

**CONSTITUTIONALISM AND JUDICIAL APPOINTMENT AS A MEANS
OF SAFEGUARDING JUDICIAL INDEPENDENCE IN SELECTED
AFRICAN JURISDICTIONS**

by

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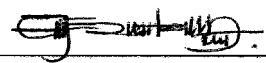
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DECLARATION

I declare that '**Constitutionalism and the process of judicial appointment as a means of safeguarding democracy and judicial independence in selected African jurisdictions**' is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references.


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ABSTRACT

The beginning of the 1990s saw many African countries embarking on the process of drafting new constitutions as they abandoned independence constitutions. Most of the independence constitutions were perceived as constitutions without constitutionalism and they were generally blamed for failure of democracy and the rule of law in Africa.

The study analyses the state of democracy and constitutionalism and the impact that colonialism had on the African continent. Apart from the spurt of new constitutions adopted, democracy is growing very slowly in most African states with widespread human rights violations and disregard for the rule of law and the principle of separation of powers, still holding the centre stage.

Judicial independence is an important component of democracy in the modern state. The study therefore scrutinizes how the principle of judicial independence can be promoted and protected to enhance democracy. One important mechanism which plays a crucial role in safeguarding judicial independence is the way judicial officers are appointed. The study selects four countries – Swaziland, Kenya, Zimbabwe and South Africa and analyses how judicial officers are appointed in these countries in an effort to find an effective and optimal approach.

The premise of the study is centred on the role of constitutionalism and the process of appointing judges as a means of promoting and safeguarding democracy in these selected countries.

Key terms

Constitutionalism, Constitution, Rule of Law, Democracy, International Law, Judicial Independence, Judiciary, and separation of powers.

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ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ANC	African National Congress
APP	African People's Party
APRM	African Peer Review Mechanism
AU	African Union
BIICL	British Institute of International and Comparative Law
BLA	Black Lawyers Association
CA	Constitutional Assembly
CALS	Centre for Applied Legal Studies
CASAC	Council for the Advancement of the South African Constitution
CC	Constitutional Court
CJ	Chief Justice
CODESA	Convention for a Democratic South Africa
CPA	Criminal Procedure Act (SA)
CP	Constitutional Principle
CSVR	Centre for the Study of Violence and Reconciliation
DA	Democratic Alliance
DCJ	Deputy Chief Justice
DJCD	Department of Justice and Constitutional Development
DRC	Democratic Republic of Congo
ECK	Electoral Commission of Kenya
EEC	European Economic Community
EU	European Union
FUL	Freedom Under Law
GA	General Assembly
GCB	General Council of the Bar
GNU	Government of National Unity

GPA	Global Political Agreement
IBA	International Bar Association
IC	Interim Constitution
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICD	Independent Complaints Directorate
ICJ	International Commission of Jurists
JSA	Judicial Service Act
JASA	Justice Alliance of South Africa
JSC	Judicial Service Commission
KADU	Kenya Democratic Party
KANU	Kenya African National Union
LSSA	Law Society of South Africa
MDC	Movement for Democratic Change
MJCD	Minister of Justice and Constitutional Development
MPNP	Multi-Party Negotiating Process
MP	Member of Parliament
Mps	Members of Parliament
MPS	Municipal Police Service
NA	National Assembly
NADEL	National Association of Democratic Lawyers
NARC	National Rainbow Coalition
NCOP	National Council of Provinces
NDI	National Democratic Institute
NDPP	National Director of Public Prosecution
NEPAD	New Partnership for Africa's Development
NPA	National Prosecuting Authority
OAU	Organization of African Unity
OSISA	Open Society Initiative for Southern Africa

PAC	Pan Africanist Congress
PSC	Public Service Commission
SAA	South African Airways
SAHRC	South African Human Rights Commission
SADC	Southern African Development Community
SADCLA	Southern African Development Community Lawyer Association
SAIIA	South African Institute of International Affairs
SAPS	South African Police Service
SCA	Supreme Court of Appeal (South Africa)
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States
WJP	World Justice Project
WWI	First World War
WWII	Second World War
ZANU-PF	Zimbabwe African National Union – Patriotic Front

TABLE OF CONTENTS

Declaration.....	i
Abstract.....	ii
Key terms.....	ii
Acknowledgements.....	iii
Abbreviations.....	4

Chapter One

INTRODUCTION AND GENERAL OVERVIEW

1.1 Background.....	2
1.2 Research Questions.....	3
1.3 Aim of Study.....	4
1.4 Scope and Limitation of Study.....	5
1.5 Description of Planned Research Methodology.....	5
1.6 Structure of the Study and Outline of the Chapters.....	6
1.7 Key Concepts.....	7
1.7.1 Constitutionalism.....	7
1.7.2 Democracy.....	7
1.7.3 The Rule of Law.....	9
1.7.4 The Separation of Powers Doctrine.....	9
1.7.5 Judicial Independence.....	11
1.7.5.1 Functional and Personal Independence.....	12
1.7.5.2 Appointment Process of Judicial Officers in Comparative Perspective	12

Chapter Two

ANALYSIS OF CONSTITUTIONALISM, DEMOCRACY, SEPARATION OF POWERS, AND THE RULE OF LAW IN AFRICA

2.1 Introduction.....	17
2.2 The Impact of Colonialism on Constitutionalism in Africa.....	19
2.2.1 Defining Colonialism.....	19
2.2.2 The State of Africa after Colonialism.....	21
2.3 Explaining the Concept of Constitutionalism.....	25
2.4 Explaining the relationship and connection between the concepts of Constitution(s), Constitutionalism, Democracy, and Elections.....	28
2.4.1 The state of democracy and constitutional sovereignty in South Africa since the adoption of the 1993 Interim Constitution (and Constitution of the Republic of South Africa, 1996) and the first democratic elections of 1994: Are there lessons for other African countries?.....	30
2.4.2 Overview of Elections v Democracy in Africa.....	33
2.4.2.1 The African Union (AU) and the African Charter on Democracy, Elections and Governance (ACDEG).....	35
2.5 The Doctrine of Separation of Powers and the Rule of Law in Africa.....	36
2.5.1 Explaining the Doctrine of Separation of Powers.....	38

2.5.2	Implementation of the Idea of Constitutionalism and the Doctrine of Separation of Powers in Selected African States in Contrast with the US and Germany.....	40
2.5.2.1	Checks and Balances.	41
2.5.2.2	The System of Checks and Balances and Separation of Powers under the US Constitution.	41
2.5.2.3	Constitutionalism and Separation of Powers in the Federal Republic of Germany.	43
2.5.2.4	Constitutionalism and Separation of Powers under the South African Constitution.	46
2.5.2.5	Constitutionalism and Separation of Powers in Zimbabwe.	52
2.5.2.6	Constitutionalism and the Doctrine of Separation of Powers in Kenya.	58
2.5.2.6.1	Kenya from Independence (1963)....	58
2.5.2.6.2	The Period 1978 to 1991.	60
2.5.2.6.3	The influence of Elections on Constitutionalism and Separation of Powers in Kenya.	62
2.5.2.6.3.1	Multi-Party Elections.	62
2.5.2.6.3.2	1992 Elections.	62
2.5.2.6.3.3	1997 Elections.	62
2.5.2.6.3.4	2002 Elections.	63
2.5.2.6.3.5	2007 Elections.	64
2.5.2.7	Constitutionalism and Separation of Powers in Swaziland.	65
2.5.3	A Comparative Assessment of Constitutionalism and Democracy in Western and African Countries.	66
2.5.4	Africa and the Rule of Law.	67
2.5.4.1	Explaining the Rule of Law.	67
2.5.4.2	The African Peer Review Mechanism (ARPM) and the rule of law in Africa.	69
2.6	Conclusion.	71

Chapter Three

PROTECTING JUDICIAL INDEPENDENCE

3.1	Introduction.	75
3.2	Judicial Independence in the Contemporary State.	77
3.3	Different Ways of Ensuring Judicial Independence.	80
3.3.1	The Constitution and Legislation.	80
3.3.2	Judicial Service Commissions or Councils.	81
3.3.3	Courts or Tribunals.	81
3.3.4	International Law/Conventions or Documents..	83
3.3.5	The Process for the Appointment of Judicial Officers.	84
3.3.6	Personal Independence.	84
(i)	<i>Appointment</i>	85
(ii)	<i>Removal</i>	85
(iii)	<i>Terms of Office</i>	86
(iv)	<i>Remuneration</i>	86
(v)	<i>Conditions of Service</i>	87
3.3.7	Functional Independence.	87
3.4	Judicial Independence in Practice: The Case of South Africa.	90
3.4.1	South Africa's Constitution (1996) and the Notion of Judicial Independence.	90

3.4.2	How does the Concept of Judicial Independence Link to Human Rights and Democracy in a State? (For example – the Constitution of the Republic of South Africa declares that the bill of rights is the cornerstone of democracy in the country).	91
3.4.3	Judicial officers and the “fit and proper” requirement.	92
3.4.4	The nexus between the notion of judicial independence and human rights and democracy: A South African constitutional perspective.	96
3.5	South Africa’s Judicial History under Apartheid Rule and the Judicial Triumph and Challenges since the Start of a New Democratic and Constitutional Order.	102
3.6	Conclusion.	103

Chapter Four

THE APPOINTMENT PROCESS OF JUDICIAL OFFICERS IN SWAZILAND, KENYA, ZIMBABWE AND SOUTH AFRICA

4.1	Introduction.	106
4.2	The Judiciary and the Selection Process of Judicial Officers in Swaziland.	108
4.2.1	The Constitution and Judicial Authority in Swaziland.	108
4.2.2	The Appointment of Judicial Officers under the Swazi Constitution.	110
4.2.3	The Judicial Service Commission (JSC) in Swaziland.	112
4.2.4	The State of the Judiciary since the adoption of the New Constitution in Swaziland.	115
4.2.5	Judicial Crisis.	119
4.3	The Judiciary and the Selection Process Of Judicial Officers in Kenya.	121
4.3.1	The Judiciary in Kenya.	121
4.3.2	The Judiciary under the new Constitution of Kenya, 2010.	124
4.3.3	Appointment of Chief Justice, Deputy Chief Justice and other Judges in Kenya.	126
4.3.4	The Role of the Judicial Service Commission in Kenya.	128
4.3.5	Assessment.	129
4.4	The Judiciary and the Selection Process of Judicial Officers in Zimbabwe.	130
4.4.1	A Brief Description of the Crisis in Zimbabwe since 2000.	130
4.4.2	The Judiciary and the Constitution in Zimbabwe.	131
4.4.3	Appointment of Judges.	134
4.4.4	The Judicial Service Commission in Zimbabwe.	135
4.4.5	Assessment.	136
4.5	The Judiciary and the Selection Process of Judicial Officers in South Africa.	137
4.5.1	The Judicial Service Commission in South Africa.	137
4.5.2	The Appointment of Judicial Officers in terms of Section 174 of the Constitution.	140
4.5.3	The need for the judiciary to reflect broadly the racial and gender composition of South Africa when judicial officers are appointed (Section 174(2)).	141
4.5.4	The Appointment of the Chief Justice (CJ) and Deputy Chief Justice (DCJ) of the CC and the Appointment of the President and Deputy President of the SCA (Section 174(3) of the Constitution).	143
4.5.5	Appointment to the Constitutional Court (Section 174(4)).	149
4.5.6	Appointment in the Supreme Court of Appeal and the High Courts.	151
4.5.7	Term of Office, Remuneration and Removal of Judges in South Africa.	153
4.6.	Conclusion.	155

Chapter Five

GENERAL CONCLUSION.

Bibliography

1	Books.....	171
2	Chapters in books.....	175
3	Articles.....	176
4	Theses.	178
5	Conference and Unpublished Papers	178
6	Reports.....	179
7	Internet/Websites Articles and Reports.	180
8	Cases.	183
9	Constitutions.	184
10	Statutes.....	185
11	Regional and International Instruments	185

Chapter One

INTRODUCTION AND GENERAL OVERVIEW

1.1	Background	2
1.2	Research Questions	3
1.3	Aim of Study	4
1.4	Scope and Limitation of Study	5
1.5	Description of Planned Research Methodology	7
1.6	Structure of the Study and Outline of the Chapters	6
1.7	Key Concepts	7
1.7.1	Constitutionalism	7
1.7.2	Democracy	7
1.7.3	The Rule of Law	9
1.7.4	The Separation of Powers Doctrine	9
1.7.5	Judicial Independence	11
1.7.5.1	Functional and Personal Independence	12
1.7.5.2	Appointment Process of Judicial Officers in Comparative Perspective	12

1.1. Background

The appointment of judicial officers often takes centre stage in African countries because of the nature of politics and the way in which legislation regulating the process is interpreted or perceived by different role players. One interesting case was the appointment of the former acting National Director of the Public Prosecutions in South Africa as an acting judge which was met with criticism from certain quarters within the South African legal fraternity.

In response, the Minister of Justice of the Republic of South Africa was quoted as saying:

“I have noted that certain formations in the legal fraternity such as the General Council of the Bar (GCB) as a leader of the pack, the Law Society of South Africa (LSSA) and the Freedom under Law (FuL) have raised concerns and or objections regarding the decision I made to appoint Advocate Mokotedi Mpshe as acting Judge in the North West High Court.

They argue that this appointment of a former acting national Director of Public Prosecutions as a former employee of the state violates the principle of judicial independence and believe is unconstitutional. ...

The GCB and of late the LSSA, the latter organization through media statements, urged me to withdraw or suspend the appointment as they harbour fears that this undermines the independence of the judiciary, ‘either as a perception or in principle’. I disagree with this assertion and I will forthrightly demonstrate the basis of my disagreement”.¹

This is not a uniquely South African challenge. There are many different cases concerning perceived threats to the independence of the judiciary in various African states as reported in the media and by other institutions or organizations. On 8 June 2009 it was reported in a *This Day* newspaper article under the heading: “Nigeria: South East Lawmakers Protest Over Appointment of Judges” by Onwuka Nzeshi as follows:

“Abuja — The issue of Federal Character in the appointments being made by President Umaru Musa Yar’Adua is again causing ripples in the South-east, as the federal lawmakers representing the zone yesterday raised objections on the recent nomination of judges from different parts of the country preparatory to their elevation as justices of the Court of Appeal”.²

Democracy and the rule of law in Zimbabwe have largely collapsed and the ZANU-PF and MDC Government of National Unity are currently working on the adoption of a new

¹ Minister of Justice, J Radebe, RSA “Mpshe’s appointment consistent with the Constitution” available at http://www.justice.gov.za/m_statements/2010/20100218_mpshe.html (accessed 21/05/2010).

² Onwuka Nzeshi “Nigeria: South east lawmakers protest over appointment of judges” available at <http://allafrica.com/stories/200906081246.html> (accessed 26/05/2010).

constitution that will pave the way for fresh elections and restore constitutionalism to Zimbabwe. In 1999, President Robert Mugabe, responding to a letter addressed to him by four Supreme Court judges seeking clarification on torture charges, is quoted as having said:

“The judiciary has no right to give instructions to the President on any matter”.³

A number of reports by political parties and civil society organizations on the independence of the South African judiciary have appeared recently.⁴ The issue has even caught the attention of the International Bar Association (IBA).⁵ The IBA has likewise reported on threats to judicial independence in other African states, like Uganda.⁶ These reports show that there is a threat, or perceived threat, to the independence of the judiciary in new democracies in Africa.⁷

The above synopsis indicates the need to examine the role of constitutionalism, together with the process of appointing judicial officers as an expression of this constitutionalism in an effort to ensure judicial independence and promote democracy in Africa.

1.2 Research Questions

A number of questions are raised in this research:

- What is the role of constitutionalism in ensuring good governance?
- What is the nexus between the concepts of constitutionalism, judicial independence and democracy?
- What is the role or influence of the international community in the development and promotion of constitutionalism in the African continent in the era of globalization?
- What is the role of judicial appointment in the in promoting constitutionalism in Africa?

³ <http://www.sokwanele.com/node/74>; www.aidsfreeworld.org (accessed 23/07/2010).

⁴ See for example, “The DA’s judicial review: Threats to judicial independence in South Africa” available at http://www.da.org.za/docs/621/judicial%20review_document.pdf (accessed 14/11/2012).

⁵ ‘Beyond Polokwane: Safeguarding South Africa’s judicial independence’ July 2008, an International Bar Association Human Rights Institute Report.

⁶ “Judicial independence undermined: A report on Uganda” September 2007, An International Bar Association Human Rights Institute Report.

⁷ See Hyslop J *African democracy in the era of globalisation* (1999) at 1. The term “new democracies” is used here to indicate the states in Africa which have since replaced, or are in the process of replacing, the constitutions they inherited from their colonial predecessors on independence, with new constitutions reflecting Africa’s move to constitutionalism as discussed in this dissertation.

- How can the independence of the judiciary make contribution towards the promotion of human rights and democracy in the modern state?
- Does the process of appointment of judicial officers offer sufficient assurance of their independence and impartiality? Are there any more advanced models for the appointment of judicial officers, e.g. the interference of the legislative authority, by which judicial independence is guaranteed?
- Does the newly adopted constitutions (in the case of South Africa, Swaziland and Kenya) and draft constitution in the case of Zimbabwe provides a fair and an unambiguous model or way in which judicial officers should be appointed?
- What can be the best state practice? Can these countries learn from one another?

1.3 Aim of Study

An evaluation of these claims requires a closer study and deeper understanding of the meaning and importance of judicial independence on the African continent, and its relationship with concepts like constitutionalism, the rule of law, and the separation of powers. What is needed is a better understanding of the major theories of judicial independence.⁸ Such an understanding will include an analysis of international and regional legal standards governing the independence of the judiciary.

On the basis of a deeper understanding of the meaning and nature of judicial independence, it will then become possible to investigate various constitutional and other general mechanisms that contribute toward the independence of the judiciary.

The aim of the study is to establish what mechanisms for the appointment of judges are employed in selected “new” African democracies. After a comparative and descriptive analysis of paradigmatic examples of the various appointment processes, the study will aim to provide a critical evaluation of these processes with a view to the identification of the best

⁸ For the need to develop a theoretical perspective on the issue see Russel Peter “Towards a general theory of judicial independence” in Russel and O’Brien (eds) *Judicial independence in the age of democracy: critical perspectives from around the world* (2001) at 1.

state practice in line with the demands of African constitutional democracy, as explored in Chapter 2 of the dissertation.

1.4 Scope and Limitation of Study

The study examines the state of constitutionalism and judicial independence in the four selected African jurisdictions.⁹ The study briefly examines the concept of colonialism and covers the period immediately after independence; how things have unfolded since then; and in particular the period between 1990 and 2012 which has seen new constitutions adopted and existing constitutions amended. Although the study addresses four countries, the case of South Africa will dominate the discussion by and large. Where appropriate, reference is made to other African countries, while the positions in Germany, Canada and the US are also considered.

In examining the issue of judicial independence, a number of factors emerge as relevant. These include the strength and length of tenure; the security of conditions of service; the scope and nature of judicial training; and the extent of administrative control over case management and finances. The present study is, however, in the main, limited to the way in which judges are selected for and appointed to their positions.

1.5 Description of Planned Research Methodology

The way of appointing judicial officers varies widely among different countries in the world. The question of judicial independence is a global issue and affects the whole world, and as a result reference will be made to various countries of the world, although the focus will be on the four selected Anglophone African states. In carrying out this research, a qualitative approach will be employed under the following guidance:

Comparative Method: A comparative study of the processes of appointing judges in Swaziland, Kenya, Zimbabwe and South Africa. These countries have different experiences and political backgrounds, but the reason for choosing them is because of recent developments including, among other things, the following: Reports of interference or threats by ruling parties' governments against the judiciary as found in various reports by independent institutions, opposition parties, analysts and commentators, as well as reports in

⁹ The term "jurisdictions" is used interchangeably with "states" and "countries" throughout the dissertation.

the media.¹⁰ Furthermore, Zimbabwe is in a process of adopting a new constitution in line with the principles of constitutionalism and accepted international standards, whereas, Kenya on the other hand, adopted a new constitution in 2010, Swaziland in 2005 and South Africa in 1996.

Most of the discussions are drawn from among other things constitutions, legislation, International Instruments such as Covenants and Declarations and other works, textbooks, case law, citations from the press and memoranda as well as journal articles and conference papers on constitutionalism and judicial matters in Africa and the rest of the world, as well as internet sites on related topics.

1.6 Structure of the Study and Outline of the Chapters

Chapter one, this chapter outlines the general introduction, background, problem statement and aim of the study; methodology to be followed in order to arrive to the intended objectives; and also provides a brief exposition of the key concepts which will be examined in detail in the course of the study.

Chapter two examines the state of constitutionalism in Africa and analyses, among other things, the impact of colonialism, the concepts of democracy, separation of powers, and the rule of law. The chapter aims to show the nexus between these concepts and their importance in ensuring good governance.

Chapter three draws attention to various mechanisms that can be considered by states in order to protect judicial independence. It further links the concept of judicial independence to human rights and democracy in the contemporary state, with South Africa's experience and the 1996 Constitution dominating the discussion.

Chapter four, which is the core of the study, deals with the appointment process of judicial officers in Swaziland, Kenya, Zimbabwe and South Africa. It analyzes the sections in the constitutions of the respective countries which deal with the appointment of judicial officers and the role played by the judicial service commissions/councils in each country.

¹⁰ See footnotes 1, 2, 4 and 6 above.

Chapter five concludes the study and provides an overview of the preceding chapters and, based on this, assesses which of the systems examined can be regarded as “best practice” for the appointment of judicial officers which will ensure the independence of the judiciary and promote constitutionalism on the African continent.

1.7 Key Concepts

The key concepts dominating this study are – constitutionalism, democracy, the rule of law, the doctrine of separation of powers, and judicial independence. These are concepts which interact and influence one another in the drive to achieve a desirable and legitimate government for the people, by the people. Human rights, peace, and good governance are of global concern and in order to ensure their promotion and protection, it is of utmost importance for every contemporary state to adhere to the principles governing these concepts.

1.7.1 Constitutionalism

Constitutionalism refers to the universally accepted idea that government derives its power from a legitimate constitution which reigns supreme and which must be respected by everyone. The world has, since the 1990s, become more global and the idea of constitutionalism has developed and spread throughout the international community of states. Constitutionalism promotes democracy and the rule of law, and requires that government conform to the standards set and any limitations imposed by the constitution. According to Louis Henkin, constitutionalism requires that government respect and ensure individual rights, which generally are those rights recognized by the Universal Declaration of Human Rights, and further refined in the International Covenant on Civil and Political Rights the International Covenant on Economic, Social and Cultural Rights.¹¹ An essential element in the realization of constitutionalism is an independent judiciary that is impartial and which conforms, not only to the constitution, but also to other regional and international bodies that set minimum standards for the independence of the judiciary in a democratic state.

1.7.2 Democracy

Democracy is a broad concept that has taken centre stage when it comes to issues of good governance. It is a concept that continues to engage the attention of all spheres of society, and

¹¹ Henkin Louis “New birth of constitutionalism: Genetic influences and genetic defects” (1993) 14/3-4 *Cardozo Law Review* at 533-548.

is explored by scholars, lawyers, economists, politicians and the populace at large. It is indeed a famous and important concept. Mangu argues that:

“democracy is certainly the most popular concept and the most in fashion in both political and social scientist discourse. Its popularity results from the fact that over the years, democracy has become a very value-laden term.”¹²

One cannot claim a universal or clear-cut definition of democracy.¹³ According to Robert Dahl, “a key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals”.¹⁴ In his effort to emphasize the concept of democracy, Dahl introduced what he termed polyarchy – “a political order distinguished by the presence of seven institutions, all of which must exist for a government to be classified as a polyarchy”.¹⁵ He lists elected officials, free and fair elections, inclusive suffrage, right to run for office, freedom of expression, alternative information, and associational autonomy.¹⁶ Foster mentions two important things he termed “Two Cheers for Democracy” – “one because it admits variety and two because it permits criticism”.¹⁷

Although popular and regarded as a global symbol of good governance, as compared to most countries in the West, it can be argued that in Africa, democracy has, as a system of government, not done very well. For example in certain African countries the freedom of expression can be curbed; elections are allegedly characterised by violence and coercion, therefore not free and fair; and sometimes freedom of association is challenged.¹⁸ All these mitigate against the achievement of a democratic government.

¹² Mangu AMB *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* LLD Thesis, Pretoria: University of South Africa, 2002 at 173.

¹³ See Lijphart A *Democracy in plural societies: A comparative exploration* (1977) at 4.

¹⁴ Dahl RA *Polyarchy: Participation and opposition* (1971) at 1.

¹⁵ Dahl RA *Democracy and its Critics* (1989) at 221.

¹⁶ *Ibid.*

¹⁷ Lively J AND Lively A *Democracy in Britain: A reader* (1994) at 172.

¹⁸ The cases of Kenya and Zimbabwe as discussed in chapter two below, present classic examples in this regard.

1.7.3 The Rule of Law

The South African Constitutional Court regards the rule of law, or the principle of legality, as the essence of constitutionalism.¹⁹ The principle entails that every exercise of public (and private) power should be subject to or ruled by law.²⁰ The rule of law in this context, does not simply refer to the “rule of rules” in the classic formalist sense of the term, but rather means that the exercise of power is subject to a process of judicial review.²¹ In addition to meeting standards of legality, every exercise of power must be independently measured against standards of rationality (and at times reasonableness), that are triggered by the violation of certain constitutionally entrenched human rights.²²

The principle of the rule of law implies the existence of an independent judiciary that can subject the exercise of power to the test of (formal) legality and (deliberative) rationality. Spigelman indicates that

“actual or threatened transgression of civil rights in society, notably but not limited to the exercise of the police function of government, are in large measure deterred by the very existence of an independent legal profession with access to courts consisting of independent judges”.²³

The principle of judicial independence is not only closely related to the idea of the rule of law, it also emanates from the principle of separation of powers which is regarded as a mechanism to promote democracy and constitutionalism.

1.7.4 The Separation of Powers Doctrine

The doctrine of separation of powers, developed in the 17th century in an effort to ensure division of state authority into legislative, executive and judicial functions and the performance of such functions by separate branches of government. Among the components of separation of powers are the *trias politica* doctrine and the establishment of checks and

¹⁹ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998). See par 56-59.

²⁰ O'Donnell Guillermo A “Why the rule of law matters” (2004) 15/4 *Journal of Democracy* at 35.

²¹ Barnett Hilaire *Constitutional and administrative law* (2012) at 22.

²² Zimmermann Augusto “The rule of law as a culture of legality: Legal and extra-legal elements for the realization of the rule of law in society” (2007) 14/1 *eLaw Journal* at 10.

²³ J J Spigelman Chief Justice of New South Wales: Judicial Appointments and Judicial Independence, The Rule of Law Conference, Brisbane 31 August 2007 available at http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_spigelman310807.

balances on the actions of the various branches of government. Generally regarded as the father of the *trias politica* doctrine, Montesquieu argues that the reason for the separation of powers is that there can be no political freedom in a country where one and the same person or body of persons makes the laws, implements them, and acts as arbiter when they are contravened.²⁴ According to Woolman *et al*:

“The articulation of an explicit doctrine of separation of powers as a distinct explicatory theory of governance is generally thought to have its origin in the political philosophy of the age of Enlightenment in seventeen-century Europe, when political thinkers started to challenge the unlimited might and arbitrariness of an absolute monarch. However, its basic aim is much older, i.e. to find a structure of government that prevents accumulation of too much power in one institution.”²⁵

The doctrine of separation of powers promotes the idea of protection of individual rights by way of distribution of political power between different institutions of governance. This is affirmed by Seerdof and Sibanda in Woolman *et al* who also argue that the “separation of powers is the basis for an institutional, procedural and structural division of public power to create conditions that place human rights at the centre of society”.²⁶ The principle of separation of powers is regarded as an instrumental function and an institutional mechanism to protect human rights against abuse by the executive or other authorities.

The South African Constitution does not refer to the separation of powers doctrine explicitly but makes provision for the different branches of government. Section 43 provides that the legislative authority of the Republic is vested in Parliament. Section 85(1) and (2) indicates that the executive authority of the Republic is vested in the President and the President exercises the executive authority, together with the other members of the Cabinet. Section 165(1) provides that the judicial authority of the Republic is vested in the courts.

In *De Lange v Smuts*, Ackermann J held as follows:²⁷

“In our first certification judgment dealing with the 1996 Constitution, *In re: Certification of the Constitution of the Republic of South Africa*, we stated that although

²⁴ The French political philosopher and classic proponent of constitutional theory Charles-Louis Secondat de Montesquieu (1689-1755) developed in his seminal book *Del' esprit de lois* (1748) (*The spirit of the laws*) an idea of separation of powers of the state's governmental institutions.

²⁵ Woolman *et al Constitutional law of South Africa* (2008) (2nd ed) vol 1 at 12-3.

²⁶ *Id* at 12-1.

²⁷ *De Lange v Smuts* 1998 (3) SA 785 CC at par 60.

it is clear that pursuant to Constitutional Principle VI the Constitution provides for a system of separation of powers among the three co-equal branches of government, '[t]here is ... no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute.' I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest."

1.7.5 Judicial Independence

The independence of the judiciary emanates from the principle of separation of powers and is generally accepted across the globe as a vital ingredient of the constitutional state. The principle of judicial independence is firmly stated in a number of documents and sets of guidelines, to which countries around the world subscribe. Judicial independence means that the courts shall be subject only to the law and that no person, institution or organ of the state may interfere with the functioning of the courts. There can be no doubt that an independent judiciary is an indispensable condition for constitutional democracy.²⁸ In South Africa the independence of the judiciary is firmly entrenched in the Constitution.²⁹ The Constitution contains a general provision which guarantees the principles of judicial independence and non-interference by other organs of state.³⁰

In an effort to strengthen the independence of the judiciary, Commonwealth countries provide some key guidelines in what has become known as the "Latimer House Guidelines". According to the Latimer House Guidelines:

²⁸ See Justice RR Mzikamanda "The place of the independence of the judiciary and the rule of law in democratic sub-Saharan Africa" at 2. Paper presented on 14 November 2007 at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), Johannesburg, South Africa. Available at http://www.saifac.org.za/docs/2007/mzikamanda_paper.pdf. See also *De Lange v Smuts* 1998 (3) SA 785 CC at par 59.

²⁹ The Constitution of the Republic of South Africa, 1996.

³⁰ Section 165 of the South African Constitution provides as follows:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice
- (3) No person or organ of state may interfere with the functioning of the courts
- (4) 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."

“An 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. An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.”³¹

1.7.5.1 Functional and Personal Independence

Rautenbach and Malherbe distinguish between the personal independence and functional independence of the courts.³² The functional independence of the judiciary is concerned with the way in which the courts exercise their powers within the blueprint of the constitution which reigns supreme in a constitutional state. This is very important for the purposes of ensuring the independence, objectivity as well as impartiality of courts. Section 165(2) of the South African Constitution explicitly recognizes the functional independence of courts by providing that the courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice.

Personal independence is sometimes referred to institutional independence. In order to uphold personal independence it is important to ensure that judicial officers are comfortable in carrying out their functions and there is no arbitrarily control or conditions imposed by other government bodies. There are various factors which determine institutional independence including among others the manner in which judicial officers are appointed, their term of office, their security of tenure and their conditions of service.

1.7.5.2 Appointment Process of Judicial Officers in Comparative Perspective

There are various options that different countries use in the process of appointing judicial officers across the globe which include, *inter alia*, judicial service commissions or councils, voting, the President as head of executive, as well as the role played by the Parliament or Senate in the process. This study will look at four selected Anglophone African states namely

³¹ Commonwealth Latimer House Principles: <http://www.cmja.org/downloads/Latimer%20House/Commonwealth%20Principles%20on%20Three%20Arms%20of%20Government.pdf> (accessed 22/05/2010).

³² Rautenbach IM and Malherbe EFJ *Constitutional law* (2009) (5th ed) at 236-239.

South Africa, Zimbabwe, Kenya and Swaziland and the provisions in these countries' constitutions governing the process of appointing judicial officers. Since the Constitution of the Republic of South Africa, 1996 came into effect it has received various comments from different sectors of the international community and some analysts, both constitutional and political, argue that the Judicial Service Commission as a body used in South Africa for the appointment of judicial officers, is one the best practices because it enables different independent stakeholders ranging from lawyers, academics and representatives of different political parties to participate in the process thereby eliminating any chances of interference by the legislature and the executive.³³ The case of South Africa so far presents an interesting example that will form the bedrock of this research against which the other states examined will be contrasted.

There are various issues that need to be considered in order to contribute to the independence of the judiciary pertaining to, *inter alia*, the appointment, salaries and tenure of judicial officers. In Zimbabwe the Constitution³⁴ provides in section 79(1) that judicial authority is vested in the Supreme Court, the High Court, and other subordinate courts. The Declaration of Rights as entrenched in section 18 of the Zimbabwe Constitution, makes provision for the right to the protection of the law and a right of everyone to be accorded a fair hearing before an impartial tribunal. However, the same Constitution makes another provision for an Act of Parliament to vest judicial authority in a person or authority other than a court referred to initially, and also to vest the judiciary or an individual judge with functions other than judicial functions. These, as Saller puts it, "cast some doubt on the integrity of the separation of powers provided for in the constitutional text".³⁵

The way in which judicial officers are appointed in different countries across the globe is entrenched in their respective constitutions. For example:

In South Africa, Section 174(3) provides that:

³³ Section 178 of South Africa's Constitution establishes a Judicial Service Commission composed of various people from different background as an effort to ensure its independence for appointment of judicial officers. This is fully discussed in Chapter Four below.

³⁴ Constitution of Zimbabwe, 1980.

³⁵ Saller Karla in Van De Vijver L *The judicial institution in Southern Africa* (2006) Democratic Governance and Rights Unit, UCT at 244.

“The President as head of national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice, and after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal”.

In Zimbabwe, Section 84(1) provides: “the Chief Justice and other judges of the Supreme Court and the High Court shall be appointed by the President, after consultation with the Judicial Service Commission”. According to Lovemore Madhuku,³⁶ from cases in both Zimbabwe and Mozambique,³⁷ the expression “after consultation with” has a clear meaning, i.e. the President is not bound by the views of the body he or she is required to consult.³⁸

Kenya adopted a new constitution on 27 August 2010, after it had been overwhelmingly approved in a national referendum. This Constitution makes provision for new constitutional changes including among other things the creation of a “convincingly inclusive” judicial service commission which makes recommendations to the President on the appointment of judges. The clause on the appointment of judicial officers provides that, the President shall appoint –

- (a) The Chief Justice and the Deputy Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and
- (b) All other judges, in accordance with the recommendation of the Judicial Service Commission.³⁹

Although Swaziland is a Monarchy, in 2005 the Kingdom adopted a constitution which proclaims that Swaziland is unitary, sovereign and a democratic Kingdom.⁴⁰ The Constitution makes a provision for the establishment of an independent judicial service commission which advises the King in the process of appointing justices of the Superior Courts in Swaziland.⁴¹

³⁶ Madhuku L “Constitutional protection of the independence of the judiciary: A survey of the position in southern Africa” (2002) 46/2 *Journal of African Law* at 232-245.

³⁷ Article 170(2) of the Constitution of Mozambique provides that: “The Professional Judges shall be appointed by the President of the Republic after, consultation with the Supreme Council of the Judiciary”.

³⁸ This raises the fear in that it may afford the President an opportunity to manipulate the process and appoint judicial officers who may be bound to sympathize with him, and therefore not perform their functions impartially.

³⁹ Section 166(1) of the Constitution of Kenya, 2010.

⁴⁰ Section 1(1) of the Constitution of the Kingdom of Swaziland Act, 2005.

⁴¹ Sections 153(1) and 159(1) of the Constitution of the Kingdom of Swaziland.

Chapter Two

ANALYSIS OF CONSTITUTIONALISM, DEMOCRACY, SEPARATION OF POWERS, AND THE RULE OF LAW IN AFRICA

2.1	Introduction	17
2.2	The Impact of Colonialism on Constitutionalism in Africa	19
2.2.1	Defining Colonialism	19
2.2.2	The State of Africa after Colonialism	21
2.3	Explaining the Concept of Constitutionalism	25
2.4	Explaining the relationship and connection between the concepts of Constitution(s), Constitutionalism, Democracy, and Elections	28
2.4.1	The state of democracy and constitutional sovereignty in South Africa since the adoption of the 1993 Interim Constitution (and Constitution of the Republic of South Africa, 1996) and the first democratic elections of 1994: Are there lessons for other African countries?	30
2.4.2	Overview of Elections v Democracy in Africa	33
2.4.2.1	The African Union (AU) and the African Charter on Democracy, Elections and Governance (ACDEG)	35
2.5	The Doctrine of Separation of Powers and the Rule of Law in Africa	36
2.5.1	Explaining the Doctrine of Separation of Powers	38
2.5.2	Implementation of the Idea of Constitutionalism and the Doctrine of Separation of Powers in Selected African States in Contrast with the US and Germany	40
2.5.2.1	Checks and Balances	41
2.5.2.2	The System of Checks and Balances and Separation of Powers under the US Constitution	41
2.5.2.3	Constitutionalism and Separation of Powers in the Federal Republic of Germany	43
2.5.2.4	Constitutionalism and Separation of Powers under the South African Constitution	46
2.5.2.5	Constitutionalism and Separation of Powers in Zimbabwe	52
2.5.2.6	Constitutionalism and the Doctrine of Separation of Powers in Kenya	58
2.5.2.6.1	Kenya from Independence (1963)	58
2.5.2.6.2	The Period 1978 to 1991	60
2.5.2.6.3	The influence of Elections on Constitutionalism and Separation of Powers in Kenya	62
2.5.2.6.3.1	Multi-Party Elections	62
2.5.2.6.3.2	1992 Elections	62
2.5.2.6.3.3	1997 Elections	62
2.5.2.6.3.4	2002 Elections	63
2.5.2.6.3.5	2007 Elections	64
2.5.2.7	Constitutionalism and Separation of Powers in Swaziland	65
2.5.3	A Comparative Assessment of Constitutionalism and Democracy in Western and African Countries	66
2.5.4	Africa and the Rule of Law	67

2.5.4.1	Explaining the Rule of Law	67
2.5.4.2	The African Peer Review Mechanism (ARPM) and the Rule of Law in Africa	69
2.6	Conclusion	71

2.1 Introduction

This chapter examines the concepts of constitutionalism, democracy, separation of powers and the rule of law. It is argued that the period starting the 1990s saw changes as most African countries adopted new constitutions in a quest to ensure constitutionalism and democracy. The concept of colonization is discussed as it is regarded as the foundation to failure to constitutionalism and democracy in most African states. The chapter further illustrates the relationship and connection between the concepts of constitutionalism, democracy, separation of powers and the rule of law, and stresses their integration towards the common goals of peace and good governance in the modern state.

The past two decades, i.e. between 1990 and 2010, have seen many changes on the African continent and there is suddenly an intensifying interest in African democracy, constitutionalism and the rule of law in Africa among scholars, political scientists, politicians and lawyers from both Africa and the rest of the international community. With scholars already referring to this period as the “second independence” of Africa after colonialism,

“ever since 1990 there has been a new spurt of constitution writing in many African states in an effort to create and implement legitimate constitutions and move away from the notion that constitutions are legitimately grounded in domestic law and the unique will of a state, into the modern notion that constitutional legitimacy requires conformity with a system of universal norms grounded in an elaboration of the mores of the international community of nations”.⁴²

As Oloka-Onyango puts it, with “the commencement of the twenty-first century; issues of constitutionalism in Africa have gained considerable prominence”. This, he claims, is a coming-together unprecedented since Africa’s “heady early days of independence”, and can with reasonable confidence be termed the African “rebirth of constitutionalism”.⁴³

However, it remains a pressing question whether these new written constitutions will be able to produce and preserve constitutionalism in certain states because of the nature of politics dating from colonialism and oppression, as well as constant poverty and underdevelopment since independence from colonial masters. Furthermore, internal power struggles have been a thorny issue and hampered the progress of democracy and constitutionalism in a number of

⁴² Cata Backer Larry “From constitution to constitutionalism: A global framework for legitimate public power systems” (2009) 113/3 (Winter) *Penn State Law Review* at 672.

⁴³ Oloka-Onyango J *Constitutionalism in Africa: Creating opportunities, facing challenges* (2001) at 1.

African states. On the other hand, corruption by some bureaucrats has always been a threat to the prosperity of constitutionalism on the African continent. Some people have laid the blame for modern African challenges at the door of colonialism, and argue that colonial masters planted divisions in Africa in order to exploit the natural resources of the continent.⁴⁴

It goes without saying that the independence of the judiciary is vital in order to achieve or sustain constitutionalism, but this can only be realized through a transparent appointment process of the judicial officials free from executive interference. An independent judiciary is one of the foundational elements for democracy and a safeguard in support of the rule of law. However, in some instances the independence of the judiciary raises more questions than answers as allegations of interference by the executive emerge together with allegations of certain presidents appointing their cronies who will protect their interests.⁴⁵ In many African countries the appointment of judicial officers is accompanied by a public outcry,⁴⁶ with opposition parties, jurists, members of the public and others, regularly accusing the executive of interfering in the process and appointing individuals loyal to the president rather than being impartial and ready to espouse justice. The idea of constitutionalism is globally acknowledged and accepted by the international community as a means by which to enhance the rule of law and promote democracy and the promotion and respect for human rights.⁴⁷ The role of the constitution for a democratic state is arguably very important, but as Backer⁴⁸ puts it,

“Constitutions without legitimacy are no constitution at all, and legitimacy is a function of values which in turn serve as the foundation of constitutionalism and furthermore, it is through the construction of those value frameworks that international law has come to play an increasingly important role”.

⁴⁴ See footnote 59 below and also Meredith Martin *The fate of Africa. From the hopes of freedom to the heart of despair (A history of fifty years of independence)* (2005) at 1-14.

⁴⁵ One classical example is the disputed outcome of the November 2010 Presidential Elections in Ivory Coast where the judicial arm was accused of not being impartial but loyal to then incumbent President Laurent Gbagbo. The Independent Election Commission declared then opposition leader Outtara as the winner and later on the Constitutional Council declared Gbagbo as the winner. Both leaders saw themselves as rightful leaders of Ivory Coast and this resulted in a conflict which lasted for a couple of months and ended with the arrest of Gbagbo in April 2011 by Outtara forces with the help of the French troops. See “Post-Election: Côte d’Ivoire’s 2010 Presidential Election” Available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=790:post-election-reflection-cote-divoires-2010-presidential-election-&catid=42:election-reflection&Itemid=270 (date accessed 14/11/2012).

⁴⁶ De Vos Pierre “Mpshe’s appointment: Scandalous attack on independence of the judiciary” 8/2/2010 available at <http://constitutionallyspeaking.co.za/mpshes-appointment-scandalous-attack-on-independence-of-the-judiciary> (accessed 11/2/2011)

⁴⁷ Lollini Andrea *Constitutionalism and transitional justice in South Africa* (2011) at 5.

⁴⁸ Cata Backer Larry footnote 42 above at 672.

It has become important in the modern-day for the countries of the world to come together and form part of the global community. There is no single country that would wish to be isolated from other countries. International law does not impose on countries how they should operate or the form of democracy countries should follow, but there are international generally accepted standards of democracy that countries should respect to which they are expected to adhere.

According to Dugard, both the League of Nations and the United Nations “provided a new mechanism for the collective admission of states to the international community”.⁴⁹ He further espouses the traditional criteria for statehood as described in the Montevideo Convention of 1933 which provides that the “the state as a person of international law should possess certain qualifications including – a permanent population; a defined territory; government and capacity to enter into relations with other states”.⁵⁰ Governments are urged to assume authority through democratic means. A government that comes to power through unconstitutional and undemocratic means is likely to be isolated and sanctioned by other members of the international community.⁵¹ The African Union Constitutive Act makes provision that any government which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.⁵²

2.2 The Impact of Colonialism on Constitutionalism in Africa

2.2.1 Defining Colonialism

The *Concise Oxford English Dictionary*⁵³ describes Colonialism as “the policy or practice of acquiring political control over another country, occupying it with settlers and exploiting it

⁴⁹ Dugard John *International law: A South African perspective* (2011) (4th ed) at 81.

