

# THE PLACE OF THE INDEPENDENCE OF THE JUDICIARY AND THE RULE OF LAW IN DEMOCRATIC SUB-SAHARAN AFRICA

By

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## 1. INTRODUCTION

### 1.1 Background

The topic of the independence of the judiciary and the rule of law is admittedly vast and complicated. A discussion on the independence of the judiciary and the rule of law today will invariably recognize that the area has received a lot of attention and has earned wide coverage. The independence of the judiciary and rule of law are matters of ancient origin, pre-dating modern democracy and its three waves in constitutional history.<sup>1</sup> Many eminent and eloquent jurists have dealt with the subject matter in varying degrees of depth. Courts have made numerous and landmark pronouncements on the independence of the judiciary and the rule of law. Economist, social scientists and political scientists of varying distinction have devoted time discussing the subject matter. The topic constitutes one of the major topics most commented upon in recent times by the media and politicians alike. The independence of the judiciary and the rule of law have seen unnumbered martyrs, suffer and die to ensure the firm establishment and protection of the principles. Indeed as Mr. Justice Sydney L. Robins one time opined ‘everything which can be said (on the topic of judicial independence) has already been said and repeated on so many occasions and in so many learned articles that any further observations are inevitably redundant’,<sup>2</sup> there might be the temptation to ignore the subject. It is true a lot has been said about the independence of the judiciary and the rule of law, but certainly not everything. As evolving concepts, the independence of the judiciary and the rule of

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<sup>1</sup> The history of the principle of the independence of the judiciary had little to do with the rise in modern democracy, but had everything to do with the development of the rule of law.

<sup>2</sup> Quoted in ‘Judicial Independence’, Remarks of Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada during the 300<sup>th</sup> Anniversary of the Act of Settlement Conference, Vancouver, British Columbia and also marking the retirement of Chief Justice Allan McEachern of Canada, May 11, 2001.

law will inevitably attract further observations. It is suggested that continued unwarranted direct and subtle assault on the independence of the judiciary and the rule of law, among other reasons, provide sufficient reason why the topic should be continuously commented upon. It should be placed, and should remain, high on the agenda of every nation, particularly the agendas of democratic Sub-Saharan African nations, as this work intends to show. Indeed it should be beyond dispute that there are few principles which are more important than the independence of the judiciary and the rule of law in any democratic state.<sup>3</sup>

## **1.2 Justification for Further work on the Independence of the Judiciary and the Rule of Law**

The vastness and complexity of the topic under consideration, and that a lot of work has already been done in the area should not discourage one from investigating the matter further.<sup>4</sup>

The doctrines of the independence of the judiciary and the rule of law are so intricately intertwined that they are inseparable even as they are both cornerstones of democracy. This work focuses on both of them. The case for the independence of the judiciary and the rule of law needs to be made, and very strongly. There are many both in the public and the private arena who do not understand it or who ignore it, assault it and even describe it either as unnecessary or a necessary evil. Some people conveniently push it to the peripheral of democracy.

Nevertheless, the independence of the judiciary is widely considered to be the foundation of observance of human rights and the rule of law, which in turn is considered to be a cornerstone of democracy. Thus human rights, the independence of the judiciary, the rule of law and democracy are so closely related that they stand indispensable to each other in the pursuit of personal well-being.

A number of grounds are put forward to justify further work on the independence of the judiciary and the rule of law: (i) Its importance as part of checks and balances in the process of democratic governance and in upholding of human rights and rule of law; (ii) the widespread lack of understanding of the concepts and how the independence of the judiciary and full observance of the rule of law might be achieved;<sup>5</sup> (iii) evident lack of commitment to, rejection of or attempts to ignore or minimize the importance of the principle especially among some of those in leadership positions; (iv) numerous serious attacks and threats to the independence of the judiciary continue without relenting and some worrying trends, creating the need to find some new measures and to improve on the already existing measures to deal with the continuing threats and challenges to the independence of the judiciary and the rule of law in order to effectively protect and consolidate the concept ; (v) the need for constant update on

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<sup>3</sup> *ibid*

<sup>4</sup> “Towards an Independent and effective judiciary in Africa” by The Hon. Mr Justice A.M. Akiwumi

<sup>5</sup> “Judicial Independence” Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada May 11, 2001.

recent developments on the independence of the judiciary as an evolving principle<sup>6</sup>; (vi) increased need for its maintenance as the courts are getting increasingly busy with important constitutional and political cases with governments and their agencies being litigants in the courts, thereby drawing more attention to the courts and naturally government would wish to have court outcomes that are conducive to attainment of their policy ends and (vii) there is need to find some new measures and to improve on the already existing measures to effectively protect and consolidate the independence of the judiciary and the rule of law.

The need to remain vigilant to maintain and indeed consolidate, the independence of the judiciary cannot be overemphasized.

### **1.3 The Importance of Justice in a Democratic State**

The third wave of democratization<sup>7</sup> in the last two or so decades has resulted in most Sub-Saharan African countries attaining constitutional democracy. The overriding quest is for justice as people everywhere demand justice. The strengthening of justice in the region is critical for consolidation of democracy and respect for human rights. Due to globalization, people have become increasingly concerned by the necessity to protect citizens and communities against abuses of all kinds, first and foremost by the misuse of power by their own governments.<sup>8</sup> Justice is part of general government. St Augustine once considered that without justice a government would be nothing but a band of robbers.<sup>9</sup> The UN Charter of 1945 prioritized the maintenance of peace and justice following the devastating two World Wars which inflicted untold suffering on mankind. Not only is justice a very important element for peace, stability and democracy. Justice is also important for the progressive well-being of individuals in society. Democracy would be meaningless without justice.

In Sub-Saharan Africa the quest for justice keeps growing as the euphoria on the third wave of democracy appears to wane.<sup>10</sup> The more urgent issue of consolidating democracy in Sub-Saharan Africa is faced with challenges such as poverty, ethnicity, regionalism, gender inequality, the HIV/AIDS pandemic and lack of capacity on the part of the populations of the region. In facing up to these and other challenges Sub-Saharan Africa will have to prioritize justice. The quest for well-being is bound to test on how national resources are shared, creating a potential for conflict. Property rights and socio-economic

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<sup>6</sup> As observed by the Constitutional Court of South Africa in *Van Rooyen V State* 2002 (5) SA 246 (CC)

<sup>7</sup> See "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives From Southern Africa" by Prof. Charles M. Fombad, *The American Journal of Comparative Law*, Vol. 55, winter 2007, No. 1 reprinted, page 1, 1<sup>st</sup> Wave (1828-1926), 2<sup>nd</sup> Wave (1943-1962) and 3<sup>rd</sup> Wave (late 1980s to early 1990s).

<sup>8</sup> Keynote Address by Mr. Ahmedou Ould-Abdallah, Special Representative of the Secretary General of the United Nations for West Africa at West African Judicial Colloquium, <http://www.warc-croa.org/Discours%20Ould%20Abdallah%20Anglais.htm> (accessed 2007/10/08)

<sup>9</sup> "Democracy in Africa: The Challenges and the Opportunities" An Address to the South African Parliament by Chief Emeka Anyaoku, Commonwealth Secretary General on 1<sup>st</sup> June, 1998.

<sup>10</sup> See "Support for democracy seen falling in Africa" by Craig Timberg, May 25, 2006.

rights are matters of immediate concern in the region, making the administration of justice increasingly relevant and important in the process of democratization.

Absence of justice compromises peace and balanced socioeconomic development. Observably, that real justice implies first of all the credibility of the judiciary.<sup>11</sup> Modern administration of justice is through the judiciary, not through the ancient trial by ordeal.<sup>12</sup> The judiciary as a mechanism for the interpretation of the law and the resolution of disputes administers justice in the name of the State. Mr. Singhvi, a former United Nations Special Rapporteur to investigate the independence of judges and lawyers was not in doubt that the absence of impartiality and the independence of the judiciary leads to a denial of justice and makes the credibility of the judicial process dubious. He observed that “[I]mpartiality and independence of the judiciary is more a human right of the consumers of justice than a privilege of the judiciary for its own sake.”<sup>13</sup> In the words of Mr. Ahmed Ould-Abdallah ‘It is important to ensure the independence of the judiciary across the continent because, otherwise, it would be difficult to think about genuine collaboration at international level. But priority should be given to justice at the national level, in order to make sure that governments practice at home what they preach at the continental level.’<sup>14</sup>

Justice is a precious commodity as “injustice anywhere is a threat to justice everywhere”.<sup>15</sup> The role of an independent judiciary is extremely important in for democratization, because without the independence of the judiciary there cannot be impartial justice. Without an independent judiciary constitutional democracy would become meaningless. Justice is rooted in public confidence and once that confidence is destroyed, justice, the rule of law and indeed democracy suffer.<sup>16</sup> Even political competitors must be able to achieve mutual respect for the independence of the judiciary, rather than get stuck with mutual violations of the independence of the judiciary.

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<sup>11</sup> This is not to ignore primary justice administered at community level as a means of settling disputes, often referred to as alternative dispute resolution mechanisms. See Jennifer Widner in “Courts and Democracy in Post-conflict Transitions: A Social Scientist’s Perspective on the African Case” (infra)

<sup>12</sup> English judicial history records trial by ordeal prior to the 12<sup>th</sup> century as where an accused would be forced to pick up a red hot bar of iron, pluck a stone out of a cauldron of boiling water, or something equally painful or dangerous., or the accused would be tied up and thrown into a lake or other body of water. Trial by ordeal was banned by William II (1087-1100) and was condemned by the Church in 1216. The tendency to resort to mob justice, sometimes instigated by political heavyweights is a crude way of exacting justice, reminiscent of the ancient and long discarded trial by ordeal and ought not to have any place in any modern democracy.

<sup>13</sup> U.N. Doc E/CN.4/Sub.2?1985/18 and Add.1.-6 para75, 1985, Cited in the Report by one of Mr Singhvi’s successors, Mr Loandro Despouy, to the UN Commission for Human Rights, Dec. 31, 2003, UN Doc. No. E/CN.4/2004/60

<sup>14</sup> Keynote Address by Mr. Ahmedou Ould-Abdallah, Special Representative of the Secretary General of the United Nations for West Africa at West African Judicial Colloquium, <http://www.warcroa.org/Discours%20Ould%20Abdallah%20Anglais.htm> (accessed 2007/10/08)

<sup>15</sup> Martin Luther King Speeches

<sup>16</sup> “The Judiciary and the Rule of Law” by former Chief Justice R.A. Banda of Malawi (unpublished)

## 1.4 The Research Question

Most of Sub-Saharan Africa has embraced democratic governance, with democratic constitutions in place. Some of these constitutions contain express provisions for the protection of the independence of the judiciary, showing that democratic Sub-Saharan Africa recognizes that the independence of the judiciary is an imperative to modern African societies.

The present exercise examines the adequacy or of the constitutional and legal guarantees of the independence of the judiciary and the rule of law in Sub-Saharan Africa.

The further question is whether there is manifest commitment to the independence of the judiciary and the rule of law especially among the leaders of democratic Sub-Saharan Africa. An affirmative answer means that ways must be found to ensure that such commitment is reinforced so that the evolving principle of judicial independence is entrenched. A negative answer means that further inquiry be done as to what needs to be done to elicit the much needed commitment to the independence of the judiciary and the rule of law and to ensure that democracy thrives.

Constitutional or legal guarantees of judicial independence though necessary, are insufficient to show the existence of an independent judiciary and the observance of the rule of law. There is need for political commitment. Many examples in democratic Sub-Saharan Africa today support an argument that the combination of express political statements and the attitudes of the political leaders towards the judiciary show that they treat the independence of the judiciary as unwelcome in the implementation of their agendas. Events in the Comoros, Cape Verde, Togo, Mauritania, Nigeria, Ghana, Senegal, Sudan, Ethiopia, Eritrea, Uganda, Kenya, Tanzania, Madagascar, Cameroon, The Democratic Republic of the Congo, Zambia, Zimbabwe, Malawi, Mozambique, Swaziland and South Africa, to name but a few countries, would tend to support this argument.

Circumventing constitutions is nothing new in Sub-Saharan Africa. Memories are still fresh regarding what happened to the independence constitutions of most African states.<sup>17</sup> Shortly after their adoption, those independence constitutions were either abandoned or extensively amended, including removing the bill of rights, on the pretext that they were foreign concepts and lacked the character of African. Multiparty rule was replaced by single party dictatorship on the pretext that the concept of multipartyism was foreign to Africa and was divisive. Military takeovers of government and suspension of constitutional order in Sub-Saharan Africa became the order of the day. Not surprisingly, we are seeing today in democratic Sub-Saharan Africa the 'new' democratic constitutions being subjected to numerous amendments with a call to inject into them more of the African character. If what Sir Winston Churchill is anything to go by, then Africa

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<sup>17</sup> "The Role of the Legislature and the Executive in Constitution Making and Domestication of International Instruments" by Dr Jane Ansah, Attorney General of Malawi, March, 2007

remains in perpetual search for the right form of government.<sup>18</sup> This work discusses the view that the principle of the independence of the judiciary might be foreign to Sub-Saharan Africa.

### **1.5 The Objective of the Research**

There are five objectives.

Firstly to demonstrate that the independence of the judiciary is a constitutional imperative, a rule of law imperative, a human rights imperative and an imperative for democratic governance in Sub-Saharan Africa. History will reveal a long struggle littered with martyrs for the independence of the judiciary and the rule of law.

Secondly to assess the extent to which Sub-Saharan African Constitutions guarantee the independence of the judiciary in the respective countries.

Thirdly to assess the extent to which the promotion of the independence of the judiciary is implemented in Sub-Saharan Africa.

Fourthly to highlight some of the major threats or challenges to judicial independence in democratic Sub-Saharan Africa

Lastly to make recommendations aimed at eliciting total commitment to judicial independence and the rule of law especially among the political leaders of Sub-Saharan Africa.

### **1.6 The Significance of the Research**

Concerns about lack of commitment and threats to the independence of the judiciary and the rule of law have been voiced in numerous forums, writings and judicial pronouncements. In 1948 the Universal Declaration of Human Rights affirmed the need for independent and impartial tribunals for the protection of individual rights under the law. In 1985 the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders adopted Basic Principles on the Independence of the Judiciary and these were endorsed by the General Assembly the same year. That notwithstanding, the 1990s saw an alarming increase in attacks on judges and lawyers in many countries leading to what appeared to be an overall weakening of human rights protections.

When Mr. Param Cumaraswamy of Malaysia was in April, 1994 appointed United Nations Commission on Human Rights Special Rapporteur<sup>19</sup> to focus on problems and

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<sup>18</sup> In one of his famous quotes, Sir Winston Churchill said “ Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.” (1947)

<sup>19</sup> Prior to Mr. Cumaraswamy, Mr. Singhvi had the task to investigate the independence of the judiciary in UN Member States and he drafted what came to be known as the Singhvi Declaration which was

progress in promoting universal judicial independence, he pledged to raise international awareness of the Guidelines and Conventions related to judicial autonomy, defense counsel and jurors, and treatment of prisoners. In his report to the Commission in 1995, MR Cumaraswamy pledged to work to publicize the Basic Principles on the Independence of the Judiciary and ensure that people understood them. The work Mr. Cumaraswamy set out to do must continue. Mr Param Cumaraswamy was replaced in 2003 by Leandro Despouy of Argentina.

The African Charter on Human and Peoples' Rights also recognizes the independence of the judiciary in Africa as indispensable to the protection of human rights. The AU Protocol adopted in June 1998 for the establishment of the African Court on Human and Peoples' Rights guarantees the independence of the Court in much the same way as most constitutions of democratic Sub-Saharan Africa guarantee judicial independence in their countries. The effectiveness of the African Court on Human Rights and the African Court of Justice will depend not only on de jure independence of the judiciary but more importantly on de facto independence of the judiciary practiced at national level. Prioritizing the principle at national level will no doubt ensure its observance at continental level.

It is the purpose of this work to examine the guarantees and the levels of the independence of the judiciary and to contribute to the understanding and popularization of the evolving principle of the independence of the judiciary in Sub-Saharan Africa, adherence to the rule of law which in turn must lead to the consolidation of democracy. The work also suggests ways in which challenges and threats to the independence of the judiciary can be dealt with to ensure protection of the principle. Sub-Saharan Africa having adopted democratic governance must stay the course and must allow democracy to flourish by abiding by the rule of law in an atmosphere where the concept of judicial independence is allowed to evolve.

### **1.7 The Hypotheses**

This work is premised on the fact that the independence of the judiciary and the rule of law form the bedrock of a working democracy, as a cornerstone of any functioning democratic structure. Democratic Sub-Saharan Africa today needs more of judicial independence and adherence to nurture the young democracy for the good of the peoples of the region. Guaranteeing judicial independence in a country's constitution or other laws is only the first step towards ensuring its observance. The degree to which the constitution guarantees the independence of the judiciary varies from country to country.

Further, absence of commitment to the independence of the judiciary and the rule of law signifies absence of commitment to democracy. There must be independence of the judiciary as a matter of law and as a matter of fact. Most countries in Sub-Saharan Africa recognize the independence of judiciary but they have yet to show commitment to it and to the ideals of democracy. Collapse of democracy would mean a return to despotism,

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subsequently overtaken by the UN Basic Principles on the independence of Judges and lawyers. The Singhvi Declaration was never formally adopted.

totalitarianism, autocracy, dictatorship and gross abuse of human rights, much against the will of the demonstrated people. Judicial independence is not a principle foreign to Africa. There must be a role for everyone to uphold judicial independence and the rule of law to ensure the survival and flourishing of democracy and Sub-Saharan Africa needs to do more to promote and protect both de jure and de facto independence of the judiciary.

### **1.8 Methodology**

Informed by previous work done in the area by various experts, this work devotes considerable discussion to democracy, human rights and the rule of law with a view to link them with the main area of focus, being the independence of the judiciary.

The research was mainly done in the library of the Constitutional Court of South Africa which to date remains the best stocked court library known to the writer. It included review of literature and case authorities by way of comparative study. Detailed analysis of each country of the region is avoided. It is regional trends that are examined.<sup>20</sup> The work benefited from interactions with the Justices at the Constitutional Court and the various academics presently at South African Institute for Advance Constitutional, Public, Human Rights and International Law (SAIFAC).

### **1.9 Limitation of the Research**

Surveys were not included as part of the project. There has been no empirical data collected to explain the causes of the numerous attacks and challenges facing the independence of the judiciary in Sub-Saharan Africa, for example.

### **1.10 The Structure of the work**

The work is in six parts. The first part is the introduction, setting out the scope of the work. The part seeks to justify the need for an in depth work. It places the quest for justice in Sub-Saharan Africa as preoccupying the people of the region. The objectives of the research are set out, the importance of justice in a democratic state, the research question, the significance of the research, the hypotheses, the research methodology and the limitations of the exercise are highlighted.

The second part briefly discusses democracy in Sub-Saharan Africa and draws a link between the rule of law, observance of human rights and democracy. The part examines the extent of democratic governance in the sub continent, by first defining democratic governance. Some main principles of democratic governance are discussed, with the rule of law given prominence. The doctrine of separation of powers and the role of the judiciary in a democracy are also discussed.

The third part discusses the principle of the independence of the judiciary generally and how it is linked to democracy, the rule of law, human rights and economic growth. The

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<sup>20</sup> For detailed country analysis the reader is referred to fuller works as cited herein and available elsewhere.

historical development of the principle is intended to show that it has a long history and it is a tried and tested principle, it is achievable and yet it has been the subject of assault and martyrs. Contemporary issues relevant to the independence of the judiciary, such as judicial accountability, are dealt with.

The fourth part is devoted to the trend in relation to the independence of the judiciary in Sub-Saharan African countries. The variations in the constitutional and legal guarantees are highlighted, levels of commitment generally and actual observance and promotion or otherwise, of the principle in Sub-Saharan Africa.

The fifth part considers the future of the independence of the judiciary in Sub-Saharan Africa including what needs to be done to ensure its promotion and protection.

The sixth part is devoted to conclusions.

## **2 Democratic Governance in Sub-Saharan Africa**

Sub-Saharan Africa lies south of the Sahara Desert on the African continent. It is considered the poorest region of the world. It suffers from the effects of economic mismanagement, high levels of corruption, high levels of illiteracy, ethnic conflicts and the legacy of colonialism and slavery. The 48 countries of the region called Sub-Saharan Africa include six island countries of Mauritius, Seychelles, Madagascar, Sao Tome and Principe, Comoros and Cape Verde. The countries fall into further sub-regions of West Africa, Central Africa, East Africa and Southern Africa. The region has a population of over 750 million people. Nearly all of the Sub-Saharan Africa has adopted democracy as a system of governance.<sup>21</sup> Most of these countries have attained democratic governance in the 1990s with a view to improve their lot. Change of government in Sub-Saharan Africa is nothing new. Sometimes the change has been through military take-over. As for democratic change, some of which has seen violence, Sub-Saharan Africa has experienced what experts have described as a “third wave of democratization”.<sup>22</sup> Those countries that felt liberated in the late 1950s and early 1960s have gone through a second liberation through the process of democratization.

The survival and consolidation of democracy in Sub-Saharan Africa will depend on the commitment and ability of the countries of Sub-Saharan Africa to take extra measures to ensure that the independence of the judiciary is firmly established, respected, protected and above all given priority. Democracy in sub-Saharan Africa must not be seen to be an imposition from outside, but that which the people of the region really want and fought for, even with the ultimate sacrifice. Sub-Saharan Africa requires strong, stable, sustainable democracies to deal with the myriad of challenges facing the region. Hence,

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<sup>21</sup> Somalia remains without a democratic government while all military regimes in the region have been replaced by democratic governments

<sup>22</sup> See “Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa” by Professor Charles M. Fombad of the University of Botswana, Professor of law, reprinted from *The American Journal of Comparative Law*, Volume LV, Winter 2007, Number 1

democracy must be nurtured and protected. The role of independent judiciaries will be critical in that process. Without an independent judiciary there can be no protection of rights, including minority rights, the rule of law, and therefore no democracy. An independent judiciary is a guarantee to democracy.

## **2.1 The Meaning of Democratic Governance**

When Sir Winston Churchill described democracy as the worst form of government little did he know that that would be the form of government sweeping through the entire globe today.<sup>23</sup> Indeed it has been said that if all people were Angels, there would have been no need for government. The support for democracy in Sub-Saharan African countries, though on the decline in some countries, remains higher than before the third wave of democracy.

Government may take one or more of any form of government, democratic, authoritarian, dictatorship. Dr Kofi Abrefa Busia noted that at the time many African countries replaced colonial rule with African rule the world lacked faith and conviction in democracy even among the established democracies of the West. He identified whom he described as halfhearted democrats.<sup>24</sup> This day almost the entire Sub-Saharan Africa has embraced democracy.

The term democracy is used to describe a form of government in which the sovereign power resides in and is exercised by the whole body of free citizens directly or indirectly through a system of representation. It is distinguished from monarchy, aristocracy or oligarchy<sup>25</sup>. Some have said that democracy is a system of government based on the consent of the governed. Abraham Lincoln defined democracy as a government of the people, by the people and for the people<sup>26</sup>. Liberal democracy is most common. Critics of liberal democracy have argued that it tends to be idealistic and apparently lacks realism. They argue that liberal democracy is an abstract idea rather than a system of governance that delivers real transformation while addressing issues of well-being such as a poverty and inequality. This also tends to explain some of the disillusionment that some societies suffer upon adopting democratic governance.<sup>27</sup> The truth of the matter is that democracy is not an abstract concept, but a real driving force towards attainment of progressive well-being. This becomes clear when one begins to understand the central elements and principles of democracy and how relevant they are to the progressive well-being of individuals and societies.

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<sup>23</sup> Sir Winston Churchill is quoted as having said “Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.”

<sup>24</sup> ‘The Prospects for Democracy in Africa’ lecture delivered on 4<sup>th</sup> January, 1961.

<sup>25</sup> “The Interface Between the Three Organs of Government in the Promotion of Good Governance” by Professor Z.D. Kadzamura, Vice Chancellor, University of Malawi, 26<sup>th</sup>-27<sup>th</sup> January 2006.

<sup>26</sup> US President Abraham Lincoln’s Gettysburg Address, November, 1863

<sup>27</sup> Some view democracy as tyranny of the majority over the minority, besides being expensive and breeding inefficiency, corruption and social divisions.

There are different forms of democracy carrying different labels. There is majoritarian democracy which emphasizes on majority rule. Minorities are not always comfortable with majoritarian democracy and will often times raise the issue of proportional representation. Some have argued that democracy is not only majority rule, but rather it is also the rule of basic values, values upon which the whole democratic structure is built, and which even the majority cannot touch.<sup>28</sup> Pluralist democracy, on the other hand, is viewed as a government by the people operating through various organized groups such as political parties or pressure groups. There is the elitist democracy which suggests that in real life there are only few powerful individuals who must run the affairs of the State.

The constitutional democracy that most Sub-Saharan African countries have adopted places the constitution as the supreme law and emphasizes on respect for the rule of law. All organs of state are subject to the constitution. The main features of a constitutional democracy are meaningful popular elections to create government, existence of limitation as to governmental power and effective recognition and guarantee of individual rights.<sup>29</sup> A constitution is a living document. The court which interprets it must constantly breathe life into the constitution. Only an independent court can do that effectively.

In its report entitled *Governance Matters 2007: Worldwide Governance Indicators 1996-2006* released July 10, 2007, the World Bank noted that some of Africa's poorest nations had made big strides towards good governance within the period of ten years.<sup>30</sup> That notwithstanding there are signs of disillusionment with democracy in some parts of Sub-Saharan Africa, where observably respect for authority appears to have diminished considerably. An earlier survey by Michigan State University in the US had shown that although Africans' support for democracy remained high, there was increasing dissatisfaction with the way it was practiced in their countries with especially rapid decline in Nigeria, Malawi, Zambia and Zimbabwe.<sup>31</sup> The data was from three rounds of survey administered across the regions of Africa.<sup>32</sup> It must be pointed out that there is no perfect democratic State in the world.<sup>33</sup> Differences in forms of democracies will invariably be dictated by different cultural values, beliefs ethnic composition, historical

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<sup>28</sup> The Indian Court has held in the 1970s that there are certain constitutional provisions which not even the majority can amend if the effect of such an amendment is to change the constitutional foundation of the constitution. See also Rt. Hon. Beverley McLachlin, CJ of Canada on Judicial Independence cited below

<sup>29</sup> This is in contrast with a system of Parliamentary supremacy as is present in the United Kingdom. Most of Sub-Saharan Africa was ruled under the Parliamentary supremacy system before the third wave of democracy. While the position might have changed with the adoption of constitutional democracy, there is evidence that attitudes of parliamentary supremacy linger on.

