

The paradigm of an independent judiciary: Its history, implications and limitations in Africa

joseph b diescho

Introduction

The inevitability of human error, especially when human interest (which includes the exercise of power as an end in itself) comes into conflict with the claims of others, requires that a judiciary should interpret the law, and the assumptions, which underlie it, which is as far as possible independent of the Executive and the Legislature.¹

There is hardly any society on the planet today that does not, in one or other fashion, cherish or call for more independence of the judicial organ of state. This is so because there is a growing recognition and acceptance that, in order for people – as individuals, communities, organisations and even nations – to live in harmony, there ought to be a set of rules and regulations that are agreed upon, accepted and adhered to uniformly and with a fair degree of predictability. In addition, it is accepted that, in order for peace and equilibrium to exist, which in turn guarantee fairness and justice, there ought to be an arm of society that is equipped to interpret the rules without fear or favour. This reality recognises and calls for the institutions of justice, the courts, to assume an independence to interpret the rules without fear or favour.

The judiciary is that part of the government system which encompasses –

- the structure and jurisdiction of the courts and the officers of the courts
- the judges and their tenure, and
- judicial processes, by means of which the constitution and the laws of the country are interpreted, their implications adjudicated, and disputes between citizens scrutinised and mitigated under accepted rules and by duly qualified people, whose findings are respected by all concerned.

The independence of the judiciary from the influence and control of political actors is one of the hallmarks of a constitutional democratic system. Yet there are contradictions and challenges in all systems that aspire to adhere to the principles of an independent judiciary. The challenges are there due to –

1 Marsh, Norman S. 1959. *The rule of law in a free society: A report on the International Congress of Jurists, New Delhi, India, January 5–10, 1959*. Geneva: International Commission of Jurists, p 279.

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- 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.

The independence of the judiciary is an integral part of a constitutional democracy. As hinted above, the first difficulty associated with establishing this independence involves the judiciary inevitably being part of the political process: the political environment produces the leaders, who in turn appoint the members of the judiciary. In this sense, it is to be expected that there are fundamental relationships between the political actors and those who are assigned by these actors to execute the responsibility of interpreting the laws independently.

The second difficulty is the human factor. Although professionally trained jurists pledge to be impartial in their interpretation of the laws, and to be true to the intentions of the lawmakers of old, their human bias and preference may stand in the way of true impartiality.

The third difficulty comprises historical, traditional, cultural and experiential differences towards the concept of the law and its bearing upon all, without exception. In other words, there are cultures where the law is supreme, whereas in others, the person in the leader is more supreme than the law.

A cardinal feature of a democratic system is the doctrine that the judicial branch is independent, and that judges, as officers of the courts, are protected from political influence or other pressures that might affect their judgements. Hence the saying that judges hold office “during good behaviour”, meaning that they can be removed from office only if found guilty of serious offences, which is a difficult process indeed. The remuneration packages of judges and the attendant social prestige that accompanies their jobs are meant to give them financial independence cum immunity from economic and social temptations. Hence, in real democracies, members of the judiciary, especially of the higher courts, are held in higher esteem than their peers in the political branches of the system. In this context, a *democratic system* is to all intents and purposes that government which is informed by laws and not so much by the whims of people.

What is *judicial independence*?

Peter Russell opines that –²

... the judiciary's essential function derives from two closely related social needs. First, in a civil society we want some of our relations to be with each other and without government to be regulated by reasonably well-defined laws setting out mutual rights and duties. Second, when disputes arise about these legal rights and duties, we want a mutually acceptable third-party adjudicator to settle the dispute.

Constitutional democracy, as a system of government where the governor derives his/her power to rule from the governed, exhibits built-in problems. The very essence of such a democracy inheres in its assumption that human beings are prone to failure and power is prone to be abused. The human being, if left unchecked, can become a beast towards others. In the first place, democracy assumes that order can be created and sustained in a situation where human interactions are at play – but only when there is a composite of views and perspectives agreed to by the greatest number of participants.

A constitutional democracy is, therefore, fundamentally predicated upon the acceptance of reasonable precepts, as follows:

- The first precept is that there is no set of rules that is known to and accepted by all members in a uniform manner, to be adhered to by all in a similar fashion at all times, as had arguably been the case with traditional patterns of authority where the ruler attained such authority and power by hereditary right or by some unquestionable supernatural decree that in turn enjoyed the same respect by all concerned.
- Second, people living in a so-called modern society where standards of avarice rule do not necessarily maintain the consanguine relations that used to bring and bond together people into relationships, in such a way that they were all related and held a similar perspective on their happiness and well-being with respect to one another, as used to be the case with *ubuntu* in African communities.
- Third, as philosophers warn us, human beings, by virtue of who they are, are political animals with a strong motivation regarding survival and self-preservation that ought to be mitigated through agreed-upon and reasonable rules and regulations that protect all uniformly, fairly and predictably. These realities did not exist previously, or when they did, not to the same extent as they do nowadays, and

2 Russell, Peter H & David M O'Brien (eds.). 2001. *Judicial independence in the age of democracy: Critical perspectives from around the world*. London: University Press of Virginia, p 3.

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- Fourth, the effective functioning of a society requires a clear separation of powers in accord with the tasks that spheres of power have to exercise. Those spheres ought to respect and be respected by others – just as they, in their turn, enjoy relative autonomy from others. This division of labour, as it were, is to be observed in a transparent, equitable and predictable manner by all. It is in this context that the language of the independence of the judiciary emerges and assumes prominence: such an independence of the judiciary did not feature cardinally in previous societies where all powers, whether legislative, executive and interpretive, were not part of the common existential struggle for survival.