⁵⁰ *Id* at 82-88.

⁵¹ See article 1(c) of the Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security which provides for a “Zero tolerance for power obtained or maintained by unconstitutional means”.

See also UN Security Council – among the functions and powers of the Security Council is “to call on Members to apply economic sanctions and other measures not involving the use of force to prevent or stop aggression”.

⁵² Article 30 of the AU Constitutive Act, 2000.

According to the Act the AU, guided by its vision of a united Africa and by the need to build partnerships between governments and all segments of civil society, always strives to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African states.

⁵³ *The Concise Oxford English Dictionary* (2002)(10th ed revised).

economically". In his work "A definition of colonialism", Horvath⁵⁴ defines colonialism as follows:

"It seems generally, if not universally agreed that colonialism is a form of domination - the control by individuals or groups over territory and/or behavior of other individuals or groups. Colonialism has also been seen as a form of exploitation, with emphasis on economic variables, as in the Marxist-Leninist literature and as a culture change process"

It was during the 19th century that European countries came to Africa and started colonizing it. European superpowers – Britain, France, Germany, Belgium, Italy, Portugal, and Spain conquered and shared Africa among themselves, mostly for the purposes of boosting their economic interests. This colonization was described as a remarkable process of territorial expansion with an imperialistic tendency by the European countries.⁵⁵ Britain being the strongest imperial power in Africa, owned vast of land and at some stage "its territories accounted for four-fifths of African trade south of the Sahara".⁵⁶ Until then, life for African people differed greatly from that of those in Europe. Gailey writes: "further conventional wisdom creates an idyllic past where Africans lived in peace and harmony with one another until the arrival of white imperialists who for their own selfish interests created arbitrary divisions among African populations".⁵⁷ He further argues that "each European power imposed its own economic system and imperial presuppositions upon Africans under their control, and gradually, Africans altered their economic and social systems to conform to the new economic realities" imposed by the colonizers.⁵⁸

It has been over three centuries since Europeans set foot on the African continent but all countries are still classified as underdeveloped and some characterized by continuous conflict and failure of democracy because of the "foundation" laid by and the impact that colonialism has had on the continent. Colonialists did not care about how power can be shared to ensure peaceful and good governance of the countries they conquered. Donald Gordon argues that "imperial rule from the beginning expropriated political power; unconcerned with the needs and wishes of the indigenous population, the colonial powers created governing apparatuses

⁵⁴ Horvath Ronald J "A definition of colonialism" (1972) 13/1 (Feb) *Current Anthropology Journal* at 46.

⁵⁵ Harris Norman Dwight *Intervention and colonization in Africa* (1914) at 1.

⁵⁶ Roberts Andrew *The colonial moment in Africa* (1990) at 3.

⁵⁷ Gauley Harry A *Africa troubled continent: A problems approach* (1983) at 33, 78-79.

⁵⁸ *Ibid.*

primarily intended to control the territorial population, to implement exploitation of natural resources and to maintain themselves and the European population".⁵⁹

As the result of all this negative perception against colonialism generally, today most people in Africa perceive colonialism as a system that was brought to Africa by European imperialists in order to conquer and take away or take control of the continent's natural resources to boost their economies without much care about the locals. When we look at the centre of conflict today in Africa one can argue that the issue of resources is at the core with its roots emanating from colonialism. This could be attributed to a number of factors, including, among other things, that most leaders took lessons in self-enrichment from colonial rulers and the fact that colonialism advanced authoritarianism. It is necessary therefore, in the following section, to assess the state of Africa post-the Colonial experience.

2.2.2 The State of Africa after Colonialism

It is arguable that after obtaining independence from the colonial masters from the late 1950s onwards, the continent of Africa failed dismally to govern itself. According to Taiwo, "many problems that affect various African countries at the present time with different degrees of intensity are frequently traced to the lingering effects of colonialism".⁶⁰ In the post-independence era, African states on the whole have been characterized by discriminatory, racial and unacceptable and violent undemocratic methods of governance, including, among other things, presidents-for-life; single-party parliaments; military juntas; apartheid; and other hardships.⁶¹ David Washburn⁶² argues that after colonialism, new elites, often in the form of dictators, frequently rose and still rise to power in certain of the African post-colonial countries.

The influence of colonialism on African leaders immediately after achieving independence from colonial masters was perceptible through the actions of well-known leaders in some

⁵⁹ Gordon April A and Gordon Donald L *Understanding contemporary Africa* (1996) (2nd ed) at 57.

⁶⁰ Olufemi Taiwo *How colonialism preempted modernity in Africa* (2010) at 3.

⁶¹ For example, the problem of presidents who have stayed in power for a very long time has created problems in countries like Zimbabwe under President Robert Mugabe, in Libya under Muammar Gaddafi, and other African states with the similar challenges; the Nigerian Military Juntas (1966-1979 and 1983-1998) and The People's Redemption Council in Liberia (1980-1986); The apartheid government in South Africa until 1994 as well as other hardships that led to civil wars in countries like Angola, Mozambique, Democratic Republic of Congo, and others.

⁶² Washburn David "Post-Colonialism: Trying to regain ethnic individuality" available at <http://www.postcolonialweb.org/poldiscourse/washburn1.html> (accessed 16/11/2010).

African states. For example, as described by Meredith, “as founding fathers, the first generation of nationalist leaders – Nkrumah, Nasser, Senghor, Houphouet-Boigny, Séjou Touré, Keita, Olympio, Kenyatta, Nyerere, Kaunda and Banda, all enjoyed great prestige and high honour; they were seen to personify the states they led and swiftly took advantage to consolidate their control”.⁶³ The post-colonial background of African constitutions without constitutionalism has continued to bedevil African hopes for constitutional democracy and the rule of law. Many people perceive most constitutions adopted immediately after gaining independence as imposed by the former colonizers to continue to protect and serve their interests in Africa while ignoring the principles of constitutionalism.⁶⁴ As a result of the lack of basic principles of constitutionalism in those constitutions, many leaders have used that loophole to abuse their power by violating human rights and resorting to undemocratic tactics.⁶⁵ Perhaps it is true that the problem with African leaders is that they were never exposed to good governance by their colonizers, which in turn gives value to the allegations by Africans that the Europeans colonized Africa only to exploit its rich resources.

Colonialism and exposure to Western culture has brought about many changes in African culture and traditions, and most leaders who took over the reigns after colonialism cared less about democracy or working hard at bringing about transformation and development, than about clinging to power for as long as possible and enriching themselves and friends. Because of the Western culture imposed by colonial masters, African people were thrust into new experiences which they could not comprehend with the guidance of the old African traditions. Poor leadership and autocratic rule by some African leaders as a result of colonial inheritance has hampered Africa’s growth path, and peace initiatives and development efforts have been moving at a snail’s pace.

⁶³ Meredith Martin *The state of Africa. A history of fifty years of independence* (2005) at 162.

⁶⁴ African scholars including Oloka-Onyango, Mangu, Gutto and Fombad, developing researchers and the people of Africa in general, blame colonization for the failure of their countries and argue that colonizers treated Africans like objects and showed no interest in implementing the principles of democracy and constitutionalism. The rule of law was perceived as intended solely to protect settlers against Africans.

⁶⁵ For instance, when they granted independence to African countries, and when new constitutions were drafted and adopted with the help and guidance of colonizers, many principles which characterize constitutionalism such as human rights and their protection, terms of office for presidents, etc, were not discussed and were explicitly omitted from the new constitutions. This resulted in many violations of and disregard for human rights and even civil wars prompted by presidents not wanting to relinquish power after many years in office. For example, the civil wars caused by struggle for power in different countries, like the Angolan civil war (1975-2002) between MPLA and UNITA; Mozambican civil war (1976-1992) between FRELIMO and RENAMO; Rwandan civil war (1990-1993) between the ruling government and the rebels RPF.

Perhaps Gordon has a point when he indicates that the process of granting independence was very quick and never carefully developed by the colonial masters to enable Africans to govern themselves in a democratic, progressive and peaceful manner.⁶⁶ He argues that

“the democratic governmental models developed by the French and British for their colonies were essentially alien structures hastily superimposed over the deeply ingrained political legacies of imperial rule and; that the real political inheritances of African states at independence were the authoritarian structures of the colonial state, an accompanying political culture and an environment of politically relevant circumstances tied heavily to the nature of colonial rule”⁶⁷

Without a doubt, colonialism has had a very negative impact in the political, economic, cultural and social spheres of contemporary Africa. The exploitation of natural resources by colonial masters has left the continent crippled and also laid the foundation for never ending crisis in most African countries. Judging by the level of development and democracy between the former colonial masters and the colonized, one can agree with Gordon who argues that “African colonies were made politically and economically subordinate to European needs, while the exploitation of its resources was characterized by low investment and brutality”.⁶⁸

The issue of natural resources can be hardly separated from the question of political unrest and the failure or collapse of democracy in most African states. Some people claim that Western countries continue to interfere in African issues because they have unfinished business dating back to colonial rule.⁶⁹ Resources of each and every state form the economic backbone of that particular state. They should be under the guardianship of a legitimate government which should be able to protect them and ensure fair distribution of such resources to its citizens. If state resources are not in the hands of a legitimate government how can one lay a strong foundation for democracy and constitutionalism and the rule of law in a state? Since independence the question of power and state resources in most African countries can be identified as among the major problems that have delayed the progress of the continent as a whole.

⁶⁶ See footnote 59 above at 57.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ For example, the issue of blood diamonds among other things, which prompted the Kimberley Process – the international group formed to clamp down on trade in diamonds used to fund conflict. In some countries you find rebels fighting the sitting government with the assistance of some western countries, for instance Outtara was assisted by French special forces to oust Gbagbo (see footnote 44), while in Libya the rebels killed and ousted Ghadafi’s government with the help of NATO.

Although different views on the impact of colonialism on the African continent continue to emerge such as the failure of democracy in most African states, and the equality⁷⁰ of nations seems impossible in real terms, or the divide between the developed and developing countries appears to remain elusive for the foreseeable future, one important thing is the growing interdependence of the world community as almost all countries strive to forge relations and friendship as members of the international community. The importance of the interdependence of the world community is also demonstrated by Professor Richardson III⁷¹ who argues that:

“One point of context is the growing interdependence of the world community, indeed, in Professor Reisman’s words into conditions of global simultaneity. In the international community, the distance between ‘global independence’ and economic and corporate ‘globalization’ mirrors the distance to be bridged on the local level in national states by the successful resolution of questions of race and class equity. This reality of interdependence is increasingly accompanied by a new wave of nationalists’ sentiments from governments and populations, rich and poor countries alike, including African states.”⁷²

Even though most political and economic analysts and commentators emphasize the importance of the interdependence of world communities, it is clear that underdeveloped countries like Africa are still oppressed and undermined by world superpowers who formulate policies and make major decisions that continue to place them in stronger positions when compared to these developing nations.⁷³

⁷⁰ In terms of the Charter of the United Nations, 1945, among the purposes of the UN are: to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. Most importantly, article 2(1) of the Charter provides that the UN is based on the principle of the sovereign equality of all its members. Notwithstanding these provisions in the Charter, the gap between the developed and developing countries of the world is widening in all political economic and social spheres. For example, the standard of living in developed countries is generally high compared to the standard of living in developing countries and so is the currency. When it comes to political powers or decisions affecting the world, one is still confronted with the all-powerful Security Council controlled through the veto power by five permanent members whose dominant position is based on a now artificial power-construct dating back some sixty-five years. Such a structure is hardly supportive of the principle of equality of all the UN member states.

⁷¹ Henry J Richardson III, Professor of Law, Temple University School of Law.

⁷² Richardson Henry J III “Africa: Many challenges, much hope: Remarks” in (1995) 89 *American Society of Law Proceedings* at 484.

⁷³ For instance, developed countries tend to isolate themselves through institutions or organizations like NATO, G8, Security Council (UN) and other major institutions, while making policies and taking decisions that impact on the whole world. This has a very negative impact on developing countries which are normally not represented or without powers yet they rely on aids from the very same institutions or organizations that exclude them when it comes to decision taking.

Having considered the interplay between colonialism and constitutionalism, and examined the state of Africa after the ‘Colonial enterprise’, we need now to turn our attention more closely to exactly what is intended under the concept of constitutionalism.

2.3 Explaining the Concept of Constitutionalism

The *Collins English Dictionary* describes constitutionalism as “the principles, spirit or system of government in accord with a constitution, especially a written constitution”.⁷⁴ Michel Rosenfeld perceives constitutionalism as follows:

“in broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law and the protection of fundamental rights. Moreover, although not all constitutions conform to the demands of constitutionalism and although constitutionalism is not dependent on the existence of a written constitution, the realization of the spirit of constitutionalism generally goes hand in hand with the implementation of a written constitution.”⁷⁵

Constitutionalism means that government power or the governing power in a state is distributed and limited by a system of norms, values and principles entrenched in a constitution which must be obeyed by everyone including the executive, legislature and the judiciary.

In his work, “Teaching about democratic constitutionalism”, John Patrick describes constitutionalism as follows:

“Constitutionalism means limited government and the rule of law to prevent the arbitrary, abusive use of power, to protect human rights, to support democratic procedures in elections and public policy making, and to achieve a community's shared purposes. Constitutionalism in a democracy, therefore, both limits and empowers government of, by, and for the people. Through the constitution, the people grant power to the government to act effectively for the public good. The people also set constitutional limits on the power of the democratic government in order to prevent tyranny and to protect human rights (Holmes (1995) at 299).”⁷⁶

⁷⁴ *Collins English Dictionary* first published in (2000) (5th ed).

⁷⁵ Michel Rosenfeld, a Justice, Sydney L Robins, Professor of Human Rights and Director, Program on Global and Comparative Constitutional Theory (Benjamin N Cardozo School of Law, New York, US) are quoted in this work from Larry Cata Backer's “From constitution to constitutionalism” (see footnote 41 above).

⁷⁶ Patrick John J “Teaching about democratic constitutionalism”(1997) *ERIC Educational Reports* available at FindArticles.com (accessed 23/06/2010).

As described by American political scientist and constitutional scholar, David Fellman,⁷⁷

“Constitutionalism is descriptive of a complicated concept, deeply imbedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to the rule by the arbitrary judgment or mere fiat of public officials. Throughout the literature dealing with modern public law and the foundations of statecraft the central element of the concept of constitutionalism is that in political society government officials are not free to do anything they please in any manner they choose; they are bound to observe both the limitations on power and the procedures which are set out in the supreme constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law.”

Perhaps the greatest modern proponent of constitutionalism is Louis Henkin.⁷⁸ For him, constitutionalism and “popular sovereignty” cannot be divorced. It is from the people that the authority of a legitimate government is drawn. Only the people can establish a legitimate system of government, and conversely, it is the people who must answer for this system.⁷⁹ Once established, the constitution is the “supreme law” to which all, including government, are subject.⁸⁰

From these truisms, Henkin draws certain principles which form the basis of constitutionalism: “government ruled by the law and democratic principles”, which in turn implies political democracy and representative government and excludes the possibility of “government by decree” unless authorized by the constitution and controlled by “democratic

⁷⁷ David Fellman (14 September 1907 - 23 November 2003) was a United States law and civil liberties professor and an advocate for academic freedom. He taught general constitutional law, administrative law and civil liberties at the University of Wisconsin in Madison, United States (possibly the first instance of such as a separate course in an American political science department).

⁷⁸ Henkin Louis “New birth of constitutionalism: Genetic influences and genetic defects” (1993) 14/3-4 (January) *Cardozo Law Review* at 533-548. In this article, Henkin wrote about the revolutionary developments during the period which brought new commitment in various parts of the world to a political ideology of “constitutionalism”. He argues that there can be little doubt, however, of the immediate influence of two prominent constitutional instruments *viz*, the United States Constitution and its Bill of Rights (over two hundred years old now) and the International Bill of Rights, the common designation for the Universal Declaration of Human Rights(UN General Assembly resolution 217A (III) 1948) and the two principal international covenants on human rights (ie the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966)).

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

political institutions".⁸¹ A democratic government must be limited; must commit to the principle of separation of powers and the system of checks and balances; the military should be subject to civilian control and the police be "governed by law and judicial control".⁸² Most important for present purposes, however, is that the state must have an independent judiciary. These principal elements of constitutionalism identified by Henkin and the other authors above provide a good platform from which to explore the concept of constitutionalism which has become a universal order of the global world in an effort to harness the principle of democracy and the rule of law. The elements are formulated by Henkin in a wide ranging methodology in an effort to ensure that if the principle of constitutionalism is adhered to, prosperous and peaceful governance will be attained by all states across the globe.

Henkin's argument that "the people" are the locus of sovereignty, and that the will of the people is the source of authority and the basis of legitimate government, has been evident and proven in various instances where the people have turned against a government that they felt oppressed them. For example, the cases of Benin in February 1990⁸³ and the 2010/2011 uprisings in certain northern parts of the African continent, where an intensive campaign of civil resistance and demonstrations against longtime leaders and governments in some Arab states took place,⁸⁴ serve as a clear indication that the will of the people is the source of authority and the basis of legitimate government. For a government to be legitimate and respected it must reflect the will of the people it seeks to regulate, and strive to adhere to and uphold the rule of law, and promote and protect human rights and the wellbeing of its people.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ "In February 1990, protracted strikes and popular protests finally forced Mathieu Kérékou, the long-serving dictator of the small West African country of Benin, to convene a 'National Conference'. A broadly representative, albeit extra-parliamentary, assemblage of influential political, civic and occupational groups and elites, the National Conference drawing inspiration from the *éstatsgénéraux* of 18th century revolutionary France, declared itself sovereign and proceeded to enact far-reaching changes to the country's constitutional order. It stripped Kérékou of all executive power, abolished the one-party system, installed an interim prime minister and legislature and authorized the drafting of a new constitution that won popular approval as the basis for a democratic reconstitution of civil authority." Prempeh H Kwasi "Africa's 'constitutionalism revival': False start or new dawn?" (2007) 5/469 *International Journal of Constitutional Law* at 469.

⁸⁴ During the end of 2010 and in 2011 the so-called "Arab spring" broke out in the North of Africa. This refers to the civil resistance and demonstrations in Tunisia and Egypt which resulted in the collapse of governments of President Ben Ali of Tunisia and President Mubarak of Egypt. In Libya the demonstrations resulted in a civil war which brought an end to the government of Gadhafi and his death. See Joffé George "The Arab Spring in North Africa: origins and prospects" (2011) 16/4 *The Journal of North African Studies* at 507-532.

2.4 Explaining the relationship and connection between the concepts of Constitution(s), Constitutionalism, Democracy, and Elections

A written constitution is never a guarantee of constitutionalism or democracy.⁸⁵ On the other hand, however, it has proved to be one of the most important tools in helping to sustain constitutionalism in the modern world. According to Ackerman, “the enlightenment hope in written constitutions is sweeping the world”.⁸⁶ Ever since the start of the 1990s many African states have been involved in the process of drafting and adopting new constitutions and ensuring the entrenchment of the principles of democracy and constitutionalism in these constitutions in the hope of bringing a solution to the troubles that have bedeviled the continent since independence from its colonial masters.

Many African countries have written constitutions, but on a number of occasions those constitutions have failed to protect civilians from leaders who disregard the rule of law and abuse their powers. For instance, article 1(1) of the Swaziland Constitution⁸⁷ provides that “Swaziland is a unitary, sovereign, democratic Kingdom”, while article 2(1) provides, “this Constitution is the supreme law of Swaziland and if any law is inconsistent with this constitution, that other law shall, to the extent of the inconsistency, be void”. Despite these provisions clearly stipulating that the foundation of the Kingdom of Swaziland is laid in democracy and indicating that the Constitution is the supreme law of Swaziland, the Kingdom remains, in practice, the last absolute monarchy in Africa, and there has been a consistent cry from the people of the Kingdom and the international community for democracy to prevail in that country.⁸⁸

⁸⁵ See Okoth-Ogendo HWO “Constitutions without constitutionalism: Reflections on an African political paradox” in Greenberg, Douglas *et al* *Constitutionalism and democracy: Transitions in the contemporary world: The American Council of Learned Societies comparative constitutionalism papers* (1993) 65-84.

⁸⁶ Ackerman Bruce “The rise of world constitutionalism” (1997) 83 *Virginia Law Review* at 772. By the “enlightenment hope in written constitutions” can be perceived as a “secondment” to the conviction that many countries of the word has put in written constitutions. For instance, superpowers like the US have shown stability and led by example ever since the adoption of its written constitution in 1787. Lately, prior 1994, South Africa was in a huge crisis because of apartheid and there were even fears of a civil war outbreak, but a well negotiated constitution stabilized the country and laid a solid foundation for democracy and constitutionalism in the country.

⁸⁷ The Constitution of the Kingdom of Swaziland, 2005

⁸⁸ The people of Swaziland, under the umbrella body called Swaziland Democracy Campaign, have for a number of years been embroiled in a struggle for multiparty democracy in their country. They have described democracy as “an indispensable pillar of modern socio-economic and political governance”. South Africa’s well-known trade union Cosatu, has on a number of occasions criticized and voiced their support for change to Swaziland’s “oppressive rule” under King Mswati III, maintaining that Cosatu support “the idea of a speedy transition to a new and democratic system in Swaziland and encouraging an

In Zimbabwe, President Robert Mugabe, who has been in power since independence, lately has been accused of manipulating the process of drafting a new constitution in order to protect his government against the will of the majority of the people of Zimbabwe.⁸⁹ It has been over ten years now since there was an outcry about the collapse of democracy and the rule of law in Zimbabwe. This has not only affected the country's political stability, but has hit hard on the economic and social levels as well as with regard to relations with other countries of the world which have imposed sanctions against that country. There have been many reports involving gross violation of human rights by the government of Zimbabwe.⁹⁰

In the case of South Africa, the country had its first taste of democracy in 1994 when democratic elections were held for the very first time. As appears to be the case in many African countries during elections, there was fear as to what was going to happen given where the country was coming from under an apartheid government. There were mixed feelings and mistrust among the people and the possibility of civil uprising was even mooted. It can be argued that, that was a turning point in the history of the country's politics. The Interim Constitution,⁹¹ and more recently the Final Constitution,⁹² played a major role in stabilizing the situation in South Africa. However, South Africa's "success" can be ascribed to the multiparty negotiations and the principle of tolerance and compromise between 1990 and 1993 among the leaders of various political parties, including the role played by what has

all inclusive process" available at www.cosatu.org.za; <http://www.swazidemocracy.org> (accessed 06/06/2011).

At the end of the Cosatu-Zimbabwe-Swaziland Solidarity Conference held in Kempton Park, South Africa on the 10th and 11th of August 2008 the conference declared that "the continued denial of political space, particularly the ban of multiparty politics and the right to participate in public institutions of decision making remain a denial of a core tenet of democracy" available at www.cosatu.org.za (accessed 06/06/2011).

⁸⁹ On 15-18 September 2010 the author attended a regional conference held by the National Democratic Institute on Civil Society and Constitutional Reform at Burgers Park Hotel, Pretoria, South Africa with the purpose of "strengthening civil society's capacity to make meaningful contributions to current and future constitutional reforms processes in Southern and East African region". Among the participants in that conference were representatives from Zimbabwe who alleged that the government did not fully allow free public consultation and participation in the processes, as the country prepares for the drafting of a new constitution. It was reported during the proceedings that people were allegedly beaten and threatened by state organs such as the police to prevent them from attending such gatherings.

⁹⁰ A Roman Catholic human rights group called Catholic Commission for Justice and Peace claimed that "perpetrators of violence" were "shipped" into the townships to create no-go zones for rival political party's supporters in Zimbabwe's capital Harare and that some militants and security forces loyal to Mugabe led political violence at some stage. See <http://m.news24.com/news24/Africa/Zimbabwe/Surge-in-Zim-violence-20110703> (accessed 07/07/2011).

⁹¹ South African Interim Constitution (Act 200 of 1993).

⁹² The Constitution of the Republic of South Africa, 1996.

come to be popularly known as CODESA⁹³ and the MPNP⁹⁴ in the democratic history of the country.

Perhaps tolerance and compromise is one lesson that needs to be spread across Africa for leaders of different countries to understand democracy and constitutionalism as well as the role and responsibility that comes with leadership. One can say that the open process of negotiation and the sacrifices made by the participants during the negotiation process in South Africa, paved the way for what the constitution of the country is today. There has been praise for the South African constitution across the globe. Though sometimes there are challenges, it is safe to say that the South African constitution has so far managed to stand the “test of time” and this could be a lesson for other African countries.⁹⁵

2.4.1 The state of democracy and constitutional sovereignty in South Africa since the adoption of the 1993 Interim Constitution (and Constitution of the Republic of South Africa, 1996) and the first democratic elections of 1994: Are there lessons for other African countries?

Prior 1994 South Africa was not a democratic state and it followed a system of parliamentary sovereignty.⁹⁶ After lengthy negotiations in the 1990s the Interim Constitution was adopted in

⁹³ CODESA is the Convention for a Democratic South Africa where formal constitutional negotiations and transition in the South African political landscape began on 20 December 1991. Although it was never a success, CODESA played a significant role in laying the foundation for multi-racial/party discussions.

⁹⁴ MPNP means Multi-Party Negotiating Process. “In March 1993 full negotiations began at the World Trade Centre. The parties present decided to use the name MPNP – instead of CODESA. There were twenty-six parties taking part in the MPNP. The MPNP had to write and adopt an interim Constitution to say how the government would govern after the elections on 27 April 1994. The MPNP drew up the Interim Constitution which was to last for two years. The MPNP also drew up and adopted the 34 Constitutional Principles. These principles would guide the Constitutional Assembly (CA) which had to draw up the final Constitution”. Available at <http://www.sahistory.org.za/pages/governance-projects/constitution/drafting.htm> (accessed 23/03/2011).

⁹⁵ For instance there was a lot of criticism and allegations of interference and threat to the Constitution by opposition parties, scholars, media and ordinary citizens in 2008 when the then Acting Head of the NPA in South Africa withdrew charges of corruption against the president of the ruling ANC and then prospective state president Jacob Zuma.

⁹⁶ Parliamentary sovereignty, also known as parliamentary supremacy, is a concept of constitutional law in which all powers are vested in parliament. This means that the legislature reigns supreme, i.e. it can adopt any law without the validity of such law being tested or reviewed by a court of law. Although many scholars and lawyers across the globe criticize this system, it does not mean that democracy is impossible under parliamentary sovereignty. Countries like Britain, Finland, New Zealand and others subscribe to this system and have continued to sustain their democracy. However in the case of South Africa under the apartheid government, “parliament commanded law and there was little scope for individuals or groups to

1993 and this subsequently paved a way for the first democratic elections in 1994. After that, the country moved from the system of parliamentary sovereignty to constitutional sovereignty and the constitution was declared the supreme law of South Africa and vested the judicial authority in the courts.⁹⁷ The Constitutional Court was established and vested with authority to deal with constitutional matters and ensure the protection and promotion of human rights and democracy in the Republic of South Africa.

The coming into being of the new constitution and the Constitutional Court in the new democratic South Africa brought a huge change in the political landscape of the country. The Constitutional Court has played a very active and important role in safeguarding good governance by making important rulings on different cases on constitutional matters. Since its first sitting on the 15th of February 1995, the court has faced many challenging cases and unprecedented situations in the legal history of the country, but it has proudly stood the test of time. In *Ex parte Chairperson of the Constitutional Assembly* the court held:

“The formal purpose of this judgment is to pronounce whether or not Court certifies that all the provisions of South Africa’s proposed new constitution comply with certain principles contained in the country’s current constitution. But its underlying purpose and scope are much wider. Judicial ‘certification’ of a constitution is unprecedented and the very nature of the undertaking has to be explained. To do that, one must place the undertaking in its proper historical, political and legal context; and, in doing so, the essence of the country’s constitutional transition, the respective roles of the political entities involved and the applicable legal principles and terminology must be identified and described. It is also necessary to explain the scope of the court’s certification task and the effect of this judgment, not only the extent and significance of the court’s powers, but also their limitations. Only then can one really come to grips with the certification itself.”⁹⁸

The Constitutional Court has proven its readiness to uphold justice and the rule of law as well as to ensure that human rights are respected within the private sphere and also respected and protected by the law and the government. It has since handed down several landmark judgments that have had a profound impact on South African law and also influenced the law

challenge government action; it could adopt any law no matter how unfair and discriminatory, and the validity of such law could not be challenged in court”. *Constitutional law: Only study guide for CSL 101-J* University of South Africa at 9.

⁹⁷ Section 2 and section 165 of the Constitution of the Republic of South Africa. Also section 1 provides that the Republic of South Africa is one, sovereign, democratic state founded on the following values: (c) supremacy of the constitution and the rule of law.

⁹⁸ *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC) at par 1.

of other countries across the globe.⁹⁹ Before 1994 only a minority of South Africans enjoyed human rights. With the dawn of democracy, the Bill of Rights is entrenched in the Constitution as a cornerstone of democracy in South Africa.¹⁰⁰ Various cases decided by the Constitutional Court reflect a new era for human rights. The *Makwanyane*¹⁰¹ case brought an end to the death penalty in line with the right to life in the constitution and in another case the court ruled in favour of a certain Hoffmann¹⁰² for being unfairly discriminated against by the SAA because of his HIV status.

South Africa's history of democracy draws a unique picture that can be modelled by other African states to lay a strong foundation on constitutionalism and democracy and thus put an end to the instability that has ravaged these states ever since. In 1995 the parliament of South Africa passed an Act on the Promotion of National Unity and Reconciliation (Act no 34 of 1995) and also established the Truth and Reconciliation Commission in order to deal with the social ills of the past, reconcile and heal as a nation and move forward in accordance with the Constitution (1993) which provided an "historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of colour, race, belief or sex".¹⁰³

⁹⁹ <http://www.constitutionalcourt.org.za> (accessed 11/06/2011).

¹⁰⁰ Section 7(1), (2) of the South African constitution provides that (1) the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people the country and affirms the democratic values of human dignity, equality and freedom; and (2) that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

¹⁰¹ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC).

¹⁰² *Hoffmann v South African Airways* (SAA) [2000] 12 BLLR 1365 (CC), was a case that ended in the Constitutional Court of South Africa which involved violation of section 9 of the constitution that makes provision for equality. Section 9 provides among other things that:

- (1) Everyone is equal before the law and has a right to equal protection and benefit of the law;
- (2) Equality includes the full and equal enjoyment of all rights and freedoms ...;
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;
- (4) No one may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3) ...

Hoffmann appealed to the Constitutional Court from the High Court challenging the constitutionality of South African Airways' employment policy or practice for refusing to employ people living with HIV as cabin attendants. The court held that South African Airways had infringed Hoffmann's constitutional right not to be unfairly discriminated against and that there is no place for stereotyping and prejudice under South Africa's new "era of respect for human dignity, compassion and understanding of ubuntu". The Constitutional Court ordered South African Airways make an offer of employment immediately to Hoffmann and that SAA pay the costs of the application in both the High Court and the Constitutional Court.

¹⁰³ Quoted at par 7 in *S v Makwanyane*, see footnote 101 above.

However, South Africa's state of affairs is not free from the challenges that have faced other African states. However, with the help of a well drafted and legitimate constitution, the country has so far managed its democracy, promoted good and peaceful governance, and upheld the rule of law.¹⁰⁴ Chapter 9 of the country's constitution makes an important provision for state institutions supporting constitutional democracy including among others, the Public Protector, the South African Human Rights Commission, Auditor-General, the Electoral Commission, and others.¹⁰⁵ Further, the constitution makes it clear that these institutions are independent and subject only to the constitution and the law, and that they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.¹⁰⁶

The rule of law is being upheld by different state organs in the country as provided by the constitution. For instance, unlike during the apartheid era where police could violate human rights without prosecution, under the new democratic dispensation there is an effective police watchdog called Independent Complaints Directorate (ICD).¹⁰⁷

2.4.2 Overview of Elections v Democracy in Africa

On the African continent, the issues of constitutionalism, elections and democracy have always been topical amid allegations of hijack by compradors and other outside influences. Mangu points out that “Africa is widely acclaimed in the Western media and literature as a continent of virtually unrelieved tyranny, dictatorship, economic bankruptcy, administrative incompetence and violence”.¹⁰⁸

He also rightly argues that elections in Africa are not new, but that the typical African elections are not free and fair.¹⁰⁹ The challenge is that in most countries “elections have not

¹⁰⁴ The Constitution was drafted by a democratically elected Constitutional Assembly well represented by different people of South Africa.

¹⁰⁵ Section 181(1)(a-f).

¹⁰⁶ Section 181(2).

¹⁰⁷ The ICD is a government department that was established in April 1997 to investigate complaints of brutality, criminality and misconduct against members of the South African Police Service (SAPS), and the Municipal Police Service (MPS). It operates independently from the SAPS in the effective and efficient investigation of alleged misconduct and criminality by SAPS members. Available at <http://www.icd.gov.za/about%20us/legislation.asp> (accessed 26/08/2011).

¹⁰⁸ Mangu André Mbata B “Challenges to constitutionalism and democratic consolidation in Africa” (2005) 24/3 *Politeia* at 316.

¹⁰⁹ Mangu André Mbata B “Constitutional democracy and constitutionalism in Africa” (2006) 2 *Conflict Trends* at 5.

resulted in consolidation of democracy”.¹¹⁰ The problem is that some leaders do not hold elections to establish legitimate governments, but rather to consolidate their hold on power. One could not find a better way of expressing this than Mangu’s sentiment that “one does not organise an election to lose it”.¹¹¹

According to Olukoshi, “the feeling is that all things are falling apart, nothing good is directly or potentially coming out of Africa and democracy is unworkable on the continent”.¹¹²

“Yet [says Mangu] African heads of state and government made it clear in the Preamble to the Constitutive Act of the African Union that they were committed to promoting and protecting human and people’s rights, consolidating democratic institutions and culture, and to ensuring good governance and the rule of law, which are critical for the New Partnership for Africa’s Development (NEPAD) and the African Renaissance”.¹¹³

Although a number of African countries have held regular elections which have been monitored by both regional and international bodies, this has never been a guarantee of democracy or constitutionalism for most African states. The common political turmoil, corruption, and poor economic conditions in most of these countries, have continued to create an enormous challenge as well as to threaten the aspirations of peace and the ensuing development of constitutionalism on the African continent.

Adelman writes:

“if, with post (1991:36), we understand democracy to mean the ‘ineffable right of all of us as human beings, without distinction of gender, race, nation or class to control the decisions that determine our daily lives and future prospects’,¹¹⁴ it is apparent that there is a large democratic deficit in Africa”.¹¹⁵

African leaders have in many instances disregarded the fact that being in power must come with legitimacy. Legitimacy, in this sense, means that people must peacefully and

¹¹⁰ *Id* at 6.

¹¹¹ *Ibid.*

¹¹² Olukoshi A *State, conflict and democracy in Africa: The complex process of renewal* (1999) at 451-465.

¹¹³ See Mangu footnote 109 above.

¹¹⁴ He argues that Post’s definition of democracy is not dissimilar to Green’s (1989: 45) description of the role of pluralism as being “to increase the probability that persons – especially poor persons – will be able to organize themselves to act, to influence the actions of others and to hold other major actors to account” (see footnote 60 above).

¹¹⁵ Adelman Sammy “Constitutionalism, pluralism and democracy in Africa” (1998) 42 *Journal of Legal Pluralism and Unofficial Law* at 74.

democratically elect leaders who should lead them. Leaders should not turn being in power into a circus or competition between a few individuals as seems to have become the habit in Africa. People are forced to engage in war in order to protect or promote the interests of individuals. The “worship” of individual leaders has continued to haunt peace and transformation in Africa. It has since become a habit that every time elections are held and a person is announced as the victor in most African countries, one or more of the other candidates refuse to accept the outcome of the elections. In most cases this results in the outbreak of a civil war or some civilians losing their lives. This tendency has, in recent times, been seen most notably in Nigeria, Uganda, Kenya, Democratic Republic of Congo, and Ivory Coast, to mention but a few.¹¹⁶

The importance and reach of democracy is not limited to the political sphere. It extends to different spheres including the social, economic and cultural. It is a well-known fact across the globe that democracy has become an essential tower of strength in the modern world, where all countries strive to forge friendships and relations and also abide by the general standards of international law and international relations.

2.4.2.1 The African Union (AU) and the African Charter on Democracy, Elections and Governance (ACDEG)

The AU was established in order to, among other things, unite the African continent and promote democratic principles; promote and protect human rights; and promote peace, security and stability on the African continent.¹¹⁷ With the vision of strengthening the objects of the Constitutive Act, the AU adopted the ACDEG in 2007 in the hope of enhancing good governance, popular participation, the rule of law and human rights.¹¹⁸

¹¹⁶ Nigeria held its Presidential elections on 16 April 2011. John Campbell of the Council on Foreign Relations – a Center for Preventive Action in the US, but an independent, nonpartisan membership organization, think tank, and publisher – issued a report in September 2010 titled “Electoral Violence in Nigeria” raising fears on imminent post-elections violence in Nigeria based on the country’s overlapping regional, religious and ethnic divisions. Immediately after the announcement of Goodluck Jonathan as the winner, allegations of organized violence and arson in parts of the north as a show of disapproval of Jonathan were reported. See <http://www.saharareporters.com/press-release/post-election-violence-huriwa-canvasses-national-conference> and www.cfr.org (accessed 21/04/2011).

¹¹⁷ See article 3 (objectives of the Union) of the AU Constitutive Act.

¹¹⁸ See preamble to the African Charter on Democracy, Elections and Governance.

However, it could be said that so far the AU has not done well in ensuring that its objects are realized as the continent continues to experience challenges in governance due to conflict, allegations of elections which are not free and fair, or are accompanied by violence, corruption and many other challenges.¹¹⁹ There are many treaties and declarations in Africa, yet many people continue to suffer at the hands of the same leaders who created these documents only to disregard them to serve and protect their personal interests. Surely there is a need to revisit the composition of the AU and its powers and functions if this problem is to be addressed?

2.5 The Doctrine of Separation of Powers and the Rule of Law in Africa

The philosophy of constitutionalism and the doctrine of separation of powers in Africa are foreign modes of governance adopted from the West during the late 20th century by different African countries as they become independent from colonialism. During colonial rule, the settlers did not practice or introduce democratic governance in Africa or to the people of Africa. They generally followed an autocratic system which enabled them to control the people, while depleting local resources and, in some instances, practicing slavery. Since independence most African states have been struggling to transform traditional governance which included despotism and monarchies, to adopt democracy which is characterized and dominated by constitutionalism and the principle of the separation of powers. Although the rule of law has always existed, the traditional mode of governance in ancient Africa was that of kingship or chieftaincy and little or nothing was known about the theory of constitutionalism or the doctrine of separation of powers in Africa.¹²⁰

¹¹⁹ For example, the recent “Arab spring” in the north of Africa, the problems that led to the Global Political Agreement in Zimbabwe.

¹²⁰ Before colonialism was introduced in Africa, traditional kings and chiefs ruled communities. Democracy in the modern sense was not known and there was no separation of powers. For instance, Wallace gives a description of history of African chieftaincy under the Zulu Kingdom as follows – “In theory, the chief had total power over his people; the chief owned all land; he controlled the court system and his court was the highest and final court of appeal; as chief judge he could ‘eat people up’ (i.e. confiscate their property, especially cattle) and even had the power of life and death; he was the national religious leader. In practice, most chiefs were much more like constitutional monarchs with many checks on their power. The chief was the chief justice; everyone had a right of appeal to the chief, including from the decisions of headmen or sub-chiefs. Thus, he was the final court of appeal – the Supreme Court. It was the chief who made the decisions. Court cases were handled very extensively” Mills Wallace G *History* 316 9 Zulu http://husky1.stmarys.ca/~wmills/course316/9Zulu_Shaka.html (accessed 18/11/2010).

Ojwang explains “pre-colonial times” as follows – “From anthropological studies, it is clear that African ethnic groups, before the advent of European colonialism in the nineteenth century, lived as autonomous nationalities with their own separate governance systems. The political systems of this period can be

As indicated at the outset of this work, after independence from their colonial masters there were a high hopes among African societies, that the new African leaders, given their calls to patriotism and the fact that they had witnessed the sufferings of their people under colonial rule, as well as the poverty and underdevelopment rampant in the communities, would work in harmony, engaging the people in an attempt to bring balance within the communities. However, in most instances these leaders soon lost touch with the peoples' mandate and, as Meredith argues, they "were seen to personify the states they led and swiftly took advantage to consolidate their control".¹²¹

The issue of poor leadership, arrogance, dictatorship, cronyism and corruption among many African leaders had a very negative impact on the development of constitutionalism and democracy in the African continent.¹²² Although most challenges are associated with the ineffectual constitutions adopted upon independence,¹²³ the abovementioned issues derailed progress in Africa until the beginning of the 1990s when almost all African countries embarked on a mission of drafting and adopting new constitutions with clear provisions on sensitive issues identified as a major source of African problems. These were, most notably, constitutional sovereignty, separation of powers, a limit on the presidential term of office, Bills of Fundamental Rights, and so on.¹²⁴ It can be argued that the period from the early

analyzed in two broad categories. The first category comprised tribal groups with a centralized authority, organized administrative machinery and formal judicial institutions; while the second consisted of those societies which lacked centralized authority, hierarchical administration, or organized judicial arrangement." –Ojwang JB "Constitutional trends in Africa – the Kenya case" (2000) 10/2 *Transnational Law and Contemporary Problems* at 519.

¹²¹ Meredith Martin *The state of Africa: A history of fifty years of independence* (2005) at 162.

¹²² The abovementioned shortcomings have always been a problem and continue to torment the African continent and also pose as a threat to initiations of peace and prosperity all over the continent and even to promising democracies such as South Africa. For example, in South Africa, there was a huge outcry from the media, opposition parties and some members of the public when Mo Shaik was appointed as head of the South African Secret Service in 2009. It was alleged that because of his closeness to President Zuma his loyalty would be to Zuma rather than the state. Before Zuma became President he was facing corruption charges which were controversially dropped shortly before the elections and Mo Shaik became popular after he told a gathering at the University of Pretoria that the corruption charges against Zuma were going to be withdrawn as later happened.

¹²³ As discussed in paragraph 2.1 above the beginning of 1990 saw a spurt of new constitutions (from independence constitutions) by different African countries, with the period coined "second independence" of Africa after colonialism.

¹²⁴ Recently the new constitution of Angola (Constitution of the Republic of Angola, 2010) has appeared prominently with a reflection of stability, hope and prospect for the once war-torn African country. Part of the preamble of the Angolan constitution reads: "Reaffirming our commitment to the values and fundamental principles of the independence, sovereignty and the unity of a democratic state based on the rule of law, pluralism of political expression and organization, the separation and balance between the powers of bodies that exercise sovereign power, the market economy and respect and guarantees for fundamental human rights and freedoms, which constitute the essential pillars supporting and structuring

1990s was a turning point on issues of constitutionalism, the rule of law, and the entire political landscape in most states in the African continent.¹²⁵

2.5.1 Explaining the Doctrine of Separation of Powers

Arguably, one of the leading works on constitutionalism and separation of powers across the globe is by Professor Vile who published the first edition of his work titled *Constitutionalism and the separation of powers* in 1967. He defines the separation of powers in the following terms:

“A ‘pure doctrine’ of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive and judicial. Each branch of government must be confined to the exercise of its own function and not allowed to encroach upon the functions of other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.”¹²⁶

From Vile’s explanation of separation of powers – and those of other philosophers¹²⁷ – it may be concluded that the objective of the doctrine is to ensure good governance and to restore and maintain peace and the rule of law in a state. The separation of powers guarantees fairness and justice within the state and its society which cannot be achieved where power is concentrated in the hands of a single body. The doctrine can be better demonstrated by the example of a soccer game where there are different role players including the referee, the coach, spectators and the players. In this game each of the abovementioned persons plays different roles to make the game exciting and enjoyable. There is no way in which one can be a player and a referee, or a coach and a spectator simultaneously, as that will be a recipe for bringing the beautiful game into disrepute and eventually lead to conflict. So is the doctrine

this Constitution”, and this indeed is an indication of a commitment by the Angolan people who have been striving for a better future and democracy since independence more than three decades ago.