<sup>30</sup> See "Africa embracing good governance: World Bank report" on <http://www.cbc.ca/world/story/2007/07/11/worldbank-report.html> (accessed 2007-10-17)

<sup>31</sup> "Africans sound of on democracy, corruption and poverty in MSU survey", May 24, 2006, <http://newsroom.msu.edu/site/indexer/2784/content.htm> accessed 2007/10/15

<sup>32</sup> West Africa (Benin, Cape Verde, Ghana, Mali, Nigeria and Senegal); East Africa (Kenya, Madagascar, Tanzania and Uganda) and Southern Africa (Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Zambia and Zimbabwe).

<sup>33</sup> In fact it has been suggested that every state is capable of democratic governance, an idea which opens up for state to claim democratic governance even if in actual fact not democratic. Imperfections will be observed in what may be described as old or mature democracies just as imperfections will be found in new or modern democracies.

backgrounds as well as levels of socio-economic development. Even in Africa, democracy will differ from country to country.<sup>34</sup> However, every State should at least in theory be capable of democratic governance because there are several universally accepted principles about democracy even if in practice on the ground might differ from country to country.<sup>35</sup> Some of the principles of democracy are:

- a) Respect for the human person – the citizens.
- b) Equal civil and political rights among citizens.
- c) Consent of the governed.
- d) Periodic free and fair elections
- e) Decision by majority vote combined with tolerance of dissenting or opposing views.
- f) Transparency and accountability of Government officials and other activities.
- g) Rule of law.
- h) Freedom combined with responsibility.
- i) Separation of powers.
- j) The independence of the judiciary

## **2.2 The Rule of law**

The Rule of Law is an ancient principle. Uncontrolled use of power and discretion by those who governed, coupled with the unpredictability of rule by men in governing society caused a lot of dissatisfaction and eventually gave birth to government of laws<sup>36</sup>. The rule of law became overriding such that both the rulers and the ruled became subject to the sanctity of the law.<sup>37</sup> In the present day the rule of law is considered to be a cornerstone of a well-functioning democracy. It is undeniable that in the globalized world the rule of law at national level becomes a precondition for a well functioning system at

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<sup>34</sup> “Democracy in Africa: The Challenges and the Opportunities” An Address to the South African Parliament by Chief Emeka Anyaoku, Commonwealth Secretary General on 1<sup>st</sup> June, 1998.

<sup>35</sup> “The Interface Between the Three Organs of Government in the Promotion of Good Governance” by Professor Z.D. Kadzimir, Vice Chancellor, University of Malawi, 26<sup>th</sup>-27<sup>th</sup> January 2006.

<sup>36</sup> While Plato was convinced that the best form of government was rule by a benevolent dictator, he conceded that such leaders are hard to come by and he thought that government should be by god of Law (by Nomos). Aristotle was clear that a king should rule by law and not by discretion

<sup>37</sup> Both the early Greek philosophers and Christian philosophers had a vision of law as a system of rules whose source lay outside the ruler himself.

international level.<sup>38</sup> Thus the scrupulous adherence to the rule of law both at national and international level is the only way to ensure justice, development, well-being, peace and security for this and future generations.<sup>39</sup> Without a vigorous rule of law, defended by an independent judiciary, rights are not safe and the equality and dignity of all citizens are at risk.<sup>40</sup>

The rule of law is defined variously. It means that everyone is subject to the sanctity and discipline of the law and that no one, whether the ruler or the ruled, sits above the law.<sup>41</sup> No person or particular branch of government may rise above the law and no branch of government should consider itself to have unlimited powers.<sup>42</sup> This entails that there are established rules known, accepted and which must be respected by all. Such laws must be those that reflect the will and the morals of society expressed neutral, clear and objective manner.<sup>43</sup> The rule of law also entails that citizens can only be constrained or punished for violation of the law and in accordance with the law. This is called the principle of boundedness in relation to the rule of law.

The rule of law implies the existence of just laws which make the legal system predictable, fair and transparent; a legal system supported by effective judicial institutions aimed at protecting citizens against arbitrary use of power by state authority and lawless acts. As the bulwark of society the rule of law is regarded as a reliable long-term bulwark against the abuse of state power.<sup>44</sup> Once the rule of law is breached, society would not function in peace.<sup>45</sup> It is As Chief Justice Spigelman of New South Wales observed, those in society who are wealthy or powerful, including but not limited to the manifestations of the executive branch of government, have other means of getting their way. The effective operation of the rule of law, confines those with power, whether in government or commercial corporations or the media or, in some societies and contexts, social or religious groups or trade unions.<sup>46</sup>

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<sup>38</sup> See “The International Rule of Law Starts at Home” by Ambassador (and Judge) Hans Corell of Sweden in International Judicial Monitor Jul/Aug 2007 Volume 2, Issue 2, Accessed 2007-10-16 at [http://www.judicialmonitor.org/current/globaljudicial\\_dialogue.html](http://www.judicialmonitor.org/current/globaljudicial_dialogue.html)

<sup>39</sup> Ibid

<sup>40</sup> See “Why the Rule of Law Matters” by Guillermo O’Donnell, Journal of Democracy, Baltimore, Oct., 2004, Vol. 15, Issue 4; p32

<sup>41</sup> Former Chief Justice Dumbutshena of Zimbabwe is quoted as having once said that “The Rule of Law demands from the State and the Citizen that they be subject to the laws and rule which make society to function in peace. Laws are necessary not only to make society function in peace but also to establish the legality of the State.” Quoted in “The Judiciary and the Rule of Law” by former Chief Justice R.A. Banda of Malawi (unpublished)

<sup>42</sup> The equality before the law provision under the constitutions of democratic Sub-Saharan Africa

<sup>43</sup> It is widely believed that an amendment of 2001 to section 65 of the Republic of Malawi Constitution targeted the National Democratic Alliance party which had just been formed with a view to put it out of business or create a vehicle for the removal of its members from parliament.

<sup>44</sup> “Globalization and the Rule of Law” by Professor Jeffrey D. Sachs, a Galen L. Stone Professor of International Trade at Harvard University, Remarks delivered at Yale Law School, October 16, 1998.

<sup>45</sup> “The Judiciary and the Rule of Law” by former Chief Justice R.A. Banda of Malawi (unpublished);

<sup>46</sup> “Judicial Independence: Purposes and Threats” by Chief Justice Spigelman of New South Wales, 30<sup>th</sup> April 2007.

Both the substantive and the procedural laws should aim at resolving disputes in a fair manner.<sup>47</sup> Such set of laws must provide a framework for majority rule as in democracy, while at the same time protecting minority rights. A distinction has often been drawn between rule of law and rule by law. There will be a rule by law where unjust and oppressive laws are enacted and used to exercise governmental power over opponents of the government.<sup>48</sup>

The rule of law requires that it be recognized in the constitution of the country, the foundation and framework for orderly government and democracy with appropriate checks and balances. It is a theory of governance which relies upon a series of legal and social constraints designed to promote order and to prevent arbitrary and unreasonable exercise of government power. This is a government and a democracy of adequate and effective participation by the public in selecting leaders and in making laws with full protection for minority rights within majority rule; a democracy that allows for meaningful public input in policy making through free speech, free press, freedom of assembly and public discourse. Most importantly, however, rule of law requires an independent judiciary which is impartial and effective.<sup>49</sup> An independent judiciary is regarded as the cornerstone of the Rule of law because it facilitates effective application of the Rule of Law.<sup>50</sup>

Viewed from an economic developmental perspective, it is beyond question that observance of the rule of law promotes economic development. Multilateral institutions such as the World Bank and many other policymakers throughout the world believe that the rule of law promotes economic development.<sup>51</sup> It will also be noted that NEPAD has made good governance and the rule of law as its foundation. When countries in Sub-Saharan Africa adopted constitutional democracy they recognized the supremacy of their constitutions and therefore the supremacy of the rule of law. The United Nations Millennium Development Goals champion the rule of law as a vehicle to bring about sustainable development, explicitly acknowledging that achievement of the Millennium Development Goals rests heavily on the development of the rule of law, among other factors.

In drawing up the connection between the rule of law and the independence of the Judiciary it is critical to appreciate that the existence of an independent, impartial and effective judiciary is a fundamental aspect of the rule of law.<sup>52</sup> Again, while the prime

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<sup>47</sup> Jurists and philosophers now distinguish between ‘substantive’ Rule of Law being rule according to some particular set of laws that are valued for their content and ‘formal’ Rule of law being rule according to any laws generated by some legislative process, even if they are “bad” laws.

<sup>48</sup> For example the pass laws of apartheid South Africa and media restriction laws of Zimbabwe

<sup>49</sup> “Building Blocks for a Rule of Law” by Judge Sidney Brooks, U.S. Bankruptcy Judge, April 2007

<sup>50</sup> “The Judiciary and the Rule of Law” by former Chief Justice R.A. Banda of Malawi (unpublished)

<sup>51</sup> This explains why in the early 1990s the World Bank and the International Monetary Fund began conditioning financial assistance on the implementation of the rule of law in recipient countries.

<sup>52</sup> The Mo Ibrahim Foundation in the Ibrahim Index of African Governance the rule of law index assesses the independence of the judiciary among other aspects and shows that low values of the independence of the judiciary suggest power rule of law and high values suggest better rule of law. For Sub-Saharan Africa the detailed expert survey analysis scores from 2000 to 2006 correlations are seen as lower than in other countries [http://www.moibrahimfoundation.org/index/by\\_cat\\_rule\\_of\\_law.asp](http://www.moibrahimfoundation.org/index/by_cat_rule_of_law.asp) accessed 2007-10-16

role of the judiciary is to administer the law, it is for the law-maker to ensure that the laws which judges have to administer are inherently just laws.

There are critics to the Rule of Law<sup>53</sup>. One criticism is that the rule of law has gained undeserved legitimacy in the modern world and it can be manipulated by the elite, the shrewd and the calculating to their own advantage.<sup>54</sup> The argument goes on to suggest that the law has no clear objective, is indeterminate and therefore cannot possibly serve as an effective barrier to the governments abuse of power. This is because power structures in society, not the law itself, determine the outcome of legal issues and problems.<sup>55</sup> Because judicial interpretation and enforcement of the law is influenced by the ruling elite, the rule of law does nothing more than legitimize already existing legal relationships and power structures, so the argument goes. Related to this criticism is that which says that laws are often incapable of providing definitive standards of behaviour because of their complex structures and unavoidable ambiguities in language<sup>56</sup>.

Furthermore the law may not be tied to general notions of justice and fairness, thereby tolerating extraordinary unjust rules undercutting the theoretical justifications of the rule of law. The theoretical justification would be the promotion of liberty and restrained government. Yet another criticism relates to legal transplanting in the name of development<sup>57</sup>. Thus developing countries are made to adopt laws often at odds with cultural, political and social norms and be required to apply those laws in the name of rule of law and development.<sup>58</sup> The transplantation of economic laws, for example, is criticized as being blackmail. Because Western societies generally control access to the global market, to some extent, developing countries must adopt the developed countries' laws and understandings of the rule of law in order to engage effectively in global economic activity.<sup>59</sup>

Now, the above criticisms seem to have their root in the fact that there is no precise definition of the rule of law and there might be variations form one country to another and from one legal system to another. The laws themselves vary from country to country and keep changing within their own contexts. Rather than diminish the centrality of the rule of law, these criticism serve to highlight aspects of the concept that need

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<sup>53</sup> See "What is the Rule of Law", an article of The University of Iowa Center for International Finance and Development, [http://www.uiowa.edu/ifdebook/faq/Rule\\_of\\_Law.shtml](http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml) accessed 2007/10/16

<sup>54</sup> Morton J. Horwitz, Harvard law professor and leader of critical legal studies suggested that "By promoting procedural justice [ the rule of law] enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage."

<sup>55</sup> See "What is the Rule of Law", an article of The University of Iowa Center for International Finance and Development, [http://www.uiowa.edu/ifdebook/faq/Rule\\_of\\_Law.shtml](http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml) accessed 2007/10/16

<sup>56</sup> *ibid*

<sup>57</sup> *ibid*

<sup>58</sup> Western democracies tend to focus on individual liberties, which others associate with capitalism. Again in the West, legal development occurred simultaneously with social, political and economic development while this is not the case with developing countries

<sup>59</sup> See "What is the Rule of Law", an article of The University of Iowa Center for International Finance and Development, [http://www.uiowa.edu/ifdebook/faq/Rule\\_of\\_Law.shtml](http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml) accessed 2007/10/16

refinement.<sup>60</sup> For example the laws that are made must have had the meaningful participation of the generality and must be with sufficient clarity for the ordinary man and woman to understand them. Such laws must not be mere transplants, but must be adapted to local circumstances, taking into account the cultural, social and historical circumstances of the country making the laws. A democratic environment would allow for popular participation in law-making and therefore facilitate the observance of the rule of law. As stated by Helen Yu and Alison Guersey<sup>61</sup> “Economic growth, political modernization, the protection of human rights, and other worthy objectives are all believed to hinge, at least in part, on ‘the rule of law.’”<sup>62</sup>

The central role of the rule of law in the democracies of Sub-Saharan Africa is beyond question. Sub-Saharan Africa cannot be governed by the rule of law without an institutionalized arrangement for the independence of the judiciary as democracy depends on the courts enforcing what the legislature intended, not what the executive wants<sup>63</sup>. We need more, rather than less, observance of the Rule of Law. The former World Bank President James Wolfensohn rightly observed that there would be no sustainable development in Africa when justice and the rule of law do not prevail.<sup>64</sup> The former President is quoted as having said that there “must be legal and judicial system in Africa which functions equitably, transparently and honestly before the continent can achieve equitable development.”<sup>65</sup> Of course it has to be conceded that it is difficult to measure observance of the Rule of Law. However its contribution to democracy, liberty and well-being is assessed from time to time through governance indicators.<sup>66</sup>

### 2.3 Human Rights Priority

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<sup>60</sup> Each country will have to work out how best to equip itself with a performing law and justice system that will take into account the country’s own social, economic, cultural, historical and political circumstances.

<sup>61</sup> World Bank, *The Rule of Law as a Goal of Development Policy*

<sup>62</sup> Also the Mo Ibrahim Foundation in the Ibrahim Index of African Governance observes that “Governments and governance cannot function without the political good called Rule of Law. Such a designation refers not necessarily to the Anglo-Saxon common law, the Napoleonic Code, Islamic jurisprudential methods or others, but rather to a codified, transparent method of adjudicating personal disputes of all kinds, formal and informal contractual obligations, and disputes between citizens and the nation-state, without resort to violence. Thus nation-states with enforceable codes of law, nation-states that have adhered to international conventions and legal obligations, and nation-states with judicial mechanisms free of state control have stronger rule of law regimes and supply larger amounts of the political good of Rule of Law.” [http://www.moibrahimfoundation.org/index/by\\_cat\\_rule\\_of\\_law.asp](http://www.moibrahimfoundation.org/index/by_cat_rule_of_law.asp) accessed 2007-10-16

<sup>63</sup> See “Judicial Independence: Purposes and Threats” by Chief Justice Spigelman of New South Wales, 30<sup>th</sup> April, 2007.

<sup>64</sup> While opening a session of All Africa Conference on Law, Justice and Development, in Abuja, Nigeria, “*World Bank President Calls for Well Established Rule of Law in Africa.*”

<http://eco.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTPROGRAMS/EXTTRA DERESEARCH...> accessed 2007-10-16 The President emphasised that “Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible” and that there was need for African countries to demonstrate their resolve to embark on the path of legal and judicial reform by redefining their budgets priorities and by allocating adequate budgetary resources to sustain the proper functioning of all legal and judicial institutions.

<sup>65</sup> Ibid

<sup>66</sup> World Bank governance indicators and the Mo Ibrahim Foundation Ibrahim Index of African Governance are but examples of how the rule of Law rates in governance of the various countries of the world.

The UN in its Background Note recognizes that human rights require the independence of the judiciary as its priority.<sup>67</sup> The founding nations of the United Nations were determined to “establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained”.<sup>68</sup> The 1948 United Nations Universal Declaration on Human Rights adopted three years after the UN Charter recognized the need to afford individuals effective remedies for violation of the rights before a competent, independent and impartial tribunal.<sup>69</sup> The position was reaffirmed in 1966 through the adoption of International Covenant on Civil and Political Rights which enshrined judicial rights of fair trial and others as a matter of law, and not just as a matter of principle.<sup>70</sup> The Covenant and two Optional Protocols, along with the 1966 Covenant on Economic, Social and Cultural Rights and the Universal Declaration on Human Rights, together make up what is known as the International Bill of Human Rights. Human rights observance as a tenet of constitutional democracy requires enforcement mechanisms and, as most observers will readily acknowledge, an independent and assertive judiciary becomes indispensable for both human rights and democracy. As a judiciary is established to ensure compliance with the law, it becomes a fundamental organ of State for preventing abuse of power and protecting human rights. It was on this account that the United Nations set forth standards in relation to the independence of the judiciary, termed Basic Principles on the Independence of the Judiciary, in 1985. These were followed by the adoption by the UN Economic and Social Council in 1989 of Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary.

At regional level the African Charter on Human and Peoples’ Rights recognizes the need for protection and enforcement of human and peoples’ rights. Indeed previous governments were criticized for gross violations of human rights and the third wave of democracy came with promises of better protection of human rights, besides economic empowerment. Africa is not alone in recognizing the centrality of the independence of the judiciary in the observance and enforcement of human rights.<sup>71</sup>

## 2.4 Separation of powers

Modern democratic constitutions rarely define the doctrine of separation of powers. The Republic of Malawi Constitution, for example, does not use the word ‘power’. Instead it talks about the separate status, function and duty of the executive,<sup>72</sup> the legislature<sup>73</sup> and

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<sup>67</sup> UN Background Note *The Independence of the Judiciary: A Human Rights Priority* <File://A:/JUDICIARY.htm>; <http://www.un.org/rights/dpi1837e.htm> accessed 2007/6/6

<sup>68</sup> Charter of the United Nations adopted in 1945

<sup>69</sup> Articles 8 and 10 of the UN Universal Declaration on Human Rights

<sup>70</sup> Article 14 provides that “(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charges against him, or his right or obligations in a law suit, everyone shall be entitled to a fair public hearing by a competent, independent and impartial tribunal established by law”

<sup>71</sup> Asia, Arab, Europe Latin America regions have all recognised the principle of the independence of the judiciary in their various human rights instruments.

<sup>72</sup> Section 7 of the Republic of Malawi Constitution

<sup>73</sup> Section 8 of the Republic of Malawi Constitution

the judiciary.<sup>74</sup> The principle of separation of powers seeks to separate the powers and functions of the state with no single organ of State exercising complete authority as each is regarded as independent of the other. No organ of government is more government than the others<sup>75</sup>. They must complement each other in the service of the society.

Separation of power divides the organs of government into three namely; the Executive, the Judiciary and the Legislature. The Legislature makes laws, the Executive puts the laws into operation while the Judiciary interprets the laws. The principle is extended to enable the three branched to act as checks and balances on each other. The fact that each branch independently checks the other from exceeding their powers, ensures that the rule of law is observed and individual rights are protected.

The principle dates back to ancient Greece when Aristotle favoured mixed government composed of monarchy, aristocracy and democracy since he saw that none was ideal. In 1656 James Harrington proposed a system based on separation of powers.

John Locke, an English political philosopher (1632-1704), idealized the principle of separation of powers in his “Second Treatise of Civil Government” 1690. This was after he had noted that there were temptations to corruption which existed where the same persons who have powers of making laws also have the power to execute them. Locke’s views were part of a growing English radical tradition and this prepared the ground for separation of powers in England.

Paradoxically by a faulty analysis of the English concept of separation of powers,<sup>76</sup> Baron de Montesquieu, the French political and legal philosopher who admired the English concept of separation of powers, gave the impetus and moving spirit to the principle of separation of powers as a real antidote to abuse of power. The name Montesquieu is now firmly attached to the principle of the separation of powers. Montesquieu saw not only separation of powers between the three branches of English Government, but within them, such as the decision-sharing power of judges with juries, the separation of the Monarch and Parliament within the legislative process. And in his book “**The Spirit of Laws**” 1748 Montesquieu considered that English liberty was preserved by its institutional arrangements. He said:

*“Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go .... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another .... There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers”.*<sup>77</sup>

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<sup>74</sup> Section 9 of the Republic of Malawi Constitution. It has been suggested that undue emphasis on power rather than, status, functions and duties is part of the reason why the principle faces resistance.

<sup>75</sup> See Judicial Independence Vis-à-vis The Executive and the Legislature” by Honourable Justice Chipeta, September 2005.

<sup>76</sup> “The Role of the Judge in the Democratic State” by Hon Justice P. Nnaemeka-Agu of the Supreme Court of Nigeria found in Commonwealth Secretariat List of Documentation and Reading Materials for Workshop on Administrative Law Blantyre, Malawi, 1-4 August 1994

<sup>77</sup> Lespirit des Lois, Bk 11 as translated by Nuget {1949}

Locke's and Montesquieu's ideas found a practical expansion in the American revolution. The framers of the American Constitution in the 1780's were motivated by the desire to make impossible the abuses of power they saw as emerging from the English King George III. They thus adopted and expanded the separation of powers principle in that not only were the three branches of Government separated but they were also balanced. The Judiciary which was hitherto regarded as the weakest of the three was balanced with the others. The modern day concept of separation of powers is a refinement of what was adopted in America those many years ago. Few subsequent democracies have fully adopted the American approach, but the concept is universally aspired to, though taking various forms amidst the complex inter-play of ideas, interests, institution and the political circumstances that form part of each government system.<sup>78</sup>

## 2.5 The Role of the Judiciary in a Democracy

As democracy takes root the close relationship between democracy on the one hand and a fair and an independent judiciary becomes almost obvious; one can not exist without the other. The reality though is that while the independence of the judiciary is an essential element of democracy, theoretically there can be the independence of the judiciary even though there is no democracy. The history of the concept of the independence of the judiciary will show this. As Judge Sidney Brooks, US Bankruptcy Judge correctly put in a presentation he made at a Fulbright Scholars Conference, April, 2007,

*“If it were left for me to decide whether we have a democracy without fair and independent courts- or fair and independent courts without a democracy- I would not hesitate to choose the latter”.*<sup>79</sup>

The explanation is that democracy without an independent judiciary would fail and turn into tyranny, whereas tyranny would inevitably collapse in the face of an independent judiciary. Failed tyranny would probably give way to democracy. The judiciary should be a strong defender of democracy as the last line of defense. It is not the case that the judiciary is an enemy of democracy as some would want to argue. This should show that a fair and independent judiciary is very important to society. It ought to be cherished and given high priority even in a democratic setting. The words of Kriegler J. in the South African case of *S v Mamabolo (E. TV and Others Intervening)*,<sup>80</sup> distinctly explain the role of the judiciary:

*“In our constitutional order the judiciary is an independent pillar of the State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of the separation of powers it stands on equal footing with the executive and legislative pillars of the State; but in terms of political, financial or military power it cannot hope to*

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<sup>78</sup>See “Separation of Powers: Doctrine and Practice” by Graham Spindler, <http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/0/E88B2C63DC23E51>

<sup>79</sup>“Building Blocks for a Rule of Law” by Judge Sidney Brooks, U.S. Bankruptcy Judge, April 2007.

<sup>80</sup> 2001 (5) BCLR 449 (CC) paras 16-17

*compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse or no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter of disputes between organs of the State and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the State.”<sup>81</sup>*

The judiciary being one of the three branches of government has upholding the Rule of Law as its central role in a democracy.<sup>82</sup> The judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the Bill of Rights. For example although Parliament has a wide power to delegate legislative authority to the executive, there are limits to that power and it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed<sup>83</sup>. In order for the judiciary to effectively perform its function it is important that the judiciary be independent and that it be perceived to be independent.<sup>84</sup> The role of the judiciary in safeguarding the principle of separation of power includes developing the principle itself.<sup>85</sup> There comes a time when the courts must perform the difficult task of reconciling democracy with the operation of the courts themselves, especially in an emerging democracy. If the judiciary is to speak without fear or favour, ill-will or affection, it must be truly independent and outside the control of the other Branches. The judiciary must uphold the law and the legal system and must show commitment to the rule of law. It must provide mechanisms for a fair and peaceful resolution of conflicts in accordance with pre-established rules and under fair and balanced procedures. The judiciary must contribute to legal certainty by clarifying norms and the relationship between them through interpretation and by contributing to the evolution and refinement of legal rules.

The traditional role is seen when the judiciary decides disputes between citizens *inter se*, between the citizens and other residents in the State and between the citizen and the state or any of its agencies. This indeed is the basic purpose for which the judiciary exists. Through the traditional functions of the judiciary by enforcing contracts and creating a climate of stability and predictability for business, the judiciary plays a key role in promoting economic development. This role includes declaration of rights and pronouncements of several issues that might be in litigation between parties in accordance with the laws of the particular State. In performing this function the judiciary is concerned with justice according to law which may not coincide with the ordinary concept of justice. This is also referred to as popular justice in the sense of giving to every man his dues or social or distributive justice in the sense of giving to every society

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<sup>81</sup> Ibid

<sup>82</sup> “The Judiciary and the Rule of Law” by former Chief Justice R.A. Banda of Malawi (unpublished)

<sup>83</sup> Ibid

<sup>84</sup> Independence of the judiciary is a fundamental requirement for a functioning democracy. It is essential to the courts integrity and credibility within a political system.

<sup>85</sup> See *De Lange Vs Smuts NO and Others 1998 (3) SA 785 (CC); 1998(7) BCLR 779 (CC)* where Ackermann J said “I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, ...”

its dues.<sup>86</sup> The challenge for judges is to bridge the gap between justice according to law and according to ordinary or popular justice. This is not to suggest that the law should be compromised.

The words of Chief Justice Chaskalson sitting in the South African Constitutional Court are apt when he said in *S V Makwanyane and Another*<sup>87</sup> that:

*“Public opinion may be of some relevance to the inquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to Parliamentary Sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of say minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the right of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social out casts and marginalised people of our society. It is only if there is a willingness to protect the worst and weakest among us that all of us can be secure that our own rights will be protected. This court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.”<sup>88</sup>*

The trend on this point seems to be a movement away from technical justice to substantial justice which is close to the concept of ordinary justice.<sup>89</sup> The judiciary is the perfect vehicle for protecting minority rights while the executive and the legislature are more responsive to the majority.<sup>90</sup> Judges have no constituents. Thus judges must focus on what is right even if that is not necessarily popular.

