IBA celebrates the Magna Carta

The International Bar Association recently celebrated the 800th anniversary of the Magna Carta by holding a conference in Cape Town in May.

The Magna Carta, also known as the Great Charter, was signed at Runnymede in 1215 between King John of England and the Barons who were disgruntled by the King's arbitrary behaviour. This charter has been viewed as a milestone in the development of human rights and the rule of law in England and common law countries.

Topics discussed at the celebratory event included the role of lawyers in upholding democracy and upholding the rights of individuals; challenges to judicial independence; maintaining limits on government power in modern states; and the recognition and application of equality.

Speakers included Chief Justice, Mogoeng Mogoeng who delivered the keynote address; retired Constitutional Court Justice, Kate O'Regan; and Deputy Governor Administration at the Bank of Zambia, Doctor Tukiya Kankasa-Mabula.

Role of lawyers in upholding democracy and rights

The first panel discussion was titled 'The role of lawyers in upholding democracy and the rights of individuals'. The panel consisted of director at Bingham Centre for the Rule of Law in London, Sir Jeffery Jowell; ENSafrica chairman, Michael Katz; lawyer at Mossadek Law Firm in Casablanca, Tarik Mossadek and Alpha Media Holdings chairperson in Zimbabwe, Trevor Ncube.

Mr Ncube described the Magna Carta as 'one of history's greatest and most enduring documents' adding 'that it originated from a group of leading noblemen and not from ordinary people does not dilute its appeal, and indeed, its lasting significance to the citizens of the world.'

Mr Ncube spoke on what the Magna Carta means to him, both as a Zimbabwean and as a citizen of the world. He spoke about its enduring effect but also raised important questions over the promotion and protection of civil rights, the core of which are traceable to the Magna Carta.

In this regard, he spoke about the role of the legal profession as well as its role in promoting and protecting human rights.

Mr Ncube said the Magna Carta did two important things. Firstly, it was the first proclamation that recognised the legal rights of subjects under the crown and secondly, it recognised that the monarch, which was essentially the state, was also capable of being bound by the law.

‘In this way, the Magna Carta established an important contractual relationship between the state and the citizen, with the state having power over the citizen but also being bound by the law and the citizen being entitled to legal rights. It is this relationship, between the state and the citizen that forms the basis of the modern nation-state. The state is limited to the extent that it must uphold and respect the rights of citizens which are granted by the law. This means the law is an important element in this relationship and it must be respected and enforced,’ he said.

Mr Ncube said the Magna Carta was the first legal instrument to provide for the right of *Habeas Corpus*. He then went on to tell delegates about an incident in Zimbabwe where this law was used, many years after it was signed.

‘On 9 March 2015, a young Zimbabwean journalist and human rights activist called Itai Dzamara was allegedly abducted by an armed group of unknown individuals. This happened in broad daylight … A few days later, his family and lawyers approached the courts.

The application they were making was based on the right of *Habeas Corpus*, which I understand means “show the body”, a remedy, I am told, which is often sought where a person is suspected of being in the custody of the state. The demand is for the person to be produced and for the state to justify why he should be kept in custody. The roots of this important remedy are to be found directly in the Magna Carta,’ he said.

According to Mr Ncube, in this particular case, the court granted the order and compelled the law enforcement authorities, including the police and intelligence services to convene a search for Mr Dzamara, on the basis that the state has a duty to protect. But, to date, his whereabouts have still not been accounted for.

Mr Ncube mentioned how lawyers have been harassed in Zimbabwe and how lawyers are ‘politically captured’ by political organs of the state.

Harsh operating environment

Mr Ncube said human rights lawyers sometimes have to operate in harsh working environments, adding that sometimes they become victims while trying to assist victims of human rights violations.

‘For example, in November 2014, Kennedy Masiye, a lawyer working for the Zimbabwe Lawyers for Human Rights was severely assaulted by members of the police at a police station where he had attended to represent his client who had been arrested while exercising his right to demonstrate,’ he said.

Mr Ncube added that many other lawyers have been subjected to assault and harassment of a similar nature. He said these abuses of power cause fear and intimidation among lawyers. ‘It is a harsh operating environment which means only the brave, and some might even say the reckless lawyers, are prepared to take up work in defence of political activists. ‘These are the heroes who with no regard to their own safety commit themselves to help others who need legal assistance,’ he said.

