

The role of the executive in safeguarding the independence of the judiciary in Namibia¹

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*Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.*²

Introduction

Rather than thinking of the relationship between the executive and the judiciary as unhealthy, with the former threatening the independence of the latter, the executive should be considered a facilitator of the independence of the judiciary. It is imperative in a mature democracy – and similarly in an adolescent one like Namibia’s – that Judges are independent both of parliament and government. It is against this background that this paper endeavours to determine the role of the executive in safeguarding the independence of the judiciary. In particular, it aims to examine the Constitution of the Republic of Namibia with a view to establishing how the executive can employ the appropriate constitutional provisions to protect judicial independence, juxtaposing the two organs of state on the power-sharing stage with mutual and interdependent coexistence.

The need to seat the organs of state next to each other with some sort of specialisation is due to the potential usurpation of power. With this in mind, the analysis of the topic at hand will start with a consideration of the Namibian constitutional arrangement and monitor how that arrangement puts the Namibian executive in a position where it safeguards the independence of the judiciary.

- 1 Paper originally presented at the Conference on the Independence of the Judiciary in Sub-Saharan Africa: Towards an Independent and Effective Judiciary in Africa. The Conference was organised by the Konrad Adenauer Foundation’s Rule of Law Programme for Sub-Saharan Africa, and was held at the Imperial Beach Hotel, Entebbe, Uganda, from 24 to 28 June 2008.
- 2 Value 1 of the 2002 Bangalore Principles of Judicial Conduct. These Principles, developed by the Judicial Group on Strengthening Judicial Integrity, are increasingly seen as a document which all judiciaries and legal systems can unreservedly accept. The United Nations Social and Economic Council, in Resolution 2006/23 of 27 July 2006, invited member states, consistent with their domestic legal systems, to encourage their judiciaries to take the Bangalore Principles into consideration when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary.

Since this theoretical analysis needs a practical exhumation of the realities on the ground, tangible practicalities of the safeguards the executive offers will also be scrutinised.

The Namibian Constitution, democracy and the rule of law

The Republic of Namibia, as the country is known today, was declared a German Protectorate in 1884 and a Crown Colony in 1890; thereafter it became known as *Deutsch-Südwestafrika*, *South West Africa* and *South West Africa/Namibia*. The territory remained a German colony until 1915, when it was occupied by South African forces. From 1920 onwards, the territory became a protectorate, i.e. a mandated territory under the protection of South Africa in terms of the Treaty of Versailles. Significant local and international resistance to South Africa's continued domination of the country emerged in the late 1950s and early 1960s.³

In the wake of the substantial repression of an incipient nationalist movement within South West Africa, the South West African People's Organisation (SWAPO), under the leadership of Sam Nujoma, was formed in exile in 1960. The organisation committed itself to ongoing efforts to work through international bodies, such as the UN, to pressure the South African government, and took up an armed struggle against the latter. Political and social unrest within Namibia increased markedly over the 1970s, and was often met with repression at the hands of the colonial administration. In 1978, the UN Security Council passed Resolution 435 and authorised the creation of a transition assistance group to monitor the country's transition to independence. In April 1989, the UN began to supervise this transition process, part of which entailed supervising elections for a constituent assembly to be charged with drafting a constitution for the country. After more than a century of domination by other countries, Namibia finally achieved its independence in 1990 after a long struggle on both diplomatic and military fronts.⁴

The 1990 Constitution of the Republic of Namibia is the fundamental and supreme law of the land. The Constitution is hailed by some as being among the most liberal and democratic in the world. It enjoys hierarchical primacy amongst the sources of law by virtue of its Article 1(6). It is thematically organised into 21 chapters which contain 148 articles that relate to the chapter title. Together, they organise the state and outline the rights and freedoms of people in Namibia.

3 Amoo, SK & Skeffers, I. 2008. "The rule of law in Namibia". In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, p 17.

4 (ibid.).

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The Constitution excels in guaranteeing human rights by comprehensive coverage and provisions set out in clear language. Human rights are justifiable as their protection can be secured through the courts. The Bill of Rights embodied in Chapter 3 of the Constitution outlines the 16 fundamental rights and freedoms which voice the carpet values and spirit of the independent Namibian nation. Most post-independence jurisprudence revolves around the application and interpretation of Chapter 3. Article 10, for example, provides as follows:

- (1) *All persons shall be equal before the law.*
- (2) *No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.*

Article 12 of the Constitution contains the provisions for a fair trial. The principle of the rule of law runs throughout the constitutional regime.⁵ The Constitution explicitly states that Namibia is established as –⁶

... a democratic and unitary state founded on the principles of democracy, the rule of law and justice for all.

The fact that power is stated to vest in the people who exercise their sovereignty through the democratic institutions of the state in turn reinforces the concept of legitimacy.⁷

Central to the notion of *democracy* is access to information and public participation. Government has the duty to make available information to ensure that citizens know what it is doing on their behalf, something without which truth would languish and people's participation in government would remain fragmented. Only when government business is conducted in a transparent manner in which scrutiny by an informed public is allowed can the independence of courts be guaranteed. After all, the people of Namibia are the ones to confer power to the executive through democratic elections. If they are made aware of irregularities on the part of the government they voted into power, they are able to alter the situation through the ballot box.