What happens in traditional judicial role is that the judiciary determines the claim on the basis of the law and facts, it examines and states the law before applying that law to the facts, it interprets relevant statutes including rules of procedure and states on the application of the statute. The court carefully examines the relevant law as embodied in decided cases, overruling or modifying them while taking into account the dynamics of our ever-changing society. It is part of the responsibility of the judiciary to see to it that living men and women are not ruled by dead law.<sup>91</sup> Before resolving any conflict the court must determine the law. A conflict must be resolved in an impartial manner. The

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<sup>86</sup> “The Role of the Judge in the Democratic State” by Hon Justice P. Nnaemeka-Agu of the Supreme Court of Nigeria found in Commonwealth Secretariat List of Documentation and Reading Materials for Workshop on Administrative Law Blantyre, Malawi, 1-4 August

<sup>87</sup> *1995(3) SA 391 (CC); 1995(6) BCLR 665 (CC)*

<sup>88</sup> *Ibid* at paras 88-9

<sup>89</sup> “The Role of the Judge in the Democratic State” by Hon Justice P. Nnaemeka-Agu of the Supreme Court of Nigeria found in Commonwealth Secretariat List of Documentation and Reading Materials for Workshop on Administrative Law Blantyre, Malawi, 1-4 August 1994

<sup>90</sup> “The Role of the Independent Judiciary” by Susan Sullivan Lagon in Freedom Papers 4 at page 3

<sup>91</sup> “The Role of the Judge in the Democratic State” by Hon Justice P. Nnaemeka-Agu of the Supreme Court of Nigeria found in Commonwealth Secretariat List of Documentation and Reading Materials for Workshop on Administrative Law Blantyre, Malawi, 1-4 August 1994

judiciary also lays down appropriate judicial policy on one or more of the main issues in the case. Again the judiciary recognizes and safeguards the principle of separation of powers through the supervisory jurisdiction of higher courts over lower courts.

The process of democratization has markedly transformed the role of the courts from the traditional role to its present pivotal role to uphold the rule of law and strengthen democratic governance.

*The Judiciary as the Guardian of the Constitution.*

The judicial function is an essential component of constitutional democracy. The judiciary is the guardian of the constitution and rule of law<sup>92</sup>. It must interpret the commands of the Constitution as no other body can. The Republic of Malawi Constitution provides as follows:

*“The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.”<sup>93</sup>*

The judiciary has recognized this responsibility in a number of judicial pronouncements.<sup>94</sup> The courts have not been in any doubt that they have a constitutional responsibility to review all constitutional decisions because they are the protectors and guardians of the fundamental law of our country.<sup>95</sup>

The interpretation of the fundamental law of the country is and must remain the constitutional responsibility of the courts. With the advent of the new dispensation in 1994, the judiciary in Malawi acquired a pivotal role and status in the maintenance and strengthening of democratic constitutionalism.<sup>96</sup> The courts have had to deal with many controversial issues which raised awkward and difficult questions of law and fact. As observed by the International Commission of Jurists Mission to Malawi it is a credit to Malawi Courts that they have dealt with many such difficult cases both judicially and judiciously. Since 1994 the judiciary has been a credit to constitutionalism in terms of its decision making as well as capacity building.<sup>97</sup>

The Constitution makes it abundantly clear that it is the supreme law of the land.<sup>98</sup> When adopting constitutional supremacy, Malawi abandoned the doctrine of Parliamentary

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<sup>92</sup> Sections 9 of the Republic of Malawi Constitution

<sup>93</sup> Section 9 of the Republic of Malawi Constitution.

<sup>94</sup> *The Attorney General V Malawi Congress Party, L.J. Chimango MP and H.M. Ntaba (Press Trust Case) MSCA Civil App. No. 22 of 1996; The Attorney General, Malawi Electoral Commission, UDF V Gwanda Chakwamba, Kamlepo Kalua and B.D.K. Nkhumbwe MSCA Civil Appeal No. 20 of 1999. Attorney General V Dr Mapopa Chipeta MSCA Civil Appeal No. 33 of 1994; [1996]1 LRC 459.*

<sup>95</sup> Ibid

<sup>96</sup> ICJ Mission to Malawi Preliminary Report on Removal Of Judges, 2002

<sup>97</sup> Ibid

<sup>98</sup> Section 5 of the Republic of Malawi Constitution

Supremacy.<sup>99</sup> Any act of government or any law that is inconsistent with the provisions of the Constitution are, to the extent of the inconsistency, invalid.<sup>100</sup> It also provided that in the interpretation of all laws and in the resolution of political disputes the provisions of the Constitution must be regarded as the supreme arbiter and ultimate source of authority.<sup>101</sup> In the application and formulation of any Act of Parliament and in the application and development of the common law and customary law, the relevant organs of State are engendered to have regard to the principles and provisions of the Constitution.<sup>102</sup> It must however be borne in mind that constitutional adjudication is inherently difficult and especially in an emergent democracy, political disputes inevitably enter the judicial arena<sup>103</sup>. An independent judiciary is critical to the working of any constitution in those circumstances.

### Judicial Review

An important element of the functions of the courts is the exercise of judicial review of legislative and executive acts. This entails the power to strike down executive acts or pieces of legislation if inconsistent with the constitution. Modern democratic constitutions tend to expressly provide for the power of judicial review.<sup>104</sup> American Constitutional history records that one of the founding fathers, Thomas Jefferson, fiercely attacked judicial review as undemocratic, elitist and violation of the principle of separation of powers. This tends to explain why despite being supported by more than half the delegates to the Constitutional Convention, the term judicial review is conspicuously absent from the Constitution of the United States.<sup>105</sup> Judicial review, while not being synonymous with judicial activism, is a valuable deterrent in that the State and other Branches of it must take it into consideration before they act lest they risk the court's rebuke. Judicial review allows the courts to be counterweight to the other Branches. Without judicial review the judiciary would be too weak to play its role in the system of separation of powers as envisaged by democratic constitutions.<sup>106</sup> It is important that the court understands the scope of judicial review in order that the power be used appropriately without creating judicial tyranny.

The purpose of judicial review is to correct erroneous decision-making.<sup>107</sup> The duty of the court to check the abusive acts of another branch of government which in a non-

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<sup>99</sup> See *Jasi Vs Rep. Criminal Appeal No 64 of 1997* (unreported); ("The Role of International Law in the Protection of Human Rights under the Malawi Constitution 1995," by Professor Tiyanjana Maluwa: African Year book of International Law Page 55 published by Kluwer Law International, 1996, the Netherlands.

<sup>100</sup> Section 5 of the Republic of Malawi Constitution.

<sup>101</sup> Section 10(1) of the Republic of Malawi Constitution.

<sup>102</sup> Section 10(2) of the Republic of Malawi Constitution.

<sup>103</sup> ICJ Mission to Malawi Preliminary Report on removal of three Malawian judges (2002)

<sup>104</sup> See Section 108(2) of the Republic of Malawi Constitution

<sup>105</sup> It was the case of *Marbury V Madison* (1803) that lay the foundation for modern judicial review in the United States of America.

<sup>106</sup> "The Role of the Independent Judiciary" by Susan Sullivan Lagon in Freedom Papers 4

<sup>107</sup> See also *Hira and Another V Booyesen and Another* 1992 (4) SA 69(A) 193-4.

democratic State would constitute a political question immune to judicial intervention is by the process of judicial review an important aspect of democratic governance.

The court must not refuse to lift a finger to resolve a constitutional controversy of supreme transcendental or national importance on the ground that it is political in nature. We are aware that constitutional decision-making involves policy-making and in that sense politics. The court has been given the innovation endowed with expansive powers of and the duty to review cases and controversies.

The judiciary has by constitution been entrusted with the duty to settle actual controversies involving rights which are legally demandable and enforceable and to determine whether or not there has been a grave abuse of discretion amounting to lack of or excess of jurisdiction on the part of any branch or instrumentality of the government.

The judicial power is meant to be a check against all powers of government without exception, except that the judicial power must be exercised within the limits confined thereto. A matter of national defense, national interest, national welfare is not necessarily beyond the jurisdiction of judicial power.<sup>108</sup>

In the *Executive Council Western Cape Legislature and Others V President of the Republic of South Africa and Others*<sup>109</sup> (*The Western Cape case*) the court enforced the principle of separation of powers by setting aside a proclamation of the President on the grounds that the provisions of the Local Government Transition Act (Act 209 of 1993) under which the President had acted in promulgating the proclamation was inconsistent with the separation of powers required by the constitution and accordingly invalid.<sup>110</sup>

Again *In South African Association of Personal Injury Lawyers Vs Heath, Willem Hendrik, The Special Investigating Unit, President of the Republic of South Africa and the Ministers of Justice*<sup>111</sup> the Constitutional Court of South Africa dealt with the issue of separation of powers among other issues. The matter first came before Coetzee AJ who considered the appointment of a judge under The Special Investigating Units and Special Tribunals Act of South Africa to head the Special Investigation Unit. The court of first instance held that the functions the first respondent was required to perform under the Act as head of the SIU were not inconsistent with the independence of the judiciary. The court also held that under the South African Constitution there is no express provision dealing with the separation of powers, and that it was not competent for a court to set aside a legislative provision on the basis that it violates what, at best for the appellant, is no more than a “tacit” principle of the Constitution. He held further that the United States and Australian authorities relied upon by the appellant were not relevant, because the

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<sup>108</sup> *National Consultative Council Vs The Attorney General Civil Cause Civil Cause No 958 of 1994*

<sup>109</sup> 1995(4) SA 877 (CC); 1995(10) BCLR 1289 (CC)

<sup>110</sup> *The Malawi Law Society, Episcopal Conference of Malawi and Malawi Council of Churches Vs The State and The President of Malawi, The Inspector General of Police, Army Commander Misc. Civil Cause 78 Of 2002*

<sup>111</sup> Case CCT 27/00

constitutions of those countries provide for a rigid separation of powers, whereas the South African Constitution does not do so.

Chaskalson P, noting that the matter before him was concerned not with the intrusion of the executive into judicial domain but with the assignment of a member of the judiciary to the executive with the concurrence of the legislature, of functions close to the heartland of the executive said at the outset:-

*“This appeal concerns the constitutionality of important provisions of the Act and of two proclamations issued by the president pursuant to its provisions. It reflects a tension that often exists between the need on the part of government to confront threats to the democratic state, and the obligation on it to do so in a manner that respects the value of the constitution.”*<sup>112</sup>

In The Malawi Law Society, Episcopal Conference of Malawi and Malawi Council of Churches Vs The State and The President of Malawi, The Inspector General of Police, Army Commander<sup>113</sup> matter was for Judicial Review of two directives made by the President at a public rally on 28<sup>th</sup> May 2002 banning all form of demonstration in relation to a constitutional amendment sought to allow the President of the Republic of Malawi to serve unlimited terms in office, otherwise described as **“open term,”** and that the second, third and fourth respondents must deal with anyone who violated such a directive. The applicants sought an order of ***certiorari*** quashing the directive banning demonstrations as unconstitutional, illegal and unlawful and an order of mandamus requiring the respondent to abide by the constitution. Section 38 of the Republic of Malawi Constitution provides that:

*“Every person shall have the right to assemble and demonstrate with others peacefully and unarmed.”*<sup>114</sup>

The High Court found that the directive by the President at a political rally to limit this right to demonstrate did not amount to law and therefore not covered by the limitations clause in section 44 of the Constitution. The court quoted with approval, the dictum of Tambala, J as he then was in National Consultative Council Vs The Attorney General Civil Cause<sup>115</sup> in dealing with the question of police roadblocks when he said:

*“There is need to strike a balance between the needs of society as a whole and those of individuals. If the needs of society in terms of peace, law and order, and national security, are stressed at the expense of the rights and freedoms of the individual, then the Bill of Rights contained in our Constitution will be meaningless and the people of this country will have struggled for freedom and democracy in vain. In a democratic society, the Police must sharpen their skills and competence. They must be able to perform their main function of preserving peace, law and order without violating the rights and freedoms of the individuals. That is the only way we can contribute to the development of a free State. Matters of national security should not be used as an excuse for frustrating the will of the people expressed in their Constitution”.*<sup>116</sup>

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<sup>112</sup> Ibid

<sup>113</sup> Misc. Civil Cause No. 78 of 2002

<sup>114</sup> Section 38 of the Republic of Malawi Constitution

<sup>115</sup> Civil Cause No. 958 of 1994

<sup>116</sup> Ibid

The court then found that the directives made by the President were unconstitutional and that banning all form of demonstration was unreasonable as such a ban is too wide and not capable of enforcement as events had shown at the President's own rallies. The court observed that Democracy will always have enemies both within and without the government. The reliefs sought by the applicants were accordingly granted.

*In the matter of the Constitution of the Republic of Malawi and In the Matter of the Removal of MaC William Lunguzi as The Inspector General of Police and in the Matter of Judicial Review.*<sup>117</sup> the court held that the removal from office of Inspector General of Police of Mr. MaCWilliam Lunguzi by the President was unlawful and unconstitutional in that Section 43<sup>118</sup> and 154<sup>119</sup> of the Constitution were not complied with. The court however refused to order reinstatement because such an order would border on usurpation of powers of executive.

### *Enforcement of Human Rights*

The Constitutions of new democracies invariably embody in them a Bill of Rights. The judiciary is given the role to protect and enforce these rights of individuals. Governments are considered the worst violators of human rights. The judiciary should take their role as protectors and enforcer of human rights. It should be unafraid to assert human rights no matter how passionately the majority object. The Judiciary must also take cognizance of other constitutional bodies with authority to deal with issues of human rights. In Malawi these bodies include the Ombudsman<sup>120</sup> and the Malawi Human Rights Commission.<sup>121</sup>

Many of the matters that have come up for judicial review relate in some way or other to human rights.<sup>122</sup> American Supreme Court Justice Ruth Bader Ginsburg once said:

*“Many jurists in the United States regard constitutional review by court in the human rights sphere as our nation’s hallmark and pride. I agree.”*<sup>123</sup>

This statement is in my view equally true in the emerging democracies of the world. The enforcement of human rights by the courts epitomizes the importance of the independence of the judiciary. If the judiciary was to speak without fear or favour, if it has to be truly independent, it has to exist outside the control of the other branches. It has been said that judicial independence is the most essential characteristic of free society. This is to say that separation of powers is a foundation for judiciary's independence.

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<sup>117</sup> *Misc. Application No. 55 Of 1994.*

<sup>118</sup> Provision on Administrative Justice, rules of natural justice and fairness

<sup>119</sup> Provision on establishment of the office of Inspector General of Police and removal of an incumbent.

<sup>120</sup> Chapter X of the Republic of Malawi Constitution.

<sup>121</sup> Chapter XI of the Republic of Malawi Constitution.

<sup>122</sup> *The Malawi Law Society, Episcopal Conference of Malawi and Malawi Council of Churches Vs The State and The President of Malawi, The Inspector General of Police, Army Commander Misc. Civil Cause No. 78 of 2002; In the matter of the Constitution of the Republic of Malawi and In the Matter of the Removal of MaCWilliam Lunguzi as The Inspector General of Police and in the Matter of Judicial Review Misc. Application No. 55 Of 1994.*

<sup>123</sup> See “The Role of an Independent Judiciary”, by Philippa Strum, in Democracy Papers, USINFO.STATE.GOV

There is need for the judiciary to enforce a culture of respect for the rule of law and mutual respect among the branches of government for the respective roles and functions of each branch. Thus the judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the Bill of Rights. The judiciary has ultimately to determine the proper meaning of rights, how they relate to each other and which rights should prevail to be enforced under given circumstances. It is important that the judiciary be independent and that it be perceived to be independent.

In the case of *Maggie Nathebe V The Republic*<sup>124</sup> the Malawi high Court said:

*“More importantly, it is the duty of this court to ensure that the laws of the land accord with the august position now given to fundamental human rights in our constitution. The presumption of innocence is a fundamental right under the constitution. Laws that whistle it are now subject to scrutiny by courts and, characteristically, will only be upheld if they are reasonable recognized by human rights standard and necessary in an open democratic society.”*

As Dr. Kanyongolo observed in a recent report on a research he conducted in Malawi courts can play an important role in aligning national legislation to human rights standards there are guaranteed by international law and the constitution.<sup>125</sup>

For the judiciary to effectively perform its function it must be endowed with independence from control, pressure or influence whether from the executive, the legislature, the press, the public, the non-governmental organizations or from any other quarter whatsoever. Again the judiciary requires public trust, confidence and respect. It must be a judiciary that is transparent and accountable with ethical judges whose court system is not corrupt. For the judiciary to be effective it also requires adequate resources to be allocated to it.

### **3 The Concept of the Independence of the Judiciary**

The principle of the independence of the judiciary has become established as an international norm with varying degrees of adherence to it. Though internationally recognized it is widely misunderstood and often violently attacked. In some cases only lip service is paid to it. Violation of the principle must not only be regarded as illegal involving a breach of a country’s own constitution, but must also be regarded as offending ordinary human values. A failure to understand the principle of the independence of the judiciary signifies a failure to understand the duties and responsibilities of the judiciary in any given society.

#### **3.1 Meaning of the independence of the Judiciary**

There is no precise or agreed meaning of the concept of the independence of the judiciary.<sup>126</sup> It tends to be viewed from different angles such as judicial, constitutional,

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<sup>124</sup> *Misc. Cr. App. No. 9 of 1997*

<sup>125</sup> Malawi Justice Sector and the Rule of Law - A review by AfriMAP and Open Society Initiative for Southern Africa, 2006.

<sup>126</sup> Perhaps the absence of one meaning explains why the concept is often misunderstood and undermined.

political or economic angles. The independence of the judiciary entails that the judiciary as a branch of government and individual judges exercise their functions without undue interference in the decision making from the executive, the legislature, colleagues, the public or from any quarter whatsoever.<sup>127</sup> Judges must decide matters before them fairly and impartially, relying only on the facts and the law. Independence of the judiciary assures justice to the citizen and upholds the rule of law, human rights and democratic systems.

At institutional level, it is understood to mean that the judiciary as a branch of government is independent from the controls and influences of the executive and the legislative arms of government. At the individual level it is understood to mean that in deciding any matter before him or her, the judicial officer must do so impartially and without any influence or pressure, whether from the executive, the legislature, a member of the public, colleagues, family member or from any quarter whatsoever. Impartiality refers to the state of mind or attitude of the judge. Judges should be able to make hard and unpopular decisions without fear of any reprisals, personal or professional, for using their best judgment to interpret the law. Judges who are fearful that they can suffer reprisals for unpopular decisions are less likely to be neutral arbiters in matters that come before them. Yet there must be independence both at institutional level and at individual level. On the other hand, independence of the judiciary does not mean that a judge is free to do as he or she thinks fit for the principle only operates within the law.

The independence of the judiciary is a principle that holds that all litigants and all accused, no matter what their political beliefs or social status, should receive fair and equal treatment by a court functioning independently of improper influences. Judges should decide cases based on the law and facts and not based on their political convictions. Judges should not play into the hands of those who seek to subvert the rule of law in order to satisfy their political or private agendas. The independence of the judiciary may be described as an impartial judiciary, whose decisions are respected, and which is free from interference. The judiciary here should be understood to mean both the lower courts and the superior courts in a unitary sense.<sup>128</sup>

The independence of the judiciary does not signify unpredictability or waywardness on the part of the judiciary. Nor does it signify judicial rudeness or arrogance, be it in the name of judicial activism or not. The role of an independent judiciary is to protect rights and uphold the rule of law in a transparent and accountable manner.

### **3.2 Historical Development of the Principle**

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<sup>127</sup> Interference can come from various sources even though the executive is often the major source. It can come from the executive, the legislature, influential individuals, political parties, NGO's and the judicial hierarchy itself.

<sup>128</sup> Some jurisdictions draw a distinction between the lower court which operate under the executive and the superior courts which are considered a separate branch of government. In South Africa and Zimbabwe the magistracy is under the Ministry of Justice. Both countries also share the Roman-Dutch law tradition.

The principle of the independence of the judiciary has a long history and must not be regarded as a bi-product of the now famous three waves of modern constitutional democracy. In the ancient times it was associated with growing trends of radicalism rather than the development of democratic governance. It must be said though that the concept has risen to unprecedented prominence with the new roles that the judiciary has acquired under modern constitutional democracy.

In the common law tradition the concept of the independence of the judiciary is credited to the British system of justice which is regarded as the cradle of the independence of the judiciary, the lynchpin of the Anglo-Saxon legal tradition. The common law then spread to all parts of the British Empire.

The independence of the judiciary first developed as a fortress against the seemingly unlimited powers of the king who used them capriciously many times. The English courts were one time the King's courts, serving at the good pleasure of the Crown and subject to dismissal without cause. That was not to remain forever as the idea of individual rights and the rule of law began, culminating into the *Magna Carta* of 1215. This development epitomized the need for courts independent of the King to enforce those individual rights. This was a real struggle. An account is given (by Jack Giles) of some pivotal moments in that struggle for the independence of the judiciary. In the fifteenth century Chief Justice MacEachen had to deal with a situation where the son of King Henry IV, Prince Hal (who later became King Henry V) matched into Court and ordered a prisoner released. The prisoner was Prince Hal's servant. The Chief Justice refused the Prince's orders, saying "Your servant has broken the law, and must be punished by the law. If you wish to save him you must go to the King, your father, and beg mercy from him. He can grant it if he thinks fit. Now I pray you leave the court and allow me to deal as I think just with the prisoner". The Prince is said to have flown into rage and struck the Chief Justice. The Chief Justice remained unmoved and charged the Prince in the name of the law to give up his sword for contempt and disobedience. The Prince went quietly to prison. Thus the Chief Justice had to apply the law independently and impartially, without fear or favour, ill-will or affection. The all-powerful monarch had to accept this. When Prince Hal came to power, he did not dismiss his father's courageous judge. Rather he confirmed him and showed him great honour.

The fight for the independence of the judiciary continued in the centuries that followed as many rejected the concept. For example in 1616, James I demanded that the monarch be consulted in cases that affected the Crown or any of its prerogatives. Chief Justice Coke refused to do so. James I dismissed him from his office, complimenting himself on his magnanimity in saving the obstinate Chief Justice's head. For a period of twenty-five years the judges remained firmly under the throne. Charles I who reigned next removed two Chief Justices and suspended a Chief Baron, followed by impeachment of some judges for raising revenue without the sanction of Parliament. Then for a third of a century political pressure was taken off the judges. What followed thereafter was a long series of removals of judges for political reasons.<sup>129</sup> However in the longer term, the

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<sup>129</sup> Charles II sacked 11 judges in the last 11 years of his rule and his brother James II sacked 12 in three years

views of Chief Justice MacEachen and the Lord Chief Justice Coke on the independence of the judiciary and rule of law prevailed.<sup>130</sup> The Act of Settlement of 1701 in one of its briefest clauses finally gave statutory recognition to the principle of the independence of the judiciary. That was not the end of the battle for the independence of the judiciary. Even with the Act of Settlement statutory recognition of the independence of the judiciary, Parliament continued to attempt to exert political pressure on the Bench, with the King and his ministers seeing nothing wrong in pressurizing judges on pending cases. In 1770 two members charged in Parliament that a minister had tampered with a judge. The King himself sent the judge a letter of instructions on one occasion but the judge, knowing his duty and having the courage to do it, returned the letter to the King unopened and unread.

It is clear that over time judges had serious difficulties securing the independence of the judiciary. Although the Act of Settlement provided that judges would continue in their job on good behaviour (*quamdiu se bene gesserint*) “but upon the address of both Houses of Parliament it may be lawful to remove them”, in fact it has never been necessary to resort to the provision in that the power of removal has never been used as regards an English judge.<sup>131</sup> The ideas of John Locke and Montesquieu who envisioned separation of powers of the judiciary, the executive and the legislature gave greater impetus towards winning the battle for the independence of the judiciary, at least in the common law tradition. However, winning that battle required statesmen who, with commitment, translated that vision into political practice and the courageous judges who stood firm for the principle of the independence of the judiciary on pain of removal and imprisonment.<sup>132</sup> The principle then spread to other places which had adopted the common law tradition. The United States of America developed it further at the adoption of its Constitution against arguments that the judiciary consisted of unelected officials and should not be given so much power. What prevailed was the doctrine of separation of powers and the balancing of powers of the three branches of government with checks and balances to which the independence of the judiciary was key.

In the civil law tradition<sup>133</sup> the rise of the independence of the judiciary can be traced as far back as the famed Byzantine Emperor Justinian *Corpus Juris Civilis* which had been compiled and decisions of jurists burned to create certainty and purity in the law. The 533 A.D. first codification of Roman law under Justinian gave coherence and certainty to it

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<sup>130</sup> In 1688 Parliament unexpectedly and in the so-called Glorious Revolution asserted sovereign power and recognised the importance of underpinning the principles of the independence of the judiciary in a public way, although by what was considered to be an oversight, the basic ground rules for the independence of the judiciary were omitted from the Bill of Rights of 1689. Be that as it may, William III respected the independence of the judges and the rules were enacted in much the same form in the Act of Settlement (1701).

<sup>131</sup> See “Judicial Independence – Its History in England and Wales” by Lord Justice Brooke.

<sup>132</sup> Britain remains without a written constitution, but more recently the Constitutional Reform Act 2005 of England has enacted some strong and specific provisions aimed at further entrenching the independence of the judiciary as provided for in the Act of Settlement.

<sup>133</sup> Civil law or continental is the predominant system of law in the world, having its roots in Roman law, Canon law and the Enlightenment (especially the *Corpus Juris Civilis* of Emperor Justinian. Also French Napoleonic Code (1804), German Civil Code of 1900 and the Swiss Code (1907) were the most influential in the development of the civil law tradition.

such that interpretation by judges was not necessary. Most of the present day civil law jurisdiction inherited the civil law system as developed in France. Judgeships in pre-Revolutionary France were private property, such that even Montesquieu inherited, held for a decade, and then sold a judgeship.<sup>134</sup> Thus judicial independence was without real meaning. This approach was also advocated in the 19<sup>th</sup> Century during the development of the Code Napoleon (1804), where it was said that interpretation of the law should be left to elected legislature and not unelected judges. In 1883 France made the first step towards institutional guarantee of the independence of the judiciary when Parliament granted jurisdiction to special chamber of Court of Cassation (France's Supreme Court) to sit in judgment of other members of the judiciary in disciplinary proceedings. When this idea was found difficult to implement in practice, France and the other countries that Napoleon had conquered and where the Civil Code approach was received, judges assumed an important role. While in the civil law tradition interpretation of the law is more conservatively done than in the common law tradition,<sup>135</sup> it is not in doubt that the principle of the independence of the judiciary is recognized and respected. Indeed the 1958 Fifth Republican Constitution of France where the civil law tradition is believed to have originated expressly recognizes the principle of the Independence of the judiciary.