Mr Ncube said there are also other factors that affect lawyer’s work in the field of human rights and democracy such as ‘political capture’.

He said: ‘By “political capture” I refer to a situation where political actors subject the legal profession, or significant parts of it, to persistent and disproportionate influence, which affects the manner in which they carry out their functions. In order to promote the rule of law, the legal profession ought to carry out its functions independently, and without undue influence from or bias towards political actors, however powerful they might be. It is the hallmark of the profession’s independence that even the most reviled alleged criminal is able to find legal representation. Nevertheless, this independence is lost when the legal profession or significant parts of it become “captured” by political actors and this invariably affects their ability to carry out their professional mandate.’

Mr Ncube said since most of the victims of human rights injustices are usually supporters of the opposition or civil society activists, the lawyers who represent them have often been branded ‘opposition lawyers’, by their detractors in the state media, adding that in this way, they are regarded by the state and ruling party as helping the cause of the opposition.

He said a senior politician recently fell out of favour with the ruling party and was expelled. The politician disclosed that it was very difficult to find lawyers that were prepared to take up his case. Mr Ncube added that these pejorative characterisations are not reserved for lawyers acting on behalf of the traditional opposition parties.

According to Mr Ncube, the ruling party has a group of lawyers who are always ready to defend it in the media. Every report that has legal implications often has lawyers, presented as ‘legal experts’ who back the state and give legal justification to the conduct of the state, even when such conduct is patently unjustifiable or unreasonable.

Mr Ncube said political capture derails the effectiveness of the legal profession in supporting the rule of law and promoting a democratic culture. He said it promotes a culture of impunity and a sense among the political leadership that they are above the law and beyond public criticism.

Judicial capture

Mr Ncube said the greatest concern over the capture of the legal profession is the capture of the judiciary. ‘The role of the judiciary is to interpret the law and to act as the adjudicator of disputes between individuals and between the state and individuals. In order to perform this role effectively, the judiciary must be independent. These principles are enshrined in the new constitution of Zimbabwe,’ he said. The new constitution was adopted in March 2013.

According to Mr Ncube having principles in a constitution is one thing and the actual practice is a different matter altogether. He said the great fear in Zimbabwe has been that the independence of the judiciary has been compromised, largely because of political interference. He added that when Zimbabwe adopted a new constitution, there was hope that there would be transformation of the judiciary, as had happened in Kenya, which had followed a similar process. Kenya had undertaken a serious overhaul of the judiciary, ensuring that there would be a transformed judiciary to administer the new constitution.

However, in Zimbabwe, despite complaints over many years that the judiciary was compromised, there was no such transformation. The judiciary has remained exactly as it was before the new constitution. ‘For example, many members of the judiciary who benefitted from the land reform programme are expected to pass judgment on the same disputes over land,’ he said.

Mr Ncube said two years since the new constitution was adopted, it is disappointing that there has been very little progress in its implementation. He said the government has dragged its feet and failed to ensure that the various national laws and policies are realigned with the new constitution. ‘The government blames a lack of resources for the slow speed in implementation but most Zimbabweans believe the real problem is the lack of political will. Already, there is talk from government ministers that the new constitution will be amended. It would be a sad day for the people of Zimbabwe if the new constitution is amended before any serious attempts have been made to fully implement it.

‘The problem, however, is that even two years since its adoption, very few are aware of the contents and effect of the new constitution. There has been little effort from government to promote awareness of the constitution,’ he said.

Mr Ncube said there is little continuing professional development among lawyers in Zimbabwe. He added that there has not been effective education among practising lawyers, prosecutors and judicial officers regarding the requirements of the new constitution, which has resulted in the failure by lawyers to challenge laws that are patently unconstitutional.

He said: ‘For example, the new constitution has new guarantees for the right to life. It effectively bans the death penalty for all except men aged between 21 and 70 and only then when it is aggravated murder. However, the criminal legislation which currently exists has not been amended to conform to this new system. The result is that convicts are still being sentenced to death regardless of the changes in the new constitution, itself a travesty of justice.