The rule of law, apart from concepts such as *separation of powers* and *limited government*, is another factor that contributes to democracy. Constitutional

5 Hinz, MO. 2003. "The rule of law and the new African constitutionalism". In Hinz, MO (ed.). *Without chiefs there would be no game: Customary law and nature conservation*. Windhoek: Out of Africa Publishers, p 273.

6 Article 1(1), Namibian Constitution.

7 Article 1(2), Namibian Constitution.

theories were written about the rule of law centuries before the concept of *constitutionalism* gained momentum. What is noteworthy is that constitutionalism is related to both democracy and the rule of law. Indeed, the doctrine of the rule of law and constitutionalism both deal with the limits on the exercise of the powers of government. They rest on three premises:⁸

- The absence of arbitrary power: No person is above the law and no person is punishable except for a distinct breach of the law established in the ordinary manner before the ordinary courts
- Equality before the law: Every person is subject to the ordinary law and the jurisdiction of the ordinary courts, and
- Judicial decisions confirming the common law.

Separation of powers

The principles of Montesquieu's theory of the separation of powers require that the three organs of a state exercise their constitutional functions independently from each other, meaning that one branch should not interfere with the functions of another organ of state.⁹ In order to guarantee and protect the fundamental rights of the individual and to prevent dictatorship and tyranny, established mechanisms need to be put in place to place constitutional and legal restraints on the powers of government or the various organs of state.¹⁰ The need for checks and balances on the powers of the separate branches of government is central to a constitutional state, because these measures avoid the concentration of power in one particular branch of government and so prevent dictatorship and arbitrariness in government.¹¹

In Namibia, the separation of legislative and executive powers from those of the independent judiciary is guaranteed. Various mechanisms are put in place to ensure that each branch of government remains independent of the other through a system of checks and balances.¹² According to Article 1(3) of the Constitution, there are three main organs of state: the executive, the legislature,

8 Dicey, AV. 1965. *An introduction to the study of the law of the constitution* (10th Edition). London: The Macmillan Press Ltd, p 15ff.

9 Bradley, AW & KD Ewing. 1997. *Constitutional and administrative law* (12th Edition). London: Longman, pp 89–90.

10 Amoo, SK. 2004. "The concept of *constitutionalism*". Unpublished notes prepared for first-year students taking the "Introduction to Law" course. University of Namibia, Windhoek, p 170.

11 (ibid.).

12 Diescho, J. 1994. *The Namibian Constitution in perspective*. Windhoek: Gamsberg Macmillan, 70ff.

and the judiciary. With respect to the judiciary, both the powers granted to the institution and the protections that it enjoys are quite substantial. Included in the Constitution is an extensive and fully justiciable Bill of Rights, which specifically requires that administrative agencies act fairly and reasonably towards citizens. This gives citizens the right to take executive agencies to court, and the judiciary the authority to adjudicate such matters. Beyond this, the rights of standing (concerning who may bring matters before the court) are relatively broad, thus increasing the prospects that courts will be called upon to adjudicate the actions of the executive and legislative branches.

The executive

Chapters 5 and 6 of the Constitution indicate that the executive comprises the President and Cabinet.¹³ Their working relationship is consultative, and their paramount function is policy-making. Cabinet members are required to attend sessions of the National Assembly to answer questions pertaining to the legitimacy, wisdom, effectiveness and direction of government policies. According to Article 35(1), the Cabinet consists, inter alia, of the President, the Prime Minister, and other members to be nominated for the purposes of administering and executing the functions of the government. Besides policy-making, the executive is responsible for negotiating and signing international agreements, which, according to Article 144 of the Constitution, form part of the law of Namibia.

The Constitution explicitly incorporates international law and makes it part of the law of the land. Ab initio, public international law is part of the law of Namibia.¹⁴ No transformation or subsequent legislative act is needed.¹⁵ However, international law has to conform with the provisions of the Constitution in order to apply domestically. In case a treaty provision or other rule of international law is inconsistent with the Constitution, the latter will prevail. A treaty will be binding upon Namibia in terms of Article 144 of the Constitution if the relevant international and constitutional requirements have been met.¹⁶

13 Article 27(2) of the Namibian Constitution; see also Naldi, G. 1995. *Constitutional rights in Namibia: A comparative analysis with international human rights*. Kenwyn: Juta & Co. Ltd, pp 15–17.

14 See Tshosa, O. 2001. *National law and international human rights law: Cases of Botswana, Namibia and Zimbabwe*. Burlington: Ashgate Publishing Company, p 79ff.

15 Erasmus, G. 1991. "The Namibian Constitution and the application of international law in Namibia". In Van Wyk, D, M Wiechers & R Hill (eds). *Constitutional and international law issues*. Pretoria: VerLoren van Themaat Centre for Public Law Studies, p 94.

16 (ibid.:102ff).

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The conclusion of or accession to international agreements is governed by Articles 32(3)(e), 40(i) and 63(2)(e) of the Constitution. The executive is responsible for conducting Namibia's international affairs, including entry into international agreements. The President, assisted by the Cabinet, is empowered to negotiate and sign international agreements, and to delegate such power. It is required that the National Assembly agrees to the ratification of or accession to international agreements. The Constitution does not require a promulgation of international agreements in order for them to become part of the law of the land.¹⁷

The primary function of the executive is to provide political leadership.¹⁸ Thus, the leadership is entrusted with the power to manage the nation's collective affairs.¹⁹ Because the Constitution creates the system of executive presidency, the President, as the head²⁰ of the executive, chairs Cabinet meetings.²¹ These responsibilities place him or her in a position with considerable influence over policies and bills to be tabled before Parliament.²² As stated in Article 32(4)(a)(aa) of the Constitution, the President is responsible for, inter alia, the appointment of the Chief Justice, the Judge President, and the judges of the High and Supreme Courts, on the recommendation of the Judicial Service Commission.