¹²⁵ This was indeed a turning point as the new constitutions, for instance, now provided term limits for presidents and this could mean some presidents who had been in power for lengthy periods could be expected to vacate office to allow new leaders to ascend to power. Also new constitutions, for instance in countries like South Africa, brought about major transition and improvement to the lives of the majority of people in that the new constitution provided for among other things universal suffrage and human rights for all.

¹²⁶ Vile MJC *Constitutionalism and the separation of powers* (1967) at 13.

¹²⁷ Philosophers like Montesquieu and John Locke.

of separation of powers in a state, for the purposes of ensuring peace and avoiding conflict, the same people cannot afford to hold power in the three branches of government.

The history of the separation of powers dates back to the 17th century when it was realized that for purposes of good governance, peace and progress in a state, there was a need for government powers or functions to be separated into legislative, executive and judicial branches. Montesquieu is regarded as an “architect” of the doctrine of separation of powers. Since then (17th century) many philosophers and scholars have written various works about the doctrine and it has been followed, developed and adopted by many countries of the world in an effort to achieve peaceful governance. Peace and justice take centre stage in international, regional and domestic law. For the rule of law to prevail there must be peace.¹²⁸ The doctrine of separation of powers in the modern state has developed gradually to play a vital role in balancing relations, enhancing democracy and also creating a better environment for the implementation of the principles of constitutionalism.¹²⁹

According to Montesquieu “constant experience shows that every man invested with power is apt to abuse it and to carry his authority as far as it will go, but to prevent this abuse, it is necessary from the very nature of things that power should be a check to power”.¹³⁰ If there is no limit for the people vested with power, they will do as they please. It is important to limit powers as this will ensure that a person does not act outside the law or his limitations. This is how the doctrine of separation of powers came about and begins to shed some light as to how important it is that the legislative, executive and judicial authority must be separated in order to guarantee checks and balances in a constitutional state.

It is very important clearly to understand the idea of separation of powers and checks and balances as well as how state authority is shared.¹³¹ Montesquieu further indicates that “there would be an end of everything were the same man the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals”.¹³² According to Mangu “power

¹²⁸ This is why today we have international organizations like the UN and one of its main objectives is to maintain international peace and almost every state across the globe subscribes to the UN.

¹²⁹ Most contemporary states subscribe to the idea of separation of powers in an effort to ensure that different government powers are not concentrated on one individual.

¹³⁰ Montesquieu B *The spirit of the laws* (1949) at 150.

¹³¹ The principle of checks and balances is discussed in 2.5.2.1 below.

¹³² Montesquieu B *The spirit of the laws* (1949) at 152.

corrupts and separation of powers is essential to liberty and democracy”,¹³³ hence the doctrine has spread all over the world today in an effort to balance government powers and good governance.

2.5.2 Implementation of the Idea of Constitutionalism and the Doctrine of Separation of Powers in Selected African States in Contrast with the US and Germany

It is evident, from the way in which most countries of the West run their political and economic affairs compared to the challenges in most African countries, that the doctrine of separation of powers has stabilized those countries over the years and that it is well established and practiced.¹³⁴ Perhaps this success can be traced to popular participation and high levels of literacy amongst the members of society in the West.¹³⁵

In Africa there are only a few instances where we can claim that the doctrine is prevailing and peace and prosperity are maintained. In most instances, even in countries with constitutions that clearly differentiate between the three branches, some leaders in their capacity as presidents try to manipulate the process of governance by putting cronies in different levels of government in order to serve or protect their interests or “hidden agendas”. For example, the 2001 appointment of Godfrey Chidyausiku as Chief Justice in the Zimbabwe Supreme Court was criticized by many as they perceive it as a deployment by the ZANU-PF of someone who would protect the interests of the government because of his

¹³³ See Mangu AMB “Separation of powers, independence of the judiciary, and good governance and development in African Union Member States” unpublished paper (The Institute for Democracy, Governance, Peace and Development in Africa) available at <http://www.idgpa.org/downloads/IDGPA-%20English4-%20Independance%20of%20the%20judiciary.pdf> (accessed 27/06/2012).

¹³⁴ For example, most African states experience some form of unrest either prior, during or after the elections (Kenya, Zimbabwe, Senegal, DRC), while their peers in Europe regularly have peaceful elections and transition of power. Again some African countries rely on foreign aid usually given by the Western countries to balance their expenditures.

¹³⁵ The level of literacy in Africa is very low and this might be among contributing factors to the conflict and underdevelopment in most countries. The first democratically elected President of South Africa and world political icon Nelson Mandela once said: “Education is the most powerful weapon which you can use to change the world” (http://www.goodreads.com/author/quotes/367338_Nelson_Mandela (accessed 10/07/2011)).

It will be of paramount importance if African countries can invest more in education and improve the level of literacy as this will help people to make rational decisions about issues affecting their countries as well as avoiding conflict which has since ravaged the African continent. In some situations it is claimed that most people are loyal to liberation organizations or leaders to an extent that even when such organizations or leaders make mistakes they continue supporting them without paying much attention to the impact on their lives and their countries.

“close association with the ruling party and his previous statements endorsing the government’s land policy”.¹³⁶

This is the major challenge in the politics and governance of different African states. It is important for African leaders to know, understand and accept the responsibility that comes with holding public office as well as the respect for the rule of law. The application or practice of the principle of separation of powers is not a “universal model”,¹³⁷ it differs from state to state, but it can be argued that the US model has influenced and inspired many countries throughout the world.

2.5.2.1 Checks and Balances

The role played by the system of checks and balances is a very important one in a democratic state as it guarantees that no single branch of government can become too powerful and end up usurping the functions or powers of the other branches. However, by the same token, no single branch of government can function in complete independence – what is required is a healthy relationship between the three branches. In other words, an “absolute” theory of separation of powers in which one branch functions in complete isolation is not viable.

2.5.2.2 The System of Checks and Balances and Separation of Powers under the US Constitution

The United States of America is a constitutional state based on constitutional sovereignty. The Americans also subscribe to the principle and idea of separation of powers.¹³⁸ According to this principle in the US, the legislative, executive and judicial branches of government are created and power is shared among all of them.¹³⁹ The most interesting aspect of this system is that the powers of one branch can be challenged by another branch and this is what the system of checks and balances is all about, ie one branch serves as a watchdog or safeguard against any form of irregularity by the other branch(es).¹⁴⁰ According to Gerangelos, the “view of the separation of powers as a continuing safeguard of decisional independence, in

¹³⁶ See Moyo Gugulethu “Corrupt judges and land rights in Zimbabwe” in Transparency International *Global Corruption Report 2007: Corruption in Judicial Systems* (2007) at 35.

¹³⁷ In *De Lange v Smuts* 1998 (3) SA 785 CC at par 60.

¹³⁸ Articles I, II and III of the United States Constitution, 1787.

¹³⁹ See Korn Jessica *The power of separation: America constitutionalism and the myth of the legislative veto* (1996) at 14-26.

¹⁴⁰ http://www.usconstitution.net/consttop_cnb.html (accessed 18/06/2011).

particular, remains at the forefront of United States constitutional jurisprudence to a far greater extent than elsewhere".¹⁴¹

Kelly¹⁴² gives a detailed explanation of the role of the three branches of government in the US as follows:

The Legislature

Among other functions the legislative branch is vested with the powers to make laws. It may perform checks and balances over the executive in various ways. For instance, it may override presidential vetoes with a two-thirds vote and may remove the president through impeachment. It also has the power over the budget to fund any actions by the executive. It approves treaties and presidential appointments.

On the other side it keeps checks over the judicial branch by, for example, the creation of lower courts. It has powers to approve the appointment of judges and to remove them through impeachment.¹⁴³

The Executive

The function of the executive is to execute the laws of the US. It exercises checks on the legislature in a number of ways including a veto power; it has the ability to call special sessions of congress. It also has powers to recommend legislation.

Over the judicial branch, the president as head of the executive is vested with the powers to appoint judges in the Supreme Court as well as other Federal judges.¹⁴⁴

The Judicial Branch

The function of the judiciary is to interpret laws of the US. The judiciary may exercise checks and balances on the executive through courts by, for example, judging some executive actions to be unconstitutional through the power of judicial review.

On checking over the legislature, courts are vested with powers to rule on the constitutionality of legislative acts.¹⁴⁵

¹⁴¹ Gerangelos Peter A *The Separation of powers and legislative interference in judicial process* (2009) at119.

¹⁴² Kelly Martin *About.com Guide* available at http://americanhistory.about.com/od/usconstitution/a/checks_balances.htm (accessed 15/06/2011).

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

2.5.2.3 Constitutionalism and Separation of Powers in the Federal Republic of Germany

Unlike other countries in the rest of the world which use the term “constitution”, the Germans have what has become popularly known as the “Basic Law for the Federal Republic of Germany” (*Grundgesetz der Bundesrepublik Deutschland*).¹⁴⁶ According to David Currie, “the German Basic Law is one of the great constitutions of the world”.¹⁴⁷ Kommers points out that “it was called a ‘basic law’ because the Parliamentary Council did not want to bestow the dignified term ‘constitution’ (*Verfassung*) on a document drafted to govern a part of Germany for a transitional period that would only last until national reunification”.¹⁴⁸ After reunification in 1990, the Basic Law became the constitutional law for all of Germany. What is interesting about Germany and its constitutionalism, and perhaps a lesson that some African countries can learn, is the way in which the situation unfolded without violence. The two parts of Germany were separated for a period of forty years but they managed to uphold the constitutional order. Twelve national elections were successfully held within this period under the guardianship of the *Grundgesetz*.

When West and East Germany finally reunited in 1990, they unanimously decided to retain the Basic Law as an all-German constitution and to continue its designation as the *Grundgesetz*.¹⁴⁹ However, there were questions and issues that needed to be addressed regarding amendments to the Basic Law raised by unification. One big question was the legitimacy of Basic Law as to whether it should be ratified in a popular referendum.¹⁵⁰ And a referendum would apparently confer on it the popular legitimacy it arguably lacked.¹⁵¹ In 1991 a parliamentary commission on constitutional revision was established but it did not support the idea of a popular referendum.¹⁵² According to Kommers “the commission

¹⁴⁶ The German Basic Law (*Grundgesetz*) was a document adopted in 1949 to govern the western part of Germany after it was divided into two parts at the end of the Second World War. The Germans hoped that despite the division, one day it would reunite. In order not to jeopardize chances for reunification it was felt that it would be wise to regard the *Grundgesetz* only as a provisional constitution for the provisional West German state. After four decades (in 1990), Germany reunified when the eastern part, i.e. the German Democratic Republic, peacefully joined the Federal Republic of Germany after the collapse of the communist regime.

¹⁴⁷ David P Currie is quoted here from the foreword he wrote to Kommers’s second edition of *The constitutional jurisprudence of the Federal Republic of Germany* (1997) see note 148 below.

¹⁴⁸ Kommers Donald P *The constitutional jurisprudence of the Federal Republic of Germany* (1997) (2nd ed), at 30.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

appeared to accept the prevailing view among Germany's constitutional lawyers that twelve national elections in forty years expressed overwhelming popular support for the existing constitutional order and established the Basic Law's fundamental legitimacy".¹⁵³

The Basic Law is clear on the issues of the term of office for the president and possible removal from the office. The term of office for the president in Germany is five years but he/she is eligible to be reelected for another term but is not permitted to serve more than two terms.¹⁵⁴ The president may be removed from office on the basis of serious misconduct by a two-thirds vote of either the *Bundestag* or the *Bundesrat* if the Federal Constitutional Court finds him/her guilty of deliberate violations of the Basic Law or other federal law.¹⁵⁵ However, the president is protected by the law, for example by enjoying immunities from arrest and prosecution among other things.¹⁵⁶

It is clear that the Basic Law was laid on a strong constitutional foundation and this was one of the reasons why there were no major amendments or a need to develop a new constitution upon reunification. The Federal Constitutional Court also had stood firm as guardian of the constitutional order. This could mean that a well-developed document can help to consolidate different views and ensure peaceful and good governance in a country. Germany is one country that was defeated and penalized in both the First World War and Second World War, had its resources controlled or taken away to pay for its debts, yet managed to recover well both in the political and economic spheres. Today the country is among the world superpowers and has a major influence both political and economically.

Like many other countries in the world, Germany also subscribes to the principle of separation of powers and democracy. This principle is explicitly expressed in the Basic Law.¹⁵⁷ Kommers argues that "German constitution makers believed that they could secure liberty and avoid oppressive government by setting up a system of shared powers similar to constitutional arrangements in the United States, however, separation of powers in the

¹⁵³ *Ibid.*

¹⁵⁴ Article 54(2) of the Basic Law.

¹⁵⁵ Article 61.

¹⁵⁶ Article 60(4)

¹⁵⁷ Article 20 of the Basic Law makes the following provision:

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive and judicial organs.
- (3) Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice.

Federal Republic of Germany differs from the division of authority among the branches of the United States government".¹⁵⁸ The US follows the presidential system as opposed to the German's parliamentary system. The legislature chooses the head of government who is also responsible to the legislature;¹⁵⁹ and "federal ministers serve at the pleasure of the legislature".¹⁶⁰

Accordingly, this creates a unique way with less structural separation between the legislature and the executive. The judicial power is vested in the judges.¹⁶¹ Judges are free from any influence or interference from the executive and legislative organs. This provides significant structural and functional limits to the concentration of power as well as significant safeguards against arbitrary governmental action.¹⁶² The German structure of the principle is correlated to issues of federalism while in turn relating to "the federation's preeminence in the field of legislation and the states' preeminence in the field of public administration".¹⁶³ Because of this, "executive-legislative conflicts often resolve themselves into disputes between federal lawmakers and state bureaucracies"¹⁶⁴ which clarifies the principle of separation of powers. The executive branch is constituted by the Federal president as head of state and the Federal chancellor as head of cabinet and government. The legislative authority is vested in the legislature (*Bundestag*), elected directly through proportional representation¹⁶⁵ and the *Länder* through the *Bundesrat* in terms of their federal structure. The president, chancellor and the cabinet, *Bundestag* and the *Bundesrat* together with Federal Constitutional Court, are said to constitute the highest constitutional organs of the Federal Republic.¹⁶⁶ Kommers further indicates that "the constitutional court is *primus inter pares*"¹⁶⁷ among the other federal organs because it has the authority to define their institutional rights and duties when resolving conflicts between them".¹⁶⁸

¹⁵⁸ Kommers footnote 148 above at 115.

¹⁵⁹ *Id* at 116.

¹⁶⁰ Currie David P *The Constitution of the Federal Republic of Germany* (1994) at 103.

¹⁶¹ Article 92 of the Basic law provides that "judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the *Länder*".

¹⁶² Currie footnote 160 above at 104.

¹⁶³ Kommers footnote 148 above at 115.

¹⁶⁴ *Ibid.*

¹⁶⁵ Currie footnote 160 above at 105.

¹⁶⁶ Kommers footnote 148 above at 115.

¹⁶⁷ Latin word meaning "first among peers".

¹⁶⁸ Kommers footnote 148 above at 115.

2.5.2.4 Constitutionalism and Separation of Powers under the South African Constitution

Section (1) of the Constitution of the Republic of South Africa, 1996 provides that the Republic of South Africa is one, sovereign, democratic state founded on the following values:

- a) Human dignity, the achievement of equality and advancement of human rights and freedoms.
- b) Non-racialism and non-sexism.
- c) Supremacy of the constitution and the rule of law.
- d) Universal adult suffrage, a national common voter's roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

It is, among other things, this section in which the foundation of South Africa's democracy, constitutionalism, and the rule of law is laid. The South African Constitution is one of the best in the spurt of constitutions produced in Africa (or perhaps in the world) since the beginning of the 1990s.¹⁶⁹ However, the constitution did not come about without a struggle. In the words of Devenish,¹⁷⁰ the 1996 Constitution is a "product of compromise of which it's making involved significant and innovative compromises flowing from arduous and penetrating negotiations over a period of five years".¹⁷¹ South Africa's political struggle under minority rule (apartheid) was different from other struggles in other African states which degenerated into armed conflict that resulted in the loss of many lives.¹⁷² Although there was no direct war in the country, many activists and their families were tortured and murdered by "apartheid agents" and the "notorious security police of apartheid" in the country, or were compelled to flee into exile.¹⁷³ As the result of the past experience, there

¹⁶⁹ See the discussions above at 2.4.1.

¹⁷⁰ Devenish George E, an honorary research associate at the University of KwaZulu Natal. He researched and taught constitutional law in various South Africa's universities and was one of the Drafting Committee members of South Africa's Interim Constitution of 1993.

¹⁷¹ Devenish GE *The South African Constitution* (2005) at 431.

¹⁷² For instance other neighbouring countries like Mozambique, Angola and Zimbabwe were involved in bitter armed struggles for independence for many years.

¹⁷³ In the 1980s the so-called Vlakplaas unit, also known as C10 or C1 was formed by the apartheid government in South Africa under the commandery of Eugene de Kock and functioned as a paramilitary hit squad (police counterinsurgency) with the main object of capturing freedom fighters (ANC and PAC) and subsequently turning them against their comrades or killing them. During the Truth and Reconciliation Commission hearings some former members of the Vlakplaas made confessions as they sought pardon from the commission. On the 20th of April 1999 in the "Craig Duli Matter" one former member of Vlakplaas, Mr MD Ras, was examined by Mr Jansen who asked him to brief the TRC about the general operation and functioning of Vlakplaas, what they consisted of and so on. Mr Ras responded as follows –

"We worked on a national basis, covertly and overtly. Overtly it meant that a white group leader along with some of the ascaris, who were former ANC or PAC members would go to various parts of the country where the former members were used to identify ANC and PAC members who were in the country and such persons would

was considerable tension in the country which set a difficult platform for the parties negotiating a new transformative constitution. Compromise was the only way round these problems.

The Constitution is built on the strong foundation laid by the Interim Constitution and the 34 Constitutional Principles (CPs).¹⁷⁴ The constitutional principles established that South Africa shall be a sovereign state that subscribes to a democratic system of governance and is committed to achieving equality of all people without discrimination on the basis of sex, gender or race.¹⁷⁵ For the first time, human rights for all were recognized together with freedoms and civil liberties.¹⁷⁶ Most importantly, the principles provided that the constitution shall be the supreme law of the land and bind everyone – including organs of state at all levels of government.¹⁷⁷ In this approach the rule of law shall reign supreme and justice prevail in society.

The adoption of a new constitution meant the end to parliamentary sovereignty and gave birth to constitutional sovereignty. This also symbolized the new dawn of constitutionalism in South Africa. In other words, the idea of a limited government which means that every state action complies with the provisions of the Constitution was accomplished. The constitution embodies a code of values, principles and norms that are generally accepted by the society and respected by the state. Furthermore, unlike in the past where only minority groups (generally whites) were allowed to vote, the constitution now makes provision for a universal adult suffrage, regular elections, and a multi-party system of democratic government.¹⁷⁸ This could also be perceived to be in line with Henkin's argument that constitutionalism is based

then be arrested with the objective of using such persons for evidence in court against other former members as well as the recruitment of certain of such persons which meant that after the time they would come and work at Vlakplaas. The covert aspect involved cross-border operations where such members, such ANC or PAC members were killed in cross border situations".

In 1988 the former human rights and apartheid activists and later justice in the Constitutional Court of South Africa (1994-2009), Albie Sachs, was in exile in Mozambique and escaped death after secret agents of the apartheid government placed a bomb in his car in Maputo. As a result of the explosion he lost his arm and the sight in one eye.

Sources:<http://www.info.gov.za/speeches/1997/08050w13297.htm>; <http://www.sahistory.org.za/dated-event/vlakplaas-commander-testifies-harms-commission-about-secret-police-killings1981>; <http://www.thepresidency.gov.za/pebble.asp?relid=1485>; http://www.justice.gov.za/trc/amntrans/1999/99041521_el_990420el.htm

¹⁷⁴ The 34 constitutional principles were agreed upon by the participating parties and negotiators in order to ensure that the new constitution complied with them.

¹⁷⁵ Constitutional Principle I.

¹⁷⁶ Constitutional Principle II.

¹⁷⁷ Constitutional Principle IV.

¹⁷⁸ Section 1(d).

on popular sovereignty. People are afforded the opportunity to choose their own government thereby rendering it legitimate and reflecting the will of the people.¹⁷⁹

The principle of constitutionalism places an obligation on all branches of government (ie the legislature, executive and judiciary) and its representatives to carry out their functions and duties in a manner that demonstrates respect for the rule of law, human dignity, accountability, openness and in concordance, in the words of Finn, with “publicly articulated prospective rules that enable citizens to access the legitimacy and propriety of public policies”.¹⁸⁰ If a government is imposed on the people, it will not command respect and will never be legitimate.

Devenish argues that “a commitment to both reason in public affairs and to the protection and promotion of human dignity is indispensable to constitutionalism”.¹⁸¹ State officials are duty-bound to conduct themselves in a manner that is in line with the law of the country and does not compromise their eligibility to hold public office.

Another interesting constitutional principle worth mentioning is CP VI which provides that – there shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness. The principle of separation of powers is implied in the Constitution of the Republic of South Africa. It provides that the executive authority of the Republic is vested in the President who exercises it together with the other members of the cabinet.¹⁸² The legislative authority is vested in Parliament,¹⁸³ while the judicial authority is vested in the courts.¹⁸⁴ As custodian of the judicial branch of government, the courts are required to be independent and subject only to the constitution and the law which they must apply impartially and without fear, favour or prejudice.¹⁸⁵

¹⁷⁹ See footnote 78 above.

¹⁸⁰ Devenish footnote 171 above at 33; Finn JE *Constitutions in crisis: Political violence and the rule of law* (1991) at 37.

¹⁸¹ Devenish footnote 171 above at 34.

¹⁸² Section 85(1)(2).

¹⁸³ Section 43(a).

¹⁸⁴ Section 165(1).

¹⁸⁵ Section 165(2).

Nonetheless, the doctrine of separation of powers has been subject to a lot of criticism by politicians, lawyers and scholars across the globe, yet “it remains an integral part of the theory and philosophy of constitutionalism or limited government”.¹⁸⁶ Mathews raises an interesting argument when he refers to the doctrine of separation of powers as “a government (system) of separated institutions sharing power”.¹⁸⁷ All the three branches of government in South Africa are required to observe and adhere to the provisions of the constitution when exercising their powers and one branch should not encroach on or usurp the functions of another. Rather, the branches must maintain a healthy relationship and are expected to work in cooperation, though independently, with one another towards building a united, peaceful, prosperous and democratic country.

As indicated above (in the case of the US and Germany), one cannot single out a model of separation of powers, countries normally practice this principle in a manner that reflects their systems. In *In re: Certification of the Constitution of the Republic of South Africa*,¹⁸⁸ the Constitutional Court held that “as the separation of powers doctrine is not a fixed or rigid constitutional doctrine, it is given expression in many different forms and made subject to checks and balances of many kinds”.¹⁸⁹ The Constitutional Court declared that:

“There is, however, no universal model of separation of powers and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute. This is apparent from the objector’s own examples. While in the USA, France and the Netherlands members of the executive may not continue to be members of the legislature, this is not a requirement of the German system of separation of powers. Moreover, because of the different systems of checks and balances that exist in these countries, the relationship between the different branches of government differs from one country to another. The principle of separation of powers, on the one hand recognizes the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that constitutional order, as totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers:

¹⁸⁶ Devenish footnote 170 above at 11.

¹⁸⁷ Mathews is quoted by Devenish footnote above 170 at 11 from his book *The darker reaches of government* (1978). The phrase originally comes from Neustadt *Presidential power: The politics of leadership* (1960) at 33-37.

¹⁸⁸ 1996 10 BCLR 1253 (CC).

¹⁸⁹ Paragraph 111.

the scheme is always one of partial separation. In Justice Frankfurter's words, '[t]he areas are partly interacting, not wholly disjoined'.¹⁹⁰

Addressing the annual human rights lecture at Stellenbosch University, then Chief Justice Ngcobo indicated that the doctrine of separation of powers is still developing in South Africa and stressed that all three branches of government are required to cooperate with one another in upholding the constitution. It was necessary, he urged, "to move away from the perception that the courts were engaged in a tough battle with other levels of government".¹⁹¹ The South African system of separation of powers and checks and balances promotes both independence and interdependence of the three government branches. In his keynote address to the 3rd conference on Access to Justice in South Africa, organized by the judicial branch and attended by some members of the executive and legislature, the President, Zuma said:

"This is an affirmation of our constitutional value of cooperative governance, on which our model of separation of powers is premised. The separation of the three branches of the state forms a critical basis of our open and democratic society founded on equality and human dignity. Our greatest achievement as a new nation in the 1990s was the adoption of a constitution which enshrines human dignity, equality and the advancement of human rights and freedoms".¹⁹²

Although, since the first democratic elections and a new constitution, South Africa has been doing well "constitutionally speaking", there have been a lot of arguments from different structures in the country, including the ruling party itself (the ANC), alleging that "opposition forces are trying to use courts to co-govern";¹⁹³ oppositions;¹⁹⁴ civil society groups; lawyers,

¹⁹⁰ Paragraphs 108 and 109.

¹⁹¹ www.businessday.co.za Titled – "Ngcobo urges debate on power" (accessed 24/08/2011). (See also footnote 67 below.)

¹⁹² www.politicsweb.co.za (accessed 10/07/2011).

¹⁹³ President Zuma argued at the 3rd Conference on Access to Justice that opposition parties must not "use" courts in assisting them to co-govern with the ruling ANC Party. However, he emphasized that "the principle of separation of powers must reign supreme to enable the efficiency and integrity of the various arms of the state in executing their mandates" – www.politicsweb.co.za. Titled – Opposition forces trying to use courts to co-govern – Jacob Zuma (accessed 10/08/2011).

Adding to this issue, in an interview with the *Sowetaneditor*, the ANC Secretary General Gwede Mantashe reiterated the issue of opposition parties trying to use the courts to co-govern with the ruling party when he stated that "the judiciary needs to depoliticize itself" – www.sowetanlive.co.za. Titled – "Judiciary must be de-politicised" (accessed 20/08/2011).

Sincerely one must be worried when the President and the Secretary General of the powerful ruling party make public statements alleging encroachment by the judicial branch on the affairs of the other two branches of government as a result of opposition parties trying to co-govern with the ruling party. Does not this pose a threat to judicial independence? Is this not some of the things which contributed to the collapse of constitutions and the failure of constitutionalism in other African states? With the ANC policy of cadre deployment, does not this poses a threat to South Africa's young but symbolic democracy, considering the fact that the constitution gives the President of the country more powers in the appointment of heads of strategic institutions such as the National Director of Public Prosecution, the Chief Justice, Deputy Chief

scholars, researchers, commentators and the general public criticizing the ruling party and its government, and other arguments centering on issues of governance, the rule of law, and separation of powers.¹⁹⁵

The Constitution of South Africa protects freedom of expression which is important for a healthy democracy.¹⁹⁶ The arguments, debates and criticisms by the different structures mentioned above also form part of constitutional democracy. The failure or collapse of constitutions and constitutionalism in other countries is due to “silence” from opposition parties and other civil society groups while the law of the country is disregarded or flouted by the state.

As Devenish puts it, “the mere existence of a constitution, even if it contains an eloquent exposition of human rights, does not in itself suffice to ensure constitutionalism”.¹⁹⁷ There are many countries in Africa with constitutions, but just as many of these constitutions have failed to ensure the upholding of the principle of constitutionalism.¹⁹⁸ In his blog “Constitutionally Speaking”, Professor de Vos wrote:

“I think it is healthy for our democracy that people debate and argue and shout and scream when they disagree with one another – as long as they are also prepared to listen and to engage with the arguments of opponents and are prepared to reconsider the

Justice and other judicial officers? Only time will tell, but surely it is important to have the freedom of expression protected by the constitution as this affords different interested parties like, commentators, researchers, media, civil society groups and everyone to scrutinize government action as expected in a constitutional democracy.

¹⁹⁴ The official opposition party in South Africa, the Democratic Alliance (and other opposition parties) has on a number of occasions raised serious constitutional and governance issues (whether true or unfounded) against the ruling party (African National Congress). For example, issues of cadre deployment, appointment of the NDPP, heads of chapter 9 Institutions and so on. See www.politicsweb.co.za Titled – “The ANC and the judiciary – Helen Zille” (accessed 11/07/2011).

¹⁹⁵ Recently, while travelling by train from Johannesburg to Pretoria I encountered a group of some ten middle-aged, well-educated citizens discussing current politics in South Africa. They levelled criticism and blame at the current ruling party citing concern over proposals for a media tribunal, appointment of the NDPP and judicial officers, and the separation of powers and judicial independence. They felt that the government is rapidly diverting from its democratic roots and even claimed that the only difference between the current government and the apartheid government, is that the ANC was democratically elected. They nonetheless perceived it as applying many of the tactics used by its predecessor. Clearly no government can satisfy everyone – that is why we have opposition parties. One cannot, however, dispute the fact that ever since the ANC took over power it has committed itself to upholding the rule of law in line with the constitution of the country.

¹⁹⁶ Section 16.

¹⁹⁷ Devenish footnote 171 above at 34.

¹⁹⁸ One example is the Kingdom of Swaziland where there are allegations of suppression of freedom of speech by the state.

correctness of their own positions when necessary. In a constitutional democracy, no one should be above criticism".¹⁹⁹

Freedom of speech or expression is undoubtedly important in a democratic country. Free expression has the potential to contribute to accountability and openness in a democratic state. Citizens and civil society groups must be free to debate, criticize and scrutinize any matter of interest without fear of being persecuted by the government.

Recently, Choudhry referred to South Africa's current state of affairs as a dominant party democracy and indicated that "one of the pathologies of a dominant party democracy is the colonization of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them in webs of patronage".²⁰⁰ The ANC has dominated South Africa's politics as the ruling party since the first democratic elections in 1994 (now 17 years) and "with no sign of a credible electoral competitor on the horizon"²⁰¹ and, he argues, it will continue to dominate for the long time. This can only lead to a threat to the principle of constitutionalism and democracy. The fear about this type of dominance, as history has taught us in countries like our neighbour Zimbabwe, is 'comfort' of the dominating party which ends up resting on its laurels and deviating from the constitution to satisfy its own agenda and benefit political elites. The big question raised by Choudhry, and many other critics, is how South Africa's constitutional order will respond if (perhaps, when) it is threatened? Of course, only time will tell.

2.5.2.5 Constitutionalism and Separation of Powers in Zimbabwe

Zimbabwe has an interesting history on its way to independence from colonial domination.²⁰²

Upon independence in 1980, Zimbabwe adopted a new constitution which symbolized the

¹⁹⁹ <http://constitutionallyspeaking.co.za> 'On criticism, hysteria and empty rhetoric' (02/04/2008 by Pierre de Vos) (accessed 24/08/2011).

²⁰⁰ Choudhry Sujit "He had a mandate": The South African Constitutional Court and the African National Congress" (2009) 2 *Constitutional Court Review* at 3.

²⁰¹ *Ibid.*

²⁰² Zimbabwe was engaged in a liberation struggle with colonial rulers from 1965 to 1980. The people of Zimbabwe were tired of oppression and wanted change that would bring about democracy and economic opportunities for everyone. An excerpt taken from the site Zimbabwe Government Online reads: "The escalating cost of the war, the breakdown of civil administration, a collapsing economy, a failed Internal Settlement and increased pressure from allies all forced Smith to concede to the general elections that brought about majority rule. On the other hand, the nationalist leaders were also desperate to end a war that claimed thousands of lives in wanton bombings of refugees in neighbouring countries by the Rhodesian forces. The guerrilla armies were also confronted by strained logistics. Further to this, pressure from leaders of African countries, particularly the Frontline States, whose economies were also suffering the brunt of the war, also contributed to the nationalists conceding to unsatisfactory ceasefire arrangements

end of colonial rule and the dawn of democracy in the country. However, like many other constitutions of independence (in other African states), the Zimbabwean one was also “imposed upon it by the British (colonizer) during the 1979 Lancaster House Conference which eventually led to its independence”.²⁰³ In 1991 the eleventh Constitutional Amendment Act was passed in order to provide among other things “safeguards on the exercise of presidential power and to avoid unnecessary conflict and division between the various branches of government”.²⁰⁴ Zimbabwe was hopefully on the right track and had a vision of smartening up its constitutional order and was determined to be a leading example to other African countries.²⁰⁵

However, according to Makumbe, despite the several amendments to the constitution to date, “it (the constitution) remains essentially a non-Zimbabwean, colonial relic, which is a source of much political contention and dissatisfaction”.²⁰⁶ He further argues that “in a neo-colonial setting, political liberalization and democratic development cannot be realized before the people themselves write their own constitution i.e. a constitutional conference is a *sine qua non* for a meaningful democratic development in any liberalizing postcolonial society”.²⁰⁷ Currently Zimbabwe is in a process of adopting a new constitution to create a new constitutional order in the country and restore constitutionalism.

It has been more than a decade since the collapse of constitutionalism in Zimbabwe.²⁰⁸ The ZANU-PF has been at the helm of government since the country gained independence more than thirty years ago, with a single president in the person of Mugabe.²⁰⁹ What could possibly have been a turning point and eventually the collapse of the constitutional order to one of the promising democracies of the developing African continent?

whose effects continued to assail the new nation in the post-liberation war era. The war thus ended with the signing of the Lancaster House Agreement that resulted in national elections overwhelmingly won by Robert Mugabe’s ZANU (PF) party” available at http://www.gta.gov.zw/index.php?option=com_content&view=article&id=168&Itemid=188 (The History of Zimbabwe) (accessed 30/08/2011).

²⁰³ Hatchard John, “Constitution of Zimbabwe: Towards a model for Africa” (1991) 35 *Journal of African Law* 79.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ Sichone Owen *The state and constitutionalism in southern Africa* (1995). Article by John Makumbe titled “Electoral procedures and processes in Zimbabwe” at 65.

²⁰⁷ Makumbe *Ibid.*

²⁰⁸ See Matyszak in Malleson and Russell *Appointing judges in an age of judicial power* (2006) at 331-354.

²⁰⁹ President Mugabe has done everything to retain power, from allegations of election rigging to using the security forces to threaten opposition supporters.

Two issues are detected in the Zimbabwe situation which appears to be among the contributory factors to the collapse of constitutionalism in that country. As indicated earlier, Zimbabwe is currently in the process of adopting a new constitution. However, the country is currently run under the “flawed” constitution which they seek to replace. First, the “given or imposed” constitution, and later the amendments made to protect the president and his ruling party without legitimacy, could also be perceived as the root of the problem in Zimbabwe’s current constitutional and political affairs. Secondly, the issue of a one party dominance has proven to be a blow for Zimbabwe as shall be later substantiated.

The current Zimbabwe constitution has long been criticized. Makumbe points to, among other things, the powers given to the President to appoint some twenty percent of the MPs which, he argues, seriously undermines the efficacy of parliament as a public representative and a democratic institution.²¹⁰ The consequence is that because the President is the one who appoints them (the MPs), he can remove them at any time and as the result they are forced to be loyal and to put the interests of the President above those of the public. During debates and voting sessions such MPs cannot act autonomously, rather they are bound to stick with the person who appointed them. In other words, they are indirectly accountable to the President, something that is not good for democracy and constitutionalism.

The current embattled constitution, further, has a controversial clause which grants the President unreasonable immunity against any civil or criminal proceedings, consequently putting him above the law.²¹¹ The government of Zimbabwe and ZANU-PF under the leadership of President Mugabe has violated the law and human rights on many occasions. The President has in many regards failed to respect the principle of separation of powers which is crucial in every democracy. Makumbe makes a crucial point by arguing that:

“The fact that the Constitution mixes up the principles of separation of powers and that of fusion of powers results in Zimbabwe being neither a parliamentary nor a presidential democracy in the true sense of these terms. In essence, therefore, Zimbabwe cannot be safely argued to be a democracy at all”.²¹²

²¹⁰ Sichone Owen footnote 206 above at 67.

²¹¹ Section 30(1) provides that the President shall not, while in office, be personally liable to any civil or criminal proceedings whatsoever in any court. (Constitution of Zimbabwe as amended at 14 September 2005 up to and including Amendment no 17)].

²¹² Sichone Owen footnote 206 above at 68.

Although Section 3 declares the Constitution to be the supreme law of Zimbabwe,²¹³ in recent years, the constitutional order and the rule of law have collapsed in Zimbabwe due to the arrogance and interference, or rather disrespect by the President for the other branches of government. Dating back from the year 2000, Zimbabwe's situation (politically, lawfully and economically) has been very tense. The issue of land invasion contributed to lawlessness and a swift collapse of the economy in Zimbabwe.²¹⁴ Although the governing ZANU-PF and the President (Mugabe) put the blame on the imposed "sanctions" by the "Western" countries, it is clear that poor governance and the disregard of the rule of law have led to the escalating political and economic problems of Zimbabwe.

The coming into being of the main opposition, the Movement for Democratic Change (MDC)²¹⁵ in the political facet of Zimbabwe was perceived as a threat by the ruling party which for many years has been sitting comfortably at the helm of government. Many observers argue that Mugabe and his ZANU-PF have never afforded space for opposition parties in Zimbabwe and have for many years tried to keep things that way by every means.²¹⁶ After independence Mugabe embarked on a mission to consolidate the opposition into his party in order to protect his dominance.²¹⁷

²¹³ Section 3 provides that – "this Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency be void".

²¹⁴ When his support started waning, Mugabe swiftly came up with a strategy to buy back loyalty from his people by implementing a controversial land reform plan that brought Zimbabwe's economy to its knees. Led by war veterans, the plan saw farms, farmers and farm workers being attacked, raped, and murdered and homes and other properties burned and destroyed. The police could not protect the victims citing a lack of resources and that this was a political problem that needed a political solution. Taylor Ian and Williams Paul "The limits of engagement: British foreign policy and crisis in Zimbabwe" (2002) 78/3 *International Affairs* (Royal Institute of International Affairs 1944- at 549-550 available at <http://www.jstor.org/stable/3095890?seq=4> (accessed 16/09/2011); Williamson Jeremiah I "Seeking civilian control: Rule of law, democracy, and civil-military relations in Zimbabwe [notes]" (2010) 17/2 *Indiana Journal of Global Legal Studies* at 393.

²¹⁵ The MDC was formed in 1999 by some people of Zimbabwe who were dissatisfied with the way in which the ZANU-PF were running the country. On its website the party indicates that "the MDC was formed on the basis of carrying on the struggle of the people; the struggle for food and jobs; peace; dignity; decency and democracy; equal distribution of resources and justice; transparency and equality of all Zimbabweans" available at <http://www.mdc.co.zw/index.php/our-party/our-history.html>(accessed 16/09/2011).

According to the CRS Report "many domestic and international observers assert that elections since 2000 have fallen short of democratic standards" – "Zimbabwe: 2008 elections and implications for US Policy" (May 2008) – Lauren Ploch Analyst in African Affairs, Foreign Affairs, Defense, and Trade Division.

²¹⁶ Williamson points out that after independence, Mugabe immediately "unleashed a campaign of political terror to force the opposition ZAPU party to surrender its prerogatives to ZANU-PF". He (Mugabe) is reported to also have personally sponsored the deployment of the famous "North Korean Fifth Brigade" which killed and tortured thousands of Zimbabweans who were against being incorporated to the ZANU-PF. See Williamson JI "Seeking civilian control: Rule of law, democracy, and civil-military relations in Zimbabwe [notes]" (2010) 17/2 *Indiana Journal of Global Legal Studies* at 392-393.

²¹⁷ Hatchard John "Constitution of Zimbabwe: Towards a model for Africa" (1991) 35 *Journal of African Law* at 81.

The pre- and post-2008 presidential and parliamentary elections were masked by violence which left many people dead, injured, raped, assaulted and traumatized.²¹⁸ The election results (2008) took more than a month to be released. These were the elections in which the ZANU-PF faced the toughest opposition since they took power in 1980 and such opposition was a big threat to the supporters of the ruling party.²¹⁹ With almost half the seats of parliament having gone to MDC in the 2000 elections, ZANU-PF was very alert that the elections could go either way. Many people were tired of oppression, unemployment and poor economic conditions. They wanted change and the only hope for the ruling party was to use violence to threaten people and at least divert attention from the opposition.

When the results were later released, for the first time an opposition (MDC) had won a majority of seats over the ZANU-PF. However, neither the ZANU-PF nor the MDC presidential candidates won an outright majority in order to become President and therefore a run-off had to be held in order to determine the winner.²²⁰ Many people thought that this was the end of Mugabe, but he continued with his plan of intimidating the supporters of the opposition. People were beaten and murdered. Tsvangirai received different kinds of advice on the violence to his supporters and eventually withdrew from the second round which handed Mugabe what he wanted – i.e. an opportunity to steal the elections and reclaim power.²²¹

The tensions between the MDC and ZANU-PF continued after the second round which declared Mugabe President. The MDC declared the results of the run-off void and they were not prepared to work with Mugabe and the ZANU-PF after the violent elections. There was no way forward and the country was on its knees. A speedy compromise had to be reached to salvage the already sunk ship. After months of lengthy negotiations headed by then South African President, Thabo Mbeki, a compromise was brokered, and this gave birth to a

²¹⁸ See “Electing to rape: Sexual terror in Mugabe’s Zimbabwe” a Report by AIDS-Free World, New York (2009) available at www.aidsfreeworld.org/Publications-Multimedia/Reports.aspx (accessed 17/09/2011).

²¹⁹ The MDC first participated in the 2000 elections and obtained 57 of the 120 parliamentary seats with the remaining 63 having gone to ZANU-PF. With the collapse of the economy many people wanted change during the 2008 elections and ZANU-PF was aware that the MDC might pull a surprise in the polls.

²²⁰ See <http://www.independent.co.uk/news/world/africa/tsvngirai-wins-47-in-zimbabwe-election-say-sources-818531.html> titled “Tsvangirai wins 47% in Zimbabwe election, say sources” (accessed 17/09/2011).

²²¹ Initially, the election results were not released for over a month. The MDC approached the High Court in an attempt to force the official release of the results but was unsuccessful. It can be argued that this was Mugabe’s strategy to seek ways to remain in office as indeed later happened.

Government of National Unity (GNU) in February 2009 based on the Global Political Agreement (GPA).²²²

It has been over two years since the GNU was put in place. There have been ups and downs with the fear that it might collapse at any time because of the continuing misunderstandings and tension between the President (Mugabe) and the Prime Minister (Tsvangirai). Part of the agreement was that a new constitution reflecting the will of Zimbabweans would be drafted and adopted to guide the country into fresh democratic elections. The process has been moving slowly with different reports citing lack of funds and delaying tactics by Mugabe.

Whether the solution to Zimbabwe's political problems will be found and if found, when, remains a mystery. Only time will tell. Some reports claim that the ZANU-PF and its War Veterans are of the opinion that no person who did not fight in the 1970s war of independence shall hold the highest office in the country. In December 2010 the Sowetan Newspaper reported the following:

"Mugabe's defence minister, Emmerson Munangagwa, told voters: 'In the last elections you voted for the wrong party. If you don't vote for us in the next election, we will rule, even if you don't want'. Zanu (PF) has already started deploying its violent militia in rural areas to re-establish previous patterns of brutal intimidation".²²³

It appears that there is still some way to go before democracy; the rule of law and constitutionalism can be restored in Mugabe's Zimbabwe unless the other countries put necessary pressure and both international and regional organizations such as the UN, SADC and others, take drastic steps to correct the wrongs of Zimbabwe.

²²² See "Zimbabwe: GNU: The successes and failures" (Nkomo, Dumisani) – Southern African Legal Assistance Network. Available at <http://www.salan.org/news/zimbabwe-gnu-the-successes-and-failures> (accessed 17/09/ 2011).

Chigora Percyslage and GuzuraTobias "The politics of the Government of National Unity (GNU) and power sharing in Zimbabwe: Challenges and prospects for democracy" (2011) 3/2 *African Journal of History and Culture* at 20-26. Also available at <http://www.academicjournals.org/AJHC/>.

