DEPARTMENT OF CORRECTIONAL SERVICES: REPUBLIC OF SOUTH AFRICA

OFFICE OF DEPUTY MINISTER

ADDRESS BY ADV NGOAKO RAMATLHODI ON THE OCCASION OF THE HAROLD WOLPE CONFERENCE TITLED: RE-VISITING THE POLITICAL ECONOMY OF SOCIAL CHANGE IN CONTEMPORARY SOUTH AFRICA

TOPIC FOR DISCUSSION: CONSTITUTIONALISM AND ITS CHALLENGES IN SOUTH AFRICA

We discuss constitutionalism and its challenges eighteen years after the birth of a new and democratic dispensation. A dispensation which brought about laudable progress and brought about fundamental changes in the lives of black people in the country. It is also a dispensation that continue to be laced with apartheid economic and social relations. Perhaps the greatest challenge to constitutionalism or the rule of law arises from the unequal and disproportionate distribution of wealth and opportunities in favour of the white nation as opposed to the black nation. Some have described this phenomenon, as a nation of two economies. On this, there seem to be some emerging resemblance of universal consensus.

The real debate is how we have arrived at this juncture and, perhaps more importantly how to do we move forward in a way that we address historic injustices without frightening beneficiaries of apartheid. Some blame the government and corruption as the main if not the sole cause of these inequalities. The constitution has nothing to do with the current challenges. One concedes the fact that the adoption of unfortunate liberal policies in the early days of democracy and continuing corruption have indeed contributed to current difficulties. However that is only part of the explanation. The other part of the explanation lies in the laws that regulate the manifest contest for economic equality between the black nation and the white nation.

Section 25 state that ‘no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.’ Sub section 2 states that, ‘ Property may be expropriated only in terms of law of general-

‘a’ for public purpose or in the public interest; and ‘b’ subject to compensation, the amount of which and the time and manner of payment of which have been agreed to by those affected or decided or approved by a court ‘ There lies the legal basis for willing buyer willing seller practice that has been the hallmark of the system of land redistribution in the country. Indeed the Land Claims Court, has gone on to pronounce on this principle as the law of the land. There are arguments that it is possible that, in an appeal matter, the Constitutional court might come to a different conclusion. One leaves that to the future, however, as matters stand, the principle of willing buyer willing seller is the law of the land.

What Section 25 does is to put the courts at the center of the contest for the birth of new and equitable economic relations. This then explains the interest that many commentators, take in the topical issue of the transformation of the Judiciary. Post 1994 settlement we adopted a constitution which became the supreme law of the land with an entrenched and mandatory principle of separation of powers. We thus entered an era of constitutional democracy with the supremacy of the constitution as opposed to Parliamentary supremacy of gone by days. Simply put, in a Constitutional democracy, all law and executive decisions have to comply with the constitution and the rule of law. Meaning that any law and executive actions not passing the constitutional test, have to be struck down by the courts as unconstitutional, and therefore, of no force and effect.

Constitutional democracy functions much better where separation of powers between the three branches or spheres of government is clearly spelt out in the constitution. Our constitution delineates powers and functions allocated to the Legislature, the Executive and the Judiciary. The relationship between these three spheres is aptly captured in the so called doctrine of separation of powers. The essence of the doctrine is that no sphere of the state should encroach on the powers of the others. All the three spheres have separate, albeit inter-related functions. Whilst playing together in the same play field, each one is expected to remain in their domain. In the first Certification case, it was held that, ‘A separation of functions and personnel would achieve little if not combined with appropriate checks and balances. The purpose of checks and balances is to ensure that the different branches of government control each other internally and serve as counterweights to the power possessed by the other branches.’