The differences in the historical development of the principle of the independence of the judiciary in the common law tradition and civil law tradition notwithstanding, there has been a convergence on many of the basic institutional elements supporting the independence of the judiciary. This convergence has made it possible to develop international and global norms of the concept of the independence of the judiciary. One thing is certain; it took a long struggle to win the independence of the judiciary. The history demonstrates that the fight for the independence of the judiciary has been long and treacherous with many martyrs along the way. It also shows that while the rise of the doctrine of separation of powers gave impetus to the principle of the independence of the judiciary it was certainly not the origin of the principle. Finally an appreciation of the historical development of the principle can contribute significantly to the understanding of the meaning, purpose and importance of the independence of the judiciary.

### **3.3 Whether Independence of the Judiciary is a Foreign Principle to Sub-Saharan Africa**

The historical development of the principle of the independence of the judiciary as given above mainly focuses on the common law and civil law traditions which only spread to Sub-Saharan Africa after they had developed in Britain and France. The relevance of the principle to Sub-Saharan Africa becomes an issue.

Sub-Saharan Africa has experienced change of governments within a relatively shorter period than the rest of the world. The third wave of democracy in the region is not the

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<sup>134</sup> See "Law, Liberty and Economic Growth" by Gerald W. Scully, NCPA Policy Report No. 189, Dec., 1994 ISBN #1-56808-053-0

<sup>135</sup> Within a civil law tradition statutes would not be subject to judicial review and liberty would be at the sufferance of the legislature.

first taste of democracy. At independence some of these countries held democratic election and set up democratic governments based on democratic constitutions. These governments quickly turned into dictatorships, the democratic constitutions changed to create one-party dictatorships and the bill of rights removed. The argument was that democracy had introduced concepts that were foreign to African culture and tradition.<sup>136</sup> It will be seen that when democracy was first adopted at independence in many Sub-Saharan Africa it suffered a quick and, as some would say, accidental death. Yet in the United States of America democracy has survived for over two centuries. It has survived for a very long time in the other older democracies. The question may be asked as to what went wrong with the independence phase of African democracy? Now that most of Africa is having a second go at constitutional democracy, what was it that was not learnt then which we must learn now? Is Africa still searching for an appropriate system of governance or is Africa now committed to constitutional democracy? Not with suggestions that there are disillusionments about democracy on the continent.<sup>137</sup>

Samuel M. Makinda in his article entitled “Reclaiming Democracy for Africa: Alarming signs of Post-Democratic Governance”<sup>138</sup> calls for strategic leadership committed to the establishment and consolidation of democracy in Africa. Strategic leadership has to be conceived and exercised within a system of shared values, rules, norms and principles. He decried the idea that democratic governance has in a global interdependence broadened the constituency of Western policymakers, which has become an entire world. Some so called African democrats tend to argue that certain tenets of democracy are foreign to Africa and therefore inapplicable. Former Commonwealth Secretary General, Chief Emeika Anyaoku, dismissed the idea that democracy was foreign to Africa when he spoke to the South African Parliament in 1998. In a detailed and well researched speech he was able to trace democratic practices in the African way of life even before modern democracy came to grip Africa. He also observed that with the French policy of assimilation and British policy of replacing African beliefs with their own there is not much else remaining that can be called African culture. By the same token the principle of the independence of the judiciary is not foreign to Sub-Saharan Africa although historically it may have not have been developed. It therefore comes as a surprise that Joaquine De Mello, President of the Bar Association of Tanzania should have acknowledged at a recent conference on ‘Constitutionalism: East African Experience’ that the concept of the independence of the judiciary was foreign to the East African countries of Uganda, Tanzania and Kenya.<sup>139</sup> This only goes to show that she was

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<sup>136</sup> See “The Role of the Legislature and the executive in Constitution Making and Domestication of International Instruments”, by Dr Jane Anshah, Attorney General of the Republic of Malawi, March 2007, (unpublished).

<sup>137</sup> “Support for Democracy seen falling in Africa” by Craig Timberg (May25, 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/24/> accessed 2007/10/15; “Poll of 18 African Countries Finds All Support Democracy” (June12, 2006) although the article also notes that trend analysis reveals some deterioration in the support for democracy in most of the 12 countries surveyed since 2000. <http://www.worldopinion.org/pipa/articles/braficara/>... Accessed 2007/10/15

<sup>138</sup> <http://www.uneca.org/itca/governance/Documents/Reclaiming%20democracy%20for%20Africa.PDF> accessed 10/10/2007

<sup>139</sup> See “African leaders fond of ‘phone justice’” by Lydia Shekighenda (04 October, 2007) <http://www.ippmedia.com/cgi-bin/ipp/print.pl?id=99719> accessed 2007/10/09

recognizing the argument that the independence of the judiciary is a concept foreign to Africa. However, that argument should never be given credence for it is only used to circumvent the rule of law. Even if the concept were foreign, it would be argued, it is a cornerstone of the democracy that the countries have adopted and it is so fundamental to it that they cannot opt to discard it and retain the democracy. As Korema J. of the International Court of Justice once observed, *“Of course there were rules in Africa in the past, but if Africa is to become a modern continent, we have to abide by what entails today. That does not mean we are denying our Africanness.”*<sup>140</sup>

### **3.4 Purpose and Importance of the Independence of the Judiciary**

The independence of the judiciary lies at the very heart of the judicial function, a cornerstone of any worthwhile legal structure and an essential element of any democratic system of governance that respects the rule of law. It is there not to serve the judges but the society. It is independence not for the judges, but independence of the judiciary for the society. It is the right of the people to have an independent judiciary. The right to fair and impartial adjudication of a matter before a court of law can only be upheld where there is the independence of the judiciary.

In Sub-Saharan Africa, like everywhere else, courts matter. More and more people are bringing their disputes to court for resolution.<sup>141</sup> They bring these matters to magistrate courts or the high court and appeal court. As these courts become important to people, the independence and impartiality of the judiciary becomes important.

The very notion of entrenched rights demands an independent judiciary. It is a requirement of the rule of law. An independent judiciary is and must be impartial. The judge's personal interests must not influence the decisions such that the judge must ensure that he or she is not only impartial but is also seen to be impartial.

Decisions rendered by an independent and impartial judiciary deserve to be respected by all and to be complied with without exception. The State must enforce the court decisions. Indeed courts administer justice in the name of the State. There should be no repeat of President Andrew Jackson's attitude when he said in response to the decision of the US Supreme Court in *Worcester v Georgia (1832)* that “John Marshall (the Chief Justice) has made his decision, now let him enforce it” yet he knew the responsibility to enforce court judgments lay with the executive branch of government. While no American President could be heard to say this today, evidence of such an attitude may be found in democratic Sub-Saharan Africa where court decisions are routinely ignored by the executive.

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<sup>140</sup> ANB-BIA SUPPLEMENT: The Judiciary in Africa, <http://www.peacelink.it/anb-bia/nr337/e00.html>

<sup>141</sup> Contrast this with Jennifer Widner's observations in “Courts and Democracy in Post-conflict Transitions: A Social Scientist's Perspective on the African Case”, *The American Journal of International Law*, Vol. 95, No. 1. (Jan., 2001) pp64-75

The principle of the independence of the judiciary ensures that the judiciary is free from interference from the executive, the legislature, the public, the media or civil society. Observers suggest that insulating judges from interference by government officials is often taken to be the most important aspect of the independence of the judiciary in that the executive has the potential interest in the outcome of myriad cases and it has so much potential power over judges.<sup>142</sup> However, a judge's individual independence remains critical in decision-making. In the absence of the independence of the judiciary, whether at institutional or individual judge level, the fundamental rights guaranteed to the citizen under the democratic constitutions of Sub-Saharan Africa will be illusory.

Some have attempted to explain the principle of the independence of the judiciary in political terms. They describe a political foundation of the independence of the judiciary on a number of reasons.<sup>143</sup> Firstly, it is said that violations of the independence of the judiciary would be too costly in the political sense and so politicians would avoid violations. Secondly, it is said that the independence of the judiciary allows politicians to shift the blame for unpopular decisions from themselves to the judges. Thirdly, an independent judiciary is politically attractive because, by making policy harder to change, it makes legislative bargains between politicians and interest groups more durable and hence more valuable to politicians. Fourthly, it has been suggested that the independence of the judiciary arises from the desire of politicians to avoid the risk inherent in sustained political competition in that they recognize that though the independence of the judiciary reduces the benefits a party can accrue while in power, it also reduces the cost of being out of power since its opponents are also constrained by it. Notably, these political explanations focus on what advantages politicians enjoy from the independence of the judiciary. Each one of them has its own problems. It is not correct to say that the independence of the judiciary arises out of political convenience. Indeed these political explanations do not accurately reflect the level of political commitment to the principle of the independence of the judiciary. The worst threats or assaults on the independence of the judiciary are from politicians. Further, the independence of the judiciary is not a principle intended for politicians or to advance the agenda of the government of the day. It is there for the society to get fair and impartial justice.

There are those who reject or refuse to recognize the principle of the independence of the judiciary for various reasons. It is argued that the judicial role in legislative review and judicial independence on which it rests is undemocratic as it replaces majority rule. Articles like "Forget Judicial Independence, It's Time for Judicial Accountability" or "Put meddling judges in their place" or that "Democracy in Africa Is a Lie" give some sense of some of the attitudes expressed about the independence of the judiciary. Indeed some have even argued that the principle is undemocratic and is an enemy of democracy. This argument is especially made with regard to judicial review where courts test

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<sup>142</sup> "Judicial Independence and the Constitution in Time of Change" by William Blair, Martyrs Day Memorial Lecture delivered on June 28, 2005, Ghana

<sup>143</sup> See "Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs", by Matthew Stephenson, [http://www1.worldbank.org/public\\_sector/legal/judicialindependence.htm](http://www1.worldbank.org/public_sector/legal/judicialindependence.htm) accessed 2007/09/26

legislation and governmental action against the supreme law of the land. The same old argument that it is not right that a law made by elected persons should not be struck down by unelected individuals. This argument is that the independence of the judiciary runs counter to the idea of majority rule in a democracy.

These arguments demonstrate a misunderstanding of what democracy really is. In a constitutional democracy, the constitution is supreme law and there can be no power or institution above or equal to the constitution. The rule of law and the independence of the judiciary are cornerstones of a working constitutional democracy. Observance of human rights is an integral part of a functioning democracy. Democracy, therefore, is not about majority oppressing the minority. Democracy should not be narrowed to majority rule, for that would raise the potential of tyranny of the majority. Democracy is about majority rule while fully respecting the minority rights. It must also recognize individual rights including fundamental rights. Whereas the executive and the legislative branch respond to majority views, the judiciary has to respond to both the majority views and the minority views. This is where impartial balancing act becomes crucial. The constituency of the judiciary is much wider than that of the other two branches of government in that it includes both the majority and the minority. This is where the counter-majoritarian arguments falter.

### **3.5 The Independence of the Judiciary as a Critical Factor for Investment and Economic Growth**

Accelerated economic growth tends to increase the role of government in the economic life of any society and if not watched or controlled and properly balanced can amount to a real threat to democracy. It is possible to sponsor rapid economic growth and give it as an excuse or deem it a convenience for suppressing criticism of governmental decisions or activities. That can be used to undermine democracy and the rule of law. From the economic development point of view it has been suggested that rational politicians should be interested in the independence of the judiciary in order to make their promises credible. Economic growth depends on credible commitments to sound economic policies and the independence of the judiciary makes policy commitments credible.<sup>144</sup> As such an independent judiciary encourages local and foreign investment and enhances economic growth.<sup>145</sup> It has been observed that: “Adherence to the rule of law is a fundamental precondition for the realization of development in all sectors. The absence of the rule of law continues to constrain market development, public confidence in the legal system, and the security and general wellbeing of the people. A competent and independent judiciary is vital to the development. The lack of judicial independence and the level of corruption impedes peoples’ confidence in formal conflict resolution and encourages reliance on informal and sometimes violent means of dispute resolution.

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<sup>144</sup> The 2007 Global Competitiveness Index shows that South Africa leads Africa at position 44 followed by Mauritius at 60 while many sub-Saharan African Countries, such as Mozambique, Zimbabwe, Burundi and Chad dominated the bottom. Chad was lowest at position 131. Other surveys have shown that South Africa also leads Sub-Saharan Africa in its high level of observance of the independence of the judiciary.

<sup>145</sup> “Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs” by Matthew Stephenson, <http://www1.worldbank.org/publicsector/legal/judicialindependence.htm> accessed 2007/09/26

Moreover, the absence of the independence of the judiciary discourages foreign investment.”<sup>146</sup>

Politicians only renege on the independence of the judiciary if their preferences deviate from the dicta of the judiciary. They tend to narrowly view the rule of law and the independence of the judiciary as political tools for the realization of their political objectives. It is however to be emphasized that while *de jure* independence of the judiciary does not have an impact on the real GDP growth per capita growth, *de facto* independence of the judiciary.<sup>147</sup> Thus some studies done in the area found that independence of the judiciary, especially *de facto* independence, does matter for economic growth. It was also noted in those studies that the distinction between *de jure* and *de facto* independence of the judiciary indicates that it is not sufficient to enshrine such independence in legal documents, but that it is necessary to shape the independence of the judiciary through additional informal procedures that may be accompanied and enforced by informal social sanctions. *De facto* independence of the judiciary lies in the independence actually being enjoyed by judges as measured by various factors, beyond the letter of the law. *De facto* independence of the judiciary means that there must be implementation beyond the letter of the law. This was the concern of the United Nations when it adopted procedures for the implementation of the basic principles of the independence of the judiciary in 1989.

### **3.6 The Independence of the Judiciary at International Level**

International norms on judicial independence of the judiciary have developed. Although modern constitutions will have provisions about the principle of the independence of the judiciary, international law and principles are becoming increasingly important sources for the application of the principle. The 1948 United Nations Universal Declaration of Human Rights has become an obvious starting point when judicial independence is viewed from the human rights perspective. According to that declaration every individual “is entitled to a fair and public hearing by an independent and impartial tribunal”.<sup>148</sup> The International Covenant on Civil and Political Rights also provides that “[A]ll persons shall be equal before the Courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>149</sup> The Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held in Milan in 1985 adopted the United Nations Basic Principles on the Independence of the Judiciary which were later the same year endorsed by the United Nations General Assembly. The procedures for the implementation of those basic principles were adopted in 1989. UN Special Rapporteurs for the independence of the judiciary are appointed from time to time to monitor the

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<sup>146</sup> NGO Statement, 2000 Consultative Group Meeting in Cambodia: Good Governance <file:///A:/Rule%20of%20law.htm> (accessed September 26,2003)

<sup>147</sup> “Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators” by Lars P. Feld and Stefan Voigt <http://ideas.repec.org/p/ces/ceswps/906.html> accessed 2007-10-09.

<sup>148</sup> Article 10

<sup>149</sup> Article 14

implementation of the basic principles and report from time to time to the UN Commission on Human Rights. Three United Nations approved instruments on standards for the independence of the judiciary, lawyers and prosecutors remain in place alongside one unendorsed instrument called the Singhvi Declaration of 1985.<sup>150</sup>

The Commonwealth Heads of Government adopted the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government (the Latimer House Principles) in 2003 to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values. One such fundamental value is the independence of the judiciary. There is a recognition in the principles that "[A]n independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country." In April 2005 Commonwealth Africa took a further step in Nairobi by drawing a "Plan of Action on the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government." The purpose was to provide for ways and means of promoting and advancing the Commonwealth Principles including the independence of the judiciary.

The Bangalore Principles adopted following the work of the Judicial Integrity Group also underscored the principle of the independence of the judiciary.

Other international instruments dealing with the independence of the judiciary are the Universal Charter of the Judge adopted on November 17, 1999 by the International Association of Judges; the European Charter on the Statute for Judges adopted by the Council of Europe in July 1998 to give effect to Article 6 of the European Convention on Human Rights which provides for the independence of the judiciary and the UN Basic Principles on the Independence of the Judiciary; Statement of Principles of the Independence of the Judiciary(6<sup>th</sup> Conference of the Chief Justices of Asia and the Pacific) (Beijing, 1995) and the Suva Statement on the Principles of Judicial Independence and Access to Justice, August 2004. The American Convention on Human Rights also provides for protection human rights through a competent, independent and impartial judiciary.<sup>151</sup>

In so far as Africa is concerned, State parties to the 1981 African Charter on Human and Peoples' Rights<sup>152</sup> have duty to guarantee the independence of the judiciary.<sup>153</sup> In the

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<sup>150</sup> See Remarks by Dato' Param Kumaraswamy, former UN Special Rapportuer on the Independence of Judges and Lawyers, to the Arab Judicial Forum, September 15-17, 2003

<sup>151</sup> Article 8(1)

<sup>152</sup> Articles 8 and 26 of the Charter

<sup>153</sup> See also Article 6 of the 1950 European Convention on Human Rights providing for the guaranteeing of the independence of the judiciary. The 1994 recommendation of the Council of Europe "On the Independence, Efficiency, and Role of Judges" provides that "All necessary measures should be taken to respect, protect and promote the independence of judges".

New Partnership for Africa's Development (NEPAD) Declaration on Democracy, Political, Economic and Corporate Governance,<sup>154</sup> member States of the African Union reaffirmed their commitment to the promotion of democracy and its core values. They undertook in particular to work with renewed determination to enforce the rule of law and adherence to the separation of powers, including the protection of the independence of the judiciary and of effective parliaments, among other matters. The Heads of State and Government agreed to ensure the independence of the judicial system that will be able to prevent abuse of power and corruption. They adopted An African Peer Review Mechanism on the basis of voluntary accession to promote adherence to and fulfillment of the commitments in the Declaration.

### **3.7 Essentials of the Independence of the Judiciary**

A complex mix of factors dictated by local circumstances determines the level of the independence of the judiciary in any country. There is no single model of achieving the independence of the judiciary. However, there is a clear set of essential requirements to ensure the institutional independence of the judiciary and the individual impartiality of the judges. These essential requirements have been established over long experiences and in many different countries including through international norms for the institutional design of the judiciary for a rule of law system.

#### *Constitutional guarantees*

The constitution of a country is the essential bulwark of the principle of the independence of the judiciary<sup>155</sup> and constitutional guarantees are critical for the entrenchment, preservation and promotion of the independence of the judiciary.<sup>156</sup> Entrenched provisions vesting judicial functions exclusively in the judiciary and providing that in the exercise of such judicial functions, the judiciary shall be independent and subject only to the constitution and the law, are absolutely essential for democracy. A formal constitutionally-entrenched, independent judiciary is absolutely essential and a necessary pre-condition to functional and substantive judicial independence.<sup>157</sup> Constitutions can serve to protect and enhance the existing notions of the independence of the judiciary and they give judges and all others the means to protect the independence of the judiciary.<sup>158</sup>

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<sup>154</sup> AHG/235(XXXVIII) Annex I of 18/06/2002.

<sup>155</sup> In some countries like Britain, the principle is guaranteed in an Act of Parliament. Preference though is guaranteeing the principle through entrenched provisions of a constitution. Beyond the constitutional and legal guarantees, the judiciary must be and be seen to be in fact independent.

<sup>156</sup> Constitutional guarantees must include entrenched provisions that the judiciary is independent from the other two branches of government and that neither the two branches nor any individual whomsoever shall interfere with the functioning of the courts.

<sup>157</sup> "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa" by Prof. Charles M. Fombad A.J.I.L. Vol. 55 No. 1. page 15

<sup>158</sup> As was observed by The Helen Suzman Foundation in talking about the South Africa Justice Bills "A carefully drafted constitution is necessary but not sufficient condition for constitutional democracy to take root. Without an independent judiciary to ensure compliance with the constitution, even a highly commendable constitution can degenerate into a fine-sounding but meaningless document. For that reason

Whereas early battles for the independence of the judiciary had nothing to stand on except the courage of the judges, modern battles have the constitutions to stand on.

This can be contrasted with Britain where until 2005 it was guaranteed by the Act of Settlement of 1701. Even with the 2005 changes in England it is still guaranteed by an Act of Parliament, The Constitutional Amendment Act of 2005.<sup>159</sup>

The status of the independence of the judiciary in the Constitution of the United States of America is less elaborate than in the Constitutions of Sub-Saharan Africa.<sup>160</sup> Yet the independence of the judiciary in the United States is undoubtedly firmly established as a cornerstone of American democracy as evidenced through practice in decisional and institutional terms and the Constitutional provisions.<sup>161</sup> The position in the 1958 Fifth Republican French Constitution is even less elaborate in guaranteeing the independence of the judiciary.<sup>162</sup> Yet the practice in France leaves no one in doubt that the independence of the judiciary is deeply entrenched in that democracy. In fact in 1980 the *Conseil Constitutionnel* (Constitutional Council) stated that the independence of the judiciary was a fundamental principle recognized by laws of the Republic and thus protected by the Constitution.<sup>163</sup>

Most democratic constitutions guarantee the independence of the judiciary. Provisions guaranteeing the independence of the judiciary must be entrenched in the constitution. They must be elaborate provisions and not vague. The other branches and their officials must be placed under a constitutional duty to assist and protect the independence of the judiciary through legislation or other measures including policy measures. It is an important aspect of the independence of the judiciary that decisions of courts are obeyed.<sup>164</sup> A constitution would be meaningless if the courts' pronouncements on it are ignored. This would in turn mean that constitutional democracy is meaningless.

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any threat to judicial independence, however small it might seem and however plausible government protestations of innocence might sound, should be treated seriously. The stakes are so high that constant vigilance against threats to judicial independence is imperative." "Judicial Independence imperiled", [http://www.hsf.org.za/%23ArticleDatabase/article\\_view.asp?id=390](http://www.hsf.org.za/%23ArticleDatabase/article_view.asp?id=390) accessed 2007/10/10.

<sup>159</sup> Britain, along with Israel and New Zealand and a fourth country, does not have a written constitution. Yet the Principle of the Independence of the judiciary is so deeply entrenched there that it is inconceivable that Act of Parliament guaranteeing it can be amended to remove the guarantees

<sup>160</sup> Article III vests judicial power in the courts and does guarantee federal judges the right to continue in office during good behaviour. It also guarantees that judges "shall, at stated times, receive for their Services a Compensation, which shall not be diminished during their continuance in office". The Judiciary Act of 1789 established the judicial courts of the United States of America with some elaboration on their powers.

<sup>161</sup> This practice has developed over the more than two hundred years of their democracy. One may wonder why Sub-Saharan Africa is struggling to establish the independence of the judiciary when it has more elaborate constitutional guarantees.

<sup>162</sup> Article 64 of that constitution provides that the President of the Republic shall be the guarantor of the independence of the judiciary and the judges may not be removed from office.

<sup>163</sup> Judgment of 22<sup>nd</sup> July, 1980, Con. Const. No 70401 DC.

<sup>164</sup> See Section 165(5) of the Constitution of the Republic of South Africa which provides that "An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

### *Administrative and Budgetary Autonomy*

Administrative and financial autonomy are important aspects of the independence of the judiciary. While it is democratic for any of the other branches of government to check, and indeed offer constructive criticism on its operations, it is undemocratic for any such branch to seek to control the judiciary. The doctrine of separation of powers and the principle of checks and balances do not include control of one branch by the other. The trend in the world today is to provide for administrative and financial autonomy for the judiciary, for controlling the staff and the purse of the judiciary is in fact controlling the judiciary.

### *Qualifications of Judges*

It is important that only qualified and competent persons be appointed to the judicial office. There must be minimum qualifications set for the appointment of judges. Merit must be the primary consideration for appointment to a judicial office. There are certain judicial virtues that would have to be taken into consideration. They include legal learning, trial experience, wisdom, compassion, clarity of thought and expression, robust independence, capacity for detachment, impartiality, attentiveness, diligence, common sense, strength of character and administrative skills.<sup>165</sup>

### *Nomination and Appointment Processes.*

The process for the nomination and appointment of judicial officers vary from country to country. In some instances positions in the judiciary are advertised and interested persons apply. Those short-listed are either considered by the Judicial Service Commission or are invited for interview. Names of successful candidates are submitted to the President and the President makes appointment either on the advice or on the recommendation of the Judicial Service Commission. Whatever the method of nomination and appointment, it is critical that the process be transparent. Some people have argued that in the spirit of transparency, the names of those who did not make it to the short list be published together with the reasons. That course of action might be as counter productive as it is likely to infringe on the right to privacy.

After appointment, promotion should be based on merit. It is debatable whether promotion based on seniority also amounts to promotion on merit.

### *Secure remuneration*

The financial security of a judge is important for ensuring that he or she remains independent in performing adjudicative functions. A judge's remuneration should not be reduced during the tenure of office without his or her consent. At the same time it should be reviewed from time to time to ensure that it does not lose its original value.

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<sup>165</sup> See "Judicial Appointments and Judicial Independence." By Chief Justice Spigelman of New South Wales, Address to a Rule of law Conference, Brisbane, 31 August, 2007

### *Security of tenure and Disciplinary Matters*

Security of tenure of judges must be included in the constitution. They should be appointed to serve until attainment of a prescribed age or for life. They should only be removed on limited grounds of inability to perform their functions or for serious misconduct. In some jurisdictions judges remain in office as long as they remain of good conduct. Judges on contract are sometimes thought to be vulnerable to influence if they must worry whether their contract will be renewed or not. Matters of disciplining judges and judicial service commission or similar body must be provided for. Disciplining or removal of judges must follow clearly laid down procedures which incorporate the concept of rules of natural justice.

### *Immunity from Prosecution Provisions*

An important aspect of the independence of the judiciary is that a judge should not fail to render a decision for fear of being prosecuted by a disgruntled unsuccessful party. There must be included provisions for the immunity of the judicial officer from prosecution for anything done bona fide in the course of performing a judicial function. It is important that judges are protected from prosecution for anything they do bona fide in the performance of their judicial functions. As Lord Denning M.R. said “No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness he is not liable to an action.”<sup>166</sup>

### *Impartiality and Integrity*

Impartiality and integrity are judicial virtues that require some explanation. Independence of the judiciary entails that the decision-maker should be impartial deciding the case. Judicial decisions must not be influenced by the judge’s personal interest in the outcome of the matter. Personal interest would include acting for the benefit of another party. The integrity and propriety of the judge is a critical factor for ensuring impartiality. When the Judicial Integrity Group drew up the Bangalore Principles of Judicial Conduct it recognized that a judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law.<sup>167</sup>

### *Transparency and accountability*

In this age of democratic governance, transparency and accountability are critical aspects of the independence of the judiciary. Indeed these are requirements of a constitutional democracy and no branch of government can avoid being transparent and accountable.