²²³ See "Is poll Mugabe's achilles heel?" available at <http://www.sowetanlive.co.za/news/2010/12/13/is-poll-mugabe-s-achilles-heel> (accessed 17/09/2011).

2.5.2.6 Constitutionalism and the Doctrine of Separation of Powers in Kenya

2.5.2.6.1 Kenya from Independence (1963)

Kenya was a British colony until it gained independence in 1963. The Lancaster House Constitutional Conferences were held in London in 1960 and 1962, and in Nairobi in 1963 in order to negotiate an independence constitution of Kenya²²⁴ and transition of power from colonial masters to Kenyans. Like all other British colonies, Kenya had its constitution imposed on it by the British. However, Kibala argues “it was a fairly progressive liberal democratic constitution from the departing colonialists”.²²⁵ Though it was an imposed document, the constitution²²⁶ at least included some important provisions which indicated various components of constitutionalism such as checks on executive power, the protection of fundamental rights and freedoms of the individual,²²⁷ the Judicature and the Judicial Service Commission,²²⁸ and so on.

The colonialists had spent some time negotiating with, as well as affording the people of Kenya an opportunity to prepare themselves for taking over.²²⁹ Various political parties emerged in preparation for the Kenyan General Elections of 1963.²³⁰ However, issues of tribalism or ethnicity manifested which threatened the whole process, but the situation calmed and the elections were finally delivered with the Kenya African National Union

²²⁴ “Kenya: Key historical and constitutional developments” available on the ‘Eastern African Centre for Constitutional Development’ site –www.kituochakatiba.org(accessed 20/09/2011).

²²⁵ Gichira Kibala “The state of constitutionalism in Kenya, 2003” at 1 available at http://www.kituochakatiba.org/index2.php?option=com_docman&task=doc_view&gid=21&Itemid=36(accessed 20/09/2011).

²²⁶ 1963 Kenya Constitution (Independence Constitution).

²²⁷ Chapter II made provision for the protection of fundamental rights and freedom of the individual. Part of Section 14 read: “whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely: (a) life, liberty, security of the person, and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and”.

²²⁸ Chapter x (the Judicature), under section 171 (1) provided as follows: “There shall be a Supreme Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this constitution or any other law”.

Furthermore Section 184(1) made provision that – “There shall be a Judicial Service Commission ... ”, of which in carrying out its functions in line with the constitution shall not be subject to any direction or control of any other person (2).

²²⁹ See <http://www.britannica.com/EBchecked/topic/315155/Kenya-African-National-Union-KANU>.

²³⁰ Sanger Clyde and Nottingham John “The Kenya general elections of 1963” (1964) 2/1 *The Journal of Modern African Studies* at 1-40.

(KANU) obtaining a majority of seats, followed by the Kenya Democratic Party (KADU) and lastly, the African People's Party (APP) in the House of Representatives.²³¹

Jomo Kenyatta, the leader of KANU, became Prime Minister and after 1964 he was President until his death in 1978. As indicated above, the constitution contained clauses that represented some elements of constitutionalism but this did not guarantee constitutionalism in Kenya in the following years, as will be unfolded. Like many other African leaders who assumed power after independence, Kenyatta also tried his best to keep opposition parties out of the equation by banning them or rendering them ineffective.²³²

Kibala gives an interesting picture of how the situation swiftly diverted from the constitutional order:

“Almost immediately after independence the ruling party began to dismantle the elaborate checks placed on executive power. This was done by, first and foremost, undermining the political opposition and ultimately forcing the official opposition party to fold up and join the government to create a *de facto* one party state. In tandem with the decimation of political opposition, was the enactment, repeal and/or amendment of several provisions of the constitution all calculated to amass power on the executive, particularly the presidency, and the removal of effective powers of the judiciary and parliament to hold the executive in check.”²³³

One can argue without doubt that the issue of imposed constitutions by colonial masters has been a thorn in flesh for African countries, irrespective of how well structured the constitution was. Tribalism, too, has destroyed hopes of democracy, not only in Kenya but in many African countries and still poses a threat and a source of conflict on the continent. The colonizers contributed to this epidemic by disregarding this issue during their occupation. Perhaps another point is that, because they never practiced democracy during the period of colonization and only defended the interests and rights of other white settlers, Africans were grouped in their various tribes and those who were observing, and eventually took charge, inherited authoritarianism and could not really see the value of a constitution that would limit their powers.

²³¹ *Id* at 35.

²³² Miller Norman and Yeager Rodger *Kenya: The quest for prosperity* (1984) at 38-39.
See also “Kenya African National Union (KANU)” – article from the Encyclopedia Britannica available at <http://www.britannica.com/EBchecked/topic/315155/Kenya-African-National-Union-KANU>(accessed 22/09/2011).

²³³ See footnote 225 above at 1 (Kibala Gichira “The state of constitutionalism in Kenya 2003”).

Kenyatta was accused by other tribes of putting his people (the Kikuyu) first when distributing economic resources, which they dubbed “Kikuyization of the civil service”.²³⁴ Political players opposed to KANU holding public meetings without permit were arrested and detained.²³⁵ As time passed, nepotism and bribery became the order of the day under Kenyatta’s administration.²³⁶

2.5.2.6.2 The Period 1978 to 1991

After the death of Kenyatta in 1978, Daniel arap Moi who was Deputy President took over as President of Kenya.²³⁷ Upon taking office, Moi committed himself to bringing unity and stability in Kenya by ending political factionalism and corruption.²³⁸ But soon after, he was accused of wasting no time in following in the footsteps of Kenyatta by enforcing oppression and destruction of opposition.²³⁹ In 1982 Moi with his ruling KANU party added a clause to the constitution which turned the *de facto* one party state into a *de jure* one party state in order to guarantee that dissidents could not form or register an opposition party.²⁴⁰ This proved the lack of commitment to and ignorance of the rule of law and the principle of constitutionalism by Moi and the KANU party.

Moi’s tenure was characterized by tension, hostility, corruption, beatings, detention, coercion and other forms of violence.²⁴¹ Many people lived in fear for their lives despite the constitution which made provision for the protection of fundamental rights. However, the State did not respect the rule of law. In 1982 there was a failed coup against Moi’s regime.²⁴² The fact that constitutionalism was fading in Kenya was evident through some constitutional

²³⁴ Miller and Yeager footnote 232 above at 39.

²³⁵ *Ibid.*

²³⁶ *Id* at 45.

²³⁷ See <http://www.britannica.com/EBchecked/topic/387733/Daniel-arap-Moi> (accessed 22/09/2011).

²³⁸ Miller and Yeager footnote 232 above at 98-100.

²³⁹ See Hornsby Charles *Kenya: A history since independence* (2012) at 347.

²⁴⁰ See Badejo Babafemi A *Raila Odinga: An enigma in Kenyan politics* (2006) at 90. In the review of David Throup’s book *Multi-party politics in Kenya*, Imbo points out that: “From the earliest days of his presidency, Moi and his ruling party KANU were opposed to a multi-party democracy. They used every means at their disposal to derail the formation and registration of opposition parties – detention without trial, the provincial administration, the registrar of societies, the attorney-general and courts of laws, even the police and hired KANU youth wingers”. Imbo Samuel Oluoch, Department of Philosophy, Hamline University *African Studies Quarterly: The Online Journal for African studies* available at <http://www.africa.ufl.edu/asq/v2/v2i4a11.htm> (accessed 24/09/2011).

²⁴¹ Miller and Yeager footnote 232 above at 98-116.

²⁴² *Id* at 101. See also “How heroic trio of fighter pilots scuttled mission to bomb State House and GSU” Roy Gachuhi available at <http://www.nation.co.ke/News/-/1056/821148/-/item/0/-/sr2sg0//index.html> (accessed 22/09/2011).

amendments such as the Sixth Amendment that gave the office of the President powers to detain Kenyan citizens without trial.²⁴³

One thing that autocratic leaders have in common is that they are always aware that in order to retain power you need to eliminate opposition by every means. Mostly, such people are preoccupied with power that will give them and their allies' access to resources. They are always aware that allowing opposition (checks and accountability) will mean limited access to resources. Most of them accumulate considerable wealth while in power and are surrounded by advisors and allies who protect them while in turn getting a share of state resources.²⁴⁴

Towards the 1990s pressure was mounting on President Moi. The economy was perceived as having been politicized. Opponents argued that he was interfering and influenced the appointment of his close associates to key economic positions.²⁴⁵ In early 1990 he is reported to have publicly condemned the idea of a multi-party system – while other African states opened up to the system, he referred to it as a manifestation of Western cultural imperialism.²⁴⁶ In 1991 international pressure was increasing. Foreign donors withheld aid. He was left with no choice and eventually submitted to a multi-party system.

²⁴³ Miller and Yeager footnote 232 above at 67.

²⁴⁴ Most African dictators such as Denis Sassou Nguesso of the Republic of Congo; Ali Bongo of Gabon; Robert Mugabe of Zimbabwe; Muammar Gaddafi of Libya; Mobutu Sese Seko of ex-Zaire; Obiang Nguema Mbasongo of Equatorial Guinea; Daniel Moi of Kenya are/were wealthy and own luxury properties, have/had fat accounts overseas while the people they are/were leading suffer in poverty every day.

See Allen Peter “UK ‘helps dictators buy Paris homes’: African leaders accused of stealing millions in aid” available at <http://www.dailymail.co.uk/news/article-2019890/Billions-aid-Britain-used-fund-lavish-life-style-dictators.html> (accessed 22/09/2011).

See also http://www.transparency.org/news_room/latest_news/press_releases_nc/2010/2010_11_9_paris and “The Scourge of African Tyrants” at <http://www.sowetanlive.co.za/columnists/2011/09/22/the-scourge-of-african-tyrants>; “The looting of Kenya” available at <http://www.guardian.co.uk/world/2007/aug/31/kenya.topstories3> (accessed 22/09/2011).

Kiage argues as follows: “Moi in particular metamorphosed from being a hesitant head of state to a dyed in the wool autocrat whose ruthless crack down on political dissent was near legend. Human rights were routinely violated and corruption became so rampant a part of the socioeconomic fabric that the Moi regime was viewed as one that would do anything in order to be able to continue to plunder the country’s resources while unflattering parallels were made between Moi and Mobutu, the late Zairean arch-thief and the two, jointly and severally referred to as ‘Moibutu’.” Kiage Patrick “Prosecutions: A panacea for Kenya’s past atrocities” (2004) ½ *East African Journal of Human Rights and Democracy* at 105.

²⁴⁵ Miller and Yeager footnote 232 above at 179.

²⁴⁶ *Id* at 215.

2.5.2.6.3 The influence of Elections on Constitutionalism and Separation of Powers in Kenya

The way in which elections and the banning and unbanning of political parties, as it will be discussed, has had an impact on the development of constitutionalism and on the practice of the doctrine of separation of powers in Kenya.

2.5.2.6.3.1 Multi-Party Elections

“Multi-party politics in Kenya is after all a story of murder, mayhem, gerrymandering, financial scandals, election rigging, unprincipled calculations of tribal and self-interest, defections, political resurrections and reincarnations”²⁴⁷ After the unbanning of political parties in 1991, multi-party elections were held in 1992. Since the unbanning of opposition parties in 1991 four multi-party general elections were held in Kenya up to 2007.²⁴⁸

2.5.2.6.3.2 1992 Elections

As expected, several newly formed political parties participated in the first multi-party elections (1992) since independence in a quest to unseat the long serving Moi and his KANU. As is the case with most African states,²⁴⁹ the pre-election period was allegedly rocked by violence.²⁵⁰ Moi and his KANU, however, managed to retain power and it was to be another long five years of waiting to try and challenge them in the 1997 elections.

2.5.2.6.3.3 1997 Elections

Although generally there were improvements compared to the 1992 elections, the 1997 elections did not meet the general standards of free and fair elections as promoted by the international community.²⁵¹ Violence and irregularities occurred. In the words of Mwangi Kagwanja – “the road to the 1997 general elections was a dangerous minefield of vigilante

²⁴⁷ <http://www.africa.ufl.edu/asq/v2/v2i4a11>.

²⁴⁸ 1992, 1997, 2002 and 2007 general elections.

²⁴⁹ It has become a habit in many African countries that the period prior or during or immediately after the elections is barraged by violence. This has been always the case for instance in Nigeria, Zambia, Zimbabwe and DRC to mention a few. In some instances you find supporters of different political parties intimidating or killing each other. Sometimes there is no tolerance as some places are no-go zones if you belong to a rival political party.

²⁵⁰ “The run-up to this poll was marked by accusations and counter-accusations between the main parties and wide-scale intimidation and harassment of opposition candidates against a background of ethnic violence and economic crisis (probably the worst in the country’s post-independence history)” – “Elections held in 1992” available at http://www.ipu.org/parline-e/reports/arc/2167_92.htm(accessed 24/09/2011).

²⁵¹ Rutten Marcel *et al Out for the count: The 1997 general elections and prospects for democracy in Kenya* (2001) at 72-97.

violence”.²⁵² The state was accused of inciting and sponsoring violence against the supporters of opposition parties in an effort to intimidate them and thereby hold on to power.

It was well known that KANU and Moi had never been proponents of a multi-party system. The only time when they welcomed it was when they had no option but to compromise in the face of mounting pressure in 1991. Although Moi ended up giving-in to the idea of multi-party elections, opposition parties and those who did not support him were treated with contempt. The government was alleged to have supported vigilantism.²⁵³

One way of realizing democracy is through elections. Citizens are afforded an opportunity to vote for whomever they believe can deliver them from oppression, poverty and under-development. Although there was violence and the Electoral Commission of Kenya (ECK) was accused of incompetence and bias, the 1997 elections went ahead with different political parties participating. At least there was an increase in the number of voters and observers from both local and the international community. Yet again, Moi and his KANU manage to salvage victory though it was a hung parliament as KANU failed to obtain a clear majority to enable it to be in control.²⁵⁴

2.5.2.6.3.4 2002 Elections

Unlike the 1992 and 1997 elections, the 2002 elections were reported to be much better and indicated democratic processes. Some observers concluded that the government of Kenya and the ECK administered a fair and transparent election.²⁵⁵ Several constitutional review processes took place regarding the elections with various civil society groups, opposition parties and the government engaging to find ways of improving democracy in Kenya. This enabling environment was a turning point to the traditional politics of Kenya since its independence in 1963.

²⁵² *Id* at 72.

²⁵³ Kagwanja argues that “vigilante groups in Kenya were sponsored by the state to stem the tide of the multi-party challenge and to help sustain the hegemonic elite of the one party era in power”. He further points out that “at times security forces provided training, protection and worked hand in hand with ethnic vigilantes during attacks” (*id* at 72-73).

²⁵⁴ Cowen Michael and Laakso Liisa *Multi-party elections in Africa* (2002) at 128.

²⁵⁵ The Carter Center: Observing the 2002 Kenya Elections (2003) Final Report at 8.

The run-up to the 2002 elections is said to have been more peaceful than that of the previous two elections (1992 and 1997) since the multi-party system was reinstated.²⁵⁶ This round, Moi was retiring and he had put Uhuru Kenyatta, the son of Jomo Kenyatta, as the presidential candidate for KANU and he (Uhuru) was facing a major challenge from the newly formed National Rainbow Coalition (NARC) led by Mwai Kibaki. Kibaki defeated Kenyatta to become President and power was transferred in a peaceful democratic fashion.

Bakari gives an interesting summary of the 2002 Kenyan elections and what eventually led to the fall of KANU – a party that had dominated Kenyan politics for four decades amid abuse of human rights, corruption and undemocratic governance. Perhaps this is a lesson that other African countries faced with a similar challenge should consider in future. He argues as follows:

“The emergence of a new generation of leaders with better education, sophistication, and idealism made it possible to not only challenge the old order, but also gradually undermine its claim to legitimacy. The fact that corruption, blatant abuse of human rights, divisive ethnic politics had been ingrained in the Kenyan body politic did not help matters for the ruling elite. They had almost completely lost credibility as a group, to turn things round. But ultimately, the decision on the part of the fragmented opposition to close ranks and work toward the defeat of KANU paid dividends in the end. The classic Machiavellian politics played by the previous regimes seem have no place in the new dispensation.”²⁵⁷

The time for which many people had waited had finally dawned. The monster (KANU) which had been a thorn in the flesh of Kenyans for many years was defeated. Now it was time to restore constitutionalism and ensure prosperity and peaceful governance. According to Khalid and Akivaga, the majority of Kenyans perceived the 2002 elections as the “re-birth of a new democratic culture for their country and believed that their government will respond to their grievances and treat them with dignity and respect human rights”.²⁵⁸

2.5.2.6.3.5 2007 Elections

The 2004 Kenya Report on “Democracy and Democratic Culture” warned of the vulnerability of democracy and identified, among other challenges, the “problem of impunity and the

²⁵⁶ *Id* at 10.

²⁵⁷ Bakari Mohamed “Kenyan election 2002: The end of Machiavellian politics?” (2002) 1/4 *Alternatives: Turkish Journal of International Relations* at 289.

²⁵⁸ Akivaga SK *et al* *A democratic landmark?: Character of the 2002 general elections* (2003) at 182.

ineffectual state capacity to implement and enforce the law”.²⁵⁹ Ineffectual state capacity to enforce the law always opens a floodgate of problems as will later be discussed with regard to the violence that erupted after the 2007 elections. The 2002 elections brought hope and progress in Kenya, and so far appears to be a “milestone” in the country’s political and constitutional reforms.

2.5.2.7 Constitutionalism and Separation of Powers in Swaziland

Like the three other African countries discussed above, Swaziland was also a colony of Britain. It attained its independence from Britain in 1968 and like most British colonies “had a Westminster Constitution similar to that which the British had bequeathed to most of its former African colonies”.²⁶⁰ As it was the case with most African countries since the beginning of the 1990s, it can be argued that the people of Swaziland also felt the need for a new constitution that would reign supreme and bring about constitutionalism and democracy. In 2006 Swaziland adopted a new constitution which declared the country a democratic Kingdom and made it clear that the Constitution is the supreme law of the Kingdom and nullifies any law or conduct which might be inconsistent with it. However, it can be argued, based on the continuing “crisis”²⁶¹ which had rocked the country, that, the new Constitution has so far yet to represent constitutionalism in Swaziland. Fombad had rightfully argued that although the Constitution has been accepted as the supreme law of the land it has “a split personality and is in many respects a parody of contradiction: a good number of legally and socially progressive and liberal ideas co-exist with numerous legally and politically conservative ideas that can hardly be reconciled with either modern constitutionalism and democracy”.²⁶²

The principle of separation of powers is expressed under Chapters VI, VII and VII which makes provision for and divides the three branches of government into the executive, legislature and the judiciary. Beside these provisions the King is professed to possess more powers which enable him to encroach in all the three branches thereby disregarding the rule

²⁵⁹ Kenya Report 2004 “Democracy and democratic culture in East Africa – Kenya” (2004) 2/4 *East African Journal of Human Rights and Democracy* 9.

²⁶⁰ Fombad CM “The Swaziland Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?” (2007) 23 *S Afr J on Hum Rts* at 93.

²⁶¹ See 4.2.5 ‘Judicial crisis’ below.

²⁶² See footnote 260 above at 94.

of law in the country. Section 11 of the Constitution exacerbates the situation by making a controversial provision which in any case vindicates the King from legal proceedings.²⁶³

2.5.3 A Comparative Assessment of Constitutionalism and Democracy in Western and African Countries

When we compare the political, economic, and social affairs of Western countries with those of their African counterparts', many differences emerge. For example, some African countries rely largely on foreign aid to fund government activities. Elections are generally peaceful in the West as opposed to threats and violence in most African states. Western countries are more stable. Although not perfect, they are united and adhere to the rule of law. For instance, an organization like the European Union (EU) is principled and always takes the lead in directing the affairs of its member states. There were many wars in Europe up to 1945 (the end of WW II) but since then Europeans have managed to unite, and to deal better with conflicts (as compared to their African counterparts), which have a potential to halt peace and development efforts in every country.²⁶⁴

The principle of constitutionalism, if properly followed, unleashes the rule of law and democracy in every environment. Today it can be argued that most Western countries have provided an enabling environment for constitutionalism to blossom in their countries in contrast to African nations.²⁶⁵ Governance should not be seen as a ticket to wealth and dominance, as has been the case in most African countries. However, the problems of Africa cannot be laid solely at the door of Africans who have failed their countries. Some Western countries are responsible for influencing and supporting rebels and/or despots in Africa for as long as they continue to gain economic benefits.

The African Union (AU) on the other side, has failed to stamp its authority on its member states. In most countries people suffer and die because of a few individuals who battle for

²⁶³ Section 11 provides that the King and *iNgwenyama* shall be immune from –
(a) suit or legal process in any cause in respect of all things done or omitted to be done by him; and
(b) being summoned to appear as a witness in any civil or criminal proceedings.

²⁶⁴ Although Europe had its own challenges which resulted in the outbreak of the first and second world wars, which later led to the division of Germany into East and West, it could be argued that the European continent has since recovered and improved and member states are able to have peaceful elections and their state of economy is better compared to their counterparts in Africa. For example, today Germany's economy is one of the strongest not only in Europe but in the world.

²⁶⁵ See Olusegun Obasanjo 'Foreword' in Deng Francis M *et al* *Identity, diversity, and constitutionalism in Africa* (2008) at ix-xii.

power.²⁶⁶ The AU Constitutive Act²⁶⁷ makes provision for the non-recognition of a government that come to power by unconstitutional means, yet they fail to solve political conflicts in most of the states until violence erupts.²⁶⁸ The Heads of States meet regularly to discuss African problems, yet they seldom come up with a solution. If the so-called Western “super powers” endorse rebels (as it was recently the case in Libya)²⁶⁹ the very same African Union which initially had a different opinion in resolving the matter will follow and endorse the victorious rebels sponsored by some Western countries in disregard of Article 4²⁷⁰ of the Constitutive Act.

2.5.4 Africa and the Rule of Law

2.5.4.1 Explaining the Rule of Law

There is no specific definition of the rule of law. However, one interesting description of the rule of law in the 21st century is by the founder of the World Justice Project, William Neukom, who describes the rule of law as follows:

“The rule of law is the foundation for communities of opportunity and equity – it is the predicate for the eradication of poverty, violence, corruption, pandemics, and other threats to civil society”.²⁷¹

The World Justice Project (WJP) Rule of Law Index 2010 defines the rule of law as a rules-based system in which the following four universal principles are upheld:

- “The government and its officials and agents are accountable under the law;
- The laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property;

²⁶⁶ For example, recently in Ivory Coast people died because of the battle between Gbagbo and Outtara.

²⁶⁷ AU Constitutive Act, 2000.

²⁶⁸ Zimbabwe, Kenya, Libya, Ivory Coast, to mention a few.

²⁶⁹ For example, NATO assisted the rebels in fighting and toppling the government of Gadhafi in Libya, although the AU was against the involvement of NATO as it violated the provision of article 4(e), (f) and (p) of the Constitutive Act, most states have welcomed the change in Libya so disregarding the Act.

²⁷⁰ Article 4 provides among other principles, that the Union shall function in accordance with the following principles –

- (e) peaceful resolution of conflicts among Members States of the Union through such appropriate means as may be decided upon by the Assembly
- (f) Prohibition of the use of force or threat to use force among Member States of the Union
- (p) Condemnation and rejection of unconstitutional changes.

²⁷¹ See Agrast MD, Botero JC and Ponce A *The World Justice Project. Rule of Law Index (2010)* World Justice Project at 1.

- The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient;
- Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.”²⁷²

It is trite that most African states hardly meet the components mentioned above in the definition by the WJP and accompanying principles of the rule of law. Most countries on the continent have been characterized by corruption, violence, lack of justice, unlimited government powers, lack of accountability, a controlled judiciary, and other undemocratic activities.²⁷³ It is the disregard of this rule of law by some African leaders that has been a recipe for problems and anarchy in African states for many years. If the rule of law is adhered to, good governance can be achieved and democracy realized.

Article 4 of the AU Constitutive Act provides, among other things, that the Union shall function in accordance with the following principles:

“(m) Respect for democratic principles, human rights, the rule of law and good governance”.

The preamble to the African Charter on Democracy, Elections and Governance points out that AU member states have reaffirmed to work relentlessly and collectively to deepen and consolidate the rule of law, peace, security and development in Africa.

However, as was argued in the previous chapter, so far the African declarations and the Constitutive Act have not achieved the desired goal of creating a prosperous continent where the rule of law reigns supreme. The very same leaders who participate in making these treaties, go back to their countries to violate human rights and disregard the rule of law and as “sovereign states”, nothing can be done by the AU to effectively prevent such power abuses. Perhaps it is time the concept of state sovereignty in Africa is reexamined against the powers of AU in order to enable it to deal with the challenges that most countries face.

²⁷² *Id* at 2.

²⁷³ See, eg, countries like Kenya, Zimbabwe and Swaziland as discussed above.

An interesting lesson for African leaders could be extracted from the US Justice Brandeis in *Myers v United States*.²⁷⁴ According to Korn, Justice Brandeis “expected the constitutional system to ‘fit its rulers for their task’ demanding from them ‘in the main, education and character’, so that they would best fulfill the various responsibilities of governing”.²⁷⁵ It is very important for leaders to be educated and to understand the responsibility that comes with holding public office.

At the OAU Meeting of Heads of State and Government in Tunisia, 1994, then South African President and world political icon, Nelson Mandela, said:

“We must face the matter squarely that where there is something wrong in how we govern ourselves, it must be said that the fault is not in our stars but in ourselves. We know that we have it in ourselves, as Africans, to change all this. We must assert our will to do so – we must say that there is no obstacle big enough to stop us from bringing about an African renaissance”.²⁷⁶

This type of statement shows Mandela’s selfless attitude as a leader and the understanding that leadership is not about self-fulfillment and domination of others. Leaders must learn to respect the rule of law and understand what the principles of separation of powers and constitutionalism seek to achieve under democracy.

2.5.4.2 The African Peer Review Mechanism (ARPM) and the rule of law in Africa

The political, economic and social spheres form the backbone of every state. Also, these spheres are bound to interact with one another. One cannot ignore one sphere if one is to realize prosperity and good governance in a state. It is essential to maintain cooperation and a good relationship between these spheres in order to safeguard democracy and constitutionalism. In an attempt to deliver good governance in Africa, NEPAD²⁷⁷ has

²⁷⁴ *Myers v United States* 272 US 52, 293 (1926).

²⁷⁵ See Korn Jessica *The power of separation: American constitutionalism and the myth of the legislative veto* (1996) footnote 139 above; Lief Alfred (ed) *Excerpt from The Brandies guide to the modern world* (1941) at 4.

²⁷⁶ See Herbert Ross and Gruzd Steven *The African Peer Review Mechanism: Lessons from the pioneers* (2008) SAIIA at 3.

²⁷⁷ The New Partnership for Africa’s Development (NEPAD) is a programme of the African Union (AU) adopted in Lusaka, Zambia in 2001. NEPAD is a radically new intervention, spearheaded by African leaders, to pursue new priorities and approaches to the political and socio-economic transformation of Africa. NEPAD’s objective is to enhance Africa’s growth, development and participation in the global economy – (source: <http://www.nepad.org/> (accessed 30/09/2011)). To realize this objective there must be

introduced what has come to be known as African Peer Review Mechanism (APRM).²⁷⁸ However, the problem in Africa has always been the question implementation, commitment and inconsistency;²⁷⁹ individual leaders and factionalism²⁸⁰ as well as the West which is perceived by some leaders as having an “agenda” against “African solutions for African problems”.²⁸¹

There has been progress and regression at the same time, on issues of good governance on the African continent. Without fear or favour, there are issues that must be pointed out which have always put the continent’s democratic initiatives at risk. First, efforts on resolutions that may benefit Africa’s countries are always made, but later either abandoned or ignored by the succeeding leaders who come with new ideas.²⁸²

Secondly, in some instances individual leaders are “worshipped” by certain groups of people to the extent that the country ends up being divided. In many cases this has contributed to political turmoil. For instance, not long ago many people died in Kenya during the 2007 general elections because of the influence and disagreement of two leaders of different

peace and good governance. The rule of law must be respected by all states and leaders and the principles of constitutionalism must be adhered to.

²⁷⁸ The African Peer Review Mechanism is a mutually agreed programme, voluntarily adopted by the member states of the African Union, to promote and re-enforce high standards of governance.

The APRM process looks at four focus areas:

- 1 Democracy and good political governance – This area looks at ensuring that member state constitutions reflect the democratic ethos, provide accountable governance and that political representation is promoted, allowing all citizens to participate in the political process in a free and fair political environment.
- 2 Economic governance and management – Good economic governance including transparency in financial management is an essential pre-requisite for promoting economic growth and reducing poverty.
- 3 Corporate governance – This area focuses on promoting ethical principles, values and practices that are in line with broader social and economic goals to benefit all citizens. It works to promote a sound framework for good corporate governance.
- 4 Socio-economic Development – Poverty can only be effectively tackled through the promotion of democracy, good governance, peace and security as well as the development of human and physical resources available at <http://www.nepad.org/economicandcorporategovernance/african-peer-reviewmechanism/about> (accessed 30/09/2011).

²⁷⁹ See Mangu AMB “Assessing the effectiveness of the African Peer Review Mechanism and its impact on the Promotion of Democracy and Good Political Governance (2007) 7/2 *African Human Rights Law Journal* at 367.

²⁸⁰ By individual leaders and factionalism I am referring to many incidents in Africa where conflict starts because of individuals like, for instance, the 2007/2008 violence in Kenya between the supporters of Mwai Kibaki and Raila Odinga which claimed many lives, in South Africa the dominant ruling ANC in which prior to the party’s electoral conference people stop identifying themselves with the party in support of individuals, as, for instance, happened in 2007 when people were divided between the ‘Mbeki camp’ (then party President) and the ‘Zuma camp’ (the challenger who later claimed the presidency).

²⁸¹ For example, during the recent uprisings in Libya in which Gadaffi was dethroned and killed by the rebels, the AU’s resolution was undermined by the West through NATO which assisted the rebels which resulted in loss of many lives and destruction of Libya.

²⁸² For example, during Mbeki’s, Obasanjo’s and Chissano’s terms of office as presidents in their respective countries there was much talk and hope about the African Renaissance and NEPAD, among other things, but since their departure little is heard or done to advance the later’s objectives.

political parties – Mwai Kibaki and Raila Odinga.²⁸³ In Ivory Coast a war ensued because of the power struggle between two individuals Laurent Gbagbo and Allasane Outtarra.²⁸⁴ In Zimbabwe too, during the 2008 elections violence erupted which resulted in many people being beaten, raped and killed by people “hero worshipping” president Mugabe and opposed to the Movement for Democratic Change.²⁸⁵

In all these instances, the rule of law and other mechanisms put in place to safeguard democracy and good governance were ignored. The question that arises is – why do the majority of people suffer and die for their leaders who dress in expensive clothes, feast on gastronomic delights, and occupy luxury places? In turn, how does a “good leader” with the best interest of his people at heart, allow them to die or be killed in his name? In many cases loyalists are repaid by being appointed to key government positions with political and economic influence in the country. In this way corruption becomes institutionalized, which results in conflict in the long run. Whether this may be denied or challenged, the fact of the matter is that this has become a trend in African politics that hampers democracy and constitutionalism on the continent and needs to be addressed as a matter of urgency.

2.6 Conclusion

The two decades (1990-2010) were a crucial transition period for African democracy and constitutionalism. Several changes took place with most states drafting and adopting new constitutions which “entrenched constitutionalism” as they tried to move away from the “problematic independent constitutions”, purportedly imposed by former colonizers, which were blamed for the failure of democracy in most parts of the continent.

As Mangu rightfully points out, “the history of post-colonial Africa has hardly been a success story for constitutional democracy and constitutionalism”.²⁸⁶ Although colonialism is rightfully blamed, the continual challenges rest squarely on the ineffective African Union which has failed to create an enabling environment for the new democracies in Africa. A constitution per se is not a guarantee of democracy and constitutionalism, as has been

²⁸³ See publication by The Go Down Arts Centre – *Kenya burning: Mgogoro baada ya uchaguzi* 2007/8 (2009).

²⁸⁴ See footnote 45 above.

²⁸⁵ See paragraph 2.5.2.5 above.

²⁸⁶ See Mangu André Mbata B “Constitutional democracy and constitutionalism in Africa”, footnote 109 above at 8.

witnessed, for instance, in states like Swaziland where a new Constitution was adopted in 2005 but reports of the violation of human rights and disregard of the rule of law by the King who is also the head of state, continues.²⁸⁷

As it stands, the struggle for democracy and constitutionalism in most African states is still a far-fetched dream that requires unity, hard work and commitment by African leaders if the dream for a united, prosperous and peaceful Africa is to be realized. As Mangu puts it –

“Africans should understand that constitutional democracy and constitutionalism can never be given on a silver platter, but it will always be the result of struggles in which many sacrifices will have to be made”.²⁸⁸

Although the doctrines of separation of powers and constitutionalism have gained momentum in Africa since the early 1990s, the problem of poor governance and conflict has continued to torment some parts of Africa. While it can be argued that some countries like South Africa have progressed better, unfortunately the same cannot be said about other countries like Zimbabwe which had a promising democracy but suddenly succumbed to undemocratic tactics including elections which were not free and fair, violence, and other human rights violations.

Despite the renewal of the Organization of African Unity (OAU) in 1999 which eventually led to the formation of the AU in 2002, political unrest has continued to bedevil some countries with the recent famous “Arab Spring” which dethroned some long serving leaders in Tunisia and Egypt, and led to the death of Muammar Gadaffi in Libya. Although efforts are always made through declarations and treaties and other mechanism such as APRM to promote democracy and secure good governance and peace in Africa, implementation is still a major hurdle that hampers success.

In this chapter we established the need for constitutionalism and good governance if democracy is to prevail worldwide, but in particular on the African Continent. Our investigation further established essential elements without which there can be no, or only

²⁸⁷ See footnote 88 above.

²⁸⁸ See again Mangu “Constitutional democracy and constitutionalism in Africa”, footnote 109 above at 8.

severely limited, constitutionalism and good governance. We further investigated the state of constitutionalism and good governance in selected African jurisdictions.

However, establishing a situation or identifying a lacuna, without offering a solution – or at least a way forward in starting to address the problems identified – does not make for good law. The following chapters therefore, turn to an examination, analysis, and evaluation of one of the most essential elements or “requirements” to ensure the successful pursuit of constitutionalism and compliance with good governance, namely judicial independence.

Chapter Three

PROTECTING JUDICIAL INDEPENDENCE

3.1	Introduction	75
3.2	Judicial Independence in the Contemporary State	77
3.3	Different Ways of Ensuring Judicial Independence	80
3.3.1	The Constitution and Legislation	80
3.3.2	Judicial Service Commissions or Councils	81
3.3.3	Courts or Tribunals	81
3.3.4	International Law/Conventions or Documents	83
3.3.5	The Process for the Appointment of Judicial Officers	84
3.3.6	Personal Independence	84
(i)	<i>Appointment</i>	85
(ii)	<i>Removal</i>	85
(iii)	<i>Terms of Office</i>	86
(iv)	<i>Remuneration</i>	86
(v)	<i>Conditions of Service</i>	87
3.3.7	Functional Independence	87
3.4	Judicial Independence in Practice: The Case of South Africa	90
3.4.1	South Africa's Constitution (1996) and the Notion of Judicial Independence	90
3.4.2	The Concept of Judicial Independence and its relation to Human Rights and democracy in a state	91
3.4.3	Judicial officers and the “fit and proper” requirement	92
3.4.4	The nexus between the notion of judicial independence and human rights and democracy: A South African constitutional perspective	96
3.5	South Africa’s Judicial History under Apartheid Rule and the Judicial Triumph and Challenges Since the start of a New Democratic and Constitutional Order	102
3.6	Conclusion	103

3.1 Introduction

In this chapter we examine judicial independence as a cornerstone of good governance and constitutionalism. The chapter opens with an analysis of the concept of judicial independence as it is used in the contemporary state and this is followed by the identification and explanation of the various mechanisms used by different states to safeguard judicial independence and its relationship with the concepts of democracy and human rights.

Over years, the concept of judicial independence has evolved throughout the world and today is acknowledged by many states as an important mechanism for safeguarding democracy. It forms a vital part of some aspects which give meaning to the principle of separation of powers, the protection of democracy, and constitutionalism against any contravention by the state. Over years, governments, jurists, scholars, commentators, journalists, students and the general public have come to appreciate the importance of an independent judiciary in realizing democracy. It is through an independent judiciary that the rule of law can be upheld in a democratic state; hence it has received “scrutiny” from all spheres of society.

Most contemporary constitutions across the globe contain specific guarantees which seek to promote the functional and personal independence of the judiciary. For example, the Constitution of Greece provides that – “justice shall be administered by courts composed of regular judges who shall enjoy functional and personal independence”.²⁸⁹ Sub-article (2) of article 87 indicates that “in the discharge of their duties, judges shall be subject only to the constitution and the laws”²⁹⁰ – meaning, according to Pikramenos, that “judges are not subject to other state powers or judges of higher ranks”,²⁹¹ but only to the Constitution and the laws of the country.

Matters concerning appointment, salaries, pensions and tenure of judicial officers, among other things, are normally included in Constitutions or Acts of Parliament to further strengthen and protect the independence of the judiciary in executing its functions. The US Agency for International Development Guidance for Promoting Judicial Independence and

²⁸⁹ See article 87(1) of the Constitution of Greece as revised by Parliamentary Resolution of 27 May 2008 of the VIIIth Revisionary Parliament.

²⁹⁰ *Ibid.*

²⁹¹ See “Judicial independence and judicial review of the constitutionality of laws: Constitutional guarantees and public practice in Greece” by Pikramenos M available at <http://www.concourt.am/hr/ccl/vestnik/3.13-2001/pikram.htm>(accessed 03/11/2011).

Impartiality identifies a number of sources from which interference in judicial independence may originate:

- “The executive, the legislature, local governments
- Individual government officials or legislators
- Political parties
- Political and economic elites
- The military, paramilitary and intelligence forces
- Criminal networks
- The judicial hierarchy itself.”²⁹²

When looked at, these sources, if there are no strong regulatory mechanisms in place, have the potential to influence or control the judicial system in the country, hence the importance of personal and functional independence of the judiciary to grant judicial officers freedom and protection when executing their functions without fear or favour.

Different countries follow different methods; however there is no fixed method prescribed to ensure judicial independence. As members of the global community in the modern world, states try to meet universal standards for ensuring and safeguarding judicial independence. Countries normally borrow from other countries’ constitutions and try to comply with international law and treaties emanating from organizations of which they are members, in an effort to attain good governance and democracy.

The judicial authority in South Africa as entrenched in the Constitution will be the principal guide and will be supported by examples of some other countries’ provisions for ensuring judicial independence across the globe.

The term of “a judicial officer” in the wide sense refers to judges, magistrates, lawyers, advocates and prosecutors in the field of law. In this work, however, I use the term to refer specifically to the judges of the court, although reference will be made to other judicial officers where necessary.

²⁹² US Agency for International Development *Guidance for promoting judicial independence and impartiality* (January 2002) (revised ed) at 5.

3.2 Judicial Independence in the Contemporary State

Judicial independence is a universal notion concerning the judicial branch of government's independence from any sort of interference by, or any influence or functioning from the other two branches namely, the executive and the legislature, bolstered by the general conception that the judiciary must at all times be effective and impartial in adjudicating cases and upholding the rule of law in a given state. The concept of judicial independence is a broad term that covers a wide field of constitutional law. It covers, among other things, the process of appointment of judicial officers; conducting of independent trials; striking a balance and cooperation among the three wings of government; and the promotion and protection of human rights and democracy in a state.

The principle of judicial independence seeks to guarantee the autonomy of judicial organs when exercising judicial authority in line with established standards (whether international, regional or local) and the given law.²⁹³ Consequently, the fundamental nature of judicial independence is to provide judicial organs with a means to "determine right from wrong without being distorted by external forces or wills" in line with established laws of the country.²⁹⁴

Shirley Abrahamson²⁹⁵ argues that – "although the phrase is hard to define, the term judicial independence embodies the concept that a judge decides cases fairly, impartially and according to the facts and law, not according to whim, prejudice or fear, the dictates of the legislature or executive or the latest opinion poll".²⁹⁶ It is the law that must reign supreme and which must be applied and interpreted fairly and without fear or favour to every citizen by independent judicial officers. The judiciary deals with different cases that affect different people from different backgrounds with different status in the society.

Again judicial officers are members of the community who may have certain religious beliefs and who belong, or might belong, to a certain political organizations within the society.

²⁹³ Ma Huaide and Deng Yi "Judicial and constitutional reform" in Yu Keping *Democracy and the rule of law in contemporary China* (2010) at 254.

²⁹⁴ *Id* at 54.

²⁹⁵ Then Chief Justice of Wisconsin Supreme Court.

²⁹⁶ Abrahamson Shirley S "Keynote address: Thorny issues and slippery slopes: Perspectives on judicial independence" (2003) 64/1 *Ohio State Law Journal* at 3.

Nonetheless, they need to rise above their backgrounds and decide cases according to the facts and the law. As Stephen Burbank puts it:

“Courts are institutions run by human beings. Human beings are subject to selfish and/or venal motives and even moral paragons differ in the quality of their mental faculties and in their capacity for judgment and wisdom.”²⁹⁷

It is against this background that the judiciary must be independent and impartial in executing its functions and this can be realised by creating an enabling environment for the law of the country to take control of the situation and ensure that everyone, from the executive to the legislature, and including the judiciary, abide by the law.

The importance of securing judicial independence in a given state has always been regarded as vital. However, it was not until the mid 1980s that world countries (under the umbrella of United Nations) saw the need to document some general standards that should guide member states in realising this notion. During the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, a number of “Basic Principles on the Independence of the Judiciary” were adopted.

Twenty Basic Principles were adopted. Among others are the following:

- “(1) The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
- (2) The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
- (3) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
- (4) There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation

²⁹⁷ Burbank Stephen B “What do we mean by judicial independence? [Comments]” (2003) 64/1 *Ohio State Law Journal* at 326.

- by competent authorities of sentences imposed by the judiciary, in accordance with the law.
- (5) Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
 - (6) The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
 - (7) It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.”²⁹⁸

The Congress further declared that:

“Member States have a task of securing and promoting the independence of the judiciary and that this should be taken into account and respected by Governments within the framework of their national legislation and practice and should be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general”.²⁹⁹

As highlighted earlier, the notion of judicial independence complements the notions of democracy, constitutionalism, the rule of law and the desire for good governance in a state. The 20th century saw the concept of human rights emerging as one of the most important issues that a government must prioritise when dealing with its people, with the adoption of the Universal Declaration of Human Rights (UDHR)³⁰⁰ in 1945, and later the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other conventions that followed.³⁰¹

The principle of constitutionalism implies that the government can be taken to court by its people for any act of violation, while, conversely, the government may take decisions that may appear adverse in the eyes of the public. But what is important in a constitutional and democratic state, where the rule of law reigns supreme with an impartial and independent

²⁹⁸ See <http://www2.ohchr.org/english/law/indjudiciary.htm> (accessed 13/10/2011).

²⁹⁹ *Ibid.*

³⁰⁰ Article 8 of the UDHR provides that: “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law”; whereas Article 10 provides that: “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

³⁰¹ The UDHR, ICESCR and the ICCPR with its two Optional Protocol form part of what is universally known as the International Bill of Human Rights. See Fact Sheet no 2 (Rev 1) The International Bill of Human Rights. United Nations, Geneva (1996).

judiciary, is that even if courts of law find against the government, court processes and judgments will be respected and executed according to the law.

3.3 Different Ways of Ensuring Judicial Independence

There are many methods that can be used in the securing of the principle of judicial independence. In this section a few methods are identified, namely the Constitution and legislation; judicial service commissions or councils/boards; courts or tribunals; the process of appointment of judicial officers; international law/conventions or documents; and personal and functional independence. The appointment process which forms the cornerstone of this dissertation is discussed in detail in chapter four.

