

JUDICIAL INDEPENDENCE AS AN ESSENTIAL ASPECT OF THE RULE OF LAW¹

Thomas S. Masuku J²

The Importance of Judicial Gatherings to Advocate for Judicial Independence and the Rule of Law

The independent judiciary and the rule of law is a modern “gospel” that should be spread across the continent. Vast amounts of money and time is spent for the political elites across Africa to come together and discuss these issues. This practice leads to a recurring question. Why should we meet and expend money only to preach, as it were, to the converted?

Would it not be better and more beneficial for the political elites to leave the comfort and serenity of air-conditioned and beautifully adorned venues and instead go to the highways and by-ways of this region. They could look for the “heathen” so to speak, in order to preach the “gospel” or good tidings related to the independence of the judiciary and the rule of law.

This premise is based on an assumption that the judiciary acts in a way separate from the other members of the *trias politica*, namely members of the executive and legislative organs of State. These two “usual suspects” have become notorious for continuously violating the twin core principles of an independent judiciary and the rule of law. Additionally, there may be other constituencies who have joined the bandwagon in this regard, including some captains of business and other people with financial and political muscle and prowess or those who have untrammelled access to political influence in various countries.

Sadly, the most remarkable addition to this growing inglorious list, are judges. This, at times, even includes the “first among equals”, Chief Justices themselves. Some Chief Justices have played a deleterious role in the nefarious battle to undermine judicial independence, thwart judicial accountability and render the rule of law nothing but a pipe dream.

Judges are not fully and irreversibly converted in this regard. There is a great need to continue preaching the “gospel” of the independence of the judiciary and the rule of law, especially to judges.

People, including members of the judicial and legal professions, tend to forget or become complacent regarding core ethical and judicial virtues. For that reason, regular “preaching” and dusting of judicial cobwebs is necessary, even if it may seem to the unwary to be a waste of time and resources. It brings revival to the spirit of core judicial virtues and places them on the correct pedestal. This is similar to the way that converts in all the religions of the world do not stop attending religious services and activities once they are converted. Dusting of religious cobwebs is

- 1 Paper presented at the Judicial Colloquium on Working towards a Just, Peaceful and Inclusive Botswana: 50 years of Promoting Rule of Law and Equal Access to Justice, held at Gaborone, Botswana on 11 and 12 April 2016.
- 2 Judge of the High Court of Namibia (Civil Division) and former High Court Judge of the High Courts of Swaziland and Botswana; B.A. (Law), LL.B (University of Swaziland).

a constant necessity for the attainment of higher spiritual goals. It is accordingly no different in the high calling of judicial officers.

Furthermore, gatherings of judges create a venue for the cross-pollination of ideas on these key issues. These are likely to spread past the boundary of our profession to those still in need of “salvation”. Ruminations and decisions made by gatherings of judges may eventually reach the ears and hopefully the hearts of those we perceive to be the main culprits and impediments to the full and unadulterated acceptance and application of the key concepts of the independence of the judiciary and the rule of law.

One lesson of our time is that the debilitating cancer of undermining and interfering with the independence of the judiciary and the rule of law is pretty much constantly mutating and has in recent times found an unlikely, unexpected and unwanted home within some of the very members of the judicial fraternity. Some judges, including certain Chief Justices, have participated in the rape and molestation of the independence of the judiciary and the rule of law either for personal aggrandisement or for that of their political ensembles. There are some “politicians” dressed in judicial robes who use the judicial office to deliver on political mandates. Some judges have found themselves doing dirty, injudicious “judicial” business for those they perceive to be in authority over them. Improper orders that flow out of these situations need to be discussed within the judicial fraternity.

