

OPENNING REMARKS BY HON. MEPHATO REATILE

Chairperson of The Committee on Justice and Human Rights of The Pan-African Parliament

AT

Meeting of the African Group of The International Association of Judges

ON

Safeguarding the Independence and Conditions of Service of Judicial Officers

Cape Town, South Africa, 2 June 2019

Hon. Justice Mogoeng Mogoeng, Chief Justice of the Republic of South Africa;

Hon. Judge Hlophe, President of the High Court, Western Cape Province;

Daniel Thulare, President of the Judicial Officers' Association of South Africa (JOASA);

Dr. Arne Wulff, Director, Konrad Adenauer Stiftung's Rule of Law Program for Sub-Saharan Africa;

My Lords and Ladies,

Distinguished guests,

Ladies and gentlemen, all protocol duly observed,

Good Morning!

It is both an honour and a pleasure to be invited to speak at this meeting and to such a prestigious group of distinguished judges and jurists from Africa, the presence of whom I duly acknowledge in this wonderful venue.

I would like to begin my speech by thanking the organizers - the African Group of the International Association of Judges and the Judicial Officers' Association of South Africa (JOASA) - for kindly extending this invitation to the Pan-African Parliament, through the Permanent Committee on Justice and Human Rights, which I represent here, in my capacity as Deputy Chairperson.

As some of you may know, the Pan-African Parliament is one of the eleven organs of the African Union, set up to with the mandate to ensure a meaningful and effective participation of the peoples of Africa in the African Union policy and decision-making. Established with

consultative and advisory powers, the Pan-African Parliament is evolving into an institution with full legislative powers, whose members will be elected through universal suffrage. The objectives of the PAP include among others, mainstreaming African peoples' aspirations in the AU decision-making, facilitating domestic implementation of African Union policy and legal instruments, and promoting African shared values, such as democracy, good governance, human rights, constitutionalism and the rule of law, which, as you may all agree with me, seat at the crux of the theme of this meeting.

My Lords and Ladies, distinguished guests,

“SAFEGUARDING THE INDEPENDENCE AND CONDITIONS OF SERVICE OF JUDICIAL OFFICERS”, which is to be contextualized within the judicial independence discourse, may appear to be a topic that been extensively debated and discussed at various fora by eminent jurists, legal scholars and politicians alike. Mr Justice Sydney L Robin once opined that:

“everything which can be said (on the topic of judicial independence) has already been said and repeated on so many occasions and in so many learned article that any further observations are inevitably redundant.”¹

Valid or debatable as this claim may sound, it does not however invalidate the rationale for this important gathering, and many other ones to come, where the issue of judicial independence is reflected on, and this, for perhaps one good reason: Judicial independence, both institutional and personal, seats at the core of the rule of law and constitutionalism, principles which guide political and economic governance of our countries and our continent, which evolve day after day, and sometimes are tested by the actions and omissions of different actors, including primarily those from the Executive and Legislative branches of Government. This should be reason enough for those judicial and political scholars and practitioners not to ignore further discussion on the ever-evolving dimensions to this concept, which constitutes the guarantee of good governance, realization of human rights, peace and stability and also economic development in Africa.

At the Pan-African Parliament, and the African Union generally, constitutionalism and the rule of law, which includes respect for the personal and institutional independence of the judiciary and judicial officers has been reaffirmed in policy and legal instruments of the African Union. Aspiration 3 of the African Union Agenda 2063, which echoes with Goal 16 of the United Nations Sustainable Development Goals, envisages an Africa of good governance, respect for human rights, justice and the rule of law, under which the AU Member States are expected to consolidate democracy and improve the quality of governance; respect human rights and the rule of law and to build strong institutions, including judicial, to promote and advance the realization of those shared values.

