

# Speech by Prof. Charles Manga Fombad

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Meeting of the African Group of The International Association of Judges

ON

## Safeguarding the Independence and Conditions of Service of Judicial Officers

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Speaking on:

### JUDICIAL POWER AND DEMOCRATIC CONSOLIDATION IN AFRICA: OPPORTUNITIES, CHALLENGES AND FUTURE PROSPECTS<sup>1\*</sup>

Thank you chair for the kind introduction. I wish to thank the organisers of this meeting, particularly Mr. Daniel Thulare, President of the Judicial Officers Association of South Africa and Ms Vanja Karth, Director of the Democratic Governance and Rights Unit (DGRU) at the University of Cape Town, for the privilege and honour of being invited to be part of this important discussion on a very topical issue.

#### The Title of My Presentation

I want to start by pointing out that, for a variety of reasons, the judiciary in Africa has not always played its role as the guardian of the constitution, protector of human rights, and impartial enforcer of the rule of law. The reasons for this are numerous and varied but four main ones come to mind:

- (i) the absence of adequate safeguards for judicial independence which exposed judges to control and manipulation by the executives;

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- ii) the effective absence of constitutional review in the case of civilian jurisdictions or the adoption of defective systems of constitutional review in post-independence constitutions of common law jurisdictions;
- iii) the prevalence of one party and military dictatorships which made elections irrelevant. For as we know, without electoral competition and the uncertain outcomes in the electoral market, there is no reason to have recourse to courts; and
- iv) finally, judicial timidity and the abdication of responsibility by judges deferring and pandering to the perceived or actual wishes of the executive.

The constitutional reforms of the last three decades have resulted in important changes designed to introduce fully functional and independent judicial institutions. Effective independent judicial institutions are not only necessary for the existence and sustenance of constitutionalism and democratic governance but also vital for its consolidation. This is particularly so at a critical time like this when the democratic transition is increasingly threatened by the ominous signs of a reversal and a return to one party dictatorship courtesy of dominant parties.

- My presentation will touch on three main issues;
- Firstly, the expansion of judicial power in the last three decades;
- Secondly, the challenges encountered by the judiciary in spite of its expanded powers;
- Thirdly, how the judiciary can play a meaningful role to help fend off the looming dangers of a democratic reversal and act as the last defence of the constitution and constitutionalism;
- And end with some concluding remarks.

## **1. The Expansion Of Judicial Power In Africa**

The general process of constitutional renewal that started in the 1990s has been marked by two important developments: firstly the move to make judicial institutions really independent and secondly, the expansion of judicial review.

There have been serious attempts to make judiciaries in Africa more independent by limiting the scope for external interference, especially by the executive. Safeguards of judicial independence have seen the introduction of measures that provide for judicial autonomy, financial autonomy, security of tenure, adequate remuneration, transparent systems of judicial appointment and judicial accountability. However, there is considerable variation in the degree and scope for judicial independence with the prospects for this being better in Anglophone countries than in Francophone and Lusophone countries. In fact, in Francophone Africa, the prospects for judicial independence is substantially compromised by constitutional provisions that make the president of the republic in these countries the guarantor of judicial independence.

The other development has seen the expansion of judicial review consistent with contemporary global trends. Before the 1990s, constitutional justice was a vain hope in Francophone and other civil law jurisdictions. Today, more, but by no means all the constitutions of Francophone African states now provide for some degree of judicial review that enhance the prospects for constitutional justice.

The question that one asks is whether these developments have actually led to an effective improvement in the quality of constitutional justice. Have the courts taken the opportunities that have been presented to influence the pace and nature of the political and constitutional transformation process on the continent?

## 2. The challenges in the exercise of the expanded judicial powers

If the African judiciary could be considered to have been one of the victims of the long years of totalitarianism that enveloped the continent soon after independence, the post 1990 constitutional reforms have provided it with an opportunity to redeem itself. African courts can now, unlike in the past, play some role, however limited, in promoting constitutional democracy and justice.