To be sure, the role of the judiciary, not to speak of its independence, arises only in the context of a constitutional democracy, which sets in motion a host of new problems and challenges that only occur with democracy. Put simply, democracy mitigates the problems of democracy. In the old traditional fiefdoms in Africa and arguably elsewhere, there was only one ruler: with unfettered powers to make laws, interpret them and apply them as s/he deemed fit at a given time. The ruler was the legislator, the prosecutor, the judge and the spiritual high priest at the same time, and the ruled were treated as subjects – not citizens. The subjects were at the ruler's beck and call. To larger and lesser degrees, many colonial administrations in Africa possessed similar powers over their colonial subjects: hence the struggle for freedom, self-rule and political independence by Africans, who wanted to rid themselves of the shackles of both the uncontrolled traditional powers of their rulers (who became the conduits of colonial abuse and subjugation) on the one hand, and the foreign rulers that strode over the African landscape on the other.

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Some of the cornerstones of judicial independence follow, for consideration:³

- Judges are free to evaluate, objectively, the facts of the disputes placed before them by applying the constitution, existing laws and ordinances objectively and without duress from other organs of government
- The judicial arm of the state operates independently vis-à-vis the legislative and executive spheres of the same socio-political system which created them all
- Officers of the courts are independent from one another, and seniority in terms of the judicial hierarchy does not affect their judgement in relation to one another
- All matters of a judicial nature are attended to by competent members of the legal fraternity
- Assignment of judges to handle cases is undertaken by senior officials of the court solely on clear and convincing evidence of their ability to perform the required tasks
- Tenure of judges lasts until retirement in terms of conditions established by appointed members of the legal enterprise
- The state allocates sufficient financial and other resources to the judiciary to obviate temptations that arise as a result of financial insecurity
- Disciplinary action against judges is taken solely on convincing grounds of inability to perform, and
- The selection and appointment of judges is purely on selective criteria in accordance with the merit system.

3 The United Nations Universal Declaration on Human Rights of 10 December 1948 lays the foundation for the fundamentals that must be observed by all member states of the United Nations with respect to the independence of the judiciary. Many states in Africa have adopted these requirements in their own constitutions. Article 78(2–3) of 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 127 of the Constitution of Ghana; and Article 78(2–3) of the Constitution of Namibia, to mention but a few, make commitments to the independence of the judicial branch of government. Cf. also UNHCHR/United Nations High Commission for Human Rights. 1985. UNHCHR/United Nations High Commission for Human Rights. 1985. *Basic Principles on the Independence of the Judiciary, Adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985.* Available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm; last accessed 14.10.2008.

A history of the doctrine of judicial independence

The genesis of the doctrine of judicial independence is to be found in the evolution of a constitutional democratic state in Europe. It is accompanied by the development of the rule of law, with the attendant prerequisites of the separation of powers and the existence of checks and balances. The debate about the role of the courts in general and the judges in particular evolved in the context of the history of the exercise of unfettered power by political rulerships, mainly in Great Britain, but also later in the United States and Europe.

Historically, the institutional and normative conditions that precipitated the evolution of a constitutional or democratic system operated in Europe in two distinct ways: as a product of the yoke of absolutism, and as the antithesis of unfettered power. The collapse of the feudal system and the unification of nation states based on large political territories under absolutist monarchs generated national economies and political systems that needed a different type of law and order. Conditions arose that led to the emergence of a new mercantile bourgeoisie. At the same time, the interference of absolute monarchs in trade created conflict with this emerging bourgeois society which nurtured new expectations of its own. Importantly, this context of struggle by the bourgeoisie against the old doctrines, such as that of divine rights which justified absolutist rule and unlimited powers, generated a slew of political and constitutional debates that in turn set the pace for constitutional systems.

The rule of law emerged to limit the whims of rulers by subordinating their acts to the law. In its general application, it ensured that citizens, the state and its institutions – including, of course, the monarch – were all subjected to the supremacy of the law. The rule of law formed the basis of a state strong enough to secure order and free commercial activity, but one limited in its competence by the restrictions of the law.

In its political sense, the rule of law signified a landmark transformation of the absolutist state to a liberal constitutional state. This was a state born of the political victory of the bourgeoisie against the exclusive political power of the monarchs. Economically, the laissez-faire spirit was replaced by a new state of affairs wherein a power derived from a contract, and power was to be shared between the upper and middle ranks of society together with the ruler. This was to become the constitutional system in a democratic system of governance.

It is against this background, therefore, that traditional scholars of constitutional theory regard the original edifice of constitutionalism as the subordination of the exercise of governmental power to legal rules.

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Most constitutional law experts would concur that the independence of the judiciary is only possible in a constitutional democracy that involves the proposition and appreciation that the exercise of governmental power is bounded by rules: rules that prescribe the procedures according to which legislative and executive acts are to be performed, and delimit their permissible content.⁴

In simple terms, this background was as follows: the King of England did not hear cases himself; therefore, he depended upon certain people to do so on his behalf, and in his name. The King's representatives did not have their own minds, so to speak, but stood in for the King and reported directly to him. The decisions they made were his decisions, which, once he was satisfied with them, could not be questioned. Over a period, the role of the interpretive courts evolved into a separate institution altogether.

The struggle to limit monarchical powers in the history of Great Britain continued for a long period since the issue of separating legislative, executive and judicial powers in England was not an easy one, particularly because the British have never developed a written constitution. It was only with the seizure of power from King William in a coup d'état in 1668, when legislative powers were stripped away from the absolute monarch, that it became possible to wrest power away from the one person who had until then been the maker, interpreter and enforcer of the law. The settlement – which allowed him to return to the throne – was the agreement that Parliament would henceforth make the laws, albeit in the name of the King. From then onwards, the British King became more and more of a figurehead, functionally speaking.

