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**Botswana: authorities must uphold independence of judiciary in impending impeachment proceedings against four judges**

The International Commission of Jurists (ICJ) expresses its deep concern at recent developments in Botswana in respect of impeachment proceedings initiated against four judges and their suspension from office pending a disciplinary hearing.

The four judges, constituting one-third of the 12 Member High Court of Botswana, Justices Key Dingake, Modiri Letsididi, Ranier Busang and Mercy Garekwe, were suspended under section 97 of the Botswana Constitution on allegations of misconduct and bringing the name of the judiciary into disrepute.

The ICJ calls on all involved judicial and executive authorities to scrupulously respect the principles governing the independence of the judiciary in their conduct in addressing this serious situation, including in their actions throughout the course of any impeachment and disciplinary proceedings.

On 28 August 2015, the President of Botswana, Ian Khama, suspended the four judges after they, along with the other eight members of the Court, signed a petition directed to the Chief Justice. The petition had objected, among other things, to alleged poor conditions of service, as well as disparaging comments the Chief Justice was said have made about another judge's ethnicity and defamatory statements related to corruption. The petition also advocated for the Chief Justice's impeachment and was copied to all judges of the High Court. The Chief Justice and the President took issue with the contents and tone of the petition, alleging it to be disrespectful of the Chief Justice and causing disrepute of the judiciary in the eyes of members of the public.

On the 4th of September 2015, the Law Society of Botswana (LSB) issued a statement in which it condemned the actions taken by the Chief Justice and President against the four judges. The LSB considered that the case ought to have been resolved administratively rather than through what it said was "selective" impeachment of only four out of the 12 judges, particularly as no *prima facie* evidence existed that a crime had been committed. The LSB alleged that "the selective approach in suspending and subjecting to a Tribunal only four (4) of the twelve (12) Judges who had signed the Petition, supported the widely held view that the action was a witch-hunt intended to remove certain Judges and ensure a more Executive Minded Bench."

On the 23rd of September 2015, the LSB issued another statement following reports that three of the 12 judges had withdrawn their signatures to the petition after the judges had been "offered an 'amnesty' against any possible action being taken against them if they retract their association and / or apologise". The LSB went on to criticize an amnesty "made only to a select few of the Judges and not all" the 12 judges who signed the petition.

On 24 September 2015, the LSB issued a further statement calling on the Chief Justice to resign or face impeachment after the JSC offered amnesty to three other judges, who had signed or associated themselves with the petition. The amnesty extended to any possible action being taken against them if they retracted their association and / or apologized. The offer of amnesty was not made to all 12 judges that had signed the petition, and in particular, it was not made to the four suspended judges.

On 28 September 2015, the Impeachment tribunal was to have commenced hearing of the matter, but the four concerned judges instituted litigation against appointment of the Tribunal and their suspension, which litigation is still pending. Since then, the courts have been irregularly issuing instructions, contrary to proper procedure, through the Registrar of the High Court in the pending litigation, and given that the Registrar is party to the litigation, this creates an inherent conflict of interest. These developments surrounding this case have raised serious concerns over the independence of the judiciary generally but more specifically the prospects for an independent, impartial and fair hearing for the suspended judges.

On 15 September 2016, the LSB issued a statement on the revelation of a final audit report on judges' housing allowances for which the four judges have been suspended. The LSB alleges that the audit report revealed that three other judges had erroneously been paid housing allowance and that some amounts remain unpaid to date. It alleged further that report makes recommendations on steps to be taken against the judges, but that none of the recommendations include the actions taken by the Chief Justice, who instituted the audit, but did not await its findings before taking action. The "Final Audit Report – Honourable Judge's Housing Allowance" is dated 23 May 2016.

The selective institution of disciplinary proceedings against only four of the judges who signed the petition raises serious questions about the basis for the actions, including motives, of the Executive and Chief Justice, particularly because the latter is Chairman of the Judicial Service Commission on whose recommendation the Executive acts. A serious conflict of interest arises in this case because the subject of the petition (the Chief Justice) is the same person that can cause the Executive to take action against any judge.

The ICJ reminds the Botswana authorities of their duty to guarantee the independence, impartiality and accountability of the judiciary under international law, including the African Charter on Human and Peoples Rights and the International Covenant on Civil and Political Rights, treaties to which Botswana is a party.

The ICJ further reminds the Botswana authorities of their duty under international law and standards to guarantee the full enjoyment of the right to a fair trial for the suspended judges during the impeachment proceedings.

The ICJ has been monitoring developments and shall monitor the impeachment proceedings to assess whether they comply with the requirements of the independence of the judiciary and the right to fair trial under international law

and standards. In addition, the ICJ will observe the recusal application to be heard on 22 September 2016.

## **Background**

Article 7 of the African Charter on Human and Peoples Rights (ACHPR) provides that, "Every individual shall have ... the right to be presumed innocent until proved guilty by a competent court or tribunal; and... the right to be tried within a reasonable time by an impartial court or tribunal." Article 26 provides that "States parties to the present Charter shall have the duty to guarantee the independence of the Courts".

Article A 1.4 (g) of the Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa, adopted by the African Commission on Human and Peoples' Rights, provides that "all judicial bodies shall be independent from the executive branch".

Article 14 of the International Covenant on Civil and Political Rights provides in part that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

The United Nations Basic Principles on the Independence of the Judiciary include the following provisions:

8. ... members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Value 1 of the Bangalore Principles of Judicial Conduct, states on Independence of Judiciary as a Principle that "Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial."

The Commonwealth (Latimer House) Principles on the Three Branches of Government state in part as follows:

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.

...

Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

...

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.

## **Contact**

Arnold Tsunga, ICJ Regional Director for Africa, t: +27 73 131 8411 or +263 777 283 249 ; e: [arnold.tsunga@icj.org](mailto:arnold.tsunga@icj.org)