However, the African political scene has become more volatile with elections that often carry the risk of violence due to the increasing tendency of incumbents to hang on to power by all means. Courts have become the battleground for many political battles. Their ability to protect Africa's fledgling constitutional democracy has been hamstrung by a number of obstacles. The main ones are the increasing politicisation of the judiciary, judicial corruption, lack of resources and judicial conservatism.

Political interference with the judiciary and the threat it poses to the ability of the judiciary to operate independently, objectively and fairly is probably the most insidious problem that has survived the post-1990 constitutional reforms and remains a potent obstacle to the ability of the judiciary to arrest the risks of democratic reversal. This ranges from manipulation of the appointment systems to appoint executive-minded judges, to intimidating judges as has been the case in countries such as Uganda, Malawi and even in South Africa (politicians have branded some judges as counter-revolutionaries).

Judicial corruption remains a potent problem. Judges all over the continent are reasonably well paid and receive salaries and pensions well above that of the average civil servant. Yet, after the police, the judiciary is generally considered to be the most corrupt institution in Africa. The quality of justice has suffered where it becomes cheaper to buy a judge than hire a lawyer.

All the studies on the judiciary in Africa in the last three decades have drawn attention to the problem of lack of resources. The judiciary cannot operate independently and efficiently without adequate resources. In some instances, the lack of resources may be a deliberate political ploy to put pressure on the judiciary.

Other problems that constrain the performance of the judicial institutions on the continent include poor infrastructure, lack of adequate funds to cover running expenses, insufficient stationery and office equipment and inadequate working facilities such as courtrooms. In many countries, judges do not have access to sufficient legal information resources such as books, case reports, statute books and gazettes. This is particularly so in the rural areas where there are no libraries or where libraries have been neglected over the years. This is often aggravated by the lack of computer skills or lack of motivation on the part of users. In some cases, there is no access to the internet or, where there is such access, there are technical problems such as slow and erratic networks, unreliable power supplies and poor user support and maintenance systems.

The final problem that I would like to refer to affects the ability of the judiciary to perform to optimum level is judicial conservatism. There isn't enough evidence to show that African judges are alive to the new progressive constitutional rights spirit of the 1990s or if so, have sufficiently manifested this in their approach to constitutional interpretation. There is a certain narrow conservatism that often ignores the new context in which constitutional disputes must be interpreted. This new context includes the rejection of dictatorship in all its forms and the sensitivity to issues of human rights. Many judges are still too imbued with the past to recognise the imperatives of change necessitated by a fast globalising world where geographical as well as legal boundaries are breaking down regularly.

The future of constitutionalism in Africa depends on how judges can, where possible, overcome these challenges.

### **3. The Opportunities For The Judiciary To Influence The Course Of Democratic Consolidation And Constitutionalism**

It is now clear that the prospects for judicial institutions in Africa to act objectively and independently in a manner that will promote Africa's faltering attempts to entrench constitutional democracy and promote constitutional justice are not as good as they appeared to look after the hectic constitutional changes of the 1990s. As the fight to cling on to power by African leaders intensifies, there will be more pressure on the judiciary to decide cases, especially politically sensitive cases in deference to the executive. The prospects for the future depends on the judiciary becoming more assertive and willing to reflect the contemporary desires and aspirations of the citizenry and the progressive spirit of the post 1990 constitutional reforms. To be able to do this, there are at least two measures that are needed. First, the judiciary must be willing to act as agents of change and the last defence against authoritarianism. Secondly, the judiciary will need to join the global judicial dialogue that strives to promote respect for the rule of law and good governance.

#### **3.1 The judiciary acting as agents of change and last defence against authoritarianism**

A passive judiciary in the face of Africa's overbearing executives and the constitutional weaknesses of the legislature is a clear and present danger that must be averted. Judicial independence in the post-independence period was not only compromised by the mere intolerance of the executives but also by the enthusiastic abdication of judicial responsibilities by the judges. Constitutionalism and democracy in Africa today can only develop and grow with judges who are liberal, progressive, activist or have "bold spirits" and not the "timorous souls" of the passive judges of the past.

I firmly believe that constitutional justice can only be realised with a judiciary that is prepared to use its powers to negate the continuous authoritarian impulses of elected politicians. This can be done in at least three ways.

Firstly, judges must, as an imperative, adopt a more principled and rights-sensitive approach to interpreting constitutions in a manner that takes account of the radical political, economic and social changes of our times and the revulsion against dictatorship. It is manifestly clear in many instances that the revised or new constitutions were not only designed to eliminate dictatorship and promote democracy and good governance. The goal was also to promote a new human rights culture that is particularly sensitive to issues such as hunger, poverty, unemployment, ignorance, illiteracy, disease and other social ills that have inflicted so much hardship on a majority of the population on the continent. This must be the context in which judges decide cases today.

Secondly, another approach to promoting change is by adopting broad interpretative techniques when interpreting constitutions. This, arguably inheres in the very nature of a constitution itself. Far from being a document that contains "time-worn adages or hollow shibboleths," or resembling a "lifeless museum piece," a constitution must be regarded as a living document which is designed to serve present and future generations as well as embody and reflect the fears, hopes, aspirations and desires of the people.

Finally, perhaps the most significant way in which African courts could strengthen good governance and constitutionalism on the continent is to ensure that governments do not breach their international commitments. It is a notorious fact that African governments have no difficulty signing international treaties and conventions and sometimes ratify them but are never in a hurry to domesticate them.

Whilst courts cannot compel governments to domesticate such international treaties, they can at least compel governments not to act in breach of such treaties. The foundation for this approach was laid down in the famous Botswana judgment of *Attorney-General v Dow*. As the judge pointed out:

*“...Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. This principle, used as an aid to construction as is quite permissible under section 24 of the Interpretation Act...”*

This approach was also adopted by the South African Constitutional Court in the *Glenister v President of the Republic of South Africa*. One can argue here that judges have an inherent duty to continuously breathe life into the constitution and ensure that the government respects its international law commitments. But this will require a more open-minded global approach to constitutional issues.

### 3.2 African judges joining the global judicial dialogue

In order to sustain the momentum towards greater constitutional justice in Africa, judges need to abandon the conservative inward-looking culture that was characteristic of the old judiciary and instead perceive of themselves as members of a global legal community where knowledge and ideas are exchanged across jurisdictions. So far, there has been little evidence of an intra-African dialogue in terms of either cross-fertilisation, borrowing or migration of constitutional ideas from one African constitution to another or through the use by judges of jurisprudence from other African jurisdictions.

For example, the South African Constitutional Court during its early years relied extensively on foreign jurisprudence. Hardly any of this was from other African jurisdictions. Both in constitution making and in constitutional interpretation, there is still a tendency for African constitutional designers and judges to rely and copy extensively and sometimes even almost exclusively from the former colonial power's legal system. This negative self-defeating attitude has considerably changed in Anglophone Africa where constitutional experts look beyond England for inspiration and guidance. In Francophone Africa, constitutional draftsmen have continued to seek inspiration from and rely almost slavishly on the Gaullist Fifth Republic model, which some of them still consider to be the most reliable and unassailable constitutional model.

Three critical issues need to be noted here.

Firstly, there is much to learn and emulate from the progressive nature of the 1996 South African constitution and the high quality of the judgments delivered by the South African Constitutional Court. The fact that in certain areas of the law, such as socio-economic rights, this Court has laid down principles that are copied the world over suggests that we do not need to continue to look out of the continent for, and copy Western constitutional models. The South African constitution has not only incorporated the best elements of Western constitutional systems but it has adapted this to its own historical, social and cultural context in such a way that it is now a model which even some Western countries can emulate.

Secondly, the universality of certain constitutional law principles and standards is no longer in doubt. For example, a court can hardly deal with a human rights dispute today without being invited by counsel to consider one foreign authority or another. More often than not, the reliance on these foreign authorities has been rather eclectic with scant or at most superficial references to the techniques of comparative law. Many constitutions do not explicitly or implicitly authorise the judge to refer to

or invoke international law, or rely on comparative law. Nevertheless, it can be argued that in the globalised world of today, it would be self-defeating and a dereliction of duty for a judge to completely ignore legal developments abroad and their actual or potential implications for domestic law. The fact is that the fundamental values that underpin most constitutions, such as equality, dignity of the human person, non-discrimination, freedom of speech and others are now universal.

