

The independence of the legal profession in Namibia

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Introduction

The legal profession has always and will predictably continue to play in pivotal role in Namibia's social development. Indeed, the observance of the rule of law in a democratic country like Namibia will be mere rhetoric if its judges and legal practitioners are not assured of independence of mind and action. The independence of the legal profession is not accorded to lawyers for their own benefit or to shield them from being held accountable in the performance of their duties: the purpose of independence is to protect the people by affording them a platform from which to pursue, ultimately exercise, and protect their constitutional rights.

The *independence* of the legal fraternity means that they are accorded protection similar to that of the judiciary, in order to enable them to render their services to clients without fear, favour, or undue interference by the state. This paper sets out to explore whether the legal fraternity in Namibia is independent. Because the independence of the legal profession is intertwined with the concept of *judicial* independence, the paper will also examine the extent to which the legal profession can enhance this very important branch of government. The paper concludes by looking at the challenges facing the legal profession, and makes recommendations to address these challenges.

Is there a basis for the independence of the legal profession?

We will review the current legislative framework relating to the theme of this paper.

The Namibian Constitution

Whilst the independence of the judiciary in Namibia is guaranteed by the Constitution,¹ the position of the legal fraternity is not that clear. However, it is submitted that, implicit in the protection of an independent judiciary, is also the protection of an independent legal profession. It is inconceivable that the

1 Article 78(2) of the Constitution states that –
[t]he Courts shall be independent and subject only to this Constitution and the law.

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Constitution would not recognise an independent legal profession, since it is a sine qua non for an independent judiciary.

It is further submitted that the protection given to courts in terms of Article 78(3)² is by implication also extended to the legal profession. This is based on the fact that, in order for the rule of law to have meaning, the legal profession should enjoy the same protection accorded to the judiciary.

Legislation

The Legal Practitioners Act, 1995 (No. 15 of 1995) regulates all matters relating to the legal profession and legal practitioners in Namibia. Inter alia, the Act deals with –

- admission and enrolment
- privileges, restrictions and offences in connection with practice
- discipline and removal from practice
- restoration to the roll, and the legal practitioner's fidelity fund.

The Act does not deal with the duties of legal practitioners or the extent to which they are independent from external pressures in the execution of their mandate.

The Legal Practitioners Act and the race issue

The Legal Practitioners Act has, however, restricted the independence of the legal profession. Before independence, the profession was responsible for the practical training of aspirant legal practitioners.

Namibia had a divided profession, comprising attorneys and advocates. Advocates were seen as specialists in their various fields. Therefore, the public could not go directly to advocates, but had to be referred by an attorney. Advocates could appear in both the Lower Courts (magistrates' courts) and the High Court, or Supreme Court of South West Africa, as it was then known.

Since the profession was divided into attorneys and advocates, there were also two different methods of entering the profession. For two years, candidate attorneys with the required degree in law were attached as articled clerks to a

2 See Article 78(3):

No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.

principal who had to be a practising attorney. At the successful completion of their articles, the candidates sat for an admissions examination, set and moderated by the Law Society. A candidate could not apply for admittance by the Supreme Court of South West Africa without passing this examination. While a four-year B Proc degree for a South African university was the academic requirement for an attorney, an aspirant advocate needed a five-year LLB degree from a South African university.

During the colonial era, black lawyers (more often, aspiring black lawyers) complained that the system worked against them. A case in point was a complaint that Ephraim Katatu Kasutu submitted to the Black Lawyers Association (BLA) in South Africa, stating that he had repeatedly failed the Board examination without due cause. The BLA took the matter up with the Law Society, and Mr Kasutu was admitted.³

The fear of black lawyers was not without foundation. The apartheid policies of the South African government, the financial disadvantages of the black communities as a result of those policies, and the total absence of training facilities for aspiring black lawyers kept the profession almost exclusively white. The case of Mr Kasutu is a clear indication that the black community was highly suspicious of the legal fraternity and its ability to level the playing fields after independence.

When the SWAPO Party of Namibia won the elections and became the first government of an independent Namibia, it was committed to transforming the legal system. SWAPO initially wanted to replace the Roman-Dutch common law, inherited from the South African colonial rule, with an indigenous legal system. However, when the realities of such a radical change became clear, the Constituent Assembly opted to maintain the Roman-Dutch common law and the statutory laws enacted during the colonial period. The whole legal system valid on the day before independence became the legal system of an independent Namibia.⁴

The government were faced with another dilemma as well. The law graduates who had received their legal education in foreign jurisdictions in exile did not qualify to enter the legal profession in Namibia – whether as lawyers or attorneys. Ten years later, an online government publication remembered the first clash between government and the legal profession:⁵

3 BLA/Black Lawyers Association. 2008. *The history of BLA*, http://www.bla.org.za/asp/content_sub.asp?id=4&sid=3; last accessed 2 October 2008.