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<sup>166</sup> *Sirros v Moore* [1975] Q.B. 118 at 132

<sup>167</sup> The Bangalore Principles of Judicial Conduct were adopted by an international Judicial Group on Strengthening Judicial integrity in 2001 and these were revised by a Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002. By resolution 2006/23 the United Nations Social and Economic Council invited member States to encourage their judiciaries, consistent with domestic legal systems, to take into consideration the Bangalore Principles of Judicial Conduct when reviewing or developing rules with respect to professional and ethical conduct of the members of the judiciary.

Rather than weaken the independence of the judiciary, transparency and accountability strengthen the principle. That court proceedings are as a general rule held in open court is an aspect of both transparency and accountability.

### *Public Trust and Public Confidence in the Judiciary*

Yet another critical element of the independence of the judiciary is Public support of, and public confidence in, the judiciary.<sup>168</sup> The confidence of the public in the administration of justice is of paramount importance. The authority of the courts rests on public acceptance of judicial decisions and that acceptance depends on public confidence in the judges; the integrity, impartiality, independence and moral authority of the judiciary. Building public support or creating a constituency of the independence of the judiciary requires that there be created among the public a clear understanding of the principle and that it is for them as their right and not for the judges. The importance of the principle in protecting human rights and upholding the rule of law and democracy ought to be clearly explained to the public. Public should also be made aware why a half-hearted democrat would want to undermine the independence of the judiciary.

### **3.8 Measuring Judicial Independence**

There are problems associated with measuring the independence of the judiciary. Gathering comparative data is difficult. The independence of the judiciary is continuous in that either you have more or less of it rather than dichotomous in that you cannot give a definite yes or answer to it. The point must be made, though, that there are minimum measurement requirements that need to be met.<sup>169</sup> Assessing the independence of the judiciary in any one country requires combining different elements even though such elements do not necessarily move together.<sup>170</sup> It is also said that the degree of the independence of the judiciary in one country may vary depending on the type of cases, whether mere contractual matter or one with political overtones.

Focusing on formal provisions or institutional structure for purposes of measuring the level of the independence of the judiciary only deals with part of the problem because formal guarantees tend to be routinely ignored or manipulated. Formal protections are not sufficient to measure the actual independence of the judiciary.<sup>171</sup>

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<sup>168</sup> Public confidence in the judicial system is so vital to the effective operation of the judicial system and to the rule of law, and ultimately to democracy. Yet achieving public confidence in the judicial system is a very difficult undertaking. On the contrary, public confidence can very easily be destroyed by careless, baseless and unsubstantiated public attacks and criticism of the judiciary.

<sup>169</sup> See “Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs” by Matthew Stephenson, <http://www1.worldbank.org/publicsector/legal/judicialindependence.htm> accessed 2007/09/26

<sup>170</sup> As an evolving concept, it entails a combination of different elements which are in turn difficult to measure.

<sup>171</sup> Rather than use adherence to formal guarantees of the independence of the judiciary, which are frequently ignored or manipulated, Widner doing a research in common law Africa in 1999 conducted lawyer survey; asking lawyers in each nation whether in their judgment, the judiciary was more, or less, independent than it was five years before.

Despite the difficulties with measuring the independence of the judiciary, it is possible to tell whether a country respects and upholds the independence of the judiciary or not through assessing the conduct of its leaders towards their judiciary. A combination of what the formal guarantees are and what a country does about the independence of the judiciary assessed through surveys would give a good picture whether that country protects and promotes the independence of the judiciary and to what level.

An investor will want to know how the judicial system of a country operates before investing in that country. This will include whether the leaders respect and enforce courts decisions even though they may be against the government or whether or not political leaders control, manipulate or intimidate the judiciary. In most cases an investor will be interested to know whether the independence of the judiciary exists in fact in a given country. It is true to say that “[T]he sources of judicial independence are complex and do not conform to any single simple model. Nonetheless, it should be clear that developing an effective strategy to foster judicial independence requires a careful and critical examination of the incentives of politicians to support judicial independence. Unless these incentives are in place, no policy can hope to be successful.”<sup>172</sup> The difficulties in measuring the independence of the judiciary and the rule of law are indicative of the need for further empirical research to determine the levels and probably why there are endless assaults on the principle.

### **3.9 Independence of the Judiciary and Accountability**

In contemporary discourse on the independence of the judiciary there is need to strike a balance between the requirements of independence on the one hand and an appropriate measure of judicial accountability on the other. There can be no doubt that persons appointed to the position of high esteem and respect as judicial office must be persons with proven competence, integrity, probity and independence. That-notwithstanding, the judiciary as institution of democratic governance must function in a transparent and accountable manner. Accountability and transparency are the very essence of democracy. The principle of separation of powers tempered by the principle of checks and balances means that the judiciary too as a branch of government is subject to check and balances by the other two branches of government. Again as a public institution run on public funds, the judiciary must be accountable for its activities. Those who administer justice must be accountable to the people whose property the justice is. In modern democratic governance there can be no challenge to the need for judicial accountability. A modern judiciary should serve the country and the people well and cannot afford to behave as a runaway train or a tyrant on the pretext of the independence of the judiciary doctrine. Some have said that the shortest line between power and criminality is zero accountability, and that the independence of the judiciary means zero accountability. Nothing can be further from the truth.

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<sup>172</sup> “Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs” by Matthew Stephenson, <http://www1.worldbank.org/publicsector/legal/judicialindependence.htm> accessed 2007/09/26

Accountability, with respect to both the use of public resources and the integrity of public decision-making, requires the judiciary to explain and defend itself in ways which would once have been regarded as an affront to its dignity and, perhaps, to its independence. Many a treatise have argued about a tension between the independence of the judiciary on the one hand and judicial accountability on the other. That tension, it has been argued, leads to frequent controversy and constitutional crisis. If indeed the independence of the judiciary and judicial accountability are two sides of the same coin as many would argue it is difficult to see the tension as it would be difficult to see a tension between two sides of the same coin. It is difficult to see any such tension between the separate status of the executive and accountability of the executive or between the separate status of the legislature and accountability of the legislature. Why then should it exist between the independence of the judiciary and judicial accountability, one would ask. It seems tension should not be there. There have been some very outrageous editorial headlines such as *“Forget Judicial Independence, It’s Time for Judicial Accountability.”*<sup>173</sup> Yet in the body of the article one finds the following concession: *“Democracy requires independent court- but not tyrannical courts – decisions are based solely on facts and law --- not personal feelings or wishes or by influence from other sources and campaign contributions.”*<sup>174</sup>

The real question is what kind of accountability the judiciary should be subjected to in respect of the functions it performs.<sup>175</sup> Judicial accountability should not be a free-flowing concept but that which is properly circumscribed so that no one should be allowed to ride on the back of the concept of judicial accountability in unjustified endeavours to control, harass and embarrass the judiciary and justice. As Mr. Param Kumaraswamy once said, judicial accountability is not the same as the accountability of the executive or the legislature or any other public institution.<sup>176</sup> It is submitted that lack of understanding of the functions and the principle of judicial independence and undefined calls for judicial accountability would be responsible for the apparent tension. Some people would use the high-sounding phrase of judicial accountability without an appreciation of its real meaning and what it would entail.

Justice according to law, rather than popularity or public opinion, is the objective of the judiciary. Public opinion is fragmentary and transient must be distinguished from public confidence which is broadly based and enduring. Accountability must be on those matters the judiciary is required by law as its functions. In common law jurisdictions judges are required to explain their decisions by giving reasons within the decision-making process and within the courtroom. It is not expected of them to go on a political or public platform or enter what has been described as ‘the court of public opinion’ and explain their judgment. In a civil law jurisdiction long windy judgments giving reasons for the

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<sup>173</sup> North Country Gazette, March 17, 2006, <http://www.northcountrygazette.org/articles/031706Accountabilty.html> accessed 2007/10/08

<sup>174</sup> Ibid

<sup>175</sup> It has been suggested by some that a very significant mechanism for checking the conduct of judicial officers is through professional criticism of judges and peer pressure, yet another misconception of what accountability is about.

<sup>176</sup> See Remarks by Dato’ Param Kumaraswamy, former UN Special Rapportuer on the Independence of Judges and Lawyers, to the Arab Judicial Forum, September 15-17, 2003

decision are anathema. The appeals hierarchy provides a check and a line of accountability. Beyond the highest court of appeal the matter would call for legislature to have another look at the law. On financial matters the judiciary like the other branches of government is subject to audit by the Auditor General or some similar institution.

There are of course areas which the judiciary needs to work on and improve in order to enhance accountability and attain the treasured public confidence it need. Thus, there must be put in place clear compliant handling mechanism as well as clear mechanisms for evaluation of the performance of the judiciary. Mr. Param Kumaraswamy put it succinctly when he said the following:

*“Judges are accountable to the extent of deciding the cases before them expeditiously in public (unless for special reasons), fairly and deliver their judgments promptly and giving reasons for their decisions; their judgments are subject to scrutiny by appellate courts. No doubt legal scholars and even the public including the media may comment on the judgment. If they misconduct themselves, they are subject to discipline by the mechanism provided under the law. Beyond these parameters, they should not be accountable for their judgments to any others. Judicial accountability stretched too far can seriously harm judicial independence.”<sup>177</sup>*

A demand for judicial accountability is not an intrusion into the independence of the judiciary if it done with full appreciation of the functions of the judiciary and the doctrine of the independence of the judiciary. Discourse on judicial accountability should not eclipse the principle of the independence of the judiciary.

### **3.10 Independence of the Judiciary and Judicial Activism**

Judicial activism is used as a derogatory phrase and is contrasted with judicial restraint.<sup>178</sup> Judicial activism is a common law feature and should not be taken to mean the same thing as judicial lawlessness. Hon. Justice Kirby suggests that judicial activism should not be viewed as meaning power without responsibility but rather as conforming to duty where the activism is appropriately done, looking at the law in context.<sup>179</sup> He is concerned that the phrase ‘judicial activism’ has become code language for denouncing and demonisation of important judicial decisions with which conservative critics do not agree.<sup>180</sup> When either judicial activism or judicial restraint is stretched to the extreme it becomes a real threat to the independence of the judiciary. Filling in gaps in the law is an

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<sup>177</sup> Ibid

<sup>178</sup> It has been suggested that while judicial activism is the subject of spirited attack, the far greater problem is judicial abdication of its core constitutional duty to protect individual rights.(see “A cheer for judicial activism” in ‘The Statesman’ – Ghana, [http://www.thestatesmanonline.com/pages/news\\_detail.php?newsid=3468&section=9](http://www.thestatesmanonline.com/pages/news_detail.php?newsid=3468&section=9) accessed 2007/10/07)

<sup>179</sup> “Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty” by Hon. Justice Michael Kirby AC CMG, <http://www.austlii.edu.au/au/journals/MULR/2006/18.html> accessed 2007/10/12

<sup>180</sup> Ibid

aspect of interpreting the law such that it makes the sense the law maker intended when making the law. Some people call that judicial law-making. It is important that the judiciary does not create a gap in the law in order to fill. That is not part of judging and certainly it would warrant criticism. In October 1997, Senator Jefferson Session observed as he presented a lecture to Federalist Society that “[T]he only real threat to judicial independence is judicial activism” and he went on to quote Archibald Cox that “a judge whose decisions are influenced by politics is putting the independence of the judiciary at risk”.<sup>181</sup> If the constitution is a living document, as most will agree, then judicial activism must entail breathing life into the constitution, which is not such a bad idea. Hon. Justice Kirby sees judicial activism to some degree as inherent in the judicial function. In somewhat strong language he says: “The one branch of government that the legislature, the executive, capital, unions and the media cannot control- indeed the one source of power that is not (and should not be) subject to bullying and control from any source- is the judiciary. From their bully pulpit the scribblers and those who are intolerant of views other than their own, can thunder and attack the judges as activists and illegitimate.... Well, I have a message for those of that ilk. The judges will simply ignore them and do their duty. In the cases that come to the judicial seat, the judges will continue performing their functions with independence and integrity according to their best notions of the law and their conscientious appreciation of the justice of the particular case.”

Hon Justice David identifies three forms of judicial activism, namely activism in reforming procedural rules, activism in political and social reforms and activism in human rights.<sup>182</sup> He too warns that judges who insist on being absolutely passive in the courtroom while manipulation occurs, tolerate, in effect, the injustice that may result. It is the judicial activism involving political and social reform that appears to be dangerous and attracts most comment. Bearing in mind that one of the most important functions of the judiciary in a democratic state is to shield the people from illegal conduct of government, it becomes easy for the judiciary to attract criticisms that undermine its independence. The judiciary needs to be consistent and steadfast in its application of the law in this regard and not to decide cases on personal inclinations and subjective intentions of the judge.<sup>183</sup> Yet there must not be fear of change or adaptation to change for that would also be engines for injustice. Erosion of human rights should not be allowed to happen on account exercising restraint. Erosion of human rights happens very gradually and at times imperceptibly.<sup>184</sup> What is paramount is care in the application and development of the law.

An independent judiciary, especially one with the power of judicial review, has become a pivotal part of the constitutional architecture of modern democracies. Admittedly without

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<sup>181</sup> “Reflections on Judicial Independence” by Hon. Jefferson Sessions, Senator from Alabama, October 17, 1997.

<sup>182</sup> “Ethical Problems with Judicial Activism” by The Hon Justice David Edited version of a paper given at a Conference in Beijing organised the National Judicial College, October 12, 2004, [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_Court/II\\_sc.nsf/pages/SCO\\_ipp12\\_...](http://www.lawlink.nsw.gov.au/lawlink/supreme_Court/II_sc.nsf/pages/SCO_ipp12_...) accessed 2007/10/12

<sup>183</sup> Ibid

<sup>184</sup> Ibid

it, modern constitutionalism, being the rule of law within a system of horizontal and vertical checks and balances, would be a nonstarter. What is called judicial activism should be within the parameters allowable by law and should not lead to the judiciary usurping the powers of the other branches of government.

### **3.11 The Independence of the Judiciary and Judicial Education**

Continuing legal and judicial education is very important for members of the judiciary in order for them to maintain or even enhance their competence levels. There was a time when it was considered that by the time one becomes a judge one would have had all the training and the relevant experience one would require to perform well on the bench. That time is long since gone. The law is changing all the time and there is need for constant updating, not just on the law itself, but also on the skills required on the bench. Most judges realize this. Conservative as courts may be, technology has infiltrated them, and quite useful technology. This is a new innovation that would remotely resemble any training that a judge may have had those many years ago. The case for continuing legal and judicial training is now settled.

Continuing legal and judicial training contributes significantly to the sustenance of the independence of the judiciary in that it aims to maintain and enhance competences in the judiciary. An incompetent judiciary would be a public disgrace and would not engender the much needed public trust and confidence. An incompetent judiciary would undermine the independence of the judiciary.

Let me add that owing to the sensitivity of the matter of judicial training it is now widely accepted that for it to be properly done and to be effective it must be under the charge of the judiciary. Having chaired the Malawi Judiciary Training Committee since 1998 and having studied various training programmes from many different countries, the writer has established that the assertion is accurate.. Training of the judiciary managed and controlled from outside the judiciary just does not work. Of course the faculty for such training must be a carefully selected mix of experts including from outside the judiciary.

### **3.12 The Independence of the Judiciary and Judicial Code of Conduct.**

The conduct of judicial officers on and of the bench has for a long time been known to affect the perception of the public on the impartiality or otherwise of the judicial officer. Good judicial conduct enhances the perception of impartiality while bad judicial conduct has the opposite effect. In turn it affects the independence of the judiciary in that public confidence and public trust will either be enhanced or eroded.

The history of Judicial Codes of Conduct is a troubled one. The idea of drawing up judicial codes of conduct was frowned upon as an incursion into the territory of the independence of the judiciary. Judges' behaviour was characterized by wisdom and fairness and they resolved disputes in a consistent and equitable manner. As standard setters, members of the judiciary enjoyed reverence and deference resulting from their embodiment of the earlier stated values. However, members of the judiciary are

individuals who are a product of their own upbringing. Since ‘men are not angels’ and since in a democratic society the judiciary is the bulwark of freedoms and rights, it became increasingly necessary to adopt rules of conduct and basic human values. The judiciary is the ultimate refuge for all quarrels between individuals inter se and between individuals and various public authorities. Indeed the judicial office is a public office arising from public trust. In order to preserve the public trust, incumbents of the office must adhere to some code of conduct to avoid personal gain, partiality and being exposed to undue influence.<sup>185</sup> Thus a judicial code of conduct will help to enhance the independence of the judiciary. The Bangalore Principles on Judicial Conduct adopted by the Judicial Integrity Group in 2001 represent international effort to encourage countries to adopt judicial codes of conduct and not to frown upon them. Many countries are yet to adopt national judicial codes of conduct.

#### **4 The Independence of the Judiciary in Sub-Saharan Africa**

##### *Basis*

The independence of the judiciary in Sub-Saharan Africa is not only grounded in the history of the legal systems that the region inherited but also in the constitutions of the countries, local circumstances and the international and regional legal instruments spelling out the principle as well as the level of commitment to the principle. The independence of the judiciary, a doctrine intricately intertwined with the doctrine of rule of law, is especially at risk in Sub-Saharan Africa where cases of abuse and glorification of lawlessness appears rampant. Lack of judicial independence in one Sub-Saharan Africa has the potential of throwing the whole idea of regional integration into turmoil.

Most of democratic Sub-Saharan African countries have constitutions that guarantee the independence of the judiciary to varying degrees.<sup>186</sup> The constitutional guarantees of the independence of the judiciary in these countries are generally weak and inadequate.<sup>187</sup> Sub-Saharan Africa can be categorized on the basis of the degree to which the countries guarantee the independence of the judiciary in their Constitutions and other laws: (i) Strong constitutional and legal safeguards such as South Africa; (ii) Weak constitutional and legal safeguards; (iii) No constitutional or legal safeguards. The question of commitment can be tested as against all three categories.

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<sup>185</sup> “Judicial Ethics and the role of a Judge in a Democratic Society” by Hon. Judge Taghrid Hikmet, Presented to a Conference at Harvard Law School, December 1-2, 2006

<sup>186</sup> Angola Art 120-123; Botswana ss96-104; Lesotho ss47, 118-133; Madagascar Art 97-124; Malawi ss9, 103-109; Mauritius ss76-86, 113-119; Mozambique art 161-175; Namibia art78-85; S. Africa ss165-180 Swaziland ss62,138-160; Zambia art161-175; Zimbabwe ss79-92

<sup>187</sup> A distinction needs to be drawn between constitutional and legal guarantees of the independence of the judiciary on the one hand and guarantees by the actual practice of the State authorities in their observance and protection of the independence of the judiciary. The protection and promotion of the independence of the judiciary will be at the highest level where the constitutional and legal guarantees are elaborate and deeply entrenched in the constitution of a country and where there is demonstrable strong commitment to the principle through practice. Of course the judiciary must itself respect the principle of the independence of the judiciary.

## *Challenges and Threats*

Independence of the judiciary in Sub-Saharan Africa faces serious challenges and is generally weak.<sup>188</sup> It is characterized by weak and inadequate constitutional guarantees coupled with lack of commitment by political leaders to promote and protect the principle. There is little evidence that the independence of the judiciary is a top priority of the democratic governments of Sub-Saharan Africa. It is perpetually threatened through unwarranted attacks and circumventing the constitution, especially by the executive branch of government in all of Sub-Saharan Africa.<sup>189</sup> Concerns have been expressed at various forums regarding strong pressure from the executive, incomplete financial and administrative autonomy of the judiciary, interference by the legislature, weak infrastructure, inadequate budgetary allocations, corruption, low pay and sometimes a hostile attitude of the media towards the judiciary. It is conveniently ignored or disregarded even by those who purportedly champion democracy. Those who profess to support it in most cases simply pay lip service to the principle. While there must be constitutional and legal guarantees of the principle of the independence of the judiciary, it is imperative that there is de facto independence of the judiciary and this requires the commitment of all who champion democracy, particularly those in political authority.

There are some very worrying trends in so far as the observation of the principle of the independence of the judiciary is concerned.<sup>190</sup> In many Sub-Saharan countries formal guarantees of the independence of the judiciary are routinely ignored or manipulated. There are signs that there is no commitment to the principle and that those who call themselves democrats appear to be half-hearted democrats. In his report on the independence of judges and lawyers submitted to the United Nations Commission on Human Rights on 11<sup>th</sup> February, 2002, the Special Rapporteur Dato' Param Cumaraswamy regretted that the situation of the independence of the judiciary and the rule of law remained delicate throughout the world. He was concerned about repeated

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<sup>188</sup> Professor Gutto notes that the independence of the judiciary in Sub-Saharan African countries remains fragile and requires nurturing.

<sup>189</sup> Obstacles to the independence of the judiciary are lack of political will, lack of respect for the constitution, disobedience of court orders, lack of capacity. Modern challenge to the independence of the judiciary may be blatant (the Uganda case or justice by telephone as in Tanzania), but in most cases it is subtle. Judges should not be made to decide cases according to popular opinion or political pressure but according to law and justice. While there would be nothing wrong with evaluating the performance of judicial officers and with criticism of judicial decisions (may be appropriate and salutary), personal attacks on judges may rise to a level where they raise concerns about whether the judge, however courageous, may be unconsciously affected. The executive arm of government has always been regarded as the principal threat to the independence of the judiciary, because the executive is in one manner or another the ultimate source of power for the appointment of judges, for the administration of mechanisms for discipline or removal and the source of funding for the administration of justice. It seems fashionable among democratically elected governments in many sub-Saharan African countries to undermine judicial independence and the rule of law, whether by unwarranted attacks on the judiciary or by circumventing constitutional provisions aimed at guaranteeing the independence of the judiciary.

<sup>190</sup> The judiciary faces a number of limitations which inhibit its role in safeguarding the principle of the independence of the judiciary. Some such limitations may arguably be necessary for the proper functioning of the principle. However there are other limitations which are a creature of those who want to live above the law and who are bent on frustrating the work of the judiciary.

efforts by some Governments, especially in Sub-Saharan Africa, to interfere with the independence of the judiciary. That interference went so far as removing or attempts to remove judges in countries such as Eritrea, Guinea-Bissau, Malawi, Tunisia and Zimbabwe among others.<sup>191</sup> Mr Cumaraswamy also observed that that the security situation of judges, prosecutors and lawyers in some countries remained a cause for concern, having noted the killings of five judges, five prosecutors and one lawyer with many more threatened.

### *Strong Constitutional Guarantees*

There are very few Sub-Saharan countries that have strong constitutional guarantees of the independence of the judiciary. South Africa is recognized as a country in Sub-Saharan Africa with strong constitutional and legal guarantees of the independence of the judiciary which are also respected in practice.<sup>192</sup> The constitution deals with all or nearly all the basic elements of the doctrine of the independence of the judiciary ranging providing that the judiciary is independent and subject only to the constitution and the law and that all organs of government must do everything within their powers to support and promote the doctrine, providing strict procedures for hiring and tenure, disciplining, qualifications and competences, including principles of judicial accountability. The Constitution of the Republic of Malawi is also said to have entrenched the principle of the independence of the judiciary though, arguably, not as strongly as the South African Constitution.<sup>193</sup>

Swaziland is a constitutional monarch where there has been a relentless assault on the independence of the judiciary. The 1968 Constitution of Swaziland provided no constitutional guarantees of the independence of the judiciary. The new constitution institutionalizes the independence of the judiciary, giving the judiciary exclusive judicial authority.<sup>194</sup> The history of the judicial institution in Swaziland has been one of the independence of the judiciary being subjected to immense pressure or even completely ignored.

The Constitution of the Republic of Uganda guarantees the independence of the judiciary and affirms that the judiciary is not subject to the control or direction of any person or

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<sup>191</sup> See UN document E/CN.4/2002/72 Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted to the Fifty-eighth session of the UN Commission on Human Rights, in accordance with the Commission's resolution 2001/39

<sup>192</sup> Section 165 of the Constitution of the Republic of South Africa

<sup>193</sup> The Republic of Malawi Constitution does not have an equivalent of Section 165(3), (4) and (5) which provide that "No person or organ of state may interfere with the functioning of the courts"; "Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts"; and "An Order or decision issued by a court binds all persons to whom and organs of state to which it applies" respectively. Thus, under the Constitution of the Republic of South Africa, both negative and positive duties are placed on other organs of government to promote and protect the independence of the judiciary.

<sup>194</sup> But as Voigt would say there is a distinction between de jure independence of the judiciary and de facto independence of the judiciary. The latter is preferred because it is the one that makes a whole difference to investment and economic growth.

authority.<sup>195</sup> Besides, Uganda is a party to the International Covenant on Civil and Political Rights which guarantees the principles of equality before the law and the independence of the judiciary. Uganda is also a party to regional instruments which guarantee the independence of the judiciary.

### *Weak Constitutional Guarantees*

Constitutional guarantees for the independence of the judiciary are weak in most Sub-Saharan African countries.<sup>196</sup> Some such constitutions articulate parliamentary supremacy and not constitutional supremacy. Kenya, Mauritius and Zimbabwe constitutions fall in this category. The Kenyan Constitution does not state that the judicial function is exclusively left to the judiciary.

In Cameroon the 1999 amended Constitution<sup>197</sup> provides for a separation of powers and provides that “the judicial power shall be independent of the executive and legislative powers.”<sup>198</sup> Although the Cameroonian Constitution provides for judicial independence, in reality the enormous powers given to the President under the Constitution to appoint, dismiss, promote, transfer and discipline judicial officers, especially judges and prosecutors limits the independence of the judiciary.<sup>199</sup> It is significant that appointments to the bench are not done by the judiciary itself.<sup>200</sup> Again the fact that the grant of pardons and reprieves is outside the judiciary has limiting effects on the exercise of judicial power. The power of the legislature to nullify a Supreme Court decision by enacting a law to invalidate a court’s decision has limiting effect.<sup>201</sup>

The Constitutions of the Comoros,<sup>202</sup> Cape Verde,<sup>203</sup> Mauritania,<sup>204</sup> Togo,<sup>205</sup> Niger,<sup>206</sup> Benin,<sup>207</sup> Guinea-Bissau,<sup>208</sup> Chad<sup>209</sup> and Rwanda<sup>210</sup> recognize the independence of the judiciary but also make the President the guardian of the independence of the judiciary. It is interesting to note in the case of the Comoros that it has had nineteen coups or

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<sup>195</sup> Article 128(1) and (2) of the 1995 Constitution of the Republic of Uganda

<sup>196</sup> Although most of the Sub-Saharan Africa democratic constitutions articulate the distribution of powers among the executive, the legislature and the judiciary, many of them do not articulate the principle of the independence of the judiciary.

