



CAPACITY DEVELOPMENT SESSION FOR THE SADC PF STANDING COMMITTEE ON DEMOCRATISATION, GOVERNANCE AND HUMAN RIGHTS (DGHR) HELD ON 13TH APRIL 2021 FROM 09:00 TO 16:00

“The role of Parliament in protecting Constitutionalism and the Rule of Law in Southern Africa: Prospects and Challenges.”

CONCEPT NOTE

1.0 Introduction

Constitutionalism and the Rule of Law lie at the centre of sustainable democracy and parliaments are the fulcrum of protecting constitutionalism and the rule of law in any democracy.

Constitutionalism generally refers to various constitutional mechanisms and procedures such as the separation of powers between the legislature, the executive and the judiciary, the independence of the judiciary, due process or fair hearings for those charged with criminal offences and respect for individual rights, which are partly constitutive of a liberal democratic system of government. The Rule of Law, on the other hand, implies that governments are accountable by law and that citizens are equal under the law. A broad conception of the rule of law incorporates such elements as a strong constitution with constitutional limits on power, human rights, an effective electoral system, a commitment to gender equality, laws to protect minorities and other vulnerable groups, and a strong civil society.¹

In an open constitutional democracy, the rule of law principle is premised in the principle of participation and consultation. This means, for laws to be legitimate and enjoy broad adherence, citizens ought to have been widely consulted and the law should be reflective of society's needs and values. Parliaments as democratically elected and representative institutions play a pivotal role in this regard by serving as the forum for public participation and consultation.

2.0 Challenges Faced by Parliament in Protecting Constitutionalism and the Rule of Law

While parliaments are central to protecting constitutionalism and the rule of law, there is evidence that they do not always fulfil this role effectively due to

¹ International Institute for Democracy and Electoral Assistance (2014), *Rule of Law and Constitution Building: The Role of Regional Organizations*

various reasons, including power relations which undermine the principle of separation of powers, for instance.

As observed by SADC PF in the *Benchmarks for Democratic Legislatures in Southern Africa* (2012)², the re-introduction of multi-party politics in the early 1990s in Africa has led to a renewed interest in institutions of democracy. However, the wave of pluralism has not necessarily produced effective and efficient Parliaments to underpin the democratisation process. To the contrary, most of Africa's young democracies are still characterised by dominant executives, not-so-independent judiciaries, and weak Parliaments. Without the full development of the three branches of government – the executive, legislative and judicial – prospects for democratic consolidation on the continent are limited.

Thus, SADC PF further observes that: *“In southern Africa it has been observed that the executive generally dominates Parliament, including even setting its agenda, appointing parliamentary staff, and determining its calendar. In some cases, the large dual membership of ministers to the executive and legislative branches of government as well as their proportionately large number, have resulted in decreased parliamentary oversight capacity ... In many instances, Parliament is primarily a reactive institution rather than proactive one, largely unable to respond sufficiently to emerging challenges, opportunities and national emergencies.”*³

Indeed, as Neliswa Nkonyeni (2002) observes, parliamentary effectiveness cannot be satisfactorily treated without confronting issues of power in two dimensions: firstly, power as a capacity: having the relevant legal rights and resources – financial, human and organisational – to carry out necessary tasks, and secondly, power as relational: here having sufficient power and independence in relation to the executive to oversee it effectively.⁴ Parliament, therefore, have to strike a balance between cooperation with, and oversight over, the Executive.

Parliament should vigorously guard the ‘separation of powers’ and “check and balance” and ensure that relationship between the three arms of government is one of equality and independence. Encroachment on the powers of one arm by another would have an adverse effect on Constitutionalism and the Rule of Law. Regrettably, sometimes Parliaments play a complicit role by allowing the balance of power to favour one arm of government, in particular the Executive. This behaviour betrays public trust and compromises democracy.

² SADC PF (2012), *Benchmarks for Democratic Legislatures in Southern Africa*, p. 2.

³ Neli PF (2012), *Benchmarks for Democratic Legislatures in Southern Africa*, p. 2.

⁴ Neliswa Nkonyeni (2002: 2-3), *The Challenge of Parliaments in Safeguarding the National Development Interests in an Atmosphere Where the Executive Plays a Dominant Role*.

3.0 Building the Capacity of Parliament in Protecting Constitutionalism and the Rule of Law

In line with objective 3 of the SADC PF Strategic Plan which is *“To facilitate capacity development and other programs of support for Members and staff of Parliaments to augment skills, knowledge and competencies to face emerging challenges,”* the SADC PF has arranged for the training for Members of Parliament from the DGHR Standing Committee, Members from other SADC PF Committees and national parliaments on the role of Parliament in protecting Constitutionalism and the Rule of Law in Southern Africa. The training which is being hosted jointly with International IDEA, GIZ and Austrian Development Agency will focus on prospects and challenges, drawing lessons from a comparative overview regionally and internationally, including case law.

4.0 Objectives of the Training

The training aims to achieve the following objectives:

- i) Raise the level of knowledge of Members of Parliament on the principles of Constitutionalism and Rule of Law in a democratic system;
- ii) Identify opportunities and challenges faced by Parliaments in fulfilling their role in protecting Constitutionalism and Rule of Law through sharing of comparative experiences;
- iii) Enhance the capacity of SADC Parliamentarians to carry out their constitutional responsibility in upholding and championing Constitutionalism and Rule of Law;
- iv) Build consensus on priority areas for action to enhance the role of Parliament in protecting Constitutionalism and Rule of Law across SADC Member States.

5.0 Format for the Event

The capacity building meeting will be held virtually during the statutory meeting for the DGHR Standing Committee during the 49th Plenary Assembly on 13th April 2021. The Committee will receive a presentation from a leading expert on legal and parliamentary development matters from the SADC region.