

**PROVIDING FOR THE INDEPENDENCE OF THE JUDICIARY IN AFRICA: A QUEST
FOR THE PROTECTION OF HUMAN RIGHTS**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE DEGREE
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DECLARATION

I, LETSEBE PIET LESIRELA, hereby declare that this research is my own work and that, it has not been submitted to any other institution of learning for an award.

Thus, signed on this day, the 27th October 2003, at the Catholic University of Central Africa, Yaoundé, Cameroon.

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PREFACE

Human rights violations in Africa in the post-independence era have been the norm rather than an exception. The independence of each country has seen the undemocratic grip and continued retention of power by most forerunners of the liberation wars. Military governance has continuously dominated the political systems and has become the character of most African governments. The result has been the use of force to coerce obedience to military reign and deterrence of potential dissidence. In this environment the legitimate role of the judiciary has diminished with their replacement by subjective, as opposed to objective judicial bodies. The atmosphere is such that allows for no complaints against government, only government can raise grievances through cruel use of force against the society it purports to represent. The consequence has been the sad tainting of fundamental rights and freedoms of inhabitants of the continent.

The adoption of the African Charter on Human and Peoples' Rights in 1986 had given hopes that humanity in Africa would be restored. However, violations have grown even worse and systematic. The majority of African States leaders do not value constitutional guarantees of human rights and the culture of impunity is rife. All this is so because the justice systems deny the judiciary the place of the protection human rights in which it would also serve as a watchdog over the activities of the executive and legislative hegemonies. It is thus the purpose of this research to echo the voices of the victims of governmental abuses by calling for the revitalisation of the judiciary powers in Africa. The research has also taken account of the minimal advances taken by some governments that give hope in the human rights protection of the nations which they serve. Also, the AU developments have been considered whose practical implementations remain suspect.

This research is dedicated to my late grandfather and predecessor *Mr. Lesirela P Maduna* whose humble life, religious and cultural convictions on justice continue to guide my daily life.

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ABBREVIATIONS

ACHPR	AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS
ACHPR	AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
ACHR	AMERICAN CONVENTION ON HUMAN RIGHTS
ACJ	AFRICAN COURT OF JUSTICE
ACtHPR	AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
ANC	AFRICAN NATIONAL CONGRESS
AU	AFRICAN UNION
CJ	CHIEF JUSTICE
CJSA	CHIEF JUSTICE OF SOUTH AFRICA
CMJA	COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION
DHRJ	DEVELOPING HUMAN RIGHTS JURISPRUDENCE
ECHR	EUROPEAN COVENTION ON HUMAN RIGHTS
ECSJ	EUROPEAN CHARTER ON THE STATUTE FOR JUDGES
IAJ	INTERNATIONAL ASSOCIATION OF JUDGES
IBA	INTERNATIONAL BAR ASSOCIATION
ICCPR	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
J	JUSTICE/JUDGE
JJOASA	JOURNAL OF THE JUDICIAL OFFICERS' ASSOCIATION OF SOUTH AFRICA
NGOs	NON-GOVERNMENTAL ORGANISATIONS
OAS	ORGANISATION OF AMERICAN STATES
OAU	ORGANISATION OF AFRICAN UNITY
Res/s	RESOLUTION/S
SA	SOUTH AFRICA
SACC	CONSTITUTIONAL COURT OF SOUTH AFRICA
SADC	SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
SALJ	SOUTH AFRICAN LAW JOURNAL
SR	SPECIAL RAPPORTEUR
UCJ	UNIVERSAL CHARTER OF THE JUDGE

UDHR	UNIVERSAL DECLARATION OF HUMAN RIGHTS
UN	UNITED NATIONS
UNCAT	UNITED NATIONS COMMITTEE AGAINST TORTURE
UNGA	UNITED NATIONS GENERAL ASSEMBLY
UNHRC	UNITED NATIONS HUMAN RIGHTS COMMISSION
US	UNITED STATES

INTRODUCTION

Debates about the human rights situations in Africa hardly finish without the mention of the subject 'judicial independence'. This is so because reports about human rights abuses in most African countries often link these to an ineffective judiciary.¹ Either it served as a mouthpiece of the abusive government or was simply ignored.² Hussein Solomon, for instance, relates the situation of the judiciary in Mozambique, Swaziland and Angola where the courts have been stripped of their independence by the governments.³ Julia Harrington offers another example about the situation in Nigeria during the military governments of Generals Babangida and Abacha.⁴ The courts were entirely barred from adjudicating over cases involving violations of human rights.⁵ Consequently, in all these circumstances the judiciary is, in the context of internationally accepted norms and standards, realistically rendered nonexistent,⁶ though not irrelevant.

The judiciary has a central role as an institutional mechanism for the protection, promotion and enforcement of human rights. Yet, against this background is the reluctance by the African leaders to accept the judiciary's rightful role, as the custodian of the rule of law and justice.⁷ This is further evidenced by recent attitudes towards the establishment and jurisdiction of the African Court on Human and Peoples' Rights (African Court).⁸ Governments preferred a limited scope for the Court, thus restricting the *locus standi* of the possible petitioners to the Court.⁹ In some countries judges who sought to advance this role have been branded 'sell-outs'.¹⁰ It ranges from unfair and unwarranted criticisms, forced resignations or exiles and sometimes assassinations.¹¹ For example, investigating

¹ The International Bar Association (IBA): 'Report of the Zimbabwe Mission 2001' *Public Statements and Threats in Relation to the Judiciary*.

² Goldstone 'Judicial Flexibility and Adaptability' in Ajibola & Van Zyl (1998) 208; Communications 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia*, Thirteenth Activity Report 1999-2000, (*Compilation of Decisions on Communications of the ACHPR*, p 104, para 74).

³ Solomon (2003) 69-73.

⁴ Harrington 'The African Court on Human and Peoples' Rights' in Evans & Murray (2002) 320.

⁵ As above.

⁶ UN General Assembly (UNGA) Res 40/32 of 29 November 1985 and 40/146 of 13 December 1985; Van der Merwe (2000) 2 (*JJOASA*) 169.

⁷ IBA (n 1 above)

⁸ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter the Protocol).

⁹ Harrington (n 4 above) 314-320.

¹⁰ IBA (n 1 above); Assaf 'Application of International Human Rights Instruments' in Cotran & Sherif (1997) 89.

¹¹ Communication 39/90, *Annette Pagnouille (On behalf of Abdoulaye Mazou) v Cameroon*, Tenth

allegations of executive interference with the judiciary in Zimbabwe, the IBA recorded as disturbing, the forced resignations of judges perceived to be pro-white farmers' interests (i.e. described as too sympathetic to whites) as opposed to national interests.¹² The success of the government's interference was marked by the premature retirement of the former Chief Justice (CJ) Gubbay.¹³ In Swaziland, Sibusiso Dlamini (a senior government official) criticised two Appeal Court rulings that put limits on King Mswati's power and undertook to ignore them. As a result the two judges who protested the criticism resigned.¹⁴

Another case pertains to lawyers. The harassment and assassination of lawyers equally puts the independence of the judiciary in jeopardy.¹⁵ Thus, considering the Third Periodic Report of the Belarus, the UN Committee Against Torture (UNCAT) emphasised as of serious concern the following in its concluding observations:

*45(g) Presidential Decree No.12, which restricted the independence of lawyers, subordinating them to the control of the Ministry of Justice and introducing obligatory membership in a State-controlled Collegium of Advocates, in direct contravention of the UN Basic Principles on the Role of Lawyers.*¹⁶

On 19 September 2002, the Human Rights Watch reported the brutal assassinations of Barnabas Igwe (a lawyer) and his wife at their home in southern Nigeria.¹⁷ Igwe, along with his other colleagues, had denounced abuses by the State government which included, *inter alia*, government's failure to pay salaries of workers for several months. The lawyers had publicly given the government a 21-day ultimatum to pay the salaries or resign. Prior to the assassinations, Igwe and his colleagues had allegedly been directly and telephonically threatened by senior state officials in an attempt to silence them.¹⁸

¹² Activity Report 1996-1997, (*Compilation of Decision of the ACHPR*, p 61). Kanyeihamba (2000) 5. See also Assaf (n 10 above).

¹³ IBA (n 1 above); Le Roux (2003) XLIVI *Codicillus* 55 56-59.

¹⁴ 'Swaziland Reform is in the Air' *NewAfrica* February 2002 No 415 26; SADC: 'Judges Moot Regional Judges Forum' *De Rebus* September 2001 19.

¹⁵ Basic Principles on the Independence of Lawyers of 13 December 1985; Guidelines on the Role of Prosecutors of 18 December 1990; Res on the Right to Fair Trial and Legal Aid in Africa, 13th Annual Activity Report of the ACHPR 1999-2000, Annex IV.

¹⁶ Concluding Observations of the Committee Against Torture: Belarus 20/11/2000: <[http://www.unhchr.ch/tbs/downsf/\[symbol\]/A.56.44,paras 40-46;En?Open Document](http://www.unhchr.ch/tbs/downsf/[symbol]/A.56.44,paras 40-46;En?Open Document)> (accessed on 11 October 2003).

¹⁷ Nigeria: Anambra State Critics at Risk:< http://www.africahome.com/annews/categories/politics/EP_F_KUVALYKOUBprbJI.shtml> (accessed on 11 October 2003).

¹⁸ As above.

That said, it is worth noting from the outset, however, that the concept of the independence of the judiciary is not the absolute responsibility of the executive, nor that of the legislative branch of governments. It comprises a combination of a multiple facets and, the commitment of the judges represents one of such facets.¹⁹ Goldstone J attributes some of the blame to the lack of commitment to the cause of human rights by the individual judges themselves. He mentions as an example, the inaction that was common among the majority of judges and senior (influential) legal practitioners under the apartheid government who did not question the legitimacy of racist laws. Had they actively engaged the government of the day, perhaps the situation might have been better.²⁰ This in essence means that the latter's strict adherence to these laws facilitated their legitimisation. Similar observations are made by Kleyn and Viljoen in their discussion of the positivist theory of law, where they relate the tension between positivist judges in apartheid SA and non-positivists.²¹ The latter accused the former of perpetuating racial oppression through their passive application of apartheid laws, while the former perceived it as irrelevant whether these laws were fair and just, a matter accordingly foreseen by parliament when enacting the said laws.²² Indeed, the independence of the judiciary is merely the overall product of a merger of all facets.

The African Charter on Human and Peoples' Rights (ACHPR) is notably now in its 17th year since it came into force²³ and, with the exception of Morocco, which has since withdrawn its membership from the Organisation of African Unity (OAU),²⁴ all African countries are parties to this Charter. It contains an extensive list of fundamental rights and freedoms of persons and, implores all members to adopt effective and efficient measures to ensure their realisation.²⁵ The core of these obligations lies in Article 26, which read together with Article 7 of the Charter, may well be coined as 'realisatory provisions', because adherence to them gives value to the whole Charter. The former requires guarantees on the independence of the judiciary and further, of the national institutional establishments for the promotion of the rights enshrined in the Charter. It in part reiterates the Article 1 mandate. Meanwhile, Article 7 deals with procedural guarantees of a trial litigant.

¹⁹ Schofield 'Maintaining Judicial Independence in a Small Jurisdiction' in Hatchard & Slinn (1999) 75.

²⁰ Goldstone (n 2 above).

²¹ Kleyn & Viljoen (1995) 20, 44.

²² As above, 44; Priban *De Jure* (2002) 2 256; Weeramantry (1997) 112.

²³ Adopted by the OAU on 27 June 1981 and entered into force on 21 October 1986.

²⁴ Morocco withdrew its membership from the OAU on 1 January 1983.

