

THE IMPORTANCE OF PROMOTING JUDICIAL INDEPENDENCE IN THE SOUTHERN AFRICAN REGION

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Introduction

Judicial independence is the concept that courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. This is important for the proper functioning of a State based on democratic values. Judicial independence is also a key component of social transformation and democratic consolidation. There are numerous studies which indicate that independence and accountability of judges is fundamental to an impartial judicial process. As a consequence, judges' protection from undue influence or interference is a key concern and various principles and standards to protect judicial independence have been introduced by different bodies. At the same time, cases where judges have used their margin of discretion to make biased decisions have demonstrated the need for more accountability and oversight.

It is fundamental to the rule of law, to the right to a fair trial, to the right to liberty and security of person, and to the right to effective remedy for violations of human rights, that individual judges and the judiciary as a whole must be independent and impartial.² The requirement that courts and other tribunals be effective, independent and impartial "is an absolute right that is not subject to any exception".³

For the judiciary as an institution, the requirement of independence refers in particular to: the procedure and qualifications for the appointment of judges; guarantees relating to security of tenure until a mandatory age of retirement or expiry of term of office; the conditions governing promotion, transfer, suspension and cessation of their functions; and the degree to which the executive and legislative branches of power do or do not in practice interfere with judges and judicial decision-making.⁴

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2 See International Covenant on Civil and Political Rights (ICCPR) article 14(1); Universal Declaration of Human Rights (UDHR) article 10; Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (hereinafter: 'UN Basic Principles on the Independence of the Judiciary'), Principle 1 and 2; Universal Charter of the Judge, approved by the International Association of Judges on 17 November 1999, Article 1; Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002, Value 1 and Value 2; see also International Commission of Jurists International Principles on the *Independence and Accountability of Judges, Lawyers and Prosecutors – Practitioners' Guide No. 1* (2007).

3 Human Rights Committee "General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial" UN Doc. CCPR/C/GC/32 (2007), para. 19.

4 *Id.* See also UN Basic Principles on the Independence of the Judiciary.

This paper will view judicial independence through the lenses of rule of law, corruption and fair trial rights.

Protecting the Rule of Law

Rule of law standards include an obligation to ensure that States have access to a competent, independent, impartial and accountable judiciary that will not bend to political or other pressure. For example, in September 2016 the Zimbabwean police banned protests in Harare. The decision went on review before the Harare High Court. The courageous Justice Priscilla Chigumba found that the police banning order was “invalid” and curtailed citizens’ rights.⁵ This brave judgment asserted the independence of the judiciary at a time when there was an intense crackdown on protest and social media activism in Zimbabwe.⁶ The President tried to intimidate the judiciary when he said that judges when allowing these protests to continue showed a reckless disregard for peace and accused them of being negligent.⁷ Subsequent developments saw another High Court judge dismiss a legal challenge to the police order and uphold the police ban on anti-government street protests after weeks of demonstrations calling for President Robert Mugabe to step down.⁸

The Influence of Corruption on the Administration of Justice

Corruption in the judicial system has a detrimental impact on citizens and can seriously compromise the legitimacy and stability of democratic institutions. A fair and impartial judicial process is a precondition for accountable governance and for anti-corruption safeguards to take effect. Judges are as capable as any other public official of perpetrating or being complicit in violations of human rights. The State is responsible for all judicially perpetrated or judicially complicit human rights violations - this is true even if the judge’s conduct is “lawful” under the State’s domestic law.

Swaziland editor Bheki Makhubu and human rights lawyer Thulani Maseko were arrested in March 2014 and charged with contempt of court for writing and publishing two articles criticising the Swazi judiciary and the then-Chief Justice, Michael Ramodibedi. Initially, High Court Judge Mumsy Dlamini found their original arrest warrants to be defective and released them.⁹ The men were subsequently re-arrested by Judge Mpendulo Simelane and detained for more than a year

5 “Zimbabwe court overturns ban on Harare protests” *Al Jazeera* (7 September 2016) available at <http://www.aljazeera.com/news/2016/09/zimbabwe-court-overturns-ban-harare-protests-160907201438556.html> (last accessed: 20 November 2016); C Zvayi “Demo case: State scores own goal” *The Herald* (8 September 2016) available at <http://www.herald.co.zw/demo-case-state-scores-own-goal/> (last accessed: 20 November 2016).

