



**Southern African Chief Justices' Forum's 2nd Judges Summer Colloquium:
Independence of the Judiciary as a Challenge to Democracy, Human Rights and Rule of
Law**

Livingstone, 19 – 21 May 2011

Concept Note

1. Conceptual Background

The judiciary is the third branch of government responsible for the interpretation of the law.¹ As such, the rule of law dictates that the judiciary be independent of the executive and the legislature to ensure a division of labour allowing for the checking and balancing of power.² An independent judiciary is therefore essential to the building of just and democratic states in Africa. Unfortunately, the context within which judicial independence should be observed and practiced on the continent is often hostile.

Across Africa judicial independence³ is recognized albeit to varied extents – as both constitutional and legislative recognition are common⁴ – but the challenges lie with the implementation. These challenges stem from:

- the interlocking of state organs and their functions;
- the human factor, since judges and juridical officials remain part of the community with all its vicissitudes; and
- systems not all being the same in terms of what they hold dear, and in terms of their attitudes towards the law when it matters to them directly.⁵

¹ The executive makes government policy and the legislature is responsible for law-making. As justification, the principle of separation of powers as proposed by John Locke in his Second Treatise on Civil Government and Montesquieu in De l'Esprit des Lois expound on the vesting of power in separate entities as a safeguard against despotism. The principle of separation of powers therefore implies that the 3 distinct branches of government, the executive, the legislature and the judiciary function independent of each other; and thereby guaranteeing the independence of the judiciary.

² The principle of separation of powers as proposed by John Locke and Montesquieu expressed in terms of formulae have since proved controversial in practice.

³ Kristy Richardson *A Definition of Judicial Independence* notes that although a universally accepted definition of judicial independence is not available there are 3 recognized theoretical constructs. These constructs are 'insularity', 'impartiality' and 'authority'. The elements of 'insularity' include appointment, security of tenure, protection of salary and financial autonomy. 'Impartiality' includes the making of decisions based on law and fact, and ability to make decisions free of outside influence. And 'authority' includes how the law is made, public confidence, media relations and administrative law.

⁴ Section 165(2–3) of the South African Constitution; Section 103(1) of the Constitution of Malawi; Section 118(2) of the Constitution of Lesotho; Section 128 of the Constitution of Uganda; Section 91(2) of the Constitution of Zambia; Section 79 B of the Constitution of Zimbabwe; Section 127 of the Constitution of Ghana; Articles 165 and 166 of the Constitution of Egypt; and Article 78(2–3) of the Constitution of Namibia.

⁵ Joseph B Diescho in 'The Independence of the judiciary in Namibia', *The paradigm of an independent judiciary: Its history, implications and limitations in Africa* at 18.

On the international level, judicial independence is expressed under articles 8 and 10 of the United Nations Universal Declaration on Human Rights (UDHR). The UDHR emphasizes that every individual “is entitled to a fair and public hearing by an independent and impartial tribunal.” while the United Nations Basic Principles on the Independence of the Judiciary, together with the Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, indicate the international standards for judicial independence.⁶

On a regional level, the judicial independence finds expression *inter alia* under Article 26 of the African Charter; the Commonwealth Principles on the Accountability of the Relationship between the Three Branches of Government (the Latimer House Principles); and the Plan of Action on the Commonwealth (Latimer House) Principles of the Accountability of the Relationship Between the Three Branches of Government. However, resonance of judicial independence on the international, regional and national levels notwithstanding, challenges continue to plague and compromise the concept in practice. These challenges range from the history, politics, culture and the economics of the states and the region - case in point being the developments around the suspension and review of the SADC Tribunal.

The review process of the SADC Tribunal has forced the spotlight on some of the elements of judicial independence. These have included the appointments of judges and security of tenure. But more importantly, the suspension and review of the SADC Tribunal has highlighted a critical facet of judicial independence: justice must not only be done but must be seen to be done. The poor enforceability record of judgements by regional tribunals compromises the effectiveness and legitimacy with the citizens as it erodes confidence in the institution. Indeed public perception and confidence is relevant for the proper functioning of an independent judicial body.