<sup>197</sup> The 1972 Cameroon Constitution was amended in 1996

<sup>198</sup> Article 37(2) of the Constitution of Cameroon

<sup>199</sup> Article 37(3) of the Constitution of Cameroon; See “Researching Cameroonian Law” by Professor Charles Manga Fombad published June/July 2007 <http://www.nyulawglobal.org/globalex/Cameroon.htm> accessed 2007/10/08

<sup>200</sup> Most Sub-Saharan African Constitutions provide the role of a Judicial Service Commission or a body of similar nature in the appointment of judicial officers.

<sup>201</sup> *Kayambo Vs Kayambo 11 MLR 259*

<sup>202</sup> Article 28 of the Constitution of the Union of the Comoros

<sup>203</sup> Article 2 (2) of the Constitution of Cape Verde

<sup>204</sup> Article 89 of the 1991 Constitution of Mauritania

<sup>205</sup> Article 113 of the Constitution of Togo

<sup>206</sup> Articles 98-100 of the Constitution of Niger

<sup>207</sup> Article 188 of the Constitution of Benin

<sup>208</sup> Article 120 of the Constitution of Guinea-Bissau

<sup>209</sup> Articles 146 & 148 of the Constitution of Chad

<sup>210</sup> Article 86 of the 1991 Constitution of Rwanda

attempted coups since gaining independence from France on July 6, 1975. This means that if the guardian of the independence is not safe, then it cannot be expected that that which the guardian guards is in fact safe.

Ghana<sup>211</sup> has some provision that guarantees the independence of the judiciary. There are few safeguards regarding hiring and firing in Ghana's Constitution. These flaws account for some of the abuses and violations of the principle.

Senegal too has some flaws in the constitutional guarantees and institutional arrangements which are reflected in the abuses of the judiciary.<sup>212</sup> When Senegal's former Prime Minister Idrissa Seck was charged with undermining State security, there were many questions raised about the independence of the judiciary in that country. Yet at the time Senegal under President Abdoulaye Wade was considered one of Africa's model democracies.<sup>213</sup> The political fall-out between the President and the former Prime Minister and television broadcasts by the President against the former Prime Minister were seen as influencing the judicial process. Most Senegalese wanted the police and the judiciary to be allowed to work independently and without any pressure to find out if Mr Seck was guilty of the charges or not.<sup>214</sup>

The Constitution of the Sudan<sup>215</sup> appears to be somewhat contradictory on the question of the independence of the judiciary. In one breath it states that the judiciary is directly responsible to the President of the Republic in the performance of judicial functions<sup>216</sup> and in another breath it grants the courts independence.<sup>217</sup>

Ethiopia's constitution provides very weak protection to the judiciary against serious political manipulations and abuses of the judicial system<sup>218</sup>. With the provision of nominal constitutional guarantees to the independence of the judiciary and the fact that the judiciary is treated as an extension of the executive creates practical impediments to the independence of the judiciary. The judiciary does not see its role as upholding the constitution or exercising checks and balances over the executive and the legislature. Judges who assert their independence attract attention and may be punished for it.<sup>219</sup> In

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<sup>211</sup> Chapter VIII of the Constitution of Ghana

<sup>212</sup> Title VIII of The Constitution of the Republic of Senegal.

<sup>213</sup> "Is Senegal's 'model democracy' tarnished? By Tidiane Sy, <http://news.bbc.co.uk/2/hi/africa/4714475.stm> accessed 2007/10/09

<sup>214</sup> Ibid

<sup>215</sup> Article 99 of the 1998 Constitution of Sudan

<sup>216</sup> Article 100 of the 1998 Constitution of Sudan

<sup>217</sup> Article 99 of the 1998 Constitution of Sudan

<sup>218</sup> Articles 78 and 79 of the Ethiopian Constitution vests judicial power in the judiciary, Proclamation No. 1/1995

<sup>219</sup> An Addis Ababa Judge who sentenced The Minister of Justice to jail for four weeks for refusing to hand over a suspect to the courts was soon transferred, a move widely seen as punishment to the judge, and the minister was quickly pardoned by the President at the Prime Minister's request. (See "African Commitments to Democracy in theory and Practice, A review of eight NEPAD countries" by Anne Hammerstad, page 88, <http://www.iss.org.za/pubs/Other/ahsi/HammerstadMono/Contents.html> accessed 2007/10/09

rural areas, the concept hardly exists in practice as judges must be on the side of government or they will be removed by local administrators if considered not loyal to the executive.

The scope of the independence of the judiciary in Angola, Madagascar, and Mozambique is quite diminished, because the relevant constitutional provisions are narrow in scope, vague in formulation and exclude details of critical determinants of the independence of the judiciary.<sup>220</sup>

In Zambia, the Republican Constitution provides that the judges “shall be independent, impartial and subject only to this Constitution and the law”<sup>221</sup> and states that the judiciary shall be autonomous.<sup>222</sup> There is no provision that vest judicial functions exclusively in the judiciary.

### *No Constitutional Guarantees*

The mere mention of the independence of the judiciary is not a constitutional guarantee, unless the principle is in entrenched provisions of the constitution.

The Nigerian situation is not rosy either. The Nigerian Constitution provides that “The independence, impartiality and integrity of Courts of Law and easy accessibility thereto shall be secured and maintained.”<sup>223</sup> This provision, however, is placed under “Fundamental Objectives and Directive Principles of the constitution.” There are few safeguards regarding hiring and firing in Nigeria’s Constitution. These flaws account for some of the abuses and violations of the principle.

The Constitution of Tanzania, in its Preamble, refers to the independence of the judiciary as a fundamental aspect of the democracy where it indicates the importance of ‘a judiciary that is independent and dispenses justice without fear or favour.’ There are no specific provisions in the constitution guaranteeing the independence of the judiciary. In fact there are ouster clauses used to limit the jurisdiction of courts at certain times.<sup>224</sup>

It is not enough to state the principle in the preamble of the constitution or in the fundamental principles of the constitution. The independence of the judiciary must not just appear as aspiration but must be expressed in implementable terms.

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<sup>220</sup> see “Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa” by Professor Charles Manga Fombad, Reprinted from *The American Journal of Comparative Law*, Vol. 55, Winter 2007, Number 1, p160

<sup>221</sup> Article 91(2)

<sup>222</sup> Article 91(3)

<sup>223</sup> Section 17(1) (e)

<sup>224</sup> Section 41(7) of the Constitution provides that once one has been declared by the Electoral Commission to have been elected as President, that declaration cannot be challenged in court.

### *Security of Tenure*

The power of impeachment of judges which resides in the National Assembly can operate as a limitation to the exercise of judicial functions, particularly where no clear impeachment procedures which conform to principles of natural justice are in place.<sup>225</sup> The most serious threat to judicial independence in recent times in Malawi occurred in 2001 when the National Assembly used its power under the constitution to petition for the President to request the removal from office of three High Court Judges: Hon Justice D.F.Mwaungulu, Hon Justice G.M. Chimasula Phiri and Hon Justice A.C. Chipeta, allegedly for incompetence and misconduct. In fact the attempt to remove judges in 2001, 2002 was not really on grounds of incompetence or misconduct but because the judiciary had made some decisions which some influential section of politicians to whom the decision applied did not agree with.<sup>226</sup>

### *Appointment Processes*

In many Sub-Saharan African countries appointment processes are heavily politicized with a high potential of packing the judiciary with compliant judicial officers. Mostly the processes are not transparent with the President having powers to appoint on recommendation or on advice from some body that itself may be packed with political appointees.

In the Democratic Republic of the Congo all the judges in the Supreme Court were named by President Joseph Kabila. The result has been that many decisions have been favourable to the President and the executive.<sup>227</sup>

### *Remuneration*

The remuneration of judicial officers can be used as a device for undermining the independence of the judiciary particularly where it is not secured under the constitution of a country.

The case of Swaziland where the judges were awarded a substantial increase in their pay in order to win the judiciary over to do the bidding of the executive is one example.

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<sup>225</sup> Malawi does not have these in place as we write this paper.

<sup>226</sup> There have been numerous political disputes which have found their way into the judicial fora. Matters relating to constitutional adjudication, inherently difficult, especially in an emergent democracy, have come before the Malawi courts through political disputes. The Malawi courts have had to contend with attendant problems and tensions regarding such political disputes. It is a credit to Malawi courts that they have dealt with many such difficult cases both judicially and judiciously (ICJ Report on Removal of Judges). As the ICJ further observed since 1994 the judiciary has been a credit to constitutionalism in terms of its decision making as well as capacity building. The judiciary has been the target of unfair and unjustified criticism even to the point of being described by some Members of Parliament as dogs which deserve not to be fed at the time the National Assembly discussed a review of the Judges terms and conditions. The, judiciary while welcoming fair and justified criticism, remain professional and unmoved even as they work in very difficult circumstances.

<sup>227</sup> Ibid

Zimbabwe is said to have improved the remuneration and other benefits for the judiciary, including allocating to members of the judiciary some of the seized farms as a way of 'softening' the judiciary in favour of the executive.

Malawi too had a recent experience where even though remuneration payable to the judiciary is a matter to be determined by the National Assembly, the executive chose not to implement what the National Assembly had determined to be the remuneration for the judicial officers effective July, 2006.<sup>228</sup>

*The Role of the Judiciary in Upholding its Independence.*

In general, Sub-Saharan African Courts have performed their adjudicating functions in an independent manner and have asserted their independence both inside and outside the courtroom. On many occasions the courts have reaffirmed the principle in judicial pronouncements. ( Various international organizations, conferences, seminars workshops and other gatherings have affirmed the importance of the principle of the independence of the judiciary). The limitation is that the Judiciary is reactive to situations. It must wait until matters are brought to it. With respect to the principle of the independence of the judiciary the court will have to wait until a test case is brought to it for it to assert the principle. The difficulty here is that owing to the newness of the democratic culture in most of our countries, not many will be in a position to take up a test case. Many assaults on the principle occur outside the courtroom.

It has been said that since independence in 1957, the court system in Ghana, headed by the Chief Justice, has demonstrated extraordinary independence and resilience.<sup>229</sup>

In Tanzania it is the work of Chief Justice Nyalali, Chief Justice of Tanzania from 1977 to 2000,<sup>230</sup> and that of Chief Justice Barnabas Samatta which is credited for building an independent judiciary and promoting the independence of the judiciary. For Tanzania it would appear the biggest blemish on the independence of the judiciary is corruption. It is generally agreed that the government usually respects decisions of the courts and complies with judgments adverse to its interests. According to surveys, 72% of Tanzanians are said to have indicated that they trust the judiciary. The judiciary may have been described as timorous souls and unduly deferential, but would not be because of a political culture, rather prevailing legal culture ( see *Judicial Institution in Southern Africa* p197).

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<sup>228</sup> The State v President of the Republic of Malawi, Minister of Finance, Secretary to the Treasury ex parte Malawi Law Society, Constitutional Cause No 6 of 2006 [The Judges' Case] where the court ruled that under the Republic of Malawi Constitution the executive had no power to determine the remuneration payable to judicial officer but that it was for the National Assembly to so determine and the executive to implement.

<sup>229</sup> As quoted from US Country Studies Series by William Blair in "Judicial Independence and the Constitution in Time of Change" Martyrs Day Memorial Lecture delivered on June 28, 2005

<sup>230</sup> See "Who Cares About Courts? Creating a Constituency for Judicial Independence in Africa" by Judge Mary Dudziak and Professor of Law, University of South Carolina Law School; "Building The Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa" by Jennifer A Widner, New York: W.W. Norton & Company, Inc. 2001.

In January, 2004 leading West African judges, jurists and parliamentarians issued an innovative declaration designed to promote the independence of the judiciary and the Rule of Law throughout the region at the time they closed the Cotonou Conference on the Rule of Law and Separation of Powers in Francophone West Africa held January 13-15 under the auspices of the West African Association of Francophone Supreme Courts (AOA-HJF).<sup>231</sup> The Declaration of Cotonou called for the creation of a new, concrete monitoring mechanism under the auspices of the AOA-HJF( who would have the responsibility for the implementation of all the commitments and recommendations) and regional judges' association on their commitments on (1) consolidating an exchange network for legal and judicial information to improve access to laws and jurisprudence for the judges and the public; (2) implementing and training on ethics and professional conduct rules for all stakeholders of the justice sector; and(3) establishing a monitoring and assessment mechanism for implementing the Declaration in complement to peer evaluation process of the New Partnership for Africa's Development. The IFES Senior Rule of Law Advisor and Anti-Corruption Research Fellow, Keith Henderson, remarked that "[T]his Declaration establishes, for the first time, a clear path and strategy necessary to address one of the highest obstacles to peace, democracy and prosperity in the region- the lack of an independent judiciary. Without this key institution, the basic human and property rights of the African people would continue to be abused and remain elusive". The conference ended with a call to action on the commitments made.

The crack down on opposition members in Zimbabwe has put the judiciary in that country to the test and many times the judiciary has ruled against the executive including ordering security forces to allow an opposition rally. The courts there have also ordered that Morgan Tsvangirai to be freed and the police to release the body of an activist killed by the security forces.

In Nigeria former attempts by former President Olusegun Obasanjo to stop his Vice-President Atiku Abubakar from running for presidency in an impending election but the court ruled against the President's actions. Similarly courts overturned three illegal impeachments of State governors by the executive in collaboration with the legislature.

In Uganda, the judiciary went on a week long strike in March 2007 in protest of the actions of the executive that constituted blatant violation of the independence of the judiciary. The strike was in defense of the independence of the judiciary.

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<sup>231</sup> Conference co-organised by the Agence Intergouvernementale de la Francophonie and IFES with support from U.S. Agency for International Development attended by Chief Justices and representatives of the Supreme Courts of Benin, Burkina Faso, Chad, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo and two regional court, key parliamentarians, Ministers of Justice from the region, judges, academics, donors from France, US and Canada as well as representatives of partner associations. The Conference was to discuss and identify problems and solutions arising in the pursuit of the independence of the judiciary and democracy in West Africa. The key role of the judiciary in achieving sustainable development and democracy was stressed.

### *The Judiciary as its own Enemy*

The judiciary has in some instances been its own enemy by limiting its exercise of judicial functions through its own restrictive notion of what constitutes the proper role. As Justice Jackson of the United States one time said judges sometimes do “exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir”.<sup>232</sup> Undue regard to technicality in decision-making without pragmatism in certain instance would also undermine the independence of the judiciary.

Sometimes the conduct of judges undermines their own independence and impartiality and that of the institution. Some judicial officers exhibit outright arrogance and this erodes public trust and confidence in the courts besides hindering access. High levels of corruption have been recorded in many of the judiciaries of Sub-Saharan Africa, especially in the lower levels of the judiciary. The lower levels of the judiciary are the most visited by citizens as they deal with the bulk of judicial matters. Thus the picture of the judiciary that most citizens will have is that of the lower judiciary.

The case of Nigerian judges removed for clearly and consistently siding with the executive even where the executive was clearly on the wrong side of the law. Professor A.A. Olowofoyeku records that following a spate of dismissals of 32 judges by military regime in April 1985, the Chief Justice said that he was in favour of the purge because it was a cleaning exercise that removed certain undesirable elements from the judiciary. Professor Olowofoyeku comments as follows about the Nigerian Judiciary:

*“It is clear that the independence of Nigeria’s judiciary is seriously deficient. Its institutional independence and a substantial part of the judges’ individual independence is generally undermined by the other arms of government. The judges themselves effectively undermine, through the deficiency in integrity or impartiality of some of them, their own independence.”*<sup>233</sup>

These remarks were in 1989 but the situation in Nigeria’s judiciary remains fragile. Indeed few undesirable elements within the judiciary have in certain circumstances tarnished the image of the entire judiciary and thereby undermined its independence.

### *The Role of the Legal Profession*

Sometimes lawyers can be a threat not only to their own independence but also to the independence and impartiality of the judiciary. The legal profession in Sub-Saharan Africa has performed remarkably well in the promotion and protection of the independence of the judiciary. The legal profession in Ghana, Uganda, Zimbabwe, Swaziland, Malawi, Namibia, Nigeria and South Africa has stood firmly in support and protection of the independence of the judiciary. It has done likewise in most Sub-Saharan African countries at the pain of harassment and intimidation.

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<sup>232</sup> Sacher v US 343 US 112 (1952)

<sup>233</sup> “The Beleaguered Fortress: Reflections of the Independence of Nigeria’s Judiciary.” By Prof. A.A. Olowofoyeku, Journal of African Law, Vol. 33, No. 1. (Spring 1989), pp55-71

In Malawi for example there have been in the recent past relentless executive attacks on the judiciary<sup>234</sup> and legal protection<sup>235</sup> that there are corrupt members of the judiciary and that the judiciary had been infiltrated by mercenary judges and lawyers. These remarks were made in the face of public high ratings and increased public confidence in the judiciary as evidenced by a number of independent studies. In those circumstances Malawi Law Society and thankfully a number of civil society<sup>236</sup> have come out boldly in defense of the independence of the judiciary even though some of the executive accusations seemed to have an effect in swaying the attitude of some section of the public.

### *Governmental Interference in the Judiciary*

Politicization of judicial officers in Sub-Saharan Africa is the biggest threat to the independence of the judiciary.<sup>237</sup> There are numerous instances in Sub-Saharan Africa of harassment of the judiciary and assault on the independence of the judiciary, especially by the executive branch of government which seeks to control, rather than check, the judiciary. A few examples will suffice. It is notable that African leaders quickly learn from each other of the ways to undermine the independence of the judiciary, such that it is easy to see some pattern or trends across the sub-continent.

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<sup>234</sup> “Bingu Bashes Judges” The Daily Times January 2, 2007; “A House Divided, Statement on Section 65”, The Daily Times, July 5, 2007

<sup>235</sup> “Mutharika should follow procedures” (when dealing with matters concerning “unprofessional” judiciary rather than continually attacking it and the [ Malawi Law] society in public), The Daily Times, January 9, 2007

<sup>236</sup> Press Statement by The Public Affairs Committee, Weekend Nation, 11-12 August 2007 in which “The Public Affairs Committee (PAC) has noted with concern the increasing acts of intimidation and hostility towards the judiciary by the executive arm of government and its affiliates. A case in point is the reported search by the police and the Anti-Corruption Bureau Officers at Justice Joseph Manyungwa’s house. This event, coming soon after the judicial officer had granted an injunction to UDF party to stop meeting of Parliament, appears ill-timed, desperate and calculated to intimidate. PAC also recognizes earlier public statements by a government official accusing the former Chief Justice of conniving with UDF party on the section 65 ruling. In addition, there has been another report of an attack on Justice Duncan Tambala by unknown people in Ntcheu. As PAC, we would like to strongly denounce the approach taken by perpetrators of these events. Such Reaction to judicial decisions is a threat to the rule of law and sets a dangerous precedent in the relationship of the two arms of government. These events cannot be allowed to continue if Malawians are to safeguard their constitutional Democracy....if there are problems with the way the judiciary is operating, constitutional mechanisms are available for disciplining of judicial officers or appealing on decisions. We expect people in a civilized set up to utilize these measures rather than resorting to backward politics.”

<sup>237</sup> As observed by Prof. Gutto at a 2006 Stakeholders conference on the Independence of the Judiciary in Sub-Saharan Africa, organised by the Konrad Adenauer Foundation. Professor Gutto also observed at that conference that the pursuit of the independence of the judiciary forms part of the larger historical challenge of nation building within the framework and guidance of commitment to democratic governance, constitutionalism, the rule of law and the promotion and the protection of fundamental human rights. He hoped that continental judiciaries such as the African Court on Human and Peoples’ Rights and the African Court of Justice, once operational, would enjoy degrees of independence that would ensure that justice is dispensed fairly and without fear, favour or prejudice and that judiciaries in Africa would claim their rightful place in democratic Africa.

At a Southern Africa Regional Conference on Separation of Powers in a Constitutional Democracy held at Blantyre, Malawi (January 28-31) under the auspices of IFES Keith Henderson<sup>238</sup> made an interesting presentation on “Judicial Independence from a Global Perspective with a Constitutional Democratic Africa Twist”. While emphasizing that without the independence of the judiciary the key institution charged with protecting individual, property rights, enterprises, civil liberties and constitutional rights cannot live up to its critical role in a functioning democracy, he observed that there were obstacles to the independence. He referred to a survey done in 23 countries including Anglophone Africa such as Malawi, Kenya, Zimbabwe, Uganda, Nigeria and Zambia. All six Anglophone countries showed that executive interference in the functioning of the judiciary constituted the main barrier to the attainment of the independence of the judiciary followed closely by corruption. Thus executive dominance of the judiciary and corruption constituted the biggest barriers to the independence of the judiciary in most countries of the world, according to the survey. In order to advance the judicial independence reform agenda Keith Henderson urged that there be movement beyond the rhetoric and into implementation, in other words creating the independence of the judiciary in fact.<sup>239</sup>

There is evidence of threats to the independence of the judiciary in South Africa, notwithstanding the strong constitutional safeguards. In 2002, the Minister of Health, Manto Tshabalala-Msimang indicated her intention to ignore a Constitutional Court ruling that the State must provide anti-retroviral drug Nevirapine to prevent mother-to-child transmission of HIV.<sup>240</sup> By this time South Africa was fast establishing a high level of respect and protection of the independence of the judiciary such that the overwhelming media and other criticism of what was clearly an attempt to undermine the independence of the judiciary inevitably led the Minister to backtrack. Before this, the establishment of special equality courts under the Equality Act of 2000 with the requirement that the presiding officers in those courts undergo some specialized training was considered by

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<sup>238</sup> IFES Senior Rule of Law Advisor and Anti-Corruption Research Fellow

<sup>239</sup> Keith Henderson proposes that (i) Creating a fair independent judiciary is the cornerstone of a democratic society based upon the rule of law; (ii) Protecting civil liberties, such as free speech, freedom of association and freedom of religion is extremely difficult and unpredictable without this institution; (iii) Sustaining most economic and political reforms is difficult, if not impossible, without this institution; (iv) Preventing and fairly addressing human rights abuses in a systematic way, particularly those related to the poor, minorities and the disenfranchised, is best guaranteed in a democratic society by an independent judiciary; (v) Balancing civil liberties interests such as privacy, against important national security and law enforcement objectives, such as fighting terrorism, is most fairly accomplished in a democratic society by an independent judiciary; (vi) Protecting and resolving property and contract rights and resolving governmental disputes is most effectively and fairly achieved in a democratic society by an independent judiciary; (vii) Strengthening both an independent media and an independent judiciary are critical since they are mutually supporting institutions that can not survive over the long-term without the other; (viii) Addressing transnational law enforcement issues effectively and fairly requires observance to a common set of rule of law principles, independent judicial oversight and greatly enhanced international cooperation and (ix) Addressing and reducing systemic corruption, including the fair and effective implementation of laws and enforcement of court decisions, is virtually impossible in a democratic society without an independent judiciary.

<sup>240</sup> Minister of Health v Treatment Action Campaign (2002), (5) SA 721 (CC)

many as an encroachment on the independence of the judiciary.<sup>241</sup> More recently the Justice Bills drew a lot of criticism as being a blatant attempt by the Executive to strip the judiciary of some of its independence which was guaranteed by the Republic of South Africa Constitution and observance of which principle had served democratic South Africa so well thus far. The spirited debate on the Bills has exposed some of the real dangers of subtly encroaching on the independence of the judiciary by the executive wishing to take charge of administrative functions of the court in the belief that it is the executive that must account for the funds for the running of the judiciary.<sup>242</sup> Although there might be examples of independent judiciaries which are dependent on the executive for administrative and budgetary functions, such examples should be few and far between. Indeed there is an apparent contradiction in that arrangement. We would not talk of the independence of the judiciary where the executive controls the budget and staff of the judiciary. If the executive were to dictate how funds were to be spent in the judiciary, such as the buying of stationery, vehicles, going on court circuits, buying library books or securing court space whether through construction or renting, then the independence of that judiciary will be an illusory.<sup>243</sup> The trend which reinforces the independence of the judiciary is to give the judiciaries more administrative and budgetary control to protect against executive domination of the judiciary.

According to the International Bar Association the assault of the judiciary in Swaziland ranged from executive abuse and manipulation of traditional law and customs, non-enforcement of judicial decisions which the executive does not agree with, convenient and unjustified attacks on foreign judges working in the country's judiciary and emigration of experienced local judges due to executive interference. Yet the judiciary stood firm in defense of its independence by insisting that the executive had to follow the law and respect court decisions.

In Zambia Chief Justice Matthew Ngulube was criticized by the executive and he suffered a smear campaign which included allegations of rape when he ruled that section 5 of the Public Order Act which required every person wanting to hold a public meeting to get police permit as unconstitutional, to which the government reacted angrily.<sup>244</sup> Judge Kabazo Chanda was suspended, and later forced to resign, for ruling that awaiting trial prisoners be released, as they had not been charged within the prescribed time limits.<sup>245</sup> President Mwanawasa, a former practicing lawyer, frequently comments on

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<sup>241</sup> The UN Special Rapporteur on the Independence of the Judiciary found that this was not the case.

<sup>242</sup> The former Chief Justice Arthur Chaskalson of South Africa, observed that "It is important, particularly in a constitutional state, that the executive should not have control over the way the court functions. It can have a say but not control.", Conference Proceedings on The justice Bills Judicial Independence and the Restructuring of Courts, General Council of the Bar of South Africa Human Rights Committee, February 17, 2006 page 20

<sup>243</sup> See "The Beleaguered Fortress: Reflections of the Independence of Nigeria's Judiciary" by A.A. Olowofoyeku, *Journal of African Law*, Vol. 33, No. 1. (Spring, 1989), pp55-71 at pp56&57

<sup>244</sup> Christine Mulundika and 7 others v The People, SCZ/25/1995

<sup>245</sup> The Judicial Institution in Southern Africa, page 235

cases pending before the court for which he has been criticized as undermining the independence of the judiciary.<sup>246</sup>

Perhaps Uganda most poignantly illustrates the challenges and threat for the independence of the judiciary and the rule of law in Sub-Saharan Africa. What happened in Uganda reverberates throughout the region with impunity. The murder of the Uganda's Chief Justice Ben Kiwanuka under the presidency of Idi Amin in 1972 for refusing to misapply the law in favour of the presidency remains a chilling reminder of the unrelenting and gruesome attack on the independence of the judiciary in Uganda. Even more troubling are recent events in Uganda as per the ABA report of September, 2007. Anti-judiciary demonstrations overtly orchestrated by the executive and endorsed by Parliament whose Speaker was ready to receive submissions from the demonstrators in the shape of constant residential diatribes against and threats to the judiciary characterized the recent judicial history in Uganda, perhaps some of the worst forms of executive interference with the independence of the judiciary.<sup>247</sup> What happened in Uganda is characteristic of what happens in many sub-Saharan countries despite constitutional guarantees of judicial independence.