The country whose constitutional history has a more direct bearing on the modern judicial independence debate is the United States of America (USA). The American experience commenced as a rebellion from the established British and other European systems of absolute power in the hands of one person or a system. The USA as we know it was predicated upon the desire to establish and commit itself to creating a constitutional system with clear checks and balances among the three organs of government.

Alexander Hamilton, one of the framers of the American Constitution, wrote the following in defence of the independence of the judiciary in the constitutional system:⁵

4 Le Sueur, AP & Herberg, JW. 1995. *Constitutional and administrative law*. London: Cavendish Publishing Ltd; Parpworth, Neil. 2002. *Constitutional and administrative law*. London: Butterworths LexisNexis; Yardley, DCM. 1964. *Introduction to British Constitutional Law*. London: Butterworths.

5 *The Federalist*, No. 78.

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... there is no liberty, if the power of judging be not separated from the legislative and executive powers ...

American President Woodrow Wilson (1913–1921) argued that government –⁶

... keeps its promises, or does not keep them, in its courts ... The struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent and impartial courts ...

Following this, and in subsequent court rulings and political utterances, American opinion-makers have been consistent in their defence of the judiciary. In *Brown versus the Board of Education* (1954), a landmark decision, the United States Supreme Court declared that the existing separation of education facilities for children of different race groups was inherently unequal and unconstitutional. Other countries, arguably to lesser degrees, have made strides in advancing the independence of the judiciary in the promotion of mature constitutional democracies.

Doctrinal independence in the American system requires that Congress not reduce judicial salaries directly or indirectly, remove judges during good behaviour, nor usurp the judicial power by modifying court judgments. *Functional* independence refers to the freedom from interference that flows naturally from the judicial office in the absence of regulation in terms of a congressional delegation of authority to the courts. Put another way, in the absence of congressional or intra-judicial regulation, judges enjoy the functional independence to do whatever they are not prohibited to do.

Customary independence refers to the zone of independence – norms, if you will – that Congress respects when exercising its constitutional powers over courts and judges. It is derived from time-honoured interpretations of the constitutional limits on congressional power, notably as Congress has defined them, together with closely related notions of inter-branch comity that courts and Congress have traditionally respected as a permanent fixture of government in a system of separated powers. Customary independence differs from functional independence in that such independence – like doctrinal independence – is in significant part a product of constitutional interpretation. Unlike doctrinal independence, however, customary independence concerns political or quasi-political constitutional questions in which the interpreter of primary, if not final, resort is Congress rather than the courts.

6 “Importance of Judicial Independence: Remarks by Sandra Day O’Connor, Associate Justice, Supreme Court of the United States before the Arab Judicial Forum”, Manama, Bahrain, 15 September 2003.

Democracy and the rule of law

The struggles for freedom from colonial rule in Africa were, without exception, waged for self-rule and democracy. Yet the connection between democracy and the rule of law was not made by freedom-seekers, as it ought to have been. The understanding of *democracy* during the liberation struggle was restricted to the desire to end racial and colonial oppression and to take over power. In political terms, *democracy* in the minds of the liberation leaders echoed what the first President of Ghana, Kwame Nkrumah, so strikingly expressed:⁷

Seek ye first the political kingdom, and all things will be added unto you.

Democracy without the rule of law is just as empty as the rule of law without democracy. Democracy concerns the rule of law and the rule of law deals with the independence of the judiciary. In other words, the rule of law is a necessary condition for democracy and sustainable development. If Africa is in dire need of democracy, as both a necessary as well as a sufficient need for sustainable socio-economic development, then the actual cardinal need is for a system where citizens play a meaningful role in the affairs of the state. This relationship between the system of government and the citizens must be characterised by a clear understanding and appreciation, by both parties, of the separation of powers, protection of human rights, and due process. After all, development is about human progress and enhanced quality of life – which is a consequence of a mature network of communications and relationships, including the manner in which disputes that are bound to occur from time to time are settled.

It has to be emphasised that absolute deference to the rule of law in any given society is more of a theoretical concept than a practical reality, even in systems that can claim to be advanced in democratic practice and economic development. In fact, all systems, even those that are not in a position to boast of real democracy and development, have some semblance of respect for human rights and the rule of law. The degrees of this respect vary with time and administrative circumstance: mature democracies usually show greater respect for the rule of law than newly emerging democracies, a category in which most African countries find themselves. However, violations of human rights exist even within mature democracies, since abiding by the rule of law is never comprehensive, and there will always be the possibility of violations, to varying degrees.

⁷ Melady, Thomas P. 1961. *Profiles of African leaders*. New York: Macmillan, p 133; Kwame Nkrumah's famous political dictum as regards independence in Africa.

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Many African countries, at least at the level of the popular demands for participatory systems of governments, are, at the level of discussions, committed to the rule of law and the observance of judicial independence. Therefore, the transition of Africa's emerging democracies into mature systems of governance that will in turn facilitate real stability and peace will not only take time, but will also require African governing elites to commit themselves to and guarantee more rights and freedoms to their citizens, just as they must remain congruent in their promotion of democratic processes in the societies they purport to govern.

The recognition and effective application of the principle of the separation of powers is essential for achieving judicial independence. This principle is, however, not a self-enforcing one; nor are the categories of public power which are to be separated entirely clear-cut, completely self-contained, or mutually exclusive. There is always the possibility that one branch of government will deliberately or unwittingly encroach upon another branch's powers. In Africa, invariably, the strong executive branch devours the available space and interferes as a matter of course in the legislative and judicial functions of government, being two of the readily available instruments with which to pursue and fulfil political ambition.

It is important to emphasise that, in essence, the separation of powers concerns a coordination of functions more than their real or absolute separation. As much as the division of labour between the branches is to be delineated, they must still know what the others are doing in order for equilibrium in or cohesion of government to occur. This represents a call for constant review and communication.

