

**AN OVERVIEW INTRODUCTION OF THE THEMES OF  
THE CONFERENCE BY J. M. NGANUNU – CHIEF JUSTICE  
OF BOTSWANA**

Your Excellency President of the Republic and the Honourable Minister of Justice Defence and Security, I have already welcomed you to this conference. No further words of welcome will give all of us any further mileage. I trust that what I have to say gives you a shortened foretaste of what the judges assembled here will be discussing in these next two days, as well as their hopes for good governance, justice and dignity for all the peoples of our region.

My Lords and Ladyships, invited guests, ladies and gentlemen, let me join His Excellency the President in welcoming you to Botswana at Kasane; and to this conference of our own. In terms of international solidarity Kasane, where we are meeting today and tomorrow, is a good conference venue because it lies at the point where Zimbabwe, Zambia, Namibia and Botswana have contiguous boundaries and people of common heritage.

Just across the river you see Namibia – a country we share a border for over 1582 kilometers.

Your Excellency, President of the Republic of Botswana, 17 countries, those of SADC states plus the Republics of Uganda and Kenya are members of a judicial organization known as the Southern African Chief Justices Forum, which consists of Chief Justices and senior judges of the member states. This Organisation constitutes a Forum in which the judges consult, exchange views and information on the state of the Rule of Law in each member state and the region, on an annual basis, sitting in various Countries as invited by a member state. At such meetings Chief Justices take stock of the capacities and capabilities of the courts of the various judiciaries to deliver judicial service to their communities; they suggest ways of improvement of delivery of services and give advice and assistance, where the rule of law is particularly threatened in any member state. In this manner Chief Justices and their fellow judges keep abreast of the latest best practices in the

court systems of the region and the world, and assist each other in their training needs.

Each and everyone of our judiciaries is determined to contribute meaningfully to nation building. Based on their positions in modern African constitutions, African judiciaries do not perceive themselves as ivory towers that stand to be gazed from afar; No! They regard themselves as an integral part of the society they live in. They actually have a hand in the modeling of societal values, the promotion of democratic practices, good governance and the establishment and practice of the rule of law. Societal values that have been articulated by the Commonwealth Heads of State in their Harare Declaration of 1991.

This year Botswana invited the Forum to Kasane, and I say to my colleagues, please take Kasane as your home and speak freely on things within and outside the conference; your freedoms of speech and of association shall be respected in

Botswana, as is done throughout our towns and villages in respect of all residents and visitors to our country.

Kasane is one of our smallest village/Towns. You may not therefore find enough people to interact with, especially with such a busy schedule; but in compensation I hope you will get to meet the inhabitants of the bush and the water; so that you can truly appreciate what forms the basis of our tourism. Please do not mind comrades, the voices they may use, nor the languages they shall speak in; I understand that as long as we respect them these other inhabitants of our earth they will respond well and feel relaxed in our midst. If any of you would want to capture any of them and carry them with you. In your videos and cameras you will be free to do so; otherwise kindly do so after obtaining a proper licence; and do it in the company of wildlife officials; otherwise the beasts themselves may turn against you and you may become the captured instead.

Ladies and gentlemen the conference agenda has been circulated; and any person who wants to contribute a paper should see the Secretary of our organisation who will make the necessary arrangements. As usual, this conference belongs to members. Its richness and outcome shall come out of your wise contribution and energetic participation. Therefore each Chief Justice and members of his delegation are encouraged to participate vigorously. The agenda will be flexible to accommodate other issues as long as notice of the same is given.

Now if I may introduce some of the issues on the agenda. The first theme looks at how the prevalence of the Rule of law and lawfulness in government leads to political stability which in turn should contribute a good measure to social and economic development. This part of the theme proceeds from the now accepted truism that a stable and calm society is a sine qua non for economic, social and cultural progress; and advancement and that a badly governed and unstable society loses its developmental impetus; because it dissipates its

energy in trying to correct or fight bad government or in running away from it. It also loses any contribution from foreign capital and international and in all our constitutions whatever the formulation may be, the doctrine of separation of powers with its concomitant doctrine of the independence of the judiciary constitute a fundamental part of the rule of law; and therefore these topics shall constitute a sizeable part of our discussion of what role constitutionalism and good governance play in the promotion of economic progress and advancement of any country and its region.

