THE SEPARATION OF POWERS IN A CONSTITUTIONAL DEMOCRACY – A CONFERENCE IN BLANTYRE, MALAWI

Paper by Justice T H Madala on "The Role of Judicial Review in Strengthening Constitutional Democracy and Promoting Economic Growth" delivered on the 29 January, 2003.

Introduction

Thank you Mr Facilitator Dr Kanyangolo, Chairman of Conference Professor Bradley, your Lordship Chief Justice Unyolo, Honourable Justices here present, Honourable Ministers, Honourable Members of Parliament, distinguished guests and participants, ladies and gentlemen. Allow me to be among the first and certainly the first of the South African judiciary to congratulate you, your Lordship Chief Justice Unyolo, on the confirmation of your appointment as the Chief Justice of this country.

The Organisers of this conference "Separation of Powers in a Constitutional Democracy" have chosen a very interesting, challenging, and yet diverse topic. I have been tasked with treating the topic "The Role of Judicial Review in strengthening Constitutional Democracy and Promoting Economic Growth." It is most gratifying to me to note that all three branches of government are represented at this conference at which it is hoped to promote a deeper understanding of the complimentary roles which all three branches play in a constitutional democracy so that it in turn functions according to the rule of law.

Let me kick-start the discussion of the role of judicial review in strengthening constitutional democracy by suggesting that Constitutional Democracy connotes a development in the concept of democracy which started at end of the eighteenth century but which has only gained universal recognition only very recently.

For me, the components of democracy are most starkly revealed in comparison to its antonym, totalitarianism. What democratic societies promote – and repressive ones do not – are the rights of citizens and their participation in decision-making about the rules they will be governed by. Democracy promotes choice, voice and access to rights. Totalitarianism promotes none of those. On the other hand it represses both choice and voice and denies access to rights. The effectiveness of the rules or rule-makers any given democracy generates may vary, but their defining similarities will be a commitment to rights and to participation.

Constitutional democracy recognises the more ancient democratic principle that government of a country is subject to and legitimated by the will and consent of the governed (or more accurately the will and consent of the majority of the governed) which is determined by regular multi-party elections based on universal adult suffrage. Furthermore, constitutional democracy limits this older principle by making the democratically elected government and the will of the majority subject to a written constitution and the norms embodied therein, which constitution is enshrined as the supreme law of the country in question. Section 1 of our Constitution sets out these fundamental values.[1] Section 2 decrees that all conduct that is inconsistent with the Constitution is invalid.[2]

[1] **Republic of South Africa**
1. The Republic of South Africa is one, democratic state founded on the following values

From time to time I shall be referring you to the South African Constitution a document with which I can claim familiarity. The founding values of the Constitution are articulated in a Bill of Rights which is referred to in the Constitution as

"a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom"[3].

The concept of a constitutional democracy, is a radical one, the full implications of which are not always readily appreciated. It changes the whole approach to the regulation of the state and those living in it from a political exercise which can in principle be, and in practice sometimes is value free and dictated by the majority, to one which is shaped and ruled, both directly and indirectly, by the Constitution and its underlying norms and values. Most countries in our region inherited the Westminster style of government which ordained parliamentary supremacy ? so that what parliament said was the unchallenged law. With the institution of constitutions in the region, such constitutions now become the supreme law of the countries. In a constitutional state, governance can never again be a merely pragmatic enterprise aimed exclusively at achieving the various goals comprising the government's electoral mandate. Such governance is now subject to the Constitution and its values. Where the

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(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and multi-party system of democratic government, to ensure accountability, responsiveness and openness.

[2] **Supremacy of Constitution**
2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.
[3] Section 7 (1) of the Constitution

Constitution ordains itself as the supreme law of the land everything is to be done according to and in terms of the Constitution and the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.[4]

The Constitution also embodies the principle of the separation of powers but, in consequence of the bitter lessons of constitutional history, has come to accept the vital need to impose checks and balances on the three arms of the state. Their powers are defined in the Constitution. The judicial power requires courts to interpret and uphold the Constitution, and this inevitably gives rise to a potential tension between the courts and the other arms of government. The tension exists in all cases where the legislature or the executive has made choices that are challenged in the courts. This tension has to be managed by the courts and the Constitutional Court has said that it will be necessary to develop a doctrine of separation of powers that

> "reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the other hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest."[5]

Courts have an important role to play in the transformation demanded by the Constitution. In so doing this they need to be sensitive to the role of the legislature and the executive in a democratic system of government

[4] Section 8 provides:

> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

[5] *De Lange v Smuts and Others* 1998(3) SA 785 (CC); 1998(7) BCLR (CC) at para 60.

and to the difficulties inherent in governing a country with a history such as ours, where resources are limited and demands are multifarious.