4 Article 140, Namibian Constitution.

5 GRN/Government of the Republic of Namibia. 2000. *A decade of peace*. Windhoek: Ministry of Justice & Office of the Attorney-General. Available at <http://www.op.gov.na/>

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Since the return of Namibian citizens in 1990 who had left Namibia during the colonial period, the ministry and the legal profession had been inundated with inquiries about the possible recognition of the foreign legal qualifications of returnees. In order to address this issue, it was decided that the admission of legal practitioners to the bar and the attorney profession should be dealt with at the same time. These efforts culminated in the passing by the [sic] parliament of [the] Attorneys Amendment Act, 1991 (Act 17 of 1991) and the Admission of Advocates Amendment Act, 1991 (Act 19 of 1991). These amendments were carried out amid fierce resistance from certain circles of the old establishment that viewed the integration of Namibians who had obtained their legal qualifications in countries other than South Africa as a “threat to the rule of law[”]. Given this resistance from the private sector, those who were integrated into the profession experienced considerable discrimination in the initial period.

The amendments were not too drastic. The profession was open for aspiring law students who had completed a LLB degree in a Commonwealth or other common law jurisdiction, but not for graduates from civil law jurisdictions.⁶ Consequently, “the threat to the rule of law” was soon forgotten.

The real changes to the profession came with the Legal Practitioners Act. The Act merged the two professions and took away the Law Society’s control over the practical training of lawyers and over Board examinations. These changes took away some accepted powers and functions of the profession. Both advocates and lawyers took exception and fiercely resisted the new Act. Petitions were even sent to the Human Rights Commission in Geneva, as well as to the International Bar Association in London.⁷

The Law Society of Namibia and the Society of Advocates issued a joint response to government. The document was harsh and insensitive. It accused the government of being as negative towards an independent profession as the previous government had been.⁸ They also warned that the rule of law was being undermined in limiting the independence of the profession, —⁹

Decade_peace/moj.htm; last accessed 2 October 2008.

6 It is ironic that the government opted to emphasise the name or title of the degree rather than the actual level of degree. The United Kingdom’s LLB is a case in point. While it is only a three-year degree, it received the same recognition as the then five-year LLB degree from a South African university, although the LLB was already a second degree. South African students could even skip the LLM and do a LLD or PhD immediately after an LLB. Yet, the three-year law degree from South Africa, the B Iuris was not seen as an adequate qualification to enter the profession. The inconsistency is still in place.

7 GRN (2000).

8 “Joint response by the Law Society and the Society of Advocates to government” (Maritz & Theunissen 1995; cited by Shikongo, E. 2003. “Annual Report of the President of the Law Society of Namibia”. Windhoek: Law Society of Namibia. Reprinted in Steinmann, R & Cöhrssen, C (eds). 2006. *The Law Society of Namibia: 85th Anniversary Commemorative Book*. Windhoek. Law Society of Namibia, p 160ff.

9 (ibid.:161).

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... which in turn could result in constitutional reforms and the eventual instalment of a benign dictator.

The joint statement explained the tension between government and the profession by stating that, —¹⁰

... as is the case in any third world countries [sic], the legal profession is viewed as partisan and anti-government and its opinion untrustworthy.

For government, the fusion of the profession was the only way to guarantee black legal practitioners equal opportunities. The Society of Advocates was white and elitist. By the merging of the profession, new black practitioners no longer had to wait for briefs from white law firms. An admitted legal practitioner can now appear in both the Lower Courts and the High Court.

The Attorney-General, the usually moderate Adv. Vekuui Rukoro, reacted in Parliament with an equally hard response:¹¹

Coming, as it does[,] from a group of people who kept muted silence throughout the occupation of our country by the former colonial regime, particularly as regards the atrocities committed by that government on our people, the statements are too laughable for words. I will not bother to say anything more about them.

The comment of the Attorney-General is clear: how can one take this harsh response of an organisation that is almost exclusively white seriously in the light of their support of the previous colonial regime?¹² To add insult to injury, the Attorney-General thanked the Namibian Law Association (NLA), an association representing the interest of blacks in the profession, for their contribution and positive attitude.¹³

There is merit in the Attorney-General's reply to the joint response, especially if one takes note of its insensitive wording. Even the phrase "third world countries"

10 (ibid.).

11 "Address to the National Assembly" (Rukoro 1995; cited in ibid.:161).