Before Namibia's independence, judges were appointed by the President of the Republic of South Africa on the recommendation of the minister of justice in that country, a position that applied to the mandated territory, Namibia, as well. In this respect, the executive historically exercised a great measure of control over the judiciary. In this premise of history, it is evident that, still today, the President is vested with a great deal of power and responsibility, which, if employed in accordance with the rule of law, can contribute greatly to the attainment of the independence of the judiciary in Namibia. Moreover, Article 32(1) subjects the exercise of presidential executive functions to the overriding terms of the Constitution, the laws of Namibia, and the rule of law, and obliges the President to uphold, protect and defend the Constitution as the Supreme Law.²³

17 (ibid.).

18 Mbahuurua, VH. 2002. "The executive power in the Namibian Constitution: Percept and practice". In Hinz, MO, SK Amoo & D van Wyk (eds). *The Constitution at work: 10 years of Namibian nationhood*. Windhoek: University of Namibia Press, p 42.

19 (ibid.).

20 Article 32(3), Namibian Constitution.

21 Article 40 sets out the duties and functions of the Cabinet.

22 See Article 32, Namibian Constitution.

23 See also Article 5, which generally obliges all branches of government as well as private individuals to respect and uphold the Bill of Rights. This effectively demonstrates that the Bill of Rights has both vertical and horizontal application.

The legislature

The legislature as outlined in Chapter 7 and 8 of the Constitution is made up of the National Assembly and the National Council. In Namibia, *Parliament* refers to the National Assembly acting in terms of the Constitution and subject to review by the National Council. The legislative power of Namibia is vested in the National Assembly, subject to the assent of the President or the National Council, where applicable. As the principal legislative authority in the country, the National Assembly has the power to make and repeal laws. According to Articles 74 and 75 of the Constitution, the National Council has the power to consider and review legislation passed by the National Assembly. Without playing a judicial or quasi-judicial role, with a view to Article 32(9) it can be submitted that the executive branch is accountable to the legislative branch.²⁴

The judiciary

Chapter 9 of the Constitution deals with the administration of justice. In Article 78, the Constitution refers to the judicial powers that are comprised of the Supreme Court, the High Court, and the Lower Courts of Namibia. Article 78(2) explicitly states that the courts are to be independent and subject only to the Constitution and the law. The administration of justice is required to be independent from the other organs of state. The sacrosanct nature of this value was expressed by the Supreme Court.²⁵ The Supreme Court is the highest national forum of appeal. It has inherent jurisdiction over all legal matters in Namibia and, according to Article 79 of the Constitution, it adjudicates appeals emanating from the High Court, including appeals that involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed therein. The Supreme Court also hears matters referred to it by the Attorney-General or authorised by an Act of Parliament.²⁶

As Namibia has a system of stare decisis, meaning that all decisions emanating from the Supreme Court are binding on all other courts unless they are reversed by an Act of Parliament or the Supreme Court itself.²⁷ Unlike the Supreme Court,

24 Mbahuurua (2002:50).

25 See *Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmSC).

26 To date, only two cases have been referred to the Supreme Court by the Attorney-General, namely *Ex Parte: Attorney-General. In re: Corporal Punishment by Organs of State* 1991 (3) SA 76, and *Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmSC).

27 Article 81, Namibian Constitution.

the High Court exercises original jurisdiction. As set forth by Article 80, the High Court can act both as a court of appeal and a court of first instance over civil and criminal prosecutions and in cases concerning the interpretation, implementation and preservation of the Constitution.²⁸ There are several lower courts in Namibia. They are the magistrates' courts, the labour courts, and the customary courts.

The independence of the judiciary

It is a constitutional obligation upon the executive and legislature to safeguard the independence of the judiciary, which is unconditionally proclaimed in Article 78(2) of the Namibian Constitution. *Judicial independence* can be defined as –²⁹

... the degree to which Judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role (in their interpretation of the law), in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the Judges personally or on the power of the court.

The judiciary is considered as the watchdog of the fundamental rights and freedoms of individuals. For instance, as Article 25 of the Constitution provides, every individual who is of the opinion that his or her fundamental rights have been violated or threatened is entitled to approach a competent court to protect such right or freedom.³⁰ In addition, the judiciary has the duty to check that the other branches of government do not abuse their powers. However, in order to effectively fulfil these functions, it is essential that the legislature and executive do not interfere with the work of the courts. Article 25 further gives a court of competent jurisdiction the power to declare an Act of Parliament inconsistent with the provisions of the Bill of Rights. What must be noted is that, as an option to declaring the Act of Parliament invalid, the court also has the discretion to refer it to the National Assembly for the defect in the impugned law to be corrected.³¹

28 The High Court is presided over by the Judge-President. A full sitting of the High Court consists of the Judge-President and six other judges. The jurisdiction of the High Court with regard to appeals is required to be determined by Acts of Parliament. Some decisions of the High Court, which bind the Lower Courts, are recorded both in Namibian and South African law reports.