3.3.1 The Constitution and Legislation

The notion of judicial independence in the main finds expression in the constitution of a country. The constitution can be regarded as the supreme mechanism for safeguarding the independence of the judiciary since other mechanisms such as the judicial service councils, the appointment process, the role of international law and how it is applied in terms of the municipal laws, usually find expression in the constitution through the courts, and by virtue of the courts' power to test the validity of any law against the provisions of the constitution.³⁰²

The general rule is that the constitution indicates that “the constitution” is the highest law in the country.³⁰³ It makes provision for the separation of powers, a Bill of Rights, the functioning of the three wings of government, and more importantly, vests the judicial authority in “independent” courts of law.

So we find in the Constitution of the Republic of South Africa that the “judicial authority is vested in the courts which are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice”.³⁰⁴ It further provides for the enactment of legislation by National Parliament to complement the

³⁰² For example, in the case of South Africa see sections 2; 39(1)(b); 174; 178 and 233 of the Constitution of the Republic of South Africa, 1996.

³⁰³ For example, see section 2 of South Africa’s Constitution (1996); article 1 of the Constitution of the Federal Republic of Nigeria (1999); article 2 of the Constitution of Kenya (2010).

³⁰⁴ Section 165(1)(2).

provisions of the Constitution in order ensure an effective and efficient administration of justice in the country. Section 180 of the said Constitution indicates that:

“National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution including –

- (a) training programmes for judicial officer;
- (b) procedures for dealing with complaints about judicial officers; and
- (c) participation of people other than judicial officer in court decisions.”

3.3.2 Judicial Service Commissions or Councils

Today most countries’ constitutions make provision for the establishment of Judicial Service Commissions or Councils/Boards in order to guarantee judicial independence. These bodies are usually composed of different people from various backgrounds – such as lawyers, politicians and academics– charged by the constitution with a responsibility of finding appropriately qualified lawyers who are fit and proper to sit on the bench and dispense justice impartially according to the law and in a way that engenders trust among the public in the judiciary.³⁰⁵

More details about the role of judicial service commissions or councils/boards are discussed in detail in chapter four which deals with the appointment processes of judicial officers.

3.3.3 Courts or Tribunals

Traditionally courts and/or tribunals are the custodians of the law in a state. According to the Bangalore Code of Judicial Conduct “a competent, independent and impartial judiciary is likewise essential if the courts are to fulfill their role in upholding constitutionalism and the

³⁰⁵ Section 178 (1) of SA’s Constitution makes provision for a Judicial Service Commission (JSC) composed of the Chief Justice; the President of the Supreme Court of Appeal; One Judge President; two practicing advocates; two practicing attorneys; one teacher of law from any university in SA; six persons designated by the National Assembly (NA); four permanent delegates to the National Council of Provinces (NCOP); and four persons designated by the President as head of the national executive after consulting the leaders of all parties in the NA.

In Uganda, article 146 of the Constitution (1995) establishes a Judicial Service Commission whose function in terms of article 147 (1) is among other things (a) “to advise the President in the exercise of the President’s power to appoint persons to hold or act in any office of Chief Justice, Deputy Chief Justice, Principal Judge, Justice of Supreme Court, Justice of Appeal and a Judge of the High court, which include power to confirm appointments, to exercise disciplinary control over such person and to remove them from office; (c) to prepare and implement programmes for the education of, and for the dissemination of information to judicial officers and the public about the law and administration of justice; (e) to advise the government on improving the administration of justice”.

rule of law".³⁰⁶ When there is a dispute, whether among organs of state, between the state and its citizens, or among private individuals, the courts generally act as the referee in order to find a just solution in line with the laws of the country.

Courts play an important role in shaping society both at national and at international level. Section 4 of the Treaty establishing European Economic Community (EEC)³⁰⁷ makes provision for the establishment of a Court of Justice in Europe. Article 164 of the EEC provides that "the Court of Justice shall ensure observance of law and justice in the interpretation and application of the treaty". This indicates that the role of courts is not only about the settlement of cases and controversies, but that there is a duty on the courts to ensure that the law is at all times observed.³⁰⁸

Shetreet correctly argues that "courts perform an important function of adjudicating and reprimanding the parties before the court and on occasion the general public and the social and political institutions".³⁰⁹ Through the judicial decisions they make, he adds, "courts are thus able to shape societal ideas and mores, to create laws and to resolve specific disputes thereby, contributing towards an ordered society and promoting good governance in a state".³¹⁰

For all of the above to be possible the courts must be managed by an independent judiciary. As managers of courts, judicial officers must at all times be independent and be seen to be independent when applying the law. The nature of courts is that they are important institutions that form part of government and which must command respect in the eyes of the public.³¹¹

³⁰⁶ The Bangalore Principles of Judicial Conduct 2002. Preamble at 2. Available at <http://www.constitutionnet.org/vl/bangalore-principles-judicial-conduct-2002> (accessed 21/11/2011).

³⁰⁷ Treaty establishing the European Economic Community 1957.

³⁰⁸ Barav Ami "The Court of Justice of the European communities" in Shetreet S *The role of courts in society* (1988) at 390.

³⁰⁹ *Id* at 468.

³¹⁰ *Ibid.*

³¹¹ In the complaint by the justices of the Constitutional Court of South Africa to the Judicial Service Commission concerning an alleged interference and an attempt to influence two justices of the court in a pending case concerning an influential politician of the ruling party by the judge president of the Western Cape High Court, the Constitutional Court justices pointed out among other things that "public confidence in the integrity of the courts is of crucial importance for our constitutional democracy and may not be jeopardised". (See *Hlophe v Constitutional Court of South Africa and Others* (08/22932) [2008] ZAGPHC 289 at par 4.4.)

In its consideration of foreign law, the Constitutional Court of South Africa emphasized the importance of public confidence in the administration of justice in the *De Lange*³¹² case as the Canadian Supreme Court had pointed out in *Valente*.³¹³ The court argued that:

“Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effectiveness. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception”.³¹⁴

3.3.4 International Law/Conventions or Documents

There are many international documents or conventions or institutions that promote or strive to contribute towards the notion of judicial independence. These include, but are not limited to, the following –

- Universal Declaration of Human Rights (see articles 8 and 10).³¹⁵
- The Basic Principles on the Independence of the Judiciary.³¹⁶
- The Bangalore Principles of Judicial Code of Conduct.³¹⁷
- The International Commission of Jurists (International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors).³¹⁸
- Latimer House Principles on the Three Branches of Government.³¹⁹

Although they are important, it must be emphasized that most of these international and regional instruments are not obligatory or binding on individual states. However, they serve as guidelines and universally accepted standards that countries are reasonably expected to abide by as members of the international community. Today many countries find it to be in their best national interest to conduct themselves in line with the contemporary norms of

³¹² *De Lange v Smuts NO and Others* 1998 (7) BCLR 779.

³¹³ *Valente v The Queen* (1986) 24 DLR (4th) 16 at 172.

³¹⁴ *Id* at par 71.

³¹⁵ <http://www.un.org/en/documents/udhr/>(accessed 04/01/2012).

³¹⁶ <http://www2.ohchr.org/english/law/indjudiciary.htm> (accessed 04/01/2012).

³¹⁷ See footnote 306 above.

³¹⁸ <http://www.unhcr.org/refworld/type,HANDBOOK,ICJURISTS,,4a7837af2,0.html> (accessed 04/01/2012).

³¹⁹ http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BACC9270A-E929-4AE0-AEF9-4AAFEC68479C%7D_Latimer%20House%20Booklet%20130504.pdf(accessed 04/01/2012).

international practice. If individual states reject what is perceived as universal practice they normally face isolation or sanctions from the international community.

3.3.5 The Process for the Appointment of Judicial Officers

The process for appointing judicial officers definitely contributes to the independence of the judiciary. For judicial officers to be impartial and independent in applying the law, they must be appointed on merit, experience and qualifications. Their appointment should not be influenced by any connections or relations they might have with the president or the ruling political party or members of judicial service councils or boards.

According to the provisions of the Commonwealth (Latimer House) Principles:

“The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary”.³²⁰

As indicated above, this section only serves to identify different mechanisms but the process of appointment of judicial officers and the role played by judicial service council’s /commissions / boards will be discussed in detail in chapter six below.

3.3.6 Personal Independence

The idea of personal independence is concerned with the personality and/ or personal security of judicial officers in relation to the performance of their functions.³²¹ Judicial officers must be free and satisfied with their conditions of service. They must be protected against any kind of threat, or from any temptation that might seek to divert them from performing their core functions in terms of the law and the constitution.

Rautenbach and Malherbe define personal independence as follows:

³²⁰ Commonwealth (Latimer House) Principles on the Three Branches of Government (November 2003) at 17.

³²¹ Rautenbach IM and Malherbe EFJ *Constitutional law* (2009) (5th ed) at 236.

“The personal independence of the judiciary means that the appointment, terms of office and conditions of service of judicial officers are not controlled arbitrarily by other government bodies”.³²²

There are various factors which are normally included in constitutions and legislation which determine the personal independence of judicial officers:

(i) *Appointment*

The appointment process must be transparent and free from any influence whether from the executive or legislature or the ruling political party.³²³ The reason for transparency and freedom from internal and external influence is to ensure impartiality of judicial officers. A transparent and free appointment process guarantees allegiance to the law rather than to individuals or certain groups or institutions.

(ii) *Removal*

Generally, modern constitutions or Acts of Parliament specifically indicate circumstances under which a judicial officer may be removed from office.³²⁴ This means that a judicial officer cannot be removed or dismissed by anyone for any reason that is not provided for in the constitution or legislation. This is important in order to ensure that judicial officers do not fear or favour any person when adjudicating cases.³²⁵

³²² *Ibid.*

³²³ The process of appointment of judicial officers is dealt with in detail in chapter six below. In some instances (for example in developing democracies like South Africa) a judicial service commission is established in terms of the provision of the constitution for purposes of eliminating external influences, but one finds it criticised for being dominated by politicians or politically connected people who play a major role in influencing the outcome of the appointment process. See, discussions in Chapter four below.

³²⁴ For example, section 177 of South Africa’s Constitution makes the following provision –

- (1) A judge may be removed from office only if –
 - (a) The Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of misconduct; and
 - (b) The National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.
- (2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
- (3) The President on the advice of the Judicial Service Commission may suspend a judge who is the subject of a procedure in terms of subsection (1).

³²⁵ Take, for example, the case of South Africa where senior officials of the ruling party African National Congress including the President have on more than one occasion been quoted as referring to courts as “counter revolutionary” (see footnote 96 in chapter 4 above) and others having the view that courts are used by opposition parties to co-govern (see “Keynote address by President Jacob Zuma on the occasion of the 3rd Access to Justice Conference” held in Pretoria on 8 July 2011). This could be interpreted to mean that if there were no mechanisms safeguarding judicial independence such judicial officers who find against the wishes of the ruling party could be removed or marginalized at the will of such politicians.

(iii) *Terms of Office*

Judicial officers are usually appointed for a fixed, non-renewable period. This also contributes to independence and impartiality because there will be no need to fear not being retained where decisions against some influential executive or legislative members are made. Section 176(1) of South Africa's Constitution provides that a Constitutional Court judge holds office for a non-renewable term of twelve years or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends such judge's term of office. Subsection (2) of the same section provides that other judges hold office until they are discharged from active service in terms of an Act of Parliament.

(iv) *Remuneration*

According to Rosenn, “the underlying policy is to protect judges from financial retribution for rendering decisions that displease the legislature or the executive”.³²⁶ Remuneration is a big issue in any given situation. There is a belief that where judicial officers earn low salaries they will be susceptible to bribes and corrupt activities. It is important to offer adequate remuneration in order to guard and promote the integrity of the judiciary. The USAID Guidance for Promoting Judicial Independence and Impartiality indicates that most judges who participated in their study agreed that “respectable salaries are a necessary element of judicial independence”.³²⁷ In recent years various countries have increased judicial officers’ salaries in an effort to strengthen judicial independence in line with various international and regional guidelines promoting this notion.³²⁸

In South Africa, section 176(3) of the Constitution protects this factor by providing that: “the salaries, allowances and benefits of judges may not be reduced”.³²⁹ In the Canadian case of *Valente v The Queen*³³⁰ the court mentioned remuneration as one of the essential conditions for judicial independence. It argued that “the essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence”.³³¹

³²⁶ Rosenn Keith S “The protection of judicial independence in Latin America” (1987-1989) 19/1 *Inter-American Law Review* at 15.

³²⁷ See footnote 292 at 31.

³²⁸ *Ibid.*

³²⁹ See also the Judges’s Remuneration and Conditions of Employment Act No 47 of 2001 which gives a detailed account on salaries, allowances and benefits of judicial officers in South Africa.

³³⁰ *Valente v The Queen* (1985) 24 DLR (4th) 161.

³³¹ *Id* at 162-163.

(v) *Conditions of Service*

Principle 11 of the UN Basic Principles on the Independence of the Judiciary seeks to create a universal standard for better conditions of service for judicial officers by providing that: “the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by the law”. If all the above-mentioned aspects are adequately secured it would not be easy for any influential person to find a loophole to penetrate or divert the independence of the judiciary and in this manner justice cannot be tempered with.

In the case of *Mackin v New Brunswick*³³² the Canadian Supreme Court emphasised the importance of judicial independence and argued that:

“Emphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably seen to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or command the respect and acceptance that are essential to it. In order for such confidence to be established and maintained, it is important that the independence of the court be openly ‘communicated’ to the public. Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.”³³³

The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and retirement age as provided for by Principle 11 of the UN Basic Principles of Judicial Independence, are the objective legal guarantees capable of preserving or restoring public confidence in the judicial system, thereby giving it legitimacy and strength to dispense justice impartially.

3.3.7 Functional Independence

The notion of functional independence focuses on the way in which courts as custodians of the judicial authority in the state carry out their duties within the framework of the law and the constitution. In order to administer justice, courts must not be subject to the executive or

³³² *Mackin v New Brunswick* (2002) 209 DLR (4th) 564.

³³³ *Id* at 585.

the majority in parliament, or the whims of public opinion or media, but only to the law and the constitution. Courts must be free from any influence or interference from other state organs.³³⁴

With regard to freedom from executive or legislative interference, the functional independence aspect manifests from the court power to review the legality of administrative acts and the constitutionality of statutory legislation. Functional independence further stretches to freedom from internal influence or interference from within the judiciary itself. For instance, although the doctrine of *stare decisis*³³⁵ must be respected, it should not be misused by higher ranked judicial officers to meddle with the functioning of other officers or lower courts.

The Supreme Court of Canada in the case of *The Queen in Right of Canada v Beauregard*³³⁶ described judicial independence as follows –

“Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence”³³⁷

This Canadian approach to the independence of the judiciary has since been emphasized in various cases by the Constitutional Court of South Africa in an effort to clarify and guarantee the independence of South African courts in dispensing justice and upholding the rule of law.³³⁸

³³⁴ In 1952 the South African Parliament tried to usurp judicial powers when it passed an Act establishing a High Court consisting of all Senators and members of the House of Assembly with the power to review decisions of the Appellate Division of the Supreme Court of South Africa. This move was a clear disregard of the doctrine of separation of powers and the notion of judicial independence. The court declared the Act invalid and held that the High Court of Parliament was not a court of law and could not encroach on the functioning of the judicial branch of government. See *Harris v Minister of Interior* 1952 (2) SA 428 (A); *Minister of Interior v Harris* 1952 (4) SA 769 (A).

³³⁵ *Stare decisis* is a legal principle which according to the *Trilingual Legal Dictionary* means “abide by or adhere to decided cases”.

³³⁶ *The Queen in Right of Canada v Beauregard* (1987) 30 DLR (4th) 481.

³³⁷ *Id* at 491.

³³⁸ See *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 at pars 70, 71, 72, 73 and 159 and *State and Others v Van Rooyen and Others* 2002 (8) BCLR 810 at pars 19, 20, 21, 22 and 23.

It is a general standard that judicial officers enjoy immunity against civil actions and the offence of contempt of court.³³⁹ This is another important rule which enhances the independence of judicial officers in applying the law without the fear or risk of “being sued for defamation every time they express an unfavourable view about a litigant or the credibility of a witness during the course of giving a judgment”.³⁴⁰

In the South African case of *May v Udwin*³⁴¹ the Appellate Division (now Supreme Court of Appeal) upheld an appeal against a judgment by a High Court awarding Udwin, an attorney, damages and costs in an action he brought against May, a magistrate, for defamation. The court held that –

“the nature of judicial duties are such that a judicial officer is more often than not active in a sphere where the performance of his judicial duties exposes him to the risk of injuring a person in his reputation and it is for this very reason that there is according to our common law a rebuttable presumption that a judicial officer who defames someone in the exercise of his judicial authority does so lawfully within the limits of his authority”.³⁴²

The court further indicated that “public interest in the due administration of justice requires that a judicial officer, in the exercise of his function should be able to speak his mind freely without fear of incurring liability for damages of defamation”.³⁴³

In *Penrice v Dickson* the appeal court upheld the immunity privilege of judicial officers when acting in official capacity and pointed out that a judicial officer will only be liable for damages where there is proof that he had acted in bad faith or proof of an absence of reasonable care being insufficient.³⁴⁴

³³⁹ See Rautenbach and Malherbe footnote 321 above at 238.

³⁴⁰ *Constitutional law: Only study guide for CSL 101-J* (2005) University of South Africa at 204.

³⁴¹ *May v Udwin* 1981 (1) SA 19 (A). In this case, the respondent (an attorney), as plaintiff had sued the appellant (defendant), a magistrate, in the High Court for damages for alleged defamatory remarks made by the defendant in a written judgment furnished in connection with litigation in which the respondent was involved in his capacity as an attorney. The respondent had established that the words were defamatory and that the appellant had proved that they had been published on a privileged occasion, namely during the course of judicial proceedings in a magistrate’s court. The High Court found that the defendant was not protected by reason of the privileged occasion and awarded the plaintiff damages. On appeal the Appellate Division upheld the appeal and altered the judgment of the court *a quo* by dismissing the action.

³⁴² *Id* at 19.

³⁴³ *Ibid.*

³⁴⁴ *Penrice v Dickson* 1945 AD 6 14.

As the British court argued in *Valente v The Queen*, “both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice, and without that confidence the system cannot command the respect and acceptance that are essential to its effective operation”.³⁴⁵ Judicial independence is an essential element of democracy³⁴⁶ that needs to be promoted, protected and respected at all times by judicial officers themselves, the government, and the public in general.

3.4 Judicial Independence in Practice: The Case of South Africa

3.4.1 South Africa’s Constitution (1996) and the Notion of Judicial Independence

Section 2 of the Constitution declares the Constitution as the supreme law in South Africa and nullifies any law or conduct that is not consistent with it. It further affirms that all obligations imposed by the Constitution must be fulfilled. Chapter two contains the Bill of Rights. Section 7(1) provides that the Bill of Rights is a cornerstone of democracy in South Africa and a duty is laid upon the state to respect, protect, promote and fulfil the rights in the Bill of Rights.³⁴⁷ The judicial authority of the country vests with the courts which are independent and subject only to the Constitution and the law which they are bound to apply impartially and without fear, favour or prejudice.³⁴⁸

The International Commission of Jurists emphasizes a country’s judicial system as central to the protection of human rights and the preservation of the rule of law.³⁴⁹ It can be argued that an independent judiciary has become a *sine qua non* for human rights in the modern democratic state. During the period in South Africa before 1994, the judiciary functioned at the will and whim of the executive and the legislature.³⁵⁰ It did not enjoy any independence or constitutional guarantees in its functioning.³⁵¹ It was during the apartheid era in South

³⁴⁵ *Valente v The Queen* (1986) 24 DLR (4th) 16 at 172.

³⁴⁶ Gordon Amy and Bruce David “Transformation and the independence of the judiciary in South Africa” The Centre for the Study of Violence and Reconciliation (CSV) at 7.

³⁴⁷ Section 7(2).

³⁴⁸ Section 165(1) and (2).

³⁴⁹ See “International principles on the independence and accountability of judges, lawyers and prosecutors” *Practitioners Guide no1* International Commission of Jurists (2007) at b.

³⁵⁰ See Institute for Democracy in South Africa (IDASA) *Judicial accountability mechanisms: A resource document* (2007) at 3.

³⁵¹ *Ibid.*

Africa when John Dugard wrote an article on “The judiciary in a state of national crisis” and asked a very important question:

“Can judges save a society in which the ruling regime has embarked upon a program involving the suppression of basic human rights and the departure from accepted legal principles?”³⁵²

Interestingly, Dugard highlights many instances not only in South Africa but throughout the world, where at some stage the judiciary found itself being influenced or sympathizing with the sitting government and compromising the principles of impartiality and the rule of law and human rights that must be upheld by the judiciary.³⁵³ If the judiciary is appointed and/ or controlled by the executive branch the principle of checks and balances will be compromised as judicial officers will have to prove loyalty to those who appointed them rather than to justice and the rule of law.

3.4.2 How does the Concept of Judicial Independence Link to Human Rights and Democracy in a State? (For example – the Constitution of the Republic of South Africa declares that the bill of rights is the cornerstone of democracy in the country)

Human rights must be respected, protected and promoted by the government as well as private individuals when dealing with one another. There is a huge potential for anarchy in a state where human rights are disregarded, or where “simple justice between man and man” does not exist.³⁵⁴ In the South African context (Constitution, 1996), the concept of “human rights” carries with it a number of fundamental rights listed under chapter two.³⁵⁵

Given the country’s history and its system of oppression of the majority under apartheid, South Africa has since the dawn of democracy and constitutional order made significant

³⁵² Dugard John “The judiciary in a state of crisis – with special reference to the South African experience” (1987) 44 *Washington and Lee Law Review* at 477.

³⁵³ *Id* at 477-501.

³⁵⁴ In *Grootboom* (par 2), Yacoob J points out that “unless the plight of communities living under intolerable conditions is alleviated people may be tempted to take the law into their own hands in order to escape such conditions” (see footnote 379 below at par 2).

³⁵⁵ The Bill of Rights mentions a number of fundamental rights, including but not limited to the following – equality; human dignity; life; security of the person; privacy; freedom of religion, belief and opinion; freedom of expression; freedom of association; assembly, demonstration, picket and petition; political rights; citizenship; freedom of movement and residence; freedom of trade, occupation and profession; property; housing; environment; healthcare, food, water and social security; education; language and culture; cultural, religious and linguistic communities; access to information; just administrative action; access to courts; and other rights.

progress through the judiciary in trying to strike a balance between the government and its citizens amid a number of challenges resulting from the apartheid legacy. According to the Institute for Democracy in South Africa:

“The judiciary is essentially developing and re-defining South African jurisprudence and therefore playing an important role in the transformation of South Africa into an open and inclusive constitutional democracy that guarantees the progressive realization of social and economic rights. Viewed in this light, the independence of the judiciary must not only be constitutionally protected; it must also capture and maintain the confidence of the public it seeks to protect.”³⁵⁶

The notion of judicial independence bestows upon judicial officers a responsibility to protect the balance of powers and human rights in a given state. With democracy expanding and levels of literacy increasing in the modern world, it is expected that many people will start understanding and knowing their rights and freedoms (especially in developing nations). Judicial officers might be faced with major challenges or threats that may influence their decisions when adjudicating cases if they are not properly trained to uphold the rule of law.³⁵⁷ The subject of judicial independence has evolved and become an interesting topic in the contemporary state, which must be understood to instil and strengthen impartiality in judicial officers to safeguard the balance of power among the three branches of government and with the public.

3.4.3 Judicial officers and the “fit and proper” requirement

The South African Constitution makes provision for a number of courts as the backbone for the country’s judicial system.³⁵⁸ Any person who is to be appointed as a judicial officer in

³⁵⁶ See footnote 350 above at 3.

³⁵⁷ For example a judicial officer can be influenced by his or her religion; political opinion or political orientation; media; culture; public opinion; academia; pressure from or his/her relationship with the executive or legislature and other factors such as bribes and corruption. See footnote 292 above in which Steven Burbank argues that courts are institutions presided over by judicial officials who are not by nature different from other human beings who can be prone to bribes or other corrupt activities and moral obligations.

³⁵⁸ Section 166 illustrates the judicial system that includes the following courts –

- (a) The Constitutional Court
- (b) The Supreme Court of Appeal
- (c) The High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts
- (d) The Magistrates’ Courts
- (e) And any other court established or recognised in terms of an Act of Parliament, including any court of a status similar either the High Courts or the Magistrates’ Courts.

South Africa must be both appropriately qualified and fit and proper.³⁵⁹ The term “fit and proper” may be interpreted to mean that a judicial officer is independent and impartial, and can apply the law without fear, favour or prejudice. Slabbert argues that:

“It is commonly accepted that in order to be ‘fit and proper’ a person must show integrity, reliability and honesty as these are the characteristics which could affect the relationship between a lawyer and a client and a lawyer and the public”.³⁶⁰

As indicated in the introduction above, the following section shall refer to a “judicial officer” in the form of a prosecutor within the South African context in an effort to corroborate the relationship between a “fit and proper” person and a judicial officer with the notion of judicial independence.³⁶¹ The office of the National Director of Public Prosecution (NDPP), like that of a chief justice or any judge, is an integral office of trust, honesty and integrity. The same level of impartiality and independence is expected from both offices in order to dispense justice and execute their functions without fear, favour or prejudice.

Chapter 8 of South Africa’s Constitution deals with the administration of justice, and among other things makes provision for the establishment of the prosecuting authority,³⁶² which in terms of national legislation must exercise its functions without fear, favour or prejudice.³⁶³ The National Prosecuting Act³⁶⁴ regulates the prosecution proceedings as dictated by the Constitution. Section 9 (1) of the Act provides that –

“Any person to be appointed as National Director, Deputy Director or Director must –

³⁵⁹ See section 174(1) of the Constitution; See also section 15(1)(a) of the Attorneys Act 63 of 1979 and section 3(1)(a) of the Admission of Advocates Act 74 of 1964 which requires a person to be fit and proper in order to practice law in the courts of the Republic.

³⁶⁰ Slabbert Magda “The requirement of being a ‘fit and proper’ person for the legal profession” (2011) 14/4 *Potchefstroom Electronic Law Journal* at 212.

³⁶¹ Prosecutors are also judicial officers but here reference is made to the South African scenario in order to emphasize the importance of the term ‘fit and proper person’ to the perception of judicial independence. For example, the former Deputy National Director of Public Prosecutions and later Acting National Director of Public Prosecution, Advocate Mokotedi Mphse was later appointed as Acting Judge in the North West High Court. This, however drew some criticism from the legal fraternity [the Law Society of South Africa (LSSA) and the General Council of the Bar (GCB)], concerning his impartiality as some saw his appointment as a reward following his controversial decision to withdraw corruption charges against the ANC President Jacob Zuma on the eve of the national elections in 2009 (see <http://www.timeslive.co.za/local/2010/02/18/radebe-defends-mokotedi-mpshe-appointment> “Radebe defends Mokotedi Mpshe appointment” (accessed 26/01/2012)).

³⁶² Section 179.

³⁶³ Section 179(4).

³⁶⁴ National Prosecuting Act 32 of 1998.

- (b) be a fit and proper person, with due regard to his or her experience conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.”

In the *Democratic Alliance v The President of the Republic of South Africa and Others*³⁶⁵ case the South African Supreme Court of Appeal upheld the appeal by the Democratic Alliance³⁶⁶ launched on the questioning of the appointment of the National Director of Public Prosecutions, Menzi Simelane,³⁶⁷ in terms of Section 179³⁶⁸ of the Constitution read with

³⁶⁵ *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241 (1 December 2011).

³⁶⁶ The Democratic Alliance is the official opposition party in South Africa.

³⁶⁷ Simelane had worked for the Department of Justice and Constitutional Development (DJCD) as Director-General. In 2008 the Ginwala Inquiry was launched to establish the fitness of Vusi Pikoli (Simelane's predecessor) to hold office as NDPP after he had been suspended by the President. Simelane, as the accounting officer of the DJCD, was called by the Commission to give evidence in the inquiry into Pikoli. Simelane he was found to have given misleading and untruthful evidence, therefore unreasonable, hence the DA's later argument that he was not a fit and proper person to hold office as NDPP. (See "Report of Enquiry into NDPP: Report of the Enquiry into the Fitness of Advocate VP Pikoli to hold the Office of National Director of Public Prosecutions" November 2008 available at www.justice.gov.za/commissions/2008_ginwala.pdf.)

On 9 December 2008 the then Minister of Justice and Constitutional Development (MJCD) issued a statement indicating that the Ginwala Inquiry had made certain findings about Simelane – that his conduct was highly irregular and that as a result of these findings he (the Minister) regarded the findings as “very serious in light of the constitutional imperatives contained in Section 195 which include a high standard of professional ethics, accountability and transparency” (see <http://www.info.gov.za/speeches/2008/08122315451004.htm>). He then requested the Public Service Commission (PSC) to carry out an investigation into the conduct of Simelane during the Ginwala Inquiry. The PSC found Simelane to have, among other things, misrepresented facts, failed to disclose information and certain documents to the Ginwala Inquiry, and recommended to the MJCD that disciplinary action may be taken against him (see letter titled “Investigation into the Conduct of the Director-General of the Department of Justice and Constitutional Development during the Ginwala Enquiry”, faxed to then MJCD Enver Surty by the Chairperson of the PSC dated 6 April 2009).

³⁶⁸ Section 179 of the Constitution provides as follows –

- (1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of –
 - (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the National executive; and
 - (b) Directors of Public Prosecutions and Prosecutors as determined by an Act of Parliament.
- (2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
- (3) National legislation must ensure that the Directors of Public Prosecutions –
 - (a) are appropriately qualified; and
 - (b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).
- (4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
- (5) The National Director of Public Prosecutions –
 - (a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
 - (b) must issue policy directives which must be observed in the prosecution process
 - (c) may intervene in the prosecution process when policy directives are not complied with; and
 - (d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:
 - (i) The accused person.
 - (ii) The complainant.
 - (iii) Any other person or party whom the National Director considers to be relevant.

Sections 9³⁶⁹ and 10³⁷⁰ of the National Prosecuting Act by President Jacob Zuma in November 2009.

The question before the appeal court was whether President Zuma had complied with the prescripts of the Constitution and Section 9(1)(b) of the National Prosecuting Act (see footnote 51) in his appointment of Simelane as the National Director of Public Prosecutions.³⁷¹ The court ruled as follows:

“It is declared that the decision of the President of the Republic of South Africa, the First Respondent, taken on or about Wednesday 25 November 2009, purportedly in terms of section 179 of the Constitution of the Republic of South Africa (the Constitution), read with sections 9 and 10 of the National Prosecuting Authority Act 32 of 1998 to appoint Mr Menzi Simelane, the Fourth Respondent, as the National Director of Public Prosecutions (the appointment), is inconsistent with the Constitution and invalid”.³⁷²

It is expected of a fit and proper person to, at all times, stand firm in principle when applying the law and be able to strike a balance between majoritarianism or public opinion and constitutional supremacy.³⁷³

Section 172(2) of the Constitution provides that:

- (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.

³⁶⁹ Section 9 of the National Prosecuting Act provides –

(1) Any person to be appointed as National Director, Deputy National Director or Director must –
(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic; and
(b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.

(2) Any person to be appointed as the National Director must be a South African citizen.

³⁷⁰ Section 10 of the Act provides that the “the President must in accordance with Section 179 of the Constitution appoint the National Director”.

³⁷¹ *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241 at par 1.

³⁷² *Id* at par 124. However, the decision of the Supreme Court of Appeal (SCA) had to be confirmed by the CC in line with section 167(5) of the Constitution which provides that: “the Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force”.

³⁷³ See Deputy Chief Justice Dikgang Moseneke “Striking a balance” *The Sunday Times* 02 October 2011 at 5 (Review).

- (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

The Democratic Alliance applied to the Constitutional Court for confirmation of the order of the Supreme Court of Appeal, while the Minister for Justice and Constitutional Development and Simelane (NDPP) appealed against the judgment and order of the SCA. The Constitutional Court dismissed the appeal and confirmed the declaration by the SCA that the appointment of Simelane as the NDPP was invalid.³⁷⁴

The court questioned the Minister's action for ignoring the findings of the Ginwala Commission and the recommendations of the Public Service Commission on the conduct of Simelane.³⁷⁵ The court further held that:

“the difficulties concerning Mr Simelane’s evidence that appear from a study of the records of the Ginwala Commission were and remain highly relevant to Mr Simelane’s credibility, honesty, integrity and conscientiousness. The Minister’s advice to the President to ignore these matters and to appoint Mr Simelane without more was unfortunate. The material was relevant. The President’s decision to ignore it was of a kind that coloured the rationality of the entire process, and thus rendered the ultimate decision irrational.”³⁷⁶

3.4.4 The nexus between the notion of judicial independence and human rights and democracy: A South African Constitutional perspective

Justice Mosenke points out that “the South African Constitution designates the judiciary and in particular the Constitutional Court as the prime upholder and enforcer of the Constitution”.³⁷⁷ Since its establishment the South African Constitutional Court has never disappointed but stood firm in promoting and protecting the rule of law, constitutional supremacy and human rights in the country.³⁷⁸ The court has since its inception dealt with

³⁷⁴ *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24 at par 95.

³⁷⁵ At par 85.

³⁷⁶ At par 86.

³⁷⁷ See n 373 above.

³⁷⁸ Justice Mosenke also argues that it is through “a robust and supreme constitution” in which the government can grow stronger as well as have stability in the eyes of its people, and whereas, “institutional arrangements such as the separation of powers, checks and balances and individual civil, political and justiciable socioeconomic rights make the government more responsible, more consistent, more predictable more just, more caring, more responsive and more legitimate in the eyes of the citizenry”, if the judiciary is vigilant, independent and functions in consistence with the rule of law and the Constitution. (*Ibid.*)

many landmark cases that proved its commitment to the Constitution and the rule of law in the country. It has made rulings without fear, favour or prejudice against the public or government but according to the facts and the law and in the spirit of the Constitution.

In an effort to answer the question tabled above, ie how does the concept of judicial independence link to human rights and democracy in a state? (and the provisions of section 7(1) which provides that the Bill of Rights is a cornerstone of democracy in South Africa), two cases by the Constitutional Court – the *Government of the RSA v Grootboom* which shall later be referred to as *Grootboom* and *S v Makwanyane* which shall later be referred to as *Makwanyane* shall be briefly discussed.

***RSA v Grootboom*³⁷⁹**

The Grootboom case involved the enforcement of socio-economic rights in terms of the Constitution of South Africa. Irene Grootboom and members of her community (390 adults and 510 children) were evicted from their dwellings and left without shelter in the cold and wet Cape winter. They applied to the High Court for an order court “directing the First Respondent, the local authority or one or more of the respondents,³⁸⁰ to provide adequate basic temporary shelter or housing for them and their children pending their obtaining permanent accommodation, and also to provide them with adequate and sufficient basic nutrition, shelter, health and care services and social services to all their children”.³⁸¹

³⁷⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169. Mrs Grootboom together with other people (about 390 adults and 510 children) lived in an informal squatter settlement called Wallecedene in the Western Cape. They had no water, sewage or refuse removal services and the area was partly waterlogged and lies dangerously close to a main public road. Most people in this area had applied for subsidized low-cost housing from the municipality and had been on the waiting list for about seven years, however it appeared that it was going to be a long wait and their conditions of living were continuously deteriorating. In September 1998 they moved to a vacant land that was privately owned and had been earmarked for low cost housing and put up their shacks and shelters. The land was unlawfully occupied as the occupants did not have the consent of the owner. In March 1999 the magistrate ordered that the occupants vacate the property and authorised the sheriff to evict, dismantle and remove any structure remaining on the property by the 19th of May 1999. The municipality was ordered to identify alternative land for the permanent or temporary occupation of these residents. By the 18th of May 1999 the municipality had not provided an alternative place as ordered by the magistrate and the residents were forcibly evicted. Their homes were bulldozed and burnt and their possessions destroyed as many of them were not present and could not salvage their personal belongings.

³⁸⁰ The respondents were the Oostenberg Municipality, Cape Metropolitan Council, Western Cape Provincial and the Government of the Republic of South Africa.

³⁸¹ *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) Editors' summary at par A.

They relied on sections 26³⁸² and 28³⁸³ of the Constitution to justify their submission that the respondents had a duty to provide them and their children with basic shelter. They argued that “the right of access to adequate housing had to be interpreted to include a minimum core entitlement to shelter and that there was a minimum core obligation resting upon every State party to ensure the satisfaction of minimum essential levels of each of the rights recognized by the International Covenant on Economic, Social and Cultural Rights”.³⁸⁴

As to whether socio-economic rights are justiciable, Justice Yacoob pointed that they are expressly included in the Bill of Rights and that section 7(2) of the Constitution binds the state to respect, protect, promote and fulfil the rights as provided in chapter 2, and therefore the question is not whether they are justiciable, but how to enforce them in a given case.³⁸⁵ However, he advised, it would be wise to deal carefully with each case as it arises because different factors may also come into play. The state does not have unlimited resources, it also needs to be protected by the law against unfair or unreasonable demands by members of the public, and the law needs to be followed by all the parties and thereby justice shall prevail.³⁸⁶

The CC held that all the rights in the Bill of Rights are inter-related and mutually supportive.³⁸⁷ They complement one another, for example, the rights to human dignity will be denied if people do not have food, clothing or shelter.³⁸⁸ Socio-economic rights for all people therefore enable them to enjoy the other rights enshrined in chapter 2.³⁸⁹ The realisation of socio-economic rights also contributes to the advancement of race and gender equality and

³⁸² Section 26 provides as follows:

- (1) Everyone has a right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources to achieve the progressive realization of this right.
- (3) No one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

³⁸³ Section 28(1)(c) provides that every child has the right “to basic nutrition, shelter, basic health care services and social services”.

³⁸⁴ See footnote 381 above at par D.

³⁸⁵ See footnote 379 above at par 20.

³⁸⁶ In terms of section 36(1) of the Constitution – the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose.

³⁸⁷ Paragraph 23.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

the evolution of a society in which men and women are equally able to achieve their full potential.³⁹⁰ Respect for human rights is a recipe for successful democracy and makes it possible for any country to attain good and peaceful governance.

*S v Makwanyane*³⁹¹

This case dealt with the constitutionality of the death penalty in South Africa's new constitutional order.

Two accused persons were convicted in the High Court on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances.³⁹² They were given death sentences by the High Court on each of the counts of murder, and long-term imprisonment on the other counts.³⁹³ They appealed against both the convictions and sentences to the Appellate Division (now Supreme Court of Appeal) which dismissed the conviction appeal and confirmed that the circumstances of the murders were such that the accused should receive the heaviest sentence permissible under the law.³⁹⁴

In terms of section 277(1)(a) of the Criminal Procedure Act³⁹⁵ (CPA) the death penalty was an appropriate sentence for the crime of murder. At this time the Interim Constitution (1993) (IC) was in force, however, it was not in force during the trial in the High Court. Now the Appellate Division had to take into account the provisions of the Constitution of South Africa (IC). On appeal, the question was whether the provisions of section 277(1)(a) of the CPA were consistent the Constitution.³⁹⁶ Counsel for the accused argued that the section (277(1)(a)) violated the provisions of sections 9³⁹⁷ and 11(2)³⁹⁸ of the Constitution (IC).

The Appellate Division dismissed the appeal against the sentences on the counts of attempted murder and robbery and referred the matter to the Constitutional Court (CC), but postponed the further hearing of the appeals against the death sentences until the constitutional issues

³⁹⁰ *Ibid.*

³⁹¹ *S v Makwanyane and Another* 1995 (6) BCLR 665.

³⁹² Paragraph 1.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ Criminal Procedure Act 51 of 1977.

³⁹⁶ Paragraph 2.

³⁹⁷ Section 9 of the Interim Constitution provided that: "every person shall have the right to life".

³⁹⁸ Section 11(2) provided that – "no person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment".

had been dealt with by the CC.³⁹⁹ Chaskalson P identified two issues that were raised, namely, the constitutionality of section 277(1)(a) of the CPA, and the implications of section 241(8)⁴⁰⁰ of the IC.⁴⁰¹ Also, the court acknowledged the provisions of section 102(6)⁴⁰² of the IC as to how the case was referred to it by the Appellate Division.⁴⁰³

The CC was required to determine the constitutionality of the death penalty. The court argued, among other things, that the dawn of democracy and the new constitutional order brought a radical change in South Africa. The new order provided a future for everyone that is founded on human rights, democracy and supremacy of the law.⁴⁰⁴ The court made references and comparisons to and with both international and foreign law and authorities for and against the death sentence.⁴⁰⁵

On the view of the public's opinion with regard to the death penalty, Chaskalson P raised a progressive argument which proves the independence and commitment of the judiciary to the Constitution and the rule of law. He acknowledged that, the majority of South Africans feel that the death penalty should be imposed in extreme cases of murder, but argued that "although public opinion may have some relevance, 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".⁴⁰⁶ Most importantly, "if public opinion were to be decisive there would be no need for constitutional adjudication", he continued.⁴⁰⁷

³⁹⁹ Paragraph 3.

⁴⁰⁰ Section 241(8) provided that:

"All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution."

⁴⁰¹ Paragraph 3.

⁴⁰² Section 102(6) provided that: "If it is necessary for the purposes of disposing of the said appeal for the constitutional issue to be decided, the Appellate Division shall refer such issue to the Constitutional Court for its decision".

⁴⁰³ Paragraph 3.

⁴⁰⁴ Paragraph 7.

⁴⁰⁵ For example, Chaskalson P considered examples from countries such as Canada, US, Germany, India, Hungary, Zimbabwe, Jamaica, Tanzania and others; and other authorities such as the UN Human Rights Commission, the European Court of Human Rights, the International Covenant on Civil and Political Rights and so on, in an effort to strike the balance and arrive at a just decision in accordance with South Africa's new constitutional provisions.

⁴⁰⁶ Paragraph 88.

⁴⁰⁷ *Ibid.*

Indeed if judicial officers were dictated to by public opinion or government officials what would be role of the law and the Constitution? It is this character, knowledge and understanding of the notion of judicial independence and the principle of separation of powers which enables judges to make rational judgments and uphold the rule of law in the country.

Human rights form a part of democratic processes that can only be possible through an independent judiciary. The court is the custodian of human rights and has a duty at all times to strike the balance between the majority and minority through the law. In the words of Chaskalson P: “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 rights of minorities and others who cannot protect their rights adequately through the democratic process”.⁴⁰⁸

The court found the death penalty to be in conflict with the provisions of the Constitution and declared it unconstitutional and referred the case back to the Appellate Division for a lawful sentence.⁴⁰⁹ All the other justices⁴¹⁰ of the CC concurred with Chaskalson P judgment regarding his conclusion, reasons and the proposed order.

The *Grootboom* and *Makwanyane* cases are two of the most important cases regarding, among other things, principles of South African law and matters of interpretation of the Constitution that the CC has ruled upon since its inception and which have highlighted the importance of the new constitutional order in the new democratic South Africa. The cases demonstrate the role of the courts and the independence of the judiciary in applying and interpreting the laws of the new Republic as compared to the apartheid era.⁴¹¹ Dugard points out that there have been remarkable situations in which South African courts gave preference to the state in their judgments where they should have exercised their discretion in favour of individuals.⁴¹²

The CC also clarifies through its judgments that no one is above the law and that at all times the law must reign supreme. In *Grootboom* Justice Yacoob pointed out that the Constitution

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Paragraph 151.

⁴¹⁰ The other justices were Ackermann, Didcott, Kentridge, Kriegler, Langa, Madala, Mahomed, Mokgoro, O'Regan and Sachs.

⁴¹¹ See Dugard John “Human Rights in South Africa – retrospect and prospect” (1979) *Acta Juridica* 263 at 271.