Similarly, the legislature and executive must show and have shown in South Africa a deep rooted respect for the rule of law and constitutionalism. This is evident from the government's response to one of the Court's early judgments in 1995 when the Court held that President Nelson Mandela had acted unconstitutionally with regard to local government elections and declared invalid his actions in this regard.[6] Despite the fact that the matter was politically sensitive and potentially far-reaching, President Mandela appeared in public and even on television to stress that he fully accepted the Court's decision, that the Court was the final constitutional arbiter on the constitutionality of his presidential actions, that the Constitution was supreme and that the Court's judgment had to be followed unconditionally. Here one sees the role of judicial review and its strengthening of constitutional democracy.

As the Court has stressed in a recent judgment,

> The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.[7]

Judgments of the Court

The fact that the Constitutional Court is sensitive to its role in a democracy and respects boundaries that are inherent in the separation of powers, does not mean that is a passive court. On the contrary it has not

[6] *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others* 2000(1) SA 661 (CC); 1999(12) BCLR 1360 (CC)

[7] *Minister of Health and Others v Treatment Action Campaign and Others (1) 2002(5) SA 173 (CC); 2002(10) BCLR 1033 (CC at para 129.*

hesitated to give judgments, not always popular judgments, holding that laws or conduct of the state and its officials are inconsistent with the Constitution. It has for instance invalidated capital punishment,[8] corporal punishment,[9] the criminalising of sodomy,[10] presumptions of fact in a number of different criminal law statutes that had the effect of placing the burden of proof in criminal cases on the accused,[11] unduly short periods of prescription in respect of claims against the state,[12] regulations of the education department that discriminate against foreign employees,[13] immigration regulations that discriminate against unmarried heterosexual[14] and homosexual couples,[15] and the state's housing policy in the Western Cape.[16] It has also held that the government acted unlawfully in handing over to the FBI a suspect wanted in the USA for terrorist acts which carry the death sentence, without securing an undertaking from the USA that the death sentence would not be imposed;[17] that prosecutors cannot withhold witnesses statements from an

[8] *S v Makwanyane and Another* 1995(3) SA 391 (CC); 1995(6) BCLR 665 (CC).

[9] *S v Williams and Others* 1995(3) SA 632 (CC); 1995(7) BCLR 861) (CC).

[10] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999(1) SA 6 (CC); 1998(12) BCLR 1517 (CC).

[11] For example *S v Bhulwana; S v Gwadiso* (1996(1) SA 388 (CC); 1995(12) BCLR 1579 (CC).

[12] *Moise v Transitional Local Council of Greater and Others* 2001(4) SA 492 (CC).

[13] *Larbi-Odam and Others v Member of the Executive Council of Education* (North-West Province) and Another 1998(1) SA 745 (CC); 1997 BCLR 1655 (CC).

[14] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (200)(3) SA 936 (CC); 2000 (8) BCLR (CC).

[15] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000(2) SA (1) (CC); 2000 (1) BCLR 39 (CC).

[16] *Government of the Republic of South Africa and Others v Grootboon and Others* 2001(1) SA 46 (CC); 2000(11) BCLR 1169 (CC).

