"The role of the African Judiciary, university and intellectuals in deepening democracy, pursuing social justice and supporting the national development agenda"

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Introduction

One of the strongest pillars that kept the atrocious apartheid system alive, was the Judiciary. Although apartheid South Africa was not a constitutional democracy with entrenched fundamental human rights, true patriots like Schreiner JA, Didcott J, and Professor Barend van Niekerk still found ways to have the law give practical expression to the innate rights of all humanity, including black people. By contrast, almost all other Judges and academics seemed to consider themselves so bound by the dictates of apartheid laws, as to be incapable of doing anything to the contrary. They devoted their energies and intellect to the advancement of institutionalised racial discrimination.

African universities and intellectuals must thus know that posterity will judge them just as harshly for failing to respond to the clarion call to undo the injustices of the past and contribute positively to the renaissance of our continent.

Madiba's comments on the apartheid era Judiciary and the duty to transform

The Rivonia Trial took place at the time when apartheid was virtually fossilised into the psyche of most of our white compatriots, including members of the Judiciary. Moved by the observance of the multi-dimensional manifestations of apartheid even in the Judiciary, Madiba made the following observations in his address to the court during the Rivonia Trial:

> "The existence of genuine democratic values among some of the country's whites in the Judiciary, however slender they may be, is welcomed by me. But I have no illusions about the significance of this fact, healthy a sign as it might be. Such honest and upright whites are few and they have certainly not succeeded in convincing the vast majority of the rest of the white population that white supremacy leads to dangers and disasters.
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> I hate race discrimination most intensely and in all its manifestations. I have fought it all my life; I fight it now, and will do so until the end of my days. Even although I now happen to be tried by one whose opinion I hold in high esteem, I detest most violently the set-up that surrounds me here. **It makes me feel that I am a black man in a white man's court**. This should not be. I should feel perfectly at ease and at home with the assurance that I am being tried by a fellow South African who does not regard me as inferior, entitled to a special type of justice.
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> This is not the type of atmosphere most conducive to feelings of security and confidence in the impartiality of a court."

The dawn of our constitutional democracy imposed the duty to transform our Judiciary urgently and in a more robust and meaningful way. At the time, of the 165 Judges, only two were women (white) and three were black men. The constitutional imperative to have due regard to representivity on the basis of gender and race always had to feature significantly in identifying candidates to be recommended by the Judicial Service Commission (JSC) for appointment by the President. And that has been done over the years. Of the 243 Judges, 89 are white, those of Indian descent are 25, so-called Coloureds are 23 and Africans are altogether 106. Women number 79. And when this is further broken down, there are 35 African women, 25 white women, 12 Indian women, and 8 Coloured women. It has been a difficult process.

Because of the paucity of black and female senior counsel, appointments to higher courts have been made not only from the ranks of senior counsel, as was the case during the apartheid era, but also from the ranks of practising advocates and attorneys as well as academics who had practised the law for at least ten years. Candidates for judicial office had and still have to demonstrate an acceptable degree of competence and potential to be appointed.

The transformation agenda has not been easy. Several attempts were made in recent years to delegitimise the JSC on the basis that it is not committed to gender transformation, it applies arbitrary and irrational selection criteria, it is controlled by politicians and it is anti-white males. But this opposition has not, and will not, deter the JSC from executing its constitutional mandate.

Alive to the experiential limitations that the apartheid regime had imposed on some of our people, judicial educational programmes had to be and were embarked upon. This is intended to deepen Judicial Officers' understanding of their new responsibilities and strengthen their forensic skills. The judicial education programmes were and are still designed to entrench our new constitutional vision. It is fitting at this stage to give an overview of the state of the South African Judiciary.

The state of the Judiciary

(i) The focused and generally hard-working Judges and Magistrates

South Africa is blessed with a crop of hard-working and focussed Judges and Magistrates who understand and treasure judicial independence. Notwithstanding isolated incidents of justifiable dissatisfaction with our performance or conduct, we have done well in the circumstances. Broadly speaking, quality justice has been made accessible to our people and delivered to them as expeditiously as the situation and resources permit.

