

THE BLANTYRE RULE OF LAW/SEPARATION OF POWERS COMMUNIQUE

TO THE LEADERSHIP AND PEOPLE OF THE SADC REGION

Preamble

1. There is a universal need in every constitutional democracy for the structure of the state to consist of three main institutions, or branches:
 - (a) A government with executive powers;
 - (b) An elected legislature to represent the people in making laws and in exercising oversight over the policies and decisions of the government;
 - (c) A system of courts and judges to administer civil and criminal justice and ensure adherence to the constitution.
2. The participants at the Rule of Law/Separation of Powers Conference, held at Blantyre, Malawi, from 28 to 31 January 2003, have examined in depth the extent to which good governance and the rule of law depends upon certain fundamental norms, in particular the separation of powers and the independence of the judiciary.
3. What renders the conference of particular significance is that it was attended by members of the executive, legislative and judicial branches, as well as many representatives of civil society, not only of the Republic of Malawi, but also of many countries in the SADC region, including Namibia, Zambia, Democratic Republic of Congo, South Africa and Angola. Civil society representatives included representatives of the media, of human rights organizations, law societies and of other non-governmental bodies. The conference was also attended by experts from Canada, the USA and the United Kingdom, with African and global experience in government and international legal development.¹
4. After extensive discussion, both in plenary sessions and after sharing experiences and lessons and best practices around the region and beyond, participants at the Blantyre conference have reached a clear consensus on a number of key separation of powers issues confronting many countries in the SADC region.

Underlying Principles

5. The foundation of any democratic form of governance is citizen participation, observance of the constitution and the rule of law.

¹ Conference participants would like to acknowledge the important contributions of Professors Keith Henderson and Anthony Bradley, from the USA and the United Kingdom, as well as Judge Sandra Oxner, from Canada.

6. The three branches of a state exercise different functions, but they exist within a single state and they share common goals in promoting the rule of law, peace, security, stability and welfare of the population whom they all serve.
7. Through their interaction, these three branches of the state enable democracy to be exercised under the rule of law.
8. There is no single accepted division of powers, personnel and responsibilities governance model as between the legislative and the executive branches of the state, as can be seen by the differing constitutions of many democracies. But within a democratic society founded upon the rule of law, these two branches must respect the independence of the judiciary, and provide adequate resources to enable it to perform its constitutional duties as the final arbiter of the constitution.
9. For its part, the judiciary must consciously respect the constitutional roles of the legislative and executive and make every effort to be accountable to the public and true to its own constitutional role.
10. These distinct branches of the state function within a system of mutual checks and balances. It is inevitable that healthy tensions develop between the three branches of state government, but these tensions must not develop into a dangerous struggle for power as this would never be for the benefit of the whole people.
11. Such tensions particularly run the risk of exceeding acceptable limits where a state's constitution and democratic institutions are relatively new, where there are profound economic difficulties, or where there are deep-rooted transitional divisions within a state that make it difficult to achieve the goal of sustainable development within a modern democratic society.
12. If the relations between the executive and the judiciary break down, it is likely that the administration of justice in accordance with the rule of law will be impeded. The cause of justice itself is threatened if the executive or legislative branches seek to erode the essential independence of the judiciary, for example, by impugning the legitimacy of decisions that the judiciary have made within the proper sphere of the courts. Such erosion threatens the underlying principle that government ought to be conducted according to law.
13. After extensive discussion, both in plenary sessions and in smaller workshop groups, participants at the Blantyre Conference have reached a clear consensus on a number of key separation of powers issues confronting the SADC region.

Key Consensus Findings

14. The foundation of any democratic form of governance is citizen participation and observance of the constitution and the rule of law.
15. In many countries in the SADC region, the judicial branch remains relatively weak, compared to the executive and legislative branches, which hampers it from fulfilling

its constitutional responsibilities to the people. Much of this is due to a lack of basic resources and a lack of sufficient political support.

