formalised and meaningful way. This is a regrettable oversight that cries out for urgent attention.

This issue is not raised out of the promptings or birth pangs of big egos jealously and violently crying out for accommodation. It is rather about the protection, appreciation and preservation of the heart that pumps life into the promotion of constitutionalism, the observance of the rule of law, the promotion and protection of fundamental rights, the regular holding of free and fair elections, the merciless uprooting of corruption and poor governance, for the common good of all of our people and posterity. More importantly the cry for the

Judiciary to be given the recognition it deserves is inspired by the urgent need for the renaissance of Africa.

Conclusion

I implore the delegates to this august workshop to ponder on the correct role of the Judiciary in the entrenchment, promotion and protection of human rights, the rule of law, constitutionalism, a vibrant democracy and good governance in Africa. Doing so, will open up our eyes to just how remiss we have probably been in allowing the Judiciary to fulfil its original and legitimate role in a true democracy, for the good of our respective nations and by extension the continent.

I THANK YOU ALL!

NKOSI SEKELELA IAFRIKA!

MAY GOD BLESS AFRICA!