But, as indicated above, the Judiciary has not been without its dark moments. Some among us have had to be subjected to disciplinary processes for a wide-range of performance-related misconducts. This has happened at both Magistrates Court as well as High Court levels. Some of these incidents and occasional lapses in the court system have unfortunately been given so much prominence as to make it look like the entire court system is dysfunctional. We want to assure South Africa that we take our responsibilities so seriously, that we deal properly with incidents of alleged impropriety involving any member of the Judiciary, however senior they may be. As

we do, particularly when there are some delays, the nation needs to accept that even Judicial Officers have rights to defend themselves.

We have taken several measures to enhance the efficiency and effectiveness of the justice system.

(ii) South African Judicial Education Institute

The first was to ensure that the South African Judicial Education Institute takes off. This Institute was created to offer training to aspirant Judicial Officers, to give some orientation to newly appointed Judicial Officers and continuing education and a platform for a cross-fertilisation of ideas to those who have been in the service for years. It commenced its operations in January 2012, and has helped to raise the standard and enhance the performance of Judicial Officers across the board. Some African jurisdictions have asked us to accommodate them in our judicial education programmes and we have agreed.

(iii) National Judicial Case Management Committee

The second measure taken to improve performance was the establishment of the National Judicial Caseflow Management Committee. It is a strategic think-tank for the Judiciary. It diagnoses challenges relating to court performance and prescribes appropriate solutions to address the problems. It comprises Judges representing almost all courts. They have been to several progressive jurisdictions whose performance is outstanding, to learn from the best. They have assisted the leadership of the Judiciary to adopt the best court performance enhancing

practices learnt there to a model best-suited to South Africa. We have run pilot projects in six High Courts for about a year and have since rolled out this efficiency enhancing system to all High Courts.

(iv) National and Provincial Efficient Enhancement Committees

We have also established the National Efficiency Enhancement Committee comprising all the key stakeholders in the broader justice system at the highest level possible. This Committee is chaired by the Chief Justice and has been replicated in the Provinces under the chairpersonship of the Judges President. Together, these role-players identify problems each creates to the efficiency of the broader justice system and agree on what could be done to resolve the challenges. Regular meetings are held and reports sent to the Office of the Chief Justice to monitor progress and evaluate overall performance.

(v) Norms and Standards

In line with the insertion of subsection (6) in section 165 of our Constitution and the provisions of the Superior Courts Act, which came into operation on 23 August 2013, the Judiciary established Norms and Standards which apply to all courts. They were gazetted and came into operation on 28 February 2014. These Norms and Standards are designed to facilitate the implementation of a sound case management system, the enforcement of judicial accountability and the monitoring and evaluation of court performance. Against all odds, we are implementing and monitoring compliance with these Norms and Standards.

(vi) Judicial Independence

The area of court operations hitherto neglected and resisted has been the institutional independence of the Judiciary. Institutional independence does, in our view, also rest on section 165 of our Constitution which provides in relevant part that:

> "(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
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> (3) No person or organ of State may interfere with the functions of the Courts.
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> (4) Organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
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> . . .
>
> (6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts."

This means that everything reasonably possible must be done by all organs of State to allow and help the Judiciary occupy their operational space fully.

As is the case with all Judiciaries in this continent and beyond, the South African Judiciary also faces several challenges. Some of the key problems are the huge disproportion between the workload and the budget, judicial capacities and infrastructural needs, that has resulted in huge case backlogs. The unmasked

unwillingness to recognise the Judiciary as the third arm of the State that it constitutionally is, to resource it adequately and let it occupy its operational space fully backed by institutional independence undermines our democratic credentials.

Centuries of suffering under colonialism in Africa demands of democracies in our continent to stem the evil tide of abuse of power, permanently. And South Africa is poised to lead this process considering the eminently progressive Constitution it has and its world-acclaimed democratic credentials. The question is whether there is a danger looming in the horizon to the independence of the Judiciary in this country and continent?