In conclusion Mr Ncube said lawyers need to rise above the politically demarcated lines to ensure their independence, both from the ruling party and the state and from the opposition forces. He said they have to resist the temptation to toe the political line and that they have to be critical of government, just as they have to be critical of the opposition, too. ‘In this way, there is greater scope to promote accountability across the board and to minimise the problem of “political capture”. Overall, the great influence of the legendary Magna Carta will be guaranteed to be an enduring force for more centuries to come,’ he said.

Sir Jowell raised the question of the debate about the lack of reference to the Rule of Law in the United Nations (UN) development goals post 2015 for countries. He said many countries support the idea that the rule of law should be included in the UN Millennium Goals.

Sir Jowell asked whether socio-economic rights matter more than the rule of law and foreign direct investment impact on the rule of law.

Mr Katz asked many questions of the IBA such as:

• What is the role of a corporate or tax lawyer in relation to the rule of law?
• What is the role of business in upholding the rule of law?
• What are the needs of business today when promoting human rights and social justice?
• How can capitalism promote the idea of corporate lawyers having a social conscience?

He reminded the delegates that corporate lawyers have influence over the drafting of laws, in their influence over clients. He also said they can help in issues such as due diligence, preventing cartels, etcetera. He also reminded the delegates that South Africa is threatened by massive inequality and poverty.

Mr Mossadek spoke on the Moroccan experience. He said the independence of the Bar association has been confirmed over half a century ago, adding that Morocco was a country where lawyers have been able to actively fight for a democratic process and the establishment of the universal values of individual rights.

He said the challenges faced in Morocco were people's attitudes; the abuse of power; corruption; a lack of judicial skills for the judiciary, as well as a lack of financial and human resources. Mr Mossadek said there were 4 000 judges, 12 000 lawyers and over four million cases per year.

Challenges to judicial independence

Under the topic 'challenges to judicial independence', professor of public law at the University of Cape Town, Hugh Corder said there can be no rule of law in substance without judicial independence in both form and substance, adding that this is frequently easier said than achieved. According to Professor Corder, the superior court judiciary in this country has always enjoyed constitutional independence, and there is only one recorded instance of a judge being dismissed from office, that occurred in 1897, when President Kruger dismissed Chief Justice Kotze, before the formation of the Union of South Africa.

Professor Corder said under the Constitution, the rule of law and the independence of the judiciary are emphatically and repeatedly protected: Through ss 1(*c*); 2; 165; and various other allied means. He added: 'Yet one of the basic tenets of our Constitution, indeed any such constitution, I would hazard to guess, is that those who "exercise public power or perform a public function" must be accountable through the law for their exercise of such authority, and this is naturally where the idea of accountability enters the picture.'

Professor Corder said society would normally accept that Parliament is subject to certain rules and restrictions in the making of laws and the conduct of its affairs. 'We would equally and more strictly require the members of the executive branch of government, cabinet ministers and public officials at every level, to be subject to review at an ever more onerous level, as their direct political accountability and their discretionary authority decline in scope. This is typically achieved through the well-tried mechanisms of administrative law, increasingly the broader avenues to achieve administrative justice, and ultimately through judicial review of administrative action,' he said.

He then asked what about the judiciary? He added that judges and other judicial officers exercise public power and perform a public function, but equally, the extent of their accountability must be tempered by their independence, guaranteed by the Constitution, an idea at least as ancient as Magna Carta.

Professor Corder said there are methods under common law that are well known to most legal systems that provide as a means of accountability. Among these are:
• Justiciable disputes were almost always heard in open court, so that any member of the public could observe the judicial authority at work and criticise it.
• Court judgments, which were made available to those who request it.
• Important judgments were likely to be published in official sets of law reports, a vital resource in a legal system that relied on the doctrine of precedent.

• The courts were served by an organised legal profession, which was independent and adhered to a strong code of professional ethics.
• Strong peer pressure was exerted on judges by fellow judges as well as by the legal profession, so that those who failed properly to adhere to ethical standards or acted dishonourably or unlawfully would experience collegial censure.
• The possibility of review by or appeal to a higher court existed in respect of every judicial decision, except of course those of the highest court in the hierarchy.
• The admittedly remote possibility of disciplinary measures, or even more unusually, removal from judicial office, existed in law. However, this result was difficult to achieve and the process required the participation of all three branches of government.
• The mechanism for the appointment of judges and their elevation to higher courts, or to presiding positions within the court hierarchy, provided a means by which the judiciary as an institutional whole could be called to account.