To draw further parallels to religion, the judiciary has sometimes been backsliding. This idea references when the converted develops withdrawal symptoms and goes back to the reprobate behaviour they were supposedly redeemed from. It is important to hold judges accountable when they backslide. Some judges have shown that they can and do fall below the bar, stray from the paths of judicial virtue and start engaging in conduct that is anathema to the virtues of judicial independence. They engage in conduct that is inconsistent with their oaths of office and deleterious to the independence of the judiciary and the rule of law and will even apply pressure on other judges to veer from the paths of judicial virtue. Preaching to the converted may help keeping the ones on the brink of backsliding on the straight and narrow, hopefully nudging them back to the paths of judicial virtue.

Issues of judicial independence need close and constant scrutiny and monitoring so as to detect new trends manifesting themselves in the areas of judicial independence and the rule of law arenas. To this end, frequent interaction and discussion are important and require the employment of resources to thwart and extinguish new threats to the independence of the judiciary as a central theme to the survival of democracies and the rule of law in the world.

Conceptions of the Rule of Law and Judicial Independence

Rule of law and the independence of the judiciary are broad categories that are helpful to unpack. The latter does not speak to “the independence of judges” but to the independence of the judiciary as a whole, this includes judicial officers on the magisterial bench. The need for judicial independence equally applies to them.

The decision by Mogoeng CJ in the South African Constitutional Court is a helpful starting point for this discussion:

“[O]ur constitutional order hinges on the rule of law. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would amount ‘to a licence to self help’ ... The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which will be given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with authority to make them or else approach the courts of law to set them aside, so we may escape their bidding force.”³

Two cardinal principles appear from this excerpt. First, the constitution and law should bind everyone. Second, if one seeks to be exempted from the ordinary consequences of the law, there must be recourse. Clinging to these two principles prevents society from resorting to survival of the fittest. There is a necessary intercourse between the rule of law and an independent court.

The United Nations Declaration of Human Rights (UNDHR) states, “if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression...human rights should be protected by the rule of law.”⁴ Unfortunately, the UNDHR does not define what is meant by the phrase the rule of law. There are many ways that “rule of law” could be interpreted. 600 years ago, Bracton stated the following lapidary remarks:

“The king must not be under man but under God and under the law, because law makes the king. Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power, for there is no *rex* where will rules rather than *lex*.”⁵

This is applicable not just to monarchies, but to every system of government including countries such as Botswana under the rule of a President. Leaders, be they kings, prime ministers or presidents, are placed in power and clothed with authority by the law. For that reason, they need to respect the law by subjecting themselves to God and the law, rather than man or woman. That, in essence, is the “rule of law”. It means that those in power and authority need to demean themselves to the law first and the rest of the led will do likewise.

Other great legal philosophers have characterised the rule of law differently. Dicey said, “[n]o man is above the law; every man and woman, whatever his or her rank or condition, is subject to the jurisdiction of ordinary tribunals.” Joseph Raz wrote, “[t]he rule of law means literally what it says: the rule of laws. Taken in its broadest sense, this means that people should obey the law and be ruled by it.” On the other hand, Francis Neate says, “[t]he ‘Rule of Law’ means exactly that: the law is the ruler, the supreme authority. No one is above or beyond the law. Everyone is subject to and governed by the law.”⁶ Neate wrote elsewhere:

3 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) (2016) ZACC 11 (31 March 2016), paras. 74 and 75.

4 United Nations Declaration of Human Rights, General Assembly Resolution 217 A (10 December 1948), Preamble.

5 *Bracton on the Laws and Customs of England*, Volume 2, 33, Harvard Law School Library, available at <http://bracton.law.harvard.edu/Unframed/English/v2/33.htm#FN6> (last accessed: 8 December 2016).