Going back a little in Uganda's recent judicial history, in his New Year address in 2003 President Museveni accused the judiciary of 'unprofessional bias' against the movement government and corruption, a statement the Uganda Law Society criticized. The statement epitomized a long-running standoff between the President and the Judges.<sup>248</sup> In 2004 the Constitutional Court of Uganda voided the 2000 referendum that went in favour of the movement system. The referendum had been conducted under the Referendum (political Systems) Act of 2000, a successor to the Referendum Act 1999 which the Constitutional Court had earlier declared unconstitutional even before a referendum was conducted. The 2000 Act was also declared unconstitutional. Two days after the judgment of the court an enraged President Museveni made a televised speech and said,

*"A closer look at the implications of this judgment [...] shows that what these judges are saying is absurd, doesn't make sense, reveals an absurdity so gross as to shock the general moral of common sense. [...] In effect what this means, is that this court has usurped the power of the people [...]. This court has also usurped the power of Parliament, to amend the constitution. Government will not allow any institution even the court to usurp the power of the constitution in any way."*<sup>249</sup>

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<sup>246</sup> This has been in relation to the Second Presidential petition and the ongoing trial of former President Fredrick Chiluba for corruption.

<sup>247</sup> "Judicial Independence Undermined: A Report on Uganda" By the International Bar Association, September 2007. See also the March 6, 2007 United Nations Press Release entitled " OHCHR Uganda condemns interference with independence of judiciary" <http://www.unhchr.ch/hurricane.nsf/view01/.....> Accessed 2007/10/09

<sup>248</sup> See 'Museveni for Independent Judiciary' in New Vision (Kampala), 6 February 2004.

<sup>249</sup> This language is evident of an attitude most leaders in Sub-Saharan Africa have towards the judiciary and the principle of the independence of the judiciary.

A few days later, President Museveni was quoted as saying that the major work for Judges was to settle chicken and goat theft cases but not determining the country's destiny. Locally, the President's statement drew wide criticism for undermining the independence of the judiciary. The Uganda Law Society, while expressing grave concern about the unwarranted attacks by the executive on the independence of the judiciary, noted that it was the constitutional duty of all governmental and other institutions to respect and observe the independence of the judiciary.<sup>250</sup> Internationally, the statement drew criticism for undermining the independence of the judiciary from the Secretary General of the East African Community and the United States of America through its Ambassador. Yet the President's speech inspired government supporters to demonstrate in Constitutional Square against the ruling and the judiciary, calling for disciplinary action and removal of the judges who made the ruling.

In October, 2005 the President again threatened to suspend judges in relation to widespread eviction from customary land on eviction warrants issued by the courts. He repeated the statement in November 2006 despite statements of condemnation for the President undermining the independence of the judiciary. Meanwhile the executive continued in defiance of judicial decisions. Again on 16<sup>th</sup> November 2005 around 30 armed men in black uniform, called the Joint-Anti-Terrorist Team, invaded the Kampala High Court during the hearing of a bail application of the PRA accused and when the court ruled that these had a constitutional right to bail the armed men trotting Uzi machine guns and AK-47 assault rifles tried to force their way into holding cell of the court but were kept at bay by prison guards. The Joint Anti-Terrorist Team (special joint forces of the army, the police and secret service) had instructions to re-arrest the PRA-accused should the court release them on bail. The unprecedented deployment of the Joint Anti-Terrorist Team at the court was condemned by the Chief Justice and the Inspector General of Government as having unleashed terror at the court and as constituting the most naked and grotesque violation of the doctrine of rule of law and the independence of the judiciary. The widespread condemnation of the conduct culminated in the Uganda Law Society staging a strike in protest. Sweden and the United Kingdom announced that they would withhold a substantial amount of aid to Uganda due to concerns about violations of the independence of the judiciary, among others.

On March 1, 2007, there was yet another invasion of the High Court as the PRA accused were granted bail. Around 60 police officers some armed with dogs stormed into the court chambers and attempted to enter the Registrar's office in order to seize the men. There were scuffles between the police troops, journalists and the supporters of the PRA accused. The heavy presence of the police at the court was condemned. The following day the judiciary resolved to go on a weeklong strike in protest the interference with the independence of the judiciary. On March 6, 2007 the United Nations office of the High Commissioner for Human Rights in Uganda issued a press release unequivocally condemning the interference by armed security forces with the independence of the

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<sup>250</sup> Also HURINET, Uganda Women Network and the Anti-Corruption Coalition, networks of over fifty NGOs, published a statement calling on the President to respect the independence of the judiciary. Others who strongly condemned the President's statement included the Parliamentary Advocacy Forum (PAFO) and The Foundation for African Development.

judiciary, contrary to the Constitution of Uganda and international human rights principles, thereby undermining the rule of law and the administration of justice in Uganda.<sup>251</sup> Four days into the strike, on March 8, 2007, the President wrote a letter to the judiciary regretting the events of March 1, 2007 and said that government assured the judiciary and the general public that it undertook to do all in its power to ensure that no repetition of such incidents would take place. Following the Presidents letter, on March 9, 2007, the Chief Justice Odoki announced that the judiciary would resume work the following Monday.

### *Executive Disobedience of Court Orders*

Executive disobedience of Court orders has become a way of life in many of the Sub-Saharan African Countries.<sup>252</sup> The power to enforce courts' decisions resides in the executive. These factors too have limiting effect on the role of the judiciary in safeguarding the principle of separation of powers. As Alexander Halmiton writing in the Federalist 78 said:

*“The judiciary from the nature of its functions will always be the least dangerous branch.... The Judiciary has no influence over either the sword or the purse; no direction either of strength or the wealth of society, and can take no active resolution whatever. It may truly be said to have neither Force or Will but merely judgment...”*<sup>253</sup>

Kenya has had long running problems with the independence of the judiciary since independence from British rule. Sometimes ministers openly disobey court orders and no one would be there to stop them.<sup>254</sup>

In Swaziland the Prime Minister did declare at some point that Government would not respect court decisions that went against it. Malawi records an inconsistency in this regard.

The erosion of the principle of the independence in Zimbabwe is self-evident. Court decisions are routinely ignored by the executive and some judges have been harassed. It is said that the magistracy in Botswana is highly qualified because some of the judges who have exited the Zimbabwe judiciary for lack of the independence of the judiciary have joined the magistracy in Botswana.

Malawi too has had its share of problems with the principle of the independence of the judiciary in so far as the disobedience of court orders is concerned. Dr Kanyongolo chronicles three examples of executive disregard of court orders. Lastly there are

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<sup>251</sup> The March 6, 2007 United Nations Press Release entitled “OHCHR Uganda condemns interference with independence of judiciary” <http://www.unhcr.ch/hurricane.nsf/view01/.....> Accessed 2007/10/09

<sup>252</sup> Examples of executive disobedience of court orders are to be found in Kenya, Uganda, Zimbabwe

<sup>253</sup> Writing in 1788

<sup>254</sup> See “Africa’s judiciary asserts independence” by Tim Cocks, April 1, 2007, [http://www.mg.co.za/articlePage.aspx?area=/insight/insight\\_africa?&articleid=303460](http://www.mg.co.za/articlePage.aspx?area=/insight/insight_africa?&articleid=303460) accessed 2007/10/08

instances of disobedience of court orders. As pointed out earlier, it is characteristic of some officials to want to live above the law when that suits them. Such officials choose to ignore court orders instead of challenging the same through the process of appeal within the court system. For Malawi, three examples will serve to illustrate this. First, in 2001 Senior Police Officers and the Mayor of the City of Blantyre disregarded a High Court order prohibiting government and its agencies from interfering with a public rally organized by the Opposition National Democratic Alliance. Second, in June 2003 the Government decided to deport to the United States five persons suspected of links with terrorism. The five men, suspected of channeling money to terrorist groups were arrested by American and Malawian intelligence agents on 22<sup>nd</sup> June, 2003. The High Court issued an injunction to block a deportation. Instead government on 23<sup>rd</sup> June 2003 decided to hand the suspects over to America officials who flew them to unknown destination out of the country. Third, in February 2006 Government defied a court order that required it to restore the security and other entitlements of the Vice President had constructively resigned from his position. The solution here is to impress upon all that everyone is subject to the rule of law.

#### *Inadequate Resources for the Judiciary*

Most judiciaries in Sub-Saharan Africa are inadequately resourced and are located a small proportion of the country's annual budget. Sometimes they are allocated less than what a small government Ministry would get. Judiciary programmes are rarely categorized as pro-poor. Lack of financial independence, lack of resources, staff and infrastructure- resulting in backlog of cases which poses a threat to the independence of the judiciary as people frustrated with the delays from court would resort to illegitimate ways to deal with legal problems including mob justice. Inadequacies include such things as lack of training, material and literature. It is no use giving the judiciary such huge powers when judicial officers are not adequately trained in the job and are not provided with the necessary materials for them to use in the discharge of their functions. The ICJ Mission to Malawi on the impeachment of judges, however, was deeply impressed by the training and capacity building measures that have been and are being undertaken.<sup>255</sup> Delays in resolving political dispute for example have the potential of leading to the independence of the judiciary being undermined.<sup>256</sup>

#### *Jurisdiction Stripping of the Judiciary*

Jurisdiction stripping constitutes a threat to and undermines the independence of the judiciary. Many countries in Sub-Saharan Africa, especially the many that have had military regimes, routinely oust the jurisdiction of the judiciary and create special court to exercise judicial power.<sup>257</sup> The inclusion of jurisdiction ouster clauses in the constitution

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<sup>255</sup> ICJ Report

<sup>256</sup> The case of Presidential petitions in Zambia, and electoral petitions in Nigeria in 2003 general elections were delayed such that the final outcomes were only known several years down the line.

<sup>257</sup> This is particularly true of most West African State that until very recently have experienced coups on an on and off basis.

or any other law of a country creates real potential for jurisdiction stripping of the judiciary. Tanzania has ouster clauses. As discussed above, Uganda has had a recent experience in jurisdiction stripping when certain cases were being tried simultaneously in the ordinary courts and in the Court Marshall.

Jurisdiction stripping of the judiciary; creation of special courts or special tribunals to try certain cases also occurred in Togo following the establishment of military tribunal after a coup. The war against terrorism threatens the independence of the judiciary when there is talk of introducing special measures including special tribunals to deal with terrorism offences. Diminishing the independence of the judiciary by remaking its composition to serve the interest of those in power would be an exercise in jurisdiction stripping. In the Sudan a new judicial body called the Public Grievance and Corrections Board was created which in effect has competing jurisdiction with the judiciary. The creation of this new body has seriously undermined the independence of the judiciary.

#### *The Role of the Media in Promoting Independence of the Judiciary and Rule of Law.*

The media can be a powerful tool in promoting and protecting the independence of the judiciary and the rule of law. In Sub-Saharan African countries it would appear that the media is used by powerful individuals to undermine the independence of the judiciary has an upper hand. In Zambia a terrible smear media campaign against former Chief Justice Ngulube regarding allegations of rape committed on a female office cleaner.<sup>258</sup> The story turned out to be a false allegation. The reporter who put up the story later admitted that he had been set up by someone who had lost a case before the chief justice to have him discredited and to ruin his career. There are many more media campaigns that are used to undermine the independence of the judiciary. The media is sometimes divided as being pro-executive and anti-executive and it behaves as expected, sometimes without sopping to ask what undermining the independence of the judiciary will mean to an ordinary litigant who genuinely seeks justice in the court.

The Madrid Principles on the relationship between the media and judicial independence<sup>259</sup> are intended to give guidance on the conduct of the media in the performance of their functions so that the independence of the judiciary is protected.

#### *The Role of Civil Society in Promoting the Independence of the Judiciary*

Civil society in some instances behaved in a similar manner to the media. Frederick Jjuuko notes that Kenya's NGO's and interest group began to pursue judicial independence and accountability of the judiciary reforms in terms of a democratic campaign in a manner that relegated the treatment of the judiciary to a secondary goal that would be a byproduct of constitutional reform and democratization. Now, that was

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<sup>258</sup> A torn underwear of the lady was flashed in the papers with a caption that went something like "This is the Underwear that the Chief Justice did justice to."

<sup>259</sup> Formulated by a group of 39 legal experts and media representatives at a Conference held under the International Commission of Jurists at its Centre for the Independence of Judges and Lawyers in January 1994.

unfortunate and probably not right. True no one would want corrupt judges and any corrupt judge deserves to be removed in accordance with the law. The manner in which the judges who were perceived to be corrupt in Kenya were removed attracted wide condemnation from those who care about rule of law and applaud from those who celebrate lawlessness.

In a global survey conducted by IFES in 2000, on the question whether civil society constituencies contributed to the promotion of the independence of the judiciary, globally 11 out of 19 said there was very little involvement while 8 said they were somewhat involved. In Anglophone Africa 3 out of six said civil society made no contribution to the promotion of the independence of the judiciary, 1 out of 6 said there was little contribution while 2 out of 6 said there was some contribution. What is more disturbing is that is that judges associations mostly do nothing or very little to promote the principle of the independence of the judiciary (15 out of 22 globally and 4 out of 6 for Anglophone Africa as per Keith Henderson).

Civil society has a key role to play in democratic governance and constitutionalism, a fact not always fully recognized by the civil society of Sub-Saharan Africa. Civil society must propagate democratic values, championing and defending democratic principles including the rule of law and the independence of the judiciary. Civil society should serve as buffer between the citizen on the one hand and the State with all its institutions on the other advocating, monitoring, consolidating and strengthening good governance, transparency and accountability. They can do this by popularizing the independence of the judiciary or by instituting public interest litigation where the constitution of the country provides for it or permits it.<sup>260</sup>

## **5. The Future of the Independence of the Judiciary In Sub-Saharan Africa:**

### *Optimism*

Cautious optimism must be expressed regarding the future of the independence of the judiciary. The weak and inadequate constitutional and legal safeguards for the independence of the judiciary and lack of commitment to its full implementation and observance in Sub-Saharan African countries can be transformed to form strong legal and moral basis for the principle. The most important safeguard of the independence of the judiciary, apart from constitutional guarantees, is an informed public who understand the meaning and purpose of it. There lies public confidence. Invest in public education and consciousness-raising. Create watchdog groups focusing on the independence of the judiciary.

### *Some Sub-Saharan African States Have Led the Way*

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<sup>260</sup> Some Constitutions in Africa provide for locus standi for persons to bring suits on account of the violation of human rights or the breach of the constitution without the necessity for a personal cause of action. See Art 18 (1), Botswana Constitution; SS15&46(3), Malawi Constitution; Art. 25 , Namibia Constitution

Countries such as South Africa, Botswana and Ghana have stood out as leading examples in the observance of the independence and the rule of law for others to follow. Former Chief Justice Chaskalson of South Africa while joining the spirited debates around the South Africa Justice Bills which had the potential of undermining the independence of the judiciary observed as follow:

*“The emphasis as far as these particular Bills is concerned, and what the judiciary’s concern about the Bills is, has related to the functional independence of the courts. There’s never been any attempt by the Executive to interfere with the actual decisions of the court, they have carried out the decisions though sometimes there have been problems in relation to the way that has been done.... The Executive has never interfered with the aspect of judicial independence, which concerns the way cases are decided.”<sup>261</sup>*

This certainly is a high standard of respect and protection of the independence of the judiciary compared to other Sub-Saharan African countries. As South Africa transforms, so should the rest of sub-Saharan Africa for the entrenchment of the concept of the independence of the judiciary and the rule of law and the consolidation of democracy. The future of the principle of the independence of the judiciary, and of course accountability, lies not just in individual hands of the judiciaries, but is closely linked to successful democratic transition and constitutionalism in the entire Sub-Saharan African countries. There exist in Sub-Saharan African countries in this 21<sup>st</sup> century some half-hearted democrats who would rather have a democracy without the rule of law and without the independence of the judiciary. They would like to have a democracy without checks and balances and where they would control, and not just check, branches of government like the judiciary. To them democracy is centralized and unchecked power. There should be no place for half-hearted democrats in Sub-Saharan Africa.

#### *Reinforce Constitutional Guarantees and Constitutionalism.*

There is need to reinforce the constitutional and legal provisions that guarantee the independence of the judiciary. Where a country’s constitution and laws do not guarantee the independence of the judiciary, it is recommended that the same should guarantee the principle. The rule of law needs to be reinforced in Sub-Saharan Africa. Beyond constitutional and legal guarantees is the more challenging task of demonstrating commitment to the principle by setting up structures and providing the necessary support to enhance the independence of the judiciary.

The region needs to strengthen democratic processes and promote the independence of the judiciary. Safeguarding the independence of the judiciary under the constitution is a crucial matter. Most of the constitutions of Sub-Saharan Africa do not adequately safeguard the principle. Such constitutions need to be amended to entrench the safeguards.

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<sup>261</sup> Record of Proceedings of the General Council of the Bar of South Africa Human Rights Committee Conference on The Justice Bills, Judicial Independence and the Restructuring of the Courts, Johannesburg, 17 February, 2006

It is to be observed that West Africa's post-independence history of military coups and dictatorial regimes has left the region with weak legal and judicial institutions, with their independence undermined at will by the regimes. It is only in recent times that the doctrine of the independence of the judiciary is being incorporated or guaranteed in the constitutions of those countries. For example the 1999 Constitution of the Republic of Niger guarantees the independence of the judiciary.

### *Regional Gatherings on the Independence of the Judiciary*

Regional gatherings to discuss the progress Sub-Saharan Countries are making in the promotion and protection of the independence of the judiciary would help to push the principle to the top of government agenda in the democratization process. Such gatherings would bring to the fore any threats or challenges to the principle and would suggest counter-measures.

A conference on the Independence of the judiciary in Sub-Saharan Africa<sup>262</sup> organized by Konrad Adenauer Foundation in October, 2006 noted that the independence of the judiciary in the region is very weak and resolved as follows:

- (a) To form a strong network in the region that will work towards the harmonization of laws and policies at national and regional level that impact directly on the independence of the judiciary
- (b) To take forward through in-depth research, exchange of views among all key players and to play an active role towards the finalization of the basic Pan-African Principles and Best Practice Model as relates to the independence of the judiciary in Africa.
- (c) To work closely with the African Union and the Pan-African Parliament to ensure that there is harmonization of policies, laws and practices as regards the independence of the judiciary
- (d) To promote and lobby for the independence of the judiciary in their respective countries and the region as a whole.
- (e) To form a working committee to formulate clear intervention strategies that will include but not limited to in-depth research, exchange of views among all key players and contribute towards the finalization of basic Pan-African Principles and Best Practice Model as relates to the independence of the judiciary and rule of law in Africa.

These proposals provide a sound way forward for the promotion and protection of the independence of the judiciary in Sub-Saharan Africa.

In September, 2007, a Konrad Adenauer Foundations Stakeholders' Conference on the state of the Rule of Law in Sub-Saharan Africa held at Mombasa in Kenya observed that one of the biggest challenges facing most African States was weak institutions of

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<sup>262</sup> "Independence of the Judiciary in Sub-Saharan Africa" Summary Report of the Stakeholders' Conference on the Independence of the Judiciary in Sub-Saharan Africa, held at Mt. Kenya Safari Club, Nanyuki, Kenya. October 3-7, 2006 organised by Konrad Adenauer Foundation.

democracy and rule of law and that there was need for effective and independent judiciaries to sustain democracy and the rule of law and to protect human rights. This in turn required change of attitude change among the leaders and the citizens of African countries so that they become committed to democracy, good governance, the rule of law and the independence of the judiciary.(See Report) Participants recognized the central role of the judiciary in the realization of the rule of law and noted with concern the lack of the independence and institutional weaknesses of most judiciaries in Sub-Saharan African countries.

A three day conference on “Constitutionalism: East African Experience” held early October 2007 in Dar es Salaam, Tanzania observed that African leaders are fond of using the telephone to dictate to judges and magistrates on the handling of court cases were blatantly interfering with the independence of the judiciary.<sup>263</sup> Joaquine De Mello, President of the Bar Association of Tanzania who presented a paper on the realities of judicial independence in East Africa, was quoted as saying that telephone law had become part of the legal framework of many African countries with many leaders and the affluent making it a habit to contact and direct judges on what to do with court cases. She was further quoted as saying “Africa is replete with stories of abuse of both the rule of law and historical interference of the independence of the judiciary”,<sup>264</sup>

There are a number of things that need to be done to ensure that the independence of the judiciary and the rule of law take root and become deeply entrenched in Sub-Saharan African countries. The first step is to recognize and take ownership of the principle of the independence of the judiciary. Each country should become committed to implementing it.

*Continued Court Assertiveness of the Independence of the Judiciary and the rule of law doctrine.*

Courts must continue to act boldly to protect the constitution, fundamental rights, the rule of law and the independence of the judiciary. They are the last line of defense for democracy human rights and the rule of law. It is critical that the last line of defense be very strong. As Right Hon. Baroness Brenda Hale of Richmond House of Lords, United Kingdom, properly summed it all up,

*“We must recruit judges who are good lawyers, fair and open-minded, understanding of the people and societies they serve, diverse in their backgrounds and experiences; train them well and pay them well; give them proper support in their work, which includes respecting and enforcing their orders, without threatening their independent judgment; protect them from removal other than because of age, incapacity or misbehaviour in office; in short, secure their proper place in any democratic system of government. But to*

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<sup>263</sup> See “African leaders fond of ‘phone justice’” by Lydia Shekighenda(04 October,2007) <http://www.ippmedia.com/cgi-bin/ipp/print.pl?id=99719> accessed 2007/10/09

<sup>264</sup> Ibid

*achieve all of that we need effective leadership not only from our politicians but also from the leaders of our own professions.”<sup>265</sup>*

### *Regional Body on the Independence of the Judiciary and the Rule of Law*

Sub-Saharan Africa needs to set up a body for implementation, monitoring and promoting basic principles of the independence of the judiciary.<sup>266</sup> The region should stop the fire-fighting and reacting to situations. Further the importance of the principle of the independence of the judiciary means that it should not be a mere appendage of regional collaboration whether under the African Union or under NEPAD. Sub-Saharan Africa cannot just rely on the UN Special Rapporteur on the independence of the judiciary to effectively police the implementation of the principle in the region when he has the entire world to attend to. Southern Africa has a Commission for judges among whose mandate is to promote and protect the independence of the judiciary. Having come into being in 2005, the Southern African Commission is yet to fully establish itself. Its work is yet to be fully appreciated. The efforts of the Konrad Adenauer Foundation to develop basic practices model for Sub-Saharan Africa must be encouraged but that would not be sufficient to elicit the governmental commitment necessary for the full and effective implementation of the principle. The International Commission of Jurists, Kenya Branch would face similar problems of insufficiency. The region would not be the first to have such a body. The Arab region has The Arab Centre for the Independence of the Judiciary & the Legal Profession which has the Consultative Status with the UN ECOSOC. This is besides having an Arab Judicial Forum. Of course there are some sub-Saharan African countries with connection to the Arab League, but these are very few. The rest of the sub-Saharan African counties would not have the benefit of the Arab Center for the Independence of the Judiciary.

### *Civic Education*

Popularize the principle so that the public are aware of the meaning and purpose of the principle.<sup>267</sup> That will elicit public support and anyone who tries to undermine it will be widely criticized. Where the public is well informed on the purpose and importance of the independence of the judiciary and the respect for the rule of law there are likely to be less incidents of assault on the principle. Violations of the principle would be politically costly and unattractive. Public understanding of the principle is likely to engender public confidence in the in the judiciary. Public confidence is the ultimate safeguard of the

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<sup>265</sup> “The Appointment and Removal of Judges: Independence and Diversity.” By The Right Hon. Baroness Brenda Hale of Richmond House of Lords, United Kingdom, May 2006

<sup>266</sup> At the time of writing the author was not aware of the existence of such a body or any body of similar functions, although a conference of African Jurists on the African Legal Process and the Individual convened by the Economic Commission for Africa in Addis Ababa, Ethiopia, April 19-23, 1971 resolved the independence of the judiciary be guaranteed in order to ensure the impartiality of justice and that an Advisory body be set up (See also M Hamalengwa and Others, eds, *The International Law of Human Rights in Africa*, 1988 at 56).

<sup>267</sup> Popularization of the concept of the independence of the judiciary will need long term and well thought-out programming.

independence of the judiciary. The judiciary should take on the role of civic education on the functions of the judiciary and the importance and purpose of the independence of the judiciary.

### *Role of Civil Society in Advocating for the Independence of the Judiciary*

The support of civil society should be elicited. Civil society can play an important role in promoting the independence of the judiciary. Civil society should be engaged in the efforts to promote and protect the principle as a way of creating a constituency for the independence of the judiciary.

### *The Role of the Media*

The media plays an important role in upholding the independence of the judiciary. The media brings into the public arena matters of judicial appointments as well as executive's interference with the independence of the judiciary. It also educates the public on the role and proper functioning of the judiciary and in the process promote judicial accountability. It is necessary that the media be well informed about the principle of the independence of the judiciary. The judiciary must relate with the public constantly through media explanation of the work of the judiciary and the importance of the independence of the judiciary.