We, the Pan-African Parliament, indeed adhere to the almost unanimous view that sees judicial independence as an essential component of the rule of law. In turn, for us the concept of rule of law reflects the idea that law must be just (i.e. in accordance with human rights norms) and the contents of the law and its enforcement mechanisms are able to guarantee the enjoyment of peoples' rights including protection against the arbitrary exercise of power and violation of human rights; whether from the State or from non-State actors. This

1 .See 'Judicial Independence,' Remarks of Right Honourable Beverly McLachlin, PC Chief Justice of Canada during the 300th Anniversary of Settlement Conference, Vancouver, British Columbia also marking the retirement of Chief Justice Alan McEachern of Canada, May, 2001 as quote by Justice RR Mzikamanda "The place of the Independence of the Judiciary and the Rule of Law in democratic Sub Sahara Africa", paper presented on 14 November 2007 at South African Institute of Advanced Constitutional Public Human Rights and International Law p1

credo means takes the rule of law to imply that the State must be held accountable when it abuses or undermines human rights. We hold the belief that international and African Union law and the rule of law are powerful instruments to further the judicial independence, in all its facets, which in turn will guarantee not only the enjoyment of human rights by everyone, but also sustainable development, peace and security.

This commitment has been entrenched in several legal instruments that promote respect for the rule of law and human rights. These include the African Charter of Human and Peoples' Rights; the Kigali Declaration on Human Rights in Africa; the Protocol on the Statute of the African Court of Justice and Human Rights; the Protocol to the African Charter establishing the African Court on Human and Peoples' Rights; African Charter on Democracy, Elections and Governance; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; the Solemn Declaration on Gender Equality in Africa; the African Charter on the Rights and Welfare of the Child; the African Youth Charter; and the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa.

It is worth stressing particularly that the African Charter on Democracy, Elections and Governance of 2007, which underlines the determination of the AU Member States to promote and strengthen good governance, by deepening and consolidating the rule of law; and entrenching a political culture of change of power based on the holding of regular, free, fair and transparent elections. By this Charter, the Member States committed themselves to promoting adherence to democracy and respect for human rights; promoting and enhancing adherence to the rule of law and transparency and accountability in the management of public affairs; and imposes various obligations on Member States. For example, it requires state parties to ensure transparent and accountable administration; improve public sector management; improve efficiency and effectiveness of public services and combat corruption; ensure separation of powers, including the independence and accountability of the judiciary and other public institutions.

The provisions of the African Charter on Democracy, Elections and Good Governance elaborates those of the African Charter on Human and Peoples Rights, which guarantee judicial independence through the right to be tried by a competent and impartial tribunal (Art 7). It goes beyond provisions of human rights treaties by determining that guaranteeing the independence of the Courts shall be a duty of the State (Art 26). Unlike the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights, the African Charter has approached judicial independence not only from the point of view of the judiciary's political or social role, or the objectives pursued by it, but with the individual rights in mind, particularly the right to fair trial. In fact, Impartiality and independence of the judiciary in the African context has been approached, particularly by the African Commission on Human and Peoples Rights in the context of the right to a fair trial, without dismissing individual factors which go to the heart of the concept of judicial independence namely, the rendering the courts dysfunctional through removal of jurisdiction; qualifications and competence of adjudicators; failure to provide requisite structures and facilities for the courts to perform their function; and refusal or neglect to enforce court judgements, have been considered on divers occasions by the Commission. Admittedly, these factors are all interrelated and it is sometimes not easy to draw a clear line between one or another of these.

Drawing on the abovementioned legal and policy instruments, the Pan-African Parliament hereby expresses its faith in a judiciary that is neutral and independent, but at the same time accountable and held to standards of competence and integrity. The same principles of balance must be applied to the immunities of judges once appointed, to their fair and

dignified remuneration while in service and to the process of removing them from office. In other words:

- ❖ Judges should be appointed through transparent and impartial procedures for the appointment of judges, without interference and control of the judiciary by the Executive or any other quarters;
- ❖ Judges should not be dependent on the appointing authorities (whether because they are personally indebted to these authorities for their initial appointment, or because they hope for future promotion);
- ❖ Judges should not be subject to political interference or any undue influence that undermines independence or neutrality;
- ❖ Judges also need to be held accountable, however, with mechanisms in place to discipline and possibly remove judges who neglect their duties or abuse their position of trust.