Universal Principles of Judicial Independence for the SADC Region

16. With the aim of strengthening the ability of the judiciary to perform its constitutional duties, conference participants reached a consensus on a set of universally accepted international and constitutional judicial independence norms that should be implemented in countries throughout the SADC region:
 - (a) There shall not be any inappropriate interference with the judicial process by either public officials of other branches of government or private individuals or entities. Nor shall judicial decisions be subject to revision, except upon appellate review.
 - (b) Judges shall perform their duties free from improper influences and without undue delay. They shall ensure that judicial proceedings are conducted fairly and that the rights of parties are respected.
 - (c) Not only must judges be impartial, they must be seen by all to be impartial. Accordingly, in the exercise of their rights to freedom of expression, belief, association and assembly, judges shall conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
 - (d) Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction of the ordinary courts.
 - (e) Governments are obliged to provide adequate resources to enable the judiciary to perform its functions properly. Resources and career incentives at present, including salaries, benefits and court facilities, are not adequate and they should never be reduced.
 - (f) Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection or promotion shall be based on objective factors, in particular, ability, integrity and experience, and shall include safeguards against improper influences.
 - (g) Judges shall have guaranteed tenure until retirement or the expiration of their term of office, where such exists.
 - (h) Judges should enjoy personal immunity from civil suits for acts or omissions in the exercise of their judicial functions.
 - (i) Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that render them unfit to discharge their duties. Judges have the right to a fair and expeditious hearing concerning complaints or charges against them.

All disciplinary, suspension and removal proceedings shall be determined in accordance with established standards of judicial conduct.

- (j) Legislation, judicial information and court decisions shall be made available to the public.
- (k) Decisions of the courts shall be enforced fairly and effectively.

Key Recommendations

17. **The Rule of Law.** Governmental and Non-Governmental groups must vigilantly safeguard the independence of the judiciary and the rule of the law. The three branches of government, individually and collectively, all have a solemn and legal responsibility to respect and uphold a state's constitution.
18. **Implementation and Monitoring.** Implementing these goals and giving real meaning to the concept of the rule of law and judicial independence will require ongoing attention and oversight by individuals, governmental and non-governmental groups, as well as an independent media.
19. **Collective Societal Responsibility.** Therefore, participants of this conference call upon the leadership of each country's three branches of government, as well as civil society and the media, to make every effort to ensure these constitutional principles are respected and implemented in practice.
20. **Country Working Groups .** Each country should support the creation of Country Rule of Law Working Groups that bring together well respected representatives of all three branches of government, as well as civil society, to promote, monitor and annually publicly report on each country's progress in implementing these principles.
21. **Regional Working Groups .** SADC is also respectfully but urgently requested to create a Rule of Law Working Group that has sufficient resources to undertake this important regional task, as well as to promote other fundamental rule of law reforms throughout the SADC region. Regional support, including country and comparative public reporting and monitoring, would further promote the implementation of these principles.
22. **Inter-Related Reform Agenda.** In this regard, select committees of the Blantyre conference made a number of additional legal and policy recommendations related to the implementation of the rule of law and judicial independence. They are included as an important part of the Blantyre Conference Report and should be given serious consideration by Country and SADC Working Groups, reformers and policymakers and the people of the SADC region.
23. **Open Government.** The Blantyre Conference Report recommendations highlight the need to promote open government laws and policies, such as those related to access to information, open meeting laws and whistle-blowing that are necessary to enable meaningful public participation and informed oversight of the fair and effective implementation of all reforms.

24. **Universally Accepted Constitutional Norms.** While the judicial independence principles and recommended reforms are not exhaustive by any means, the consensus was that these were all fundamental, universally accepted and relatively non-controversial. Further, participants believed their implementation would serve as a catalyst and useful strategic guidepost for moving a rule of law agenda forward in the SADC region.
25. **Political and Financial Support.** The donor community at-large is called upon to respond to this important need throughout the SADC region. Governmental and International political and financial support for Country and Regional working groups, other reform initiatives, and meaningful civil society engagement will be necessary in the current environment.
26. **Sustainable Political, Economic and Legal Reform.** Country and regional support for the practical implementation of these constitutional and international principles will promote country and regional sustainable economic and political reform, stability, trade and investment, a democratic system of checks-and-balances and anti-corruption efforts through-out the SADC region.

The Blantyre Rule of Law/Separations of Powers Communiqué was approved for release to the people and leadership of the SADC region by wide acclamation and is hereby publicly submitted for immediate consideration the 31st day of January 2003.²

Attested to by: The Honorable Chief Justice Leonard Unyolo, Malawi Supreme Court of Appeal

² Blantyre Conference participants urge that these principles be incorporated into any new draft constitutions or constitutional amendments under consideration in the SADC region.