While the separation of powers between the judicial branch and the other two branches of government, particularly the executive, is the most essential aspect of judicial independence in every democratic system of government, the existence and role of a department of justice (or, in some countries, a ministry of justice), and its relationship to the judiciary constitute central issues that have to be dealt with concisely. Wherever such departments exist, however, they inevitably have ties to the judicial branch – no matter how democratic the system of government. The strength or weakness of these ties has to be measured in the light of the said department's ability to infiltrate the judiciary. This ability may result in interference with, and at times the domination of, the judicial function in countries where the executive exercises de facto control over the other branches of government.

For reasons of political economy it may be easier to sustain an independent judiciary once it is established than it is to establish it in the first place. It takes

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time for a judiciary to prove that it is in the universal self-interest (or self-interest of those with political power) to set such an institution in place. But, once in place, the gates of a veto over ordinary and extraordinary legislation protect the judges.

The relative, but not absolute, insulation of the judiciary means it is apart from politics but still influenced by political forces. Those forces operate both to protect judges and, at times, to threaten them. The observable result of this is some tempering in the direction of judicial decision-making toward public opinion, although the mechanism of this is not entirely clear.

Finally, differing retention systems for judges will have an influence on the politics that effect judicial supremacy and judicial independence. It might well be that the more insulated judges are, the less willing the public is to accord them great authority. By the same token, the more vulnerable judges are, the more likely it is that attacks will be directed at individual judges rather than at the courts as a whole, providing greater authority to the judiciary.

Social justice

Democracy – and, for that matter, development – is about justice: political justice, socio-economic justice and, indeed, juridical justice. Democracy denotes a system wherein all citizens feel protected by the same standards or rules, to be interpreted by the same principles at all times, and as fairly as possible. In its historical sense, *justice* is about giving everybody his/her due and setting right wrongs.

In the Hobbesian notion, *justice* is about respecting the covenant that is the constitution; that those entrusted with power are there to serve, and when they fail to serve, that is unjust, for they have deviated from the contract. In this sense, the political system is there to serve the needs of the people and combat the ills that beset citizens such that they do not enjoy the rights of joy and happiness. There can be no social justice where poverty is rampant, where a few get richer at the expense of the majority: and this threatens democracy.

The African experience

There is very little debate about the rule of law in studies concerning African politics prior to and after the attainment of political independence. Indeed, many authoritative treatises on African traditional and political systems make almost

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no mention of the rule of law at all.⁸ This indicates that the rule of law as such has never been a major issue in the conceptualisation of democracy in Africa: hence the many problems at present that are associated with the reluctance of African leaders, however well-educated or informed they may be on the tenets of democracy, to accept the rule of law. Neither nationalist nor liberation leaders in Africa have internalised its significance.

It seems that, once in power, African leaders revert to the African traditional modes of doing politics. Africanists⁹ are unanimous in their conclusion that rules in the African traditions they studied were accepted by custom and tradition as having emanated from the exhaustive deliberations between men of speaking age and the ruler:¹⁰

All the people were entitled to express their opinion on affairs and they did this through the heads of their kinship groups and then their immediate political officers.

The rules governing African communities were unpredictable and often subject to the whim of the incumbent holder of power. Subjects, often referred to by the ruler as slaves, were obliged to negotiate their own relationships with the ruler – the owner of people who was, throughout his reign, above the law. As noted earlier, he was the accuser, prosecutor, the judge and the high priest – assisted by a personally assembled jury of senior councillors who served at his mercy and were at his beck and call. The councillors were accountable to the king, not the people. At times, they would convey intercessions to the monarch. What is sometimes referred to as the ‘prototypical African democracy’ took the form of intercessions and lively deliberations when the king approved of such: however, these interventions occurred without any hard and fast rules of engagement.

African kings and rulers, by virtue of their special place in their societies, occupied unique roles in socio-political and economic life. It must immediately be stated that not all African peoples and localities were governed by traditional rulers in the form of kings, queens or chiefs. Generally, Africa is as dissimilar as it is similar. However, the position of the traditional African ruler, where

8 AR Radcliffe-Brown (1978), in the seminal book by Fortes and Evans-Pritchard, makes scant mention of the rule of law when referring to the mechanism by which African communities would use communal sentiments as mechanisms to punish those who were seen to have violated common understandings (Fortes, M & EE Evans-Pritchard (eds). 1978. *African political systems*. London: Oxford University Press, p xviii).

9 Cf. Diop, Cheik Anta. 1974. *The African origin of civilization: Myth or reality?*. Westport: Lawrence Hill and Co.; Mutwa, Credo. 1964. *Indaba my children*. Johannesburg: Blue Crane Books.

10 Fortes & Evans-Pritchard (1978:29).

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one existed, was invariably the same in character and content. Rulers in Africa were not simply political heads: they were mystical and religious figures, divine symbols of their people's health, cohesion and welfare.

Often, individual rulers did not possess outstanding leadership qualities or abilities, yet they remained the link between their people's human existence and spiritual world. They were divine or sacral heads, perceived as a shadow reflection of a Supreme Being's rule over human existence. As mediators and mitigators between the world and God, rulers were highly elevated, being accorded titles such as Saviour, Protector, Child of God, Chief of Divinities, Lord of Earth and Life. The people, as their subjects, believed and accepted that rulers could do what they pleased, even controlling rainfall, for instance, and remained their permanent link with God. Rulers were expected to intercede for the people in times of grief and uncertainty. Simply put, rulers were not ordinary folk.