In all fairness, however, it is doubtful whether African governments were conscious of these obligations and their implications when they each ratified the Charter, and further, whether they have 'really' become conscious. What remains certain is that it is the ordinary and defenceless inhabitants of this continent who bear the full brunt of abuses when the Charter obligations attaching to their livelihood are not carried out by their governments,²⁶ and not the defaulting politicians. Hussein Solomon asserts that one of the causes of population movements and displacements in Africa is the abuse by governments, of power and thus, of fundamental rights and freedoms of their citizens.²⁷ I need to point out that any legislative, executive or constitutional declaration that expresses the recognition of certain norms as human rights, but which fails to actualise their enforcement, makes a mockery of the cause of those who subsequently fall prey to abuses. The same can be said of the non-compliance with existing laws that provide for enforcement, but for lack of executive co-operation cannot effectively enforce these rights.²⁸

A. Research question

The scale of human rights abuses on the continent is undisputedly high. The irony is that most constitutions contain express provisions for the protection and promotion of human rights and for the independence of the judiciary. It explains why constitutional guarantees alone are insufficient, political commitment is required if there is to be substance to these guarantees.²⁹ The combination of express political statements made by governments, and their attitudes towards the judiciary, advances the argument made by some that the majority of leaders treat its institutional independence as a foreign invention imposed upon Africa.³⁰ What is more disturbing is that no alternate mechanisms are adopted to address and stop the continuation of human rights abuses.

Therefore, this research seeks to answer the following question:

Whether judicial independence is a foreign invention imposed on African governments, and further, whether it is relevant to the protection human rights in the continent.

²⁵ ACHPR (n 23 above) art 1.

²⁶ See Kane 'Guinea: Building the Rule of Law for Social Development' in An-Na'im (2003) 143.

²⁷ Solomon (n 3 above) 67.

²⁸ See *S v Mamabolo (E TV and Others Intervening)* 2001 (5) BCLR 449 (CC) paras 16-17.

²⁹ ACHPR (n 23 above) art 1.

B. Literature review

The subject of judicial independence has received an extensive coverage. Erike Mose³¹ identifies as the starting point, Article 8 of the Universal Declaration of Human Rights (UDHR).³² This he considers to be a key provision because it translates into practice its object by requiring that there should be established, at the national level of the UN Member States, effective remedies for the implementation of the human rights enshrined in the declaration. He links it further with Article 10 which provides for the establishment of independent and impartial tribunals.³³

Beryl de Wet observes that although the independence of the judiciary is imperative in modern African societies, it was never known in the pre-colonial era. She describes the judicial process in pre-colonial Africa as community-orientated³⁴ and that it did not observe the requisite independence and impartiality practiced by western courts.³⁵ She attributes the reluctance by Africans to accept independent courts, to colonialism where courts were set to entrench the colonial rule in Africa. Even in the post-colonial era, she asserts, Africans still regard the judiciary as instruments of control and coercion.³⁶

Barney Pityana makes a useful contribution in his work and sheds light on the position of human rights in Africa.³⁷ He asserts that the protection of human rights is also a concern for Africa and questions the debates by some African scholars that challenge the universality of human rights.³⁸

A careful analysis of the work of both these writers reveals, however, that they do not draw a correlation between the universality of human rights and judicial independence in Africa. Evidently, these writers have assumed that there is universal acceptance that judicial

³⁰ IBA (n 1 above).

³¹ Mose 'Article 8' in Alfredsson & Eide (1999) 187.

³² UNGA Res 217 (III) of 10 December 1948.

³³ Mose (n 31 above) 195.

³⁴ De Wet (1998) 1 *African Legal Studies* 150.

³⁵ As above, 157; Lindholt (1997) 99.

³⁶ As above, 153.

³⁷ Pityana 'The Challenge of Culture for Human Rights in Africa: The African Charter in a Comparative Context' in Evans & Murray (2002) 219.

³⁸ As above, 225.

independence has some significance towards the protection of human rights.³⁹ The reader cannot help but deduce the implied coverage of the subject from Pityana's work. De Wet's observations overlook the fact that it is now African leaders who are not only undermining the role of the judiciary, but who also use it for political ends. It is the ordinary and defenceless Africans who now endure prejudices under the reign of their own or self imposed African leaders. There is equally a volume of journal, commentaries and Internet publications dealing with the judiciary albeit of little help to fill the lacuna. This research therefore seeks to fill this lacuna.

C. Objectives of the study

The research seeks to achieve the following goals:

- (1) to identify and demonstrate judicial independence as a universal norm for the protection of human rights
- (2) to examine the place of the judiciary under African human rights systems; and
- (3) to recommend for the popularisation of judicial independence in Africa.

D. Hypothesis

The research is based on the following thesis:

The independence of the judiciary is an effective and acceptable norm elsewhere outside the continent, largely in the developed world, and may as well be very relevant to the justice systems in Africa to address human rights problems.

E. Significance of the study

No country in the world can today correctly claim to be viable without the involvement of its neighbours.⁴⁰ The atrocities of the World War II marked the end to claims of absolute state sovereignty.⁴¹ The affairs of one nation have become the concern of the larger global community⁴² and this Africa has acknowledged through the adoption of the ACHPR which

³⁹ See for example, Nyalali 'Judicial Ethics and Accountability' in Ajibola & Van Zyl (1998) 200.

⁴⁰ Masungu (2001) 196.

⁴¹ Buergental (1995) 21; Viljoen 'Admissibility under the African Charter' in Evans & Murray (2002) 61.

⁴² As above, 25-26.

was deemed to be responsive to the crises facing mankind.⁴³ The remarks of the late and former CJ of SA (CJSA), Ismail Mahomed are worth quoting as follows:

*[A]frica itself is part of a geographically larger but - technologically, economically, ideologically and jurisprudentially – more – interdependent and intimate world. Our continent should therefore influence and be influenced by the constitutional perspectives and jurisprudential orientations of the entire world.*⁴⁴

Therefore, debates and attitudes in Africa, which seek to oust the role of the judiciary from this global project, can only distort the process. If this culture is allowed to persist, Africa will sooner or later become a pariah. This work is therefore an attempt to contribute towards the avoidance of such a state. However, as it shall be evidenced later, the proposition that the independence of the judiciary is a foreign invention is grossly indefensible.

F. Methodology of the study

As earlier mentioned, a lot of work has been documented on the subject judicial independence and how it relates to the protection of human rights, at least from a global point of view. These writings, which have been used in this research, comprise the reports of the UN Human Rights Commission (UNHRC) and African Commission on Human and Peoples' Rights (African Commission), text books, journal publications, commentaries, constitutions, international law instruments and internet publications. The other category is that concerning interviews obtained from some members of the judiciary.

G. Limitation of the study

Researching on a subject such as has been documented in this research has proved to be not only challenging. But it has too revealed the sensitivity that accompanies it as evidenced by the suspicious reluctance by a multiple of court officials who have been consulted, to share their good or bad experiences about the court processes and, in particular, the question of their independence from the executive in their country. Thus

⁴³ Mutua (2002) 71.

⁴⁴ Ajibola & Van Zyl (1998) xvi.

said, this research represents a combination of the study done from SA and Cameroon between February and October 2003.

H. The structure of the study

The research is composed of an introduction and four chapters. The introduction outlines the research question, literature review, objectives, hypothesis, significance, methodology and limitations of the study. Chapter one seeks to define the concept of judicial independence and how it relates to the protection of human rights. This is done by examining the international law perspectives on judicial independence. Chapter two highlights the theoretical and practical developments in the African continent that have taken place through the auspices of the OAU pertaining to judicial independence. Here the ACHPR, jurisprudence of the African Commission, the Protocol to the ACHPR and ancillary instruments are discussed and analysed. Chapter three discusses other universally recognised considerations that are concomitant to judicial independence and whose observance accelerate the protection of human rights. The chapter also focuses on the national constitutions to determine the extent to which justice systems cater for judicial independence and, practical responses by governments and courts. The fourth chapter seals the study by drawing evaluations, forwarding recommendations for the popularisation of judicial independence as an internationally recognised mechanism of the protection of human rights relevant to Africa, and finally, drawing general conclusion of the study.

CHAPTER 1

JUDICIAL INDEPENDENCE AS A GLOBAL IMPERATIVE IN THE PROTECTION OF HUMAN RIGHTS

1.1 Introduction

This chapter seeks to illustrate how the judiciary has gained prominence internationally as a central institutional mechanism for the protection of human rights. After discussing the definition of the concept of judicial independence, the chapter focuses on the role the independent judiciaries have to play in the protection of human rights. The last part focuses on the international law perspectives on judicial independence. Reference is also made to regional developments on this subject.

1.2 Defining the concept of judicial independence

The volume of literature on the concept of judicial independence which includes, writings, commentaries and judicial decisions proves it to be a trans-national concept. The apparent unanimity of these contributors about the underlying principles that attach to the definition of judicial independence makes it all the more redundant to pay a considerable attention to them all. The said principles, which are immediately triggered by the definition and which are regarded as fundamental prerequisites for the establishment of a fairly independent judiciary include, the observance of democracy and the rule of law.⁴⁵ By democracy it is implied the observance of the principle of separation of powers between the three organs of government, the executive, legislative and judiciary. And by the observance of the rule of law it is, *inter alia*, meant that both the rulers and the governed are equally subject to the same laws of the land.⁴⁶ Thus, in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,⁴⁷ the SACC held:

⁴⁵ Simmons (2001) 14 *Jnl of the CMJA* 8 17.

⁴⁶ Kanyeihamba (n 11 above) 64.

⁴⁷ 1999 (3) SA 191 (CC) 38.

*It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.*⁴⁸

Ajibola J of Nigeria is of the view that judicial independence broadly refers to the performance by the judiciary of their judicial functions in an environment where they are free from direction, control or dictation, be it from any quarters.⁴⁹ A more extensive and perhaps attractive definition is that offered by Eso, former J of the Supreme Court of Nigeria, when he said:

*The concept of an independent judiciary implies, first, that the powers exercised by the court in the adjudication of disputes is independent of legislative and executive power, so as to make it usurpation to attempt to exercise it either directly by legislation, as by a bill of attainder, or by vesting any part of it in a body which is not a court; secondly, that the personnel of the court are independent of the legislature and the executive as regards their appointment, removal and other conditions of service.*⁵⁰

The above definition is clearly centred on the institutional independence of the judiciary. It obliges both the legislature and the executive as important role players in a democratic government, to live the judicial management to the courts.⁵¹ This further entrenches the blame that is commonly attributed to the executive and legislative organs whenever the judiciary displays characteristics that are indicative of a non-independent judicial system. It again triggers the question whether the judiciary can in spite of all procedural and substantive guarantees, still attract the evils of an infiltrated judiciary. That is, whether the court may still lack independence, and if so, from what? Gubbay offers his view from another dimension. He asserts that when performing their judicial functions, judges are themselves responsible for their own individual independence.⁵² Perhaps a more clearer contribution is the one once made by David Simmons when he said:

*[T]he efficacy of legal and constitutional protection is limited. And however much the law may seek to insulate a judicial officer from pressure or influence, ultimately judicial independence can only be guaranteed by the character, personal integrity and responsible professional conduct of the judicial officer.*⁵³

⁴⁸ As above, para 38.

⁴⁹ Ajibola (n 44 above) 108. See also Stevens (1993) 169.

⁵⁰ Eso 'Judicial Independence in the Post-Colonial Era' in Ajibola & Van Zyl (1998) 120.

⁵¹ Meyer (1999) 1 *JJOASA* 139.

⁵² Gubbay 'Independence of the Judiciary and Judicial Accountability: The Latimer House Guidelines' <file:///A/GUBBAY%20J.HTM> (accessed on 24 July 2003).