12 Steinmann and Cöhrssen (2006:13f) state that the Society of Advocates took a strong position against injustices committed under so-called anti-terrorism legislation during the liberation struggle. However, the advocates who actively supported the struggle for independence were seen as mavericks and were isolated in the white community. See also Durbach, A. 1999. *Uprising*. Cape Town: David Philip Publishers, 19ff; Du Preez, M. 2003. *Pale native. Memories of a renegade reporter*. Cape Town: Zebra Press, p 121ff.

13 Rukoro (1995; cited in Steinmann & Cöhrssen 2006:161).

was regarded as derogatory in the developing world.¹⁴ But to blame the tension between government and the profession on a third-world mentality is not only insensitive: it also sounds like the typical racist opposition to majority rule in southern Africa. This is not to say that the societies were racist, but it does reflect their ignorance of the sensitivities of the black community.

However, it is unfortunate that the racial divisions of the past made a fruitful discussion on the independence of the legal profession impossible. Instead of discussing meaningful ways to address the inequalities of the past without limiting the independence of the profession, the different roles of the parties during the liberation struggle became the invisible pretext of the debate.

The Society of Advocates resisted the funeral of their organisation. While it no longer had government approval or a legal foundation, it remained active as a voluntary organisation. A transitional clause in the Legal Practitioners Act allows practitioners to practice without a Fidelity Fund certificate. Consequently, legal practitioners can still practice *de facto* as advocates, and rely on attorneys to refer clients to them whenever their expert knowledge is needed.¹⁵

The Society of Advocates also kept their pupillage programme and an admittance examination in place. It remains a question if the provisions of section 67(2–4) of the Legal Practitioners Act allows only members of the Society of Advocates to practice without a Fidelity Fund certificate. Nothing in the Act indicates that legal practitioners need to be affiliated with the Society of Advocates in order to practice without such a certificate. However, the Law Society seems to support the view that a legal practitioner who operates without a Fidelity Fund certificate should belong to the Society of Advocates to ensure self-regulation.

The Legal Practitioners Act gave the mandate to provide the practical training for legal practitioners to the University of Namibia, while the curriculum of such training is determined by a new statutory body, the Board for Legal Education, who also moderate the Legal Practitioners Qualifying Examination. The candidate attorneys are still obliged to do a period of attachment under a legal practitioner, but the legal practitioner's contribution to the admittance process is limited to approval of the candidate attorney's diary.

14 Scholars from the South prefer to speak of the '2/3 world', referring to the fact that the majority of the world's population lives in the South.

15 The Fidelity Fund certificate safeguards clients against possible abuse of their funds in a lawyer's trust account. Since advocates only see clients referred to them by lawyers, they do not handle trust money.

Racial issues after 1995

Race remained a contentious issue after 1995. In March 1998, Attorney-General Rukoro was accused by the President of the NLA, Dirk Conradie, of contributing to the status quo by briefing only white lawyers to handle commercial cases.¹⁶

Attorney-General Rukoro sympathised with the predicament of black lawyers, but stated in defence of his office that black lawyers had admitted to not being competent enough to handle complex cases. He opined that the government could not take the financial risk of briefing inexperienced lawyers.¹⁷

In 2002, there were only two elected black councillors on the Law Society Council. In addition, the Society did not have a black President despite the fact that Elias Shikongo served two consecutive terms as its Vice-President.

In July 2002, the Law Society, after long deliberations with the NLA, accepted a proposal that the Legal Practitioners Act and the rules of the Law Society be amended in order to allow for equal representation on the Council.¹⁸

Although the Law Society became more representative, and Elias Shikongo served two consecutive terms as its President in 2003 and 2004, the proposed amendments to the Act only came into force with the promulgation on 1 November 2005 of the Legal Practitioners Second Amendment Act, 2002 (No. 22 of 2002), during Eliza Angula's presidency. Government was possibly suspicious of the motives of the Law Society in the light of the fact that black membership of the Society would soon overtake white membership. By passing the Amendment after white members have lost their majority, the amendment will protect the white minority rather than opening the offices of power to the new black practitioners.

Although the amendment did not solve all the problems of black legal practitioners, and did not remove all the animosity against the Law Society, it made the Society more representative, and consequently gave it more space to operate as an independent institution.

16 *Namibia News Online*, 8 March 1998; Centre for African Studies, University of Pennsylvania. Available at <http://www.africa.upenn.edu/Newsletters/nano3.html>; last accessed 29 September 2008.

17 (ibid.).

