**REMARKS BY JUSTICE PETRUS DAMASEB,**

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**AT THE DGRU WORKSHOP FOR SOUTHERN AFRICAN JUDGES**

**HELD AT MIDGARD, NAMIBIA FROM 8-10 MAY 2015**

Honourable Judges

Ladies and Gentlemen

Allow me, on behalf of the Namibia Judiciary and the DGRU, the organiser of this event, to welcome you to Midgard and to Namibia. For those for whom this is the first visit to our country, I hope that your experience will make you to want to come back again. For those who are regular visitors to Namibia, I hope that you will continue to come back again, and again.

On 21st March 2015, Namibia witnessed yet another peaceful transition of power, from the second president to the third president of our Republic. Democracy and the Rule of Law are now firmly entrenched in our society. The last 25 years of independence have been relatively peaceful and, although our political landscape is occupied by one dominant political party, we boast political pluralism and a very robust media. Poverty and unemployment remain the biggest challenges facing our society.

The themes for this year's workshop are both timely and important. The first theme highlights the dilemma facing all judiciaries: the ever present tension between the elected branch of government, and the judiciary as the gate-keeper, albeit unelected. Lord Radcliffe once remarked:

> '…there was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it?'[1]

Yet much of what we do as judges remains informed by the tacit premise that there is a clear dividing line between law/policy making and the adjudication/interpretation functions. Of course, in a nuanced sense, Lord Radcliffe is correct: In interpreting laws made by Parliament, we, as judges, often establish new principles of law.
To buttress Lord Radcliffe's dictum, Lord Denning remarked:

> 'The truth is that the law is uncertain. It does not cover all the situations that may arise. Time and again practitioners are faced with new situations, where the decision may go either way. No one can tell what the law is until the courts decide it. The judges do every day make law, though it is almost heresy to say so. If the truth is recognised then we may hope to escape from the dead hand of the past and consciously mould new principles to meet the needs of the present.'[2]

To quote from Lord Radcliffe again:

> 'The Law has to be interpreted before it can be applied and interpretation is a creative activity.'[3]

In Lord Radcliffe's view, judges should work 'creatively' and without alerting the populace to what they are doing.

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[1] Radcliffe, *Not in Feather Beds* (1968), p.215
[2] 'The Reform of Equity', in C.J. Hamson (ed), *Law Reform and Law-Making* (1953), p. 31.
[3] Supra. p. 213.

Remember, Lord Radcliffe made his remarks outside the courtroom. I doubt if he would have said what he did in a judgment, and, if he did, if he would not have invited the harshest of criticism, not only from the elected class, but from his own peers.

To prove the point, Lord Devlin in deprecating the 'creative approach' commented thus:

> 'In every society there is a division between rulers and ruled. The first mark of a free and orderly society is that the boundaries between the two should be guarded and trespasses from one side or the other independently and impartially determined. The keepers of these boundaries cannot also be among the outriders. The judges are the keepers of the law and the qualities they need for that task are not those of the creative lawmaker. The creative lawmaker is the squire of the social reformer and the quality they both need is enthusiasm. But enthusiasm is rarely consistent with impartiality and never with the appearance of it.'[4]

The greatest tribute to the judicial mind is its ability over a generation (and I mean it in the collective sense – i.e. first instance and appellate levels) to appreciate where to draw the line and to carefully define the limits of its power, aided, not doubt by its appreciation of the tension regarding its role between itself and the other branches, and the changing values of society. Succeeding generations of judges might, and should be free to, change the emphasis regarding the Judiciary's role but in a way that is principled. First instance and appellate judges will then refine and calibrate the emphasis into a coherent set of rules and principles we call *precedent*.

[4] Patrick Devlin, *The Judge* (1979), pp. 3, 5, 9, 17.

The tension between the courts and the other branches regarding the courts' review power arises because choices about allocation and distribution of national resources are, at their core, political, yet the subject's rights guaranteed under the Constitution protects him or her from unreasonable, disproportionate and irrational executive or legislative measures, as the case may be. It is not a simple matter, and cases that come before the courts present very difficult questions that need to be resolved; and they severely test the judges' ability to strike a balance between, on the one hand, the need to allow flexibility to the elected branch to make political choices and, on the other hand, the importance of ensuring that the subject's rights under the Constitution do not become a chimera. The tension is not only as between the elected branch and the Judiciary regarding the latter's power of review, but also within the Judiciary itself as the U.K. case study shows. And that, in my view, serves as a moderating balance which allows for the law to develop carefully and on a case by case basis.

It needs to be said that the debate in U.K. took place at a time when sovereignty of Parliament reigned supreme and in the absence of a justifiable bill of rights. If it occurred today the debate would have been slightly different in emphasis and would have been calibrated to take into account the prevailing human rights jurisprudence in Europe. So much for the first theme.

The second theme is intended to invite debate on our orthodox adversarial common law system, in which the judge is a neutral umpire while the parties take the lead role in determining the pace and intensity of litigation. We will share with you some of the reforms initiated in Namibia and Botswana in recent years towards active control and management of cases by the judges, thus wresting control of the pace of litigation from the parties.

Colleagues,

I am sure that the next two days, laced with and punctuated as they are by appropriate leisure activity, will afford us the opportunity to debate and exchange ideas, and hopefully help us better appreciate our role as judges.

I have no doubt that the serene and agreeable setting of Midgard will provide a perfect avenue for rigorous and intellectually stimulating debate and exchange of ideas.

Once again, welcome and enjoy your stay at Midgard and in Namibia.