⁴¹² *Ibid.*

places certain obligations on both the state and the public, and it is the duty of courts to enforce them and ensure that every party complies with the set laws of the country.⁴¹³

3.5 South Africa's Judicial History under Apartheid Rule and the Judicial Triumph and Challenges since the Start of a New Democratic and Constitutional Order

South Africa has since 1994 made some progress in terms of how the judiciary dispenses justice to the people as compared to the apartheid era. Certainly, the dawn of democracy and a new constitutional order has changed the mindset of the public (especially the black majority) and restored confidence in the judiciary that was fading under the apartheid government.⁴¹⁴ As pointed out by Dugard:

“From 1960 to 1982 the Appellate Division was presided over by Chief Justices who were politically sympathetic to the Government. Judge Presidents of this period were likewise inclined. Although there was some questioning of judicial behavior from academic quarters during this period, most judges seemed to be impervious to criticism and convinced that the policy of abstention or support for the executive was juridically sound.”⁴¹⁵

He further explains that the reputation of courts and the judicial process in South Africa had deteriorated by 1982 as the black majority had lost confidence in it because of its support for the executive’s racial policies and the fact that it had become a subject of criticism to academics and legal activists.⁴¹⁶ However, as was highlighted above through the *Grootboom* and *Makwanyane* cases, the new constitutional order has since brought about a huge difference in South Africa’s legal and political spheres.

Beside the judicial triumphs that South Africa has witnessed during the past seventeen years of constitutional order, lately there have been challenges that pose a threat to the future of the judicial process in the country. This is the result of some of the ruling political party, the African National Congress (ANC) senior leaders who have made comments and allegations

⁴¹³ See footnote 379 above at par 20.

⁴¹⁴ See the discussions of *Grootboom* and *Makwanyane* above.

⁴¹⁵ See footnote 352 above at 487; see also Dugard footnote 411 above at 263 where he argues that: “Our judiciary has a reputation for independence from the executive but, as in many Western societies, the judiciary has often been accused of leaning too heavily in favour of the executive”.

⁴¹⁶ See Dugard footnote 352 above at 492.

labeling the judiciary in public gatherings or through the media platforms as “counter-revolutionary”.⁴¹⁷

Arguably, South Africa’s history of a judiciary with a “damaged reputation” is not far-fetched, as is highlighted above during the apartheid rule, hence the fear that the comments made by senior and influential members of the “powerful” ruling party pose some threat as to the recurrence of a judiciary loyal to the executive or legislative branch of government.⁴¹⁸

3.6 Conclusion

The notion of judicial independence in the contemporary world has become an important mechanism in which modern states hope for in order to achieve democracy, constitutionalism, and realising the principle of separation of powers as well as upholding the rule of law. The concepts of judicial independence, democracy, separation of powers, constitutionalism and the rule of law are interrelated. They balance each other and secure the well-being of the people, preserve peace, and national unity, and provide an effective, efficient, transparent, accountable and coherent government in any given state.

The above mentioned mechanisms, ie the constitution; judicial service councils / boards / commissions; courts or tribunals; the process of appointment; and international law / conventions or institutions need to be protected and promoted by governments in order to safeguard the principle of judicial independence and render the judiciary impartial. Also, it is important for judicial officers to preserve their honour and integrity in the eyes of the public to restore public confidence in the system, by applying the law fairly and without fear or favour. A judicial system that is controlled or influenced by the other branches of government

⁴¹⁷ See *Times Live* article of 11 September 2011 titled “Apartheid returns via the back door”, where the former ANC Youth League President and then influential Malema was quoted saying that the judiciary was untransformed and being used as a ‘back door’ to usher apartheid back” Available at <http://www.timeslive.co.za/politics/2011/09/15/apartheid-returns-via-the-back-door> (accessed 03/02/2012).

In his article titled “ANC’s fatal concessions”, ANC’s senior member and former Premier of Limpopo Province, Ngoako Ramathlodi, argued that the majority of black people are still enjoying empty political power while what he calls forces against change reign supreme in the judiciary. See *The Times* 01 September 2011 at 19.

See also the interview of the ANC Secretary-General with the *Sowetan* editor on 18 August 2011, titled “ANC’s Mantashe lambasts judges” available at <http://www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambasts-judges> and other reports at <http://mg.co.za/article/2008-10-14-you-said-it-mantashe>; <http://www.businessday.co.za/Articles/Content.aspx?id=50316>.

⁴¹⁸ For example if judicial officers are referred to as “counter-revolutionary” as in the words of the ANC Secretary General, Gwede Mantashe (*ibid*), the assumption is that those judicial officers are threatened by politicians to function in a way that brings comfort to them (politicians) and compromise the principles of independency and impartiality which characterises the judiciary in the modern democratic state.

cannot be effective or efficient in carrying out its mandate, while, on the other hand, it can be a threat to justice, the law and good governance.⁴¹⁹ After all, judicial independence is a necessity for good governance and democracy.

⁴¹⁹ See Burbank footnote 297 above at 325.

Chapter Four

THE APPOINTMENT PROCESS OF JUDICIAL OFFICERS IN SWAZILAND, KENYA, ZIMBABWE AND SOUTH AFRICA

4.1	Introduction	106
4.2	The Judiciary and the Selection Process of Judicial Officers in Swaziland	108
4.2.1	The Constitution and Judicial Authority in Swaziland	108
4.2.2	The Appointment of Judicial Officers under the Swazi Constitution	110
4.2.3	The Judicial Service Commission (JSC) in Swaziland	112
4.2.4	The State of the Judiciary since the adoption of the New Constitution in Swaziland	115
4.2.5	Judicial Crisis	119
4.3	The Judiciary and the Selection Process Of Judicial Officers in Kenya	121
4.3.1	The Judiciary in Kenya	121
4.3.2	The Judiciary under the new Constitution of Kenya, 2010	124
4.3.3	Appointment of Chief Justice, Deputy Chief Justice and other Judges in Kenya	126
4.3.4	The Role of the Judicial Service Commission in Kenya	128
4.3.5	Assessment	129
4.4	The Judiciary and the Selection Process of Judicial Officers in Zimbabwe	130
4.4.1	A Brief Description of the Crisis in Zimbabwe since 2000	130
4.4.2	The Judiciary and the Constitution in Zimbabwe	131
4.4.3	Appointment of Judges	134
4.4.4	The Judicial Service Commission in Zimbabwe	135
4.4.5	Assessment	136
4.5	The Judiciary and the Selection Process of Judicial Officers in South Africa	137
4.5.1	The Judicial Service Commission in South Africa	137
4.5.2	The Appointment of Judicial Officers in terms of Section 174 of the Constitution	140
4.5.3	The need for the judiciary to reflect broadly the racial and gender composition of South Africa when judicial officers are appointed (Section 174(2))	141
4.5.4	The Appointment of the Chief Justice (CJ) and Deputy Chief Justice (DCJ) of the CC and the Appointment of the President and Deputy President of the SCA (Section 174(3) of the Constitution)	143
4.5.5	Appointment to the Constitutional Court (Section 174(4))	149
4.5.6	Appointment in the Supreme Court of Appeal and the High Courts	151
4.5.7	Term of Office, Remuneration and Removal of Judges in South Africa	153
4.6	Conclusion	155

4.1 Introduction

As indicated in chapter three above, judicial independence has emerged as a crucial component in the field of constitutional law which contributes massively in shaping democracies and also serves to uphold the doctrine of separation of powers in the modern state.⁴²⁰ In chapter 3 we examined the concept of judicial independence from a theoretical point of view, identified its two manifestations as personal and functional independence, and identified the different ways in which it is protected in the modern state. In this chapter, the final substantive chapter in the study, we turn to a practical examination of the protection of judicial independence in the African jurisdictions selected for study. This is done through an analysis of the appointment process in each of the jurisdictions, and a study of the relevant case law which come to us from the courts.

Over the years, the notion of judicial independence has evolved and received considerable attention from scholars, lawyers, politicians and members of the public in general in evaluating its role in promoting and protecting democracy and good governance in any given state.⁴²¹

The big question, thus, is the way in which judicial officers are selected. This is an important issue that contributes to the good governance of the country. A mere qualification in law does not automatically qualify a person for judicial office. Wiener correctly argues that judicial officers should be selected from senior officers “who are deemed best qualified by reason of maturity, temperament, training and experience to perform judicial functions”.⁴²² There appears to be a general understanding throughout the world about the sensitive nature of the principle of judicial independence and the importance of a process that is transparent and free from political influence in selecting judicial officers.⁴²³ Although the judiciary must be independent, it is important to always keep in mind that, together with the other two branches of government (the executive and the legislature), it completes what in the end is called “the government”.

⁴²⁰ Vanberg Georg *The politics of constitutional review in Germany* (2005) at 1.

⁴²¹ Morton Frederick Lee *Law, politics and the judicial process in Canada* (2002) at 217. See also Uitz Renáta *Constitutions, courts, and history: Historical narratives in constitutional adjudication* (2005) at 41.

⁴²² Wiener Frederick Bernays “The army’s field judiciary system: A notable advance” (1960) 46 *American Bar Association Journal* at 1182.

⁴²³ Throup David and Hornsby Charles *Multi-party politics in Kenya: The Kenyatta and Moi States and the triumph of the system in the 1992 election* (1998) at 101.

The three branches of government are different and independent from each other, but in principle should be interdependent, interrelate and co-operate to secure the well-being and good governance of the country. In the Kenyan case of *Otieno Clifford Richard v Republic* the court argued that “... there cannot be strict separation of powers and that there must be interaction between all arms of government ...”⁴²⁴ This also manifested in *In re: Certification of the Constitution of the Republic of South Africa* when the Constitutional Court held that:

“There is, however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute

The principle of separation of powers, on the one hand, recognizes the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter’s words, ‘[t]he areas are partly interacting, not wholly disjointed’.”⁴²⁵

Countries use different methods of selection in an effort to secure judicial independence and preserve confidence in the judiciary.⁴²⁶ Henry Abraham points out that the “practices of selection differ in large measure in accordance with the traditions and needs of the country concerned”.⁴²⁷ He points to two basic methods of selecting judicial officers that are used by different countries worldwide, i.e. appointment and election.⁴²⁸

This chapter focuses on the constitutions of the four respective countries and examines the clauses that deal with the appointment of judges. The role played by the presidents, parliament and judicial service commissions/councils in the appointment process is explained in details. The argument is that the way in which judges are appointed has or may have an impact on way in which judges dispense justice. The chapter critically describes, analyzes,

⁴²⁴ See *Otieno Clifford Richard v Republic* [2006] eKLR.

⁴²⁵ *In re Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) at pars 108-109.

⁴²⁶ Haig Patapan *Judging democracy: The new politics of the High Court of Australia* (2000) at 164.

⁴²⁷ Abraham Henry J *The judicial process: An introductory analysis of the Courts of the United States, England and France* (1998) 7th edition at 20.

⁴²⁸ *Ibid.*

and compares this process of appointment starting with Swaziland, Kenya, Zimbabwe and South Africa sequentially.

4.2 The Judiciary and the Selection Process of Judicial Officers in Swaziland

4.2.1 The Constitution and Judicial Authority in Swaziland

In 2005 King Mswati III approved a new Constitution for Swaziland which came into effect in February 2006.⁴²⁹ Section 1(1) of the Constitution declares the country a sovereign and democratic kingdom.⁴³⁰ Section 2(1) makes it clear that the Constitution is the supreme law of Swaziland and invalidates any law which might be in conflict with the Constitution and further places a duty on the King and iNgwenyama, as well as all the citizens of Swaziland, in terms of subsection (2), always to uphold and defend the Constitution.

Chapter VIII makes provision for the judicature. The judicial authority of the Kingdom of Swaziland is vested in the Judiciary.⁴³¹ The Constitution defends the independence of the judiciary which is subject only to the Constitution. The independence of the judiciary of Swaziland is entrenched in section 141 of the Constitution which provides as follows:

- (1) “In the exercise of judicial power of Swaziland, the Judiciary, in both its judicial and administrative functions, including financial administration shall be independent and subject only to this Constitution and shall not be subject to the control or direction of any person or authority.
- (2) Neither the Crown nor Parliament nor any person acting under the authority of the Crown or Parliament nor any person whatsoever shall interfere with judges or judicial officers, or other persons exercising judicial power, in the exercise of their judicial functions.
- (3) All organs or agencies of the Crown shall give to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts under this Constitution.
- (4) A judge of a superior court or any person exercising judicial power is not liable to any action or suit for any act or omission by that judge or person in the exercise of judicial power.

⁴²⁹ See <http://www.state.gov/r/pa/ei/bgn/2841.htm> under the heading “Government and Political Conditions” (accessed 14/11/2011).

⁴³⁰ The Constitution of the Kingdom of Swaziland, 2005.

⁴³¹ Section 140(1).

- (5) The administrative expenses of the judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the judiciary shall be charged on the Consolidated Fund.
- (6) The salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a judge of a superior court or any judicial officer or other person exercising judicial power, shall not be varied to the disadvantage of that judge or judicial officer or other person.
- (7) The Judiciary shall keep its own finances and administer its own affairs, and may deal directly with the Ministry responsible for finance or any other person in relation to its finances or affairs.”

The history of Swaziland indicates the dominance of the Monarch over the principles of democracy and constitutionalism. For example, in their research, Joubert, Masilela and Langwenya point out that:

“The influence of the Monarch on the functioning of the state has led to numerous instances of undue influences on the various arms of government, most notably the Judiciary and the Parliament where traditional interests cloaked by the name of the King have subverted justice and development and compounded and escalated corruption as well as significantly weakening institutions of government. For instance, in Parliament it is common for members not to debate matters that may be perceived to touch on the interests and authority of the King.”⁴³²

Clearly, there is no way democracy can flourish in a state like Swaziland where the King freely intervenes in every sphere of government (executive, legislative and judicial) and judges are ordered by the Attorney General and heads of security forces not to adjudicate on matters in which the King is involved.⁴³³ It is, among other things, for this reason that judicial independence is encouraged in the modern state in order to ensure that the rule of law reigns supreme and that democracy is safeguarded.⁴³⁴

Like every state in the world striving to balance government authority, section 141 of Swaziland Constitution strives to protect and promote the independence of the judiciary in that country in line with the general standards advocated by the majority of members of the

⁴³² Joubert P, Masilela Z and Langwenya M (2008) “Consolidating democratic governance in the SADC Region: Swaziland” EISA Research Report no 38 at 28, available at <http://www.eisa.org.za/PDF/rr38.pdf>.

⁴³³ Joubert, Masilela and Langwenya point out that: “In 2003, the King threatened to dissolve Parliament unless the Speaker was removed. The Speaker was illegally removed and the reasons were not stated. This followed an incident where the Attorney General and heads of the security forces met with judges of the High Court to prevent it from deliberating on a matter that directly touched on the personal interests of the King” (*ibid*).

⁴³⁴ See “Law: Executive interference in the Palestinian judiciary” in Kassim Anis F *The Palestine Yearbook of International Law* volume 10 (1997) at 227.

international community. An independent judiciary symbolizes a desire to promote and achieve good governance, the rule of law, and the progressive development of the society.⁴³⁵

The nature of a constitution in the modern state is that it serves as a guarantor in ensuring that no one interferes with the functioning of the courts and that judicial officers are not threatened or coerced when rendering the administration of justice.⁴³⁶

However, in the case of Swaziland it should be noted that the Kingdom has struggled to embrace the idea of promoting and protecting judicial independence.⁴³⁷ Although some people hoped that the new Constitution would bring about change, others warned that it left too much political power in the hands of the Monarch and this is evident today in the current judicial crisis rocking Swaziland.⁴³⁸ In his comments on the draft Constitution, Maroleng presaged the King's absolute powers and responsibilities including the appointment of the prime minister, the cabinet, chiefs and judges, as well as his power to approve bills before they are passed into law by Parliament.⁴³⁹ The power wielded by the Monarch does not promote democracy and defeats the object of separation of powers that seeks to balance government powers in the contemporary state.

4.2.2 The Appointment of Judicial Officers under the Swazi Constitution

Langwenya emphasizes that “the process of judicial appointments is a key factor in determining the independence of the judiciary”.⁴⁴⁰ Judicial independence is universally categorized and accepted as one of the foremost mechanisms that promote and protect democracy in the modern state.⁴⁴¹

The Kingdom of Swaziland follows the appointment method for the selection of its judicial officers. The process is catered for under chapter VIII, Part 3 (Appointment, removal, etc of

⁴³⁵ Hatchard John, Ndulo Muna and Slinn Peter *Comparative constitutionalism and good governance in the Commonwealth: An eastern and southern African perspective* (2004) at 150-182.

⁴³⁶ Moller Mark K *Cato Supreme Court Review 2005-2006* (2006) at 69-73.

⁴³⁷ Dizard Jake, Walker Christopher and Tucker Vanessa *Countries at the crossroads 2011: An analysis of democratic governance* (2012) at 610.

⁴³⁸ The judicial crisis in Swaziland is discussed below under 4.2.5.

⁴³⁹ Maroleng C “Swaziland – the Kings Constitution” (2003) 12/3African Security Review 47.

⁴⁴⁰ Langwenya SM “Recent legal developments – Swaziland” (2005) *University of Botswana Law Journal* at 171.

⁴⁴¹ Thomas EW *The judicial process: Realism, pragmatism, practical reasoning and principles* (2005) at 79.

Superior Court Justices) and Part 4 (Judicial Service Commission) of the Constitution. section 153 provides as follows:

- “(1) The Chief Justice and the other Justices of the superior courts – shall be appointed by the King on the advice of the Judicial Service Commission.
- (1) Where the office of the Chief Justice is vacant, or where the Chief Justice is for any reason unable to perform the functions of the office –
 - (a) until a person has been appointed to, and has assumed the functions of, that office; or
 - (b) until the person holding the office of Chief Justice has resumed the functions of that office, as the case may be,

those functions shall be performed by the most senior of the Justices of the Supreme Court.
- (2) Where it appears to the Chief Justice that for a short duration the prescribed complement of the Supreme Court or High Court, as the case may be, is for any reason unlikely to be realized or where the exigencies of the situation so require, the Chief Justice shall advise the King to appoint a qualified person to act in that court for that duration.
- (3) Whether in respect of the office of the Chief Justice or Office of any justice of the superior courts, an acting appointment shall not exceed a single renewable period of three months.
- (4) Notwithstanding the provisions of subsections (3) and (4), the Chief Justice after consultations with the Judicial Service Commission may make an acting appointment where the duration does not exceed one month, unrenewable.
- (5) A person whose appointment to act as a Justice of a superior court has expired may, with the consent of the King acting on the advice of the Chief Justice or the Chief Justice after consultation with the Judicial Service Commission, continue to act for such a period not exceeding three months as may be necessary to enable that person to deliver judgment or to do any other thing in relation to proceedings that were commenced before that person previously to the expiry of the acting appointment.

The Chief Justice acts as head of judiciary.”⁴⁴²

As provided in the Constitution, the King cannot appoint judicial officers at his own will but acts in his authority as Head of State and must do so within the ambit of the Constitution.⁴⁴³

He is obliged to follow the precepts of section 4(4) which provides: “the King and iNgwenyama has such rights, prerogatives and obligations as are conferred on him by this Constitution or any other law, including Swazi law and custom, and shall exercise those rights, prerogatives and obligations in terms and in the spirit of this Constitution”.

⁴⁴² See section 142.

⁴⁴³ Section 64(1) provides that “the executive authority of Swaziland vests in the King as Head of State and shall be exercised in accordance with the provisions of this Constitution”.

The Constitution dictates that any person to be appointed as a judicial officer in Swaziland must be a person of high moral character and integrity.⁴⁴⁴ Such person must also have sufficient experience as a legal practitioner, barrister or advocate for a certain number of years depending on the position or the court (whether in the Supreme Court or in the High Court) to which he/she is to be appointed.⁴⁴⁵ Further, such person must have practised law in Swaziland, or any of the Commonwealth countries, or in the Republic of Ireland.⁴⁴⁶

Although the King appoints judicial officers in his capacity as Head of State, it could be argued that the wording of section 153 (1) “... shall be appointed by the King on the advice of ...” is problematic in that the King is not bound to take the decision of appointing justices of courts “with” the JSC. He merely acts on the JSC’s advice. This renders the JSC ineffective in a crucial function of ensuring a transparent and independent judiciary.⁴⁴⁷

4.2.3 The Judicial Service Commission (JSC) in Swaziland

The purpose of a judicial service commission/council/board in the contemporary state is to ensure a fair and transparent way of appointing judicial officers and to exclude any possible interference in the appointment process by influential people, including the executive or members of parliament. Section 159 of the Swazi Constitution establishes a judicial service commission for Swaziland. The Swaziland JSC cannot be an exception; as in other countries, it was presumably established to contribute to a transparent process of appointment of judges with the aim of ensuring judicial independence.⁴⁴⁸

The composition of a judicial service commission should represent a commitment to an independent judiciary. Such composition must reflect that the members themselves are free from political influence that might seek to sway the object of a judicial service

⁴⁴⁴ See section 154(1).

⁴⁴⁵ Section 154(1)(a)(i)(ii)(iii) and (b)(i)(ii)(iii).

⁴⁴⁶ *Id* at (a)(i).

⁴⁴⁷ See Guizzi Francesco “The Judicial Service Commission as an Institutional Guarantee of the Impartiality of Judges and the Independence of the Judiciary” in Council of Europe. Multilateral Meeting *The role of the Judicial Service Commission: Proceedings: Multilateral Meeting* (1995) Council of Europe at 37.

⁴⁴⁸ Judicial independence is a fundamental for democracy in the modern state and in order to strengthen this most countries establishes judicial service commissions in an effort to ensure a fair and transparent appointment process of judicial officers to safeguard this notion.

commission/council/board.⁴⁴⁹ If, for instance, the head of the executive is given powers to appoint the majority of members of the JSC, the likelihood is that its independence will be compromised thereby defeating the purpose of the JSC.

Although the Constitution provides for an independent JSC in Swaziland,⁴⁵⁰ in practical terms the King is afforded the power to appoint all members of the JSC. Section 159(2) of the Swazi Constitution provides as follows:

“The Commission shall consist of the following –

- (a) The Chief Justice who, shall be the Chairman;
- (b) Two legal practitioners of no less than seven years practice and in good professional standing to be appointed by the King;
- (c) The Chairman of the Civil Service Commission; and
- (d) Two persons appointed by the King.”

The JSC is further protected by section 159(3) which provide that: “in the exercise of its functions under this Constitution, the commission or member of the commission shall not be subject to the direction or control of any person or authority”. It is clear that, through the provisions of section 159(1) and (3), the Constitution seek to protect the independence of the JSC, with the King appointing all the members constituting the JSC, its independence is compromised.⁴⁵¹ The power of the King to appoint all members of the JSC gives him indirect influence over the JSC which runs counter to the object of its existence.

The functions of the judicial service commission are clearly articulated in section 160 of the Constitution which provides that:

- “(1) Subject to any other powers or general functions conferred on a service commission in terms of this Constitution, the judicial service commission shall among other things perform the following functions –
 - (a) Advise the King in the exercise of the power to appoint persons to hold or act in any office specified in this Constitution which includes power to

⁴⁴⁹ It is understood that the idea of a judicial service commission came about in order to have an independent body which assist in the appointment of judicial officers and it is common sense that members constituting should not be susceptible to political influence.

⁴⁵⁰ Section 159(1).

⁴⁵¹ The King appoints the Chief Justice (in terms of section 153(1)) who acts as the Chairman of the JSC, and also appoints the Chairman of the Civil Service Commission. Section 173(3) provides that “members of a service commission shall be appointed by the King on the recommendation of a line Minister or any other authority as may be provided in this Constitution or any other law”. Basically the King appoints the entire JSC.

- exercise disciplinary control over those persons and to remove those persons from office;
- (b) ...
- (c) Review and make recommendations, subject to the provisions of this Constitution on the terms and conditions of service of judges and persons holding the judicial offices enumerated in subsection (3);
- (d) ...
- (e) Receive and process recommendations and complaints concerning the judiciary;
- (f) Advise the Government through the Minister responsible for Justice on improving the administration of justice generally;”

Members of the Commission hold office for a four-year term renewable only once.⁴⁵² The Constitution appears to have been crafted in a manner that evidences commitment and readiness by the government to transform Swaziland and uphold constitutionalism in the quest for a “sustainable home-grown political order to promote transparency and the social, economic and cultural development of the country”.⁴⁵³

The JSC could be perceived as another pillar (alongside the Constitution) in safeguarding the independence of the judiciary and it is very important that the public have confidence in the body vested with powers to ensure transparent and free processes of appointing judicial officers. This perception was confirmed by the Industrial Court of Swaziland in *Hlatshwayo v Swaziland Government and Another*⁴⁵⁴ when the Court acknowledged that “the Constitution recognizes that public confidence in the Judicial Service Commission is crucial for the credibility and legitimacy of the judiciary”.⁴⁵⁵ The Court further held that “the independence of the JSC is inextricably linked to the independence of the judiciary”⁴⁵⁶ and substantiated this by quoting the South African case of *Van Rooyen v De Kock and Others*⁴⁵⁷ where the court held that:

“the attributes of judicial independence lie at the very heart of the due process of the law. They represent the true essence of a proper judicial process. It follows logically that all attempts must therefore be made to avoid any perception or indication of dependence by the judiciary on the Executive.”⁴⁵⁸

⁴⁵² See section 159(4).

⁴⁵³ See Preamble to the Swazi Constitution.

⁴⁵⁴ [2007] SZIC 2 *Hlatshwayo v Swaziland Government and Another* (Judgment) (398/06).

⁴⁵⁵ *Id* at par 21.

⁴⁵⁶ At par 18.

⁴⁵⁷ *Van Rooyen v De Kock NO and Others* 2003 (2) SA 317 TPD.

⁴⁵⁸ *Id* at par 12.1.

The independence of the JSC is undoubtedly essential for the independence of the judicial branch of government. However, in Swaziland it could be argued that this important institution has been compromised through the King's power to appoint all members constituting the JSC. After all, common sense dictates that such appointees may not execute their functions independently of the King.

4.2.4 The State of the Judiciary since the adoption of the New Constitution in Swaziland

The Swazi King is generally perceived as possessing “absolute power” over the organs of state, including the judiciary, irrespective of the Constitution which is, on paper, the supreme law of Swaziland. This perception is confirmed in the Constitution which shields the King from any legal proceedings by providing that:

“The King and iNgwenyama shall be immune from –

- (a) suit or legal process in any cause in respect of all things done or omitted to be done by him; and
- (b) being summoned to appear as a witness in any civil or criminal proceedings.”⁴⁵⁹

The question is whether section 11 represents a loophole in the Swazi Constitution that gives the King “ammunition” to disregard the rule of law and the Constitution? Or is it the case of some African leaders always being above the law? Or is it the fear or failure by the judiciary to interpret the Constitution? Or is it the combination of the three?

Perhaps a lesson that Swaziland may learn is that by nature, and truly so, the office of the head of state must be respected, protected and afforded all the dignity that it deserves, but where the incumbent transgresses he must be brought to book. In a South African case, *President of the Republic of South Africa and Others v South African Rugby Union and Others*,⁴⁶⁰ the Constitutional Court advanced some interesting arguments on the question of whether the President can be called upon to testify in a court of law.

⁴⁵⁹ Section 11 of the Constitution.

⁴⁶⁰ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999).

The court held that “there is no doubt that courts are obliged to ensure that the status, dignity and efficiency of the office of the President is protected. At the same time, however, the administration of justice cannot and should not be impeded by a court’s desire to ensure that the dignity of the President is safeguarded”.⁴⁶¹ Where specific conduct by the President clashes with the interest of justice, the President must be called to answer.⁴⁶² However, such action must be taken with “appropriate restraint sensitive to the status of the head of state and the integrity of the executive arm of government”.⁴⁶³

The Constitutional Court also indicated that: “in Germany for example, in terms of the Codes regulating Civil Procedure and Criminal Procedure the state president need not attend court in person; instead he gives his testimony in his residence”.⁴⁶⁴ This approach brings a balance between the interest of justice and the respect that comes with the office of the head of state against any form of transgression that might be committed by him/her and surely this is a good lesson for every state that no one should be above the law.

The focus in this section is on various issues, or rather concerns, about the judiciary and the criticism leveled against the government of Swaziland’s failure to uphold democratic processes and promote human rights since the adoption of a new Constitution in 2005.

In his article “Human Rights and the Rule of Law in Swaziland”, Gumede raises some crucial questions about governance in Swaziland, the powers of the King, and certain provisions in the Constitution.⁴⁶⁵ He points out that human rights and the rule of law are disrespected in Swaziland, and links this disrespect to the country’s failure to embrace modern democratic principles.⁴⁶⁶

In terms of general standards accepted by the members of the international community of states of which Swaziland is a part, courts are custodians of human rights and the rule of law. They are inherently tasked to protect these. With Swaziland accused of disrespecting these,

⁴⁶¹ *Id* at par 242.

⁴⁶² *Id* at par 243.

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid* (see footnote 189 of the case [*Zivilprozeßordnung* sections 219(2) and 375(2); *Strafprozeßordnung* section 49]).

⁴⁶⁵ Gumede Sabelo “Human rights and the rule of law in Swaziland” (2005) 5/2 *African Human Rights Law Journal* 266-286.

⁴⁶⁶ *Id* at 271.

the question that arises is whether that country's judiciary and courts are effective and efficient in upholding the rule of law or are they also "footstools" of the King who seems to enjoy supremacy over the Constitution.

Gumedze argues that: "the Constitution does not insulate the judiciary from interference by the monarch or those acting on his behalf".⁴⁶⁷ He points to, among others, section 64(1),⁴⁶⁸ section 106(a),⁴⁶⁹ section 140(1),⁴⁷⁰ and section 228(2)⁴⁷¹ of the Constitution as problematic.⁴⁷² Indeed, the way in which these sections identified by Gumedze are structured, gives more power to the King to control every sphere of government in Swaziland, thereby rendering the provisions of section 2(1) of the Constitution subordinate to the power of the King.

He also argues that: "in the event that the King interferes with judges or judicial officers, as has been the case during his reign (and his predecessor's reign), the Constitution does not provide any effective safeguards for the insulation of the judiciary from such unscrupulous interferences as the King's authority cannot be challenged in a court of law".⁴⁷³ Again, Gumedze declares that the situation causes Swazi law and custom to be in competition with the Constitution and consequently subjects the Constitution to Swazi law and custom.⁴⁷⁴

These issues raised by Gumedze take us back to the importance of the doctrine of separation of powers in terms of which Montesquieu argued that: "constant experience shows that every man invested with power is apt to abuse it and to carry his authority as far as it will go, but to prevent this abuse, it is necessary from the very nature of things that power should be a check to power".⁴⁷⁵ The current problems in Swaziland could be attributed to the sections in the Constitution which vest both executive and legislative powers in the King, while declaring him immune from any civil or criminal proceedings. Limitation of power is of vital

⁴⁶⁷ *Ibid.*

⁴⁶⁸ Section 64(1) vests the executive authority in the King.

⁴⁶⁹ Section 106(a) vests the supreme legislative authority in the King in parliament.

⁴⁷⁰ Section 140(1) vests the judicial power in the judiciary and further provides that "accordingly, an organ or agency of the Crown shall not have or be conferred with final judicial power". Nothing is mentioned about any protection against any interference by the King.

⁴⁷¹ Section 228(2) provides that "INgwenyama enjoys the same legal protection and immunity from legal suit or process as the King".

⁴⁷² See footnote 465 above at 271.

⁴⁷³ *Ibid.*

⁴⁷⁴ *Id* at 272.

⁴⁷⁵ Montesquieu B *The spirit of laws* (1949) at 150.

importance in ensuring that those vested with authority always act within their limits as prescribed by the law.

There are many countries in Africa and around the world with constitutions declared as the supreme law of the land, yet the leaders of such countries continue to disregard their constitutions.⁴⁷⁶ It appears from what we have seen above, that Swaziland is no exception. Section 2(1) of the Constitution clearly provides that the Constitution is the supreme law in Swaziland and invalidates any law that shall be in conflict with the Constitution, while subsection (2) places a duty on the King and iNgwenyama, as well as all the people of Swaziland to uphold and defend the Constitution. However, this has so far not prevented the King from overriding the Constitution.

With the latest developments (the judicial crisis – discussed below), it could be argued that Swaziland's judiciary is not effective in upholding the rule of law and protecting human rights and the Constitution. Such ineffectiveness could be linked to the argument raised above about the composition of the JSC which has all its members appointed by the King.⁴⁷⁷ Another factor is that, although the Constitution declares Swaziland a democratic Kingdom, in practice democracy is compromised by the country's history of denial of political party participation in the politics and governance of the country.⁴⁷⁸

The gap left by the absence of political parties is visible in Swaziland.⁴⁷⁹ Political parties are generally perceived as strong pillars in support of democracy in the modern state. According to Matlosa:

“Democracy is unthinkable without political parties and, conversely, political parties cannot add value to a political system under conditions of authoritarianism. Political parties play a role in the democratization process. It is also incontrovertible that political parties are key to the institutionalization and consolidation of democracy. Thus sustainable democracy is dependent upon well-functioning and effective political parties.”⁴⁸⁰

⁴⁷⁶ Refer to chapters 2 above on Kenya and Zimbabwe, for example.

⁴⁷⁷ See section 159(2) of the Constitution.

⁴⁷⁸ See Mzizi JB “Political movements and challenges for democracy in Swaziland” (2005) EISA Research Report no 18.

⁴⁷⁹ Dizard Jake, Walker Christopher and Tucker Vanessa *Countries at the crossroads 2011: An analysis of democratic governance* (2012) at 602.

⁴⁸⁰ Matlosa Khabela in the Preface to the EISA Research Report no 18 “Political movements and challenges for democracy in Swaziland” (see footnote 478 above).

As it stands, the maxim *nemo debet esse iudex in propria causa*⁴⁸¹ hardly finds expression in the Kingdom of Swaziland, as it is clear that the King is answerable only to himself as his authority cannot be challenged in court.

4.2.5 Judicial Crisis

By the year 2011 the judicial crisis had deepened in Swaziland. Various scandals involving the judiciary were reported both in and outside of Swaziland.⁴⁸² In September 2011 over one hundred Swaziland lawyers under the umbrella of Swaziland Law Society, marched to hand over a memorandum concerning the judicial crisis in the country to the Justice Department.⁴⁸³ The lawyers raised concerns about corruption, nepotism, mismanagement and poor governance within the High Court.⁴⁸⁴

The Open Society Initiative for Southern Africa (OSISA)⁴⁸⁵ brought a complaint against the Government of Swaziland at the 50th Session of the African Commission on Human and People's Rights held in October 2011 in Banjul, Gambia. In the formal statement presented to the Commission, OSISA raised several issues which prove the dysfunctionality of the judicial branch in the Kingdom of Swaziland.⁴⁸⁶ Among other things, a principal concern in Swaziland according to OSISA, is a lack of access to justice, erosion of the respect of the rule of law, and abuse of human rights which are an affront to the African Charter on Human and People's Rights.⁴⁸⁷ The statement further affirmed the boycott by the Law Society of

⁴⁸¹ A Latin maxim meaning “no person ought to be judge in his own cause”.

⁴⁸² See various reports on the following sites –<http://www.legalbrief.co.za/article.php?story=20110823081136972>; <http://mg.co.za/article/2003-04-04-rule-of-law-crumbles-in-swaziland>; <http://mg.co.za/article/2011-07-01-suspension-of-swazi-judge-an-attack-on-the-judiciary> (accessed 17/11/2011).

⁴⁸³ Report by SABC news available at -<http://www.sabc.co.za/news/a/a445ab804869b9aa9a00dbda7f952083/Swazi-court-proceedings-halted-as-lawyers-march-20110921> (accessed 17/11/2011).

⁴⁸⁴ *Ibid.*

⁴⁸⁵ The Open Society Initiative for Southern Africa (OSISA) is an organization established in 1997 advocating good governance, democracy and human rights in various countries in the Southern African region including Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe. See <http://www.osisa.org/formal/about-osisa> (accessed 05/12/2011).

⁴⁸⁶ See OSISA statement to the 50th Session of the African Commission on Human and Peoples' Rights, October 2011, Banjul, The Gambia, available at the following sites http://www.comesaria.org/site/en/news_details.php?chaine=african-commission-must-act-on-nation&id_news=1433&id_article=119; <http://www.osisa.org/law/swaziland/judicial-crisis-deepens-swaziland>; http://www.southernaficalitigationcentre.org/news/item/SALC_Joint_Statement_Support_for_the_Swaziland_Law_Society_as_Judicial_Crisis_Escalates; www.achpr.org (accessed 05/12/2011).

⁴⁸⁷ *Ibid.*

Swaziland of the courts which they alleged highlighted the subversion of the principle of judicial independence and the rule of law in Swaziland.⁴⁸⁸

Singled out in the statement, are the Government of Swaziland, the JSC, and the Chief Justice who are accused of deviating from democratic principles aimed at promoting an effective, impartial and independent judiciary to protect and promote the rule of law in Swaziland.⁴⁸⁹ The root of the crisis as OSISA puts it, “lies in a number of actions by the Government, the Judicial Service Commission and the Chief Justice of Swaziland the effect of which is the denial of citizen’s constitutional right to approach the courts, and the introduction of institutional bias in the allocation and determination of matters before the courts”.⁴⁹⁰ This crisis proves that the judiciary is submissive to the will of the King and this has resulted in the collapse of the rule of law and abuse of human rights in that country.

The judicial crisis of Swaziland has a very negative impact on the advancement of democracy and good governance in the country. This, together with the banning of political parties from contesting elections and forming part of government, has exacerbated the situation and minimized the chances of making any progress. Section 159(2) of the Constitution is flawed because it affords the King excessive influence over the JSC by virtue of his powers to appoint all its members. There is no doubt that the King’s power and influence has weakened the objectivity of the JSC and led to the massive criticism and questioning of the integrity of the judiciary of the country by its own people.

In July 2011, the International Commission of Jurists (ICJ) and Southern African Development Community Lawyers Association (SADCLA) jointly issued a “General Briefing on Judge Thomas Masuku’s Case”⁴⁹¹ – a senior judge in the High Court of Swaziland, who was suspended by the JSC pending the resolution of the case against him. The allegations against Justice Masuku included, among other things, “disrespecting the Chief Justice and insulting His Majesty the King by using the words ‘forked tongue’ with reference to him”.⁴⁹² According to the ICJ and SADCLA, the charges against Justice Masuku and the conduct of

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*

⁴⁹¹ See Briefing available at <http://www.icj.org/dwn/database/MasukuBriefing-July2011.pdf>.

⁴⁹² *Ibid.*

the Chief Justice “raised a few issues about independence, impartiality and accountability of the judiciary and the general rule of law situation in Swaziland”.⁴⁹³

At the United Nations Human Rights Council’s 19th Regular Session 2012, Clement Mavungu of the ICJ Africa Regional Programme submitted a statement on “ICJ Oral Intervention on the Adoption of the Outcome Document of the Universal Periodical Review of Swaziland”.⁴⁹⁴ This statement also confirmed the continuous interference by the King in the affairs of the judiciary, and the controversial action by the Chief Justice who issued a practice directive exempting the King who “exercises enormous political power and authority” from the jurisdiction of the Swazi courts.⁴⁹⁵ It is clear that the Chief Justice is in cahoots with the King to undermine the principles of separation of powers and judicial independence Swaziland.

4.3 The Judiciary and the Selection Process Of Judicial Officers in Kenya

4.3.1 The Judiciary in Kenya

As discussed above in chapter 3, since gaining independence in 1963 Kenya’s democracy has suffered at the hands of the KANU-led government. For many years Kenya’s judiciary has been perceived (both domestically and internationally) as “weak and too submissive” to the executive.⁴⁹⁶ In fact, the violation of the Constitution by former President Moi is attributed to the judiciary’s failure to uphold its independence and impartiality.⁴⁹⁷ The judiciary in Kenya has been known for its corrupt activities and sympathy for the KANU-led executive.⁴⁹⁸ It has subjected itself to the executive for personal gain.⁴⁹⁹

⁴⁹³ *Ibid.*

⁴⁹⁴ See United Nations Human Rights Council 19th Regular Session, 27 February – 23 March 2012. Agenda Item 6 “ICJ Oral Intervention on the Adoption of the Outcome Document of the Universal Periodic Review of Swaziland” available at <http://documents.icj.org/ICJ-HRC19UPRSwazilandintervention.pdf> (accessed 19/07/2012).

⁴⁹⁵ *Ibid.*

⁴⁹⁶ See “Justice under siege: The rule of law and judicial subservience in Kenya” (footnote 503 below).

⁴⁹⁷ Daniel arap Moi was the President of Kenya for more than two decades and under his leadership the Constitution was amended several times to protect his interests. For example he banned political parties in 1982 to make Kenya a one-party state and removed the Security of tenure of judges in the Constitution in 1988.

⁴⁹⁸ According to Makau the regimes of both Presidents Kenyatta and Moi never respected the *trias politica* doctrine as to them courts were like any other agency under the executive branch. (See footnote 503 below at 101-102). Justice Nancy Baraza points out that the judiciary was not regarded as a separate branch of

Ahmednasir Abdullahi⁵⁰⁰ refers to the period 1963 to 2003 as the “lost decades of the Kenyan’s judiciary”⁵⁰¹ and argues that “corruption and the ritual of selling of justice as an economic commodity to the highest bidder has in the process became a defining feature of the Kenyan judiciary”.⁵⁰² In his article, “Justice under Siege”, Makau argues that the judiciary in Kenya “has shown no ability or inclination to uphold the rule of law against the express or perceived whims and interests of the executive and individual senior government officials, their business associates and cronies”.⁵⁰³

The government had, either directly or indirectly, put itself in charge of the judiciary, making sure that it dealt severely with any judicial officer who failed to carry out its wishes.⁵⁰⁴ Those judicial officers who ruled against the government could either be disciplined or dismissed by the government.⁵⁰⁵ The public has lost confidence in the judiciary because it has become general knowledge that in cases involving KANU-elite and its supporters the judiciary would eventually rule in their favour.⁵⁰⁶

This executive domination of the judiciary meant that judicial officers could no longer dispense justice impartially because finding against the wishes of government came with negative consequences for their careers and professions. In a move seen as an attempt to take full control of the judiciary, in 1988 President Moi and his KANU-led parliament made certain constitutional amendments and repealed some sections of article 62 of the Constitution.⁵⁰⁷ This article addresses the tenure of office of judges of the High Court of Kenya and conditions under which judges can vacate office or be removed from the bench.

government like the executive and legislature but a mere “Department” or the “third” arm of government. (See footnote 516 below at 6 as well as The Justice Ouka Report.)

⁴⁹⁹ “Frankly, it is not just the executive that is to blame for the dependence of the judiciary. Judges themselves have bent over backwards to accommodate the wishes of the executive for financial and political rewards” (See also Makau footnote 503 below at 113).

⁵⁰⁰ An Advocate of the High Court of Kenya and Law Society of Kenya’s Representative in the Judicial Service Commission of Kenya (2011).

⁵⁰¹ Ahmednassir Abdullahi – “Restoring public confidence in Kenya’s discredited, corrupt, inefficient and over burdened judiciary: the Judicial Service Commission’s agenda for reform” available at <http://www.kenyalaw.org/klr/index.php/fileadmin/pdfdownloads/bills/2011/index.php?id=894#8> (accessed 13/02/2012).

⁵⁰² *Ibid.*

⁵⁰³ Makau Mutua “Justice under siege: The rule of law and judicial subservience in Kenya” (2001) 23/1 *Human Rights Quarterly* at 99.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.*

⁵⁰⁷ Kuria Gibson K and Vazquez Algesia M “Judges and human rights: The Kenyan experience” (1991) 35 *Journal of African Law* 146.

Although in 1990 Moi finally succumbed to a strong domestic and international pressure and restored the judicial security of tenure⁵⁰⁸ in the Constitution, the damage had already been done to the reputation and dignity of the judiciary. The executive had in place a “winning strategy” of manipulating the judiciary. Most judicial officers had come to realize that the only way to survive in their career was to “dance to the tune of the executive”. The situation had become the saying – “if you can’t beat them join them”.

The only hope was a new constitutional order that would restore the separation of powers and ensure judicial independence; respect for the rule of law and democratic processes; and the protection of human rights.

