CONSTITUTIONALISM: The key to Democracy,

Human Rights and the Rule of Law

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By The Honourable Mr. Justice Lehohla

THE CHIEF JUSTICE OF LESOTHO

The Honourable Chairman of SAJC Mr. Justice Langa

The Honourable Chief Justices from SAJC Region

Honourable Justices of Superior Courts in their respective Jurisdictions in the Region

The Secretary of the Venice Commission

The Secretariat of the VC and SAJC

Fellow Participants

[1] Please allow me to confess my vain attempt to confine so broad a topic as the above within a space of less than a quarter of what it should be if normality were to prevail.

[2] May I nonetheless be allowed to express my humble gratitude for the opportunity to have your attention anchored on the method and means employed to tackle the subject and hopefully on the resultant product of my efforts.

[3] As a prelude to the task on our hand it will be worth your while to learn that speaking briefly about Lesotho, last year marked the 40th anniversary of her Independence yet only 10 years consisting of the first five and the last five of that period represented what could be looked upon as a single protracted period of calm and stability – thanks in respect of the last five to the newly adopted electoral model known as a mixed member form of Parliament consisting of both the first-past-the-post combined with the proportional representation type of membership.

[4] I may just add that for a country which has had a long period of political upheavals and instability like Lesotho it is indeed heartwarming to learn that this new model on account of its satisfactory quality and broad based suitability is regarded as worth copying or trying by many states in Africa.

[4a] I should briefly indicate for purposes of avoiding disorientation in the vast ocean we are about to sail, that the Constitution of Lesotho is divided into chapters, fifteen of them in all.

We are going to deal more closely with Chapter II which deals with Protection of Fundamental Human Rights. Next will be Chapter III which relates to Principles of State Policy. There will be reference to Parliament which is covered under Chapter VI. There shall be no treatment in detail concerning this Chapter. There shall be a fair amount of factors to be treated under Chapter XI which is a chapter on judicature.

Suffice it then to point out that Chapter II is one of the chapters whose clauses are entrenched and therefore cannot be changed or dissolved except by two thirds vote of each house voting separately or by referendum.

Concentration on the effect in operation of the above arrangement shall not detract from the subjectmatter namely constitutionalism taken along with the subtopics tacked to it above.

Chapter VIII relates to alteration of the Constitution Clause 85 (1) thereof sets out preconditions subject to which parliament may alter the Constitution of Lesotho.

[5] Getting to grips with the topic permit me then to associate myself with the words of the Secretary of the Venice Commission uttered in the Lisbon Forum late last year that:

> "..... Constitutionalism, refers to the idea that constitutions must not remain written on paper, nicely bound in leather and forgotten under the dust of time. We have seen such constitutions, merely declaratory in nature, which had no effect in real life. A sad example was the Constitution of the Soviet Union, which proclaimed an impressive list of human rights, which were however disregarded by the State each and every day.
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> A 'real' constitution has to be normative. It shapes the country and steers it on its complex path towards democracy, the protection of human rights and the rule of law. Such normative constitutions have to be known to all, they have to be applied every day and they serve as the yardstick for the interpretation of any other legal test.
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> We have seen that democracy is not a static state of affairs. It cannot be ticked off as simply being achieved, democracy is a continuously moving process. Democracy has to be conceived, reflected upon, tried, retried and constantly improved. Democracy needs a sound framework. That framework is the country's constitution, which provides for human rights, the state's democratic institutions and their interrelation.
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> ..... if Parliament controls the Executive, constitutional justice wielded by the Judiciary is fundamental in controlling Parliament, keeping it within the boundaries set by the Constitution. The role of Constitutional Courts is to ensure that a Constitutional text becomes a real normative Constitution. In transforming the Constitution into a 'living' law for society, Constitutional justice, with a clearly established role in the institutional setting, is fundamental."

[6] When tackling the topic under consideration it is stimulating to observe that happily in most jurisdictions of the progressive world Parliamentary supremacy has given way to Constitutional Supremacy.

[7] Towards realization of this wholesome goal most Constitutions have vested in the superior courts the paramount power to :

(a) declare null and void any law or executive action or administrative action that is inconsistent with the Constitution.