Briefly described the respective domains of the three spheres are the following; The legislature makes law and holds the Executive to account on the management of public affairs. The Executive develops policy as well to implement that policy. The judiciary interpret the the law and holds the other spheres, and citizens to account in so far as obedience to the law is concerned. All the three are to different degrees accountable to the public that they purport to serve. It is important though to note that, the separation of functions recognized in the constitution is not absolute. S v Dadoo. Given the separate but interrelated functions of the three spheres and the fact that some, are enjoined to account to others, tensions will manifest from time to time. When that happens no one should throw their hands in air and cry a calamity. However, it is in order to raise a flag of caution for the balance to be restored and maintained.

This doctrine was spelt out in the case of South African Association of Personal Injury Lawyers vs Heath 2001. There it was said that, the doctrine of separation of powers and checks and balances, requires that the function of government be classified as either legislative, executive or judicial, and each function to be performed by separate branch of government. In other words, the functions of making law, executing the law and resolving disputes through the application of the law should be kept separated, and in principle, be performed by different institutions and persons.

It is important to note that, in a constitutional democracy, the courts are the final arbiter as to what constitute legislative and administrative acts, under what is known as judicial oversight in some quarters. They also have the power to determine if there was substantive compliance with the law, whenever a legislative or administrative act is performed by other spheres of government. This gives the courts enormous power, in relation to other spheres, under the doctrine of the rule of law.

This principle was spelt out by Lord Hoffmann in the Alconbury case where he said 'The more purely political a question is, the more appropriate it will be for political resolution and less likely it is to be an appropriate matter for judicial decision... Conversely, the greater the legal content of any issue, the greater the potential role of the court.' The enormity of the court's power derives from the fact that other spheres cannot interpret such content whilst the courts can. Indeed there is an emerging trend which seeks to classify most administrative acts as subordinate legislation, and thus, qualify such as legitimate issues for the compliance test. Another interesting development has been the subjection of administrative acts to the so called rationality test. An unrestrained application of this test can lead the court to substitute its own rationality for the rationality of the designated body under the constitution.

In our country decisions such as the Glen Lister, Simelane and recently Mpshe's case have raised eyebrows in some quarters as to the observance of the doctrine judicial constrain by the judiciary. This doctrine demands that in a situation where there is a possible encroachment into other spheres' domain, the courts should ere on the side of caution. Put differently, the doctrine suggests that judicial incursion into other spheres, should happen only in exceptional and limited cases, if at all. The old saying that; absolute power corrupts absolutely, should apply equally to the courts as it applies to other spheres.

Given what seems to be unequal power, it is incumbent upon the courts to be not only guardians of the constitution, but the guardians of the limits of their own power and authority as well. Only when they act in that manner can they ensure the survival of our constitutional democracy by adhering to the doctrine of separation of powers. In this regard, courts must not only respect the constitution but they must also be seen to do so.

The Constitutional Court has held that the doctrine of separation of powers is not, 'a fixed rigid constitutional doctrine. In the Smuts case Justice Ackermann remarked that, 'there is no universal model of the separation of powers'. What this means is that the

actual content of the doctrine is given life by social forces in a particular locality at its specific historic phase. In our country, a young constitutional state, we are still in the process of developing our jurisprudence on this important subject that must ultimately shape the non racial and non sexist society we seek to build. Emerging as we do, from a society characterized by the subjugation an deprivation of the black majority, separation of powers have to express itself in favour of the historically disadvantaged. The Bill of Rights, as interpreted in the Groot Boom case, and similar cases is a legitimate area, where the apparent crossing of the line by the judiciary, should be welcome in my view.

On the other hand, it is being here argued that economic rights in our constitution can only be realized where masses of people participate in their enforcement. Left alone the state is unlikely to move with the necessary speed towards the full realization of these rights. The so called service delivery protests and labour strikes 'conducted within the law' are in my view, legitimate and lawful measures undertaken by the public in enforcing the provisions of the constitution. Similarly, where there are racial attacks on others, disguised as innocent comments, such as the Spear saga, it is correct to bring the masses out in the streets in face of state paralysis.

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