

ADDRESS BY JUSTICE YVONNE MOKGORO ON THE OCCASION OF THE "A NATION IN A DIALOGUE WEBINAR" HELD ON 30 JULY 2021.

INTRODUCTION

The idea of deepening the Constitution gives us an opportunity to consciously reflect on the state of constitutionalism in South Africa and retrace our steps, determining how far we have come building the caring and egalitarian society envisaged in the Constitution, pursuing the constitutional project. More specifically and importantly, it grants us another opportunity to critically and sincerely reflect on the strengths and shortcomings of our own brand of constitutionalism and where necessary, to determine how to make our Constitution more purposefully effective as the tool we had created to break down the walls of apartheid as we simultaneously build the democratic society envisioned in the Constitution, which is based on the promotion, respect, protection, and fulfillment of the basic human rights contained in the Bill of Rights, the latter being the cornerstone of our democracy. The values of equality, freedom, human dignity, the supremacy of the Constitution and the rule of law intended to reflect the spirit of the Constitution in the context of the Preamble must be what energises the effective use of the tool. That, in essence is the South African version of constitutionalism.

A national constitution being a template of sorts in terms of which governing standards are measured, ordinarily constitutions the world over are crafted in an enduring fashion mostly for purposes of longevity and stability. That certainly does not mean that national constitutions are sacrosanct to the extent that they may not *ever* be amended. When the need for fundamental constitutional change arises due to current circumstances, and it has become necessary to address a particular national need not sufficiently provided for, a national call for constitutional change may be justified.

Since the dawn of our democracy, we have been showered with global admiration for having a most progressive constitution which has a deliberately generous and fit for purpose Bill of Rights. Like no other national constitution elsewhere, we had the audacity to protect socio economic rights as justiciable rights which may be adjudicated upon by the courts, the judiciary having been vested with the constitutional power of judicial review. We have unapologetically constitutionalised affirmative action. All three arms of the state, that is, Parliament or the legislator, the Executive or government and the Judiciary or the courts, are constitutionally obligated to promote, protect and fulfill the rights in the Bill of Rights.

The legislature has a constitutional duty to pass legislation which advances the rights of people in the context of the constitutional project. The Executive or government is equally obligated to determine and create executive instruments of policy, regulations, programmes, projects and the like, implementing those to promote, protect and fulfill the rights in the Bill of Rights. Thus, Parliament and government must design their own programmes in pursuit of the national constitutional project and *must* do so purposefully and consistently. They certainly need not have to wait for an order of court before they fulfill their respective constitutional obligations. However, where there is failure to fulfill their respective

constitutional duties, the judiciary in South Africa, based only on a constitutional complaint, has the power of judicial review and will indeed determine the complaint and order compliance with the relevant constitutional imperatives. The judiciary has over the years indeed fulfilled that responsibility without fear, without favour and without prejudice.

THE FIGHT AGAINST ABJECT POVERTY

The Constitution must thus be viewed as a tool with which it was intended to break down the walls of the injustices of the past and simultaneously build a democratic and caring society where all would not only be equal before the law but would also equally enjoy the protection of the rights in the Bill of Rights, including the specific socio-economic rights. When in 1996 we included socio-economic rights in the Bill of Rights as justiciable rights, the resolve and determination to fight against the impact of decades of colonial and apartheid socio-economic injustice was clear: the state must create the necessary instruments to progressively realise among other things, the elimination of abject poverty among the majority of people in South Africa. How far have we come? Our intentions having been so noble, pursuing the envisioned constitutional project, why do the majority of people still live in such unimaginable conditions of poverty?

This year, we have reached the 25th anniversary of constitutionalism in South Africa . And as we observe this constitutional milestone and reflect on its efficacy, we can indeed and at least celebrate the establishment of constitutionalism itself, the general and particular instances of transformation we have achieved, in line specifically with the right to equality in the Bill of Rights. The real test of the efficacy of our Constitution however, will be exposed as we juxtapose the rights protection in the Constitution with the reality of the everyday experience of people today. In particular, we *must* reflect on why the respect, protection and fulfillment of the rights in the Bill of Rights and the basic constitutional values of equality, human dignity and freedom, still elude the majority of people in society, conscious that the Constitution is *not* self-executing. And when we reflect we must do so honestly and openly, admitting to our own shortcomings and neglect.

Although we always knew that the scars and societal damage of our apartheid past are indeed deep and would not be easy to heal, the courage we demonstrated, entrenching socio-economic rights as justiciable rights and not as mere policy directives made us believe that by now we would have significantly reversed the tide of abject poverty in society. However we continue to be confronted with an ever widening wealth gap with a minority of people becoming wealthier while the majority of people continue to live in conditions of undignified and humiliating poverty. 25 years down the line, notwithstanding that we have the world's most progressive tool with which to achieve our democratic ideals of equality we continue to be known as the world's most unequal society.