29 Becker, TL. 1970. *Comparative judicial studies*. Chicago: Rand McNally and Co., p 15. Regarding the tests which the courts have used to determine the independence of the judiciary, see *Van Rooyen and Others v The State and Others* (General Council of the Bar of South Africa Intervening 2002 (5) SA 246 para. 22–28).

30 See in this regard *Kauesa v Minister of Home Affairs and Another* 1995 NR 175, and *S v Sipula* 1994 NR 41.

31 See also *Ex Parte: Attorney-General. In re: Corporal Punishment by Organs of State* 1991

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Furthermore, Article 25 read with Article 18 also subjects executive powers to judicial review. In terms of these two Articles, the courts may declare invalid any executive action which abolishes or abridges the fundamental rights and freedom of individuals, and the courts may review any administrative functions. Thus, it can be stated that legislative sovereignty is limited by the supremacy of the Constitution.

The culture of judicial independence is obliged to be sustained by procedures for appointment to the bench (Article 82), which must be fair, transparent and reasonable. The judicial input is substantial and manifest and, by guaranteeing security of tenure for judges and protecting them against dismissal or suspension (Article 84), their salaries must be adequate to protect their dignity and vulnerability. This input is accompanied by –

- making available to judges adequate secretarial facilities to enable them to discharge their functions efficiently and effectively
- enhancing opportunities for judges to acquire training and sensitivity towards groups unfairly marginalised or otherwise disadvantaged by previously unarticulated assumptions
- encouraging access for judges to technological equipment and to research assistants which facilitate just and expeditious decisions, and
- full and generous opportunities for judicial training and education in the vast network of increasingly complex sociological and scientific disciplines that impact on the identification and protection of the core values articulated by an increasingly transnational constitutional culture, and mediated by universally shared values and aspirations.

In a democratic society governed by fundamental principles such as the rule of law and respect for human rights, the judiciary might be subject to criticism. However, Judge-President Petrus Damaseb put it as follows in his speech delivered at the 2008 commemoration of the International Day of Democracy in Windhoek:³²

[A]ttacks against the judiciary undermine the independence of the judiciary and erode public confidence in the administration of justice. Criticisms against the judiciary should be informed and properly investigated before publication and should not impute improper motives against a judge.

The institutions of justice must themselves project and nurture the good reputation of the judiciary in respect of their independence and integrity, by –

(3) SA 76 (NmSC), *Kauesa v Minister of Home Affairs and Another* 1995 NR 175, and *The Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC).

32 Damaseb, P. 2008. “Judicial perspective: Democracy in Namibia – Before and after Independence”. *New Era*, 19 September 2008.

- providing adequate domestic mechanisms to correct erroneous or unjust decisions
- making access to the courts friendly and comfortable, and
- demystifying anything in the language of the law that makes it unintelligible.

Judges are clearly entitled to demand and to expect fidelity to these truths from the society that sustains them, but that society is also entitled to demand from judges fidelity to the many and subtle qualities in the judicial temper that legitimise the exercise of judicial power. Conspicuous among these qualities are scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity and energy. More difficult to articulate but arguably even more crucial to that temper is wisdom – enriched as it must be by a substantial measure of humility, an instinctive moral ability to distinguish right from wrong, and sometimes the more agonising ability to weigh two rights or two wrongs against each other.

The Judicial Service Commission

The Judicial Service Commission (JSC) plays an important role in ensuring the independence of the judiciary. The JSC, regulated in Article 85 of the Constitution, consists of the Chief Justice, a judge appointed by the President, the Attorney-General, and two members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organisation or organisations representing the interests of the legal profession in Namibia. The JSC is entitled to make such rules and regulations for the purposes of regulating its procedures and functions as are not inconsistent with the Constitution or any other law.

The JSC makes recommendations to the President when it comes to the appointment (Article 82) or removal (Article 84) of judges. In the case of removal, the JSC investigates whether or not a judge should be removed from office on the given grounds, and if it decides in favour of the removal, it informs the President of its recommendation. During such investigations the judge in question is suspended from office. It is submitted that, except where the President is empowered to extend a judge's retiring age, the modes of appointment and removal effectively insulate the judiciary from the executive. For this purpose, the Judicial Service Commission Act, 1995 (No. 18 of 1995) regulates, inter alia, the representation, tenure of office, and functions of the JSC and its members.³³ Section 5 of the Act points out the need for a balanced structuring of judicial offices.

³³ Mbahuurua (2002:56).

Constitutional measures for the executive to safeguard judicial independence

By way of Article 78(3) of the Constitution, members of the executive are prohibited from interfering with the functions of the judiciary. The obligation to safeguard this independence arises from the second part of Article 78(3): the safeguard does not end at independence, but includes dignity and effectiveness, which also have to be protected subject only to the Constitution or any other law. Interestingly, instead of ending at prohibiting interference, the Constitution obliges the same people who threaten the independence of the judiciary to grant the desired independence. In this light, the prohibited interference should be understood as negative interference, otherwise the constitutional mandate to protect and safeguard the judiciary's independence would be futile; indeed, it would be superfluous to prohibit the executive from taking positive constitutional and protective action.

