



CHIEF JUSTICE MOGOENG’S PRESENTATION ON:

**THE PROMOTION OF DEMOCRACY AND  
CONSTITUTIONAL JUSTICE**

**1. Acknowledgements**

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**2. Introduction**

The Indian economist, Nobel Prize laureate and practical philosopher, Amartya Sen, once identified the rise of democracy as “*the most important thing that had happened in the twentieth century*”.<sup>1</sup> This statement, though bold, is by no means an exaggeration.

The events of the twentieth century history bear testament to this fact. The happening of two world wars, fought amongst those brandishing the shackles of autocracy and dictatorship and those championing the virtues of freedom and democracy; the rise and fall of fascism and Nazism in Europe; the withering and collapse of Soviet-style communism in Russia; and the emergence from the yoke of colonial

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<sup>1</sup> *Journal of Democracy* 10.3 (1999) 3-17.

oppression of independent and free states in Africa, are but a few examples of how freedom and democracy have emerged as the dominant themes of our time.

Of course, when I speak of democracy, I do not do so in the strictly majoritarian sense, but in the uniquely constitutional sense. I speak of a government by majority, whose rule is defined and limited by various entrenched procedures, rights and freedoms. These rights and freedoms, which are generally captured in the form of a written constitution, are acknowledged to a lesser and greater extent in different jurisdictions. They also come in a wide variety of styles and forms. And the importance placed on them, relative to one another and indeed other interests, varies within these jurisdictions. Be that as it may, the common thread which binds them together is the almost universal recognition that their existence and reliable enforcement by government and courts of law is indispensable to a proper, healthy and functioning democracy. Indeed, in their absence, democracy will more often than not be for nought.

It is this form of democracy that I would venture to say is not only the best, but also the only acceptable, form of government.

### **3. Some of the central features of a (constitutional) democracy**

As I have noted, different countries have adopted contrasting approaches to the entrenchment of fundamental human rights. This includes the types of rights that they have sought to give protection.

Whilst this is a prerogative which vests in them as sovereign independent states, there must necessarily be certain rights which are so vital to ensuring a successful democracy that no country can, for any sustained period of time, be without.

Without suggesting an exhaustive list, I would be inclined to include within this list of essential rights and freedoms the following: the right to life; the right to equality; the freedom of religion; a universal adult suffrage; freedom of assembly; the right to dignity; freedom of expression (which extends to the press and other media outlets); the right to physical integrity and freedom and security of the person; and at least a basic right of access to information held by government.

Further, absent their justiciability, these rights and freedoms will in many instances be without practical value. Indeed, if the rights and freedoms which are generally meant to limit the powers of government cannot be enforced against that government, there will be little incentive for it to respect the limits of its power.

This observation gives rise to two further crucial features of a constitutional democracy, namely, the entrenchment of an individual right of access to court and the need for an independent judiciary, tasked with settling disputes over alleged infringements of the entrenched rights and freedoms. Insofar as the right of access to court is concerned, there will indeed be many practical and resource-related difficulties that will accompany such a right; and each country must deal with these issues in a way which best suits their unique

circumstances. Similarly, how best to ensure that a country's judiciary is independent and free from external manipulation and influence, is something that must be left up to the country concerned.

It will be obvious to everyone here that the above features of a rights-based constitutional democracy are, “*conjoined, reciprocal and covalent*”<sup>2</sup> in nature. They are mutually supportive, with the presence of one strengthening the operation of all, both independently and collectively. It is in this sense, then, that conduct which violates or undermines the exercise of a right in a particular set of circumstances has consequences which extend far beyond the immediate facts at play. They can, ultimately, undermine the very principles of democracy and constitutional justice.

Having made these conceptual and theoretical remarks, I now turn to more practical matters. I now consider some of the unique features of South Africa's democracy, which in my view further the goal of constitutionalism and justice.

#### **4. From a South African perspective**

From colonialism to the end of apartheid, South Africa's history is replete with examples of legislated discrimination, with oppression and repression of the black majority.

As the Apartheid regime faltered, the government of the day in the early 1990s entered into negotiations with various liberation groups

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<sup>2</sup> This phrase was used by Justice Kriegler in *S v Mamabolo* 2001 (3) SA 409 (CC) at para 41.

culminating in the first ever democratic, non-racial and constitutional political dispensation in South Africa. During these ongoing negotiations, in addition to an agreement that the first free and fair elections would be held in 1994, a series of constitutional principles were agreed upon and included in the Interim Constitution of 1993. It was to be these principles that would form the basis of the current Constitution of South Africa.

The South African Constitution is thus a product of negotiation, a product of a process in which there was recognition that South Africa would be a democratic state, that basic human rights must be extended to all those who live in South Africa and that those rights must be respected and protected.