The hereditary ruler in most African societies assumed a semi-divine significance and performed roles in national ceremonies as the priest, rainmaker, intermediary, diviner and/or mediator between people and God. Rulers maintained shrines, temples, sacred groves, personal priests and diviners in or near their palace. Their spirit never departed from their people. Narratives abound that such rulers were reincarnated to continue to preside over their successors, who in turn offered sacrifices or gifts in concert with other earth dwellers still living. The graves of rulers were sacred places, with servants, guards and sometimes priests; in some societies, they acted as a sanctuary for animals and human beings as well, so that none would be killed there. People were expected to speak well of them, bow or kneel before them, let them enjoy sexual rights over their wives and daughters, pay them dues, obey them at all times, refrain from copying their clothes or coming into direct contact with them, and even render them acts of reverence.

When a ruler died, it was said that "The season's air was evil towards the kings", "He has returned to the sky", or "He has gone up to higher powers". Such a passing on invariably brought the rhythm of the people's life to a standstill: work stopped and mourning was almost automatic and national. In some societies, sexual intercourse and even mating amongst animals was stopped as a sign of respect.¹¹

11 Mbiti offers an in-depth analysis of the African world view, which, for the purposes of this discussion, is an impediment to the rule of law and judicial independence in Africa (Mbiti, John S. 1990. *African religions and philosophy*. London: Heinemann). The African context that Mbiti offers does not augur well for equality under the law as the person – the ruler who makes the law – cannot be beneath the laws that s/he makes.

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This background is presented to illustrate that the rule of law as we know, understand and appreciate it today was not part of the African mind of old. Signs of this reality are visible and discernible everywhere on the continent, where citizens continue to live as subjects who are deemed not worthy of enjoying life and holding opinions under their postcolonial leaders.

The only area where we may discern the rudiments of what could have been the rule of law generally and the independence of the judiciary in the African context is in the societal understanding of the issue. As stated above, the ruler's power to appoint and depose chiefs and other subordinates was buttressed by the mystic qualities that surrounded his seat as king. This militated against the perception that he wielded absolutist or tyrannical power. Within the indigenous knowledge systems, it was sufficiently understood that there were sacerdotal officials who possessed certain powers as regards the investitures of the ruler and his/her family, so that in the final analysis it was understood that the king was subject to other opinions as he was merely a *primus inter pares*, a first among equals.

The paradox of African traditional legal administration

In his seminal book, *The black man's burden*, Basil Davidson¹² laments the manner in which post-independence African political leaders have inherited the Western-conceived concept of the *nation state*, but were unable to adapt it to the circumstances of Africa. The colonial state was created for Western conditions of change and transformation, and when imported into Africa, was used as a mechanism with which to oppress, suppress and subjugate the African people. One method of doing this was to divide and rule – by employing traditional chiefs as tools of the colonial system.

After independence, there was a sense in which the new political elite developed its own idea of how to work with traditional patterns of authority, invariably with almost the same sinister motives as the former colonialist administrations: to reach the common people for the purpose of control rather than to give power back to the people. Therefore, there is a degree of return to the use of traditional law and tribal courts to administer justice.

As indicated above, African traditional legal systems do not deal with the rule of law or the independence of the judiciary as a separate entity from the political establishment. In other words, if African traditional justice is to be followed,

12 Davidson, Basil. 1992. *The black man's burden: Africa and the curse of the nation-state*. New York: Times Books.

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then there will be a conflict in the context of the rule of law. Most traditional leaders would not consider themselves to be beneath anybody or any authority. For instance, when Nelson Mandela was President of South Africa, he did not consider himself above the King of Zululand, Goodwill Zwelithini, to whom he was so obsequious, and who was not elected by South Africans as Mandela was. The latter referred to the king as “my king”.¹³ In the African context, the traditional ruler is the final authority and arbiter, and there is no appeal. This means that a matter could be resolved in a Western magistrate court, yet the real finality would only arrive with the traditional ruler’s closure of the matter.

The case of Namibia

In specific terms, Namibia can boast of the existence of the independence of the judiciary in the context that it is spoken of today. Article 78(2–3) of the Constitution make specific reference to the independence of the courts and that no member of the executive or legislature should interfere with the functions of the judicial branch of the state. In the African and developing world contexts, Namibia has done extremely well in respecting its Constitution, even when it was hard for the executive do so. One of the moments when Namibia’s executive showed respect for the legal fraternity was in 1996, when President Nujoma appointed an Ombudsman and reversed his decision on the advice of the Judicial Service Commission. Acknowledging that he had erred, and acting on the recommendations of the Judicial Service Commission, the President appointed the first woman to the post of Ombudsman in Namibia.

Any attempt to argue that Namibia waged the same struggle for this doctrine as Britain and the United States had done would at best be fanciful. In precolonial Namibia, communities lived side by side as independent and self-reliant entities.

At the same time, it must be stated that the rule of law remains an ideal worth striving for. A major challenge Namibia faces is the transformation of the liberation movement, now the ruling party, into a true democratic political party that sees itself and functions as a political party contesting, against other equally competing parties, governmental functions. A Namibian state under the rule of law is one where it would not matter who is in political power, as long as that party wins in a free and fair election whose outcome is accepted by winner and loser alike. At the moment, we cannot say Namibia is there yet: there is a paradox that the very people who liberated the country have internalised, namely

13 Any time Mandela referred to King Zwelithini, he referred to him as such.

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that they are special citizens to whom everyone owes a debt of gratitude that can only be demonstrated by keeping them in power and perpetually treating them as being above the law; indeed, questioning them is labelled as unpatriotic.

The second major challenge is to develop a leadership across the board that cares more about the nation than parochial partisan interests. This is critical against the background that the project of nation-building ought to be an ongoing one. Namibians of different backgrounds are not yet as united as they could be, and when anxiety strikes, many Namibians return to their primordial tribal and/or ethnic bases for support. The notion of a nation operating under the same set of rules and laws – fair, predictable and justifiable – did not exist or did not constitute part of the people’s understanding of their peace and stability in relation to one another. Before independence, each community, tribal or ethnic, operated as an independent unit with a sovereign system of power relationships. The ruler of such a unit was considered the father of all, young and old, male and female, rich and poor. S/he was perceived as the provider of peace and security for all subjects, and as the final arbiter in all cases.