6 “Zimbabwe threatens social media activists, after protests” *The Sun Daily* (17 August 2016) available at <http://www.thesundaily.my/news/1939255> (last accessed: 20 November 2016).

7 A Withnall “Robert Mugabe calls Zimbabwe judges ‘reckless’ for permitting protests against him: ‘I hope they learnt their lesson’” *The Independent* (5 September 2016) available at <http://www.independent.co.uk/news/world/africa/robert-mugabe-calls-zimbabwe-judges-reckless-for-permitting-protests-against-him-i-hope-they-have-a7227036.html> (last accessed: 20 November 2016); see also F Machamire “Police Ban Ruling ‘Haunts’ High Court Judge Priscilla Chigumba” *Nehanda Radio* (1 October 2016) available at <http://nehandaradio.com/2016/10/01/police-ban-ruling-haunts-high-court-judge-priscilla-chigumba/> (last accessed: 20 November 2016).

8 “Zimbabwe court keeps police ban on protests” *Reuters Africa* (4 October 2016) available at <http://af.reuters.com/article/zimbabweNews/idAFL5N1CA52T> (last accessed: 20 November 2016).

9 *Maseko and Another v Chief Justice and 3 Others* (161/2014) (2014) SZHC 77, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/11/Dlamini-Judgment.pdf> (last accessed: 21 November 2016).

before the Supreme Court acquitted them and ordered their release.¹⁰ This Supreme Court decision came in the wake of the suspension of Judge Simelane, and the removal of Chief Justice Ramodibedi on the grounds that the two judges were being investigated by the Anti-Corruption Commission on suspicion of defeating the ends of justice.¹¹ Following a 2015 scandal Swaziland's King Mswati III dismissed Chief Justice Ramodibedi.¹² This situation clearly displayed the intersection between rule of law, corruption and fair trial rights and how a weakness on any of these pillars could be detrimental to the administration of justice.

The Swazi courts have been regarded with much suspicion following this situation. However, in September 2016, the High Court asserted its independence in declaring portions of the terrorism and the sedition laws unconstitutional.¹³ The State has already filed an appeal but the Swazi High Court's bold position remains an encouraging demonstration of judicial independence.

Fair Trial Rights

The right of everyone to a fair and public hearing by a competent, independent and impartial tribunal established by law in all criminal and civil legal proceedings, is recognised by article 14 of the ICCPR, article 10 of the Universal Declaration of Human Rights and several other human rights treaties.

Right to effective remedy and reparation

The International Commission of Jurists outlined the judiciary's role in ensuring access to remedy:

“International law and standards also clearly require that States ensure the availability of effective remedies for human rights violations and reparation for harm suffered. The fact that a violation may have been perpetrated by a judicial official over other public officials, or that a judge has been complicit in the violation, does not absolve the State of its responsibility to ensure an effective remedy.”¹⁴

10 *Maseko and Others v Rex* (18/2014) (2015) SZSC 03, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/11/The-Nation-Appeal-002.pdf> (last accessed: 21 November 2016).

11 “Justice Locked Out: Swaziland’s Rule of Law Crisis” *International Commission of Jurists* (2016) 16 and 17.

12 *Id* 17.