⁵³ Simmons (n 45 above) 10; Laue (2002) 5 *JJOASA* 119. In this article Laue argues that the

All the observations made above boil down to what may be referred to as the ‘unmasking’ of the judicial office itself. It reveals the personal characters of those who man the judicial office. This is especially relevant in countries such as SA, which have just emerged from repressive regimes and have engaged in the transformation processes of the central sectors of the society which include, the justice system. In these situations it can hardly be trusted that the loyal servant of a former oppressor can, as would a chameleon, automatically serve a democratic dispensation with an unreserved loyalty. He is in practice bound to harbour old prejudices in matters in which he has keen interest. About this Philippe Abravanel observed:

*The judge must be on his guard against the tyranny of his own prejudices. Of course, no judge is completely immune to prejudice. . . He must, however, be aware of them and put them to one side when he discharges his duties.*⁵⁴

The late CJSA, Ishmael Mahomed put it eloquently in the following terms:

*It is the capacity of Magistrates to strike that balance fairly, coherently and ethically which lies at the heart of the judicial process. That capacity for the balance requires a creative and expanding combination of diverse qualities crucial to the judicial temper and the judicial arsenal in the pursuit of justice . . . They include: Experience; Scholarship; Dignity; Rationality; Forensic skill; Some measure of humility; Capacity for articulation; Discipline; Diligence; Intellectual integrity; Intolerance of injustice; Emotional maturity; Courage; Objectivity (my underlining); Energy-both intellectual and physical; Rigour; Wisdom; Efficiency and a proper sense of relevance. A healthy dose of scepticism about the correctness of a view of the law which compels a manifestly unjust result. The moral ability to distinguish myth from wrong and sometimes the more agonising ability to weigh two rights or two wrongs against each other.*⁵⁵

In *Hoekstra v HM Advocate*⁵⁶ the Court held that a judge who had formed part of a panel in an appeal involving the alleged violation of Article 8 of the European Convention on Human Rights (ECHR),⁵⁷ which was later turned down, could hardly have been perceived (in particular, by the members of the public) to be impartial in rendering the decision not to grant appeal to the appellant. Immediately after the refusal of the appeal application, the

independence of a judicial officer include freedom from the influence of superior judicial authorities and the officer's peers.

⁵⁴ Abravanel (1997) 137.

⁵⁵ Mahomed (1998) 1 JJOASA 47 51.

⁵⁶ *Hoekstra v HM Advocate* (No 2) 2000 SLT 605.

⁵⁷ Adopted by the Council of Europe on 14 November 1950, Rome and entered into force on 3 September 1953.

said judge had retired and granted the media an interview expressing his attitude towards the case and in particular, as regard the guarantees under Article 8.⁵⁸ The Appellate Court's decision was thus set aside.⁵⁹ This decision once more points to the inescapable need for a democratic society to have a judiciary which is manifestly independent externally and internally. Externally as to win the trust of the ordinary community members who may seek to approach it for the resolution of their disputes, and internally to create and impress in the mind of a right thinking observer or litigant that the judge adjudicating on a particular matter is impartial. All these considerations must prevail if the judiciary should successfully preserve its stature. In the words of the late CJSA, Ishmael Mahomed:

*The ultimate power of the courts must therefore rest on the esteem in which the judiciary is held within the psyche and soul of a nation and in the confidence it enjoys within the hearts and minds of potential litigants in search of justice. That esteem and that respect must substantially depend on the independence and integrity of judicial officers. No public figure anywhere, however otherwise popular, could afford to be seen to defy the order of a court which enjoys, within the nation, a perception of independence and integrity. His or her own future would then be in mortal jeopardy.*⁶⁰

It must be noted, as earlier mentioned, that for the judiciary to be independent the referenced democratic principles of observance of the rule of law and the separation of powers remain specifically integral.⁶¹ The emphasis on the independence of the judiciary does not only serve as an enablement for a government determined to administratively and economically thrive, but also as a curtailer of the abuses of government power. When this power is successfully curtailed the scope for potential abuses is diminished. It is the failure to attain this restraint that would sadly result in violations, sometimes of higher scale, of fundamental rights and freedoms of individuals. This situation can be prevented by the emancipation of the judiciary to play its rightful role as the upper custodian of the rule of law and human rights protection. Sir Harry Gibbs, former CJ of Australia, was once quoted as having expressed that:

*"An independent judiciary is the very cornerstone of any democratic structure. If you destroy the cornerstone the structure will come down; it will collapse . . . If it collapse (sic) we shall be plunged into darkness and the chaos of a totalitarian and dictatorial regimes."*⁶²

⁵⁸ Art 8 of the ECHR entitles individuals the right to family life and allows for government interference only to the extent that it is in accordance with law and for public good.

⁵⁹ *Hoekstra* (n 47 above) 611L-612A. See also *S v Mamabolo* (n 28 above); *Ex parte Pinochet* (No 2) (2000) 1 AC 119; *Locabail (UK) Ltd v Bayfield Properties Ltd* (2000) 2 WLR 870.

⁶⁰ Quoted by Van der Merwe (n 6 above) 176.

⁶¹ Simmons (n 45 above) 8-11.

⁶² Quoted in Ajibola & Van Zyl (n 44 above) 166.

1.3 The role of the judiciary in the protection of human rights

When discussing the definition of the concept of judicial independence above, the focus was on the relationship between the three organs of a democratic government, and moreover, as regards their scope of functions. This part of the chapter now focuses on the independence which once secured and safeguarded, should play a meaningful role towards addressing the human rights of the community the judiciary serves. This is a practical unmasking of the individual judicial officer who is on a day to day basis faced with cases involving human rights abuses.

Referring to the role of the judiciary in the protection of human rights, is not only suggesting that the judiciary has secured its independence constitutionally and administratively,⁶³ but also that it has won the hearts of the population for whom it is constituted. The judiciary cannot afford to be passive to the course of human rights of a people, otherwise it will risk forfeiture of the authority it commands. Philippe Abravanel opines that the independence of the judiciary is not sought for the amusement of judges but for society who depend on the judiciary for redress of their disputes.⁶⁴ Goldstone J observes that the role of the judges in any society will be determined by the nature of that society.⁶⁵ This may be an ugly observation. Were judges to follow suit, it would constitute their betrayal of the course of justice. It would mean that they should remain amenable to the dictates of one regime of government after the other. In one democratic regime, a judge would have to adhere to fundamental human rights norms, and when the latter regime seizes to exist and is replaced by a dictatorship, he must readily dance to the tune. Two sides of the same coin? However, where the dictatorial regime is replaced by a democratic one with democratic dictates, a corresponding change in the judges' attitudes may well be very sound and justified.

If one may well ask. Did the nature of the society in the pre-democratic SA determine that the judiciary, as the majority did, should play an active role in facilitating the racist and repressive laws of the government against the masses? Does the current nature of the

⁶³ El-Morr 'Judicial Sources for Supporting the Protection of Human Rights' in Cotran & Sherif (1997) 5.

⁶⁴ Abravanel (n 54 above) 133.

⁶⁵ Goldstone (n 2 above) 207.

society in Zimbabwe dictate that the judiciary should, in their pronouncement of the law, submit to the tune of the government? Lord Steyn lifts the judicial veil of the apartheid SA as follows:

*It is now clearly established that during the tenure of office of Chief Justice Rabie in the 1980s he arranged for a small so-called "emergency team" to hear all cases arising from the successive emergencies declared in the 1980s. It is obvious that the criterion of selection was the "soundness", or, in that very English phrase, the "safe hands", of four or five members of the Court of Appeal. The result of this manipulation of the panels hearing such cases was that every single case arising from the emergencies was heard by the emergency team.*⁶⁶

This surely indicates that whatever the circumstances were, some judges and in particular, a very few of them, consciously declined to associate with apartheid. Hence the reference to the "safe hands or soundness" of the pro-apartheid judges. Those who openly dissociated themselves from the system fell into the category of the 'unsafe hands' or 'soundless'. Bhagwati J of India, warned against this soundness of the pro-government judges as follows:

*The judges have to be careful while positivising human rights and giving them meaning and content, to ensure that they do not in the process, out of ambition or weakness or excessive zeal for protecting the State interest dilute human rights but enlarge their scope and ambit and advance the purposes for which they are enacted as part of the fundamental law of the country. It would be no exaggeration to state that human rights would remain safe in a society governed by a written Constitution so long as its judges are strong and independent, do not cave in to pressures, influences or centres of power and are committed to the cause of human rights.*⁶⁷

I would submit, in light of the experiences gathered from various political systems of parts of this world, where human rights abuses of populations have been and/or are the source of pride for the bolstering of power and leisurely gestures in the theatres for the tyrants, that the role of the judge be inspired by international human rights norms.

1.3.1 Conflicting views about the role of the judiciary

There are divergent views as to what the role of the judge is or ought to be in the protection of human rights. This has triggered concepts such as judicial restraint and

⁶⁶ Steyn (2001) 8 DHRJ 65.

⁶⁷ Bhagwati (1988) xx.

judicial activism. Proponents of the latter view are of the belief that the judicial officer is not tied to the strict letter of a legislative provision where matters canvassed before him concern important questions of human rights.⁶⁸ He must accordingly approach the provision purposively to place it in comport with the recognised human rights norms and standards.⁶⁹ Since the society is not static, they assert, the law cannot remain relevant to new developmental challenges each generation after the other faces. So the law must be adapted to meet these challenges. The Zimbabwe Supreme Court in *Zimnat Insurance Company v Chawanda*⁷⁰ emphasised this position when it observed:

*Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The judiciary can and must operate the law so as to fulfil the necessary role of effecting such development. It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the Judiciary than by the Legislature. This is because Judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that Judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.*⁷¹

Proponents of the concept of judicial restraint believe that since judges are not democratically elected to office, they cannot legitimately express the wishes of the electorate through judicial law-making. Their duty is merely to echo the voice of the legislature and it is irrelevant whether the law is fair and just.⁷² John Dugard expressed his view concerning judges who favour judicial restraint as follows:

*[T]he sole task of the court in interpreting a statute is to discover the legislature's intention through rules of interpretation. Its function is merely seen as mechanical . . . The intention of the legislature is always discoverable, provided the right rules of interpretation are used in the right manner. The judge is denied any creative power in his mechanical search for the legislature's intention, and desirable policy considerations, based on traditional legal values, are viewed as irrelevant. The approach accords with the Blackstonian theory that judges are authorised to 'find' the law only, not to 'make' it.*⁷³

⁶⁸ Kleyn & Viljoen (n 21 above) 44.

⁶⁹ See for example, the dissenting judgement of Lord Akin in *Liversidge v Anderson* 1942 AC 206 HL when he said, "I view with great apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more Executive-minded than the Executive", quoted by Olivier (1998) 172.

⁷⁰ 1990 (1) ZLR 143 (SC); 1991 (2) SA 825 (ZS) 154, quoted by Dumbutshena 'Judicial Activism in the Quest for Justice and Equity' in Ajibola & Van Zyl (1998) 188.

⁷¹ See also Atangcho (2001) 47 *Juridis Périodique* 62 70.

⁷² Kleyn & Viljoen (n 21 above) 20.

⁷³ Dugard (1971) 88 *SALJ* 181 182, quoted by Olivier (n 69 above) 174; Chaskalson (2001) 8 *DHRJ* 243 245.

The role of the judiciary in the protection of human rights cannot be overemphasised. Now, how do judges meet the expectations of a modern society plagued by human rights abuses, if they are themselves still occupied by the ancient theories about what the role of a judge is in the society? If it can be considered a business enterprise, the judiciary is the most preoccupied business enterprise whose customers' status transcends social, racial, religious, ethnic and tribal orientations. It carries with it the burden of ensuring that the services it provides, meet the demands of most, if not all of its customers. The satisfaction of these demands is only possible if the managers of this business (judiciary), appreciate the challenges and developments in the business sector, so that theirs (judges') is a store always shelved with the most recent produce on the market.

The role of the judiciary discussed in this chapter presupposes a level of advanced knowledge about human rights jurisprudence on the part of the judicial officer, a particular level of awareness. It is because only if the judge has an in-depth knowledge about human rights, (the bill of rights in a national constitution, international human rights instruments and precedents) can he then appreciate their applicability to matters adjudicated on by him. A lack of this knowledge may in itself defeat the purpose of judicial independence, more particularly, where human rights disputes are concerned. It is unavoidable that the judge may, for lack of knowledge and to the relief of the perpetrator, betray the cause of the victims. This calls on the judiciary, in addition to government efforts, to engage in individual and collective programmes in which they can gain awareness about human rights jurisprudence. Measures have already been taken at the international level to regulate the independence of the judiciary as a means for the protection of human rights. Arguments for and against judicial activism carry both positive and negative elements and as to how they should be perceived in a democratic setting, this will be clarified later in the third chapter.