### *Elicit Political Commitment to the ideal of the independence of the judiciary*

Besides having constitutional and legal guarantees to judicial independence, there is need for vigilance on the part of everyone especially the legal profession in preserving and promoting it. Constitutions alone, even with high-sounding constitutional guarantees cannot ensure the independence of the judiciary. Politicians must be made to realize that they can achieve their political goals, be they short term or long term, through legal means and that there is nothing inherent about living above the law in order to be successful politically. There is no one who would say that Nelson Mandela was not a successful politician. And yet hear what he said in deference to the law:

*“The Constitutional Court has declared invalid proclamations which I made. At the time I was assured by my legal advisors that I had the authority and power to do so. I fully accept the decision of the constitutional Court. We all act under the Constitution and I, as President, must be the first one to show respect for the Constitution as interpreted by the Constitutional Court.”<sup>268</sup>*

President Mandela set a firm foundation and very high standard of political commitment to the independence of the judiciary which was to be followed in South Africa. Mandela's attitude to the ideal of the independence of the judiciary is quite in contrast to

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<sup>268</sup> Mandela' television Broadcast after the court ruling in the Western Cape Local Government Case, as quoted in “The Independence of the Judiciary and the Rule of law : Strengthening Constitutional Activism in East Africa” edited by Frederick W. Jjuuko 2nd Edn at page 12-13

that of many of the leaders in Sub-Saharan Africa. The Prime Minister of Lesotho refused to accept and apply courts decisions until the judiciary stood firm demanding compliance. President Museveni of Uganda is known to have challenged court decisions, saying the duty of the judge was to decide theft of chicken and goat cases. Recently President Bingu Wa Mutharika of Malawi challenged the Malawi Supreme Court of Appeal ruling of a provision on crossing the floor.<sup>269</sup>

Another classic example where South Africa has led the way to show political will to promote and protect the independence of the Judiciary is when in October 1999 a Cape Town Court imprisoned a 54 year old man for 7 years for raping his 16year old daughter. It was said at the time that a rape was committed every 36 seconds and that the offence attracted life sentence. The Judge in the case had said that while the raping of the daughter was morally reprehensible, the act was confined to the daughter and that the man did not pose a threat to society. The prosecutor instantly filed an appeal. However the remarks made by the judge unleashed a wave of anger in women's rights groups. Meanwhile a Parliamentary Committee summoned the judge to appear and explain himself over the sentence. This action gave rise to protestations in legal circles on the ground of interference with the independence of the judiciary. The Minister of Justice made a public statement saying, inter alia that;

*“In terms of our constitution, the judiciary is independent from both the legislature and the executive. The principle of separation of powers and the independence is strongly entrenched in our constitution.... The judiciary as an organ of State had to be accountable in its actions, but this did not mean that judges should appear before a parliamentary committee to explain judgments”.*<sup>270</sup>

The South African Constitution entrenched the duty for other organs of government to support and protect the independence of the judiciary in section 165(4) of the Constitution. More recently, President Thabo Mbeki having noted the spirited debate on the Justice Bills and their potential for undermining the independence of the judiciary is reported to have told the justice Ministry to slow down the process and to listen to th Judiciary and he further commented that ithad never been the intention of Government to compromise the independence of the judiciary. Angola attempted to do the same in Article 120(3) of the Constitution which provides that;

*“In the discharge of their jurisdictional duties, the courts shall be independent and subject only to the law, and they shall be entitled to the assistance of other authorities.”*

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<sup>269</sup> In the Matter of Presidential Reference of a Dispute of a Constitutional Nature Under Section 89(1)(h) of the Constitution and in the Matter of Section 65 of the Constitution and in the Matter of the Question of the Crossing the Floor by Members of the National Assembly, Presidential Reference Appeal No 44 of 2006., Malawi Supreme Court of Appeal.

<sup>270</sup> Quoted by former UN Special Rapportuer on the Independence of Judges and Lawyers, Mr. Param Cumuraswamy, in his remarks to the Arab Judicial forum, September 15-17, 2003

Not many Sub-Saharan African constitutions place a duty on the executive and the legislature to take legislative and other measures to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the court. It is submitted that such a duty would go a long way to ensure political commitment to the principle of the independence of the judiciary.

#### *Continuing Legal and Judicial Education*

Promote the independence of the judiciary through training and institutional capacity building. Judges must be at the forefront in promoting the independence of the judiciary. Members of the judiciary should be committed to the principle without exception and should continue to assert it for the benefit of the public.

#### *The Role of the Legal fraternity*

The legal fraternity must take the lead, not only in defending the independence of the judiciary, but also in promoting it. There are sections of the legal fraternity that participate in undermining the independence of the judiciary, sometimes for personal or political gains. Scrupulous enforcement of professional codes of conduct should be encouraged. Happily, most of the legal profession in Sub-Saharan Africa have fearlessly acted in defense of the principle of the independence of the judiciary. They can do more by setting up special institutions such as committees on the independence of the judiciary within the law society owing to the importance of the principle. There can be no better support to the independence of the judiciary than an independent and effective legal profession.

#### *Develop and Strengthen Peer Review Mechanism on the Independence of the Judiciary in Africa*

The concept of peer review under NEPAD appears to have elicited considerable interest among African countries. This mechanism needs to be further developed and elaborated to also prioritize the independence of the judiciary and the rule of law as an area of special focus. There should be National Institutions set up to promote and monitor the implementation of the Basic Principles on the independence of the judiciary. The African civil society need to get more interested in the independence of the judiciary and the rule of law and develop their own monitoring networks with a view to ensure preservation and promotion of the independence of the judiciary and the rule of law in Sub-Saharan Africa. These civil societies would hold African governments accountable, just as they would hold the judiciary accountable on the same aspect. Each country should set up monitoring mechanism. There should be no waiting until an event happens.

The prospects of having effective regional judiciaries such as the African Court of Human Rights and the African Court of Justice and indeed the COMESA Court and the SADC court require that there be a strong culture of protection and promotion of the independence of the judiciary and the rule of law. There can be no prospect of the Sub-Saharan African Countries respecting, protecting and promoting the independence of the

judiciary at international or regional level if they find it hard to do so at national level. Regional integration as aspired to by African governments requires that the independence of the judiciary and the rule of law be placed at top priority in each of the African countries.

#### *Appoint an African Special Rapporteur on the Independence of the Judiciary*

In 2002, the UN Special Rapporteur for the independence of judges and lawyers expressed concern about lack of the independence of the judiciary and the breakdown of the rule of law in Zimbabwe and called on the UN Commission on Human Rights to consider addressing appropriately developments in Zimbabwe.<sup>271</sup>

The UN Special Rapporteur on the independence of the judiciary may not be able to focus attention on Africa or make immediate follow-ups since he must cover the whole world. Addressing problems such as those in Zimbabwe would require speedy response. A Special Rapporteur for Africa on the independence of the judiciary would be handy and would concentrate on the African continent and would cover the Sub-Saharan Africa more adequately than the UN Special Rapporteur.

## **6. Conclusions**

The struggle for the independence of the judiciary and rule of law is of ancient origin and remains our perennial preoccupation. There can be no doubt that achieving the independence of the judiciary to ensure impartiality in judicial decisions is a complex undertaking.

The independence of the judiciary and the rule of law are closely intertwined principles which form cornerstones for consolidation of democracy and protection of human rights. The guarantee of the independence of the judiciary and the rule of law in Sub-Saharan African countries is important not only to ensure that justice is done in each case before court but also to ensure public confidence in the judicial system. It is not the right or the privilege of the judges but the right of all consumers of justice.

The promotion, protection and sustenance of the independence of the judiciary and the rule of law in Sub-Saharan Africa is critical to democracy and the rule of law. Africa's economic success depends on her adherence to democratic governance based on the rule of law, separation of powers and the independence of the judiciary. Sub-Saharan Africa should prioritize the promotion and the protection of the independence of the judiciary as the basis of achieving societal goals.

The trends in Sub-Saharan Africa show that the independence of the judiciary is seriously undermined. It faces some serious threats and challenges. Three possible explanations account for these unrelenting threats and challenges. Firstly there is widespread lack of

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<sup>271</sup> See UN document E/CN.4/2002/72 Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted to the Fifty-eighth session of the UN Commission on Human Rights, in accordance with the Commission's resolution 2001/39

understanding of the Principle among the political leadership. Secondly there are weak and inadequate constitutional guarantees in the constitutions of Sub-Saharan African countries. In some instances no such guarantees exist. Thirdly there is lack of commitment on the part of governments of most Sub-Saharan African countries to implement the principle. The independence of the judiciary is clearly not a matter of priority on the part of most Sub-Saharan African governments.

The present work has attempted to show that tracing the historical development of the principle of the independence of the judiciary gives a better understanding of the meaning, purpose and importance of the principle. Often times a narrow view of the principle is taken, leading to the numerous assaults on it. The principle is not a bi-product of the democracy, meaning that it should exist even if there be no democracy although a functional democracy needs it. In a democracy, the principle is there to ensure the consolidation of democracy while at the same time preventing the tyranny of the majority. The principle exists for more reasons than democracy. It also exists for economic growth, for example. A full appreciation of the role of the judiciary in a constitutional democracy would reinforce the promotion and the protection of the principle. Unfortunately such is not the position in Sub-Saharan Africa.

The work further considers in some detail certain matters that tend argued counter to the principle of the independence of the judiciary. These include judicial accountability, judicial activism, judicial code of conduct and judicial education. Judicial accountability must be there and it does not run counter to the principle of the independence of the judiciary. Demands for judicial accountability must be with full appreciation of the role of the judiciary in a constitutional democracy. Judicial accountability cannot be in the same manner as executive and legislative accountability whose constituents are the majority. Judicial activism must be within limits permissible by law and that the judiciary must guard against usurping the powers of the other branches of government. Stretching judicial activism or judicial restraint beyond proper limits causes injustice and undermines the independence of the judiciary. Both judicial codes of conduct and judicial education run in support of the principle rather than against the principle.

The constitutions of democratic Sub-Saharan African countries can be put into three categories: firstly, those with strong constitutional guarantees of the independence of the judiciary; secondly, those with weak and inadequate constitutional safeguards of the independence of the judiciary and, thirdly, those with no constitutional safeguards of the independence of the judiciary. Examples of all these categories are given. In general the independence of the judiciary in Sub-Saharan Africa remains weak and fragile with weak and inadequate constitutional guarantees. In terms of implementation of the principle most Sub-Saharan African government lack the commitment. Even where constitutional guarantees exist, governments disregard them and proceed to undermine the independence of the judiciary with impunity. Few countries stand out as having the constitutional guarantees and demonstrating commitment to promote and protect the principle. South Africa has the necessary guarantees and has demonstrated commitment to implementing the principle despite some setbacks. Botswana has weak guarantees but has demonstrated high level of commitment to the principle resulting in high levels of

protection of the principle. Tanzania without constitutional guarantees has developed a firm foundation for implementing the principle. The Uganda story told about undermining the independence of the judiciary is unfortunately characteristic of most Sub-Saharan African countries. The few countries that have demonstrated commitment to the promotion and implementation of the independence of the judiciary should act as examples for others to follow.

The discussion list down a number of examples of threats and challenges to the independence of the judiciary in Sub-Saharan Africa. The executive branch provides the most serious threats and challenges to the independence of the judiciary. Notably, the judiciary has at times acted as its own enemy by undermining the independence of the judiciary with the aim of pleasing certain sections of society, including the executive branch of government. Good judges do not fear public scrutiny of their performance and conduct. The presence of bad judges in their midst is what they fear as these will tarnish the rest.

The picture is clear that in Sub-Saharan Africa the independence of the judiciary is imperiled. It does not occupy any priority place on the agenda of most governments in the region. It is under serious and relentless attack, especially from the executive branch of government. The biggest battle for the independence of the judiciary is fought by the judiciary itself and the community of lawyers. It is vitally important to engage civil society, the media and the public in building a constituency for the promotion and protection of the independence of the judiciary and the rule of law. The point must be made that the judiciary is the last line of defense for democracy, human rights and the rule of law and that it is in the interest of everyone that the last line of defense be the strongest it can possibly be. Late Chief Justice Ishmael Mahomed of South Africa was very clear when he said:

*“The independence of the judiciary is crucial. It constitutes the ultimate shield against the incremental and invisible corrosion of our moral universe which is so much more menacing than direct confrontation with visible waves of barbarism”*<sup>272</sup>

The independence of the judiciary is not a privilege or right of judges but a right for every individual in society. The words of retired Justice Sandra Day O’Connor of the U.S. Supreme court that *“Constitutions and Statutes Don’t Protect Judicial Independence, People do”* appear to ring true for Sub-Saharan African countries.

Developing an effective strategy to foster the independence of the judiciary and the rule of law requires careful and critical examination of the incentives politicians may have to support the independence of the judiciary. The following words of Rt Hon. Beverley McLachlin, Chief Justice of Canada, provide some useful guide:

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<sup>272</sup> “The Independence of the Judiciary” Address by Chief Justice I Mahomed to the International Commission of Jurists in Cape Town, July 21, 1998, <http://wwwserver.law.wits.ac.za/sca/speeches/independ.html>, accessed 2007/11/05

*“Modern threats to judicial independence, like the old, demand a courageous, steadfast response. When all is said and done, the last bastion-the final refuge- of judicial independence is the conscience of each and every judge and lawyer. We, the bar and the bench, are the guardians of our legal system and the rule of law. We must resolve to stand firm against all pressures, and to ensure that our courts remain “a place apart”, to cite the title Mary Friedlan’s recent report on judicial independence in Canada. That place is built on a solid historical foundation. It is reinforced by formidable constitutional protections. But ultimately it is up to u, the inheritors of judicial independence, to pass it on to our successors, not only intact, but even stronger than we found it. That is our challenge. With God’s grace we will meet it. Nothing can be more important to our countries, and the world.”<sup>273</sup>*

The transformation of the Organization of African Unity into the African Union and the adoption of the New Partnership for Africa’s development have raised expectations of renewed commitment by African Heads of State to good governance with improved observance of human rights, the rule of law and the independence of the judiciary. Most of these commitments relating to human rights, democracy, peace, rule of law and the independence of the judiciary have been chronicled in the protocols, declarations and decisions of the continental body, but what has been lacking is the actual implementation. The need to promote the principles of human rights, democracy, good governance, the rule of law, transparency and accountability entail the existence of the independence of the judiciary.

Democratic Sub-Saharan African countries have not placed the independence of the judiciary and the rule of law in their proper place. They have not given the principle priority, but have instead seriously weakened by threatening and attacking it and continue to do so. They need to change the attitude and place the independence of the judiciary and the rule of law on high priority and get committed to its promotion and implementation. Sub-Saharan Africa needs deeply entrenched de jure and de facto independence of the judiciary to consolidate democracy and the rule of law.

## REFERENCES

1. Summary Report of the Stakeholders’ Conference on the Independence of the Judiciary in Sub-Saharan Africa, Held at Mount Kenya Safari Club, under Konrad Adenauer Foundation, October 3-7, 2006.
2. Summary Report of Stakeholders’ Conference on the State of the Rule of Law in Sub-Saharan Africa, Whitesands Hotel, Mombasa, Kenya, Held under Konrad Adenauer Foundation, September 12-16, 2007.

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<sup>273</sup> ‘Judicial Independence’, Remarks of Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada during the 300<sup>th</sup> Anniversary of the Act of Settlement Conference Vancouver, British Columbia and also marking the retirement of Chief Justice Allan McEachern of Canada, May 11, 2001.

3. Summary Report of the Stakeholders' Conference on Constitutional Adjudication in Sub-Saharan Africa Held at Paradise Holiday Resort, Bagamoyo, Tanzania under Konrad Adenauer Foundation, June 5-9, 2007
4. Summary Report of the Stakeholders' Conference on Constitution-making; Ratification and Domestication of International Instruments in Sub-Saharan Africa Held at Orion Safari Lodge, Rustenburg, South Africa, under Konrad Adenauer Foundation, February 27 – March 3, 2007
5. "Judicial Systems of Sub-Saharan Africa: An Analysis of Neglect" by Karen A. Mingst. *African Studies Review*, Vol. 31 No. 1. (April 1988, pp135-147.
6. *The Judicial Institution in Southern Africa, A Comparative Study of Common Law Jurisdictions*, edited by Linda Van De Vijver, 2006 *Siber Ink*.
7. *The Independence of the Judiciary and the Rule of Law – Strengthening Constitutional Activism in East Africa*, edited by Frederick W Jjuuko, 2005 published by Kituo cha Katiba
8. *South Africa – Justice Sector and The rule of law, A review by AfriMap and Open Society Foundation for South Africa*, 2005
9. *The Judicial Institution in Zimbabwe*, by Karla Saller 2004, *Siber Ink*
10. "Symposium: 'A Delicate Balance': The Place Of The Judiciary In a Constitutional Democracy" by Chief Justice Pius Langa, Republic of South Africa, *South African Journal on Human Rights*, Vol. 22,Part 1 2006, page 1
11. "Judicial Independence and the Constitution Fourteenth Amendment Bill" by Catherine Albertyn, *South African Journal on Human Rights*, Vol. 22,Part 1 2006, page 126
12. "The Swaziland Constitution of 2005: Can Absolutism be Reconciled with Modern Constitutionalism?" By Professor Charles Manga Fombad, *South African Journal on Human Rights*, Vol. 23,Part 1 2007, page 93
13. "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa" by Professor Charles Manga Fombad, Reprinted from *The American Journal of Comparative Law*, Vol. 55, Winter 2007, Number 1
14. **Independence, political interference and corruption – Comparative Analysis of Judicial Corruption.**
15. "Judicial Independence and the Constitution in Time of Change" by William Blair, Martyrs Day Memorial Lecture delivered on June 28, 2005, Ghana
16. *Malawi Justice Sector and the Rule of law – A review by AfriMap and Open Society Initiative for Southern Africa*, 2006
17. "Judicial Independence: What It Is, How It Can Be Measured Why It Occurs" by Mathew Stephenson of the Harvard University Department of Government and Law School."  
<http://www1.worldbank.org/publicsector/legal/judicialindependence.htm>  
 accessed 2007/09/26

18. "Judicial Independence: Purposes and Threats" Address by the Hon. J.J. Spigelman AC, Chief Justice of New South Wales to the 7<sup>th</sup> Worldwide Common Law Judicial Conference 30 April 2007, London.
19. "Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators" by Lars P. Feld and Stefan Voigt
20. "Researching Cameroonian Law" by Professor Charles Manga Fombad published June/July 2007
21. "Support for Democracy seen falling in Africa" by Craig Timberg (May25, 2006)
22. "The Role of the Independent Judiciary" by Susan Sullivan Lagon in Freedom Papers 4
23. "The Role of the Judge in the Democratic State" by Hon Justice P. Nnaemeka-Agu of the Supreme Court of Nigeria
24. "Judicial Independence: Purposes and Threats" by Chief Justice Spigel of New South Wales, 30<sup>th</sup> April, 2007.
25. 'Judicial Independence', Remarks of Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada during the 300<sup>th</sup> Anniversary of the Act of Settlement Conference Vancouver, British Columbia and also marking the retirement of Chief Justice Allan McEachern of Canada, May 11, 2001.
26. "The Role of an Independent Judiciary" by Philippa Strum, in Democracy Papers, USINFO.STATE.GOV
27. "What is the Rule of Law", an article of The University of Iowa Center for International Finance and Development
28. 'Rule of Law in Western Thought' by Melissa Thomas, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUS/TINS/0,c...> Accessed 2007/10/16
29. "The Judiciary and the Rule of Law" by former Chief Justice R.A. Banda of Malawi (unpublished)
30. "Building Blocks for a Rule of Law" by Judge Sidney Brooks, US Bankruptcy Judge, April 2007.
31. "Globalization and the Rule of Law" by Professor Jeffrey D. Sachs, a Galen L. Stone Professor of International Trade at Harvard University, Remarks delivered at Yale Law School, October 16, 1998
32. 'The Prospects for Democracy in Africa' by Dr Kofi Abrefa Busia on 4<sup>th</sup> January, 1961
33. "The International Rule of Law Starts at Home" by Ambassador (and Judge) Hans Corell of Sweden in International Judicial Monitor Jul/Aug 2007 Volume 2, Issue 2, Accessed 2007-10-16
34. "Judicial Independence Undermined: A Report on Uganda" By the International Bar Association, September 2007
35. "Democracy in Africa: The Challenges and the Opportunities", An Address to the South African Parliament by Chief Emeka Anyaoku, Commonwealth Secretary General, 1<sup>st</sup> June, 1998.

36. "The Interface Between the Three Organs of Government in the Promotion of Good Governance" By Professor Z.D. Kadzamira, Vice Chancellor, University of Malawi, 26-27 January, 2006.
37. "Challenges to Judicial Independence and the Rule of law: A Perspective From the Circuit Courts." By Hon Judge Carolyn Dineen King, Circuit Judge, United States Court of Appeals for the Fifth Circuit, February 20, 2007.
38. "Guidance for Promoting Judicial Independence and Impartiality" January, 2002, Office of Democracy and Governance, Bureau for Democracy, Conflict, and Humanitarian Assistance, U.S. Agency for International Development.
39. "Judicial Independence in Common Law Africa" by Jennifer Widner, at page 43 of "Guidance for Promoting Judicial Independence and Impartiality" January, 2002, Office of Democracy and Governance, Bureau for Democracy, Conflict, and Humanitarian Assistance, U.S. Agency for International Development.
40. "Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence" by Jennifer A. Widner, New York: W.W. Norton & Company, Inc. 2001.
41. "Courts and Democracy in Post-conflict Transitions: A Social Scientist's Perspective on the African Case" by Jennifer Widner, The American Journal of International Law, Vol. 95, No. 1. (Jan., 2001) pp64-75
42. "Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa" by Lovemore Madhuku, Journal of African Law, Vol. 46 No. 2. (2002) pp232-245
43. "Judicial Independence and Human Rights protection around the world" by Linda Camp Keith, Judicature, Vol. 85, No. 4 (Jan-Feb., 2002) pp195-200
44. "Plan of Action for Africa on the Commonwealth( Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government", Nairobi, April 4-6, 2005
45. "Is Senegal's 'model democracy' tarnished? By Tidiane Sy, <http://news.bbc.co.uk/2/hi/africa/4714475.stm> accessed 2007/10/09
46. "The problem of judicial control in Africa's neopatrimonial democracies: Malawi and Zambia" by Peter VonDoepp, June 2005. [http://goliath.ecnet.com/coms2/gi\\_0199-5055692/The-problem-of-judicial-control.ht...](http://goliath.ecnet.com/coms2/gi_0199-5055692/The-problem-of-judicial-control.ht...) accessed 2007/09/28.
47. "African Commitments to Democracy in theory and Practice, A review of eight NEPAD countries" by Anne Hammerstad, <http://www.iss.org.za/pubs/Other/ahsi/HammerstadMono/Contents.html> accessed 2007/10/09
48. The New Partnership for Africa's Development(NEPAD) Declaration on Democracy, Political, Economic and Corporate Governance, AHG/235 (XXXVIII) Annex I
49. "Law, Liberty and Economic Growth" by Gerald W. Scully, NCPA Policy Report No. 189, Dec., 1994 ISBN #1-56808-053-0

50. "Judicial Ethics and the Role of a Judge in a Democratic Society." By Hon. Judge Taghrid Hikmet presented to a Conference at Harvard University Law School, 1-2 December, 2006
51. "Why Judicial Independence" by The Rt. Hon. Sir Ninian Stephen, 2004, Keynote Address at Asia-Pacific Judicial Educators Forum.
52. "Towards an independent and effective judiciary in Africa" by The Hon. Mr Justice A.M. Akiwumi
53. "Politics and Judicial Decision Making in Namibia: Separate or Connected Realms" by Prof. Peter VonDoepp, IPPR Briefing Paper No. 39, October 2006.
54. "Constitutional Aspects of Judicial Independence" by P. H. Lane, <http://www.jc.nsm.gov.au/fb/fblane.htm> accessed 2007/06/06
55. "Judicial Independence – Its History in England and Wales." by Rt. Hon. Lord Justice Brooke, Court Appeal, England in Fragile Bastion, Judicial Independence in the Nineties and Beyond.
56. "The Judiciary in France ----- Reconstructing Lost Independence" by Bron McKillop, <http://www.judcom.nsw.gov.au/fb/fbmckill.htm> accessed 2007/10/29, also in the Fragile Bastion, Judicial Independence in the Nineties and beyond.
57. "Promoting Judicial Independence, Accountability and Transparency in Malawi", (2003) By Ralph Kasambala, Former Malawi Attorney General (unpublished).
58. "Providing for the independence of the judiciary in Africa: A Quest for the Protection of Human Rights", By Letsebe PIET Lesirela, 2003, [https://www.up.ac.za/dspace/bitstream/2263/1049/1/letsebe\\_p1\\_1pdf](https://www.up.ac.za/dspace/bitstream/2263/1049/1/letsebe_p1_1pdf) accessed 2007/11/05
59. "The Role of the Judiciary in Promoting Constitutionalism, Democracy, Economic Growth and Development in Sub-Saharan Africa" By Justice L.P. Chikopa (Mw), 2007 (unpublished).
60. "Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty" by Hon. Justice Michael Kirby AC CMG, <http://www.austlii.edu.au/au/journals/MULR/2006/18.html> accessed 2007/10/12
61. "Ethical Problems with Judicial Activism" by The Hon Justice David Edited version of a paper given at a Conference in Beijing organised the National Judicial College, October 12, 2004, [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_Court/II\\_sc.nsf/pages/SC\\_O\\_ipp12\\_...](http://www.lawlink.nsw.gov.au/lawlink/supreme_Court/II_sc.nsf/pages/SC_O_ipp12_...) accessed 2007/10/12
62. "THE ROLE OF THE JUDICIARY IN SAFEGUARDING THE PRINCIPLE OF SEPARATION OF POWERS IN A DEMOCRATIC STATE" By Justice Razine Robert Mzikamanda, A paper for presentation at the Konrad Adenauer Foundation's Rule of Law Program Conference on Separation of Powers in Sub-Saharan Africa, Cape Town, South Africa, 7<sup>th</sup>-11<sup>th</sup> November, 2006.

63. "Judicial Appointments and Judicial Independence." By Chief Justice Spigelman of New South Wales, Address to a Rule of law Conference, Brisbane, 31 August, 2007
64. Record of Proceedings of the General Council of the Bar of South Africa Human Rights Committee Conference on The Justice Bills, Judicial Independence and the Restructuring of the Courts, Johannesburg, 17 February, 2006
65. "Judicial Activism Reconsidered." <http://www.tsowell.com/judicial.htm> accessed 2007/10/12
66. "Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty." By Hon. Justice Michael Kirby AC CMG, <http://www.austlii.edu.au/au/journals/MULR/2006/18.html> accessed 2007/10/18
67. "Judicial Independence and Economic Growth: Some Proposals Regarding the Judiciary." By Lars P. Feld and Stefan Voigt
68. "Judicial Independence and Investment." By Thoson W. MacFarland, August 2006
69. "The Independence of the Judiciary" Address by Late Chief Justice I Mahomed T the International Commission of Jurists in Cape Town on July 21, 1998.
70. "Judicial Independence and Accountability in Anglophone Sub-Sahara Africa." By Stephen M. Mwenesi, Advocate of the High Court of Kenya.
71. "Aspects of Judicial Independence" by The Hon. Justice CSC Sheller, Supreme Court of New South Wales.
72. "On Judicial Independence Under Pressure." By Judge Procter Hug Jr. October, 2001, Reno Nevada.
73. "The Beleaguered Fortress: Reflections of the Independence of Nigeria's Judiciary." By Prof. A.A. Olowofoyeku, Journal of African Law, Vol. 33, No. 1. (Spring 1989), pp55-71