The Ringera Committee and the Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya and 7 Others Case

In 2003 the Chief Justice of Kenya appointed the Integrity and Anti-Corruption Committee of the Judiciary (Ringera Committee) “to investigate allegations of corruption in the judiciary and recommend disciplinary or other curative measures”.⁵⁰⁹ Several judicial officers were implicated in corruption, misbehavior and unethical behaviour.⁵¹⁰ The Chief Justice then presented the findings of the report to the President in terms of article 62(5) of the Constitution (now repealed).⁵¹¹ The judges were suspended and a Tribunal was appointed by the President to investigate their conduct.

One of the judges implicated was Justice AMRaphael Mbogholi Msagha who challenged the action in court and contended among other things that: “some of his Fundamental Rights and Freedoms under the Kenya Constitution were infringed; and that the action of the Chief

⁵⁰⁸ See footnote 503 above at 102.

⁵⁰⁹ See *Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 Others* [2006] eKLR.

⁵¹⁰ *Ibid.* See also “Kenya: Judicial Independence, corruption and reform” (2005) April ICJ Report.

⁵¹¹ Article 62 (5) provided as follows –

If the Chief Justice represents to the President that the question of removing a puisne judge under this section ought to be investigated, then –

- (a) the President shall appoint a tribunal which shall consist of a chairman and four other members selected by the President from among persons –
 - (i) who hold or have held the office of judge of the High Court or judge of appeal; or
 - (ii) who are qualified to be appointed as judges of the High Court under section 61 (3); or
 - (iii) upon whom the President has conferred the rank of Senior Counsel under section 17 of the Advocates Act; and
- (b) the tribunal shall inquire into the matter and report on the facts thereof to the President and recommend to the President whether that judge ought to be removed under this section.

Justice was in breach of the principles of the independence of the judiciary and separation of powers".⁵¹² The *AMRaphael case* is very important as it dealt, among other things, with the question of removal of a judge from office in line with the provisions of article 62 of the Constitution of Kenya.

On the issue of the separation of powers and independence of the judiciary, counsel for the applicant submitted that:

"by making representations to the President to set up a tribunal to investigate the question of the removal of the Applicant, the Chief Justice as head of the Judiciary was playing into the hands and control of the Executive, in violation of the principles of the separation of powers between the Legislature (said to be supreme), the Executive, and the Judiciary a division clearly established under the Constitution".⁵¹³

The court held that the Chief Justice in Kenya is "technically a first among equal, *primus inter pares*, and in the exercise of his ministerial powers is careful and maintains a cool aloofness in adherence to the doctrine not merely of the separation of powers between the three arms of government but also of the independence of the judiciary and of each judge".⁵¹⁴ The court further held that the "doctrine of the independence of the judiciary entails that no one judge may interrogate the other of either his decision or conduct as each judge is strictly independent of the other in his or her decisions and judicial conduct".⁵¹⁵

4.3.2 The Judiciary under the new Constitution of Kenya, 2010

The year 2010 was a turning point in Kenya's constitutional history as the country moved to adopt a new constitution symbolizing "a move from the old legal order to the new socio-legal order as embodied in the new constitutional dispensation".⁵¹⁶ A "healthy" constitutional order accompanied by an independent judiciary is the only remedy for all political ills and the violation of human rights in the modern democratic state.

⁵¹² See footnote 509 above (this form part of the seventeen declarations of Justice AM Raphael).

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.*

⁵¹⁵ *Ibid.*

⁵¹⁶ See "The manifesto of a modern judiciary" a paper presented by Justice Nancy Baraza, Deputy Chief Justice and Vice-President of the Supreme Court of Kenya at the 7thAnnual Judges Colloquium, Kenya, August 2011at 2.

Available at <http://www.kenyalaw.org/klr/index.php./fileadmin/pdfdownloads/bills/2011/index.php?id882> (accessed 14/02/2012).

The new constitutional order represents a new era of transformation from previous sufferings to restore order and strengthen the rule of law in Kenya. It bestows upon the judiciary a responsibility to arbitrate fairly on legal disputes between the state and its citizens and “other legal issues of political nature such as elections, legality of governmental power, constitutional review and interpretation and enforcement of human rights”.⁵¹⁷

State violation of human rights and the issue of elections (conflict, intolerance and rigging) has long bedeviled and thwarted peace and good governance in Kenya, hence the importance of a description of an accessible, accountable, efficient, effective, fair, impartial and independent judiciary in order to protect democratic processes and uphold the rule of law under the new legal order.⁵¹⁸

For the first time in the history of Kenya, the 2010 Constitution exclusively vested judicial power in the judiciary.⁵¹⁹ Article 159(1) of the Constitution of Kenya provides that – “judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution”.⁵²⁰ The Constitution reigns supreme and protects the exercise of judicial authority against any interference by any person or authority.⁵²¹ Previously the President had extensive powers and in some instances could disregard the rule of law and the judiciary as he pleased.⁵²² The process of appointment is the first step towards securing judicial independence.

In an effort to strengthen the constitutional provisions, the Judicial Service Act (JSA) was enacted in 2011 in order to further contribute to the idea of securing judicial independence.⁵²³ Section 3 of the Act indicates that the object and purpose of the JSA is, among other things, to ensure that the JSC and the judiciary shall:

⁵¹⁷ *Id* at 6.

⁵¹⁸ See 2.5.2.6 “Constitutionalism and the Separation of Powers in Kenya” above.

⁵¹⁹ *Id* at 2.

⁵²⁰ The repealed Constitution was silent on the issue of where judicial authority vests.

⁵²¹ Article 160(1) provides that “in the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

⁵²² See footnote 403 above where Makau points out at 100 that in 1991, “Attorney General Amos Wako stated that a characteristic of the rule of law is that no man save for the president is above the law”.

⁵²³ The Judicial Service Act 1 of 2011.

- “(a) be the organs of management of judicial services and, in that behalf, shall uphold, sustain and facilitate a judiciary that is independent, impartial and subject only to the provisions of the Constitution and the law;
- (a) ...
- (b) be accountable to the people of Kenya;
- (c) ...
- (d) facilitate a judicial process that is committed to the just resolution of disputes;
- (e) support and sustain a judicial process that is committed to the protection of the people and of their human rights;”

4.3.3 Appointment of Chief Justice, Deputy Chief Justice and other Judges in Kenya

The appointment of judicial officers is governed by article 166 of the Constitution which provides that:

- “(1) The President shall appoint –
 - (a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and
 - (b) all other judges, in accordance with the recommendation of the Judicial Service Commission.”

Unlike the Swazi provision on the appointment of judges discussed above,⁵²⁴ it could be argued here that the wording of article 166(1) of the Kenyan Constitution represents a milestone in the democratization of the process of appointment of judges in Kenya in that it directly and explicitly directs the President to appoint the Chief Justice and the Deputy Chief Justice “in accordance with the recommendation” of the JSC and “subject to the approval” of the National Assembly. This is a very important provision towards neutralizing the traditional manipulation of the judicial process in Kenya, and a lesson to other countries. This new dispensation essentially removes the power of appointment from the President and places it in the hands of the JSC which is composed of different independent individuals over whom the President has no influence. It goes even further, by subjecting the appointment to approval by the National Assembly.

⁵²⁴ See section 153(1) of the Swazi Constitution and the discussions in 4.2.2 above.

The Chief Justice and the Deputy Chief Justice are the Head and Deputy Head of the Judiciary respectively.⁵²⁵ Together with five other judges, the Chief Justice and Deputy Chief Justice sit in the Supreme Court which is the highest ranked court in Kenya on constitutional issues.⁵²⁶ The provisions of article 166 are a wise move to guarantee the independence of the judiciary and minimize any possible executive interference in, or control of the judicial arm. In order to be appointed as a judicial officer in Kenya, the Constitution sets certain requirements that a person must meet. These requirements are set out in article 166 as follows:

- “(1) Each judge of a superior court shall be appointed from among persons –
 - (a) hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or possess an equivalent qualification in common-law jurisdiction;
 - (b) possess (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and
 - (c) have a high moral character, integrity and impartiality.
- (2) The Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have –
 - (a) at least fifteen years’ experience as a superior court judge; or
 - (b) at least fifteen years’ experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
 - (c) held qualifications mentioned in paragraphs (a) and (b) for a period amounting, in aggregate, to fifteen years;
- (3) Each judge of the Court of Appeal shall be appointed from among persons who have –
 - (a) at least ten years’ experience as a superior court judge; or
 - (b) at least ten years’ experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or
 - (c) held the qualifications mentioned above in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.
- (4) Each judge of the High Court shall be appointed from among persons who have –
 - (a) at least ten years’ experience as a superior court judge or professionally qualified magistrate; or
 - (b) at least ten years’ experience as a distinguished academic or legal practitioner or such experience in other relevant field; or
 - (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.”

⁵²⁵ See Article 161(2)(a) and (b). See also section 5(1) of the Judicial Service Act which provides that the Chief Justice shall be the head of the judiciary and the President of the Supreme Court and shall be the link between the judiciary and other arms of government.

⁵²⁶ See article 163 which establishes and defines the powers and functions of the Supreme Court in Kenya.

The position of Chief Justice is a very important and strategic position as the person who occupies it is the head of the judicial branch of government,⁵²⁷ a body tasked with reviewing laws and policies formulated and implemented by the other branches. The reason why the Kenyan situation on the appointment of judges could serve as an example is because the new Constitution indicates a paradigm shift from the provision of the old Constitution. For example, when one look at the provision of article 61⁵²⁸ and the way in which the JSC was composed in terms of article 68⁵²⁹ of the previous Constitution, in contrast with the provisions of articles 166 and 171 of the current Constitution, the crafters of the latter have taken a radical approach to protect the independence of the judiciary to guard against the loopholes which previously allowed the executive to meddle in the affairs of the judiciary.

4.3.4 The Role of the Judicial Service Commission in Kenya

The Constitution provides an interesting role for the Judicial Service Commission in the appointment of judges in Kenya. The JSC of Kenya is established in terms of article 171 of the Constitution and is chaired by the Chief Justice who is also the head of the judiciary.⁵³⁰ The JSC is composed of the Chief Justice; one Supreme Court judge elected by other judges

⁵²⁷ See article 161 of the Constitution.

⁵²⁸ Article 61 of the repealed Constitution provided as follows:

- (1) The Chief Justice shall be appointed by the President.
- (2) The puisne judges shall be appointed by the President acting in accordance with the advice of the Judicial Service Commission.
- (3) A person shall not be qualified to be appointed a judge of the High Court unless....
- (4) If the office of Chief Justice is vacant, or if the Chief Justice is for any reason unable to discharge the functions of his office, the President may appoint a puisne judge to act as Chief Justice, and a puisne judge so appointed shall exercise the functions of that office until a person is appointed to and assumes the functions of that office, or until the Chief Justice resumes those functions, as the case may be, or until his appointment is sooner revoked by the President.
- (5) If the office of a puisne judge is vacant or if a puisne judge is appointed to act as Chief Justice or is for any reason unable to discharge the functions of his office, or if the Chief Justice advises the President that the state of business in the High Court so requires, the President, acting in accordance with the advice of the Judicial Service Commission, may appoint a person who is qualified to be appointed a judge of the High Court to act as a puisne judge; and a person may act as a puisne judge notwithstanding that he has attained the age prescribed for the purposes of section 62(1).
- (6) A person appointed under subsection (5) to act as a puisne judge shall, subject to subsections (4) and (7) of section 62, continue to act for the period of his appointment or, if no period is specified, until his appointment is revoked by the President, acting in accordance with the advice of the Judicial Service Commission, and may continue to act thereafter for so long as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that have already been commenced before him.

⁵²⁹ Article 68(1) of the repealed Constitution provided as follows:

There shall be a Judicial Service Commission which shall consist of

- (a) the Chief Justice as chairman;
- (b) the Attorney-General;
- (c) two persons who are for the time being designated by the President from among the puisne judges of the High Court and the judges of the Court of Appeal; and
- (d) the chairman of the Public Service Commission.

⁵³⁰ Article 171(1) and (2)(a).

of the Supreme Court; one judge of the Appeal Court elected by other judges in the Court of Appeal; a judge from the High Court; a Magistrate elected by the association of judges and magistrates; the Attorney-General; two advocates elected by the members of the statutory body responsible for the professional regulation of advocates; one person nominated by the Public Service Commission; and two other persons to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.⁵³¹

Article 172 provides that:

- “(1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall –
 - (a) recommend to the President persons for appointment as judges
 - (b) ...
 - (c) ...
 - (d) prepare and implement programmes for the continuing education and training of judges and judicial officers; and
 - (e) advise the national government on improving the efficiency of the administration of justice
- (2) In the performance of its functions, the Commission shall be guided by the following –
 - (a) competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary;”

Unlike in the previous Constitution, the current Constitution enables the JSC to play an active role in the appointment of the Chief Justice, the Deputy Chief Justice, and the other judges and this could be perceived as a milestone in securing judicial independence regarded as an essential for democracy in the modern state.⁵³²

4.3.5 Assessment

The Kenyans have taken a bold step under the new constitutional order and seem to have learnt from the previous flaws. Their model of appointment of judicial officers as provided for in the new Constitution presents a well-crafted plan to guard against executive interference (which has tormented the country for so long) in the affairs of the judiciary. This is evident through the provisions of Article 166 of the Constitution which oblige the President

⁵³¹ Article 171(2)(a), (b), (c), (d), (e), (f), (g), and (h).

⁵³² The words “... in accordance with the recommendation of the Judicial Service Commission ...” in article 166(1)(a) of the current Constitution indicate that the President is now bound to follow the recommendations made by the JSC.

to act in accordance with the recommendations of the JSC, and subject him to the approval of the National Assembly when appointing the Chief Justice and the Deputy Chief Justice who are also the Head and Deputy Head of the Judiciary respectively.

With these provisions in place, the chances of executive manipulation of the process, as in the past, have been effectively excluded.⁵³³ What is further encouraging is the composition of the JSC which is tasked in terms of Article 172(1)(a) with recommending to the President persons for appointment as judges. The JSC consist of eleven members plus the Chief Registrar of the Judiciary who acts as the Secretary to the JSC.⁵³⁴ However, the majority of JSC members are lawyers who are elected to the Commission by their peers. Presidential appointees to the Commission, both direct or indirectly, form a minority and are also subject to approval from the National Assembly so further tying the President's hands. This can be seen as a clear and major step towards restoring and guaranteeing judicial independence in Kenya.

4.4 The Judiciary and the Selection Process of Judicial Officers in Zimbabwe

4.4.1 A Brief Description of the Crisis in Zimbabwe since 2000

Zimbabwe has since independence been ruled and dominated by President Robert Mugabe and his ZANU-PF party who have been at the helm of government for more than thirty years.⁵³⁵ The formation of a major opposition party, the MDC, presented a considerable threat to President Mugabe and the ZANU-PF.⁵³⁶ In February 2000 Mugabe's government proposed a new constitution for Zimbabwe. This was rejected in a national referendum, a move that left fear in ZANU-PF for the first time in twenty years of its unchallenged dominance of Zimbabwean politics.⁵³⁷

⁵³³ See Days Drew S *et al* *Justice enjoined: The state of the judiciary in Kenya* (1992) at 8.

⁵³⁴ See Article 171(3) Of the Constitution.

⁵³⁵ Matyszak "Creating a compliant judiciary in Zimbabwe, 2000-2003" in Malleson and Russell *Appointing judges in an age of judicial power: Critical perspective from around the world* (2006) 332.

⁵³⁶ See Zimbabwe Human Rights NGO Forum Outreach Report "Taking transitional justice to the people" at 7 available at <http://www.hrforumzim.org/wp-content/uploads/2012/02/tj-report-vol-2.pdf> (accessed 21/02/2012).

⁵³⁷ *Id* at 6.

This may be regarded as a turning point in Zimbabwe’s politics and arguably could have triggered the “farm invasions” by war veterans. Matyszak points out that within two weeks of the failed referendum, the government launched its so-called “agrarian reform” in an effort to reclaim control of society.⁵³⁸ What followed the “agrarian reforms” was disastrous.⁵³⁹ One problem led to another. The economy collapsed. The elections that followed were accompanied by violence and allegations of rigging.⁵⁴⁰ Twelve years down the line, peace has not been restored. The government is an unstable Government of National Unity (GNU) between ZANU-PF and the MDC brokered by SADC under the 2008 Global Political Agreement.⁵⁴¹ Efforts to draft a new constitution continued amid allegations of an environment unfavourable for public consultations.⁵⁴²

This crisis affected not only the executive and legislative arms in Zimbabwe. Matyszak argues that in order to ensure protection against its actions (land invasions and the draconian legislation), the ZANU-PF-led government had to create a “compliant judiciary”.⁵⁴³ A “compliant judiciary” meant the removal of judges seen as opposed to government actions and appointing those who were believed to be sympathetic to government.⁵⁴⁴ This was a clear violation to the principles of judicial independence, democracy and the rule of law.

4.4.2 The Judiciary and the Constitution in Zimbabwe

As indicated above and in chapter 3, Zimbabwe has experienced many problems since 2000 and was in the process of developing a new constitution in a bid to restore order to the country. However, in this section reference will be made to the existing Constitution, ie the Constitution of Zimbabwe, 2005.⁵⁴⁵

⁵³⁸ See footnote 535 above.

⁵³⁹ See 536 above at 8, 10 and 11.

⁵⁴⁰ *Ibid.*

⁵⁴¹ See <http://www.copac.org.zw/home/government-of-national-unity.html> (accessed 01/06/2012).

⁵⁴² See SachikonyeLloyd’s paper presented at the Conference on “Legitimacy of Power-Possibilities of Opposition” organised by the Department of Political Science and Public Administration, Makerere University and Chr Michelsen Institute titled “Zimbabwe’s Constitution-Making and Electoral Reform Processes: Challenges and Opportunities (May 30 – June 1 2011) at 13-14.

⁵⁴³ See footnote 535 at 333.

⁵⁴⁴ *Ibid.*

⁵⁴⁵ The Constitution of Zimbabwe as Amended at the 14 September, 2005 (up to and including Amendment no 17).

The Constitution indicates that the judicial authority of Zimbabwe vests in the courts.⁵⁴⁶ The judiciary is headed by the Chief Justice⁵⁴⁷ who also presides over the highest court in the country, the Supreme Court.⁵⁴⁸ The notion of judicial independence is recognized and protected by the Constitution which provides that – “in the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary”.⁵⁴⁹

However, the very same Constitution continues in section 79(2) to introduce a controversial provision by purporting to vest judicial power in a person or authority other than a court of law, through an Act of Parliament.⁵⁵⁰ Saller rightly argues that the provisions of section 79(2)(a) “cast some doubt on the integrity of the separation of powers provided for in the constitutional text”.⁵⁵¹

For instance, the Privileges, Immunities and Powers of Parliament Act⁵⁵² allows the legislative branch to encroach on the functions of the judicial branch of government. Section 16(2) and (4) of the Act grants Parliament powers to assume court functions and punish any conduct that might be regarded as an offence in the eyes of Parliament.⁵⁵³ In 2004 an MDC MP, Roy Bennet, was convicted and sentenced through the judicial authority of Parliament in terms of this Act.⁵⁵⁴ During a very heated argument in Parliament between the Minister for Justice, Parliamentary and Legal Affairs, Patrick Chinamasa, and MDC MP, Roy Bennet,

⁵⁴⁶ Section 79(1).

⁵⁴⁷ Section 79A(a).

⁵⁴⁸ Section 80(1) provides that – “there shall be a Supreme Court which shall be a superior court of record and the final court of appeal for Zimbabwe and shall have jurisdiction and powers as may be conferred upon it by or in terms of this Constitution or any Act of Parliament”.

⁵⁴⁹ Section 79B.

⁵⁵⁰ Section 79(2)(a) provides as follows –

“The provision of subsection (1) shall not be construed as preventing an Act of Parliament from –

(a) Vesting adjudicating functions in a person or authority other than a court referred to in subsection (1);

⁵⁵¹ Saller “Zimbabwe” in Van de Vijver Linda *The judicial institution in southern Africa: A comparative study of common law jurisdictions* (2006) at 244.

⁵⁵² Privileges, Immunities and Powers of Parliament Act (chapter 2:08).

⁵⁵³ Section 16 provides among other things that –

(2) Parliament shall have the power to award and execute the punishments provided by this Part for the commission of any act, matter or thing which in this Part is declared to be an offence.

(4) Parliament sitting as a court shall have all such rights and privileges of a court of record as may be necessary for the purpose of summarily inquiring into and punishing the commission of any act, matter or thing which in this Part is declared to be an offence.

⁵⁵⁴ See Amnesty International Public Statement – “Zimbabwe: Unfair trial of Roy Bennet, MP” December 2004 available at <http://www.amnesty.org/fr/library/asset/AFR46/042/2004/fr/f41728ed-d53e-11dd-8a23-d58a49c0d652/afr460422004en.html>(accessed 25/07/2012).

Bennet allegedly pushed Chinamasa to the floor.⁵⁵⁵ This was after Chinamasa allegedly verbally abused Bennet.⁵⁵⁶ Bennet was then expelled from the chamber.⁵⁵⁷

The Parliament of Zimbabwe then invoked the provisions of the Privileges, Immunities and Powers of Parliament Act and appointed a five person Parliamentary Committee to review the conduct of Bennet and make a recommendation to Parliament.⁵⁵⁸ After conducting the proceedings, the Committee found Bennet guilty and recommended that he be sentenced to fifteen months' imprisonment with hard labour – three months to be suspended subject to good behaviour.⁵⁵⁹ The Parliament voted to accept the recommendation of the Committee and Bennet was taken to prison.⁵⁶⁰ The decision of the Parliament is final as the Act does not make any provision for appeal against sentences passed by parliament.

In *Mutasa v Makombe NO* Gubbay⁵⁶¹ CJ held that:

"A finding of guilty by Parliament on a contempt offence is not a crime in the conventional sense. When dealing with these contempt offences Parliament though sitting as a court does not sit as a court of law. Its proceedings are not in the nature of a public criminal trial as envisaged in section 18(2) of the Constitution, for Parliament is not 'an independent and impartial court established by law'. It exercises its own jurisdiction and powers conferred upon it by the Privileges, Immunities and Powers of Parliament Act."⁵⁶²

The *trias politica* doctrine promotes the separation of powers but also emphasizes cooperation and a good relationship between the three branches of government. In *Paradza v Minister of Justice, Legal and Parliamentary Affairs and Others*⁵⁶³ the Zimbabwean Supreme Court held that:

"the Constitution is the supreme law of the land and that it creates a fundamental framework within which the respective ambits of the legislative, executive and judicial arms of the state are defined. It is not exhaustive in its own terms, and consequently, a

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Mutasa v Makombe NO* 1997 (1) ZLR 330 (S).

⁵⁶² At 337C-D.

⁵⁶³ *Paradza v Minister of Justice, Legal and Parliamentary Affairs and Others* (68/03) [2003] ZWSC 46; SC46/03 (16 September 2003).

generous and purposive interpretation of the Constitution has to be adopted in order to give effect to its underlying values”.⁵⁶⁴

The court further reiterated the notion of judicial independence as a fundamental principle of a democratic system of government.⁵⁶⁵ The independence of the judiciary in Zimbabwe is protected by the Constitution which provides that “In the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary”.⁵⁶⁶

In *Paradza* the court argued, rightfully so, that section 79B is very important for ensuring the independence of the judiciary as well as ensuring that “the judiciary, which plays a pivotal role in the protection and enforcement of the Constitution, continues to function effectively”.⁵⁶⁷ The above cases indicate the courts’ efforts to uphold judicial independence and the protection of the Constitution in Zimbabwe. However, the executive has developed a tendency of disregarding the rule of law thereby rendering the judiciary weak.

4.4.3 Appointment of Judges

The appointment of judges in Zimbabwe is provided for by section 84 of the Constitution which establishes that –

- “(1) The Chief Justice and other judges of the Supreme Court and the High Court shall be appointed by the President after consultation with the Judicial Service Commission.
 - (1) If the appointment of a Chief Justice or a Judge of the Supreme Court or the High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of subsection (1), the President shall cause the House of Assembly to be informed as soon as practicable.
 - (2) The appointment of a judge in terms of this section, whether made before, on or after the date of commencement of the Constitution of Zimbabwe Amendment (no4) Act, 1984, may be for a fixed period and any judge so appointed may, notwithstanding that the period of his appointment has expired, sit as a judge for the purpose of giving judgment or otherwise in relation to any proceedings commenced or heard by him while he was in office.”

⁵⁶⁴ *Id* at 10.

⁵⁶⁵ *Id* at 37.

⁵⁶⁶ Section 79B.

⁵⁶⁷ At 11.

Before anyone can qualify to be appointed as judge in the Supreme Court or in the High Court of Zimbabwe, the Constitution sets out certain requirements.⁵⁶⁸ It dictates that a person must have been a judge of a court having unlimited jurisdiction in civil or criminal matters, or have been practicing as a legal practitioner for more than seven years, whether continuously or not.⁵⁶⁹ Such person does not necessarily have to be a citizen of Zimbabwe or to have practised law in Zimbabwe only.⁵⁷⁰ The experience may have been acquired in any country in which the common law is Roman-Dutch and English is an official language, or if he is a citizen of Zimbabwe, in a country in which the common law is English and English is an official language.⁵⁷¹

4.4.4 The Judicial Service Commission in Zimbabwe

The JSC is established by section 90 of the Constitution. It is composed of six members, namely, the Chief Justice, the Chairman of the Public Service Commission, the Attorney-General and three other people appointed by the President.⁵⁷²

As for the functions of the JSC, section 91 provides that:

- “(1) The functions of the Judicial Service Commission shall be to tender such advice and do such things in relation to the judiciary as are provided for by this Constitution or by or under an Act of Parliament.
- (2) An Act of Parliament referred to in Subsection (1) may confer on the Judicial Service Commission functions in connection with the employment, discipline and conditions of service of such officers and persons employed in
 - (a) the Supreme Court, the High Court and other courts subordinate to the Supreme Court and the High Court;”

The Judicial Service Act (hereafter the Act) makes further provisions for the JSC.⁵⁷³ Section 3 of the Act identifies the JSC and describes it as composed of, among other people, the Chief Justice; judges of the Supreme Court; the Judge President and the other judges of the

⁵⁶⁸ The qualifications required for appointment as a Judge in the Supreme Court or High Court are spelled out in section 82.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ *Ibid.*

⁵⁷¹ Section 82(1)(b)(ii)(iii).

⁵⁷² Section 90(1).

⁵⁷³ Act 10 of 2006.

High Court; persons presiding over other courts subordinate to the Supreme Court and the High Court.

The Act further provides in section 5 that –

- “(1) Subject to the Constitution, this Act or any other enactment, the Commission shall have the following functions –
 - (b) appointing persons to the Judicial Service, whether as permanent members on pensionable conditions of service or on contract or otherwise, assigning and promoting them to offices, posts and grades in the Judicial Service, and fixing their conditions of service;”

4.4.5 Assessment

Matyszak classifies the appointment process of judges in Zimbabwe as weak.⁵⁷⁴ Although the Constitution provides that the President appoints judicial officers after consultation with the JSC, together with the Judicial Service Act, it fails to articulate the role of the JSC. Section 84(2) of the Constitution appears to be ambiguous. It only declares that the House of Assembly must soon be informed of any appointment of a judge of the Supreme Court or the High Court by the President which was not consistent with the recommendation of the JSC. It does not indicate what remedies the House of Assembly may invoke in such cases. This leaves the President with greater influence in the appointment of judges and makes the JSC’s role less important.⁵⁷⁵

The composition of the JSC itself is a cause for concern. In practical terms, the President appoints all members of the JSC in that, other than the three people he appoints directly to the JSC, the other three, ie the Chief Justice, the Attorney-General and the Chairman of the PSC, are all appointed to their positions by the President.⁵⁷⁶ The current constitutional provisions allow too much room for interference and control by the executive in the affairs of the judicial arm. In the words of Saller “the direct and indirect role played by the president, especially in the appointment but also in the removal of judges in the higher courts structures,

⁵⁷⁴ See footnote 535 above at 333 where he argues that “the appointment of compliant judges was relatively easy, and underscores the evident weakness of the systems of appointments provided by Britain at Lancaster House”.

⁵⁷⁵ Saller argues that “the President may act against the powers of the JSC, in which case Parliament must be informed of his decision as soon as possible, but it is not empowered to ratify or overturn the President’s choice”. See footnote 551 above at 246.

⁵⁷⁶ See sections 84(1), 76(2) and 74(1) of the Constitution.

allows for considerable political influence over the judicial institution”.⁵⁷⁷ Hopefully, the new constitution will address this.

4.5 The Judiciary and the Selection Process of Judicial Officers in South Africa

Part of chapter 3 above dealt with the notion of judicial independence, the history of the judiciary under the apartheid government, and the state of the judiciary in South Africa under the 1996 Constitution. Hence, suffice it to only reiterate here that the judicial authority in South Africa is vested in courts which are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice.⁵⁷⁸

4.5.1 The Judicial Service Commission in South Africa

The JSC is established in terms of section 178 of the Constitution. It is the official body vested with powers to deal with the appointment, disciplining and removal of judges. Unlike most JSC's in most countries across the globe, the South African JSC is composed of a large number of people from different backgrounds, namely the judiciary, executive, legislature, the legal profession, and academia. It consists of 23 members and/or an additional two members in certain defined instances.⁵⁷⁹ These include the Chief Justice; the President of the SCA; one Judge President designated by the Judges President; the Cabinet member responsible for justice; two practicing advocates; two practicing attorneys; one law teacher at a South African university; six persons designated by the National Assembly; four permanent delegates to the National Council of Provinces; four persons designated by the President after consulting the leaders of all parties in the National Assembly; and, when dealing with matters relating to a specific High Court, the Judge President of that Court and the Premier of the Province concerned, or an alternate designated by them.⁵⁸⁰

In contrast to other countries like Swaziland and Zimbabwe as discussed above, in South Africa, although the President appoints some members, he does not have absolute influence on the majority of appointees in the JSC. Some members are nominated within the bodies

⁵⁷⁷ Saller Karla *The judicial institution in Zimbabwe* (2004) at 20.

⁵⁷⁸ Section 165(1) and (2) of the Constitution.

⁵⁷⁹ See section 178(1)(k).

⁵⁸⁰ Section 174(1)(a)-(k) of the Constitution.

which they represent and are then appointed to the JSC. Accordingly, some members serve at the pleasure of the bodies who nominated them.

It could be argued that the South African model of constituting the JSC creates a better chance for curbing executive influence in the affairs of the judiciary as compared to constitutional provisions of other countries.⁵⁸¹ Although the composition of the South African JSC appears to be “inclusive and fair”, it should be noted that it is not immune from criticism and suspicion of manipulation as shall be discussed below.

As per the constitutional provision,⁵⁸² the Judicial Service Commission Act⁵⁸³ was enacted to clearly articulate the role, powers and functions of the JSC in a bid to enhance judicial independence. The Act emphasizes the role of the JSC as the official and responsible body vested with power to appoint judicial officers in the Republic.⁵⁸⁴

There are different perceptions with regard to the composition of the JSC, with some claiming it has too many members, and others welcoming it and arguing that it enhances accountability and allows for the accommodation of various relevant players in the JSC.⁵⁸⁵

⁵⁸¹ As compared to the other three countries discussed above South Africa’s JSC has got many members from different fields (for instance opposition parties must be represented) and this creates a good platform for different stakeholders to have a say in the appointment of judicial officers. For example in the *Certification of the Constitution of the Republic of South Africa* the CC held that:

“The JSC has a pivotal role in the appointment and removal of judges. It consists of the Chief Justice, the President of the Constitutional Court, one Judge President, two practising attorneys, two practising advocates, one teacher of law, six members of the NA, four permanent delegates to the National Council of Provinces (“NCOP”), four members designated by the President as head of the national executive, and the Minister of Justice. The practising attorneys and advocates and the teacher of law are to be designated by their respective professions; the Judge President is to be designated by all the Judges President; at least three members of the NA must come from opposition parties; the four delegates of the NCOP must be supported by the vote of at least six of the nine provinces; and the four presidential appointments are to be made after consultation with the leaders of all the parties in the NA” [at paragraph 120].

⁵⁸² See sections 178(4) and 180 of the Constitution.

⁵⁸³ Judicial Service Commission Act no 9 of 1994 as amended by the Judicial Service Amendment Act no 20 of 2008.

⁵⁸⁴ *Ibid.*

⁵⁸⁵ See Fessha YT “Constitutional Court appointment: The South African process” (2010) *SC Working Paper 2010-06* Institute of Intergovernmental Relations School of Policy Studies, Queen’s University at 2.

In March 2012 the DA’s(the official opposition party in South Africa) shadow Deputy Minister of Justice and Constitutional Development issued a statement complaining about the composition of the JSC being too open to political manipulation and dominated by the ruling party’s politicians (ANC) or Presidential appointees. She further indicated the DA’s intention to propose amendments to the composition of the JSC in the 17th Amendment in favour of fewer political appointees and more people from the judicial and legal fraternity. See Schafer Debbie “DA to push for changes to JSC composition to ensure confidence in judicial independence” available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page/72308?oid=285568&sn=Marketingweb+detail&pid=90389>(accessed 12/03/2012).

Other views are that there are more politicians than lawyers on the JSC,⁵⁸⁶ which robs the JSC of lawyers with sufficient knowledge to assess the expertise of candidates to be appointed to the bench.

The Constitutional Court's ruling in the *Certification of the Constitution of the Republic of South Africa*⁵⁸⁷ on the JSC –

The CC reiterated that “the JSC has a pivotal role in the appointment of and removal of judges”.⁵⁸⁸ The issue of many politicians or political appointees to the JSC was also dealt with by the CC in this case.⁵⁸⁹ The court emphasized the importance of the separation of powers and argued that “an essential part of the separation of powers is that there be an independent judiciary”.⁵⁹⁰ It continued to argue that “the mere fact, however, that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with the judicial independence required by CP VII”.⁵⁹¹⁵⁹² The court reasoned that “what is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive”.⁵⁹³

In his article in the *Business Day*, Paul Hoffman of the Institute for Accountability in Southern Africa argued that:

“There are flaws in the composition of the JSC that lead to the perpetration of errors and injustices. The problem, stated more bluntly than it was possibly implied by O'Regan (a former justice of the Constitutional Court), is that there are too many politicians on the JSC and not enough lawyers. Some of the lawyers on the JSC are also there as politicians- this serves to bedevil the deliberations that are supposed to be aimed at finding appropriately qualified lawyers who are fit and proper to grace the bench and legitimately dispense justice in a manner that inspires the confidence of the public.”⁵⁹⁴

⁵⁸⁶ As clearly indicated by section 178 of the Constitution only 8 or 9 members are lawyers out of the 23 or 25 members who constitute the JSC.

⁵⁸⁷ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

⁵⁸⁸ Paragraph 120.

⁵⁸⁹ See par 121.

⁵⁹⁰ Paragraph 123.

⁵⁹¹ *Ibid.*

⁵⁹² CP VII provides that – “the judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights”.

⁵⁹³ At par 123.

⁵⁹⁴ See Hoffman Paul “Irrational decisions demand urgent reform of the JSC” *Business Day* 1 June 2011 available at http://www.ccr.org.za/index.php?option=com_content&view=article&id=695:in-the-news&

He therefore suggests the use of retired judges to serve on the JSC and argues that “their wisdom, experience and intimate knowledge of the ‘expertise’ of the aspirant judges needs to be harnessed if the JSC is going to be able to do its job properly”.⁵⁹⁵ However it can be argued that, taking into account that most retired judges are white males, such a move might not satisfy the agenda of transforming the country’s judicial system. Although Hoffman’s view of staffing the JSC with retired judges appears attractive, it can be argued that the current position is also well-founded as it accommodates different players from across the South African spectrum and promotes the principle of checks and balances within the Commission.⁵⁹⁶

4.5.2 The Appointment of Judicial Officers in terms of Section 174 of the Constitution

The appointment of judicial officers in South Africa is governed by section 174 of the Constitution which provides as follows –

- “(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
- (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.
- (3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of the parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.
- (4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
 - (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.

⁵⁹⁵ catid=41:ccr-in-the-news&Itemid=131 or <http://www.businessday.co.za/articles/Content.aspx?id=144416> (accessed 08/03/2012).

⁵⁹⁶ *Ibid.*

See footnote 582 above, at par 124, where the CC held that the JSC “as an institution provides a broadly based selection channel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments”.

- (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons if any of the nominees are unacceptable and any appointment remains to be made.
- (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.
- (5) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.
- (6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.
- (7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without fear or favour.
- (8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.

4.5.3 The need for the judiciary to reflect broadly the racial and gender composition of South Africa when judicial officers are appointed (Section 174(2))

With the history of South Africa's judiciary dominated by white male judges during apartheid, the crafters of the Constitution and lawmakers saw it proper to emphasize the issues of race and gender in the appointment of judges under the new constitutional dispensation in an effort to bring a balance within the judiciary. This provision has become another important requirement that the JSC must take into consideration when making judicial appointments.

Fair as it may appear, the provision is not immune from criticism. Different views have been expressed about the provisions of section 174(2) of the Constitution. Gordon and Bruce contend that "balancing the need for racial and gender representivity with the need for a competent, well qualified judiciary poses a difficult challenge".⁵⁹⁷ The JSC is accused of paying more attention to the issue of race and gender than to the competence of the candidates when making judicial appointments.⁵⁹⁸

⁵⁹⁷ Gordon Amy and Bruce David, "Transformation and the independence of the judiciary in South Africa" (2006) The Centre for the Study of Violence and Reconciliation (CSVR) at 47 available at <http://www.csvr.org.za/docs/transition/3.pdf>.

⁵⁹⁸ *Ibid.*

The general feeling is that there is a need for a representative judiciary, but on the other hand there is fear that if the issues of race and gender are not carefully handled in the JSC, such efforts could end up hindering judicial independence.⁵⁹⁹ Although the JSC has always considered and prioritized the provisions of section 174(2), with, on the other side, the “reasonable” concern about fewer experienced blacks and women in the legal fraternity, one can safely argue that those who have been appointed have not disappointed. They have shown competence in dispensing justice and upholding the rule of law.

Although there is confidence and hope in the judiciary of the Republic of South Africa from members of the public under the new constitutional supremacy, there are some incidences in which some members of the judiciary have behaved in a questionable manner. For example the Judge President of the Western Cape High Court, Judge John Hlophe, has long been embroiled in litigations to his fitness to hold office which has raised questions about his credibility as a judge and his ability to uphold the rule of law impartially and without fear, favour or prejudice.

On 09 October 2007 *Legalbrief Today* published a letter from a number of senior counsel at the Cape Bar raising concerns about the unwarranted conduct of Hlophe JP and called for his resignation. Among other things raised in the letter was that:

“the JSC had ‘unanimously found Judge Hlophe’s explanations for receiving money from Oasis Management Group ‘unsatisfactory in certain respects’ and that the JSC also considered his failure to disclose his relationship with Oasis at the time he gave it permission to sue another Cape judge ‘inappropriate’’”.⁶⁰⁰

Again in 2008 Hlophe was accused of “improper attempt to influence the Constitutional Court’s pending judgment” in a case involving Jacob Zuma, President of the ruling ANC and who was expected (as later happened) to become President of the country after the 2009 general elections.⁶⁰¹ The Cape Bar argued, and rightfully so, that the public cannot continue to have confidence in Judge Hlophe because of the way he had conducted himself. Indeed

⁵⁹⁹ *Ibid.*

⁶⁰⁰ See Legalbrief “There cannot be public confidence in Judge Hlophe” 09/10/2007 available at <http://www.legalbrief.co.za/article.php?story=20071009110328148>(accessed 07/09/2011).

⁶⁰¹ See *Hlophe v Judicial Service Commission and Others* (19006/09) [2009] ZAGPJHC 19; [2009] 4 All SA 67 (GSJ) (1 June 2009) at par 2.

judicial officers as custodians of the rule of law, are expected to behave in dignified manner and avoid situations where their personality is questioned by members of the public.

Though relevant, the question of experience is not insurmountable as this can be remedied by comprehensive training courses or programs for the newly appointed judges on the bench. In China, for example, judges are not required to have years of employment or experience as lawyers in order to serve on the bench.⁶⁰² Wang indicates that:

“The qualification for Chinese judges is not limited to majoring in law at a university. In accordance with the provisions of paragraph 2 of Article 34 of the Organic Law of the People’s Court of the People’s Republic of China, judges who have not majored in law must be trained in the specifics of the law”.⁶⁰³

Carp *et al*, point out that in France “all prospective judges are trained for over two years and can become judges only after passing rigorous competitive examinations”.⁶⁰⁴

4.5.4 The Appointment of the Chief Justice (CJ) and Deputy Chief Justice (DCJ) of the CC and the Appointment of the President and Deputy President of the SCA (Section 174(3) of the Constitution)

The office of Chief Justice of South Africa is to become an important institution with defined powers in line with the Constitution. The Constitution (Seventeenth Amendment) Bill seeks, among other things, to define the role of the CJ as the head of the judiciary. Section 165 is amended to include subsection (6) which, if adopted, will read:

“The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts”.

Without a doubt, the office of CJ is an important institution and position, which comes with a huge responsibility, hence the high expectations and the attention it always attracts from all spheres. Although the focus in this section is the appointment of all the judges mentioned under section 174 (3), the appointment of the CJ will dominate the discussion.

⁶⁰² Wang Yuanyuan *The independence of judges in China and Germany* (2011) at p21.

⁶⁰³ *Id* at 21-22.

⁶⁰⁴ Carp RA, Stidham R and Manning KL *Judicial process in America* (2004) (6th ed) at p99.

Since its establishment in 1994, the CC of South Africa has had five Chief Justices – Justice Ismail Mahomed (1998-2000)); Justice Arthur Chaskalson (2001-2005); Justice Pius Langa (2005-2009); Justice Sandile Ngcobo (2009-2011); and the current Chief Justice, Mogoeng Mogoeng (2011 -).⁶⁰⁵

Section 174 (3) indicates that the President, in his capacity as head of the national executive, appoints the CJ and the DCJ “after consulting” the JSC and the leaders of parties represented in the National Assembly. He also appoints the President and Deputy President of the SCA “after consulting” the JSC.

The attempt by the President of the Republic to extend the term of office of the Chief Justice Ngcobo in 2011 by invoking the provisions of the Judges’s Remuneration and Conditions of Employment Act,⁶⁰⁶ drew much criticism and led to certain civil organisations in the legal fraternity taking the matter to the Constitutional Court.

On 11 April 2011 the President wrote to the then CJ (whose term of office was to expire in four months) requesting him to remain in office for another period of five years relying on section 8(a) of the Judges’s Remuneration and Conditions of Employment Act which provides that:

“A Chief Justice who becomes eligible for discharge from active service in terms of section 3(1)(a) or 4(1) or (2), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years”.

***Justice Alliance of South Africa and Others v President of the Republic of South Africa and Others*⁶⁰⁷**

The application was brought to the CC by the Justice Alliance of South Africa (JASA), Freedom Under Law (FUL), the University of Witwatersrand’s Centre for Applied Legal

⁶⁰⁵ <http://www.constitutionalcourt.org.za/site/judges/formerjudges.htm>(accessed 26/03/2012).

⁶⁰⁶ Act no 47 of 2001.

⁶⁰⁷ *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011).

Studies (CALS), and the Council for the Advancement of the South African Constitution (CASAC).⁶⁰⁸ The National Association of Democratic Lawyers (NADEL) and the Black Lawyers Association (BLA) joined as *amici curiae* to make submissions on remedy only.⁶⁰⁹ The respondents were the President of the Republic of South Africa, the Minister for Justice and Constitutional Development, who were opposing the applications, and the CJ who was abiding by the decision of the court.⁶¹⁰

As to the question of standing, direct access and urgency, the applicants had rightfully, and the court acceded, claimed standing in the public interest, in the interest of their members or in their own interest in line with the provision of section 38 of the Constitution.⁶¹¹

The fundamental question was whether section 8(a) of the Judges's Remuneration and Conditions of Employment Act was consistent with section 176(1) of the Constitution⁶¹². Section 176(1) provides that:

“A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge”.