It is the accumulation of power in the political arms of the State and the enormous possibility for judicial manipulation, heightened by the deliberate subjugation of the Judiciary which was supposed to be, but did not remotely look like, the third arm of the State, that facilitated the coming into being and the endurance of apartheid and other oppressive systems. That extends to the apartheid practice of Judges' long leave, including the Chief Justice, being authorised by the Minister, the near absolute control of the budget and of core administrative functions and personnel by the Minister of Justice.

To achieve and give practical expression to that noble objective in South Africa, section 165 of the Constitution would have to be complied with. Of grave concern in this connection has been the unwillingness to release administrative functions,

intimate to court operations, to the Judiciary so as to allow for a credible measure of judicial self-governance.

No possibility must be left for any organ of State, person or institution to unduly interfere directly or indirectly with court operations. It was in recognition of this need and the inability of the Department of Justice to serve the courts well over the years, that a national department known as the Office of the Chief Justice (OCJ) was proclaimed in 2010. The clear rationale behind its establishment was to enable the Chief Justice and the Judiciary to take charge of particularly those administrative functions that are intimate to court operations. It was meant to be a decisive break from Executive-control as represented by the Department of Justice. Functions, personnel and the budget had to be transferred by the Justice Department to the OCJ Department. There was a common understanding between the Executive and judicial arms of the State that the national departmental mode of court administration was a stop-gap measure. Consequently, resources were released by the Justice Department to facilitate, among other things, an identification of a court administration model that would best reflect South Africa's native constitutional vision of an independent, dignified and effective Judiciary envisaged in section 165 of our Constitution.

This was commissioned by my predecessor, Chief Justice Sandile Ngcobo, who wisely ensured that those who drafted, understood and spent their entire judicial life interpreting the Constitution, led that project. As a result, former Chief Justices Chaskalson and Langa co-chaired the Institutional Models Committee, duly assisted

by the likes of Professor Mandla Mchunu. The Institutional Models Report they produced recommended a Judiciary-led court administration system to be established in terms of an Act of Parliament. That report was handed over to the then Minister of Justice and Constitutional Development on 6 October 2013.

The Judiciary pressed hard for its institutional independence to become a reality. And there has been unbelievable resistance from the Executive. The transfer of functions to the OCJ with effect of 1 October 2014 is the result of pressure from the Judiciary and much-appreciated occasional intervention by the President. Memoranda of Understanding were signed in 2012 by the Department of Justice and the OCJ in terms of which the higher Courts, the JSC, SAJEI, aspects of the Rules Board and the administration of the Magistrates Commission were to be transferred to the OCJ. But those functions, personnel and funds were not transferred. A lot of engagement took place and promises were made between 2012 and the end of 2013. On 30 April 2014 a promise of the release of additional functions, personnel and the budget was made in writing. Yet, in the new Minister's budget speech no reference was made to that transfer. The only thing that comes remotely close to transfer of functions was a mention of a Bill that would hopefully become an Act in two to three years' time.

It took our meeting of 18 August 2014 with the Minister of Justice and his officials to have the transfer of 1 October 2014 grudgingly take place. I say grudgingly because as at that time it evidently was not in the Minister's plans. And even in his

announcement of the transfer, he was very careful to describe the Secretary General of the OCJ as his proxy who would consult with the Judiciary on his behalf.

To put the opposition to the institutional independence of the Judiciary beyond doubt are the following factors:

a) Unlike other national departments which are proclaimed and almost immediately have their vote account and decent office accommodation, more than four years since its establishment as a national department, the OCJ does not have its own vote. And you must visit Edura House, down Fox Street, where the OCJ is housed to appreciate the downgrading of the Judiciary's dignity. No other institution like NPA, or any department or Chapter 9 institution is treated like that. We have consistently been told that money is not available for better accommodation for the administration.

b) Although we have a single Judiciary in this country, as borne out by sections 165 to 175 of the Constitution, the Magistracy has been left out of the transfer of 1 October 2014. If there was the will or a commitment to the institutional independence of the Judiciary, this could have been achieved through a suitably crafted version of the Superior Courts Act or the implementation of the already-signed Memorandum of Understanding. Tellingly, the Lower Courts Bill that will reportedly facilitate the transfer of functions to the Judiciary was mooted by the former Minister of Justice in 2012 already. But the Judiciary is

yet to see a copy of the draft Bill, if it now exists. We asked for it, but as at 18 August 2014 it did not exist.