Furthermore, safeguarding such independence is not left to the whims of political will: the obligation is legally imposed. However, the independence of the judiciary cannot be protected if it is so insulated that access to it becomes difficult and the efficient administration of justice is hampered. On the contrary, the constitutional mandate encourages an environment of mutual coexistence and interdependence. It aims at the judicialisation of politics rather than the politicisation of the judiciary. Now the question arises: how is this constitutional mandate respected, and how does the judiciary confront the danger of interference? No politician can afford to be seen to defy the orders of a judiciary perceived by the people to be scrupulously independent and honest in the defence of the constitutional values bonding a nation. Therein lies the real source of the strength of the judiciary and its legitimacy in seeking to execute its potentially awesome powers. Therein also lies the secret of its capacity to defend and protect the Constitution of a nation. A judiciary which is independent and which is perceived to be independent within the community protects both itself and the freedoms enshrined in the Constitution from invasion and corrosion. A judiciary that is not impairs both.

The negative duty placed on the executive is the duty to refrain from interfering with the functions of the judiciary. This duty was interpreted in the case of *S v Heita and Another*,³⁴ where, after an imposition of a sentence in one treason trial, judges were accused of being racist and disloyal, which accusation was coupled with demands for their posts as judges to be revoked with immediate effect. *In casu*, the court held that the members of the legislature and the executive were

34 *S v Heita and Another* 1992 (3) SA 785 (NmHC).

expressly prohibited from interfering with judges or judicial officers, and that —³⁵

... such interference is not allowed at any stage, be it before, during or after a verdict in a particular trial.

This duty of non-interference was also reiterated in the case of *Ex parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*,³⁶ where the Attorney-General brought a matter ex parte in terms of Article 79(3) of the Constitution, requiring the court among other things to decide the extent of the Attorney-General's final authority over the office of the Prosecutor-General. The court took cognisance of the fact that the office of the Attorney-General was an executive one, while the office of the Prosecutor-General was at the very least quasi-judicial. From this premise the court found that it would be militating against the independence of the office of the Prosecutor-General to put the final responsibility of its affairs in the hands of a political appointee. Therefore, in line with the duty of non-interference, the court found that the Prosecutor-General only needed to report to the Attorney-General on issues of public interest. Only to this extent was the Attorney-General similarly authorised to involve him-/herself with the office of the Prosecutor-General. Thus, the Attorney-General was prohibited from interfering with the process of prosecution, for this would be in conflict with the constitutional guarantee of the judiciary's independence.³⁷

In the case of *Sikunda v Government of the Republic of Namibia (2)*, the court was confronted with a situation in which the Minister of Home Affairs failed to comply with a court order that directed him to release a certain detainee. It was contended by the court that the principle of the independence of the judiciary was entwined in its own right to the effectiveness of the court; therefore, —³⁸

... the court must not only be independent but also effective: non-compliance with Court orders, even by State officials, diminished that effectiveness and could lead to collapse of the legal system.

From the foregoing it is clear that the duty as regards non-interference cannot be overstated. It forms the basis of the effectiveness of the judiciary, which is dependent upon the people's respect for such office. In *Sikunda v Government*

35 (ibid.).

36 *Ex parte: Attorney-General of Namibia. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmSC).

37 See also the contribution in this publication by Lovisa Indongo.

38 *Sikunda v Government of the Republic of Namibia and Another (2)* 2001 NR 86 (HC).

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of the Republic of Namibia and Another (1),³⁹ the Judge-President recused himself from the case in light of attacks that had been made on his office in the newspapers and other public fora. He found that, against this background, any ruling he would make would lack credibility and legitimacy and that –⁴⁰

... these attacks affected his independence, dignity and integrity as a Judge.

The general rule is that the executive should not interfere with the functions of the judiciary. An exception to this rule, however, exists in order to facilitate the achievement of the mandate of the judiciary. The exception is that the executive is only permitted to descend into the arena of the judiciary in order to protect the latter from attacks by the public, the legislature, or any other body. The second leg of Article 78(3) provides that –

... all organs of State shall accord such assistance as the Courts may require to protect their independence and effectiveness, subject only to the terms of this Constitution or any other law.

As noted by Judge O’Linn, this places a positive duty on all organs of state to protect the courts.⁴¹ It follows that failure to interfere where the court is under attack would be an evasion of their constitutional duty. This was stated in *S v Heita and Another*, where the court stated the following:

It is ... an evasion and abrogation of their legal duties if the aforesaid organs say we cannot interfere because the Judiciary is independent but then indicate that the public is free to interfere Such an attitude means in effect that these organs and their members also cannot interfere with such purported rights of the citizen. It is obvious that such an attitude is an open invitation to the disgruntled

The executive is legally obliged to protect the judiciary to ensure the effectiveness of the court.⁴² The judges depend on the protection of their independence, dignity and effectiveness, which is a pillar without which the Constitution would not survive.⁴³ Unlike Parliament or the executive, courts do not have the power of the purse of the army or the police to execute their will. The courts would be impotent to protect the Constitution if the agencies of the state refused to

39 *Sikunda v Government of the Republic of Namibia and Another* (1) 2001 NR 67 (HC).

40 Although this case involved the attacks made by the Society of Advocates and the leading newspapers, it is contended that the effect of the attacks was to render the decision doubtful in the eyes of the public as it would not be free of potential bias.

41 *S v Heita and Another* 1992 (3) SA 785 (NmHC).

42 (ibid.).

