# REMARKS AT THE DINNER OF THE FOURTH CONGRESS OF THE CONFERENCE OF THE CONSTITUTIONAL JURISDICTIONS OF AFRICA (CCJA)

**BY**

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SALUTATIONS:

[1] Directors of programme, Judge President Mlambo and Justice Mhlantla, allow me to start by conveying the heartfelt apology from Chief Justice Mogoeng Mogoeng - the Chief Justice of the Republic of South Africa. Due to an urgent commitments, he was unable to be with us this evening. He will join us later. He asked me to send his fraternal greetings to you.

[2] On his behalf, as the Chief Justice of the Republic of South Africa and also as the Vice President of the CCJA, it gives me great pleasure to welcome you all this evening –

at this Gala Dinner, which marks the beginning of the Fourth Congress of the Conference of the Constitutional Jurisdictions of Africa (CCJA). I also wish to express my deepest gratitude to all of you for having made time, despite your busy schedules, to be present with us at this very important historic occasion. The Judiciary of the Republic of South Africa, is immensely honoured by your presence here. Please feel welcome and enjoy your stay in this, our beautiful "the Mother City" and our beloved country, South Africa.

[3] I have been advised that the Third Congress of the CCJA, was well organised by the Constitutional Court of the Republic of Gabon. At that Congress, the members − through their collective wisdom, decided that South Africa should host the Fourth Congress of the CCJA, here in Cape Town.

[4] Today, after many weeks and months of hard work and preparation by the organising Committee, consisting of Justices Zondo, Jafta, Khampepe and Mhlantla as well as the Secretary General of the Office of the Chief Justice and her Team and the Secretary General of the CCJA and his team, that proposal has come to pass. Dear Committee, on my behalf and on behalf of the Chief Justice, the South African Judiciary, and the Judiciaries from all over of our beautiful Continent of AFRICA present, we are profoundly thankful to you for this − your exceptional efforts.

[5] A critical component of this symposium is the exchange of constitutional jurisprudence and judicial philosophies among members of respective judiciaries in the African region. As the host country, we recognise that the magnitude of this event is not only colossal in terms of its substantial impact to South Africa but also to Africa at large, particularly given the colonial and oppressive history of our beautiful continent. By the way, the "art and craft" of a Judge is not only informed by one's own legal experience,

expertise and jurisprudential ideologies; We, as judicial officers, do not only become enlightened by the reflections of our immediate colleagues in our courts, but also of our colleagues across other jurisdictions. That sharing of ideas enhances our judicial excellence. We therefore thank the CCJA, for visiting our oceanfront.

[6] The timing of this Fourth Congress could not have been better. This is so because our country celebrates the 21st anniversary since the adoption of our widely proclaimed Constitution. The theme of the Congress: "*Promoting the Independence of the Judiciary and the Rule of law"* is at the heart of our constitutional structure.

[7] As the South African Judiciary, we believe that judicial independence and the observance of the rule law should be central to all the jurisdictions that are and will be represented at this Congress and to all comparable democracies of the world.

[8] Struggles in our Continent, brought about by many things including, the injustices of our past, poverty, displacement, inequality, racisms, xenophobia; patriachy and sexism, require open-mindedness and concerted efforts from all of us in our broader agenda for constitutionalism, so that we can make our continent of AFRICA, a better place for all who live in it – united in our diversity.

[9] Former Chief Justice Chaskalson gave insight on the interpretation of the South African Constitution. In one of the early decisions of the Court, he said the following and these remarks rebound today:

> "The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. *It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected*." (*S v Makwanyane* at para 88) (My emphasis.)

[10] The former President of the Supreme Court of Appeal, President Howie, communicated to the delegates at the National Judges Symposium few years ago, that "without independence the nation's people could not be genuinely free." And further, he said, "without the Courts, that liberty would be impossible to achieve or preserve."

I must hasten to mention, by way of parenthesis, that to make considerable social change in our adjudication, sight should however not be lost of the fact that, devoid of the active cooperation of others (state organs) and, at least, an acquiescent public response, court decisions will have no impact. Those decisions may assume the character of judicial desires − instead of gaining effectiveness when it comes to enforcement.

[11] Esteemed Colleagues, although Judicial independence has been discussed at various symposia across the world for many years and, progressively, with somewhat rising frequency, you would probably agree that the need for such discourse has even intensified in all our jurisdictions.

[12] The more of similar discourses will dispel certain misconceptions about our accountability, as judicial officers particularly the misconception that we are accountable to those who appoint us. That is not and ought not to be the case. Nobody, nowhere, should dictate to a judge how to judge and what decision, she or he, should make.

Indeed, judges owe and should owe no favours. And, if the public has to have confidence in us, as the Judiciary, it should never be given an impression that Judges owe favours.

[13] To render Judges as independent as possible, so said President Howie, "they are, for the decisions they make in court, answerable only to the decisions of higher courts, to the law and their consciences."

[14] In our country, the objective structure of judicial independence is founded in the Constitution itself. The Constitution prohibits interference with the functioning of courts and enjoins organs of state, through legislative and other measures, to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts (section 165(4)).

[15] It cannot be gainsaid that Judiciaries or judges play a significant role in the lives of our people. Whenever people have disputes, their first port of call is the Judiciary. In many of our jurisdictions, Courts have given HOPE to the people of our Continent. It is for that reason that the Judiciary in all our different countries, should always be seen to be independent.