[17] Mohamed and Another v President of the RSA and Others 2001(3) SA 893 (CC); 2001(7) BCLR 685 (CC).

accused person without compelling reasons for doing so,[18] that the national airline acted unlawfully in discriminating against a job applicant because he was HIV positive[19] and that same-sex couples in life partnerships are entitled to pension benefits[20] and to jointly adopt children.[21]

The Court has also held that the government acted unreasonably and unconstitutionally in failing to make an anti-retroviral drug broadly available to pregnant women who were HIV positive in order to reduce the risk of mother-to-child transmission of HIV. The Court ordered the government to remove the restriction on the availability of the drug, to make the drug available for this purpose, to train counsellors for its use and to take reasonable steps to progressively extend testing and counselling throughout the country.[22]

Modern constitutionalism has moved strongly away from Plato, who saw the fundamental problem of politics in the question: "Who shall rule the state?" Instead it asks the new and different question: "How can we so organise political institutions that bad or incompetent rulers can be prevented from doing too much damage," according to one writer. This is an expression of wisdom distilled from the painful lessons of human fallibility and particularly from the attendant fact that no one can be completely trusted with power and its subtle temptations. Has it not been

[18] *Shabalala and Others v Attorney-General of the Transvaal and Another* 1996(1) SA 725 (CC0; 1995(12) BCLR 1593 (CC).

[19] *Hoffman v SA Airways* 2001(1) SA 1 (CC); 2000(11) BCLR 1211 (CC).

[20] *Satchwell v President of South Africa and Another* 2002(9) BCLR 986 (CC)

[21] *Du Toit and Another v Minister of Welfare and Population Development and Another* 2002 ( ) SA… (CC); 2002(10) 1006 (CC)

[22] Infra n7

observed that power corrupts, and absolute power corrupts absolutely? A competent and independent judiciary, with the power to review all legislative and executive action which is inconsistent with the Constitution, is regarded, almost universally, as the prime and most effective of checks and balances on the legislative and executive arms of the state.

An invariable consequence of Constitutionalism is, as I have said, the tension between the will of the majority and its representatives, on the one hand, and the normative control of the Constitution, exercised through the courts and other institutions, on the other. This tension, can never be completely or permanently resolved, an inevitability which is, as yet, inadequately appreciated. It is only when each organ of government is permitted to operate within its sphere of influence and with the knowledge and consent of the other two that there is mutual respect. It is also when they operate within their respective spheres of influence that democracy, justice and freedom are fully enjoyed. Failure to achieve this harmonious relationship in society, results in injustice, tyranny and oppression. Although all African countries possesses written constitutions and many do have specific provisions granting judicial powers as extensive as possible, relatively few courts are prepared to exercise it in the same manner and even fewer governments are prepared to concede that the judiciary can invalidate their decisions or legislative enactments. It seems to me that the people need to be educated on the question of the supremacy of the Constitution rather than the individuals who are the guardians of the Constitution.

The Honourable Dr Justice Kanyiehamba[23] once wrote:

> "It is not surprising that judicial review of a constitution can lead to a direct clash between the Executive and the Judiciary, on the one hand, and the Legislature and the Judiciary on the other. Occasionally, the conflict can only be resolved by one or more of the institutions resorting the drastic measures. Legal systems such as those of the United Kingdom, the U.S.A, Canada and Australia usually absorb the consequences of such conflicts without seriously damaging the equilibrium between the institutions of government. In the Third World countries however, the balance is often destroyed".

The Need for Judicial Review by a Constitutional Court

The South African Constitution has clearly designated the judiciary as the prime upholder and enforcer of the Constitution. This does not by any means elevate the judiciary above the other two branches. The judiciary is the guardian of the Constitution. While prescribing certain constitutional functions for all courts, it has conferred a special role in this regard on the Constitutional Court. There are particular historical and fundamental jurisprudential reasons for this which fall outside the scope of this paper. Apart from those matters in respect of which it has exclusive jurisdiction,[24] the Constitutional Court is the highest court in all constitutional matters.[25] This includes issues connected with a decision on a constitutional matter.[26] Decisions on whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter[27]. Furthermore, any issue involving the interpretation, protection or enforcement of the Constitution.[28] In fact the Constitutional Court's final jurisdiction is even more extensive than the

[23] The Honourable Dr Justice Kanyiehamba is a Judge of the Supreme Court of Uganda.
[24] Section 167 (4) of the Constitution. Act 108 of 1996.
[25] Section 167(3)(a) of the 1996 Constitution.
[26] Section 167(3)(b)and(c)
[27] Section 167 (3)(c)
[28] Section 167(7)

above might superficially suggest, because with it rests also the final decision whether, in interpreting any legislation and developing the common law or customary law, every court, tribunal or forum has correctly "promote [d] the spirit, purport and objects of the Bill of Rights."[29]

The Constitution has, gone further in its commitment to strengthening and entrenching constitutionalism and, drawing on the often sad experiences of democracies in the past, wisely makes provision for a variety of independent state institutions whose purpose is to "strengthen constitutional democracy in the Republic".[30] They are the Public Protector; the Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Gender Commission; the Auditor-General and the Electoral Commission. Apart from these state institutions the Constitution also makes provision for other independent bodies designed to play an important checking and balancing role. These institutions, important as they are, are not the subject of this paper.