13 *Maseko v Prime Minister of Swaziland and Others* (2180/2009) (2016) SZHC 180, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/09/High-Court-Majority-Judgment.pdf> (last accessed: 21 November 2016); see also “News Release: Swaziland High Court Strikes Down Provisions of the Sedition and Subversive Activities and Suppression of Terrorism Acts” *SALC* (2016) available at <http://www.southernafricalitigationcentre.org/2016/09/16/news-release-swaziland-high-court-strikes-down-provisions-of-the-sedition-and-subversive-activities-and-suppression-of-terrorism-acts/#> (last accessed: 21 November 2016).

14 “Judicial Accountability - A Practitioner’s Guide No. 13” *International Commission of Jurists* (2016) 6 to 7 (citations and parentheticals omitted).

Fair and Transparent Procedures for the Appointment of Judges are Vitally Important for Accountability and Independence

The appointment of judges in Botswana

The procedures for the appointment of judges can be another cause for concern. In Botswana the President makes these appointments acting in accordance with the advice of the Judicial Services Commission. This procedure is currently being disputed before the courts. The President is arguing that he retains a discretion to decide who to appoint and that in making his decision, he takes into account “a broad range of material considerations, including matters of national security, the socio-political situation in Botswana, public perceptions of the relevant candidate and the judiciary, and questions of policy”.¹⁵ The High Court has been inclined to agree with this discretion by the President. However, the matter is on appeal and no final position is yet available.

The appointment of judges in Swaziland

A 2015 International Commission of Jurists report found that King Mswati III, the absolute monarch in Swaziland, stands in the way of the kingdom having independent judges.¹⁶ The judges’ appointment process continues to pose a threat to judicial independence and impartiality. The Constitution of Swaziland provides that the judges are appointed by the King after consultation with the Judicial Service Commission.¹⁷ Even though Swaziland’s 2005 Constitution enshrines the guarantee of the independence of the judiciary, the executive has not respected this principle in practice.

Swaziland must effectively engage in the process of judicial reform, including by tackling underlying legal and policy factors which undermine the proper functioning of the judiciary. Only through this can it truly make progress towards ensuring protection of human rights for all. The proper functioning of the legal profession, as set out in the Basic Principles on the Role of Lawyers,¹⁸ is also key to the protection of rights.

Judicial Independence in South Africa

One situation that clearly demonstrated the independence and integrity of the judiciary was when the South African courts ordered the arrest of Sudanese President Omar Al Bashir when he attended the 2015 AU Summit in Johannesburg. The International Criminal Court (ICC) issued a warrant for his arrest in 2009 and 2010 on charges of war crimes, crimes against humanity and genocide allegedly committed in Darfur after a 2003 insurgency. As a signatory to the Rome Statute and having domesticated the Statute, South Africa was obligated to arrest President Omar al Bashir if he was found on South African territory. A full bench of the High Court ordered that

15 *Law Society of Botswana and Another v President of Botswana and Others* MAHGB-000383-15 (5 February 2016) para. 12.1, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/02/LSB-v-JSC-HC-judgment.pdf> (last accessed: 21 November 2016).

16 “Justice Locked Out: Swaziland’s Rule of Law Crisis” *International Commission of Jurists* (2016), 34 to 36.

17 Constitution of Swaziland, 2005, section 153.

18 “Basic Principles on the Role of Lawyers” adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990).

he be arrested for transfer to The Hague.¹⁹ The State subsequently facilitated his departure from the country and were on the receiving end of the full wrath of the judiciary for disrespecting the rule of law.²⁰

In the assessment of these cases we find that:

- Independence and impartiality of the judiciary requires integrity of individual judges and judicial institutions. Accordingly, there must be accountability for judicial corruption and judicial involvement in human rights violations.
- Accountability mechanisms must themselves be independent, fair and transparent, in order to ensure that they do not undermine the independence of the judiciary and that victims and the broader population see them as credible.
- Fair and transparent procedures for the appointment of judges are vitally important for accountability.