[16] But not only that, our people should also understand the role of the Judiciary, as the third arm of the state. It is therefore incumbent in every one of us, particularly, as Heads of our Courts, Judiciaries and as senior members of the Judiciaries, to inculcate a culture which demonstrate that as Judges, we value our independence and will always discharge our duties without fear, favour or prejudice. And we must ensure that the oath

of office or affirmation to administer justice to all persons alike without fear, favour or prejudice, is jealously guarded. After all, we are the guardians of our constitutions.

[17] The importance of promoting the independence of the Judiciary and the rule of law was eloquently captured by our former President Mandela in the following words:

> "The importance of the independence of the Judiciary is one of the pillars of our democracy and equally fundamental is the commitment to abide by the decisions of the courts, whether they are in one's favour or not." (Address at the opening of the President's budget debate, 21 April 1998.)

[18] We all know that the principles of judicial independence and observance of the rule law are not only central to our constitutional jurisprudence but also to the agenda of the African Union. It is therefore not surprising that it was the African Union which was behind the establishment of the CCJA with a view to ensure constitutional compliance. The achievement of the CCJA's objectives is largely dependent on the independence and impartiality of our Judiciaries.

[19] Esteemed Directors of programme and Colleagues, I am unable to conclude without saying few words about the principles of the separation of powers and the issue of funding the Judiciary – that lacks the SWORD and PURSE in administering Justice to all. Please bear with me.

[20] The question of separation of powers, although not constitutionally entrenched, is a constitutional issue. An independent judiciary, as an ultimate guardian of the Constitution, gives hope to the citizenry.

[21] The most inescapable criticism to the Judiciary is that Courts usurp the function of the administration. Some critics say that Court are taking on the tasks of policy determination that are best left to the expertise and discretion of the Executive. The criticism assumes the coherence of a distinction between legislation and adjudication and the possibility of a neutral constitutional adjudication.

[22] A view is held by some, across certain political spectrum, that the role of independent judges in our constitutional democracy should be limited. Sometimes criticism is made that Judges are making the law. Whether Judges understand issues of policy is a matter beyond the scope of my talk tonight. That should therefore be left for discussion, for another day.

[23] Suffice it say that the Constitutional Court of South Africa is, in my view, aware of the danger of taking on a policy role to a degree characteristic of political authority and indeed running the risks of being mistaken for one. Nonetheless, the separation of powers, while suggesting good reasons why the lines must be drawn, does not of itself indicate where the lines should be drawn.

[24] When litigants seek vindication of their rights, we do not and ought not simply shrug our shoulders and say priorities are matters of policy. It speaks to reason that when Courts scrutinises an official decision, it inevitably engages in policy.

[25] The principle and challenges of the separation of powers recur and will continue recurring. It is a question of a “delicate balance” and not a “difficult

balance." The former is the check and balance between the three conventional state powers.

[26] The role, power and duty of the courts derive directly from the Constitution. Judges have no discretion to refuse or avoid exercising such judicial power. Besides, there is no political consideration that entitles courts to escape their constitutional obligations. It follows that the tension between the judiciary and executive is bound to exist.

[27] This was aptly put by the former Chief justice Chaskalson when he said–

> *"It is probably inevitable that there should be some tension between judges and politicians in a country like ours where the Constitution entrenches the rule of law, and makes provision for an independent judiciary, and judicial review of legislative and executive action. This is inherent in the separation of powers and is not solely a South African phenomenon."*

[28] A former chief Justice of Australia, Chief Justice Gleeson, endorses these remarks in these terms:

> *"It is self-evident that the existence of [judicial review] will, from time to time, frustrate ambition, curtail power, invalidate legislation, and fetter administrative action. As the guardian of the Constitution, the High Court from time to time disappoints the ambitions of legislators and governments. This is part of our system of checks and balances. People who exercise political power, and claim to represent the will of the people, do not like being checked and balanced."*

[29] I mention en passant that when it comes to appointments of judges, the independence of the Judiciary may be attained if the important institutions such as the Judicial Service Commission (JSC) is comprised mainly of Judges. After all, the JSC's discharge of its responsibility − interviewing and recommending suitable candidates for judicial appoints is important for the well-being of the constitutional order, in general. The lack of resources by the Judiciary - and its continual dependence on the executive for money, may be damper to judicial independence.

[30] In conclusion, esteemed Colleagues, as the South African Judiciary – the Hosts family − we believe that this Congress will be interactive, so that we can continue contributing towards strengthening the independence of the judiciaries and the rule of law in this Continent, in keeping President Mandela's dream, of an Africa which is in peace with itself.

[31] Challenges abound, however, we must be hopeful because as the third arm of state, our Judiciaries must remain steadfast in achieving constitutional justice for all our people.

This gathering does reinforce our camaraderie. I hope that we are going to travel safely back home at the end of the sessions, with renewed vigour to uphold the rule of law.

**Once again, feel at home. We wish you a good stay in the Mother City and our beautiful Country.**

**We hope that you will enjoy our diverse heritage and will experience the warmth of the African People, as you know it.**

**Let us rise, defend our liberty and unity together, and uphold the bonds that frame our destiny for peace and justice.**

**Nkosi Sikel' iAfrika; Morena boloka setjhaba sa heso; May God protect our people.**

**I THANK YOU.**