(b) review any executive or administrative action or decision.

(c) determine any case involving violation of human rights.

[8] With the passage of time while carrying out the above functions the courts' practice has led to the emergence of administrative justice, which on developing resulted in becoming the norm or standard. This is as true of the jurisdictions of the USA, Canada the UK as it is of India, Australia, South Africa and many others including Lesotho where a visible trend along these lines has become reality.

[9] This reality has manifested itself here and elsewhere in the unmistakable observation that in exercising their paramount constitutional function, the courts are actually dispensing "constitutional justice" properly so called. Performance of this function is in turn effected in accordance with the norms and dictates of the constitutional law.

[10] Thus through repeatedly dealing with the Constitution the courts have accorded it a special place of importance and regarded it as ***sui generis***. It is in this connection that in interpreting the Constitution the courts feel obliged to do so purposively, generously and expansively in order to promote its true spirit and in the process promote the objective of the Bill of Rights. This sentiment was expressed in very clear terms in the ***Government of Namibia vs Cultura 2000***: 1994 (1) SA407.

[11] By way of illustrating the importance accorded Constitutionalism I should indicate that in Lesotho as well as in her other sister ex-High Commission Territories i.e Botswana and Swaziland including many countries in the world there is no Special Constitutional Court such as one finds in South Africa, Uganda and Mozambique where there are, so to speak, standing Constitutional Courts. However in Lesotho the High Court has jurisdiction to hear constitutional cases. The point is although hearing by a single judge in this court is not barred, nonetheless conventional prudence has dictated that constitutional cases be heard by a panel of judges - usually a minimum of three. This has been the case since 1993 when constitutionalism kicked off in earnest and seems to work quite well.

[12] Another feature which is a welcome development as an off-shoot of Constitutionalism is the ease of access to that court by parties who are not dissuaded from pursuing their perceived constitutional rights by fear of being saddled with swingeing costs in the event of losing either in the court of first instance or on appeal. Usually in these cases each party bears its own costs although no law dictates that this be invariably so. This is a salutary practice which acknowledges that because of the importance attached to Constitutionalism parties should not be kept at bay by fear of such extraneous factors as the menace posed by costs should the party be adjudged loser in his genuinely perceived belief in the correctness of his or her case and pursuit of his or her right.

[13] Constitutions are often couched in majestic terms to which effect must be given by the guarantors thereof. In their magnificence the constitutions enshrine the Bills of Rights, freedoms, functions of state organs i.e the Legislative, the Executive and the Judiciary and separation of their respective powers.

Under the Lesotho Constitution the separation of powers is entrenched and recognized. Thus one arm of government may not trespass upon the

province of the other. Each branch is given powers to discharge its functions without treading on the toes of the other. Each organ of state has a distinct role to play and acts as a check or balancing mechanism upon the other. This often leads to inevitable institutional tensions. To reconcile these tensions that might arise among the three organs of state, constitutional justice requires that there be a separation of powers between them. Thus the function of an independent judiciary is to interpret and apply the law. Decisions on bail are intrinsically within the province of the judiciary. The power to determine responsibility for a crime and appropriate punishment for its commission is a function which belongs exclusively to the courts. It thus would be an intolerable form of anathema for Parliament to arrogate to itself the power to vitiate decisions of courts arrived at in exercise of their constitutional powers. To purport to do so would be unconstitutional and therefore null and void. I should stress that it would therefore be disingenuous of Parliament to seek to make Parliament subvert, circumvent or undermine judicial pronouncements by purporting to arrogate to itself powers that the Constitution distinctly bestowed exclusively on the courts.

Indeed, the Commonwealth Principles on the Accountability of, and the Relationship between the Three Branches of Government *(The*

Commonwealth Principles) endorsed by the Commonwealth Heads of Government state as follows:

"(i) **The Three Branches of Government**

Each Commonwealth Country's Parliaments, Executives and Judiciaries are the Guarantors in their respective spheres of the rule of law and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

(ii) **Parliament and Judiciary**

(a) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the Judiciary's responsibility for the interpretation and application of the law on the other hand.

(b) Judiciaries and Parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner."