It goes without saying therefore that whatever overlap there might exist under the Constitution in a Constitutional regime between the exercise of executive and legislative powers, the separation between the exercise of judicial power, on the one hand, and the legislative and executive powers on the other, is a clear cut distinction. Such concept of the separation of powers founded on the rule of law is a characteristic feature of democracies like Lesotho and other jurisdictions of the respective Southern African region. Of importance is the fact that the courts serve as a bulwark to ensure that the laws passed by Parliament are not inconsistent with provisions of the Constitution. This is effected by application of a standard criterion or constitutional touchstone against which such laws are tested. Failure to meet this requirement means such laws cannot pass muster.

[14] In Lesotho the ground-breaking decision on independence of the judiciary and the need to heed the importance of the doctrine of separation of powers came to the fore in the Court of Appeal's pronouncement in **The Law Society of Lesotho vs The Prime Minister & Anor** LAC 1985 – 1989 pg. 129.

The Law Society had taken issue with the Prime Minister for appointing a Director of Public Prosecutions acting Judge. Their concern being that as a Subordinate of the Attorney General subject to the Public Service Laws and thus a member of the executive the DPP could not discharge or be seen to discharge his judicial functions independently as he had not resigned his public office.

In upholding the Law Society's objections the Court crisply expressed itself as follows:

> "It is right that a matter of this nature should have been brought into the open before the proper forum, namely the ordinary courts of the land and it is a credit to this country and not a discredit that such matters should be so ventilated"....

It was held that "the Human Rights Act 1983 was part of the Law of Lesotho which must be enforced by the courts, and that the Act was not just a pious expression of good intentions".

[15] The stand taken by the court was all the more commendable regard being had to the fact that the environment and atmosphere prevailing at the time militated against various kinds of freedoms specified in the Constitution because the Constitution had since been suspended in 1970 only to come back with the new ushering of the democratic dispensation in

1993. This act of boldness highlighted the fact that an assertion of independence of the judiciary is no function to be lightly indulged in by timid souls nor is it a playground for the faint-hearted. Another case which underlined the importance of separation of powers is the recent one **JOALE vs Minister of Local Government & Anor.** Const/3/2005 where the Executive was dissuaded from its insistence that in the name of sharing facilities and making life less burdensome magistrates should be responsible to District Officers who do not belong to the Judiciary. In rejecting this contention the court stressed that it would be unconstitutional to compromise the doctrine of separation of powers between the Executive and the Judiciary that way. Further magistrates even though subject to Public Service Regulations belong to and are responsible to the Judicial Service Commission which is not part of the Executive according to the constitution.

[16] In dispensing Constitutional justice the courts must do so with impartiality and independence, while seeking at all times to strike that fine balance between competing interests in the political, social, economic and cultural purlieus. This I must hasten to acknowledge is not an easy task. Why? Because it calls into play an element of judicial activism which may be necessary and thus has to be employed. However the danger which is

ever abiding in such circumstances is due to the fact that unbridled judicial activism may overreach itself and to that extent be counter-productive while at the same time judicial indolence or reticence is antithetical to Constitutionalism. Indeed there lies the dilemma for a judicial officer who is thus caught up in the true meaning of the expression "hasten slowly"!

The situation in South Africa as governed by section 39 of the Constitution which has a further dimension that "when interpreting the Bill of Rights, a court, tribunal or forum

(a) must promote the values that underline an open democratic society based on human dignity equality and freedom.

(b) .....

(c) ....."

which is in keeping with the Namibian one as illustrated in **Cultura 2000** above,

contrasts sharply with the stand adopted by Mauritius where the Privy Council in **D. Matadeen and Another vs MGC Pointu and others and the Minister of Education and Science and another** (Privy Council Appeal

No. 14 of 1997) stated that the provisions of the Constitution "cannot be construed as creating rights which they do not contain."

[17] Thus in a paper submitted in Portugal at the North South Centre Lisbon Forum the Chief Justice of Mauritius in terms stated "The Supreme Court can, therefore, only give effect to the provisions of the Constitution, **as they exist,** even if those provisions are liberally construed in such a way as to conform to international conventions"

In drawing inspiration from the Commonwealth Principles in this regard he cited a portion on independence of the Judiciary that states:

> "An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law to the extent permitted by the domestic law of each Commonwealth country"

[18] It is for you learned brethren to mull over these interesting points of contrast which stand as signposts beckoning that we should tread with caution along the path to universality (at least of the law) in our region and unity of purpose in the SAJC.

[19] An illustration of the conflict between judicial activism and judicial indolence came to the fore in Lesotho in the matter of **Tšepe vs Independent Electoral Commission & 4 ors** CIV/APN/135/05.

In that case Mr. Tšepe, a male registered voter, wished to stand as a candidate in the country's first democratic local government elections. However, he was informed by the returning officer that the particular electoral division in question was reserved for women candidates in terms of the relevant section in the Local Government Elections Act of 1998 which allocated one third of the seats in every council for women for the first three elections. Mr. Tšepe challenged the legality of the quota system as breaching his right to be free from discrimination and to participate in government in terms of the Constitution.

[20] In particular he contended that other less restrictive alternatives to enhance political representation of women existed e.g by providing two ballots – one for women and another for an open candidate. The Independent Electoral Commission (IEC) conceded that the measures discriminated against men by reason of their sex but maintained that such positive discrimination was justified.