Professor Corder added that these mechanisms are used to hold the judiciary accountable. ‘Among the further factors, which impact on judicial independence conditions of service, including salary and pension; how judges are disciplined; the existence of a code of conduct for judges; the rules relating to bias and recusal etcetera,’ he said.

Professor Corder said in many countries of the world, regrettably, judges at all levels are subject to direct influence either by threats to their safety from the executive, or through corrupt practices. He then spoke on three aspects where judicial independence faces challenges because of the need to be accountable.

He said the first potential danger exists through party political influence in the appointment of judges. He added that the natural temptation for any executive is to have judges who do not unduly upset the applecart, or are seen to frustrate Parliament.

Professor Corder said the area of judicial appointments is a critical moment at which judicial independence and the rule of law can be affected, either negatively or positively.

‘The second area, which necessarily needs great vigilance, is that of judicial discipline, both leading to dismissal and to steps short of dismissal. While the former process is relatively rare in most countries, and usually involves extensive investigation followed by approval of such dismissal by a heightened majority of the legislature, I am more interested in the processes which have been established for discipline short of dismissal,’ he said.

Professor Corder added that judges are human beings, they sometimes lose their temper, behave inappropriately or badly in public, accept gifts from those who may someday appear before them in court, or worse those who are actually on trial before them. He added that disciplinary mechanisms are necessary to preserve the credibility and legitimacy of the courts.

Professor Corder said formal processes for registering and handling complaints about judges were needed. He added that this task is often allocated to the Judicial Service Commission (JSC), adding that South Africa now had a Judicial Conduct Committee, which can appoint Judicial Conduct Tribunals to determine particularly serious incidents of alleged judicial misconduct, which reports to the JSC for ratification.

He added that there is also a Judicial Code of Conduct (based on the Bangalore Principles and similar declarations), which includes the necessity for the confidential disclosure of financial and other fiduciary interest of all serving judges and their immediate families.

‘This system has only recently been put in place, and it is too early to assess its effectiveness, but it is certainly in principle a move in the right direction, especially because of the judicial dominance of the processes and structures,’ he said.

Professor Corder said the third issue vital to the health of any system of public governance is the establishment and maintenance of an appropriate level of openness, such as to instill public confidence, and the respect of those in other branches of government.

Adding to this point he said judicial appointment and discipline, the processes in court, the extent of accountability to the profession and the public, need a strong measure of vigilance.

‘Here the existence of an independent media and a critical-minded academy and practising profession is vital. Respectfully expressed criticism of the courts and judicial activities must contribute to a better administration of justice and thus the establishment and maintenance of the rule of law. I am particularly concerned about the damaging effects of often intemperate, usually uninformed, and sometimes mischievous reactions to judgments from senior politicians of every hue, for they tend to take root in the public mind, mostly unfairly. It is difficult for the judge himself or herself to respond, certainly not in kind, and it is then that the senior leadership of the judiciary and those who value the rule of law must step in to defend the judicial institution as a whole and the targeted judge in particular, provided of course that there is good cause for such defence,’ he said.

In defining what judicial independence is, Justice O’Regan said it was the ability to make decisions on cases without undue interference from the executive or any arm of government, the parties, or judicial colleagues. She added that it was also the implementation of judgments and orders made by courts and adequate institutional features, including secure tenure, protection of salaries and pensions, budgetary autonomy, that will support independence of the judiciary.

Justice O'Regan said judicial independence matters because it ensures power is exercised, and is seen to be exercised, in accordance with the law and because it maintains the rule of law. Justice O'Regan added that judicial independence also ensures equality before the law and fair and public hearings by competent, independent and impartial tribunals.

Justice O'Regan said some matters of concern regarding judicial independence included resourcing of the judiciary in terms of weak budgetary provisions, understaffing, poor libraries and judicial numeration. She added that there was also a shortage of judges as judges are often appointed on ad hoc temporary appointments to the appellant court. These positions are often renewed regularly over long periods.