The court then summarized the fundamental question as follows:

- “(a) whether section 8(a) of the Act delegates the power to extend to the President; if so, whether delegation is permitted by section 176 of the Constitution; and, if so, whether the delegation was validly done;
- (b) whether section 176(1) authorises a differentiation of terms of office of judges of the Constitutional Court
- (c) if section 8(a) is constitutionally valid, whether the President is obliged to consult the JSC and political parties, before granting an extension; and
- (d) The appropriate remedy and the costs order.”⁶¹³

⁶⁰⁸ *Id* at par 11.

⁶⁰⁹ *Id* at par 14.

⁶¹⁰ *Id* at par 13.

⁶¹¹ Section 38 of the Constitution provides that –

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The person who may approach a court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

⁶¹² At par 41.

⁶¹³ At par 41.

The court held that the provisions of section 8(a) usurp the legislative power granted only to Parliament and therefore constitute an unlawful delegation, and accordingly violate the principle of judicial independence.⁶¹⁴ The court therefore declared that “any step taken or decision made pursuant to the provisions of section 8(a) of the Act is inconsistent with the Constitution and equally invalid”.⁶¹⁵

Lessons from *Justice Alliance of South Africa and Others v President of the Republic of South Africa and Others*

Arguably this is a landmark case relating to the process of appointment of judges in South Africa and the first of its kind that the Constitutional Court has dealt with since its establishment in 1995. The process of appointment in a constitutional democratic state is a symbol of hope which, as argued by the applicants and accepted by the CC, represents among other things “the protection of the constitution; the protection and advancement of the understanding of and respect for the rule of law and the principle of legality; the protection of the administration of justice and the independence of the judiciary; the promotion, protection and advancement of human rights; the strengthening of constitutional democracy; the promotion of social justice and equality; public accountability and open governance”.⁶¹⁶

The process of appointment of judicial officers must be respected by everyone including the executive in line with the doctrine of separation of powers. South Africa subscribes to the doctrine as per the structure of the Constitution which distinguishes between the legislature, executive and the judiciary.⁶¹⁷

In Ex parte Chairperson of the Constitutional Assembly,⁶¹⁸ the CC outlined among other things – “a constitutional democracy based on the supremacy of the constitution protected by an independent judiciary; and, a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and

⁶¹⁴ Paragraphs 62 and 68.

⁶¹⁵ Paragraph 69.

⁶¹⁶ Paragraph 17.

⁶¹⁷ Chapter 4 provides for Parliament and section 43(a) vests the legislative authority of the Republic in Parliament; Chapter 5 provides for the executive and section 85(1) vests the executive authority of the Republic in the President; Chapter 8 provides for Courts and Administration of Justice and section 165(1) provides that the judicial authority of the Republic is vested in the courts.

⁶¹⁸ *Certification of the Constitution of the Republic of South Africa 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

openness”, as the basic structures and premises of a new constitutional text contemplated by the Constitutional Principles.⁶¹⁹

The principle of checks and balances, as well as the concepts of accountability, responsiveness and openness, contribute to the core of South Africa’s democracy. It is important always to keep in mind that the reason why many states, including South Africa, subscribe to the doctrine of separation of powers is to ensure good and peaceful governance by keeping the three branches of government separate and distinct, although interrelated and in cooperation with one another.

In *Justice Alliance of South Africa and Others v President of the Republic of South Africa and Others*⁶²⁰ the CC argued, at paragraph 20, that: “the determination of this case turns on the interpretation of section 176(1) of the Constitution and section 8(a) of the Act, against the background of the constitutional imperatives of the rule of law, the separation of powers and judicial independence”. The court emphasised the importance of the appointment process in relation to the protection and promotion of the rule of law, separation of powers and judicial independence under a constitutional democracy. Arguably, where the executive is afforded an opportunity to encroach on the affairs of the judiciary, the rule of law is susceptible to manipulation and the principles of checks and balances and judicial independence are compromised.

It is the duty of courts to interpret laws and give meaning to the object of any given law in a constitutional state like South Africa. I contend that as it stands, it appears as if the executive has long been confused about the meaning of section 174(3), while on the other side the courts have not so far given it meaning.

The confusion of the executive was apparent in *JASA and Others v President of the Republic and Others*, by the manner in which the President and the Minister for Justice and Constitutional Development argued that section 174(3) of the Constitution vests the power to appoint the CJ in the President.⁶²¹

⁶¹⁹ At par 45 *Certification*.

⁶²⁰ See footnote 607 above

⁶²¹ See par 47.

By nature, politicians will do anything to consolidate power and they always endeavour to sway things in their favour. Section 174(3) is very clear. The words “after consulting” are very important. The words dictate to the President to make his appointments only after consulting with the other parties mentioned in that section. In *JASA and Others v President of the Republic and Others* the court indicated (after the President had sent a letter to the Chief Justice requesting him to remain in office for a further five years, and after the Chief Justice wrote back to the President acceding to his request) that:

“On 03 June 2011 the President effected the extension of the term of office of the Chief Justice. Later that day, the President communicated this decision to the Judicial Service Commission (JSC) and to the leaders of political parties represented in the National Assembly before he announced his decision in an address to Parliament.”⁶²²

Clearly, the President and the Minister proved the executive’s incorrect understanding of the provisions of section 174(3) and section 176(1) of the Constitution, especially the words “after consulting” and “except where an Act of Parliament extends the term of office of a Constitutional Court Judge”, respectively. The Constitution makes these provisions in order to protect and promote the separation of powers and judicial independence and the executive is bound to respect and support this.

The process of appointment dictates that the President must first consult. The purpose of the words “after consulting” is to guard against any temptation or opportunity to control the judiciary by appointing people who may be manipulated by the executive. It is worth mentioning that section 84 of the Constitution clearly defines the powers and functions of the President and further mentions the people whom the President has sole power to appoint, such as ambassadors. It was not by accident that the crafters of the Constitution distinguished the appointment of judicial officers (which specifically designate the JSC in the appointment process) and the powers conferred to the President in terms of section 84, and this ought to be respected in order to promote the separation of powers.⁶²³

⁶²² See par 10.

⁶²³ In the *Certification of the Constitution of the Republic of South Africa* the CC pointed out that as an institution the JSC provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments” (see par 124).

4.5.5 Appointment to the Constitutional Court (Section 174(4))

The Constitution allows for every South African citizen irrespective of their gender, race, sex, disability, culture, sexual orientation, religion, or belief, so long as he or she is appropriately qualified and a fit and a proper person, to be appointed in the CC when there is a vacancy. The Constitution specifically mentions the requirement of holding South African citizenship for appointment in the CC, but is silent on this point with regard to the other courts implying that non-citizens may be appointed to the bench in other courts.

As per the provisions of section 5 of the Judicial Service Commission Act,⁶²⁴ the Minister for Justice and Constitutional Development published in the *Government Gazette*⁶²⁵ in March 2003, the particulars of the procedure for the appointment of judges which the JSC has determined in line with section 178(6)⁶²⁶ of the Constitution. The appointment process in the CC begins when a vacancy arises and the Chief Justice must inform the JSC which must publicly announce such vacancy and call for nominations by a specified closing date.⁶²⁷

A person who makes a nomination must write a letter identifying him/herself and the candidate, accompanied by the nominee's written acceptance of the nomination and a detailed curriculum vitae disclosing his or her formal qualifications in line with section 174(1) of the Constitution, together with a questionnaire prepared by the commission and completed by the candidate.⁶²⁸ There is a screening committee which is responsible (in its discretion) to receive and consider nominations after the specified closing date and which shall prepare a shortlist of all candidates who qualify for appointment to be interviewed.⁶²⁹ After preparing the shortlist of candidates, the screening committee submits it to the members of the JSC.⁶³⁰ Finally the shortlist must be distributed to the “institutions”⁶³¹ and publicly announced for comment by a specified closing date.⁶³²

⁶²⁴ Section 5 of Act 9 of 1994 provides that “the Minister must by notice in the *Gazette*, make known the particulars of the procedure including subsequent amendments which the commission has determined in terms section 178(6) of the Constitution”.

⁶²⁵ *Government Gazette* 24596, 27 March 2003. Judicial Service Commission Act 9 of 1994: Procedure of Commission.

⁶²⁶ Section 178(6) of the Constitution provides that “the Judicial Service Commission may determine its own procedure, but decisions of the commission must be supported by a majority of its members”.

⁶²⁷ See footnote 620 above at section 2(a) and (b).

⁶²⁸ *Id* section 2(c)(i)-(iii).

⁶²⁹ *Id* at par (e).

⁶³⁰ *Id* at par (f).

⁶³¹ The *Government Gazette* 24596, 27 March 2003. defines “Institutions” to mean “the Law Society of South Africa, the Black Lawyers Association , the Department of Justice and Constitutional Development, the

In 2010 the JSC reviewed the Guidelines it had adopted in 1998 and came up with a summary of the criteria to be used when considering candidates for judicial appointment. First is the primary criterion, in line with the constitutional provisions,

- “(1) Whether the particular applicant is an appropriately qualified person
- (2) Whether he or she is a fit and proper person; and
- (3) Whether his or her appointment will help to reflect the racial and gender composition of South Africa?

The supplementary criteria –

- (1) Is the proposed appointee a person of integrity?
- (2) Is the proposed appointee a person with the necessary energy and motivation?
- (3) Is the proposed appointee a competent person?
 - (a) Technically experienced
 - (b) Capacity to give expression to the values of the Constitution
- (4) Is the proposed appointee an experienced person?
 - (a) Technically experienced
 - (b) Experienced in regard to values and needs of the community
- (5) Does the proposed appointee possess appropriate potential?
- (6) Symbolism. What message is given to the community at large by a particular appointment?”⁶³³

Taking into consideration the above criteria, the JSC interviews the shortlisted candidates in a process open to the public and the media but subject to set rules.⁶³⁴ Upon conclusion of the interviews, the JSC meets in private and after careful consideration selects the candidates to be recommended for appointment in line with the provision of section 174(4) of the Constitution, by consensus, or, if necessary, by majority vote.⁶³⁵ The JSC reserves the right not to recommend any of the candidates if it feels that none of them meets the set criteria.

Thereupon the JSC is required to advise the President of the names of the candidates recommended for appointment together with reasons for their recommendation.⁶³⁶ The

General Council of the Bar of South Africa, the Magistrates Association of South Africa, the National Association of Democratic Lawyers, the Society of Teachers of Law and the Association of Regional Magistrates of South Africa and other institutions with an interest in the work of the commission as the commission may identify from time to time”.

⁶³² *Id* section 2(g).

⁶³³ “Summary of the Criteria used by the Judicial Service Commission when considering candidates for judicial appointments” Issued by the JSC, 10 September 2010.

⁶³⁴ *Government Gazette* 24596, 27 March 2003. Judicial Service Commission Act 9 of 1994: Procedure of Commission, section 2(I) and (j).

⁶³⁵ *Id* at par (k).

⁶³⁶ *Id* at par (m).

commission then publicly announces the names of the candidates it recommended for appointment.⁶³⁷

Section 174(4)(b) of the Constitution provides that – “the President may make appointment from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made”. This provision creates an unnecessarily complex situation.

The word “may” in paragraph (b) means that the President has discretion whether or not to accept the nominees recommended by the JSC. This renders the JSC ineffective and is in contrast with the finding of the Constitutional Court in the *Certification of the Constitution of the Republic of South Africa* that the JSC provides a check and balance to the power of the executive to make judicial appointments.⁶³⁸

The Constitution does not provide any guidance on what grounds or under what circumstances the President may decline to accept the candidates recommended by the JSC. This could create problems or a conflict of interest, for instance if for some reason the President happens not to like candidate X, he can reject him and simply advise the JSC of his reasons. The section only provides that the President must advise the JSC with reasons but is silent on what powers or action (other than to supplement the list in line with paragraph (c)) the JSC has or can take if the President’s reasons are not convincing). This section is ambiguous and needs to be amended to allow the JSC to challenge the President’s decision and prevent concentration of too much power to the President in the appointment of judges.

4.5.6 Appointment in the Supreme Court of Appeal and the High Courts

The process under this category begins when a vacancy occurs, whether in the SCA or any provincial or local division of the High Court. The President of the SCA or the responsible Judge President of the division must inform the JSC of such vacancy.⁶³⁹ Unlike for the CC positions where the JSC announces the vacancies publicly for nominations, here the

⁶³⁷ *Id* at par (o).

⁶³⁸ See par 124.

⁶³⁹ See footnote 625 above section 3(a).

commission must inform the “institutions” of the vacancy and call for nominations by a specified closing date.⁶⁴⁰

Generally the same processes and procedures of nomination for appointment in the CC are followed for the appointment of judges in the SCA or in the High Court in line with section 3(c) of the Procedure of Commission. A list of nominated candidates is accordingly provided to all members of the JSC after the specified closing date with an invitation to make additional nominations where they so wish.⁶⁴¹ The screening committee then prepares a shortlist of candidates whom in its opinion have a “real prospect of selection for appointment”, to be interviewed and submits the list to the JSC.⁶⁴²

After receipt of the shortlist, if any member of the JSC feels strongly that a candidate who was duly nominated but not included in the shortlist should be added to the shortlist of candidates to be interviewed, she/he may request the Secretary of the JSC to add to the name of that candidate and it must thereupon be added to the shortlist.⁶⁴³ This must be done within seven days of submission of the shortlist for interviews to the JSC by the screening committee.⁶⁴⁴

The shortlist is disseminated to the “institutions” for comment by a specified closing date,⁶⁴⁵ after which it is returned to the JSC which interviews all the shortlisted candidates.⁶⁴⁶ These interviews, like those for the Constitutional Court, are “open to the public and the media subject to the same rules as those ordinarily applicable in courts of law and shall not be subject to a set time limit”.⁶⁴⁷

After all the interview process, the JSC meets privately and selects the candidates for appointment by consensus or by majority vote.⁶⁴⁸ The JSC must advise of the name or names

⁶⁴⁰ *Id* at par 3(b).

⁶⁴¹ *Id* at par 3(d).

⁶⁴² *Id* at par 3(e) and (f).

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Id* at par 3(g).

⁶⁴⁶ *Id* at par 3(h) and (i).

⁶⁴⁷ *Id* at par 3(j).

⁶⁴⁸ *Id* at par 3(k).

of the successful candidate(s) for each vacancy.⁶⁴⁹ Successful candidates are therefore publicly announced by the JSC for every position.⁶⁵⁰

4.5.7 Term of Office, Remuneration and Removal of Judges in South Africa

In a further step to strengthen the independence of the judiciary, South Africa's Constitution protects the term of office, salaries and the way in which the removal of judges from office should be dealt with. The term of office and the issue of remuneration of judges are covered by section 176 which provides:

- “(1) A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of Constitutional Court judge.
- (2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament
- (3) The salaries, allowances and benefits of judges may not be reduced.”

Section 177 provides that:

- “(1) A judge may be removed from office only if –
 - (a) The Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of misconduct; and
 - (b) the National Assembly calls for that judge to be removed by a resolution adopted with a supporting vote of at least two thirds of its members.
- (2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
- (3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).”

By including section 177, the framers of the Constitution wished to ensure that once judges have been appointed, the executive is unable to meddle in the execution of judicial duties by, for example, threatening to remove them from office.⁶⁵¹ The Constitution protects the removal of judges by explicitly setting out incapacity, gross incompetency and misconduct as grounds for removal of judges after a thorough investigation by the JSC and the approval of

⁶⁴⁹ *Id* at par 3(l).

⁶⁵⁰ *Id* at par 3(m).

⁶⁵¹ It is general knowledge that where mechanisms for checks and balances are not clearly drawn the executive usually tries to manipulate the processes to their favour even if it means encroaching on the other branches of government.

the NA through a resolution adopted with a supporting vote of two thirds of the NA members.

Further clarity on the removal of judges is provided in section 3 of Act 47 of 2001 which provides as follows –

- “(1) A Constitutional Court judge who holds office in terms of section 176 (1) of the Constitution –
 - (a) must, subject to the provisions of section 4(1) or (2), be discharged from active service as a Constitutional Court judge, on the date on which he or she –
 - (i) attains the age of 70 years; or
 - (ii) has completed a 12-year term of office as a Constitutional Court judge, whichever occurs first;
 - (b) may at any time be discharged by the President from active service as Constitutional Court judge if he or she becomes afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official duties; or
 - (c) may at any time on his or her request and with the approval of the President be discharged from active service as a Constitutional Court judge if there is any reason which the President deems sufficient.
- (2) A judge who holds office in a permanent capacity –
 - (a) shall, subject to the provisions of section 4(4),⁶⁵² be discharged from active service as a judge on the date on which he or she attains the age of 70 years, if he or she has on that date completed a period of active service of not less than 10 years, or, if he or she has on that date not yet completed a period of 10 years' active service, on the date immediately following the day on which he or she completes a period of 10 years' active service;
 - (b) who has already attained the age of 65 years and has performed active service of 15 years, and who informs the Ministers in writing that he or she no longer wishes to perform active service, shall be discharged by the President from active service as a judge;
 - (c) may at any time be discharged by the President from active service as a judge if he or she becomes afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official duties; or
 - (d) may at any time on his or her request and with the approval of the President be discharged from active service as a judge if there is any reason which the President deems sufficient.

⁶⁵² Section 4(4) of the Act provides that – “a Judge who on attaining the age of 70 years has not yet completed 15 years' active service, may continue to perform active service to the date on which he or she completes a period of 15 years' active service or attains the age of 75 years, whichever occurs first, whereupon he or she must be discharged from active service as a judge”.

The Judge's Remuneration and Conditions of Employment Act of 2001 (hereafter the Remuneration Act) was enacted to support section 178 of the Constitution and to define judge's conditions of employment in order further to protect the notion of judicial independence in South Africa. The Act provides, among other things, how judges are remunerated during active service⁶⁵³ and after discharge from active service. In an effort to ensure transparency and accountability of judges in active service, section 2(6) of the Act makes a crucial provision in that –

“no Constitutional Court judge or judge may, without the consent of the Minister, accept, hold or perform any other office of profit or receive in respect of any service any fees, emoluments or other remuneration apart from his or her salary and any amount which may be payable to him or her in his or her capacity as such a Constitutional Court judge or judge.”

This provision is an important step towards contributing in guard against any possible conflict of interest by members of the judiciary in active service, and it is important to note that it applies to all the judges in the Republic.⁶⁵⁴

4.6 Conclusion

The appointment process is an important component of judicial independence. The Constitutions of the four countries discussed above make different provisions for the appointment of judicial officers and the administration of justice.

In Swaziland the Constitution declares that the judiciary shall be independent and only be subject to the Constitution and not be subjected to the control or direction of any person or authority. Although the Constitution makes this provision, the judiciary in Swaziland has been in crisis because of the King who has been accused of interfering in the affairs of the

⁶⁵³ Chapter 1 of the Act define 'active service' as –

“Any service performed as a Constitutional Court judge or judge in a permanent capacity, irrespective of whether or not such service was performed prior to or after the date of commencement of this Act, and includes any continuous period –

(a) of longer than 29 days of such service in an acting capacity prior to assuming office as a Constitutional Court judge or a judge in a permanent capacity if such service was performed before the date of commencement of this Act; and
(b) of such service in an acting capacity prior to assuming office as a Constitutional Court judge or judge in a permanent capacity if such service was performed after the date of commencement of this Act.”

⁶⁵⁴ See paragraph 4.5.3 and footnote 600 above on Hlophe JP issue.

judiciary. This crisis has destabilized the judiciary and compromised the administration of justice in the country.

It was pointed out that the provisions of section 153(1) of the Constitution which provide that the Chief Justice and other Justices of the superior courts shall be appointed by the King on the advice of the Judicial Service Commission, means that the King is not obliged to take the advice of the JSC and this diminishes the role of the JSC and purports to give the King control of the judiciary.

In Kenya the judiciary has since the 1980s been accused of being staffed by corrupt judges who sympathized with the KANU-led executive. However, the new Constitution adopted in 2010 has brought hope. The Constitution now declares that judicial authority shall be derived from the people and vests in, and shall be exercised by, the courts and tribunals established by the Constitution. More importantly, unlike in the past, the President is now, in terms of article 166(1), bound by the Constitution to appoint judges in accordance with the recommendation of the JSC and subject to the approval of the National Assembly.

The Constitution further prevents any interference by the other branches of government or any person, including the President, in the functioning of the judiciary by pointing out that that the judiciary shall exercise judicial authority subject only to the Constitution and the law.

We have also seen that the year 2000 marked the beginning of the demise of good governance in Zimbabwe. The political problems continued and affected all the branches of government. President Mugabe and his ZANU-PF increasingly disregarded the rule of law and the judiciary. Human rights violations have risen as a result of an ineffective judiciary and democracy is compromised. As it stands, Zimbabwe is governed under the Government of Political Unity based on the Global Political Agreement and busy finalizing a new Constitution with the hope of restoring the rule of law in the country.

It was argued that the wording of section 84(1), especially the words “shall be appointed by the President ‘after consultation with’” in the Constitution, means that the President must consult, but after consulting he is at liberty to make his own decision and as a result there is a

need to review this section in a manner that will see the President and the JSC “working together” in the process of appointing judicial officers.

South Africa’s Constitution vests judicial authority in the courts and also declares that they (the courts) are independent and subject only to the Constitution and the law. The JSC in South Africa is composed of a large number of members from different spectrums as compared to the other countries discussed. Its role in the appointment of judges is considered important. However, there is a difference of opinion as regards its composition in that it includes more politicians than lawyers.

The appointment of judicial officers is governed by section 174 of the Constitution and other supporting legislation. It was contended that the wording of some clauses such as ‘after consulting’ in section 174(3), gives the President considerable influence in the appointment of senior judges, and that this may threaten the principles of separation of powers and judicial independence.

Chapter Five

GENERAL CONCLUSION

This research has sought to examine the role of constitutionalism, democracy, and judicial independence in Africa. To this end, four states, all of which have emerged from colonial pasts, were selected for examination: South Africa, Kenya, Swaziland and Zimbabwe. However, where relevant, reference has been made to other states in Africa and to countries beyond the continent. The study is formulated on two major concepts i.e. constitutionalism as a form of good governance, which is addressed in chapter two and; judicial independence as an, if not the, essential element of good governance addressed in chapters three and four.

In Chapter one the background of the study was given and the research questions and aim of the study identified. The key concepts of this research were outlined (i.e. constitutionalism democracy, separation of powers, judicial independence and the rule of law), with a description of the planned research methods followed.

In Chapter two the study looked at the “new wave” of new constitutions and new political developments in some African countries from 1990 to date. A major concern which emerged is failing constitutionalism in certain African states. Although written constitutions have proven most effective in terms of limiting and balancing government powers in the modern state, it can be argued that the success of constitutionalism does not only lie in a written constitution. This has been evident in some African states, as discussed above, which have experienced political disorder amid well-crafted constitutions.

Some lay the failure of constitutionalism at the door of the inadequate foundation laid or legacy left by colonialism in Africa. Others point to the indirect interference or influence that Western countries continue to exert over Africa. True as this may be, continuing to blame colonialism and the continued influence of Western countries on Africa will never solve Africa’s problems.

I contend that the major cause of failure in Africa lies with the ineffective African Union, which has so far failed to stand united in tackling the challenges facing the continent.

The importance of the concept of constitutionalism was discussed in detail. In its purest form, it stands for a government of the people by the people. However, it also reflects limited government power, and public confidence in the government. Constitutionalism complements democracy, and in turn democracy seeks to promote and protect good governance and human rights in the modern state.

Although there is undoubtedly a nexus between the concept of constitutionalism and a constitution, it was argued that a constitution alone does not guarantee constitutionalism. Africa abounds with examples where leaders rate themselves above the law (for example in Zimbabwe, Swaziland, Senegal, Ivory Coast, Kenya, Libya, Mali, DRC, and many others). This seems to be an ongoing challenge for most African states. What needs to be done is to introduce institutions in the AU where African leaders will undergo training in good governance, peace and cooperation, as well as the importance of constitutionalism, what the doctrine of separation of powers seek to achieve, and respect for the rule of law.

Another important issue which needs to be considered in Africa, is the continent-wide approach to state sovereignty. Although the sovereignty of every state must be respected, the time has come to rethink the meaning of sovereignty in the light of the protection of human rights and good governance, and the role that can or must be played by the AU on the continent to prevent the abuse of power by recalcitrant leaders. The AU needs to create platforms or mechanisms in the form of regulations or conventions, and ensure their implementation and enforcement, which will bind member states and enable the AU to intervene where conflict erupts as a result of leaders or rebels who disregard the rule of law and violate human rights.

It was further argued that the doctrine of separation of powers was introduced to Africa only after the advent of colonialism. Long before colonialism, traditional leaders in the persons of kings and chiefs, ruled communities. When colonizers were in charge they did not follow “inclusive” democratic practices. The indigenous populations were, in the main, excluded and denied participation in the governing of their countries by colonizers. Upon obtaining independence, the constitutions adopted lacked principles of constitutionalism. This opened the door for those who took over to consolidate power to protect their personal interests thereby compromising the public interest.

The philosophy of Montesquieu in terms of which “every man invested with power is apt to abuse it and carry his authority as far as it will go”,⁶⁵⁵ has found full expression in most African states, most strikingly exemplified by the situation of Zimbabwe where Mugabe has been President for over thirty years and good governance has collapsed as a result of his abuse of power. Furthermore, in Swaziland the judiciary has been thrown into disarray by a King who seeks to control all the branches of government. In Kenya, the country experienced extreme hardship as the result of the KANU-dominated executive which encroached on the affairs of the other branches of government.

We also saw that although South Africa has been moving in a positive direction in terms of political tolerance and separation of powers when compared to other countries in Africa, it is not immune from the challenges that have befallen other nations. However, it is submitted that other African states could profitably “take a leaf” from South Africa’s civil society groups and NGOs who have approached the courts to challenge questionable actions by the government, and also from the South African courts who have justly, fearlessly and impartially found against the government where it violated human rights or acted *ultra vires* its powers.⁶⁵⁶ Further, other African governments may learn from the South African government to respect court findings and orders in order to promote peace and good governance.

It was also established that one of the main aims of the doctrine of the separation of powers is to ensure checks and balances on government power.⁶⁵⁷ Constitutional Principle IV in South Africa provided that – “there shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness”.⁶⁵⁸ Accountability, responsiveness and openness are essential components for a healthy democracy and governments should be urged to promote these.

⁶⁵⁵ Montesquieu B *The spirit of laws* (1949) at 150.

⁶⁵⁶ See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 where the Constitutional Court held that the socioeconomic rights must be enforced in line with the Constitution. See also *Democratic Alliance v President of the Republic of South Africa and Others* *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24 where the Constitutional Court confirmed that the action of the President in the appointment Simelane as the National Director of Public Prosecutions was inconsistent with the Constitution and invalid.

⁶⁵⁷ See United Nations African Governance Report II: 2009 (Dec 2009) United Nations Publications at 118-120.

⁶⁵⁸ See Schedule 4 to the South African Interim Constitution, 1993.

The study further deliberated on the rule of law in Africa. It points out that most leaders in Africa disregard the rule of law. Although the AU Constitutive Act and the African Charter on Democracy, Elections and Governance emphasize the rule of law, it is in the main ignored by self-serving leaders. This is one of the many challenges surrounding the AU which emerges as strong on theory but, when it comes to implementation, appears unable or unwilling to execute its functions effectively when compared to similar institutions such as the European Union (EU) which is generally active, effective and involved.⁶⁵⁹ The AU needs to develop a strategy that will enable it to function effectively and to be actively involved in the promotion of good governance and the rule of law in member states.

The study agrees that the African Peer Review Mechanism can be an effective tool in improving good governance in Africa, only if it can be enforced and promoted among member states. The AU must create platforms to ensure continuity of good work or initiatives of former leaders by their successors in order to achieve the desired goal.⁶⁶⁰

Chapter three of the study looked at various mechanisms that protect the principle of judicial independence as an element of good governance. This principle has developed progressively and fits well with the concept of constitutionalism and the principle of separation of powers.⁶⁶¹ Among others, the mechanisms identified included the constitution and legislation; Judicial Service Commissions, courts or tribunals; international law/conventions or practices; and personal and functional independence of the judges. Each of the mentioned mechanisms play a very important role in protecting the independence of the judiciary and ensuring that the administration of justice is carried out diligently and effectively.

We have learnt that the UN, through its adopted “Basic Principles on the Independence of the Judiciary” seeks to promote and protect judicial independence by providing that “the

⁶⁵⁹ Take, for example, how the EU was involved in the Greece bail-out and elections in 2012.

⁶⁶⁰ One can argue in this regard that ever since the departure of former presidents Mbeki, Chissano and Obasonjo, there has not been much done on the side of NEPAD whose objects if they can be effectively implemented, have the potential to contribute to the human resource development of the continent and consequently, to peace and good governance.

⁶⁶¹ See Koovi Baï Irène Aimée “Guarantee mechanisms for the judicial independence in Benin and the issues of reform” at 2 available at <http://www.the-rule-of-law-in-africa.com/wp-content/uploads/2012/06/Koovi1.pdf>(accessed 22/08/2012).

independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country". The study also shows that an independent judiciary is a symbol of democracy. This notion was elaborated at length using South Africa as an example, in an effort to show the nexus between the principle of judicial independence and human rights in a constitutional and democratic state. It was argued that "judicial independence bestows upon judicial officers a responsibility to protect the balance of powers and human rights in a given state".⁶⁶²

This was evident in our discussion of *RSA v Grootboom*.⁶⁶³ We learnt in *Grootboom* that an effective and independent judiciary is necessary to ensure a just intervention between the government and its people to preserve law and order in a state. The CC made an important argument when it raised that –

"The issue here remind us of the intolerable conditions under which many of our people are still living ... It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions".⁶⁶⁴

This is indeed a very important finding and proves the commitment, effectiveness and independence of the Constitutional Court of South Africa to adjudicate cases impartially and without fear or favour could be a lesson to other African countries. Socio-economic rights are very important because if neglected and not legally defended those who are suffering may be forced to resort to conflict in order to improve their lives. Economic freedom is a very sensitive and important issue and it takes a bold independent judiciary to guarantee it.⁶⁶⁵ We learnt that courts form an important part of good governance and they need to be protected and respected in order to function effectively.

We have also established the importance of the personal and functional independence of judges and how it enhances judicial independence. The study agrees that it is important to

⁶⁶² See discussion in 3.4.2 above.

⁶⁶³ See discussion in 3.4.4 above.

⁶⁶⁴ At par 2.

⁶⁶⁵ According to La Porta R *et al* "it is perhaps not entirely surprising that judicial independence is especially important for economic freedom...". (See La Porta Rafael *et al* "The guarantees of freedom"(2002) NBER Working Paper Series at 4 available at http://www.nber.org/papers/w8759.pdf?new_window=1(accessed 22/08/2012).See also "Judicial checks and balances" (2003) NBER Working Paper Series at 18, where they further pointed out that "judicial independence is an important source of economic freedom" available at http://www.nber.org/papers/w9775.pdf?new_window=1 (accessed 22/08/2012).

create a free environment for judicial officers to be able to execute their duties without fear, for instance of being removed from office, demoted, or have their salaries reduced for delivering judgments that are unfavourable to the executive or legislature. Judges must decide cases before them based on the facts and the applicable law.⁶⁶⁶

Chapter four looked at the appointment process of judicial officers in Swaziland, Kenya, Zimbabwe and South Africa. The manner in which judges are appointed forms an important component of judicial independence. It is essential to ensure an open and transparent process when judicial officers are appointed, if democracy and the principle of judicial independence are to be safeguarded. It was seen that throughout the world the process of appointing judges has lately attracted considerable attention in an effort to secure the independence of the judiciary in a quest to protect democracy and human rights in the modern state.

The four countries considered in the study have all opted for a JSC to assist in the process of appointing judicial officers. The role of the JSC in good governance is dependent on the wording of the appointment clause, namely “after consultation with” / “in consultation” / “in accordance with” / “on the advice of”, etc.

The Effect of the Terms “after consultation with”, “in consultation”, “in accordance with”, “on the advice of” in Constitutions with regard to the Appointment Process

Terms such as “after consultation with”, “in consultation”, “in accordance with”, or “on the advice of” have different meanings with regard to the process of appointment of judges. All the four countries have adopted different provisions for the appointment of judicial officers in their constitutions –

Swaziland

Section 153 of the Constitution provides as follows –

- “(1) The Chief Justice and the other Justices of the superior courts – shall be appointed by the King *on the advice of* the Judicial Service Commission”.

⁶⁶⁶ See Principle 2 of the Basic Principles on the Independence of the Judiciary which reads – “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason” available at <http://www2.ohchr.org/english/law/indjudiciary.htm>. See also “The role of judges” Justice Education Society and Centre for Education, Law and Society, Canada available at <http://www.lawconnection.ca/content/role-judges-backgrounder> (accessed 22/08/2012).

Kenya

Article 166 of the Constitution provides that –

- (1) The President shall appoint –
 - (c) the Chief Justice and the Deputy Chief Justice, *in accordance with the recommendation* of the Judicial Service Commission, and *subject to the approval* of the National Assembly; and
 - (d) all other judges, *in accordance with the recommendation* of the Judicial Service Commission.”

Zimbabwe

Section 84 of the Constitution which establishes that –

- “(1) The Chief Justice and other judges of the Supreme Court and the High Court shall be appointed by the President *after consultation with* the Judicial Service Commission”.

South Africa

Section 174 of the Constitution provides as follows –

- “(3) The President as head of the national executive, *after consulting* the Judicial Service Commission and the leaders of the parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice, *after consulting* the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.
- (6) The President must appoint the judges of all other courts *on the advice of* the Judicial Service Commission.”

The framing of these terms and its effect is crucial for purposes of interpreting those clauses and giving a clear meaning in line with the principles of separation of powers and judicial independence in modern constitutional and democratic states.⁶⁶⁷ The notion of judicial independence finds expression in the doctrine of separation of powers.⁶⁶⁸ The doctrine is important for the well-being of a state. In *South African Association of Personal Injury Lawyers v Heath and Others*⁶⁶⁹ the Constitutional Court held that “the separation of the

⁶⁶⁷ In the Legal Education Teachers Association of South Australia Annual Conference of 2003 the Chief Justice of South Australia John Doyle AC, pointed out that:

“judicial independence and the separation of powers are principles or doctrines which are important but sometimes misunderstood. Each of them is of fundamental importance to the system by which our society is governed. Each is sometimes misunderstood, and, in public discussion, sometimes ignored. It may be that judicial independence is not related historically to the doctrine of the separation of powers. But even if that is so, there is an intimate relationship between the two doctrines which makes it appropriate to consider them together.”

⁶⁶⁸ See Woolman *et al Constitutional law of South Africa* volume 1 (2008) at 12-28.

⁶⁶⁹ *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000).

judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts under the Constitution".⁶⁷⁰

It is not intended for a complete separation or to provide a platform for encroachment by one branch in the functions of the other branch(es). There must be co-operation between the three branches of government in order to enable checks and balances. In South Africa the Constitution protects the judiciary and encourage co-operation between the branches of government by making a provision that: "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".⁶⁷¹

Rautenbach and Malherbe explain the effects of the terms "with the advice", "on the advice", "in consultation with", and "after consulting".⁶⁷² They point out that in the case of South Africa that the term "after consulting" means that "the President *must* consult another functionary or institution, but that, after consultation, the President is not bound by the recommendation".⁶⁷³ The issue that the President is not bound by the recommendation of the bodies that he/she must consult raises many questions and poses as a threat to separation of powers.⁶⁷⁴

The appointment of judicial officers is a crucial issue that requires fairness and transparency. I contend that the wording of section 173(4) "... after consulting ..." is vague and purports to give the President greater influence in the appointment of the mentioned judicial officers. The best thing would be to amend the wording in a manner that will clearly bind the President to consider the recommendations of the JSC and the leaders of parties represented in the National Assembly.

⁶⁷⁰ At par 25.

⁶⁷¹ Section 165(4).

⁶⁷² Rautenbach IM and Malherbe EFJ *Constitutional law* (2009) 5th edition at 204-206.

⁶⁷³ *Id* at 205.

⁶⁷⁴ For example, one can argue what is the use of consulting or of making recommendations that are not binding?

In the case of Swaziland attention was paid to the judicial authority and the Constitution, as well as how judges are appointed. It was established that the current judicial crisis as discussed is partly caused by the King's excessive interference in the affairs of the judiciary. Although the Constitution seeks to protect the independence of the judiciary in terms of section 141 the King has on several occasions overridden it. This has compromised the independence of the judiciary and consequently democracy in Swaziland.

Section 153 of the Constitution which makes provision for the appointment of the Chief Justice and other justices of the superior courts on the advice of the JSC was found not to have been structured in a way that seeks to promote the principle of separation of powers in Swaziland. This is so because the King is not bound to consider the advice of the JSC or anyone else when making judicial appointments in the superior courts.

It was also argued that the King technically appoints all members constituting the JSC and this could be perceived as a threat to the independence of the judiciary. This fear has already manifested as the judicial crisis looms in Swaziland with the government, the JSC and the Chief Justice being accused of subverting the rule of law in the country.⁶⁷⁵ The Chief Justice appears to be more loyal to the King than the law. This was evident in his controversial action of issuing a practice directive exempting the King from the jurisdiction of courts in Swaziland.

Based on the findings of the study, I contend that the problem lies with the Constitution. It needs to be amended. Political parties must be allowed to participate in the politics of Swaziland. The powers of the King need to be reduced to allow for checks and balances on power. In order to avoid the current situation where the Chief Justice has to protect the King rather than uphold the law because he knows that the King "butters his bread", section 153 must be amended in such a way that the appointment of judges would require consultation and approval of the JSC and Parliament. Further, section 159 needs to be reviewed so that the JSC is not made up of the King's appointees only as it is currently the case.

⁶⁷⁵ See discussion in 4.2.5 above.

In Kenya things seem to be moving in the right direction away from the era of KANU-dominated government and a corrupt judiciary. The 2010 Constitution came with hope. The most important provision with regard to the judiciary is article 166(1) which is seen as a milestone towards upholding the principle of judicial independence and curbing executive influence in the appointment of judicial officers. The role of the JSC is placed centre at stage and the National Assembly must approve the appointment of the judges.

In the case of Zimbabwe the study indicated that the year 2000 represents a turning point in the history of Zimbabwe which affected not only the politics of the country, but also the judiciary. It is no secret that President Mugabe has scant respect for the judiciary. This was evident in 1999 in his response to some four judges of the Supreme Court who wrote to him seeking clarity on torture charges, that:

“The judiciary has no right to give instructions to the President on any matter as the four judges have purported to do. In those circumstances, the one and only honourable course open to [the judges] is quitting the Bench”.⁶⁷⁶

It was argued that the wording of section 84(1) and (2) of the Constitution gives the President exclusive powers to appoint senior judges thereby defeating the object of the principle of the separation of powers. This section (84) needs to be amended to allow the JSC to “work together with” the President in the process of appointing judicial officers which should, further, be subject to the approval of the House of Assembly.

Although the country is currently working on a new Constitution, there is little hope that it will bring about the radical changes needed to transform the country. Among the reasons which cast doubt are the allegations of intolerance during the public consultation process of drafting the new Constitution.

In the case of South Africa the study focused on section 174 of the Constitution which makes provision for the appointment of judicial officers and the composition of the Judicial Service

⁶⁷⁶ “Electing to rape: Sexual terror in Mugabe’s Zimbabwe” a report by AIDS-Free World, New York (2009) at 8.

Commission. It was indicated that South Africa's JSC is composed of members from different spheres and has many members as compared to the JSC's in other countries. On the one hand, the 23 members' number is criticized as unnecessary while on the other hand, some welcome it and argue that it enhances transparency in the appointment process.

The study also pointed to the criticism leveled at the South African JSC that it is "overstocked" with politicians at the cost of lawyers. It was further argued that section 174(3) and (4) of the Constitution is structured in a vague and ambiguous manner. Taking into account Rautenbach and Malherbe's interpretation of the words "after consulting", to mean that "the President must consult another functionary or institution, but that, after consultation the President is not bound by the recommendation" of the functionary or institution that he must consult.

It could be contended that the crafters of the Constitution had a purpose when they put the words "after consulting the leaders of the Judicial Service Commission and the leaders of parties represented in the National Assembly" (section 174(3)) and "after consulting the Chief Justice and the leaders of the parties represented in the National Assembly" (section 174(4)), the President appoints certain judicial officers. It could be argued that the purpose was to ensure that the process of appointment does not become a decision of the President alone, otherwise there was never going to be the word "consultation", but this would have been included under section 84 of the Constitution which makes provision for the powers and functions of the President.

In June 2012 the leader of the main opposition party (Democratic Alliance), Helen Zille wrote to the President, Jacob Zuma, and advanced some constructive arguments regarding the consultation on the appointment process in the Constitutional Court. She pointed out that:

"I have today written to President Zuma to re-state that the Constitution requires proper and meaningful consultation before he decides on an appointment. In the past, the President has 'consulted' at the very last moment, as a formality, when his mind was clearly already made up. He has always sought consultation only on his preferred candidate, which has suggested that his mind has not been open to the possibility of changing his appointment based on the consultation process. This meant that the leaders

of opposition parties did not have fair chance to respond or engage with the President about his choice.

All in all, the consultation between the President and leaders of political parties about the appointment of senior judicial vacancies has been a mere fig leaf for doing what the President intended to do from the start, and cannot be regarded as meaningful. My letter to President Zuma today suggests ways in which substantive and proper consultations can take place.

The DA urges President Zuma to accept the value inherent in real consultation. This mechanism seeks to legitimise the appointment process by reaching consensus with the opposition in the decision made. It aims to protect all South Africans from political influence in the highest court in the land by incorporating a measure of oversight and democratic participation. A superficial acknowledgement of consultation does damage to the legitimacy of the appointment process, without which his choice of judges will remain questionable.”⁶⁷⁷

Political parties must work together in Parliament for the good of the country. They need to engage in robust debate to benefit the country. This initiative by a leader of an opposition party is crucial and seeks to compel transparency in the workings of one of the most important pillars of democracy, i.e. an independent judiciary. She further argued, and rightfully so, that:

“Judicial appointments are one of the most important functions of the President. If he wants the appointments to have credibility, he must consult meaningfully, and with an open mind, as we believe the spirit of the Constitution requires”.⁶⁷⁸

Another challenge is that the Constitution does not say who can nominate the judicial officers mentioned in section 174(3).⁶⁷⁹ Whether this is a sole privilege of the President or it should be the JSC or anyone is not clear. Section 174 needs to be revised in order to clarify some of these questions and to explicitly bind the President to consider the advice or recommendations of the JSC and the leaders of parties represented in the National Assembly. From the above summation of both the practice and the pitfalls inherent in judicial appointment in the African countries considered in this study, it is submitted that the Kenyan model is, in theory at least, the most effective and could be recommended as “best practice”

⁶⁷⁷ See “Zuma should consult properly on ConCourt appointment – Zille” available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=307912&sn=Detail> (accessed: 04/09/2012).

⁶⁷⁸ *Ibid.*

⁶⁷⁹ I.e. the Chief Justice, Deputy Chief Justice, President and Deputy President of the Supreme Court of Appeal.

for African countries. However, a note of caution must be sounded in that the Kenyan model has not yet proven itself in the hard school of political expedience.

Furthermore, it must be noted that in countries where there is a single dominant party, taking a certain issue to Parliament for approval could be largely meaningless in that the general practice is for members to vote along party lines.⁶⁸⁰ Under such situations, once the senior leaders of the dominant party push for a certain bill or the nomination of a particular person there is little that can be done in Parliament to counteract such a motion.

⁶⁸⁰ For example, the two ANC MPs Ben Turok and Gloria Borman who refused to vote during the Protection of State Information Bill in Parliament in 2011 were subjected to disciplinary hearing by the ANC. See HlongwaneSipho “ANC vs Turok, Borman: Damned if you do, damned if you don’t” *Daily Maverick* available at <http://dailymaverick.co.za/article/2012-05-04-anc-vs-turok-borman-damned-if-you-do-damned-if-you-dont> (accessed 04/09/2012).Aboobaker Shanti “MPs on mat for failing to toe ANC line” *Cape Times* – available at <http://www.iol.co.za/capetimes/mps-on-mat-for-failing-to-toe-anc-line-1.1282504> (accessed 04/09/2012).

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