The PAP will spare no efforts to assist policy and law-makers, both at the domestic and regional arena, to find appropriate balances between these two potentially opposing considerations, having due regard for the practical effect of constitutional provisions in the political and cultural context to which they are applied. Through its Human Rights and Justice Committee, the Pan-African Parliament is committed to working, within the confines of its limited mandate, with the Africa Group of the International Association of Judges to deploy its consultative and advisory function, but also its budgetary and oversight role within the African Union institutional architecture, for the promotion and advancement of judicial independence. The PAP will do so by harnessing its strategic position both as an enabler and an overseer of the implementation of African Union policy and legal instruments, particularly Agenda 2063 aspirations.

- ❖ As an Enabler:
 - ✓ The PAP has used and will continue to use its current advisory and consultative mandate to formulate recommendations to AU policy organs for the adoption and implementation of the normative and policy standards that are instrumental for the achievement and realization of judicial independence in Africa.
 - ✓ Informed by the evolving needs for legal and policy harmonization in matters of African common interest such as judicial independence and other rule of law predicaments, the PAP can use - and is indeed already doing so - its current consultative and advisory mandate or its future legislative competence to adopt and propose relevant model laws for African States, informed by best practices around and beyond the continent.²
 - ✓ Also, by harnessing its unique institutional position and relationship with African national and sub-regional parliaments, the Pan-African Parliament has established policy fora such as the Annual African Speakers' Conference, Women' Conference and the Youth Forum, which are vehicles for building consensus and harmonizing views amongst leaders of National Parliaments for increased commitment for domestic oversight over and implementation of African shared values and aspirations, including the rule of law and its judicial independence component.

- ✓ Further, the PAP has and will continue to resort to its consultative, advisory, budgetary and oversight function to formulate relevant recommendations to the AU policy organs on Agenda 2063 aspirations, including on the issue of judicial independence and security of tenure for judicial officers.
- ✓ Lastly, the PAP is well positioned to work with to become a forum an ideal forum for peer-learning and experience sharing amongst African Parliaments and Parliamentarians on issues to do with advancing and promotion of judicial independence on the continent.
- ❖ As an Overseer, the attainment of agenda 2063 aspirations which speak to respect for the rule of law and judicial independence, is highly dependent on the proper integration of the existing continental policy and legal frameworks into existing national plans, laws and policies. There is adequate evidence to show that the failure of most of Africa's developmental frameworks such the Lagos Plan of Action, the Abuja Treaty, to name a few, is largely attributed to delay or failure to domesticate them at by the Member States. The PAP will therefore play a very crucial role in the oversight and proper monitoring of the domestication and implementation process of Agenda 2063, with particular emphasis on the rule of law components, both at national, sub-regional and continental level. Its unique institutional relationship with national and sub-regional Parliaments will enable the PAP to effectively carry out this function.

My Lords and Ladies,

That the judiciary as an institution in any system of democratic governance plays a central role in the protection, promotion and enforcement of human rights is beyond debate. If we accept, as we should, that the judiciary is the custodian of the rule of law and justice in any country, we should have no difficulty in asserting that the concept of the independence of the judiciary and judicial officers is an important facet of the doctrine of separation of powers of the three branches of government. It is with the realisation of this principle in mind that the Pan-African Parliament and the African Union as a whole renew its commitment to the rule of law and judicial independence, as expressed by the African Commission on Human and Peoples' Rights in its decision in *Civil Liberties Organisation v Nigeria*³ as follows:

“[A] government that governs truly in the best interest of the people ... should have no fears of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society. For a government to oust the jurisdiction of the courts on a broad scale reflects a lack of confidence in the justifiability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and the rule of law.”

I will conclude on this quote and take the opportunity to indicate that a Pan-African Parliament with full legislative powers will be a strong pillar of strength for the African Union and its Member States for the realization of Agenda 2063 aspirations. While the PAP has rolled out advocacy initiatives to sensitize AU Member States to ratify the Malabo Protocol, we can equally count on your collaboration in pushing for an African Legislative Parliament, which will play a meaningful role in supporting and advance the Africa That We Want, an Africa in which judicial independence will be real, full and effective.

I thank you!