Justice O'Regan concluded by saying that the principle of judicial independence is of central importance to the rule of law, adding that the independence of the judiciary, and the separation of powers, are principles, which often give rise to tension and contestation in democracies.

Justice O'Regan also said that the existence of tension and contestation does not destroy judicial independence but they can create a threatening environment. She added that the legal profession has a duty to assert and protect judicial independence.

'The suspension of the SADC Tribunal, and the Protocol of 2014, which seeks to remove the right of individuals to approach it, constitutes a worrying demonstration of a lack of commitment to judicial independence at regional level in southern Africa,' she said.

Maintaining limits on government power in modern states

Speaking under the topic 'maintaining limits on government power in modern states', Professor Charles Fombad of the International and Comparative Law in Africa at the University of Pretoria said that no matter how good the text of a constitution or the limitations that it places on government to prevent abuse of powers and dictatorship, this will count for nothing if these limitations cannot be enforced. He added that constitutional safeguards against abuse of power by rulers will mean nothing unless the people are ready to defend these safeguards. 'Ultimately, a constitution is only as good as the people who are ready and willing to defend it,' he said.

Professor Fombad also said that standing firmly between the people and the rulers, is the judiciary generally and judges in particular. For the process of constitutionalism, good governance and accountability to take root, African judges need to adopt a bold, imaginative and judicially activists approach similar to that which has been manifested by the South African Constitutional Court in many of its decisions. 'Ultimately, the existence of constitutional limits might not guarantee good governance. Nevertheless, when this is combined with the will of the people to defend them, they will deter potential tyrants and considerably reduce the prospects of a country backsliding into anarchy or dictatorship,' he concluded.

General Counsel to the Governor of Lagos, Oyinkansola Badejo-Okusanya, said that 800 years on, she believes the Magna Carta's best days on the African continent loom large on the horizon. As an idea of freedom, democracy and the rule of law, the Magna Carta is gradually eating away at the edges of despotism across Africa. It is no longer as easy or as 'fashionable' for political leaders to have their way no matter what. They may have their say but the rule of law will eventually have its way. It has never been so clear that power does indeed belong to the people.

She said the power of the people is the greatest limitation on the powers of government. And that we have the Magna Carta to thank for that.

Speaking on the recognition and application of equality, Deputy Governor at the Administration Bank of Zambia, Doctor Tukiya Kankasa-Mabula said although the principle of gender equality is generally recognised, application has been the problem. She said there is almost universal acceptance that despite all the efforts at global, regional and national level, gender equality has not been attained and that more needs to be done.

'Law is a powerful catalyst for change especially when it is accompanied by an enforcement framework that enjoys political will. Legal reforms have not worked as well as possible. However, even in the absence of political will, what can the legal profession do to advance the cause of gender equality?' she asked.

She urged lawyers to make a difference in their communities. 'Lawyers are parents, husbands, wives, brothers and sisters, sons and daughters. What are we doing in our public and private spaces to advance gender equality? By our very training and calling, we are advocates that can advocate for this cause. We all need to challenge ourselves on how we can make a difference for a better society,' she said.

The keynote address was delivered by Chief Justice Mogoeng. He stated that the Magna Carta offered peace between the king and the nobles during very troubled times. The Magna Carta contributed to the UN and the European Convention on Human Rights and the constitutions of many countries.

With reference to the breaches in the rule of law in Africa, the Chief Justice referred to the matter of the arrest of judges in Swaziland and corruption there. He said there is nothing being done to address the constitutional crisis in that country. Chief Justice Mogoeng challenged the IBA to do something about the situation in Swaziland. He said: 'How can you come all the way to South Africa but across the border such a crisis is happening in Swaziland? We must not be seen to just be doing lip service.'

In addition, the Chief Justice spoke about the crisis in Burundi. He said the Vice President and four judges there had to leave the country under duress as there were reports of judges being forced to rule in favour of the President's third term. How do we find solutions to this? He asked, while reminding delegates that at the heart of the Magna Carta was the desire to resolve crisis.

Chief Justice Mogoeng said it is easy to manipulate or buy off the judiciary if it is not fully independent institutionally and resources wise. He added that justice should never be sold and that no one should ever be denied justice.

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