43 (ibid.).

command resources to enforce the orders of the courts. Otherwise, courts could be reduced to paper tigers: with a ferocious capacity to roar and snarl, but no teeth to bite with, and no sinews to execute what may then become a piece of sterile scholarship.⁴⁴

Efficiency of the executive in discharging its constitutional mandate

In *S v Heita and Another*,⁴⁵ the court identified several offices as falling under the legal duty to protect the independence of the judiciary. These included the President, the Attorney-General, the Prosecutor-General, the Ombudsman, the Police Force, and the Defence Force. In *S v Heita and Another*, the Minister of Justice issued a statement that reiterated the state's commitment to uphold the independence of the judiciary. It was stated that, while an honest and temperate expression of shock would not constitute contempt of court, –⁴⁶

[I]t is inadmissible and patently unconstitutional to bring or attempt to bring political pressure to bear on a judicial officer by[,] for example, calling for his dismissal simply because he or she handed down a verdict which a person or group do not agree with. Once this is allowed a fundamental pillar of our constitutional democracy, namely the independence of the Judiciary[,] is totally threatened and with it, the rule of law and our constitutional democracy.

In Namibia, the executive cannot initiate the removal of judges from office. The executive makes sure, through respect of the Constitution, that judges feel secure in their positions and will only pay allegiance to the Constitution and the law according to their oaths. There is only one incident of a judge who resigned on dubious grounds, and returned to private practice in January 1997. The reasons for his resignation were not disclosed, but there was no objection from the executive; the Chief Justice at the time only stated that there had been concerns on the bench itself.⁴⁷

In the case where a judge was accused of rape and was arrested by the police and charged, the JSC requested the accused to show cause why he should not be dismissed from the bench as stipulated in the Constitution.⁴⁸ When it came to

44 *Sikunda v Government of the Republic of Namibia and Another* (2) 2001 NR 86 (HC).

45 *S v Heita and Another* 1992 (3) SA 785 (NmHC).

46 (ibid.).

47 Bukurura, SH. 2002. "The Namibian Constitution and the constitution of the judiciary". In Hinz, MO, SK Amoo & D van Wyk (eds). *The Constitution at work: 10 years of Namibian nationhood*. Windhoek: University of Namibia Press, p 299ff.

48 Case unreported. Following the judge's arrest, he was suspended from his position as the Supreme Court Judge of Appeal at the time, before he retired from that position in October 2005. The trial ended on 28 July 2006, acquitting the accused at the close of the state's case

the issue of trial, it was clear that using the same judges who were his colleagues would infringe upon the independence of the judiciary and would discredit the result of the proceedings, thus putting the integrity of the justice system into question in the eyes of the public. This led the executive to step in, and upon the JSC's recommendation, they appointed a judge from South Africa to try the accused. The case shows that, like everyone else, judges are not above the law. However, their position as judges in a democratic state requires that they be – and be seen to be – independent and not subject to direct or indirect pressure from the executive. Thus, any investigation of criminal charges against them needs to be conducted with sensitivity to their status, their role in society, and their relationship with the executive. Procedures should be followed to avoid as far as possible any suggestion that a particular judge was being victimised by the executive for his/her views or decisions. Such procedures ordinarily involve the holding of an independent enquiry into whether or not the judge should be impeached. If the allegations are then found to have substance, and the judge is subsequently impeached, a criminal prosecution may follow.

The executive should be exemplary in its respect of court judgments. This principle was reflected by a judgment⁴⁹ delivered on 28 January 2003. The judgment held that the Permanent Secretary of Justice had no jurisdiction to appoint, transfer or terminate the services of a magistrate, and, more specifically, that section 23(2) of the Public Service Act, 1995 (No. 13 of 1995), which authorised such transfers, did not apply to magistrates. The court put it this way:

For as long as magistrates remain subject to the provisions of the Public Service Act, which virtually designates them as employees of the Government and which requires of them prompt execution of Government policy and directives, their independence will be under threat and, what is just as important, is that magistrates would not be perceived by the public as independent and as a separate arm of Government. I therefore agree with the order of the Court a quo that sec. 23(2) did not apply to magistrates.⁵⁰

The message the court sent here was that magistrates' courts were courts like any other, and should, therefore, not be under executive control. The executive took heed and established the Magistrates Commission, which is now in charge of all

on all charges. In his judgment, which was severely critical of the police's handling of the investigation of the case, South African Judge Ronnie Bosielo ruled that the evidence was so poor, contradictory and tainted by shortcomings in the police investigation that it was not necessary for the former Supreme Court Judge of Appeal and High Court Judge-President to even present the case in his defence to the court before a verdict was to be delivered. Now, more than two years later, the case is set to be revived. See *The Namibian*, 22 July 2008. The State was granted permission to appeal by the Supreme Court.

49 *Mostert v Minister of Justice* (SA3/02; SA3/02) [2003] NASC 4.

50 (ibid.).

appointments and transfers of magistrates. In this example, the executive played an important role in executing its mandate to protect and assure independence to magistrates' and other courts.

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide cases before them. No outsider – be it government, a pressure group, an individual or even another judge – is permitted to interfere or even attempt to interfere with the way in which a judge conducts a case and reaches a decision. In the *Heita* case,⁵¹ the High Court decided that it would not bow to political pressure – even from the ruling SWAPO Party. After all it is incumbent on all to ensure that the appointment of judges is not partisan, since this would jeopardise the independence of the judiciary.⁵²

In *Mostert v Magistrates Commission*,⁵³ the court said that there was a need to guard against the intrusion of the independence of the judiciary. It is the primary duty of the Namibian government to promote unity in a culturally diverse environment. In ensuring unity in diversity, the executive will be ensuring the institutional independence of the judiciary. The executive has a role to play in making sure that the bench is well constituted and represented, since it is relatively deeply involved in the appointment of judges in terms of the Constitution.