The independence of the judiciary

In relation to the judiciary and the other independent state institutions referred to, the Constitution makes explicit provision for their protection and thereby indirectly for the development of these habits of constitutionalism. The independence, dignity, accessibility and effectiveness of the courts are protected both by negative and positive injunctions in the Constitution.[31] The courts are stated to be independent and subject only to the Constitution and the law; no person or organ of

[29] Section 39(2) read with sections 173 and 167(7).
[30] Section 181(1).
[31] See section 165(2),(3) and (4).

state may interfere with the functioning of the courts; and organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.[32] Likewise the independent state institutions mentioned are declared by the Constitution to be independent and subject only to the Constitution and the law; other organs of state are obliged by the Constitution, through legislative and other measures, to protect them and to ensure their independence, impartiality, dignity and effectiveness, and no person or organ of state may interfere with the functioning of these institutions.[33]

Accountability

In the case of the courts the Constitution provides that they "are subject only to the Constitution and the law" and no provision is made for them to be accountable to any other organ of state or any other institution or person for that matter. If the term accountability is applicable at all to the courts, about which I have substantial reservations, then courts are "accountable" only to the Constitution and the law, both directly through the Constitution and indirectly through the judicial oath of office. A judge (that is to say a judicial officer on the Constitutional Court, the Supreme Court of Appeal, the High Courts and the courts of a similar status to the High Courts) may only be removed from office if such judge "suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct", has been found as a fact to fall into one or more of those categories by the Judicial Services Commission and a resolution of the National Assembly adopted with a supporting vote of at least two thirds of its members has called for such judge's removal. Provided, therefore,

[32] *Ibid*
[33] Section 181(2) and (4).

that a judge does not suffer from incapacity, is not grossly incompetent and is not guilty of gross misconduct, she or he is not accountable to any organ of state. By contrast, the independent institutions envisaged in section 181 are expressly made accountable to the National Assembly and are obliged to report on their activities and the performance of their functions to the Assembly.

Substantive independence of the courts as required by the Constitution implies much, but chiefly it connotes three things. Firstly, the training and ethical fibre of judges must be such that they can and will be beholden only to the Constitution and its values in performing their judicial duties and not be influenced by other considerations and pressures. Secondly, the judiciary must enjoy reasonable financial security and adequate working conditions in order to attract candidates to judicial office with the requisite training and ethical fibre and also in order to remove the need and temptation, once they are appointed, to look elsewhere in order to maintain an adequate standard of living and in so doing risk sacrificing their independence. Thirdly, their independence must be effectively protected by the Constitution so that no-one, whether within or outside state structures, is able to interfere improperly with the discharge of their duties. In this way, judicial review plays a powerful role in enhancing constitutional democracy.

Separation of Powers

We cannot deal fully with judicial review without considering separation of powers. In my view, the principle of the separation of powers remains topical for several reasons. Firstly, its mere evocation implies a political organisation which excludes dictatorship and violation of individual freedoms. This may be an additional reason for the contempt in which it

was held by totalitarian regimes, which considered it, according to Marx, as a commonplace expression of the division of labour in the activity to the State.

Secondly, many of the classifications of contemporary democratic political systems of government are based on the relations between the executive and the legislature as viewed by Montesquieu.[34] Probably no one would contest the genuine separation between government and the opposition, the former deriving its power from the domination exerted by the majority party through the executive (the government, and as appropriate the head of State) and the legislature (by means of the parliamentary majority).

Thirdly, the principle remains thoroughly topical for democratic governments today by virtue of the exact definition of the field of activity of each "*power*" (or authority, or functions of the State) and of the care taken to avoid interference between them, while at the same time respecting the obligation "*to act in agreement*".