6 F Neate “The Rule of Law – A Commentary on the IBA Council’s Resolution of September 2005” *International Bar Association*

“What is the Rule of Law? Some people, even quite the intelligent people express confusion about this. It is not really difficult. The Rule of Law is the only system so far devised by mankind to provide impartial control over the exercise of state power. Rule of Law means that it is the law that rules, not a monarch, not a president or prime minister, clearly not a dictator, not even a benevolent dictator. Under the Rule of Law, no one is above or beyond the law. The law is the ruler.”⁷

Universal respect for the law and separation of powers

In order for the rule of law to flourish, two things are necessary. First, there must be respect for the law at all levels of society. This includes those who live in the palace or State house as well as those who are impoverished and live in shacks; those who live in the urban suburbs of Gaborone and those who live in Tsabong. In this regard, there must be no distinction in social class, caste or whatever demarcation. Neate adds, “[t]hose who wish to exercise power find it a constraint. Politicians, those in power, even in the best organised societies tend to be the first to chip away at it.”⁸

Second, separation of powers among the three organs of State must be upheld; the executive, legislature and judiciary. Speaking about the separation of powers, Mogoeng CJ said the following:

“The principle of separation of powers, on the one hand recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of the other. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation . . . Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.”⁹

The doctrine of the separation of powers enables and mandates the courts to check on the use or abuse of power by the other organs of State. The courts must ensure that the branches all act within the confines and dictates of the constitution and consistently with the observance, propagation and protection of human rights and freedoms. The courts must be independent if the judiciary is going to be able to effectively play this pivotal role. Independence of the judiciary is a necessary ingredient for the rule of law to be sustained and for society to be held together.

Chaos will manifest itself if the independence of the judiciary is absent or compromised. An independent judiciary can guarantee the proper observance of the rule of law. The judiciary

(adopted 2009).

7 F Neate “The meaning and importance of the rule of law” (2009) *The Rule of Law: Perspective from Around the Globe*.

8 F Neate “Speech to the Rule of Law Symposium” Moscow, Russia (6 July 2007).

9 *Economic Freedom Fighters v Speaker of the National Assembly and Others* (2016) ZACC 11, paras. 91 to 93.

should have the liberty and licence to address an infringement of the law by whosoever without any interference or influence from any quarter and for any reason whatsoever.

This supervisory power should include the members of all the organs of State and individuals and legal persons. In this regard, members of the judiciary are also held accountable through the appellate courts. Should the lower courts fall below the paths of judicial virtue, the higher courts are empowered to say so unequivocally and without speaking in a forked tongue. This responsibility is a critical aspect of the constitutional duty of the judiciary to be custodians of the constitution and the law and is consistent with them being the ultimate interpreters of same.

The connection between the rule of law and the independence of the judiciary

At the most basic level, the law is put in place by the legislature and the courts have a duty to interpret and declare the law. In doing so, the court sets out the parameters of the law and calls to order those found to be acting outside the solicitudes of parliament. In order to do this, courts need to be protected and assisted in carrying out this enormous task without internal and external voices unduly influencing the process.

For centuries, lawmakers have appreciated the centrality of the independence of the judiciary in upholding the rule of law. For example, a 1346 statute from King Edward bore the following inscription:

“We have commanded all our justices that they shall from henceforth do equal law and execution of right to all our subjects, rich and poor, without having regard to any person and without omitting to do right for any letters or commandment which may come to them from us, or from any other, or by any other cause.”¹⁰

This is the independence of the judiciary put in very simple terms. It is the ability of judicial officers of all ranks to carry out their judicial functions in respect of all people, regardless of status and in respect of all causes, in accordance with the law and the facts applicable thereto, without any additives, pressure or inducement from any other source, person or authority.

Dealing with judicial independence, Professor Stephen Burbank said, “[t]rue judicial independence ... requires insulation from those forces, external and internal, that so constrain *human* judgment as to subvert the judicial process.”¹¹

Sir Guy Green, on the other hand said:

“I thus define judicial independence as the capacity of the courts to perform their constitutional functions free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions including, in particular, the executive arm of government, over which they do not exercise direct control.”¹²

10 C Robinson *History of the High Court of Chancery and Other Institutions of England, From the Time of Caius Julius Caesar Until the Ascension of William and Mary* (1882) 585; also quoted by AM Khumalo “Official Opening of the Legal Year in Swaziland” (2002) 6.

11 SB Burbank “Is it time for a national commission on judicial independence and accountability?” (1990) 73 *Judicature* 176, 177.