1.4 International law perspectives on judicial independence

The predominance in the political, commercial and technological arena, of the role of the judiciary in the protection of human rights was evidently necessitated by the atrocities of

the World War II.⁷⁴ During this war massive violations of human rights were committed that disturbed the conscience of mankind. This led to the founding, after the war, of the UN through the UN Charter in 1945.⁷⁵ Amongst its priorities was the maintenance of peace and justice.⁷⁶ It was felt that the guarantees of fundamental rights and freedoms were only meaningful in a peaceful environment, hence the emphasis on the attainment of peace and justice. To realise this goal the UN Charter obliged Member States to take separate and collective measures.⁷⁷

In 1948 the UNGA adopted the UDHR which lists certain rights and freedoms recognised as universally worthy of protection.⁷⁸ The weakness about it is its failure to oblige compliance.⁷⁹ However, it has served as a source of inspiration in many jurisdictions, and amongst international and regional bodies.⁸⁰ The role of the judiciary in the UDHR was recognised through the inclusion of Articles 8 and 10 which respectively entitles individuals to be afforded effective remedies before competent, independent and impartial tribunals whenever any of their rights are threatened.⁸¹

To facilitate the actualisation of the promises made under the UDHR, in December 1966 the UNGA adopted the International Covenant on Civil and Political Rights (ICCPR).⁸² In its preamble the ICCPR reaffirms the principles enshrined in both the UN Charter and the UDHR, the quest for peace and justice. Article 2(3) obliges State Parties to ensure the provision, on the domestic level, of effective remedies for persons aggrieved by abuses of their rights and freedoms. The role of the judiciary is specifically acknowledged under Article 14 of the ICCPR which in part provides:

(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charges against him, or his right and obligations in a law suit, everyone shall be

⁷⁴ Mokgoro (2001) 1; Kleyn & Viljoen (n 21 above) 238; Buergental (n 41 above) 21; Richard Pierre Claude: 'Human Rights Have Wings: A Note for Teachers' <<http://www.hcourt.gov.au/speech>> (accessed on 19 March 2003); The Hon Justice Michael Kirby AC CMG: 'Educating the Legal Profession in Human Rights: Practical or Pie in the Sky?' <<http://www.hcourt.gov.au/speech>> (accessed on 19 March 2003).

⁷⁵ Melander & Alfredsson (1997) 1.

⁷⁶ UN Charter, art 1; UN Background Note *The Independence of the Judiciary: A Human Rights Priority* file://A:/JUDICIARY.htm (accessed on 17 September 2003).

⁷⁷ As above, art 56.

⁷⁸ UNGA Res 217 (III) (n 32 above).

⁷⁹ Weissbrodt (2001) 1.

⁸⁰ As above.

⁸¹ Mose (n 31 above).

⁸² UNGA Res 2200 (XXI) of 16 December 1966. Entered into force on 23 May 1976.

entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

This provision had a bearing in the Supreme Court of South Wales case of *Kable v The Director of Public Prosecutions for the State of New South Wales*.⁸³ The appellant, Mr. Kable, had been serving a prison term for manslaughter. In the course of his imprisonment, he had allegedly sent out threatening email messages. Toward the conclusion of his prison term the state introduced legislation authorising the Supreme Court to order his further imprisonment to a further term renewable within six month intervals if, in the opinion of the Court, he still remained a threat. Declaring the legislation to be constitutionally invalid, the Court held:

*At the time of its enactment, ordinary members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of the executive government that the appellant should be imprisoned without the benefit of the ordinary process of the law. Any person who reached that conclusion could justifiably draw the inference that the Supreme Court is an instrument of executive government policy. That being so, public confidence in the impartial administration of the judicial functions of the Supreme Court must inevitably be impaired.*⁸⁴

In *Olo Bahamonde v Equatorial Guinea*,⁸⁵ the UN Human Rights Committee observed that failure to separate the functions of the judiciary from those of the executive, and the executive control of the judiciary, all fell foul of the spirit of Article 14(1) of the ICCPR. On November 1985 the UNGA adopted the Basic Principles on the Independence of the Judiciary (UN Basic Principles).⁸⁶ Article 1 requires governments to ensure the independence of the judiciary through the implementation of the principles in the domestic justice systems.⁸⁷ The instrument is divided into five subheadings: the independence of the judiciary; freedom of expression and association; qualifications, selection and training; conditions of service and tenure; and, disciplinary, suspension and removal of judges.⁸⁸ The principles enshrine both rights and duties for judges while at the same time requiring governments to ensure the independence of the judiciary.

⁸³ (1997) 189 CLR 51, quoted by Chaskalson (n 73 above) 247-248).

⁸⁴ As above.

⁸⁵ UN Doc ICCPR/C/49/D/468/1991 (1993).

⁸⁶ UNGA Res 40/32 & 40/146 (n 6 above).

⁸⁷ As above.

⁸⁸ As above.

In April 1994 the UN, on the recommendations of the UNHRC appointed Mr. Param Cumaraswamy as a Special Rapporteur (SR) for the promotion of judicial independence world-wide.⁸⁹ Lord Steyn recounts, *inter alia*, that the reason for the appointment of the Special Rapporteur was triggered by the increase of attacks on the independence of the judiciary in many countries.⁹⁰ Therefore, the basis for the SR's mandate has been related to the conviction that an independent and impartial judiciary and independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice.⁹¹ The SR has thus observed:

*An independent judicial system is the constitutional guarantee of all human rights. The right to such a system is the right that protects all other human rights. Realisation of this right is a sine qua non for the realisation of all other rights.*⁹²

In the Third Periodic Report of Belarus, the UNCAT recommended for the review of the Constitution, laws and decrees, and for the establishment of an independent judiciary where it found that the State President had maintained the sole power to prohibit and dismiss judges from office.⁹³ The judges also had to pass a probationary initial term and their tenure lacked the necessary safeguards of judicial independence.⁹⁴ Further efforts were made by the International Federation of Lawyers and the International Commission of Jurists to bring judicial independence to the world's attention.⁹⁵

Other measures have been taken by the International Association of Judges (IAJ)⁹⁶ and the Commonwealth Magistrates and Judges Association (CMJA).⁹⁷ Thus, on 17 November 1999, the IAJ endorsed "The Universal Charter of the Judge (UCJ)" which equally emphasises the need for independent judiciaries. Article 1 of the UCJ provides:

*The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence.*⁹⁸

⁸⁹ UN Background Note (n 76 above).

⁹⁰ Steyn (n 66 above) 66.

⁹¹ UN Special Rapporteur on the Independence of Judges and Lawyers: <[http://www: oneworld.org/SCF/incr/srijl.htm](http://www.oneworld.org/SCF/incr/srijl.htm)> (accessed on 11 October 2003).

⁹² As above.

⁹³ Concluding Observations of the UNCAT(n 16 above).

⁹⁴ As above.

⁹⁵ Steyn (n 66 above) 66.

⁹⁶ Van der Merwe (n 6 above) 169.

⁹⁷ As above; About the CMJA: Background: <<http://www.cmja.org/about.htm#background>> (accessed on 16 October 2003).

The CMJA has amongst its objectives, the advancement of the administration of law by promoting the independence of the judiciary.⁹⁹ Its membership comprises judicial officers and legal professionals from the Commonwealth countries. Meetings are convened on a regular basis in which delegates share their experiences concerning the judiciary and the protection of human rights in their countries. The Victoria Fall Declaration of 1994 made by the CMJA is illustrative of the objectives of the association as follows:

*The rule of law can only be observed if there is a strong and independent judiciary which is sufficiently equipped and prepared to apply such laws. Although it is highly desirable that the independence of the judiciary, as one of the arms of government, should be formerly protected by constitutional guarantees, the best protection rests in the support of the government and the people on the one hand, and the competence and confidence of the judges and magistrates in the performance of their offices on the other.*¹⁰⁰

The independence of the judiciary is also recognised at the regional level of the UN Member States. Article 6 of the European Convention on Human Rights (ECHR) impart provides:

*(1) In the determination of his civil rights and his obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*¹⁰¹

On 8-10 July 1998, the Council of Europe adopted the European Charter on the Statute for Judges (ECSJ) to give effect to Article 6 of the ECHR and thus the UN Basic Principles.¹⁰² Article 1(1) states that the aims of the statute are *inter alia*, to ensure the competence, independence and impartiality of the courts of law.¹⁰³ The European Court of Human Rights has observed that in determining whether a tribunal is independent, the manner of appointment of the judges, their term of office, the existence of guarantees against outside pressures, and the question whether the body presents an appearance of independence, are important considerations.¹⁰⁴ In *Valente v Queen*, the Canadian Court observed:

[S]ecurity of tenure, because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence The second

⁹⁸ As above.

⁹⁹ As above.

¹⁰⁰ CMJA Conference Report (2000), inner cover.

¹⁰¹ Adopted by the Council of Europe on 4 November 1950, Rome. Entered into force on 3 September 1953.

¹⁰² Steyn (n 66 above) 70.

¹⁰³ As above; *R v Bow Street Metropolitan Magistrate, Ex parte Pinochet Ugarte* (No 2) (1999) 1 All ER 557 (HL).

¹⁰⁴ *Findlay v United Kingdom* 24 EHRR 221; *Bryan v United Kingdom* [A/335A] [1996] 21 EHRR 342.

*essential condition of judicial independence is what may be referred to as financial security. . . . The essence of such security is that the right salary and pension should be established by law and not subject to arbitrary interpretation by the executive in a manner that could affect judicial independence.*¹⁰⁵

Under the Inter-American system, Article 25(1) of the American Convention on Human Rights (ACHR)¹⁰⁶ provides that:

*Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.*¹⁰⁷

A commentary to Canon 1 of the American Code of Judicial Conduct of 1990 (Code)¹⁰⁸ states that the defence to the judgements and rulings of courts depends upon public confidence in the integrity and independence of judges. It states further that the judges' integrity and independence depends in turn upon their acting without fear or favour. Canon 3 of the Code further states:

A judge must perform his duties fairly and impartially. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute

As regard the African human rights approach on the independence of the judiciary, this has been highlighted, (though to a limited extent) in the introductory part of this research and is thus fully dealt with below in the third chapter.

In conclusion, this chapter has attempted to trace the position of the judiciary under international law as regard the role it has to play in the protection of human rights. The various human rights instruments referenced above all point to the same goal, the promotion of judicial independence and thus, fundamental rights and freedoms of a human person. As revealed in the definition of the concept of judicial independence, certain principles have been identified as fundamental prerequisite for the establishment of an independent judicial systems. These are democracy and the principle of separation of

¹⁰⁵ Quoted by Froneman (1999) 1 *JJOASA* 135 137; Michalakis (2001) 373-381.

¹⁰⁶ Basic Documents Pertaining to Human Rights in the Inter-American Systems (updated to January 2003) 27.

¹⁰⁷ See 'Judicial Ethics in South Africa' (March 2000).

powers. Both government, judicial institutions and individual judges have been identified as important role players if the independence of the judiciary has to be secured and sustained. All this hassle, for the protection of human rights and, therefore, the promotion of peace and justice. In the next chapter, the focus will extend to African systems.

¹⁰⁸ See Nyalali (n 39 above) 199-200.

CHAPTER 2

THE ROLE OF THE JUDICIARY UNDER AFRICAN HUMAN RIGHTS SYSTEMS

2.1 Introduction

In this chapter an attempt is made to highlight both the theoretical and practical developments that have taken place in Africa, pertaining to the role of the judiciary in the protection of human rights. This is done by a discussion and analysis of the ACHPR, jurisprudence of the African Commission, the Protocol Establishing the African Court on Human and Peoples' Rights and related instruments.