The High Court dismissed the petition on the grounds that the measures were justified given that only 12% of the seats in the National Assembly were held by women despite that women accounted for 51% of the population.

[21] On appeal where the High Court's verdict was confirmed it was indicated that it is well established as a general principle that Bill of Rights provisions are to be purposively and generously interpreted. In relation to equality this means embracing a substantive approach to tackle systematic disadvantage and progressively eradicate socially constructed barriers.

This approach was held to be in line with the country's international treaty commitments in terms of the positive measures to be taken to address disadvantage including articles 3 and 26 of the International Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee in its General comment 18 paragraphs 8 and 10.

[22] Of importance was the observation by the Court that the reservation system has a sunset clause with its remedial effect of not being permanent but lasting for only three elections, and that the system has been designed in

such a way that no political party can benefit unduly and that the impact on Mr. Tšepe is not that great since he is still able to stand in a neighbouring seat for the first election.

Inspired by the spirit of constitutionalism and the impact this has on promoting democracy the rule of law and human rights as shown above, the courts in Lesotho have consistently striven to give true meaning to the independence of the judiciary. This resolve was not dampened by the haunting spectre even of the Military regime which relying on its might thought there was merit in debarring the court by legislative orders from continuing to hear cases which it felt were sailing too close to the wind.

For instance in **Swissbourgh Diamond (PTY) Ltd vs Military Council of Lesotho** 1991 – 96 (Vol. 2) LLR Cullinan CJ held the Military Council Order invalid because the "**order**" violated the property rights under Human Rights Act 1983 to the effect that it unilaterally rendered the property rights under a mining contract null and void retrospectively. This decision as already alluded to, was given before the advent of Constitutionalism that was ushered in in 1993 hence use of the word "**invalid**" in place of "**unconstitutional**".

RIGHT TO LIFE

[23] In a recent case i.e **Khathang Tema Baitšokuli vs Maseru City Council** (Const./C/1/2004) the High Court sitting again as a Constitutional Court was constrained to hold that right to life guaranteed under section 5 of the Lesotho Constitution, did not include right to a livelihood. The court held and was confirmed on Appeal that right to life was not (as in South Africa) absolute and was limited to the biological physical integrity of the individual therefore did not include other socio-economic rights as to food, health, work etc. An opposite view has prevailed in the Supreme Court of India where the courts held that the right to life is meaningless and empty if not sustained by food, health and other basic amenities. A comical example of this can be illustrated by a protest by a son to his father contained in the expression "what use is the car you have given me if you don't provide it with fuel as well" to which he replied: "before you got employment I gave you a bicycle which you rode without me providing any fuel." The moral of this short exchange is clearly that self-exertion by paddling a bicycle in order to propel it while riding is a lesson enough that in order for a donated car to move it would require the driver thereof to expend his own money for fuel.

[24] In the seminal case of **S vs Makwanyane** 1995 ILRC 269 (CC) the Constitutional Court of South Africa holding that human dignity and right to life were absolute, ruled that the death sentence constituted a cruel and inhuman punishment and hence was unconstitutional. Of late due to the spate of senseless and brutal killings news media reflect people up in arms crying out for restoration of the death penalty.

An observation in passing shows that people emerging from intensely gruesome and oppressive regimes err on the side of liberality in welding their rights to the supreme law. Buoyed up by euphoria of their miraculous salvation from grinding and nerve-wrecking oppression they are blinded to the threat posed by the eternally incorrigible elements in their midst.

[25] **SECURITY LAWS**

Security laws must be premised on general public interest and the good of the realm. They should not be prompted by sectoral motives of self-preservation. Security laws which may impinge on human rights and liberties must be strictly construed. Even in a ticking time-bomb scenario it

would be wrong to extract by torture evidence that hopefully would lead to the apprehension and conviction of the culprit/s in a democratic society. No lip-service should be paid to presumption of innocence. A balancing act between the rights of an individual and the interests of the community is to be exercised by a judicial mind that is disabused of mean prejudices, in other words a mind that is independent and impartial.

[26] In conclusion may I arrogate to myself the liberty to quote *in extenso* the Secretary of Venice Commission's inspiring remarks made at the Inaugural Ceremony for the opening of the Constitutional Court of Bahrain:

> ***"The Venice Commission promotes the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law. In fact they are not European values but truly universal ones. While each country is different and follows a different path at a different pace these common goals apply to all of them. In the pursuit of these common goals, we can rely on a source, which is an accumulated wealth of legal reasoning: The Judge- made law of our constitutions, that is to say, the jurisprudence of Constitutional Courts. Differ as it may from one country to another, this great corpus of judicial decisions does not fail to highlight the salient trends of modern democracy. In fact, the***

critical questions under review by Constitutional and Supreme courts often seem to arise at the same time, across national boundaries. The reason is that they reflect some of the current pressing needs of society and they have to be answered and accommodated by the judge who makes the Constitution work in the ordering of social life. In transforming the Constitution into a "living" law for society, constitutional justice, with a clearly established role in the institutional setting, is fundamental.

The purpose of our co-operation with constitutional courts is therefore to promote cross-fertilization between the courts, in their exchange, constitutional judges can find common ground and draw inspiration from each other, thus furthering democracy.

————Constitutional review varies from country to country and this is a positive element. Each country has its historic and cultural background and deals with its own problems accordingly. What is important though, is that the basic standards of democracy are adhered to".

May I thank you for your attention.