Independence of the judiciary and human rights protection in Southern Africa

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Introduction

One of my LL.D students from Kenya recently gave me what I considered an excellent topic for LL.D research on justice and human rights. During preliminary discussion for a topic for her LL.D thesis, the young lady suggested she wanted to write on 'Demystifying the myth of judicial independence with reference to Kenya and South Africa'! I did not think twice before telling her to go ahead and develop her proposal based on that topic.

Judicial independence in Southern Africa is no more than a myth. Of course, we shall have to wait a little later before making conclusions about the outcome of my student's research but it is common knowledge that perhaps with the exception of one or two jurisdictions, and even in those cases, only in some instances, most Southern African countries merely pay lip-service to the notion of judicial independence especially when it comes to the human rights of natural suspects like independent-minded judges, legal practitioners, press-men and women, non-governmental organizations (NGOs), etc. Even though the constitution contains, as all of them in Southern Africa do, elaborate provisions on human rights, implementation of these provisions and m0re especially their enforcement is a tall order out of this world. Victims of human rights abuses such as most prisoners and poor people in the majority of Southern African countries, know particularly abuse rather than protection of their rights. Part of this is due to the glaring lack of independence or at least some semblance of it among key institutions charged with the responsibility to protect citizens. Where judges, magistrates and other judicial officers truly independent as proclaimed in theory, most of the hardships victims of human rights undergo would be minimal.

Is it dependence or independent judiciary?

The notion of an independent judiciary is very ancient. Constitutional experts have over centuries put forth a number of theories in a bid to try bring some clarity over the idea and sometimes to develop and give it new dimension. In particular, judicial independence is most often discussed in connection with the issue of power. In ancient times, rulers monopolized power in their hands.

Scholarship has emerged in post-modern Europe to advance the notion that in order for government to achieve its objective of providing effective governance, government should be structured on the basis of three elements, namely:

- Executive;
- Legislature; and

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- Judiciary

In other words, state power needed to be distributed and perhaps redistributed among the three branches equitably. None of the three should obtain more power than the other or others. Always, state structuring is the task to try and achieve an equitable distribution of power.

The aim behind this was to try and avoid one branch or arm getting more power at the expense of others. When one branch gets more than others, the structure could become distorted. Abuse of power is inevitable in instances where one branch has a monopoly access to it. It is tempting to abuse power to secure personal interests hence to silence critics, monopolise access to resources, etc.

Writing on Power, Bertrand Russell[2] has traced the different forms of power from Priestly Power to Kingly Power onto Naked Power, etc. He called naked power to be the kind that involves no acquiescence on the part of the subject'. He said:

'Such is the power of the butcher of over the sheep, over an invading army or a vanquished nation'.

But as we shall see below, separation of powers and independence of the judiciary are new concepts when it comes to African governance. Similarly, it is quite difficult for the African society to conceptualise such notions let alone practice them. Rulers but also people generally normally would ask but why should government branches be separate from one another? What happens if instead of separating the three, we fuse them? Under Africa's one-party systems, the three branches of government often were fused under one with the executive or the one-party being on top of the other two. In practice, how does separation of powers and judicial independence play themselves out? In a case involving political authorities, does the presiding Judge really behave independently of the government leader?

Just like the University of Pretoria above, a Zambian student in the postgraduate diploma in human rights offered by the School of Law of the University of Zambia, strongly argued many years ago in my tutorial that he could not understand how the judiciary could be said to be independent of the executive. Of course it was easier to dismiss his dilemma as due to his origins as a non-lawyer which the diploma allowed but coming to seriously think of it, judicial independence is more of an aspiration than reality in any jurisdiction let alone in Southern Africa. As this student argued, how can a government branch which totally depends on the executive for establishment, funding, appointment of officers including the Chief Justice, in some cases even day-to-day activities including the Chief Justice's foreign tours, be said to be independent?

If by 'independence' means the power on the respective judicial officer to preside on and control the proceedings in court i.e. to tell lawyers to quit the argument and go to the next and to not be influenced when they retire to write the judgment, then it is a narrow concept. Judicial independence construed in this sense is no independence in the basic sense of the word because it ignores the reality surrounding the work of the judge or judicial officer which is far more than merely court-room proceedings.

[2] . Bertrand Russell, Power. A New Social Analysis 1967, pp. 35-71

To arrive at a proper meaning of judicial independence, it would be important to stretch the concept to encapsulate those conditions often not evident during proceedings but which are crucial to a genuinely and sincerely independent judiciary. In other words, rather than viewing the term in its distinct parts, judicial independence should be interpreted in the holistic sense.

Nwabueze[3] has proposed that judicial independence in Commonwealth Africa can be discussed under the following headings:

- Historical Development of the Independence of the Judiciary in the Commonwealth Africa;
- Post-Independence Changes;
- The Special Position of Expatriate Judges; and
- The extent of Actual Political Influence.