18 Steinmann & Cöhrssen (2006:148).

A joint challenge

In 2002, the Legal Practitioners Act was amended by the Legal Practitioners Amendment Act. This made it possible for public prosecutors, legal aid practitioners and magistrates with more than five years' experience, and the required academic qualification, to enter the profession at the recommendation of the Minister of Justice (magistrates) or the Attorney-General (prosecutors). The Minister or Attorney-General issue a certificate that would exempt them from attending the prescribed practical training programme at the University of Namibia or writing the legal practitioners' qualifying examination.¹⁹

The amendment was challenged in court by both the Law Society and the NLA, mainly on the basis that the Act had the limited objective to allow a specific candidate to qualify for appointment as Prosecutor-General.²⁰

The High Court ruled against the Law Society and the NLA, finding that there was no reason to believe that the Act would affect the independence of the Office of the Prosecutor-General, since prosecutors would still work under the direction and guidance of the Prosecutor-General. Consequently, the possibility is slim that local prosecutors would be reluctant to oppose the Attorney-General since it may influence him/her not to issue the prosecutor with an exemption certificate.

The Law Society and the NLA did not raise the further decline of their own authority in the process of admitting applicants to the profession. A great number of former prosecutors, legal aid lawyers and magistrates can now enter the profession without writing the qualifying exams, and without the profession having any say in their admittance.

Given the oppressive context of the colonial era, one cannot fault the actions of government to set structures in motion to open up the profession to previously

19 *Ekandjo-Imalwa v The Law Society of Namibia and Another; The Law Society of Namibia and Another v The Attorney-General of the Republic of Namibia and Others* 2003 NR 123 (HC).

20 See the summary by Justice Du Plessis:
The Law Society and the Law Association launched this application under case No (P) A55/2003 wherein they seek to have the Attorney-General's decision to issue the certificate reviewed and set aside. They also contend that s 5(1)(c A)(ii) is inconsistent with art 88(2) of the Namibian Constitution and seek a declaratory order to that effect. The Law Society and the Law Association further seek an order declaring s 18(1)(b) of the Act (which D was inserted into the Act by the Amendment Act) to be inconsistent with art 88(2) of the Constitution (I shall refer to this application as "the review application").

disadvantaged groups. The fusion of the profession was a necessary step, as was the decision to take the practical examination of aspirant legal practitioners from the then almost exclusively white Law Society and give it to two statutory bodies, the Law Faculty of the University of Namibia and the Board for Legal Education.

However, the Namibian legal scene has changed dramatically over the last six years. With the amendment of the Act, the leadership of the Law Society is no longer in white hands, and the black lawyers are no longer a small minority amongst the membership. We shall return to this issue when we discuss legal education.

International law

The concept of the *independence* of the legal profession is recognised in a variety of international instruments. The preamble of the UN Basic Principles on the Role of Lawyers bears testimony to this.²¹ It is also worth noting that Principle 22 places an obligation on governments to specifically protect the attorney–client privilege.²² Even though these basic principles are not legally binding, they nonetheless contain a series of basic principles and rights that are based on human rights standards enshrined in other international instruments like the UN International Covenant on Civil and Political Rights, and the African (Banjul) Charter on Human and People’s Rights.²³

The recognition of the right to a lawyer and/or legal representation in these international instruments is a clear manifestation that an independent legal profession is of fundamental importance to the functioning of a democratic state founded on the rule of law.

21 See Preamble: The independence of lawyers:
Adequate protection of the human rights and fundamental freedoms to which all are entitled ... requires that all persons have effective access to legal services provided by an independent legal profession.

See also Principles 7 and 8 of the UN Basic Principles document.

22 The Principle provides as follows:
Government shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

23 Article 7 of the African Charter provides as follows:
Every individual shall have the right to have his cause heard. This comprises (c) the right to defense, including the right to be defended by counsel of his choice.

The importance of the independence of the legal profession

Namibia, as a democratic state, is founded on the principle of the rule of law. According to Dicey, this concept is based on, inter alia, the following:²⁴

- (a) *The absence of arbitrary power – [N]o man is above the law and no man is punishable except for a distinct breach of the law established in the ordinary manner before ordinary courts.*
- (b) *Equality before the law – [E]very man is subject to the ordinary law and the jurisdiction of the ordinary courts.*
- (c) *Judge-made constitutions – [T]he general principles of the British Constitution[,] particularly those governing the liberties of the individual, are the result of judicial decisions confirming the common law.*

It is submitted, therefore, that the exercise of governmental powers needs to be conditioned by law, and furthermore, that citizens (persons) should not be subjected to the arbitrary will of the ruler.