The third challenge is to translate the old heroic history of the struggle for justice into a national character that will propel current and future generations to refuse to be oppressed by others, from outside or from within Namibia. As in 1904, when Samuel KaMaharero, the Supreme Chief of the *Ovaherero*, wrote a letter to Hendrik Witbooi, Chief of the Nama, urging him to forget whatever differences they had had and to unite against foreign rule. In his letter, KaMaharero urged Witbooi to set aside their differences and rather “*die fighting*” together.¹⁴

It is important for Namibians to build upon the foundations of independence in a manner that imbues all to look at one another as equal citizens with equal rights and obligations, regardless of any differences they might have had in the past. Therefore, this calls for some kind of information management that would chronicle and inform citizens of the good things that the country has achieved since independence as well as those not so good from the past.

14 Drechsler, Horst. 1980. *Let us die fighting: The struggle of the Herero and Nama against German imperialism (1884–1915)*. London: Zed Press.

Limitations of the independence of the judiciary

The judicial system is part of a dynamic political system of a particular nation or time, influenced by cultural and historical circumstances that are not static. People change, times change, situations change, feelings change and attitudes that influence judgements change. Different epochs in history and political experiences that people go through have an effect on their understanding of the law, and influence their roles in society. The courts are but a segment of a system with which people who are qualified to use it shed light on the general life of a nation at a given time. Thus, like any other organ of a big machine called *the state*, the judiciary has limitations.

Limited power of the courts

Courts of law are meant to adjudicate on the constitutionality of laws within the framework of the constitution and the precedents of previous cases, especially in common law jurisdictions. This greatly limits the court's discretion to write into a decision anything it sees fit. Consequently, it can be argued that the power of the courts is fettered in that it is essentially a mechanical one. In other words, judges hardly apply discretion of their own: they merely compare the clear statements of the relevant constitution against Acts of Parliament or the local legislature in question, merely in order to ascertain congruence.

It ought to be highlighted that a constitution, as the basis for adjudication, is itself hardly clear or unambiguous. In fact, constitutions survive the test of time largely by being as ambiguous as they are, so as to offer room for succeeding generations to interpret them in accord with their own existentialist preferences and changes over time. In this manner, a constitution remains a living document that moves on – so much so that interpretations and decisions serve as mere precedents for new generations.

Political limitations

As has been commented, politics clearly could place a major limitation on the powers of the judiciary. To be sure, justices are appointed by presidents and commanders-in-chief who are anxious to promote certain policy and ideological agendas.

Once again, it cannot be overemphasised that members of the legal fraternity are citizens of nations and, thus, live in the same circumstances as their fellows.

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Their opinions are influenced not only by what they hear when in session, but also by their own experiences, hopes, frustrations, and even concerns about the possible repercussions of their judgements at a given time.

Self-imposed restraints

By virtue of the fact that judges are human, there are times when they may restrain themselves from doing certain acts. For instance, in times of war and instability in a country, courts may decide in ways that are clearly a consequence of the goings-on at the time, and may be too restrained to criticise a president as the commander-in-chief and main player in foreign affairs. Often, the state apparatuses might convey messages that will in turn influence judges to formulate their conclusions so as not to add to a sense of uncertainty, insecurity, or even danger. In the apartheid days, the courts invariably endorsed the fear-mongering of the state when dealing with political opponents who were agitating for democratic rights but who, in the eyes of the oppressive state, were terrorists and agents of communism. In this sense, self-imposed limitations were viewed as a form of patriotism and might even have been the consequence of ambition on the part of the judge who wished to gain favour from the political leadership.

Invariably, judges, like any other members of a professional fraternity, are motivated in their conduct by ambitions of success and their own jurisprudential legacy. This ambition might limit the extent to which their verdicts might stretch the independence of the courts over which they preside and even in the judges' quest for due process in their legal praxis.

Constitutional amendment by lawmakers

The courts are there to interpret the laws; therefore, they have no direct arm to enforce their rulings. It could happen that, after the highest court had finally ruled on a matter – let alone declared an act unconstitutional, it could still be overruled through the process of constitutional amendment by the legislature, even though, admittedly, this process is invariably onerous and cumbersome in a democratic setting. It is also true that even though governments are not always known for openly disobeying court decisions, they devise ways in which they avoid compliance.

Court-packing

At different times and under different circumstances, new political leaders and administrations consider it necessary either to stem the directions of the tides of the previous administrations or set the course for the new leader's directions

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by using the courts to influence events. In previous times, rulers would appoint counsellors who would direct affairs in their small spheres of influence in accord with the wishes of their appointing master; popes and archbishops would consecrate subordinate clergymen who would further the dictates of the pontiff; dictators would marshal their lackeys to use the law to further their ends; and even in modern times, some heads of state would pack courts of law with jurists on whom they could rely to interpret the law to fit their agendas.

In most of post-independent Africa, judges have been political appointees with a direct mission to follow the agenda of their incumbent leaders. In apartheid South Africa, courts were packed with judges and state prosecutors who understood their brief to serve a beleaguered state which had invented the enemies of communism and/or black majority rule. The courts' independence was curtailed in this way as well.

American presidents are known to have a proclivity to steer the judicial system in a particular direction in anticipation of the important interpretive function of the Supreme Court, the decisions of which could frustrate the agenda of the Administration in many reform programmes.

Furthermore, it is common in Africa that the president or the executive appoint under- or unqualified persons to fill the bench with the intention of manipulating them to direct the justice system in the interests of their appointing masters. It is common that many judicial service commissions in Africa are at the beck and call of the politicians, their minister of justice or even the president in question, such that the appointment of judges, prosecutors and attorneys-general are not based on merit but on political grounds of loyalty and/or simple timidity.