Most of these elements are still relevant today as they were in 1977 when Prof. Nwabueze published his book. In particular, judges are occasionally put under political influences. In Malawi, for instance, Parliament had 'charged' three judges of the High Court accusing them of dishing out judgments in favour of the opposition (Judges Chipeta, Mwaungule, etc). In Botswana, Lesotho, Namibia and Swaziland, courts are still manned by expatriate judges usually serving very short terms creating uncertaintly in their minds and, therefore, under insecurity of tenure.

Judicial independence in pre-colonial and colonial phase

One of the most notable features of the structure of pre-colonial African society is the absence of the principle of separation of powers. Though society like any society everywhere entertained notions of justice, equity and governance in general, these were practiced differently from non-African societies. In Africa, the traditional leader and his or her council of elders constituted the pinnacle of state ensuring the protection of the population as well as providing basic goods and services. The traditional leader and more especially the royal council or traditional leaders' advisors played roles in justice, law making and implementation or the execution of the collectively arrived decisions. The same people that judged a case will either during the judgment or later pronounce on the new law and later too to its enforcement.

Besides Mauritius, Southern African countries operate under the heavy influence of customs and traditions. Despite colonialism, this influence of culture and tradition passed on from generation to generation has more or less remained. While judicial decisions are responsibility of the modern institutions of justice, lower echelons of society are still subject to the same cultural and traditional influences that guided ancestral societies. While legislative, executive and judiciary instruments in the modern sense save mostly elitist groups, lower classes largely remain under the sovereignty of custom. For example, rural communities still go to the traditional leader to seek justice for infringements caused them and to get land and other services when in need.

[3] . B.O. Nwabueze, Judicialism in Commonwealth Africa. The Role of the Courts in Government, 1977, pp. 265-279

Not surprisingly, this same experience was endured by African populations during colonialism. During colonialism, the judiciary was part of the civil service and, therefore, not independent of the executive.[4] The difference was that colonialism legislated or rather put the edicts on paper and, therefore, made permanent with the writing what was memorial. The colonial Magistrate, in so-called Anglophone Africa, was appointed by the British colonial rulers to play triple roles as executive, legislator and judiciary. Instead of sourcing him independently of the executive, the Judge would usually be promoted from among magistrates or ordinary civil servants. In his Long Walk to Freedom, Nelson Mandela reveals how his stubborn father, a traditional leader, declined to attend the summons issued against him by the local Magistrate.[5] Acting on a complaint lodged by a subject in elder Mandela's chiefdom concerning a lost cow, the local Magistrate ordered Chief Mandela to appear before him in his capacity as Chief to explain the wayward animal. However, instead of complying, senior Mandela declined to abide by the instrument and instead sent word to the effect that 'I cannot come. I am still preparing for battle'. Of course he was removed from office for defying 'government'. Like traditional system of government, colonialism did not entertain the notion of separation of powers in the colonies. This may have contributed to the less than enthusiastic response judicial independence received in post-independence Africa.

Synopsis of constitutional changes in Southern Africa

Starting from Angola, Botswana through to the Kingdom of Lesotho, the host of this workshop and to the neighbouring countries of Zambia and Zimbabwe, Southern African countries provide for some of the most progressive constitutions in the world. There is probably no region in Africa which matches Southern Africa in the provision of some of the most progressive values and institutions of state. After historical adoption of the Constitution of the kingdom of Swaziland simultaneously with that of the war-torn Democratic Republic of the Congo (DRC) around 2005, virtually everyone of the Southern African countries was proud owner of a third generation constitution mirroring world values and institutions. Due to the unstable political situation in Zimbabwe, the 'Lancaster House Constitution' that ushered that country's independence is currently being reviewed with the aim to broaden space so as to fit all political players in that country. One of Africa's biggest islands - Madagascar - is under similar political instability as Zimbabwe, a fact which effectively postpones the constitutional programme.

But it was the 1996 post-apartheid Constitution of South Africa which took the world by storm. Given its background as a pariah state, it amazed the world that South Africa resurrected from the ashes to bestow unto herself an instrument which some of the most progressive ideas. Therefore, Southern Africa's reputation as a beacon of hope in a continent so easily dismissible largely comes from South Africa's democracy which, inter alia, is informed by the 1996 Constitution. Though a 'twin' of the South African Constitution, the 1994 Constitution of Malawi borrowed significantly from the transitional Constitution of South Africa.

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[4] . Ibid, 265

[5] . Nelson Mandela, Long Walk to Freedom, 1994, pp.20 – 30; Similarly, the small country of the British colonized The Gambia lying at the foot of Senegal under French colonial rule, at first annexed to the only American African colony of Sierra Leone, was reportedly governed by a fused regime headed by a governor who acted simultaneously as 'executive, legislature and judiciary'.