Legal theorists and practitioners agree on the relevance of judicial independence to the rule of law, democracy and the protection and promotion of human rights. The imperative hence becomes to safeguard against any compromises to the independence of the judiciary. The judiciary is the most susceptible branch of government to threats from both the legislature and the executive as well as other external forces. There is continental clamour for depoliticized judiciaries. There is need for African judiciaries to shape the debate, develop and sustain judicial independence on the continent. Addressing these challenges requires the provision of the appropriate forum for dialogue, debate and charting the way forward. It is on this basis that the Chief Justice of Zambia and the Southern African Chief Justices’ Forum (SACJF) is organizing the Judges Colloquium in collaboration with the International Commission of Jurists (ICJ) and the Open Society Initiative for Southern Africa (OSISA), on the theme “Independence of the Judiciary as a Challenge to Democracy, Human Rights and Rule of Law”.

⁶ UN Special Rapporteurs for the Independence of Judiciary are occasionally appointed to monitor implementation of the basic principles and reports periodically to the UN Commission on Human Rights.

2. Aim & Objectives of the Colloquium

The overall aim of the Colloquium is to provide space for a critical review of the current state of judicial independence in the East and Southern Africa region, as an essential to foster democracy, human rights and the rule of law. Such review should help to protect and promote the independence of the judiciary in the region. In this regard, the Colloquium will be an opportunity to examine the current status of judicial independence; identify (emerging issues) real and potential threats; as well as share lessons learnt and best practice pertaining to judicial independence in theory and practice.

The specific objectives of the Colloquium are as follows:

- i. Review the current state of judicial independence within the East and Southern Africa region;
- ii. Identify real and potential threats to the independence of the judiciary;
- iii. The sharing of experiences and best practice on the promotion and protection of judicial independence;
- iv. Reaffirm the role of judicial independence, enhance awareness and further develop capacity;
- v. Create a basis for the development of a special interest network on judicial independence.

3. Outputs & Outcomes

The main outputs of the Colloquium will be a Declaration/Statement/Communiqué as well as a Report on the Colloquium. The Declaration will i) acknowledge the current state of judicial independence ii) highlight resolutions and/or recommendations iii) reaffirm the ideal of judicial independence.

The expected outcomes of the Colloquium include:

- Contribute to the development of shared values in East and Southern Africa on the concept of judicial independence and what is needed to effectively promote and protect judicial independence;
- Increased awareness of the real and potential threats to the independence of the judiciary in East and Southern Africa;
- Identification and adoption of best practice and remedial action where necessary with regard to the current state of judicial independence;
- The development of a network to secure and sustain interest and engagement on matters of judicial independence in East and Southern Africa;
- Public information on judicial independence through media engagement.

4. Format of the Colloquium

The three-day colloquium will have plenary and discussion sessions.

The plenary sessions will introduce and give an overview of the themes and sub-themes of the conference. These will include: Judicial Independence (Institutional and Financial Independence of the Courts and individual independence); Judicial Reform; Current & Potential Threats to Judicial Independence; Public Confidence; Constitutional and Legislative Guarantees; and the effect of Judicial Independence on the Protection and Promotion of Human Rights.

The interactive discussion sessions will be based on the plenary session theme. The discussion sessions will allow for experience, skills and information sharing with the intention of identifying real and potential threats as well as generating best practice.

5. Participants

The Colloquium will be attended by the Chief Justices from the judiciaries within the region, Judges from Zambia, and stakeholders from continental and regional institutions including the ICJ, OSISA, IAWJ, SADC LA; UN agencies, NGOs and academic institutions. Over 60 participants from national, regional and international institutions are expected to attend.

6. Facilitators

High level experts, members of the judiciary and scholars will serve as facilitators, presenters and discussants during the plenary and discussion sessions.

7. Duration & Venue

The Colloquium is scheduled to take place from 19 to 21 May 2011 at the Zambezi Sun Hotel, Livingstone, Zambia.

8. Partnerships & Collaborations

The SACJF and the Chief Justice of Zambia are the host. They are supported in the organization of the Colloquium by ICJ and OSISA. Financial support has been made available by the European Union and OSISA.