c) It was known, about sixteen years ago, at the time when the Bills that culminated in the Superior Courts Act and the Seventeenth Constitution Amendment Act, that the implementation of the functions that these Acts provided for needed to be budgeted for. Shockingly, when they came into operation no budget was released to the OCJ to facilitate the proper implementation of the critical functions set out therein. And these are functions that sit at the heart of the justice system in this country. You cannot have an effective and efficient court system without proper, modernised and fairly well-resourced courts. These responsibilities require the implementation of: (i) a new case management system in all the courts; (ii) the capability to monitor the implementation of the Norms and Standards, which include caseflow management, as well as the capacity to monitor and evaluate court performance. Although section 165 enjoins State organs, including the Executive, "to ensure independence, impartiality, . . . dignity, accessibility and effectiveness of the courts", the budget to do this has been virtually withheld. We ask for funds but were told that they were not available. Even in the current highly unfavourable economic climate, some funding ought to have been given for this critical function.

d) When the Secretary General (Director-General) of the OCJ was interviewed, the former Minister of Justice agreed that the Judiciary needed to be actively

involved in that process. As a result, four Judges, two Ministers and the Director-General of Justice constituted the panel. Candidates for the position of COO of the OCJ, whose role is very critical to the smooth operation of the courts, are to be interviewed. Unlike his predecessor, the new Minister says it is an executive functions and the Judiciary, is not to be involved in the interview process. This retrogressive approach cannot be a consequence of lack of understanding. He took several months before he responded to our written proposal in relation to the involvement of the Judiciary in the process. Why establish the OCJ if it was meant to be a replica of the Department of Justice or an appendage of the Executive?

e) Through the Superior Courts Act, there was an attempt to denude the Constitutional Court of its pre-existing power to make its own rules. Thankfully, the President appreciated the danger of doing so when we brought this to his attention and agreed to suspend the coming into operation of the section that seeks to deprive the Constitutional Court of its pre-existing legislatively conferred power to make rules without ministerial and parliamentary intervention. Court rules facilitate the speedy clearance of process and court performance-related hurdles. The Judiciary, like Parliament and the Executive, is best suited to craft its own rules expeditiously. The Uniform Court Rules that were crafted by the Judiciary with the concurrence of the President during apartheid. Why we would want to perform worse than the apartheid regime, baffles us, particularly in view of the inordinate delays experienced in

rule-making process driven by the Rules Board that is controlled by the Executive.

f) More can be said about the reinvigorated quest of the past years to throttle judicial independence. The 1.4 billion Rands reportedly transferred to the OCJ also needs to be explained. It is almost all for Judges' salaries, accommodation and transportation. The scary part about the transfer of that minute percentage of the overall Justice budget is that there is bound to be overspending. This flows naturally from the inexplicable disbursements for the Judges' official vehicles. The transport department deducts money for the fuel and repairs of these vehicles every month. Although we have a total of 243 Judges, and still have four months to go before the end of the financial year, Government Garage has repeatedly deducted 264 million Rands for these vehicles from our budget, already. One Judge's vehicle is on this report serviced at the cost of more than R1m in a financial year, from the look of things.

As for projects, we only have R15m for caseflow management and R22m for judicial education. There is no money available for the 254 magistrates who are about to be appointed, who cannot assume their duties without prior training. We asked for this money but it was not given. Examine the entire budget of the Justice Department and see what it is used for and how. Is there an equitable distribution of resources? Is the budget such as to enable the OCJ to succeed in the execution of its mandate or does this amount to an unintended set-up to fail? And what exactly has been

transferred and to whom if OCJ functionaries are the Minister's proxies as he put it? How is the institutional independence of the court being strengthened? How can the courts beg for resources and still have dignity? No Chapter 9 institution, no other Government department, no Municipality and neither the Hawks nor IPID are treated like the third arm of the State. None is sought to be baby-sitted like us.