In sum, it must be submitted that government has never really developed a major interest in controlling the courts. As a result, the judiciary in Namibia ultimately enjoys high levels of autonomy. This has remained true despite power having been concentrated in the hands of the ruling party since Independence, and despite the courts having shown no inclination to defer to government in the rulings that come before them. Judges are supported by elements of civil society that rally to the defence of the courts in the wake of public comments about the bench. Legal advocacy and academia, and human rights groups such as the National Society for Human Rights (NSHR) are outspoken and active in condemning government actions that potentially threaten judicial autonomy. The press are also willing to carry releases from these associations, which have in the past brought public and sometimes even international attention to aggressive government actions. One such local organisation is the Namibian Human Rights Forum, informally established in February 2008 by various key actors in an endeavour to promote

51 *S v Heita and Another* 1992 (3) SA 785 (NmHC).

52 See also Viveca, N. 1997. "Empty-bench Syndrome: Congressional Republicans are determined to put Clinton's judicial nominees on hold". *Time*, 26 May, p 37.

53 *Mostert and Another v Magistrates Commission and Another* (PI1857/04) [2005] NAHC 25.

respect for human rights, the rule of law, democracy, and the independence of the judiciary in Namibia. The Forum so far includes politicians, law professors, non-governmental organisations (NGOs), legal practitioners, and members of the Law Society, the Anti-corruption Commission, and the Office of the Ombudsman. The Forum intends to monitor the human rights situation in Namibia and the Southern African Development Community (SADC) region. Its objective is to promote human rights and protect the national democratic space by highlighting potential threats and abuses.⁵⁴

Budget funding, the executive, and judicial operational independence

If judges leave the bench for financial reasons, then the independence of the judiciary is at a crossroads. In Namibia, judges' salaries are constantly reviewed and raised if necessary. The Minister of Justice, in consultation with the Ministry of Finance, sets and publishes judges' salaries in the *Government Gazette*. Thus, an executive legislative power determines what judges should earn. Judges' salaries are charged to the Consolidated Revenue Fund so that Parliament cannot seek to exert influence on judges via the annual discussion of the state budget. This measure adds to ensuring the independence of the judiciary.⁵⁵ As yet, there is no example in Namibia of a judge leaving office on the grounds of being unable to sustain his/her family. In sum, an independent judiciary depends on security of tenure and irreducible salaries.

It is said that the judiciary in many African countries does not have operational independence because the executive determines the appointment, promotion and remuneration of judicial officers. The prospects of career mobility for judges, therefore, depend largely on how well they can court and patronise the executive. In most cases, the budget and funds of the judiciary are controlled by a ministry of justice (an executive arm of government), which creates bureaucratic procedures in financial matters and the possibility of discriminatory funding to be used against 'erring' courts. However, judicial independence needs constant vigilance when it comes to the salary, pension and other benefits of a judge's office. In Namibia, for example, the Judges' Remuneration Act, 1990 (No. 18 of 1990) provides, inter alia, for the remuneration of judges and the granting of additional benefits to them.

54 See Ruppel, OC. 2008. "The Human Rights and Documentation Centre at UNAM". In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan, pp 131–140.

55 Madhuku, L. 2002. "Constitutional protection of the independence of the judiciary: A survey of the position in southern Africa". *Journal of African Law*, 46(2):232–245.

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Section 2(2) of this Act states the following in particular:

Any salary and allowance payable ... shall be paid from the State Revenue Fund out of moneys appropriated by the National Assembly for that purpose.

Section 3(1) of the Act makes provision for amendments to the First Schedule, which contains the annual salaries associated with designated offices. Here it says the following:

The President, acting on recommendation of the Judicial Service Commission, may by proclamation in the Gazette amend the second column of the First Schedule so as to increase the rates specified therein.

Again, the influence of the executive is noticeable in the above statutory context: the executive is clearly able to exercise a degree of control over the judiciary by holding its purse strings. A restricted budget can create inefficiency and, consequently, a lack of public confidence – eventually leading to a situation where the executive can manipulate a weak and unpopular judiciary.

The executive has a significant hand on further important aspects of judicial independence, being the independence in administration, covering not only the operation of the courts, but also the appointment and supervision of supporting staff and of the various supporting services such as the library and law reports.⁵⁶

In 2006, an objective study statistically evaluated judicial independence in Namibia, using nearly 250 cases that were analysed on whether and how certain political factors had affected the patterns of decision.⁵⁷ The study investigated statistically to what extent Namibia's judicial institutions were independent, such that they were willing to assert their authority vis-à-vis other branches of government. The analysis further examined whether and how certain political factors had affected the patterns of decision-making that had been witnessed. The following questions were raised:⁵⁸

56 Oputa, CJ. 1981. *The law and the twin pillars of justice*. Owerri: Government Press, p 115.

57 VonDoepp, P., *Politics and judicial decision-making in Namibia: Separate or connected realms?* in this publication.

58 (ibid.).