Thirdly, because of the internationalisation of many constitutional law principles, judges must resist the intoxicating notion that they know it all and be prepared to keep up with the latest developments in the law. They must adopt an open mind that is willing to research into and consider developments abroad particularly in other legal systems.

Fourthly, it is rather embarrassing that there is so little evidence of serious efforts to promote an intra-African legal and judicial dialogue between the diverse and sometimes divergent legal traditions that we inherited at independence. The similarity of the experiences that African countries have gone through during the colonial era and afterwards, and the challenges of dealing with ethnic, cultural and religious diversity means that they can learn from each other's experiences. This does not mean that what obtains elsewhere has to be copied blindly, but rather to attempt to draw inspiration from the dynamic and rich jurisprudence of other jurisdictions.

Internet access is expanding and this opens up new possibilities for promoting access to information, especially African literature. Today, the latest and most important decisions of the courts of individual African states and of regional courts are just a mouse click away. Because of the rapid advances in information and communication technology in the last three decades, not only judgments but also an extraordinary amount of legal material from different jurisdictions is now readily available. The benefits of this will be completely lost if national legal experts and judges are too unbending and stuck with the past to see the benefits of learning from what is happening elsewhere on the continent.

An important way of overcoming this artificial mental barrier could be through more extensive and frequent cross-national networking of judges and other judicial officers from different legal jurisdictions. Such personal contacts will enable them to share their experiences and see how judges occupying similar positions elsewhere often confront the same kinds of problems.

An excellent example of this intra-African dialogue and sharing of experiences is the Judicial Institute for Africa programme by the Democratic Governance and Rights Unit (DGRU) of the University of Cape Town, with the support of Konrad Adenauer Stiftung's Rule of Law Programme, Nairobi Kenya. They and the other organisers and sponsors of this meeting must be strongly applauded. African judicial institutions themselves need to contribute to sustain this initiative.

## **4. Conclusion**

After more than two decades of the transition to democracy and constitutionalism, it is clear that the prospects for the future do not look as bright as they initially appeared. Africa's judicial institutions are more independent today than they have ever been and their powers to review and sanction constitutional violations have also expanded. It was inevitable that the increase in judicial independence and judicial power would involve the judiciary in political battles and controversies with the executive. In dealing with election disputes and abuse of powers, the African courts have generally not been as assertive and principled as one would have expected. Apart from South Africa, the courts on the continent have not acted vigorously and imaginatively to promote socio-economic rights. Although judicial boldness and assertiveness on its will not put an end to election abuses, executive lawlessness or

poverty and deprivation, it will certainly put pressure on election management bodies and governments to improve their performances.

The ability of African judicial institutions to keep the flames of democracy and constitutionalism burning when these are threatened by the enemies of the transition are hamstrung by numerous challenges. Nevertheless, I strongly believe that judges can and must act imaginatively as agents of change and the last defence against any authoritarian reversal. To do so, African judges need to open up, be ready to share ideas and learn from each other and be actively involved in the global judicial dialogue.

The problem of pursuing constitutional justice and protecting the democratic gains of the last three decades and the critical role of African judicial institutions assumes an unprecedented importance and urgency because of the many threats that we face today. African judicial institutions have “no influence over either the sword or the purse,” but present constitutions place them in a better position than they have ever been to check against abuse of power and entrench a culture of democracy and constitutionalism. It simply requires many of them to be as bold and assertive as the South African Constitutional Court judges have been.

Mr Chairman, I want to conclude by warning that, unless the judiciary in Africa is willing to play this sacred and special role as guardians and protectors of the constitution and constitutionalism, the present reverse winds might move the continent back into the dark turbulent days of authoritarianism. In other words, judges, in spite of the challenges they face, are eminently well placed to stem the rising tide of authoritarianism and the diminishing prospects of democratic consolidation, good governance and constitutionalism.

Thank you very much for your kind attention.