It is of cardinal importance that the legal profession is free from interference in the execution of their duties: only then will the rule of law be guaranteed. David K Malcolm AC agrees that the maintenance of an independent judiciary and legal profession is an integral part of ensuring the state adheres to the principles of the rule of law.²⁵ He argues as follows:²⁶

If the community is to have faith in our legal system, not only must they be assured that our judiciary is free from bias and unafraid to make unpopular decisions in the face of powerful interests, but we must also have lawyers and related members of the legal profession who are willing to defend the rights of people they may morally abhor, and advocate unpopular causes without fear or favour where this is consistent with the Rule of Law. By adhering to the Rule of Law, in the face of wealthy and powerful interests or popular opinion fuelled by misinformation or paranoia, both lawyers and Judges are a necessary resource in our community for protecting the rights of the minority groups and individual citizens.

24 Dicey, AV. 1885. *Introduction to the study of law of the constitution*. Available at http://www.constitution.org/cmt/avd/law_con.htm; last accessed 30 October 2008. See also citation in Carpenter, G. 1987. *Introduction to South African Constitutional Law*. Durban: Butterworths, p 85.

25 Malcolm, DK. 2005. "Independence of the legal profession and judiciary". Unpublished paper presented to the Law Society of Western Australia; available at <http://www.supremecourt.wa.gov.au/publications/pdf/TheChurchService09052005.pdf>; last accessed 29 September 2008.

26 (ibid.).

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In upholding the rule of law, a lawyer has a duty to fearlessly uphold the interests of a client without any regard to any unpleasant consequences to him-/herself or any other person. It is submitted that this duty can be effectively executed if there is no hindrance or interference from the government and its agencies. Similarly, if a lawyer cannot act freely for a client without fear of harassment or recrimination, then the rule of law will inevitably be tainted. In Singapore, for instance, lawyers representing clients with unpopular causes risk drastic repercussions ranging from criminal prosecutions, civil suits, economic ruination, disbarment, and loss of entitlement to run for public office.²⁷

A lawyer has a further duty to speak on behalf of a client, and say what the latter could properly say if s/he possessed the required skill and knowledge.²⁸ It is an indubitable fact that a large section of our society is illiterate and poor; thus, this duty is of paramount importance.

The role of the legal profession in promoting the independence of the judiciary

The concept of *judicial* independence denotes that judges be free from any interference in exercising their judicial powers. It is submitted that the erosion of the independence of judges will ultimately have a monumental impact on the independence of the legal profession. Therefore, it is in the interest of the independence of the legal profession in Namibia to jealously guard against such erosion, because failure to do so will lead to the entire legal system's collapse.

The former Chief Justice of Zimbabwe, A Gubbay, noted as follows:²⁹

Even though the independence of the judiciary is enshrined by our and other Constitutions, it is up to the politicians to respect and honour this independence and to foster respect for this independence through their actions. To disregard and undermine this independence would lead to the destabilisation of the entire region.

27 See for example Ravi, M, Chia Ti Lik & LF Violet Netto. 2007. *Lawyers petition Law Society of Singapore*. Available at <http://theonlinecitizen.com/2007/12/lawyers-petition-law-society-of-singapore/>; last accessed 3 November 2008.

28 Palmer, R & D Maquoid-Mason. 2000. *Basic trial advocacy skills*. Durban: Butterworths, p 11.

29 Gubbay, Justice A. 2002. Unpublished paper delivered by the former Chief Justice of Zimbabwe, at the Inaugural World Bar Conference - Edinburgh on 28 June 2002. Johannesburg: *De Rebus*, August 2002; published at <http://www.derebus.org.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=derebus:10.1048/enu>; last accessed 28 October 2008.

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It is the duty of the legal profession (lawyers) to adequately and competently represent their clients in the courtroom. The quality of the decision to be given by the court is largely determined by facts and arguments presented by the lawyer. Tom Ojienda, Chairman of the Law Society of Kenya, opines in this regard that a judge could lose his/her impartiality when the facts and points of law are unevenly presented.³⁰ The above point is illustrated by the Judge-President of the High Court of Namibia in the following:³¹

It is very important therefore that practitioners have a very sound knowledge of both substantive and procedural law. Many a case flounders, regrettably with great cost to the paying client, because practitioners at the early stage do not apply themselves carefully to the matter at hand.

Ojienda further believes that lawyers have a lot to gain in safeguarding an independent judiciary by way of maintaining an independent legal profession. In the first place, lawyers represent the pool that provides the bulk of the people who are eventually appointed as judges; secondly, a lawyer who desires independence for his/her profession is unlikely to bend towards undermining judicial independence in his/her conduct with the judiciary.³² In the final analysis, Ojienda argues that advocating for judicial independence is not only beneficial to judges; it also creates an enabling environment for legal practice by lawyers.³³

An independent legal profession has also a duty to speak out against threats and intimidation aimed at the judiciary. In the southern African sub-region, a total onslaught against the judiciary is being witnessed. In South Africa³⁴ and

30 Ojienda, T. 2006. "The role of lawyers and the civil society in safeguarding the independence of the judiciary in Africa". Konrad Adenauer Stiftung. *Summary Report of the Stakeholders' Conference on the Independence of the Judiciary in Sub-Saharan Africa, held in Nanyuki, Kenya, October 3-7, 2006*. Available at www.kas.de/proj/home/events/104/1/year-2006/month-vera; last accessed 26 September 2008.