The notion of 'judicial independence' in Southern African constitutions

As indicated above, virtually all Southern African constitutions recognize the widely recognized notion of judicial independence. Section 165 (2) of South Africa's widely acclaimed Constitution states that:

'The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'

As well as borrowing from instruments like the Latimer House Principles, this clause has been replicated almost mutatis mutandis in a number of Southern African constitutions during their constitutional reviews. Save for minor differences as to form, the 1994 Constitution of Malawi and the 2005 Constitution of Swaziland reiterate the essence of this norm. Others may provide for the norm in somewhat different wording or formulation but retaining its central character. For example, in addition to the numerous provisions related to judicial independence, Section 79B of the Zimbabwe Constitution, as amended, provides:

'In the exercise of judicial authority, a member of the judiciary shall not be subject to the direction or control or any person or authority of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary'

Section 9 of Malawi Constitution Act No. 20 of 1994 states that:

'The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law'

We have noted below that the Constitution of Malawi of the post-Kamuzu Banda one-party government was enacted in the midst of historical changes sweeping across the Southern African sub-continent. With Nelson Mandela's release from 27 years of incarceration by apartheid regime, South Africa embarked on the historical process of writing a democratic constitution. Besides drawing from its experiences during dictatorship under life president Kamuzu Banda, Malawi benefited from the interim Constitution of South Africa and this clause above represents one of those experiences.

Furthermore, Section 165 (3) of the same Constitution of South Africa adds the important caveat that:

'No person or organ of state may interfere with the functioning of the courts'.

This too has been replicated in the Kingdom of Swaziland's 2005 Constitution, again mutatis mutandis. The difference being that while the architects of the South African Constitution had the apartheid state machinery in mind when it came up with the

above clause, Swaziland had traditional institutions which behaved like they were above the law.

Because Zambia had often been criticized for the failure to extend the concept of judicial independence as well as impartiality to the magistrates and other judicial officers other than judges, the post-review clause on judicial independence was extended and expanded in wording. Article 91 (2) states:

'The judges, members magistrates and justices, as the case may be, of the courts mentioned in clause (1) shall be independent, impartial and subject only to the Constitution and the law shall conduct themselves in accordance with a code of conduct promulgated by Parliament'.

As indicated, Angola, Botswana, Malawi and most other Southern African constitutions recognize and guarantee the notion of judicial independence. Surprisingly, Mauritius, one of the most widely acclaimed democracies in Africa throughout the period of one-party dictatorships, does not have an explicit pro-judicial independence clause in its Constitution. There are typical provisions one finds in a constitution describing the structure of government including judicial structures in the Constitution of Mauritius but the document is shy to pronounce itself on the specific issue of judicial independence. What this means is that while a country may not make special mention of judicial independence in its constitution, it may achieve it in practice. In other words, it is not enough to proclaim the independence of the judiciary for the judiciary to be independent. Much more will need to be done to actually achieve the standard in practice and a statutory proclamation to that effect though a desired natural first priority especially for countries emerging from the throes of dictatorships, nevertheless, does not achieve it by itself.

What, however, has not happened is the maturation of the norm into reality in most of these countries. In the context of human rights, a lot remains to be done to ensure judicial oversight and protection of human rights.

Judicial independence and protection of human rights

Just like the notion of judicial independence, constitutions of the majority of Southern African countries guarantee the universally acclaimed human rights and fundamental freedoms. The internationally guaranteed civil and political rights manifest in most of the Southern African countries including previously socialist countries. Again, there are differences in forms but the contents are more or less the same.

A distinct difference is the 1992 Constitution of Angola. Whereas the South African Constitution and constitutions of most other Southern African countries protect rights of 'every person' or of 'everyone' on the territory of the state in which he is, Angolan Constitution appears to protect the human rights of only citizens. Every clause in the Angola bill of rights would start with formulations like 'every citizen shall have' 'no citizen shall be subjected to torture', etc. As indicated, this formulation might offend universal norms and practice relating to the protection of

human rights which emphasise only the fact of human as being the basis for extending constitutional protection.

The next feature is enforcement. Common law jurisdictions tend to limit the right to claim a contravened right to the victim. The usual wording is 'any person who alleges that any of the rights enumerated in the foregoing provisions, inclusive, in relation to him…….'. This formulation has the effect that it instantly excludes 'busy bodies' and other interested persons who would want to defend especially vulnerable persons. 'In relation to him' is a restrictive clause. Protection of human rights is now accepted as a duty of all who have the means to do so. Means, in terms of material and non-material resources, means in terms of knowledge, all these will not necessarily be at the disposal of the victim. It is not only unfair to indigent victims in jurisdictions which do not operate effective legal aid schemes. In the end, emphasis on the victim as the only person with the locus standi to pursue claims in relation to him compromises the judiciary to independently apply the law in relation to victim's situation because he is no position to stand-up and complain.