After all, as stated earlier, judges do not live in a vacuum, but are part and parcel of the body political mainstream of society, with the same worries and concerns as those facing the whole community. As such, judges, as family and community members, hold to the same understanding of the threats and risks facing the collective, and can make decisions that could be explained in terms of what obtains on the ground. The recent spate of court judgements in South Africa during the political fights in the ruling party illustrates how unpredictable the readings of the law are by individual judges in particular situations.

Historical contexts

Laws are contextual. Thus, their study and interpretation are also contextual. It would be incorrect to assume that laws in all situations and/or their interpretations are similar and universal. What is universal, however, is that laws exist and need

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to be interpreted by people who are trained to understand them and give effect to what they intend. Firstly, laws are made in accordance with prevailing human experiences and in order to mitigate circumstances; only later are circumstances themselves used to influence behaviour and other circumstances. Secondly, laws are regulations intending to minimise human conflict and address what may or may not happen to citizens if they deviate too far from the established norms and standards that are meant to guarantee the biggest number of people the highest form of happiness. Thirdly, laws are by no means static: they change with circumstances and experiences over time. Thus, as generations change, so does their understanding of what the laws were originally about and how to use them for the common good. Therefore, as later generations take over the three functions of state, their perspectives cannot be the same; consequently, they are likely to reinterpret the laws.

Personal/family relationships

It is not uncommon for African leaders to appoint their friends and relatives to judicial positions with a desire to influence the outcome of matters that reach their attention. This is acutely problematic in the African context, where the son of a president who becomes the minister of justice, attorney-general or the like is expected to treat the legal fraternity in a particular manner. This situation is exacerbated by the reality that, in many cases, those appointed to serve in the judiciary often use the legal profession as a stepping stone towards political leadership positions.

Challenges in the pursuit of judicial independence in Africa

It would be unfair to create the impression that the state of affairs in Africa in so far as the independence of the judiciary is concerned is only bad and negative. Africa has made great strides in spite of so many difficulties and contradictions. What is fair to say is that the road ahead is just as arduous for African nations as the road they have already traversed. The contradictions are myriad and the challenges manifold. Here are some of the challenges on the road towards a true rule of law with judicial independence.

Sed quis custodiet ipsos custodes? (“But who watches the watchers?)

And who will judge the judges? This is without doubt one of the major challenges in the pursuit of judicial independence. Good management always requires some measure of oversight, that is, that there is always accountability on the part of those who exercise decisions.

Plus ça change, plus c'est la même chose (“The more it changes, the more it stays the same”)

Referring to a changing Europe in 1849, French critic Alphonse Karr warned that the more things changed, the more they stayed the same. The study of law largely concerns developing objectivity of discernment when interpreting complex matters in the realms of human life and behaviour. Yet, there is cause to worry about the extent to which judges maintain objectivity. As suggested, judges, like any other human beings, do not always succeed in being pristinely objective. If they were, there would be no need for an appeal or a judicial precedent. Hence, the old story changes by remaining the same: the more judges try to be objective, the more they reinforce their humanness by not being so.

The need for education and literacy in democracy and the constitution

To all intents and purposes, democracy – with a built-in component regarding the role of an independent judiciary in Africa – will require a process of socialisation, starting with the school-going population, so that they internalise the tenets of real democratic states. In his influential book, *Democracy and education*, John Dewey cautions as follows:¹⁵

Democracy is more than a form of government – it is primarily a mode of associated living, of conjoint communicated experience. The extension in space of the number of individuals who participate in an interest so that each has to refer his own action to that of others, and to consider the action of others to give point and direction to his own, is equivalent to the breaking down of those barriers of class, race, and national territory, which kept men from perceiving the full import of their activities.

Arguably, part of the difficulty of achieving true democracy in Africa is that most of the members of the political elite have not received an education that could adequately prepare them to appreciate the paradoxes of democracy. Indeed, the current crop of leaders invariably pays lip service to democracy, and is inclined to respect democracy only when it suits them. When the rules of democracy no longer suit their political ambitions, they turn to undemocratic behaviour; and by doing so, they destroy the very rules they themselves have authored. It is incumbent upon African policy planners, therefore, to deliberately introduce educational curricula that elaborate on democratic rules and practices from very early on in young citizens' lives. This will ensure that, when they become participants in their bodies politic, they will have internalised the precepts of democracy, and especially that it is sustained by strong institutions and functioning civil society formations, not just the big men and women in positional power.

15 Dewey, John. 1916. *Democracy and education*. New York: Free Press, p 88.

Judicial activism

The role of the judge as a lawmaker cannot be overemphasised. Often, the law comes alive in the manner in which a particular judge interprets and or calls for the law to be enforced. Through judicial activism, judges influence the direction of the law. This happens when their interpretation of the law goes beyond the mere words of the texts at hand and beyond the matters mentioned: when they interpret the law purposefully, and say the unsaid through their interpretation.

Certain examples in jurisprudence attest to the fact that a court's interpretation of the law and/or a constitution could set in motion a dramatic course of events that might have far-reaching implications on the efficacy of the law, as in the 1954 case already mentioned.

More recently, in South Africa, the leadership battle in the ruling African National Congress (ANC) was accorded a dramatic turn of events by just a few remarks in a judgement by Justice Chris Nicholson of the Pietermaritzburg High Court on 12 September 2008, which led to the recall of President Thabo Mbeki.¹⁶ The repercussions of an inference made by the judge in a clearly activist mode are undoubtedly major for South Africa's constitutional democratic history.