Lastly, the value of the principle has been brought out by the grievous experience of the totalitarian regimes which wreaked havoc in Europe for much of this country. These regimes can be described as the most eloquent examples of the "*confusion*" of powers in the hands of the same individuals or groups of individuals, exactly as noted by Montesquieu.[35]

[34] For example, it was by means of a parliamentary majority that the Nazi Party voted the law of 24 March 1933 when entrusted legislative and constituent powers to the government for a four- year period (A. Hauriou, J. Gicquel, Gelard, Droit constitutionnel et institiones politiques, Paris, Montchrestien, 1975 p 660.

[35] For example, it was by means of a parliamentary majority that the Nazi Party voted the law of 24 March 1933 which entrusted legislative and constituent powers to th government for a four-year period (A. Hauriou, J. Gicquel, Gelard, Droit constitutionnel et institutions politiques, Paris, Montchrestien, 1975,p,660.

There is not need to dwell on what this meant for the fate of millions of individuals, for decades on end.

When one has carried out this analysis one realises that separation of powers is more a separation of duties and a command to these powers or branches to co-operate with each other.

The Judiciary in South Africa Prior to 1994 in brief

Prior to 1994, the Judiciary in general did not have the power or option to review and reverse unjust laws. The courts and other institutions had to implement and administer even draconian laws to the majority of the people. Save for a few exceptions the Judiciary shied away from commenting critically on apartheid and its legal consequences in their judgements although they had an opportunity to do so. They did not uphold the rule of law.

The substantive constitutional revolution which occurred when the interim Constitution took effect on 27 April 1994 imploded the apartheid constitution and structures, including the four provinces and the black so-called "homelands", and simultaneously replaced them with a new democratic state, consisting of nine provinces and a democratic system of local government. The changes to the basic legal nature of the South African state are as profound. The former Westminster-type constitution, manipulated by a white oligarchy through an omni-competent Parliament subject to no substantive legal limitation, has been replaced by a multiparty, universal adult franchise democracy functioning within the constraints of a rigid, written constitution incorporating an extensive and entrenched Bill of Rights, enforced by an independent judiciary

empowered to invalidate all law and conduct inconsistent with the Constitution. Legal supremacy has been moved from Parliament to the Constitution. The significant differences between the interim and the 1996 Constitutions are few and unless otherwise indicated further reference will be to the 1996 Constitution.

Democracy and the Rule of Law

Now things have changed, the Constitution guarantees the independence of the courts. Thus the Government cannot interfere with the courts in the exercise of their judicial functions and does not desire to do so as they must remain independent. In this way judicial review is allowed to freely play its role in enhancing constitutional democracy.

The drafters of the Constitution recognised that the Judiciary had to be kept independent if the rule of law was to be paramount in South Africa.[36] The Dicean doctrine was largely a debased one in the South African context. The principle of Parliamentary Sovereignty was based on the theory that the legislative function is ultimately determined by the will of the people in a majoritarian democracy. The Judiciary had been constrained by the principle. The extent of that constraint is to this day being debated

Judges on the benches of the High Courts of South Africa are especially alive to the need for nurturing and encouraging a universal respect for the rule of law. The rule of law must also be reinforced by the dynamic and participatory activities of civil society, business and NGOs. To curb the escalating violence in the country and the response of vigilantism, law -

[36] In South Africa, Judges are not elected or re-elected by popular ballot.

makers and law - givers need to ensure that paths of law and justice run sufficiently close together to gain legitimacy in the eyes of the people. The goals can only be achieved by a judiciary that is independent and impartial. Such judiciary must also be empowered to review the acts of the executive branch, through the process of administrative review.
The judiciary must be accountable—easy to say, difficult to achieve. Transparency, publicized opinions, clear standards and procedures, peer review and a vibrant free press and civil society are likely to be the key ingredients of judicial accountability.

It would no doubt be seen that democracy and the rule of law go hand in hand. Where democracy is being properly applied in a country, it means the rule of law is being obeyed by all the three levels of government. The main purpose of South Africa's constitutional protectors is to act as the guardian of the rights of people. Unless there is a strong, independent referee to ensure that these rights are respected, the rights we all fought so hard to achieve might be worn down and compromised to the point that they have no meaning at all.