2.2 Tracing the place of the judiciary under the African Charter on Human and Peoples' Rights

The starting point for the human rights enforcement in Africa is the ACHPR adopted by the OAU in 1981, coming into force in 1986.¹⁰⁹ In the preamble the OAU members pledged to ensure the promotion and protection of human and peoples' rights in their countries. The following preambular passage of the ACHPR is therefore apposite:

Reaffirming their adherence to the principles of human and peoples rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organisation of African Unity, the Movement of Non-Aligned Countries and the United Nations.

Article 1 of the ACHPR obliges State Parties to ensure the implementation of the guarantees made under the Charter, through legislation or other measures. Meanwhile, Article 2 prohibits discriminatory rendering of the rights guaranteed. Included in these is the right of individuals to have their justiciable disputes heard by competent, independent and impartial tribunals or courts of law. The relevant provisions for this are Articles 7 and 26 of the Charter. Article 7 stipulates:

1. Every individual shall have the right to have his cause heard. This comprises:

¹⁰⁹ ACHPR (n 23 above).

- (a) *the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;*
- (b) *the right to be presumed innocent until proved guilty by a competent court or tribunal;*
- (c) *the right to defence, including the right to be defended by counsel of his choice;*
- (d) *the right to be tried within a reasonable time by an impartial court or tribunal.*¹¹⁰

The guarantees under Article 7 concern trial processes of accused persons, and this was evidently inspired by the UDHR¹¹¹ and ICCPR.¹¹² It was mentioned in the introductory part of this research that Articles 7 and 26 are interrelated. Article 26 provides thus:

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow for the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

The interrelation between the two provisions, which were in the introduction coined as ‘realisatory provisions’, is manifested in the fact that they both give meaning to the guarantees made in the Charter. They provide for the enforcement mechanisms of the rights already identified by the Charter as worthy of protection. The African Commission has, in *Civil Liberties Organisation v Nigeria*,¹¹³ also asserted that both provisions are mutually supportive. In this regard, the Commission observed:

*Article 26 of the African Charter reiterates the right enshrined in Article 7 but is even more explicit about States Parties’ obligations to “guarantee the independence of the Courts and allow for the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter”. While Article 7 focuses on the individual’s right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right. This Article clearly envisions the protection of the individual’s rights against the abuses of State power.*¹¹⁴

In order to further clarify the place of the judiciary under the ACHPR, the next part examines the jurisprudence of the African Commission on this subject developed through the communication system.

¹¹⁰ See also, Res on the Right to Recourse Procedure and Fair Trial, Fifth Annual Activity Report of the ACHPR 1991-1992, ACHPR/RPT/ 5th, Annex VI (*Documents of the ACHPR*, p 224).

¹¹¹ UNGA Res 217 (III) (n 30 above).

¹¹² UNGA Res 2200 (XXI) (n 82 above).

¹¹³ Communication 129/94 *Civil Liberties Organisation v Nigeria*, Ninth Annual Activity Report 1995-1996 (*Compilation of Decisions on Communications of the ACHPR*, p 203).

¹¹⁴ As above, p 205, para 15.

2.3 Examining Communications of the African Commission on Human and Peoples' Rights relating to the judiciary

The practical effect of the African Charter on the enforcement and protection of human rights is enhanced through the communication system. It allows for individuals, groups and NGOs to petition the Commission whenever violations of human rights occur. In this capacity it serves as a quasi-judicial body of the African Union (AU).¹¹⁵ Article 31 of the ACHPR requires that the Commission be manned by persons who enjoy high reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights. In addition to legal experience, the Charter requires that the Commissioners must serve the Commission in their personal capacity.¹¹⁶ It implies that the Commissioners owe their allegiance to the AU and not to their individual home countries. They must not be influenced by external forces on the adjudication of disputes. Therefore, considerations of competence, independence and impartiality that apply to domestic judiciaries, equally apply to the Commission.

One of the preconditions for the consideration of a petition by the Commission is that all available domestic remedies must have been exhausted, unless it is obvious that the procedures involved would be unduly prolonged.¹¹⁷ The Commission considered complaints involving States' violations of Articles 7 and 26 of the Charter. These mainly involved military governments. Thus, in *Civil Liberties Organisation v Nigeria*,¹¹⁸ the Commission found violations of both of these provisions. The military government in Nigeria at the time had enacted a multiple of decrees which in effect suspended the Constitution, thereby automatically eradicating the fair trial guarantees. Decree No. 107 of 1993, in addition to suspending the Constitution, made a provision to the effect that no decree promulgated after December 1983 could be examined by any national court. Decree No. 114 of 1993 also ousted the competence of the courts, rendering the African Charter immediately inoperative. The effect was that individuals aggrieved by government

¹¹⁵ See (n 144 below).

¹¹⁶ Dihemo *A Critical Analysis of States Reporting under the African Charter on Human and Peoples' Rights* (LLM dissertation 2000 UP/UG) 32.

¹¹⁷ ACHPR (n 23 above) art 56(5).

¹¹⁸ Communication 129/94 (n 113 above) p 205.

actions could have no recourse to justice for redress. Declaring violations of the ACHPR, the Commission observed:

*The ousting of the jurisdiction of the courts of Nigeria over any decree enacted in the past ten years, and those to be subsequently enacted, constitutes an attack of incalculable proportions on Article 7. The complainant refers to a few examples of decrees which violate human rights but which are now beyond review by the courts. An attack of this sort on the jurisdiction of the courts is especially invidious, because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed.*¹¹⁹

The Commission also found a violation of ACHPR where the Nigerian military government had refused to release a detainee, after the High Court of Appeal had granted bail application. The State Security (Detention of Persons) Decree No. 14 of 1994 barred the courts from issuing writs of *habeas corpus*, or any prerogative orders for the production of any person detained under Decree No. 2 of 1984. The Commission observed:

*The fact that the government refused to release Chief Abiola despite the order for his release on bail made by the Court of Appeal is a violation of Article 26 which obliged States parties to ensure the independence of the judiciary. Failing to recognise a grant of bail by the Court of Appeal militates against the independence of the judiciary.*¹²⁰

In a similar communication of *Sir Dawda K Jawara v The Gambia*,¹²¹ a Decree of the Gambian government¹²² gave the Minister of the Interior the power to detain and extend the period of detention indefinitely. This Decree further prohibited the proceedings of *habeas corpus* on any detention made under it. The government had similarly disregarded a court order.¹²³ Thus, the Commission observed:

Given that the Minister of the Interior could detain anyone without trial for up to six months, and could extend the period ad infinitum, his powers in this case, are analogous to that of a court, and with all intents and purposes, he is more likely to use his discretion at the detriment of the detainees, who are already in a disadvantaged position. The victims will be at the mercy of the Minister who, in this case, will render favour rather than vindicating a right. This

¹¹⁹ As above, paras 14 & 15.

¹²⁰ Communication 143/95, 150/96 *Constitutional Rights Project and Civil Liberties Organisations v Nigeria*, Thirteenth Annual Activity Report 1999-2000 (*Compilation of Decisions on Communications of the ACHPR*, p 257, 261), para 30. See also *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and Others* CCT36/03 (SA Constitutional Court decision of 2 October 2003) <<http://www.wits.ac.za> or, http://www.concourt.gov.za/summary.php?case_id=12665> (accessed on 11 October 2003).

¹²¹ Communications 147/95 and 149/ 96 (n 2 above).

¹²² Decree No 3 of July 1994.

¹²³ Communications 147/95 and 149/ 96 (n 2 above), para 7.

*power granted to the Minister renders valueless the provisions enshrined in Article 7(1)(d) of the Charter.*¹²⁴

The *Centre For Free Speech v Nigeria*,¹²⁵ offers a further example. The complainants were journalists who had been unlawfully arrested, detained and brought for trial and conviction before a military tribunal. They alleged violations of Article 7 of the Charter, read together with Principle 5 of the UN Basic Principles. Under Principle 5 accused persons are entitled to be tried by the ordinary courts or tribunals using established legal procedures. It prohibits the creation of tribunals that do not use the duly established procedures of the legal process and, whose creation displaces the jurisdiction of the ordinary courts or judicial tribunals. Thus, the Commission declared the complainants' trial before these tribunals to be a violation of Articles 7, 26 and Principle 5 of the Basic Principles.¹²⁶

Jurisprudence of the Commission on judicial independence indicates, for the purposes of Articles 7 and 26, that Special Military Tribunals do not constitute competent, independent and impartial tribunals or courts within the confines of the principle of judicial independence. Thus, the Commission observed:

*"The Special Military Tribunals . . . constituted a violation of Article 7(1)(d) of the Charter by the very nature of their composition, which is reserved to the discretion of the executive organ". Withdrawing criminal procedure from the competence of the courts established within the judicial order and conferring onto an extension of the executive necessarily compromises the impartiality of the Courts, to which the Charter refers. Independent of the qualities of the persons sitting in such jurisdictions, their very existence constitutes a violation of the principles of impartiality and independence of the judiciary and, thereby, of Article 7(1)(d).*¹²⁷

The Commission's jurisprudence on judicial independence is clear. It once more identifies the independence of the judiciary in Africa as indispensable to the protection of the human rights guaranteed under the African Charter and other major international human rights instruments from which the drafters of the Charter drew inspiration.¹²⁸ The next part of this

¹²⁴ As above, para 61.

¹²⁵ Communication 206/97 *Centre For Free Speech v Nigeria* Thirteenth Annual Activity Report 1999-2000 (*Compilation of Decisions on Communications of the ACHPR*, p 273).

¹²⁶ As above, paras 16-17.

¹²⁷ Communications 54/91, 61/91, 98/93, 164/97 & 196/97, 210/ 97, *Malawi International Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des l' Homme v Mauritania* Thirteenth Annual Activity Report 1999-2000 (*Compilation of Decisions on Communications of the ACHPR*, p 161), para 98; Heyns 'Civil and Political Rights in the African Charter on Human and Peoples' Rights' in Evans & Murray (eds) (2002) 161.

¹²⁸ ACHPR Res (n 110 above).

chapter examines the instruments creating the envisaged African Court on Human and Peoples' Rights (ACtHPR) and the African Court of Justice (ACJ) as regard their recognition of the judicial independence.

2.4 Examining the Protocol Establishing the African Court on Human and Peoples' Rights

The state of human rights abuses in Africa makes the proliferation of human rights protection mechanisms inevitable and much welcomed. In June 1998, the OAU adopted a Protocol with the object to establishing an ACtHPR.¹²⁹ The premise for this development may be gathered from the following preambular statement:

*Firmly convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights.*¹³⁰

This statement is further emphasised by Article 2 of the Protocol which states that the Court's role shall be complementary to the protective mandate of the Commission. Article 3(1) states that the Court's jurisdiction shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the petitioning States.¹³¹ The Protocol requires that the Court must be composed of 11 judges who are nationals of the AU Member States, elected in their personal capacity. The criteria is that of a high moral juristic standing, recognised practical, judicial or academic competence and experience in the field of human and peoples' rights.¹³² The independence of the Court is guaranteed by the provision of security of tenure¹³³, immunity against prosecution or harassment for opinions or decisions rendered while executing the tasks of the Court.¹³⁴ And, the removal or suspension of a judge is only possible if all the other members of the Court reach a

¹²⁹ Protocol to the African Charter on Human and Peoples' Rights, adopted by the OAU Assembly of Heads of State and Government at its 34th Ordinary Session in Ouagadougou, Burkina Faso, on 9 June 1998.

¹³⁰ As above, preamble.

¹³¹ Harrington (n 4 above) 316; Institute for Human Rights and Development in Africa: Lecture document presented at the Centre for Human Rights, University of Pretoria, 24–28 February 2003, p 45.

¹³² Protocol (n 128 above) art 11.

¹³³ As above, art 15.