31 Damaseb, PT. 2005. "High Court matters – Effective case flow". Unpublished paper presented at the SADC Conference and Annual General Meeting in Windhoek, June 2005; Damaseb was the Judge-President of the High Court at the time.

32 (ibid.).

33 (ibid.).

34 This was a result of the corruption charges levelled against the President of the African National Congress. Disconcerting in this case is the fact a judge of the High Court, Justice Hlope 'allegedly' tried to influence his brothers in the Constitutional Court to rule in favour of the ANC President. Also, unwarranted statements in the case to the effect that the judiciary was counter-revolutionary have been uttered by those in the ANC itself and those in the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP).

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Zimbabwe³⁵, the judiciary has come under unwarranted and unjustified attack. In the case of *S v Heita*³⁶, wherein Judge Brian O'Linn was asked to recuse himself from hearing the case, he said the following:³⁷

Can a judge effectively perform his onerous task if people are allowed to continue undeterred to scandalise the judges – to misrepresent, to agitate, to incite, to demand, to dictate and even to threaten from public platforms, from the bush and from streets, through the media and through the structures of their parties, trade unions and churches?

Surely the answer is a resounding “No”, and to this end it is submitted that the legal profession has an obligation to come to the defence of the judiciary in all instances where its independence is under threat.

It is commendable that the Bar Council of the Society of Advocates of Namibia, in the case of *Ngeve Raphael Sikunda v The Republic of Namibia*,³⁸ came to the judiciary's defence – despite the fact that doing so was perceived by the judge hearing the case as an attack on the independence of the judiciary. In this matter, the judge failed to commit the Minister of Home Affairs for contempt of court after the Minister's repeated failure to adhere to the court directive to release the applicant from detention. The Bar Council was subsequently charged with contempt of court, after it issued a statement saying the attitude of the judge was in direct contravention of the rule of law.

In a media release of 29 November 2000, the Society of Advocates stated the following:³⁹

The Constitution of Namibia is premised upon the rule of law and upon the separation of powers. The ruling by the Judge-President is tantamount to condoning disobedience of a court order and to exempt Government officials from complying with the law. This negates the entire notion of the rule of law. It presupposes that everyone is equal before the law and that the laws of the country are to be obeyed by all, even by the highest authorities.

35 Zimbabwe possibly represents the worst-case scenario when it comes to the threats posed to the independence of the judiciary and the legal profession. Many members of the legal profession have been denied access to see their clients who were victims of political violence, and members of the judiciary viewed as not being sympathetic to the government were replaced by those by those loyal to it.

36 1992 NR 402 (HC).

37 (ibid.:414).

38 2001 NR 181 (HC).

39 Society of Advocates. 2000. Media release, 29 November 2000. Windhoek: Society of Advocates.

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In Namibia, the Law Society of Namibia,⁴⁰ being the umbrella body of an organised and independent legal profession, has been vocal in speaking out against what has been perceived as attacks on the independence of the judiciary and the legal profession, particularly in Zimbabwe. In a media release and following the arrest and detention of two lawyers outside the High Court of Zimbabwe, the Law Society reminded the Zimbabwean government of its obligations under international law, in particular the Declaration on Human Rights Defenders adopted by the UN General Assembly in 1998.⁴¹

Furthermore, the Law Society condemned the xenophobic attacks that took place in South Africa:⁴²

Our Southern African democracies have their foundations in democratic values such as a climate of legality, the rule of law and fundamental human rights, including freedom from unfair discrimination. The principle of non-discrimination is deeply embedded in the values of the new democratic societies that we sought to create by rejecting the injustice and inequality of apartheid.

In view of the above, the authors are of the opinion that, due to the judiciary being the weakest branch of government, it is incumbent on the legal fraternity to vigorously defend the independence of that branch.

In this light, the former Chief Justice of Zimbabwe, A Gubbay, praised the Law Society of Zimbabwe at a conference in Edinburgh:⁴³

[T]hroughout the regrettable saga[,] the council of the Law Society had proved to be the judiciary's staunchest and unwavering ally. In so recognising its obligation to promote and protect the rule of law, it put itself in the front line of attack by the government and its controlled media.