Allow me to now take you back a little to the discussion on the separation of powers. The doctrine of the separation of powers suggests that the judiciary simply interprets and applies the law, including the Constitution, and does not take an overtly legislative function. Yet it must be stated at the outset that (in the words of Martha Minow) "[t]he legal regulation of separation of powers requires a continuing process of mutual action and interaction".[37] She adds that the context as opposed to a priori definition ought to be the means by which separation of powers occurs:

[37] Minow Making All the Difference: Inclusion, Exclusion and American Law: 1990 at 361.

> The historical moment, the substantive issue at stake, the responsiveness of other branches to that issue, and their abilities to reassert their roles in the balance of power are more central than a remote theory of the distinct functions of each branch… Evaluation of the legitimacy of judicial conduct depends largely on the responsiveness of the other branches. Questions of the separation of powers concern not so much whether one branch has invaded the prerogatives of another as whether all remain to be able to participate in the process of mutually defining their boundaries.[38]

Thus the judiciary has a major role to play in ensuring that there exists a rule of law. The judiciary is the watchdog for the other two arms of the government: - the Executive- ensuring that it obeys correctly the laws of the country and correctly implements these laws in line with the Constitution and particularly the Bill of Rights- the Legislature, ensuring that laws made are in line with the Constitution and that the rule of law is borne in mind when making the laws.

As I mentioned earlier, the 1996 constitution makes an emphatic distinction between the various arms of government.[39] By its express direction, both the Constitutional courts and the High Courts have the power to decide on the constitutional validity of any parliamentary or provincial bill.[40] Decisions by the High Courts on the validity of Acts are however subject to confirmation by the Constitutional Court. The South

[38] Ibid at 361-362.
[39] A separation of functions is recognised in the Constitution. Section 43 vests the legislative authority of the Republic in the national sphere in Parliament and in the provincial sphere in the provincial legislatures. Sections 85 and 125 vest executive authority of the provinces in the premiers. Section 165 vests the judicial authority in the courts.
[40] Section 172 of the 1996 Constitution.

African Parliament therefore no longer has the ultimate say on the validity of laws passed by it. Judicial-law making in the form of judicial review is fundamentally different from making law by legislation. In contrast to legislative law-making, the process of judicial review is not partisan in the sense that it is initiated by the lawmakers themselves. Judges do not initiate legislation, individual litigants. This power of judicial review is an invaluable tool in the promotion of human rights and the protection of human norms. The Constitution in my view, gives explicit recognition to the role of judiciary by making provision for judicial review, based on openness, democratic principles, human rights, reconciliation, reconstruction and peaceful co-existence between the people of the country in national unity and reconciliation.'

The Role of the Judiciary in Sustainable Governance

One should then ask what is the role of an independent judiciary in sustainable governance? One can start by saying that sound and successful governance starts with two building blocks: free, open and democratic elections, and open and competitive markets. Within the private sphere, the independent judiciary can and should protect property rights, enforce contracts, secure markets on non discriminatory terms, and compensate victims of negligent actions so as to internalize significant externalities to production.

Too many communities in this region and in fact in this continent still suffer the effects of social and economic deprivation. How do we ensure that disadvantaged communities/people derive benefits from their legally enforceable rights? Countries that do not provide adequate assurances that property rights will be respected and contracts enforced become relatively unattractive locations for international investments, and this

impairs their economic growth in the global economy. We are all aware that the Western Countries have long experiences with our court systems suggesting that some measure of political independence for the judiciary enhances the court's ability to provide assurances in the areas sufficient for commerce to grow.

In the public sphere, courts can and should protect individuals' political rights to participate in elections, petition governments for redress of grievances, and preserve freedom of speech necessary for democratic systems to remain responsive to the will of the people and also to secure the legitimacy of governmental action. Once again, a measure of political independence has seemed essential to the performance of these functions by the judiciary, as well as to the maintenance of the perception that courts are capable of rendering politically unpopular judgements when political rights are infringed by official government action.