¹³⁴ As above, art 17(3) & (4).

unanimous decision that a judge must be removed or suspended.¹³⁵ The circumstances leading to the latter decision must be connected to the judge's incapacity to discharge his mandate as required by the Protocol.¹³⁶ The term of office for judges is limited to a period of six years renewable only once.¹³⁷

Pertaining to the individual independence of the judges, Article 16 of the Protocol obliges that each judge must be admonished for a declaration that he shall render his services impartially and faithfully. Further, judges are not entitled to hear cases in which they had previously been involved either as agents, counsels or advocates, as members of a national or international court or a commission of inquiry or any other capacity. This extends to a prohibition on the judges to engage in activities that would compromise their independence and impartiality.¹³⁸ The States also have a duty to execute the decisions of the Court.¹³⁹

The urgent need for independent judiciaries in Africa was also manifested by the adoption of the Grand Bay (Mauritius) Declaration and Plan of Action (Declaration) on 16 April 1999, during the First OAU Ministerial Conference on Human Rights.¹⁴⁰ It was recognised that the promotion and protection of human rights is a matter of priority in the continent, and that the achievement of this was possible only if there was observance of the rule of law.¹⁴¹ As for judicial independence, the Declaration states:

(4) The Conference recognises that the development of the rule of law, democracy and human rights calls for an independent, open, accessible and impartial judiciary, which can deliver justice promptly and at an affordable cost. To this end such a system requires a body of professional and competent judges enjoying conducive conditions.

Later in the same year, the African Commission, in collaboration with the African Society of International and Comparative Law and Interrights held a seminar on the 'right to a fair trial' in Dakar, Senegal.¹⁴² The seminar bred the Dakar Declaration on the Right to Fair Trial in Africa of 1999 which states, *inter alia*, that:

¹³⁵ As above, art 19.

¹³⁶ As above.

¹³⁷ As above, art 15.

¹³⁸ As above, art 17(2).

¹³⁹ As above, art 30.

¹⁴⁰ Annexed as Appendix 3 in Evans & Murray (2002) 376.

¹⁴¹ As above, 377.

¹⁴² The seminar was held from 9-11 September 1999.

*The right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore the right . . . is a non-derogable right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines.*¹⁴³

Further developments have come with the replacement of the OAU by the African Union (AU) in July 2001 through the Constitutive Act.¹⁴⁴ Amongst its objectives, the Constitutive Act introduces the establishment of a Court of Justice.¹⁴⁵ Unlike the Protocol to the African Charter, however, the scope of function of the envisaged Court is not defined and this is left for consideration under the subsequent protocol.¹⁴⁶

In conclusion, the adoption of the ACHPR in 1986, has since set a ground for the protection of human rights in Africa. The Charter clearly identifies the independent judicial systems as integral to the realisation of the guarantees made in it. The communication system has also added more meaning to the Charter through jurisprudence on judicial independence. Although the implementation of its decisions depend on the political will of governments, the Commission has gradually made judicial independence a popular concept among African governments. That there is no alternative mechanism for the effective implementation of the objectives of the ACHPR, is further evidenced by attempts by the AU to establish a Court of Justice. The inevitable recognition of the judiciary as a central role player was elaborated emphatically in the Grand Bay Declaration as an imperative. In the next chapter, regard is had to national judicial systems of the AU Member States.

¹⁴³ As above; Weissbrodt, Fredrickson & Byron Professor of Law, University of Minnesota Law School: 'Amnesty International Fair Trial Manual' <<http://www.amnesty.org/ailib/>> (accessed on 14 February 2003).

¹⁴⁴ Constitutive Act of the African Union of 2001, first adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government, Lome, Togo, in July 2000, AHG:Dec.143 (XXXVI).

¹⁴⁵ As above, art 5(d) & 18(1).

¹⁴⁶ As above, art 18(2); Report of the Interim Chairperson on the First Ministerial Conference of the AU on Human and Peoples' Rights in Africa held in Kigali, Rwanda, 5-9 May 2003.

CHAPTER 3

OVERVIEW OF THE POSITION OF THE JUDICIARY UNDER AFRICAN NATIONAL SYSTEMS

3.1 Introduction

It is pointed out at the outset that coverage of all constitutions of African countries is beyond the limits of this research. Such an attempt would have required a chapter devoted to this alone. Some countries will inevitably have to be left out while others will be covered. The chapter begins by discussing the role of the courts within the concepts of separation of powers and good governance. Here an attempt is made to identify the judiciary as a universally recognised institution of law enforcement, protection of human rights and prevention of corruption. The second part examines the position of the courts under national constitutions as regard their independence and the protection of human rights. The last part centres on the debates concerning observance of the rule of law and judicial activism in the context of judicial protection of these rights.

3.2 The essence of the separation of powers

Democratic governments can only be identified by the internationally accepted emblem of separation of powers between the three organs of government, the executive, legislative and judiciary. The success of a government lies with the active but separate execution of the constitutional mandates by these three organs. The doctrine of separation of powers requires that the law-making task be vested in the legislature, the application of the law in the judiciary and the executive provide for the overall administration of the government (including the execution of judicial decisions) as provided for by the law.¹⁴⁷ The central feature here is the judiciary, which is the custodian of the laws governing both of the three organs, 'itself' included. It ensures that the rule of law prevails over all the activities of the government.

¹⁴⁷ Kanyeihamba (n 11 above) 60-62; McQuoid-Mason, O'Brien & Greene (1993) 33.

Concerning the protection of human rights, the separation of powers helps to secure the impartial attention of the judiciary whenever violations of human rights arise. Montesquieu, correctly once observed:

*There is no liberty if the judiciary power be not separated from the legislature, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.*¹⁴⁸

That the judiciary must be independent does not, however, suggest that it should operate absolutely independent of the other organs of government. Nor is it suggested that the other organs have to be operationally detached from each other. The separate allocation of functions only prevents the abuse of power by any of the organs and ensures effective and efficient delivery of services to society. The position was put by the SACC in *Ferreira v Levin NO*¹⁴⁹ as follows:

*[I]t is important that we bear in mind that there are functions that are properly the concern of the courts and others that are properly the concern of the legislature. At times these functions may overlap. But the terrains are in the main separate and should be kept separate.*¹⁵⁰

Moreover, the importance of the role played by the judiciary can only be valued through the executive's implementation of the decisions rendered by the courts, whatever their status in the ranking. The decision of the SACC in *S v Mamabolo (E. TV Intervening)*,¹⁵¹ per Kriegler J, is apposite as follows:

*In our constitutional order the judiciary is an independent pillar of the State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and legislative pillars of the State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter of disputes between organs of the State and, ultimately, as the watchdog over the Constitution and its Bill of Rights—even against the State.*¹⁵²

¹⁴⁸ Quoted by Simmons (n 45 above) 8.

¹⁴⁹ 1996 (1) BCLR 1 (CC).

¹⁵⁰ As above, para 183.

¹⁵¹ *S v Mamabolo* (n 28 above).

¹⁵² As above, para 16.

In 1989, the World Bank expressed concern about the system of governance in African states. It identified the disrespect of the rule of law, separation of powers, independence of the judiciary and administration of justice systems as issues that needed serious consideration to prevent the collapse of these states.¹⁵³ This position has recently been reiterated by Hussein Solomon when he listed as the main causes of high population movements in Africa, the abuse of power and the subordination of the judiciary.¹⁵⁴ The importance of separation of powers as an important consideration in determining a government's system of governance was further emphasised by RA Banda when he said:

*"Whatever difficulties or obstacles judiciaries face, judicial independence has been accepted as an attribute of good governance."*¹⁵⁵

The absence of separation of powers, which in practice leads to the subordination of the judiciary, has both direct and indirect implications. Directly, it leads to violations of basic human rights of individuals who once aggrieved by government action can hope for no remedies as the perpetrator would itself be the arbiter. Indirectly, it has the inevitable consequence of government corruption, with the result that public wealth is amassed into fewer individuals to the detriment of the larger public. It also discourages potential investors. Put in the words of Akonumbo, "international investors simply stay away from countries perceived as being incompetent and corrupt."¹⁵⁶ The following passage is equally worth quoting:

*Adherence to the rule of law is a fundamental precondition for the realisation of development in all sectors. The absence of the rule of law continues to constrain market development, public confidence in the legal system, and the security and general wellbeing of the people. A competent and independent judiciary is vital to the development. The lack of judicial independence and the level of corruption impedes peoples' confidence in formal conflict resolution and encourages reliance on informal and sometimes violent means of dispute resolution. Moreover, the absence of the independence of the judiciary discourages foreign investment.*¹⁵⁷

¹⁵³ Bukurura (2002) 21.

¹⁵⁴ Solomon (n 3 above) 68, 74.

¹⁵⁵ Banda 'Notes on Justice Amissah's Paper Relating to a Commission for Judicial Independence in Africa' in Ajibola & Van Zyl (1998) 162.

¹⁵⁶ Atangcho (71 above) 71.

¹⁵⁷ NGO Statement, 2000 Consultative Group Meeting in Cambodia: Good Governance<file:///A:/ Rule% 20of%20law.htm> (accessed on 26 September 2003); Linda C Reif 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection: <<http://www.law.harvard.edu/studorgs/hrj/iss13/reif.shtml>> (accessed on 23 June 2003).

The doctrine of separation of powers also serves as an important criterion for the United States (US) government in the selection of foreign states which merit developmental assistance as reflected in its “The Millennium Challenge Account.”¹⁵⁸

The scourge of human suffering in Africa requires no-more debating about what the appropriate and capable measures are to bring this to a lasting end. The collapse of institutional installations for the protection of human rights is of great concern. This will remain so for as long as governments continue to hold reservations about the central role the judiciary has to play in vindicating fundamental rights and freedoms of Africa’s defenceless masses. Quite correctly, in the pre-independence era the colonial masters established western-kind courts not for the benefit of the communities, but for the entrenchment of colonial rule and domination. This is what induced the liberation wars and the eradication of injustices perpetuated by the courts which disguised the administration of justice for colonial domination. The irony, however, is that the same liberation fighters have become perpetrators, through the same courts, of injustices against their own people. The latter are now engaged in multifaceted modes of liberation against injustices of their ruthless rulers. This inevitably raises the following questions: When will the war against injustices cease? Will the current liberation fighters (assuming they finally contain oppressive regimes), personalise the judiciaries in future to cement their reign, or will they popularise judicial independence? Will their ultimate triumph be the triumph for the separation of powers and, therefore, judicial independence? In this regard, Albie Sachs once observed:

*There is no guarantee that somebody who is a freedom fighter, who is willing to sacrifice his life for freedom, will not violate the rights of others when he takes power.*¹⁵⁹

Ndima illustrates this point even further. He observes that during the negotiation process in SA, the African National Congress (ANC) and other liberation movements did not favour judicial review of legislative and executive decisions in the new negotiated democratic government.¹⁶⁰ The result would have been that the parliamentary supremacy that had induced the struggle against human rights abuses in the apartheid era would equally maintain in the new democratic era.

¹⁵⁸ Paula Dobriansky ‘Principles of Good Governance: Economic Perspectives, March’ <file:///A:/Paula%20Dobriansky,%20Principles%20of%20Good%20Governance,%20E> accessed on 26 September 2003); Atangcho (2003) 1 *Quartal* 75 96.

¹⁵⁹ Sachs (1998) 3 *Occasional Paper* # 5 13.

¹⁶⁰ Ndima (2002) XLIII 2 *Codicillus* 28 29.

Prior to the colonial interference most African societies had their own judicial institutions for the adjudication of disputes. Of course the form and structures of these institutions differed according to the dictates of the tribes. In the southern African region for instance, the system of *dikgoro*, *kgotla* or *inkundla* applied which was the equivalent of the modern courts. Kanyeihamba also points out that in the eastern African region, the BaSoga of Uganda had their judicial institutions identical to the British model.¹⁶¹ Other examples are the Akamba and Kikuyu of Kenya.¹⁶² These were run by the communities themselves, with the tribal leader as the adjudicator and the royal council as advisers. The courts enjoyed popular participation during proceedings and decisions reflected the will of the community as a whole. Offenders cooperated and accepted the punishment and instead of being condemned, depending on the gravity of the crime,¹⁶³ they were encouraged to realise their wrongs and mend ways.¹⁶⁴ These were real dispute resolution courts because decisions sustained peaceful coexistence amongst litigants and the general public. Although the chief was himself the executive, lawmaker and presiding officer in dispute resolution, he served impartially, took advice from the council and observations made by the tribe before pronouncing upon decisions. A Chief in Africa is commonly regarded as a symbol of unity and peace.