Professor Bonang Mohale will tell us that whereas the structure of most societies is diamond-shaped, with the majority of people constituted by the middle class, reflected across the middle of the diamond. The poor and the wealthy would be reflected at the bottom and top corners of the diamond respectively. In our society however, the majority of people constitute the poorest and are reflected across the middle of the diamond shape.

A further phenomenon and concern which, although not unique to South Africa, but is in the context of the relevant constitutional rights protection a serious injustice, is the feminisation of poverty. Only this week, Business South Africa gave the statistic that about 17 million people in South Africa rely on social grants and in the context of the recent social unrest, the destruction and looting of businesses in the particular areas of the country, joblessness has increased significantly. Most of these lost jobs had been in the retail sector, largely occupied by women, thus resulting in the loss of income, exacerbating the poor living conditions in the many female-led households.

GENDER-BASED VIOLENCE

Another bitter pill to swallow, notwithstanding the constitutional guarantee of the rights to gender equality, human dignity, freedom and the right to personal integrity of all including women and despite the plethora of protective legislation and policy aimed at protecting women against gender-based violence in the home and society in general, in 1999, South Africa was said to have had the highest incidence of gender based violence globally, including that of rape and domestic violence. And in December of the year 2020, in the context of the ravaging COVID-19 pandemic, President Ramaphosa declared the scourge a second pandemic that we as a country must contend with, thus demanding the government's full attention. Although the rape statistics would include men as rape survivors, 90% of them are women. For that reason the call for an end to age old harmful gender norms and gender stereotyping against women which have been found to be some of the major causes of gender-based violence is long overdue and must be eliminated because they only tend to justify violence against women. As women's anger against the violence mounts, we must attend fully to our failure to *effectively* ensure women's protection against the endemic violence. Unless we do so, the constitutional guarantees, legislative and other instruments of protection will certainly ring hollow. Critical in the endeavour to protect women against the endemic violence must be to right the wrongs of our own post-constitutional failures to *effectively* address women's socio-economic empowerment in general and women's poverty in particular. Otherwise, violence against women as a phenomenon of gender relations will not abate. The time to own up and right the wrongs of our own post-Constitution injustices generally and those against women in particular, is overdue.

THE RULE OF LAW

As regards the rule of law, and in conclusion, it suffices to briefly state that it constitutes one of the underlying or basic values of our constitution. In its most fundamental sense, the rule of law signifies that all people are equal before the law and that no person is above the law, no matter what status she or he occupies in life. The rule of law thus elevates the law above any personal and or group interests. It supports the principle that we shall all equally account for our actions before the courts of law, where the courts where the judiciary has the constitutional responsibility to adjudicate independently without fear, favour or prejudice. The laws shall thus be enforced equally to all and consistently applied and implemented. For that reason the rule of law not only prevents authoritarianism and the arbitrary exercise of public authority and power it also aims to prevent unlawful public or social disorder.

In our constitution the rule of law, alongside the supremacy of the constitution, are part of the value system which reflects the spirit of the Constitution, with which the exercise of public authority and responsibility *and* public conduct must be exercised at all times.

Of course, the question of compliance with the rule of law involves notions of ethical choices between right and wrong that are required to be made at the point of decision-making. In the context of public order management, compelling circumstances may impact the making of such choices. In our Constitution and the law in general, whereas particular compelling circumstances like abject poverty may in certain circumstances be considered as mitigation for wrongdoing like theft, it can however never ever justify the theft. The desperation created by poverty can thus not be a basis for exemption or impunity from accountability for wrongdoing. However, in the context of the recent civil unrest and public destruction of crucial infrastructure witnessed in the last couple or so of weeks, as a society, we must pay attention and work tirelessly in finding the most effective and sustainable approaches to addressing the humiliating conditions of poverty under which most people live. It suffices to say, similar to the way many of our generation relied on education to survive the ravages of apartheid poverty, so too can access to quality education, skills training and development be catalysts for bringing significant change to the socio-economic conditions of many people today. The impactful role of family, community and in particular the schooling system in shaping societal values must not be underestimated. My view is that, having witnessed the most alarming unpatriotic responses to the pertinent issues at the time, including the wanton looting and destruction of property which significantly weakened our socio-economic system, it suffices to say in conclusion, the institutions of family, communities of people and in particular the schools, clearly have their work cut out for them.

THANK YOU FOR LISTENING.

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