Why is the institutional independence of the Judiciary so important?

One of the key complaints the Judiciary has had with being served by the Executive over the years has been the poor quality of that service. Officials in whose employment the Judiciary would have had no say provided support to the Judiciary. Equipment or tools of trade that are sometimes of a poor quality would be procured for us without any consultation. We were denied things we needed to perform our duties. Library services would be discontinued without any consultation and the budget cut or diverted without any warning. The list goes on. This not only undermines the independence of the Judiciary, but also its dignity and effectiveness.

How do you become effective if you do not have the space and resources to set and implement your priorities and strategic objectives? For every major step or project the Judiciary needs to embark on to enhance court performance, unlike the two political arms of the State, the Judiciary must ask for permission and the resources. Not even the National Prosecuting Authority or any of the Chapter 9 institutions, any Government department or Municipality face the predicament, embarrassment and semblance of disrespect that this arm of the State and guardian of our constitutional democracy is facing.

To achieve peace and stability in a country, the observance of the rule of law, the protection of human rights and security of our constitutional democracy, you need an independent, effective and efficient Judiciary. A weakening of the independence of the Judiciary poses a threat to any constitutional democracy, the rule of law, the capacity to stem the tide of corruption and the creation of a peaceful, stable and investor-friendly climate.

Of great importance is that the National Development Plan requires of Government to hasten the establishment of a Judiciary-led independent court administration. It is a matter of grave concern that this monumental commitment is not matched by positive action.

The role of African universities and the intelligentsia

What then is the intellectual crop of our nation and continent to do to help the court system achieve its constitutional mandate? The South African and African intelligentsia must be interested in the court system now more than ever before. Courts are the conscience of the nation and the guardian of our constitutional democracy. It behoves our universities and our intelligentsia to raise their interest beyond the appointment of Judges and the analysis of judgments, to the equally, if not more, important role of critiquing the kind of support the Executive gives to the Judiciary as enjoined by section 165 of the Constitution.

The intelligentsia must interrogate the meaning of "the cabinet member responsible for the administration of justice" in the Constitution. How far do his or her

responsibilities extend or what do they entail, apart from the appointment of Magistrates and some acting Judges as well as oversight role over the State Attorney, National Prosecuting Authority, etc? In the same vein, the full import and meaning of section 165 must be closely examined to determine whether there is room for importing into our constitutional setting, for instance, the UK court administration model which does not have an equivalent of our constitutional provision.

The fundamentals to be engaged with are, in my view, why would the Executive be unwilling to strengthen the institutional independence of the Judiciary? What benefit do they hope to or could they possibly derive from a Judiciary that has to "beg" for resources?

It is perhaps best to broaden the discussion beyond the borders of Africa. I think control of some kind might be the motivation. Keeping the Judiciary dependent for its operations has some remote but real dangers of interfering with the adjudication process, albeit indirectly. I deliberately shy away from dealing with how exactly a measure of control might be exercised over the Judiciary through the budget, personnel and key administrative functions. I choose to highlight its potential danger to our constitutional democracy to be interrogated by the intelligentsia and move on to deal with the impact of doing so on service delivery.

For those who think our assertion that section 165 of the Constitution enjoins the State to accord the Judiciary its institutional independence is one of the many reasonable

interpretations, I say even the National Development Plan says so. It enjoins the Executive to "accelerate reforms to implement a Judiciary-led independent court administration".[1] This is what our Government has committed itself to – "to accelerate reforms to implement a Judiciary-led independent court administration". We have not seen any sign of enthusiasm to that end. We have had to push hard for transfer to take place very reluctantly on 1 October 2014.

The intelligentsia must interrogate the role of the Judiciary more intensely, the implications of section 165 of the Constitution and what is required to give South Africa and Africa the Judiciary that they need and deserve.