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- *Have Judges, for instance, deferred to government when faced with rendering decisions in important political cases?*
- *Have all Judges been equal in terms of their tendencies to side with or against the government?*
- *Have Judges altered or adjusted their decision-making in light of pressures and threats from the elected branches and other political actors?*

The result of the study indicated that, as a whole, the Namibian judiciary had performed quite admirably in terms of independence from the other branches.⁵⁹ The extent of deference to the executive was found to be minimal, although some foreign, i.e. non-Namibian, judges had displayed a tendency side with government. This tendency was especially apparent after 2000, when such judges became the target of attack from political circles following their decisions in certain cases. In this respect, their deferential tendencies toward the elected branches of government were not entirely surprising.⁶⁰

Recommendations

The executive can only safeguard judicial independence if it conducts its business in accordance with the law, and in an open and transparent manner. In this context it must be submitted that civil society also plays a role, namely by –

- advocating for key constitutional and legal reforms that impact directly on the independence of the judiciary
- monitoring and evaluating court procedures and processes, including judicial selection procedures
- monitoring and auditing judicial performance
- supporting judicial training and education
- ensuring compliance with domestic and international standards
- curbing judicial corruption, and
- monitoring actions of the executive that may interfere with the independence of the judiciary.

It has been submitted that, in various African countries and to some extent in Namibia, judicial officers are poorly trained and, thus, unable to perform their functions efficiently and effectively. This problem is especially pronounced in the Lower Courts. Magistrates barely receive judicial training, but are recruited directly from university. The culture of judicial education needs improvement in Namibia. When judicial training is poorly funded and judicial officers are poorly trained, the recipients of such training are vulnerable to demotivation, corruption and low commitment.⁶¹ This is undoubtedly one reason why some courts have poor facilities, cases are delayed, and access to justice is denied to the citizen.⁶²

59 (ibid.).

60 (ibid.).

61 See also the contribution in this publication by Isabella Skeffers.

62 This concern has recently repeatedly been expressed to the author of this paper, especially by magistrates.

Conclusion

The subservience of the judiciary to the executive is still a noticeable problem in many countries. This should be tackled wherever it exists in order to ensure that the judiciary is independent. The Namibian courts have stressed in several judgments that the separation of the bodies of government and, in particular, the independence of the judiciary are of utmost importance. Indeed, there are several provisions in the Namibian Constitution aiming to uphold the separation of powers and the notion of checks and balances.

It is clear that the executive has a strong hand in determining and protecting or taking away the independence of the judiciary. In carrying its mandate in protecting the independence of the judiciary, the executive recognises that the Constitution is the supreme law. In this respect, the role of the executive, as Justice Anel Silungwe put it, is as follows:⁶³

... to safeguard the proper functioning of the Judiciary. It shall do all that it can that the Judiciary can carry out its proper functions and must not allow its agents or servants to interfere with the functions of the Judiciary. The Executive should execute orders of courts and provide for an environment conducive to the Judiciary. The Executive should give public support to the Judiciary, the Attorney-General as the defender of the Constitution and the Ministry of Justice.

The Namibian Constitution recognises the weaknesses of the judiciary as the custodian of the Constitution and put in place measures for its protection. According to Judge O'Linn, –⁶⁴

[t]he Judiciary has no defence force or police force. They are not politicians. They cannot descend into the arena to defend themselves. They can but they should not, generally, descend by making use of a remedy of ordinary citizen to institute actions for damages for defamation or injuria. Precisely because they cannot protect themselves, unscrupulous persons may exploit this weakness by scandalising the Court or their Judges or a particular Judge, even spreading untruths without fear of contradiction.

Because of the vital role of the executive in the attainment of the ideals and aspirations of the Namibian people, it is imperative that it takes an active role in ensuring that the independence of the judiciary is not undermined by individuals,

63 Acting Judge of the High Court and Supreme Court of Namibia; substantive Judge until retirement of the same courts; former Minister of Justice and Attorney-General in Zambia; former Judge of the Court of Appeal in the Seychelles. Statement from an interview dated 27 May 2008.

64 *S v Heita and Another* 1992 (3) SA 785 (NmHC).

society, or state organs. The effectiveness of the judiciary is dependent on the executive keeping their end of the bargain to protect society from anarchy.

If the executive respects and upholds the doctrine of the separation of powers as provided for in the Constitution, it not only promotes the independence of the judiciary, but also serves as restraint on its excessive powers. In addition it ensures accountability in government – a condition without which no democratic country can flourish.⁶⁵ Accountability is a tool for achieving transparency in government, and this in turn might help to protect the independence of the judiciary.

The constitution of a nation serves as an important mechanism to uphold and further the independence of the judiciary. However, a constitution is an ideal, i.e. words on paper. It is the people of a country, and in particular those voted into power through democratic elections, that determine whether or not a constitution becomes a living document. Only if the constitutional rules and principles are upheld will it be possible to safeguard judicial independence. This, then, is what is truly meant by a constitution being an ideal: until its provisions are put into practice, it will remain a document on the shelf, gathering dust, and unable to grant people access to an independent judiciary.

In the Konrad Adenauer Foundation's 2006 Democracy Report on the Rule of Law in Zimbabwe, it is stated that the executive control over the judiciary and increased militarisation can only mean that citizens' rights have been curtailed.⁶⁶ Democracy is without a doubt a prerequisite for collective and individual judicial independence. In Namibia, these positive circumstances – to a very large extent – seem to prevail.

65 Tonchi, VL & S Nsingo. 2002. "Democratic accountability and responsiveness in Namibia's Public Service". In Hinz, MO, Amoo, SK & van Wyk, D (eds). *The Constitution at work: 10 years of Namibian nationhood*. Windhoek: University of Namibia Press, p 97.

66 <http://www.kas.de/wf/de/33.9396/>; last accessed 18.06.2008.