The other topics dealing with administrative law are related to the first topic; and through them we shall examine the ability of our courts to protect rights of citizens that are likely to be trodden in the process of rushing to develop; and the attempt to exercise powers that do not exist, or to exceed what has been given by Parliament in any statutes. In the process the conference may want to validate or debunk the words quoted below taken from the book of **B. O. Nwabueze: Constitutionalism in the Emergent states:**

“In common law jurisdictions, it is an established principle that the executive have no inherent discretionary power to act against the citizen. As almost every executive act bears directly or indirectly upon citizens, the principle operates as a guarantee against arbitrariness in executive government.”

These two subjects my Lords and Ladyships, will allow us to examine just how effective courts really are in being the guardians of all the rights of the citizens; and to assess what other tools may exist for use to do better.

We shall in the process learn from each other the difficulties that occur in theory and in practice, in the exercise by the courts of their powers and how such difficulties are dealt with and resolved amongst or between organs of state, so that the state continues its great responsibility to its citizens in the development of the country and the fair distribution of the resources of the nation. In many, if not all of our constitutions, it is acknowledged that development, and the

making of policy and the distribution of national resources are issues left to the executive government, to be implemented in accordance with such laws as parliament may have rightfully enacted. All these are areas generally left to the other two organs of state, excluding the judiciary. But the role of the judiciary is nonetheless an important and delicate one i.e. being one of providing a check on the legality of the exercise of powers by the other two organs of state; and of resolving legal disputes that are brought to courts by anyone.

Under the topics dealing with administrative law we shall learn and exchange views on the sources of powers of the court to review administrative decisions of the executive and other tribunals; how such powers can best be used; and the limits placed on the exercise of such powers in the interests of the separation of powers and respect of the powers of the other organs.

Ladies and gentlemen the subject of the independence of the judiciary has been discussed in conferences of judges, lawyers

and statesmen, probably more often than many other legal issues; so, some amongst us, might ask why discuss it again.

The simple answer is that this subject touches on the essence of the governance of a state; and it defines the relationship between the three organs of state. This subject teaches us that each organ should exercise its powers with the most sensitive consideration to the powers of the next organ dealing in the same area. Judges know all too well that the penumbra is not easy to define or stop at. If for instance, a judiciary exercises its powers in a shared sector with too much deference, to say the functions of the executive, it is likely to be labeled as too timid, and not strong enough in the protection of rights which it was alleged the executive had trodden. If on the other hand such a judiciary acts strongly it is likely to be regarded as being provocative and going too far; with some accusing it of an intention of raising unnecessary tension. In my view, to prevent serious constitutional crisis, each state organ should learn to forebear and give deference to position and functions of the other. A failure by any organ of

state to be humble and keep within its sphere has been the root cause of most constitutional fights we have witnessed in Africa.

We shall discuss the issue of where the limits are for each of the three organs of state and how we should discover them in any particular situation. And at any rate we should discuss how to manage and deal with the inevitable tension that arises at such top level.

In my view, the area of the separation of powers and judicial independence is the most compelling to exchange views in such conferences because, inter alia, of its complexity; and its importance to the public. It is the obvious flash point especially between the executive and the judiciary, as there is always an apparent conflict of co-existing powers, and yet a harmonious relationship between all organs is essential to the good health of the body politic and the welfare of the public.

Although judicial independence may have been regarded in the past as not going beyond the exclusive right of a judge to decide a case without interference from any quarter, its present meaning goes far beyond that, as illustrated for the Commonwealth countries, in the **Latimer House Principles**. This doctrine now embraces the concepts that true judicial independence may be whittled down significantly by indirect pressure, applied subtly on sensitive points of the judicial body e.g. on the way judges are chosen. **The Latimer House Principles** seek to protect these pressure points from vulnerability, for instance, in the field of appointment and removal of judges from office by providing that judicial appointment.