As implied above, most Southern African countries do not guarantee socio-economic rights in their bills of rights. South Africa is a distinct exception in the region. During discussions for a post-apartheid constitutional deal, South Africa did not blink in using the Constitution to guarantee socio-economic rights.

Case law on human rights in Southern Africa

In Southern Africa, there has been mixed response by courts in trying to discharge their duty to protect human rights. Some judiciaries have responded boldly to assert their judicial power and interpret the law only on the basis of evidence before them. One of the earliest cases we see this is in the Zimbabwe Supreme Court case of Commercial Farmers Union of Zimbabwe v. Minister of Home Affairs and others (2000). In this case, the Supreme Court, faced with an unprecedented application by white farmers who sought protection following widespread land invasions that rocked that country following the referendum government lost, unanimously ruled in favour of the appellant. Of course, government ignored the ruling, influenced a junior acting judge of the High Court to nullify the ruling of his superiors and eventually, the ruling led to the dismissal of the Chief Justice. This case shows that courts can sometimes boldly stand-up against government.

The Kingdom of Swaziland had a similar experience. It was alleged that His Majesty King Mswati 111 abrogated customary law of the kingdom by appointing his brother to a chieftainship of a particular community which at the time had its own chiefs (Matseteng, 2002). When people rejected the development, government security forces invaded the community and beat people-up, tortured them, burnt and destroyed their houses and other property, forcibly transported them to other parts of the country against their will, etc. At the Court of Appeal, the Court unanimously approbated the actions. They held that the King had acted utra vires when he issued a proclamation in which he purportedly appointed his brother as chief. Following

this, government issued a statement warning the appeal judges and making it clear that it would not consider itself bound by the judgment. As a result, the judges resigned en masse in protest at the government statement. For two years, Swaziland operated without an appeal court. The matter was only resolved two years later after the introduction of the new Constitution under a more liberal of King Mswati's brothers.

Like South Africa, Botswana and Namibia are usually considered as rule of law based countries. But the treatment of minority indigenous Sarwa people (2008) in Botswana especially their eviction from their ancestral land because government declared the land a game reserve exposed the Botswana government's true colours. The Sarwa went to court to seek protection of their rights against an adamant government. The court decided in their favour. However, despite the clear ruling in favour of the applicant, government has not yet implemented it. In Namibia, on the other hand, the Cape Strip Treason case involving hundreds of villagers that allegedly rose up against the government of then President Sam Nujoma demanding their independence is another case of how courts can be bold. Though politicians issued threatening statements against presiding judges and warned them not to grant accused bail, courts did grant them, though of course, the exercise was merely academic. All the suspects and accused persons remained in jail. In Zambia, the High Court and Supreme Court upheld the basic human rights of a Satire British-born but Zambian resident Roy Clark (2005). Clark had authored a satirical article found by government to offensive of the dignity of government officials. Consequently, government decided to deport him back to his native country – the United Kingdom. Mr. Clark was married to a Zambian woman with whom they had children. However, the Courts protected his rights and set aside the government's decision. Finally, the South African Constitutional Court, of course, has led the way in the region in asserting the courts' duty to fearlessly protect the guaranteed human rights. The Court, in several cases,[6] decided against government and for victims. However, this was possible because South Africa has the minimum political environment for the rule of law which is seriously missing in other countries.

Therefore, given above, we can say without fear of contradiction that the main challenge to the independence of the judiciary and the duty of the judiciary to protect human rights is not so much in law as in practice. While exists for further development of the law on judicial independence and human rights, the main challenge is in practice.

In terms of practice, Southern African countries are broadly characterized by liberal states such as South Africa in which courts independently discharge their duties including protection of human rights. South Africa, Botswana and Mauritius broadly fulfill the criteria of post-modern state in which human rights may be enjoyed. The Constitutional Court of South Africa plays this splendid role. Through a variety of jurisprudence on both civil and political rights and socio-economic rights, the

[6] . See: S v. Makwanyane & another (1995, death penalty case); Soobrameny (1998, access to health care services and right not to be denied emergent treatment); Grrotboom (2001, right of access to adequate housing), etc.

Constitutional Court of South Africa has acquitted its role as custodian of the Constitution against state power.

However, the same cannot be said of the majority of states in the region. Not only in Zimbabwe and Madagascar which are in political turmoil, other states in the region have difficulties trying to ensure a judiciary that is free to discharge its core functions and particularly to protect rights. Without wishing to mention one particular case or cases, courts in these countries have tried to fearlessly defend rights but in extremely difficult conditions.