

WHITHER ARE WE BOUND: DEMOCRACY OR DICTATORSHIP?

SPEECH BY NJONJO MUE, CHAIRMAN OF ICJ - KENYA, DURING THE CIVIL SOCIETY FORUM ON DEMYSTIFYING THE SUPREME COURT JUDGMENT AND THE ROLE OF THE JUDICIARY IN ELECTORAL DISPUTE RESOLUTION.

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I am delighted to welcome you to this forum that seeks to provide a platform for civil society to interrogate and shed light on the substance, meaning and implications of the Supreme Court judgment that nullified the August 8th Presidential election and ordered a repeat within 60 days.

This discussion is taking place against the backdrop of alarming developments on the political front that have caused grave concern to all who care about the future of our democracy.

One of the two main candidates at whose behest the August election was nullified has withdrawn from the race citing an uneven playing field, while the other has decided to push through controversial amendments to the election laws in a move that seems calculated to circumvent the Supreme Court judgment and fundamentally change the design of the Independent Election and Boundaries Commission (IEBC) ahead of the repeat elections. As the country hurtles towards a precipice, we the citizens have been relegated to the role of spectators.

In June this year, Jubilee Vice Chair and close confidant of President Uhuru Kenyatta warned in an interview with KTN News that we should prepare for a more lethal, brutal and ruthless Uhuru Kenyatta during his second term in office. He went on to say that we would see the President in "his true colours," and that he would "nyorosha this place" with "gloves off" and "bare knuckles". He also said that the Constitution would be amended to give "back the President power to make executive orders." More recently, Murathe has hit the airwaves once again arguing that Kenya needs a benevolent dictator.

In light of these worrying remarks, the question that arises is this, are we witnessing the slow overthrow of our Constitution and the establishment of a dictatorship?

Consider this:

Recently, we have seen university students being beaten, tortured, and raped by police officers who forcibly removed them from their lecture rooms and halls of residence in order to terrorise them. No one has been held to account. We have witnessed the naked intimidation of the Judiciary and threats directed at judges following the nullification of the August elections with ominous promises by the President to 're-visit' and 'fix' the Judiciary if re-elected. We have also seen the passing of amendments to election laws whose sole purpose appears to be to circumvent the Supreme Court judgment. And only yesterday, the Cabinet

Secretary for Interior issued a statement purporting to arbitrarily ban public demonstrations in violation of the clear provisions of the Constitution.

All this goes to show that the dictatorship that Murathe promised and continues to campaign for is already here; it's just not that benevolent!

For dictatorships are the ones that brutalise young people seemingly without consequence. Dictatorships are the ones that instrumentalise parliaments and intimidate Judiciaries. Dictatorships are the ones that change laws to suit their short-term desires. And dictatorships are the ones that outlaw public expressions of dissent at a whim.

ICJ Kenya has had a long history of involvement in Kenya's Constitution making process. In 1994, we co-authored, together with the Law Society of Kenya and the Kenya Human Rights Commission, the first model constitution titled 'Kenya Tuitakayo' which offered a vision of the new Kenya we were yearning for as a country to replace the Lancaster House Constitution. In 1997, we were played a key part in the National Convention Assembly and we worked with others in boardrooms and in street demonstrations that pushed the Moi state to agree to minimum reforms through the Inter-Party Parliamentary Group (IPPG). We were also involved in all the processes leading up to the promulgation of the Constitution of Kenya 2010.

As a community of jurists, we endeavour to be politically non-partisan. But we are unapologetically biased towards democracy, human rights and the rule of law. We therefore have a responsibility to defend our Constitution whenever it comes under threat. And in this critical moment, history is summoning us one more time to take a stand.

In this context, what is the meaning and character of the planned October 26 repeat election?

If the ruling party goes ahead with its plan to circumvent the Supreme Court judgment, reintroduce the discredited manual system of result transmission, and fundamentally alter the design of the IEBC to suit its own ends, then the period between now and 26th October and beyond will mark another watershed for Kenya's history. We will be faced with a decision whether to agree to rubberstamp a coronation in the name of an election or whether to take a stand to defend our democracy.

Each nation has in its history a list of sacred days. In the case of Kenya, our sacred days are February 18, 1957; December 12, 1963; 7 July 1990; 27 August 2010 and 1 September 2017. As we approached each of these days, we did so with a mixture of anxiety and fear, but also with hope and expectation. But as we look back to them with the benefit of hindsight, we recognise them as the moments when the old began to give way to the new.

In the same way, if our politicians do not step back from the brink and rise up and lead our country out of the current crisis, 26 October 2017 is likely to join

this list of our sacred days. For it will be the day that Kenyans will decide whether to submit to David Murathe's dictatorship or to take a stand and defend their freedom.

Speaking to the children of Israel in the early days of their nationhood, their leader, Joshua, challenged them in these timeless words: "Choose this day whom you shall serve, whether the gods your ancestors served or the gods of the Amorites. But as for me and my house, we will serve the Lord."

In the same way, the time is coming and will soon be upon us when the Kenyan people must choose whether they will serve the gods of the old order that seems so determined to re-establish itself or whether they will stand up and defend their Constitution.

And so, as we deliberate this morning on the substance, meaning and implications of the Supreme Court judgment, let us do so in the full knowledge that it has the potential to strengthen our democracy if we let it, or to be used by the political establishment as an excuse to inaugurate a dictatorship if we let them.

Amkeni ndugu zetu!

I thank you.