Of particular significance to South Africa is the Promotion of the Administrative Justice Act. The right to administrative justice holds a special relevance to South Africans. It was in this area that South African legal practitioners defended basic civil and political rights during the apartheid era. The entrenchment of fundamental principles of administrative law in the Constitution should be seen against the background of a long history of abuse of governmental power in South Africa.[41] The Constitution seeks to prevent a recurrence of this history by protecting the institution of judicial review of administrative power from

[41] See J De Waal *et al: The Bill of Rights Handbook* (2000) 3rd Edition Juta and Company.

legislative interference, while providing individuals with justiciable rights to claim relief from the effects of unlawful administrative action.[42]

This administrative justice legislation provides remedies for injustice caused by maladministration, abuse or unfairness. It is the first line of defence against malice, bad faith and corruption by public bodies. It is cardinal to the enforcement of administrative accountability, and the realisation of substantive administrative justice.

The Act advances the principle of fairness by imposing a particular procedural technique on all organs of state, statutory bodies, and public service institutions to be mindful in the application and execution of policies affecting the public. The right to seek redress before a competent court or tribunal imposes a positive duty on the public sector to observe the tenets of legality, fairness and reasonableness in all actions. Perhaps inspiration could be drawn from the South African situation; I believe Botswana and Namibia have the same legislation.

Rule of Law and Economic Growth

Democracy, economic growth and good governance are not permanently defined goods that one need only pluck off a tree. Rather, they are historical outcomes of ongoing struggles and conflicts and must be understood in their historical context. The key preconditions of sustainable development are: peace, security, democracy and political governance; economic and corporate governance with a focus on public

[42] Ettienne Mureinik 'A Bridge to Where? Introducing the interim Bill of Rights; (1994) 10 SAJHR 31(Bill of Rights seeks to create a culture of government no longer based on authority and coercion as in the past but on justification and persuasion: the administrative justice clause plays a prominent role in this project.)

finance management; and regional cooperation and integration. Development is impossible in the absence of true democracy, respect for human rights, peace and good governance.

With NEPAD, Africa undertakes to respect the global standards of democracy, which core components include political pluralism, allowing for the existence of several political parties and workers' unions, fair, open, free and democratic elections periodically organised to enable the populace to choose their leaders freely.[43] Elections are one of the most important mechanisms for ensuring the accountability of governments. Promote conditions for economic growth and development leading to poverty reduction. Promote intra-African trade and investment as well as regional development through the harmonization of economic and investment policies; and mobilise the economic integration on the continent. This will ultimately create opportunities for the continent to diversify production while adding value to its products. This process will therefore improve the international competitiveness of the continent's products on the global market.

To avoid donors from pulling out, respect for human rights, good governance and sound economic policies are very important in a country. Hence studies have shown that since the adoption of economic reforms in Africa in general and Southern Africa in particular, the influence potential of aid has been extended beyond the realm of economic policies to include new conditionalities of good governance, respect of the rule of law and environment, the observance of human rights and the holding of free and fair elections.

[43] Good Governance Conference Report: http://www.ossrea.net/rw/goodgover-02.htm .

The purpose of judicial review and the governance initiative, is to contribute to strengthening the political and administrative framework of participating countries, in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law. It is strengthened by and supports the Economic Governance Initiative, with which it shares key features, and taken together will contribute to harnessing the energies of the continent towards development and poverty eradication.

As discussed earlier, the leaders, both individually and collectively have the desire to achieve a sustainable growth and development result for the continent. Thus, serious commitment from the continental leadership and massive injection of investment from the richer nations would provide the impetus for growth and development. NEPAD is based on empowerment and self-reliance. In this context, the region through meaningful state intervention in the economy may broaden the ownership base of the regions' means of production

But while we encounter some bumps and experience some setbacks along the way, I am confident that by working together, in a responsible and constructive manner, we can establish an enduring partnership to meet the governance challenges of tomorrow, create open and vibrant self – sustaining communities, and advance shared prosperity for all.

This conference is a step in the process, and we hope we shall work together to convene sub-regional conferences in the future that will identify specific steps necessary to implement true legal and judicial reform throughout the region. We need to take steps we can together to

improve judiciaries in the countries of the region, and to hearing about the importance of administrative law reform.

Let us quickly and efficiently work together towards our goal of establishing states where the law is more than mere words on paper. It must become the true protection of fundamental human and economic rights. The establishment of those rights, we hope, will lead to prosperity and peace throughout this region and beyond. Thank you.