In determining whether judicial independence applied in a pre-colonial Africa, western perceptions about what the independence entails, which is what apparently derails the promotion of judicial independence in Africa, should be avoided. The following passage highlights this point:

The conception of judicial independence and impartiality in respect of traditional courts is not the same as in the Western law setting. There was no separation of powers between judicial, executive and legislative power; all of which vest in the chiefs or kings.¹⁶⁵ "The believers and adherents of African customary law believe in the impartiality of the chief or king when he exercises his judicial function. The imposition of anything contrary to this outlook would strike at the very heart of the African customary legal system, especially the judicial facet thereof."¹⁶⁶

¹⁶¹ Kanyeihamba (n 11 above) 58.

¹⁶² Mutua (n 43 above) 75-76.

¹⁶³ Crimes of murder could be punished with banishment, death or a higher number of cattle as reimbursement to the family of the deceased and the chief's kraal.

¹⁶⁴ Letsebe *Succession by Traditional Leaders* (LLB Dissertation 2000 UNIN) 23; Achebe (1958) 137.

¹⁶⁵ De Waal, Currie & Erasmus (2001) 575.

¹⁶⁶ *Bangindawo v Head of the Nyanda Regional Authority* 1998 (3) BCLR 314 (Tk), quoted as above.

However, the world is no longer the same. Artificial borders that had divided nations on considerations of colour, race, sex, culture, religion etc, are no more. They have melted down and now the new world order imposes on nations to come in unison on common issues. Thus, Korema J of the International Court of Justice once observed:

*Of course there were rules in Africa in the past, but if Africa is to become a modern continent, we have to abide by what entails today. That does not mean we are denying our Africanness.*¹⁶⁷

Judicial independence is not colour, race, sex, culture, religion-based. It is simply human rights-orientated, seeking to protect humankind against their own elimination. Countries need only volunteer their cooperation and implement international human rights instruments' call for domestication of universally accepted norms. Hegel has thus said:

*The point is that legal and political institutions are rational in principle and therefore absolutely necessary, and the question of the form in which they arose or were introduced is entirely irrelevant to a consideration of their rational basis.*¹⁶⁸

Africa's cooperation on the domestication of judicial independence is tested in the next part of this chapter and this is done by examining national constitutions of African countries.

3.3 Human rights and the judiciary: Examining national constitutions

The realisation of promises made under international and regional human rights instruments depend on the domestic implementation by the States.¹⁶⁹ The first step after ratification or accession is to legislate.¹⁷⁰ African constitutions largely provide for the promotion and protection of human rights and the independence of the judiciary.¹⁷¹ The practice is, however, as evidenced by some cases referenced earlier, not in comport with legislative or constitutional undertakings. The governments most readily accept that there must be a judiciary which will apply and enforce the laws. The problem, however, lies with their reluctance to accept the application of these laws in a manner that results in their embarrassment. Accordingly, the judiciary must do what pleases the master and not the

¹⁶⁷ ANB-BIA SUPPLEMENT: The Judiciary in Africa: <<http://www.peacelink.it/anb-bia/nr337/eoo.html>> (accessed on 11 October 2003).

¹⁶⁸ Translated with Notes by Knox (1967) 141.

¹⁶⁹ Handl 'Human Rights and Protection of the Environment' in Eide, Krause & Rosas (2001) 319.

¹⁷⁰ ACHPR (n 23 above) art 1.

converse. Therefore, 'this independence thing' is what they perceive to be of foreign origin. Why should something that originates in Africa embarrass Africa? They wonder. The truth, however, is that if the judiciary does not embarrass the wrong-doer, it loses the confidence of those whose rights and freedoms are eroded by the perpetrators. So, the judge must act-no matter the smile or frown of the wrong-doer.

Constitutions which are considered in this part of the research are those of SA, Sudan, Cameroon and Ethiopia. The starting point for determining the role of the judiciary in the SA justice system lies with Sections 1(c), 2 and 7 of the Constitution.¹⁷² Section 1(c) recognises the supremacy of the Constitution and the rule of law as the basic values for a sovereign and democratic SA. Section 2, in addition to the declaration made under Section 1(c), provides that any law or conduct inconsistent with the Constitution is invalid, and that the obligations it imposes must be fulfilled. Meanwhile, Section 7 imposes on the relevant authorities to honour the Bill of Rights and further, that the rights provided for in it may only be minimally invaded through the limitation clause under Section 36 of the Constitution. The separation of powers is equally recognised by the Constitution. Thus, the executive authority is vested in the president,¹⁷³ legislative authority in the parliament¹⁷⁴ and judicial power in the courts.¹⁷⁵ Before assuming judicial functions, the judge is required to declare under oath or solemn affirmation that: He,

*[w]ill be faithful to the Republic of South Africa, will uphold and protect the constitution and human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.*¹⁷⁶

The independence of the judiciary is guaranteed under Section 165 of the Constitution. This provision requires that the judiciary must pay their attention to the Constitution and other laws to the exclusion of anyone else and regardless of the position of the person in the society. It also obliges other state organs to take measures to ensure the independence of the courts and their effective rendering of judicial services. And, it obliges compliance with court decisions.¹⁷⁷

¹⁷¹ Heyns (1996) 17; Heyns (1997) 117.

¹⁷² The Constitution of the Republic of South Africa, Act 108 of 1996.

¹⁷³ As above, sec 85.

¹⁷⁴ As above, secs 42, 43 & 44.

¹⁷⁵ As above, sec 165.

¹⁷⁶ As above, sec 6(1) of Schedule 2; sec 19 of Schedule 6.

¹⁷⁷ As above, sec 165(1-5).

The role of the judiciary as an independent protector of human rights was manifested in the legislature's reversion of a number of statutes since 27 April 1994. One example is *S v Makwanyane and Another*,¹⁷⁸ in which the Constitutional Court (SACC) declared as constitutionally invalid, Section 277 of the Criminal Procedure Act 51 of 1977. This provision authorised the imposition of the death penalty on persons accused and convicted of serious crimes. The Court found that the provision was inconsistent with Section 9 of the interim Constitution,¹⁷⁹ which guaranteed the right to life, and Section 11 which guaranteed the right against torture of any kind. Consequently, parliament enacted the Criminal Law Amendment Act 105 of 1997 to remedy the inconsistency.

The position of the judiciary in Sudan is different. The earlier constitution, subsequently replaced with a Constitutional Decree, guaranteed the rule of law under Article 11 and the independence of the judiciary under Article 8.¹⁸⁰ Under the Thirteenth Constitutional Decree (also of 1995), which replaced the Transitional Constitution, the judicial power is constrained. Article 61 contains contradictory terms. In the first part it states clearly that the judiciary is directly responsible to the President of the Republic in the performance of judicial functions. The second and third parts purport to grant the courts independence.¹⁸¹ Abdullahi An-Na'im reveals that the judges enjoys no security of tenure and may be removed from office in disguise of protecting public interest.¹⁸² As regards the Cameroonian Constitution,¹⁸³ contradictory terms are equally immediately noticeable. Whereas Article 37(2) vests the judiciary power in the judiciary and guarantees the independence of the courts from the executive and legislative organs, Article 37(3) empowers the state President to appoint members of the bench and for the legal administration. About this Akonumbo observed:

*The very fact that the President of the Republic incarnates national unity and thrones over all major State institutions including the Supreme Council of the Magistracy, appoints judges and is guarantor of the independence of the judiciary explains why it has been impossible for the judiciary to stand independently of the executive.*¹⁸⁴

¹⁷⁸ (1995) (3) SA 391 (CC); *S v Ntuli* 1996 (1) SA 1207 (CC); *S v William* (1995) (3) SA 632 (CC); *S v Zuma* 1995 (4) BCLR 401 (CC).

¹⁷⁹ The Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁸⁰ Transitional Constitution of 10 October 1995.

¹⁸¹ Heyns (n 170 above) 350; 275-280.

¹⁸² An-Na'im (2003) 22.

¹⁸³ Constitution of the Republic of Cameroon, Law No 96-06 of January 1996.

¹⁸⁴ Atangcho (n 71 above) 71.

Articles 78 and 79 of the Ethiopian Constitution also vest the judiciary power in the judiciary.¹⁸⁵ Meaza Ashenafi, however, records that government officials frequently interfere with the judicial processes in cases where the government is involved. Judges are instructed to render decisions in favour of the government failing which, they may be removed.¹⁸⁶ One junior Ethiopian judge, when interviewed, expressed that the judiciary in Ethiopia is used by the government to deter opposition forces. He revealed that the death penalty is readily imposed by the pro-government judges who man the courts in large numbers. As for him he expressed: "In politically sensitive cases I decline to adjudicate with these judges because I know their vote will be unanimous against 'one dissent', 'mine'."¹⁸⁷ This seemed to hold true as another judge, from whom it could be gathered that he was a pro-government appointee, openly expressed, "well if the law says this crime merits the infliction of a wound on the accused, I will pronounce it as read-even if it means shocking the audients. The law would have taken its cause."¹⁸⁸

The above reflections represent the practice that maintains in most of the remaining countries.¹⁸⁹ It demonstrates not only a disturbing political environment that is prevalent, but also a shameful culture amongst a majority of African leaders who perceive the judiciary as a sword against their political stardom. The fear that influences the attitudes of leaders is attributable to their illegitimate occupation of decisive positions in the societies they purport to represent.

3.4 The rule of law and judicial activism

The rule of law is closely associated with the principle of separation of powers within a democratic system of government. It is equally inseparable from the concept of judicial independence. The purpose of the rule of law is, according to De Waal *et al*, to protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures.¹⁹⁰ It is further said that the overriding consideration in the theory of the rule of law is the idea that both the rulers and the governed are equally subject to the

¹⁸⁵ The Federal Constitution of the Republic of Ethiopia, Proclamation No 1/1995.

¹⁸⁶ Ashenafi 'Ethiopia: Process of Democratisation and Development' in An-Na'im (2003) 40.

¹⁸⁷ Anonymous.

¹⁸⁸ Anonymous.

¹⁸⁹ For Constitutions of other African Countries see Heyns (n 170 above).

same law.¹⁹¹ This may be illustrated in the form of a drama once played in SA. It involved police officers who belonged to the same division. Steve, a junior police officer, had had his father (also a police officer of a higher rank) murdered by criminals. He threatened to shoot and kill on the spot, anyone suspected of his death. His colleagues warned that regardless of the gravity of the crime, no matter how closely related he was to the victim and above all, his police status, proper procedures still had to be followed to secure proper conviction.¹⁹² So, in as much as the criminals did not have the right to kill his father, he equally, and regardless of his police status, had no such right against the suspects. The law applied equally. So, the rule of law had to ultimately prevail.

The judiciary has more often faced criticism for being disobedient to the rule of law. As the primary custodian of the rule of law, it normally comes as a surprise that the judiciary should preach compliance and practice the opposite. The criticism is based on the premise that the judge's role is limited merely to the application of laws of the land unreservedly. He must adhere to the letter of his oath as at the time he was sworn to office. His interpretation of the law must therefore be consistent with the readily identifiable intention of the legislature.¹⁹³ While this may hold true to a conservative judiciary, it has endured enormous opposition from liberal judges and advocates who are orientated to human rights protection. The latter do not believe in the legitimacy of an unjust law.¹⁹⁴ They believe that the law-maker is not always correct, and so, his laws need judicial correction where the wrong is discovered. The conservationist approach may be illustrated with reference to *S v Adams*,¹⁹⁵ where the Court held:

*An Act of Parliament creates law but not necessarily equity. As a judge in a court of law I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself and if I were sitting as a court of equity, I would have come to the assistance of the appellant. Unfortunately, and on an intellectual honest approach, I am compelled to conclude that the appeal must fail.*¹⁹⁶

Robert H Jackson of the US Supreme Court also expressed his concern that, the rule of law is under threat if the courts, rather than concentrate on the application of law, assume

¹⁹⁰ De Waal, Currie & Erasmus (n 164 above) 9-10.

