KONRAD ADENAUER STIFTUNG

Judicial Financial Independence in Africa

A study of eleven sub-Saharan countries

Conrad Bosire (ed)

Judicial Financial Independence in Africa

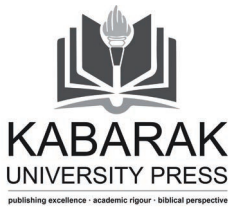
A study of eleven sub-Saharan countries

KONRAD ADENAUER STIFTUNG

Judicial Financial Independence in Africa

A study of eleven sub-Saharan countries

Conrad Bosire (ed)



Judicial financial independence in Africa:
A study of eleven sub-Saharan countries

ISBN 978 9914 9964 3 2

Published by
Kabarak University Press
Private Bag 20157, Kabarak, Kenya.
kabarak.ac.ke/press
editor.kup@kabarak.ac.ke | sales.kup@kabarak.ac.ke;
@KABUPresske

Cover design and layout by John Agutu
Email: agutujo@gmail.com
Printed by Lino Typesetters (K) Ltd., info@linotype.co.ke
Published 2024

Contents

About the authors

Conrad Mugoya Bosire is a lawyer and an Advocate of the High Court of Kenya, and has experience in the areas of law, governance, democracy, and development. Bosire has worked in the academia, civil society, and public institutions. Bosire was the Chief of Staff in the Kenya Judiciary from 2018-2021 and the acting Executive Director of the National Council on the Administration of Justice (NCAJ) during the same period. Prior to joining the Kenya Judiciary, Bosire was the Director of Research at the Katiba Institute in Nairobi. He is routinely involved in the design and delivery of Judges Continuing Education (JCE) programmes and in general judicial reforms. Dr Bosire holds a Doctor of Philosophy (Law) from the University of the Western Cape, a post-graduate diploma in federal and devolved governance from the University of Fribourg in Switzerland, a Master of Laws (LLM) in Human Rights and Democratisation from the University of Pretoria, and a Bachelor of Laws (LLB) from Moi University, Kenya.

Tinashe Carlton Chigwata is the head of Multilevel Government at the Dullah Omar Institute based at the University of the Western Cape, South Africa. He holds a PhD in Public Law from the same university and undertakes research, teaching, and consultancy on local and regional governments, multi-level government and governance-related matters, such as elections and corruption. He manages and teaches in the Masters and Postgraduate Diploma Programmes in Multi-level Government and Local Government offered by the Dullah Omar Institute. He has authored and edited several academic publications, including four books on local government and multilevel government in South Africa, Zimbabwe and Zambia. Prof Chigwata is the Editor-in- Chief of the *Local Government Bulletin*, which publishes regular and accessible articles, policy briefs, reports on judgment and summaries of new bills on local government and multi-level government in South Africa and beyond.

Mwiza Jo Nkhata is Honorary Professor in the Department of Public, International and Constitutional Law at the University of South Africa. He currently works as a Principal Legal Officer at the Arusha-based African Court on Human and Peoples' Rights (the African Court). Before joining the African Court, he taught law at the University of Malawi for fourteen (14) years and also served as Dean in the Faculty of Law. He possesses extensive experience both as a scholar and a legal practitioner, having been admitted to the Malawi Bar in 2003. He has also served as President of the Malawi Law Society, among other leadership roles. His research interests include comparative constitutional law, good governance and constitutionalism, human rights in the African context, public international law and international criminal law. Mwiza has conducted research and published extensively in the aforementioned areas. A list of some of his publications can be accessed at: https://orcid.org/0000-0002-7695-5503.

Kennedy Kariseb is senior lecturer in the Department of Public Law of the School of Law, University of Namibia. He holds a doctorate in law from the University of Pretoria, South Africa. His teaching and research are broadly blended between human rights law and international law with a focus on Africa. His latest publication is, Kennedy Kariseb, 'The making and unmaking of gender: Reflections on questions of gender and the judiciary in Namibia' in J Jarpa Dawuni (ed) *Intersectionality and women's access to justice in Africa, New York, Lexington Books, 2022, 241-258*.

Grace Kamugisha Kazoba holds LLB with honours from the University of Dar es Salaam, LL.M from the University of Pretoria and a PhD from the University of Dar es Salaam in collaboration with the University of Bayreuth, Germany. She is an alumnus of the MacCabe Centre for Law and Cancer (Melbourne, Australia). Her research interests include the East African law, interface of human rights, public health, intellectual property, international trade and investment fields of law, access to justice, gender and labour law. She has provided technical assistance and consultancy services in her areas of interests to some African countries and local and international organisations, including Ghana and Gambia; the United Nations Economic Commission for Africa (UNECA) and WHO Africa Regional Office (AFRO). She started her career at the UNHCR. She has taught, supervised and externally

examined students up to PhD level at different faculties of law of major universities in Tanzania. She is a senior lecturer at the Institute of Finance Management (IFM) where she has been both a faculty dean for four years and teaches labour, international labour migration, business and occupational health laws among others. She is an Advocate of the High Court of Tanzania.