40 The Law Society is a statutory body established in terms of section 40 of the Legal Practitioners Act. It is tasked with maintaining and enhancing the standards of conduct and integrity of all members of the legal profession. It encourages and promotes efficiency and responsibility in the legal profession. It defines and enforces correct and uniform practice, and maintains discipline among members of the legal profession.

41 Article 11 of this Declaration provides as follows:

Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession. Everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.

42 *Namibia Economist*, 30 May 2008; "LSN condemns SA xenophobic attacks". Available at <http://www.google.com.na/search?hl=en&q=Law+society+of+Namibia+condemns+xenophobia&btnG=Google+Search>; last accessed 30 October 2008.

43 *De Rebus*, August 2002

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The fact that lawyers ought to play a prominent role in protecting the independence of the judiciary is recognised by the judiciary itself. At the SADC Lawyers Association Conference held in Windhoek in June 2005, Chief Justice Julian Nganunu of Botswana said that the existence of a strong, professional and competent legal profession in any country made a big contribution to the efficient delivery of judicial service. He went on to say that lawyers were probably the first to know when a judge was corrupt. Finally, he appealed to lawyers to help sustain judicial independence and to guard against corruption in the courts.⁴⁴

It should also be noted that the Law Society of Namibia has engaged the judiciary, and continues to do so in matters likely to impact on the independence of the legal profession.

A case in point is the issue of outstanding judgments by judges of the High Court of Namibia. A number of High Court judges failed to deliver judgments timeously; in fact, some judgments had been outstanding for more than two years. This situation was likely to derail the administration of justice and compromise the rule of law, because justice delayed is justice denied.

In the case of *Pharmaceutical Society of South Africa and Others v Tsabalala-Msimang and Another NNO: New Clicks South Africa (Pty) Ltd v The Minister of Health and Another*,⁴⁵ the Court addressed the issue of delayed judgments as follows:

There are some who believe that requests for “hurried justice” should not only be met with judicial displeasure and castigation but the severest censure[,] and that any demand for quick rendition of reserved judgments is tantamount to interference with the independence[,] judicial office and disrespect for the judge concerned. They are seriously mistaken on both counts. First, the parties are entitled to enquire about the progress of their cases and, if they do not receive an answer or if the answer is unsatisfactory, they are entitled to complain. The judicial cloak is not an impregnable shield providing immunity against criticism or reproach. Delays are frustrating and disillusioning and create the impression that judges are imperious. Secondly, it is judicial delay rather than complaints about it that is a threat to judicial independence because delays destroy the public confidence in the judiciary. There rests an ethical duty on Judges to give judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible. Otherwise the most quoted legal aphorism, namely that “justice delayed is justice denied” will become a mere platitude.

⁴⁴ *De Rebus*, August 2005. “Botswana Chief Justice pleads for judicial independence”. Available at <http://www.derebus.org.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=derebus:10.1048/enu>; last accessed 30 October 2008.

⁴⁵ 2005 (3) SA 238 (SCA) at p 260H to 262 A.

The independence of the legal profession in Namibia

After numerous meetings with the Judge-President, the Law Society reported that there had been some success: a time schedule had been provided, within which the High Court judges in question were expected to deliver their outstanding judgments.⁴⁶

It is submitted that the role played by the Law Society on behalf of the legal profession in this matter contributed to the safeguarding of judicial independence and the rule of law.

Challenges and/or threats facing the legal profession in Namibia

As a profession, legal practitioners do not operate in a vacuum because we are part and parcel of society. It is every lawyer's call, therefore, to engage in activities aimed at the upliftment of the standards of our communities. Namibia has a history of imbalances created by the former South African apartheid regime Africa. It is our duty to try our outmost to help create a society that cherishes a respect for human rights and the rule of law.

Although the legal profession in Namibia is independent, it is submitted that there are a number of challenges that confront it. It is the moral and ethical duty of this profession to address and find lasting solutions to these challenges. I will now briefly discuss some of the more pertinent issues that the organised legal profession should tackle.

Pro bono work

The legacy of apartheid left the majority of Namibians illiterate, poor and in squalid conditions. In this context, the celebrated idea of equality before the law remains a pipe dream.

The legal profession therefore has a social and public responsibility to provide their services to the indigent and marginalised members of Namibian society. At present, the government, through its Directorate of Legal Aid, assist the indigent. However, albeit commendable, the Directorate's assistance is largely in criminal matters – to the detriment of other areas of law. Similarly, the Legal Assistance Centre, a non-profit NGO, has a specific mandate and cannot come to the aid of every person who needs legal help.

⁴⁶ Circular of the Law Society to its members, 24 April 2008.