¹⁹¹ Kanyeihamba (n 11 above) 64.

¹⁹² Cronje, De Beer, Scharf & Venter (1997) 3, 17, 18, 24; Scott & De Grandpre (2001) 16-19.

¹⁹³ Kleyn & Viljoen (n 21 above) 44.

¹⁹⁴ As above, 20, 44.

¹⁹⁵ *S v Adams* 1979 (4) SA 793 (T).

¹⁹⁶ As above, 801.

the role of law-making.¹⁹⁷ Robert Bork, a staunch proponent of judicial restraint, has put it in more stronger terms as follows:

*One may doubt that there are 'fundamental presuppositions of our society' that are not already located in the constitution but must be placed there by the Court. The presuppositions are likely, in practice, to turn out to be the highly debatable political positions of the intellectual classes. What kind of 'fundamental presuppositions of our society' is it that cannot command a legislature majority?*¹⁹⁸

Now the question arises whether the conservationist approach can be the answer where human rights are and continue to be the subject of erosion by government. Is it not deceiving to advocate for judicial restraint and at the same time advocate for the protection of human rights? Judicial protection of human rights is indispensable to judicial activism. This was echoed by Professor Madhava Menon of the University of Delhi as follows:

*My anguish is all the more when I heard judge after judge from the newly independent countries of Africa and Asia advocating a very narrow and technical role for themselves and perhaps very reluctant to admit or to accommodate the emerging concepts of social justice, ideology of law and judicial activism. I heard judges vehemently reiterating that they are not politicians, nor are they legislators, nor are they social reformers. They reiterated that judicial restraint was their creed and justice according to law is what they are expected to do. Activism, some of them appeared to consider as dangerous to the very basis of the independence of the judiciary. They would accept law without questioning it.*¹⁹⁹

The passage reiterates the observation earlier made that the independence of the judiciary is not for the benefit of the judges, but for the aggrieved individuals. Judges who restrain their creativity in developing the law to meet societal changes do so to the detriment of the ordinary members of the society they purport to serve. Some even restrain creativity under the disguise that the law prevents them.²⁰⁰ In some situations, however, the judge neither adheres to the strict letter of the law, nor does he develop it to meet societal changes. This may be so for a variety of reasons, for example, it may relate to personal, political or social interests of the judge,²⁰¹ peer or supervisory pressure upon him.²⁰²

¹⁹⁷ Quoted by Kirby (1988) *DHRJ* 74.

¹⁹⁸ As above, 73; *Lee v Bude and Torrington Junction Rail Co* (1971) LR 6 CP 576, at 589; *Chenny v Conn* (1968) 1 ALL ER 799, at 782.

¹⁹⁹ Quoted by Dumbutshena (n 70 above) 185.

²⁰⁰ *Planned Parenthood v Casey* 117 SCt 2791, 2871 (1992).

²⁰¹ Naidoo (2000) 3 *JJOASA* 79 81.

²⁰² Laue (n 53 above) 119-120.

The stereotyped advocacy of judicial restraint is in itself inimical to justice and the protection of human rights. A proponent of judicial restraint may be likened to a domestic servant who watches a vicious dog attack a post messenger, and when asked why he did not stop the animal, simply answers: 'But I had nothing to do! Obviously my boss has foreseen very well that his dog could attack and cause harm to visitors. My hands are tied, my job is to feed and clean the dog. Nothing more.' A judicial activist would certainly have done the converse, save the poor man-even if it means hurting the dog and absurding his boss when he later finds out.

The discussions under the three subtitles above have both identified the judiciary as a central role player in a government. The State, as shown, may claim to be representative of the larger interests of society and, with this it may convince some. But if its justice system is such as to trace the judiciary file on the bookshelves of the executive and legislative organs of government, this is a reason for the investor to retreat and, for the civilised world community to shun the face of the governor. And inevitably, all these to the further detriment of human rights.

CHAPTER 4

EVALUATIONS AND RECOMMENDATIONS

4.1 Introduction

This research has sought to vindicate the concept of judicial independence against perceptions in Africa, that dispute its universal importance for the protection of human rights. It is now beyond doubt that independent judiciaries across the globe are fundamental requisites for the achievement of the underlying objectives of the UN Charter, the attainment of peace and justice. Therefore, failure to attain peace and justice hinders the attainment of all the human rights and freedoms that flow from an environment where there is peaceful coexistence among the human community.

4.2 Universal imperatives

The clock that has led to the disintegration of world divisions and unification of nations is irreversible and thus, all must march ahead united against the injustices that have periled mankind prior to, during and after the World War II. Injustices in Africa that are perpetrated and perpetuated as a result of bad governance, have resulted in the dehumanisation of populations of this part of the globe. And, as if Africa is not part of the universe, leaders whether democratically elected or militarily imposed, have closely guarded their tyrannies against external scrutiny in the protective disguise that an African affair is sacred to Africa and to the exclusion of other nations. Ironically, this sacredness is what makes the continent's inhabitants perpetual runners for life, refugees, 'untried' and indefinite prisoners, disappeared, unnecessary patients, beggars, rape objects and corpses of 'mass-graving'. This is inhuman and unfair. Ordinary Africans are voiceless as their voices are blocked in the process by the deaf ears of their mowers. Disputations of the role judiciaries ought to play in Africa do not represent ordinary voices but, the dominant voices of the perpetrators of injustice.

After the World War II, the western world restored law enforcement and justice institutions in Germany for the trial of human rights abusers prior and during the war.²⁰³ This restoration led to the rise in the adherence by leaders, to good governance practices which included, observance of the rule of law, democracy, separation of powers and judicial independence.²⁰⁴ Thus emancipated, the judiciary protected constitutional guarantees of human rights of individuals against governmental abuses and deterred potential abuses of same. At the UN level, the UDHR and later, ICCPR have popularised the importance of the independent judiciaries in the protection of human rights. The truth about this is that, it was necessitated by atrocities that had befallen mankind and which engulfed all human races. Accordingly, this should not recur in any other part of the world. However, most of Africa has not taken heed and atrocities have more often resurfaced in a systematic manner in the guise of the world. Unfortunately this is continuing. Certainly, Africa must begin to take the plight of her defenceless inhabitants seriously.

4.3 Legal and institutional framework

4.3.1 Clear constitutional demarcations

The ACHPR set the position of the judiciary in unequivocal terms for the states to ensure both legal and institutional emancipation of the judiciaries.²⁰⁵ Some constitutions have been identified in this research, which represent the picture that maintains in most other regions of the continent. While others make clear borderlines between the judiciary, legislative and executive organs of government, a large number entrench the dominance of the executive and legislative organs. Commonality in both of these approaches is that, they are in unison on the operational level. Both belittle the role of the judiciary, so that it becomes irrelevant whether judicial emancipation is constitutionally protected or not. Constitutions need to make clear separation of the functions of the three organs of government as dictated under the ACHPR.

It has also been revealed that the practice of most justice systems is that the executive is instrumental in the appointment of members to the bench. This ultimately has an impact on

²⁰³ Lingnau (2002) 24.

²⁰⁴ As above, 27.

²⁰⁵ ACHPR (n 23 above), arts 7 & 26.

the adjudication level as judges will be expected to render favourable decisions to the government. The emancipation of the judiciary, in light of the UN Basic Principles,²⁰⁶ requires both constitutional and institutional, let alone individual independence. Therefore, the justice systems need to allow for the establishment of judicial commissions by legal professionals that will serve in the management of the judiciary as a whole, which should include, appointment, promotion, discipline, suspensions or dismissals of judges.

4.3.2 Regulation in electoral laws

Electoral laws of most democratic countries bar the registration and recognition of political parties whose policies advance, *inter alia*, racial, religious, cultural, tribal or linguistic separatism.²⁰⁷ The effect is that such parties are excluded from participation in the public affairs of the state. The same can be done of the judiciary. Electoral laws must require parties to show clear policies and mechanisms regarding the education of party leaderships and followers, on the principle of separation of powers and the role of the judiciary in particular. This must be made a fundamental precondition for their registration and recognition for participation in public affairs. This is especially important as it has in practice proved difficult to persuade leaders in the higher echelons to adhere to democratic ideals of, *inter alia*, separation of powers. If this is done, it will inculcate a culture of good governance from the grassroots level.

4.4 Human rights education

4.4.1 Educating judges

The achievement of the democratic ideals contained in constitutions and human rights instruments are futile without the meaningful participation by individual judges themselves. Transforming justice systems should therefore encompass legislative, institutional and individual transformation. Thus, judges need intensive human rights education that should

²⁰⁶ UNGA Res 40/32 & 40/146 (n 6 above).

²⁰⁷ See ACHPR (n 23 above) art 1 read with arts 2, 8, 10(1), 13 & 19.

make them relevant role players in the protection of human rights and the development of domestic laws in line with international human rights norms and standards.²⁰⁸

It is recommended that governments introduce compulsory enrollments in human rights courses for aspirant judges to ensure that the protection of human rights is actually realized. This should equally apply to old-era judges who, having been indoctrinated to uphold unjust laws, may for lack of appreciation or appropriate training find it difficult to give value to human rights guarantees. This is especially inevitable in countries long dominated by a culture of impunity, corruption and massive human rights abuses. NGOs have played enormous role in raising awareness about human rights violations in countries across the world. Therefore, for the popularisation of judicial independence in Africa, the role of NGOs remains equally essential.²⁰⁹

4.4.2 Educating politicians

It is recommended that governments should introduce a special course on the 'separation of powers and the role of the judiciary' in which enrolment is made obligatory for aspirant public officials who are elected to office. So that no one hold office without the requisite knowledge of the separation of powers and its relevance to a democratic society.

4.4.3 Long term solution

The popularisation of the concept of judicial independence in Africa will need some long term programming. For this it is recommended that as with other human rights courses, the 'separation of powers and the role of the judiciary', as proposed in the preceding paragraph, be introduced at low-level schools and tertiary institutions as a compulsory course.

²⁰⁸ Heyns & Viljoen (2002) 559, 571; Holmstrom & Karlbrink (2001) 63-64.

²⁰⁹ Res on Human and Peoples' Rights to Education, Seventh Annual Activity Report of the ACHPR 1993-1994, (XXX), Annex X (*Documents of the ACHPR* p, 350).

5. GENERAL CONCLUSION

The perils associated with the excessive concentration of government power into the executive or legislative are common features that are preventable. Africa's economic success depends on her adherence to democratic values of the supremacy of the rule of law, separation of powers and judicial independence. Under this atmosphere human rights abuses diminish and the focus is then centred on the economic development of the nation. But when human rights are at stake, instability becomes a norm which is counterproductive. The abhorrence of the concept of independent judiciaries in Africa can only legitimise the prevalence of the menace elements of, power; imposition; endurance; and tyranny (P.I.E.T), which have become common characteristic features of most governments in the continent. Therefore, countenancing executive or legislative subordination of judiciaries in any part of the continent leads to the condemnation of the whole region. Human rights protection in Africa must certainly enjoy 'actual' priority on governments' agendas.

The realisation of this objective inevitably has financial implications. Different economic situations maintain in different countries. This is certainly not always the reason for governments' failures to accord with international human rights norms that dictate for fair-governmental-play to human rights protection. It simply requires prioritising, to attain certain goals as foundation for the realisation of others. Therefore, prioritising on the promotion of the independence of the justice systems represents the advancement of fundamental human rights and freedoms. Securing judicial independence is the basis for the achievement of all other societal interests. This can be a useful approach and an effective resolution to problems that continue to haunt the African continent.

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