Access to Justice is Linked to Judicial Independence: The SADC Tribunal

One situation which seriously impacts on the independence of the judiciary is the suspension of the Southern Africa Development Community (SADC) Tribunal which is a Southern African regional court giving access to justice at a regional level. The SADC Tribunal was suspended in 2010 following a challenge by Zimbabwe to its mandate and legitimacy.²¹ The terms of office of five of the SADC Tribunal judges were not renewed, nor were these judges replaced. Although an independent commission of inquiry found in 2011, that the Tribunal was properly constituted with powers to hear human rights cases, the heads of State and governments of Southern Africa have failed to lift the suspension.²²

In 2014 SADC amended the Protocol of the SADC Tribunal.²³ The SADC Tribunal was previously a regional human rights court which individuals could access when their governments were unable or unwilling to provide effective protection of human rights. If duly ratified, the amended Protocol will remove individual access to the Tribunal as well as the human rights jurisdiction of the Tribunal.²⁴

19 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (Case No. 27740/2015) HCZAGP (23 June 2015) available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Judgement-2.pdf> (last accessed: 21 November 2016).

20 *Id* paras. 37.2 and 39.

21 F Cowell "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" (2013) 13(1) *Human Rights Law Review* 153-54.

22 L Bartels "Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal" *WTI Advisors* (2011) available at <http://lawyersofafrica.org/wp-content/uploads/2014/02/Annexure-6-B-Report-of-the-World-Trade-Institute-Advisors-of-6-March-2011.pdf> (last accessed: 21 November 2016).

23 "Communique of the 34th Summit of SADC Heads of State and Government Victoria Falls, Zimbabwe" (August 17-18, 2014) paras. 18 and 23.

24 "Coalition for an Effective SADC Tribunal Calls on Heads of State to Reinstating the SADC Tribunal" *Southern Africa Litigation Centre* (14 August 2015) available at <http://www.southernafricalitigationcentre.org/2015/08/15/coalition-for-an-effective-sadc-tribunal-calls-on-heads-of-state-to-reinstating-the-sadc-tribunal/#> (last accessed: 21 November 2016).

The Law Society of South Africa has brought a case against the State challenging the signing of this revised protocol.²⁵ In addition, the office of the UN Special Rapporteur on the Independence of Lawyers and the Judiciary has indicated that the suspension of the SADC Tribunal negatively impacts on the independence of the judiciary²⁶ and runs counter to the principles of respect for the independence of the judiciary; prohibition of inappropriate or unwarranted interference with the judicial process;²⁷ and security of tenure of judges.²⁸

Conclusion

The UN Special Rapporteur on the independence of judges and lawyers has emphasised that:

“Judicial corruption erodes the principles of independence, impartiality and integrity of the judiciary; infringes on the right to a fair trial; creates obstacles to the effective and efficient administration of justice; and undermines the credibility of the entire justice system.”²⁹

In order for States to operate optimally within a free and democratic framework, all three arms of government must also function freely and without fear. This includes the judiciary. While there have been many sightings and instances of judicial independence in Southern Africa, there is still a long way to go.

25 Court documents of LSSA litigation available at <http://www.lssa.org.za/our-initiatives/advocacy/sadc-tribunal-matter> (last accessed: 21 November 2016); supporting litigation documents from SALC available at <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africa-supporting-regional-individual-access-to-justice-in-sadc/> (last accessed: 21 November 2016).

26 Mandate of the Special Rapporteur on the independence of judges and lawyers, letter to Mr. Salomão (29 December 2011) (AL G/SO 214 (3-3-16) OTH 6/2011) available at [https://spdb.ohchr.org/hrdb/20th/AL_Other_SADC_29.12.11_\(6.2011\).pdf](https://spdb.ohchr.org/hrdb/20th/AL_Other_SADC_29.12.11_(6.2011).pdf) (last accessed: 21 November 2016).

27 UN Basic Principles on the Independence of the Judiciary, principle 4.

28 *Id* principles 11 and 12.

29 Special Rapporteur on the independence of judges and lawyers “Independence of judges and lawyers” A/67/305 (2012) para. 109.