“(a) **should be on the basis of clearly defined criteria and by a publicly declared process;”**  
**which ensures “equality of opportunity for all who are eligible for judicial office;**  
**appointment on merit;**

**and that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.**

(b) arrangements for appropriate security of tenure and protection of levels of remuneration – be in place”

and that removal and suspension of judges should only be for reasons of incapacity or proven misbehaviour.

The **Latimer House Principles** are a set of principles researched by many legal organizations of the Commonwealth, reporting to Ministers of Law of the Commonwealth, who in turn reported to the Heads of State and Government, who after a thorough and detailed examination approved the principles on judicial independence as part of the approved values of the Commonwealth of Nations on good Governance and the relationship between the three branches of government i.e. Executive, Legislative and judiciary. In the booklet introducing

these principles under the title: **“Commonwealth (Latimer House) Principles”**, it is said that:

**“The Commonwealth is an organization of values, and the values – or principles – of Latimer House are irreversible embedded in the canon and the creed of this organization. They were debated and adopted by heads of Government in Abuja in 2003, and – in being so – they greatly strengthened the existing body of beliefs and goals of this organisation, as set down in Singapore in 1971, Harare in 1991, and Millbrook in 1995.”**

The above then shows that at the level of Heads of State the doctrines of the separation of powers and judicial independence are accepted in the manner I have stated them above. The challenge is in the practice because many a dictators have shown that they can easily toss out these principles and still maintain that they live by the Rule of law and are as democratic as ever, and as every one else.

This conference no doubt, will remind us all; and perhaps say something to the Heads of State of our region, about the clear linkage between economic and social progress and good governance, respect for human rights and dignity of the individual, on the one hand; and on the opposite side, how bad government, and a failure to respect human rights can bring down a country to its knees.

Ladies and gentlemen, every coin has two sides; and so are many things on earth. The other side of the coin to judicial independence and the rights and privileges of the judges and courts, is the responsibility and accountability of the courts and judges, to the public which ordained their functions and powers in their Constitutions. Our agenda includes an examination of these issues to determine how courts do or should account to the public; and whether they as an independent entity should account to the other organs of state; and if so, how to do so without compromising their independence. In such discussions I want us to keep in mind the fact that all institutions of state were created to serve the

people; and that, we in leadership of the judicature of our states, are expected, as are all other leaders in charge of the other state institutions, to fashion and organize our institutions properly, so that they function as expected; and give value for money.

Your Excellency, my Ladyships and my Lords, building and maintaining a decent judicial structure, with adequate court rooms, and properly staffed with professionals and experts, is an expensive proposition that few states in the world can keep up with. It therefore behoves leaders of all our judiciaries to keep a check on their budgets; and to adopt the principle that the judiciary be so trained and equipped that it can also do more with far less. Thus over many years now, training and judicial reform have become a regular feature in many judiciaries. The conference is scheduled to discuss the subject of judicial reform, with a view to exchanging information on what sorts of environments lend themselves to successful judicial reform. The area of judicial reform appears to be one where we can exchange information and visits, with profit to

our respective judiciaries. Although our judiciaries are extremely busy and have less manpower than they ought to do with, nevertheless it is still most desirable that in the area of judicial reforms we can exchange information and visits more regularly than we do now; and perhaps not rely so much on foreign expertise.

Lastly, ladies and gentlemen, I hope that our annual conferences continue to be productive; and that at this crucial juncture in the development of Africa, our judiciaries will prove their worth as development partners to the other players in our respective states; not as pliable and toothless courts, but as strong institutions manned by strong and honest judges capable of fulfilling their mandates under our respective Constitutions I would like so that when history is written about the turn around of Africa – if you like, its renaissance – a footnote will be appended to the effect that during that period the courts were able to deliver adequate judicial services expeditiously; and were true guardians of the peoples' constitutions and their rights. And that they helped

make the human being the centre of development. I think we can look forward to fruitful discussions of our issues during these two days, and again I hope you will enjoy your stay in this country; and particularly the scenic environment of Kasane.

I thank you all. I thank you Mr. President for your visit and your speech what you did shows that this continent, especially with regard to justice and the dignity of man which you already have made a centre of your domestic as well as your international foreign policy.

**PULA! PULA! PULA!**