This promise of a new era is best encapsulated in the foundational values of the Constitution: namely, human dignity, equality and the advancement of human rights and freedoms which permeate throughout the Constitution. Courts are enjoined to promote these values when interpreting the justiciable Bill of Rights which lies at the centre of South Africa's transformative Constitution, which is renowned for its progressive ideals. The Constitution of the Republic remains unshakable as the founding document of our democracy.

The South African Judiciary remains firmly committed to its foundational values, eloquently stated in sections 165(2) and 165(3) of the Constitution, which articulate the independence of the Courts and that they are subject only to the Constitution and the law, which they

must apply impartially and without fear, favour or prejudice and that no person or organ of state may interfere with the functioning of the courts.

The value of an independent judiciary which can indeed perform without fear, favour or prejudice must never be underestimated – even in established and strong democracies. We guard our independence jealously for, without it, the constitutional ideals that are within our reach will become unattainable.

It is untenable, and unimaginable in terms of the Constitution, for the judiciary not to ensure that the Bill of Rights is upheld. As the Bill of Rights itself says, it is

“[A] cornerstone of democracy in South Africa, it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

The courts are the guardians of the Constitution and are enjoined to enforce the rights and freedoms enshrined in it. Without their oversight, the rights necessary for the functioning of a democracy will be illusory. Rights such as the right to dignity; the right to freedom of expression, the right to equality; the rights to freedom of assembly and association, the right to vote and the right to stand for office, must be

protected in line with the prescripts of our Constitution. This is imperative if our hard-won, yet still fledgling democracy is to flourish.

Various pieces of legislation have been enacted alongside the Constitution, to ensure the protection of such rights, and thus our democracy. This includes the Promotion of Equality and Prevention of Unfair Discrimination Act,<sup>3</sup> which seeks to give effect to the right not to be subject to unfair discrimination;<sup>4</sup> the Promotion of Access to Information Act,<sup>5</sup> which deals with the right of access to information held by the state and, in certain circumstances, to information held by private parties;<sup>6</sup> and the Promotion of Administrative Justice Act,<sup>7</sup> enacted pursuant to the right to lawful, reasonable and procedurally fair administrative action.<sup>8</sup>

Additionally, the Constitution in South Africa has mandated the establishment of various institutions to support our constitutional democracy. These include the Gender and Equality Commission, the Public Protector, the South African Human Rights Commission, the Auditor General and the Electoral Commission.

## **5. What we are doing going forward**

I consider it appropriate at this stage to mention what exactly it is that we are doing to promote democracy and constitutional justice in South

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<sup>3</sup> 4 of 2000.

<sup>4</sup> See section 9 of the South African Constitution.

<sup>5</sup> 2 of 2000.

<sup>6</sup> See section 32 of the South African Constitution.

<sup>7</sup> 3 of 2000.

<sup>8</sup> See section 33 of the South African Constitution.

Africa. We recognise that this will require making the courts and the judiciary accessible to the poor and the vulnerable communities who have difficulty in accessing the courts. It also requires the judiciary to take steps to retain its independence.

In July last year a national conference was held to grapple with issues relating to the fact that many of our people do not enjoy the full benefit of the right to access to justice, enshrined in section 34 of our Constitution. The delegates resolved to take measures to do so. These included (i) the establishment of structures which monitor access to justice and the functioning of the courts at a national, provincial, sub-cluster, and district level; (ii) the exploration of innovative ways of raising public awareness about access to quality justice; (iii) the institution of structured interaction between the judiciary and the media; (iv) the institution of judicial case management to ensure that the justice to which South Africans are given access is of a high quality and delivered with reasonable speed; (v) the prioritisation of education and training for both judicial officers and support staff; (vi) the introduction of alternative dispute mechanisms, including court based mediation; and (vii) the increase in the use of restorative justice and diversion programmes.

As I have stated, the media has been brought into the picture. It clearly has a role to play in making justice accessible to every citizen by

explaining to their audiences and readers the legal merits and nuances of a court judgment.

South Africa has gone further to establish a national Department known as the Office of the Chief Justice to ensure the independence of the judiciary. This Office has been established to allow for a transition from an executive-controlled court system to one that is controlled by the Judiciary. This should be accomplished within the next ten years. This will ensure that the Judiciary is not reliant on the executive to fund and run its programmes so as to be effective.

The introduction of a supreme democratic Constitution had radically altered South African jurisprudence and the legal system. It has provided the basis for a system in which judicial independence and the protection of the human rights of the most vulnerable enjoy paramount importance. South Africa's constitutional democracy is one that we intend to guard jealously. Although we trust that the measures that we have implemented will be sufficient for this, we are fully aware that the constitutional project is far from complete and we will continue to strive to find ways to strengthen and enhance it for the benefit of all South Africans.

I thank you.