The Ombudsman

One critical component of the administration of justice is the existence and role of the Ombudsman who, by virtue of the powers vested in his/her office, has the freedom to investigate any complaints with respect to the violation of human rights and freedoms and abuse of power brought to his/her attention by members of the citizenry. The Ombudsman, who is protected by law from interference by any state functionary, has the space, standing and obligation to be a judicial activist, mainly in the furtherance of judicial understanding by officials who do not necessarily possess sufficient knowledge of the law in so far as rights and obligations of all citizens are concerned.

Judicial review

One of the vexing issues in a constitutional democracy is the judicial review: the power of the judiciary to review actions of the legislature and the executive in

¹⁶ See "Zuma ruling fightback looms", *The Star*, 16 September 2008, p 1; "Is Mbeki recall a coup d'etat?", *The Star*, 23 September 2008, p 19; *The Mail and Guardian*, 19–26 September 2008 and 26 September–3 October 2008.

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the light of the supreme law of the land and/or the fundamental Bill of Rights. *Judicial review* refers to the institutional arrangements whereby courts of law exercise the power to invalidate or declare null and void the acts of the legislature, the executive and administrative officials when such courts find such organs conflict with or violate the written and unwritten constitution or other superior body of existing law.

One of the outcomes of a judicial review may be to invalidate specific legislation that is inconsistent with human rights conventions or the country's constitution. Either way, the courts, while conducting such a review, may be seen to interfere with the powers of elected officials; judges, on the other hand, are appointed officials, i.e. they are not directly elected by the people. This poses a major democratic challenge in any situation, since what is obvious to the judges is not necessarily the preoccupation of the politicians, who would tend to worry more about their political tenure.

Also, judges, by virtue of their own security, are more capable of interpreting the fundamental laws coldly and blindly, whereas the politician happens to be more seasonal and pedestrian by nature. This calls for judicial activism on the part of judges: to be conscientious and far-sighted in their interpretation of the regulations, be they the constitution or Acts of Parliament.

Return to respect for the social contract

It would appear that, for Africa to embrace the tenets of the rule of law and appreciate the necessity of judicial independence, more of a premium ought to be placed on the concept of a *social contract* with the governed. More importance should be accorded to the parallel between moral reasoning and political justification, as was expounded by the great social contract theorist, Thomas Hobbes, who cautioned that human beings left to their own devices without a moral compass would be hurtful to others.¹⁷ According to this theory, we are constantly at war (*Bellum omnium contra omnes*, "The war of all against all"). The argument here is that people need social pacts to guide their conduct vis-à-vis one another in order to achieve mutual advantage.

17 Hobbes (1651; cited by Tuck, Richard (ed.). 1996. *Companion to Hobbes*. Cambridge: Cambridge University Press.

Conclusion

Scholars of constitutional theory concur that the edifice of constitutional democracy is founded on the subordination of the exercise of governmental power to established legal rules such as the constitution and acts of legislation.

Central to this concept of government under the rules is the need to secure space for citizens' liberties through the establishment of a legal cordon around that space. The concept is rooted in the need to keep the state at bay in this way, in the belief that the scope of arbitrariness is drastically reduced and the autonomy of the individual preserved by a constitutional regime in which acts of government are based on predetermined rules. These measures aim to curb arbitrariness of discretion, and are to be observed consistently by the wielders of political power in a given socio-political and legal system. Constitutional democracy, such as the one African peoples pray for, is the –¹⁸

... antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.

At stake for most African states today is the uncoupling of executive from legislative powers, and judicial powers from both. In laying the tenets for this school of thought, the 18th-century French philosopher, Montesquieu, advocated in the strongest terms that the three distinct spheres of power contained in one person or body of persons would breed tyranny. Montesquieu argues as follows:¹⁹

When a legislative power is united with executive power in a single person or in a single body of magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically ...

Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to the executive power, the judge could have the force of an oppressor.

This understanding is in essence lays the foundation of administrative justice and constitutes the basis for the government of the people, for the people and by the people. Africa needs an order wherein the rule of law, checks and balances,

18 Nwabueze, Ben O. 1973. *Constitutionalism in the emergent states*. London: C Hurst & Co. Publishers, p 1.

19 Cited in Cohler, Anne M, Basia C Miller & Harold S Stone (eds). 1989. *The spirit of the laws*. Cambridge, Cambridge University Press, p 157.

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and an independent judiciary are not only enshrined in the constitutions of states, but appreciated and observed at all times. At the very least, this is essential for creating both necessary as well as sufficient conditions for the sustainable socio-economic and political development of this great yet not altogether happy continent.

The principle of an independent judiciary is the call for the courts to carry out their agreed-upon functions in an atmosphere of freedom from interference by the executive or the legislature, yet without giving the officers of the courts impunity to act in an uncontrolled and arbitrary fashion. Put differently, the call is for independence from political influence, whether exerted directly or indirectly by the political organs of government, by the public, or even by judges themselves through their involvement in politics. Judicial independence is the antithesis of arbitrary rule: it is the opposite of a despotic system of governance; it is governance through and in accord with the law.

The challenges are immense, but the desire to develop and sustain the independence of the judiciary in Africa is even greater and becoming more intense. It is in the interest of all – the ruler as well as the ruled – to deepen the commitment to the doctrine of the rule of law and to strengthen the institutions that allow the judiciary to execute its function of interpreting the law independently. This calls for a fundamental paradigm shift in African politics and administration of justice. This new paradigm is the only way to usher into Africa a culture of governance by the law and its institutions. Most of Africa has embraced constitutional democracy as the only way forward. Albeit with immense difficulty, great strides have indeed already been taken across the African continent to build upon the fundamental rules of democratic freedoms and liberties of citizens. One of the legs for striding into this desired future state is the rule of law. The independence of the judiciary, as part of the rule of law, is desired in Africa not only for purposes of the administration of justice, but also as a guarantor of justice and equality: the cornerstones of peace and sustainable economic development.