Thus, the authors propose that the Law Society make it obligatory for every law firm in the country to provide 30 hours of pro bono services a year.⁴⁷ This should not be seen as a panacea for all the problems faced by impoverished communities, but at least it is a way of making the law accessible to everyone.

Legal education

There is a strong feeling amongst legal practitioners that the Justice Training Centre at the University of Namibia (UNAM) does not adequately prepare candidate legal practitioners for entry into the legal profession. In fact, it is anticipated that the Centre's entire curriculum is to be revamped. If the training given is inadequate, it will without a doubt adversely affect the independence of the legal profession. As stated earlier, the motivation for UNAM's current programme is hardly relevant now, close to 20 years after independence. There is no longer a threat that a small white elite will be able to keep young black candidate legal practitioners out of the profession. In this regard, it is proposed that the Law Society consider and promote the following:

- **A culture of mentorship in the legal profession:** This should be cultivated, even if it means a return to the two-year full-time articles option, rather than a shorter period. This will undoubtedly have financial implications for settled law firms. And the Law Society will have to come up with a plan to accommodate candidates who cannot find a law firm willing to employ him/her.
- **Closer monitoring of the training of candidate legal practitioners at law firms and the Justice Training Centre:** At present, a principal's only role is to sign the diary of a candidate attached to his/her office once a week. While UNAM and the Board for Legal Education have taken over the qualifying exams and the determination of the curriculum, principals – and, consequently, the profession – have become passive role players of whom very little is expected.
- **A programme for principals who train candidate legal practitioners:** This will ensure that principals impart the necessary skills to candidates. A system could be considered to certify that the candidate has indeed received adequate training. One way forward could be to make a practical evaluation by the principal a compulsory component for all candidate legal practitioners. This should go beyond the principal's current signing of the diary and submission of an affidavit to the court.

⁴⁷ Rule 21 of the Cape Law Society requires its members to provide 20 hours of pro bono services a year.

- **Greater synergy between legal practitioners and practitioners practising as advocates under the Society of Advocates in respect of training:** Presently, a legal practitioner who has completed the Justice Training Centre programme and has passed the Legal Practitioners' Qualifying Examination, and intends to join the Society of Advocates, still needs to complete a pupillage and write an entrance examination. All of these requirements should be synergised and unnecessary duplication removed.
- **Periodic assessments of candidates throughout the period of articles:** These should be in relation not only to his/her work at the Justice Training Centre, but also to his/her practical work as a candidate legal practitioner attached to a law firm.
- **Adequate understanding of all aspects of law:** For those who enter the profession in terms of the amended Legal Practitioners Act (prosecutors, magistrates and legal aid lawyers), it is proposed that the Law Society devise a special programme to ensure that these practitioners have a sufficient grasp of other areas of law apart from other than criminal law, and
- **Close relationship with UNAM:** The Law Society should develop a close working relationship with the Faculty of Law at UNAM, since this will enable the Law Society to contribute on matters relating to the curriculum.

Transformation

The legacy of apartheid has created an imbalance that, still today, continues to impact negatively on previously disadvantaged members of the legal profession. Despite the changes brought about by the fusion of the profession and the amendment to the Legal Practitioners Act, there is still a perception amongst black practitioners that they do not get a fair deal.

Many black legal practitioners are confined to providing legal services only in the criminal field, whilst their white counterparts are engaged in providing services in lucrative areas of the law such as conveyancing.

Moreover, the recent rise in disciplinary cases against legal practitioners has highlighted the fact that all the racial issues have not been settled.⁴⁸ Some black practitioners recently raised their concern with the local *Insight Magazine* that

⁴⁸ Anonymous. 2008. "Disciplinary cases sharpen racial divide". *Insight Magazine*, October:25f.

white practitioners involved in disciplinary cases got away lightly, compared with their black counterparts.

According to the *Insight* article, there is still a large group of black legal practitioners who feel that they are marginalised and do not get the same opportunities as their white colleagues. On the other side of the spectrum, liberals who have made it as practitioners see these complaints as an ‘entitlement’ mentality.⁴⁹

The Law Society has a moral – if not a legal – duty to ensure that the playing field is levelled to the satisfaction of all its members. A more proactive role by the Society in engaging financial institutions to channel work equally to black and white lawyers will go a long way towards bridging the gap between different groups.

Conclusion

The independence of the legal fraternity is fundamental to the practice of law. Moreover, if the legal fraternity is not independent, then the whole idea of the rule of law will remain a pipe dream in Namibia. The existence of an independent judiciary depends on an independent and organised legal profession.

There are still monumental challenges facing the legal profession, and these ought to be addressed as a matter of urgency.

49 (ibid.).