The correlation between education and economic development

Remember, it was in Africa that the first leading universities worldwide were found - the University of Alexandria in Egypt and the Sankore University in Timbuktu, Mali. The University of Alexandria was leading in sciences, arts and architecture. It was at this University that the first library in the world was established. Active scholarship was encouraged. Learning was held in high repute, research of the highest standard encouraged and many literary prizes were awarded. This resulted in a well-run and strong central government and great prosperity in the land. It is to the University of Alexandria, not Athens, that Roman Emperors turned for teachers to induct their would-be rulers.

[1] Page 421 of the National Development Plan.

The literary treasures of Timbuktu, traceable to the great tradition of scholarship in the twelfth century, the exploitation of mineral resources which earned Timbuktu its reputation as the city of gold, the entrepreneurial skills displayed and the prestigious Sankore University in Mali, also underscore the central role quality education played in the prominence of these African countries at the time when other continents were wallowing in ignorance, illiteracy and backwardness by all standards.

There has always been a direct correlation between a sound vision for sustainable economic development and the capacity for its fulfilment. Egypt and Mali prioritised education.

The ruins of Zimbabwe and the artistic masterpieces of the Koi people of Southern Africa also add to the sophistry, wisdom and display of potentials of the African people that has always lay dormant, irking for expression.

It is not coincidental that both Egypt and Mali had world-class universities at the time they were leading global economic giants. A breakdown of leading universities in the world reveals that the countries in which they operate are leading economies in the world. That any country or continent that is determined to make a mark economically must be prepared to pay a high premium for education is evident from the connection between the leading economies and the location of the top 25 universities worldwide. Of the top ten, six are in the USA whereas four are in the UK, two in Switzerland and one in Canada. As for positions 21-25, three are in the USA, one in Canada and the other in Singapore. The strength of these economies bear

out the potency of high quality education in the development of the necessary skills for the job market, the ability or capacity to home in a national vision that could be productively rallied around and implemented.

There is a great awareness among the leaders and people of Africa that the widely publicised challenges that beset Africa and have marred its image for many years, require urgent and decisive action. Several AU instruments like the African Charter, NEPAD and the regional instruments on the rule of law, constitutionalism, human rights and the shared economic vision all point to an appreciation of the need for a radical paradigm shift and urgent action. The AU has also galvanised African countries around the 2050 African renaissance agenda or program.

One of the prerequisites for taking African countries from the third world realm where they find themselves, to the first, is an educational system that insists on very high standards from an elementary level, all the way up to tertiary.

An urgent and closer examination of our educational systems is a must. The fundamentals of a model borne out of systems that have proved to be good and effective must be put in place. Mindful of the stringent budgetary constraints within which we all have to operate, a plan must be developed for the progressive realisation of a sound educational system in each of the African countries. A collective of Ministers of Education, guided by African scholars with expertise in this area, should lead the charge. The standard of our entire educational system must

be very high and designed to meet the complex challenges of our times. This is essentially what leading economies have done.

Universities must re-examine the Bachelor of Laws (LLB) curriculum and the number of years to be spent on the LLB programme. Why is it possible to study a high quality law degree for three years in Europe and then progress to a Masters programme or if you want to pursue practice, take one year for exposure to the practical side of the law, but the same cannot be done in South Africa? Why is Singapore able to produce very good lawyers, already exposed to the practical side of the law, after four years of study yet we are thinking of increasing the years of study for an LLB programme? Is there really a correlation between the number of years over which you study towards a degree and the quality of that degree? If the problem lies with the quality of our primary and secondary school education, then ways must be found by the universities and intellectuals to help African Governments. If good quality could be secured within a shorter period, then we must pursue that option aggressively because of the acute shortage of financial resources many parents have to contend with.

A solid secondary school education and good quality law degrees are a prerequisite for a strong legal profession and by extension a well-performing court system. Universities owe it to this country and the Continent to ensure that the material that ends up in the Judiciary is of the highest quality.

When universities litigate they ought to also support black and female attorneys and Advocates. Intellectuals in Africa must be keenly interested in the instruction-giving and briefing patters in this country and beyond. More importantly, take a closer look at the broader justice system, the Judiciary in particular, make your objective views known about the problem areas and what needs to be done to address them.

I THANK YOU ALL!

MAY GOD BLESS AFRICA!