12 G Green “The rationale and some Aspects of Judicial Independence” (1985) 59 *Australian Law Journal* 13.

At the world conference of the Independence of Judges held in Canada, in 1983, a clarion call was made for judges to be free “to decide matters before them impartially and in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”¹³ This was unanimously adopted at the final plenary session.

Furthermore, Hidayatullah from the Supreme Court of India, said:

“The courts must do their duty according to their own understanding of the laws and the obligations of the Constitution. They cannot take their cue from sentiments of politicians nor even indirectly give support to something they consider to be wrong or against the Constitution and the laws. The good faith of judges is the firm bed-rock on which any system of administration securely rests and an attempt to shake the people’s confidence in the courts is to strike at the very root of our system of democracy.”¹⁴

As outlined in the Canadian case of *Valente v The Queen*,¹⁵ judicial independence happens at two different levels, namely personal and institutional independence. According to Lord Neuberger of Abbotsbury, personal independence refers “to each judge’s ability to decide any part of a case by applying the right law to the right facts. Judges must be independent of the parties and must not be subject to any pressure or inducement from the parties. They must have no interest in the outcome and must be open-minded and impartial in their approach to issues.”¹⁶ On the other hand, Neuberger said institutional independence “goes wider than individual independence. It refers to the constitutional principle that the judiciary is independent from the other two branches of State. It is the constitutional principle that the judiciary cannot properly be influenced by the executive or the legislature in carrying out the judicial function. Influence, whether overt or covert undermines the judiciary’s ability to decide cases on their merits. Justice under influence is not justice at all. It is inimical to the rule of law and the democratic system.”¹⁷ Furthermore, institutional independence also refers to the fiscal and administrative independence of the judicial institution.

Without judicial independence, the rights and interests of human beings are in serious jeopardy. It must be mentioned in this regard that judicial independence is not for the benefit of judges themselves but it is a commodity and a constitutional bequest judicial officers hold in trust for the litigating public. For that reason, the judicial and legal communities need to conduct civic education campaigns in order to make members of the public in our sub-region acutely aware that the issue of judicial independence is their business and for their good and it is not necessarily or primarily for lawyers and judges. As Shah CJ said, “[j]udicial independence is not the personal privilege or prerogative of the individual Judge. It is the responsibility imposed on each Judge.”¹⁸

There is another subtle but dangerous source of threat to judicial independence and this is from within the individual judge. Shientag says the following about this internal parasite, so to speak:

13 Universal Declaration of the Independence of the Judiciary (Montreal Declaration) (1983), para. 2.02.

14 *Namboodiripad v Nambiar*, Supreme Court of India (1971) SCR (1) 697; see also Lord Suffian “The Role of the Judiciary in a Democracy with Special Reference to a Developing Country” (1981) 3.4 *Commonwealth Judicial Journal* 45.

15 (1985) 2 SCR 673, 679.

16 Neuberger “Where the Angels Fear to Tread” *Holdsworth Club* (12 March 2012), para. 20.

17 *Id* para. 23.

18 *The CPIO, Supreme Court of India v Agarwal and Another*, Delhi High Court W.P. (C) 288/2009, para. 73.

“The subtlest poison to which a judge may succumb may be from pressure within. Every man craves praise, although some call it recognition. A deep instinct of human nature is the yearning to be appreciated. Within normal limits that craving is not only natural, but desirable. It becomes reprehensible when the judge woos popularity by his decisions, or by his conduct on the Bench.”¹⁹

When the judiciary is truly independent and it actually upholds the rule of law, this is when government can rule justly for its citizens. As Shientag put it:

“There can be no government of law without a fearless, independent judiciary. The independence of the judge is the chief of all cardinal virtues. He must be free from all external influence and subservient only to his conscience.”²⁰

19 BL Shientag “The Personality of the Judge” *Benjamin N. Cardozo Memorial Lectures* (1943).

20 *Id.*