Daniel Ronald Ruhweza is a Ugandan and UK trained attorney and senior lecturer at law. He is the acting Head – Department of Law and Jurisprudence, School of Law, Makerere University where he also serves as Patron of the Moot Society and the Christian Law Students' Fellowship. He is a Commonwealth and DFID Scholar, and Advocate of the High Court of Uganda. Daniel is President Emeritus of the Uganda Christian Lawyers Fraternity and Chair Emeritus of its Board of Directors. He is the Chair of the Uganda Law Society Rule of Law and Strategic Litigation Cluster and has served on the Committee of Legal Education and Training of the Uganda Law Council. He is also Coordinator of the LLM (Human Rights and Democratisation in Africa) programme. He has served as Board member of the Uganda Scripture Union and (Christian) Advocates of Africa Organisations. His research interests are international criminal law, transitional justice, good governance, and constitutionalism. He is a recipient of the Chief Justice & Attorney General's Prizes for Academic Excellence, as well as the Commonwealth, SIDA, Cambridge Trust and DFID Scholarships.

Theresa Uzoamaka Akphogome holds a PhD in Law from the University of Jos, LLM from University of Benin and LLB from University of Calabar. She was called to the Bar in 2004. She is a professor in the Department of Public Law, Benson Idahosa University, Benin City Nigeria. She served as the Head of Department, Public Law 2016-2018 and the Dean, Faculty of Law 2018-2021. She teaches public international law, international humanitarian law and legal research and methodology. Her research interests and publications are primarily on international humanitarian law but she also has publications in constitutional law, oil and gas law, environmental law, international criminal law and human rights law. She is a Solicitor and Advocate of the Supreme Court of Nigeria. She has attended many national and international conferences and has over 80 publications in reputable local, national and international journals. She received a research grant in 2021 from Rape, Abuse and Incest National

Network (RAINN) USA. She has participated in the KAS regional conferences on rule of law for sub-Saharan Africa.

Onalethata Kambai is an Attorney of the High Court and Court of Appeal of Botswana. He obtained his Bachelor of Laws (LLB) degree from the University of Botswana in 2006 and a Master of Laws (LLM) degree in Rule of Law and Democratic Governance from Ohio Northern University in the United States of America. Kambai has worked as Prosecution Counsel with Director of Public Prosecutions in Botswana, as part time lecturer at the University of Botswana, and is currently a legal practitioner in Botswana, focusing on public law and commercial law.

Tinotenda Takudzwa Kapatamoyo is an Attorney of the High Court of Botswana and a graduate of the Bachelor of Laws (LLB) programme at the University of Botswana. He has an interest in tax law, digital privacy law, and legal research and legislative drafting. He has published in legal as well as creative art journals. He currently practices law in Botswana.

Alison Tilley is coordinator of Judges Matter, a project of the Democratic Governance and Rights Unit, University of Cape Town. Judges Matter does research and advocacy on the appointment and discipline of judges, and related issues of judicial governance. Alison is also a member of the Information Regulator of South Africa, a statutory body mandated to regulate access to information and privacy. An Attorney of the High Court of South Africa, Alison has litigated on transparency, accountability and whistleblowing issues in several cases before the superior courts of South Africa. She has also written extensively on these. She was formerly the director of the Open Democracy Advice Centre, a civil society organised focused on access to information rights. Alison holds BA (Law) and LLB degrees from the University of Cape Town.

Vuyani Ndzishe is a research assistant at the Democratic Governance and Rights Unit, in the Department of Public Law at the University of Cape Town. He started as a research and advocacy intern on the Judges Matters project of the DGRU. As research assistant, Vuyani currently works on several research projects on judicial governance. He obtained

his BA majoring in political and international studies and legal theory, and an LLB law degree from Rhodes University. He is currently reading for his LLM at the University of Cape Town.

Mbekezeli Benjamin is research and advocacy officer at Judges Matter, a project of the Democratic Governance and Rights Unit, University of Cape Town. Mbekezeli has done legal research, advocacy and litigation on the constitutional right to housing, the right to education, and the right to protest for grassroots activists. He has litigated cases at all levels of the South African legal system, from the District Courts up to the Constitutional Court; and has appeared before United Nations treaty bodies such as the Committee on Civil and Political Rights, and the Committee on Economic, Social and Cultural Rights. Mbekezeli has written legal analyses in all national newspapers in South Africa, and has been quoted extensively in South African and foreign media. He holds an LLB law degree from Wits University, was the 2019 Global Practitioner-in-Residence at Stanford Law School, and was on the 2023 list of the *Mail & Guardian's Top 200 Young South Africans*.

Zikhona Ndlebe is research lead at Judges Matter, a project of the Democratic Governance and Rights Unit, University of Cape Town. An Attorney of the High Court of South Africa (with right of audience in the superior courts), she has practiced at one of the most prestigious law firms in Cape Town, specialising in labour and employment law. She has represented clients at the Commission for Conciliation, Mediation and Arbitration (CCMA) and at various labour bargaining councils. Zikhona has appeared in the Labour Court, and has been involved in cases up to the Labour Appeal Court. Zikhona holds an LLB degree from the University of the Western Cape, an LLM (Labour Law) from the University of Cape Town, and a certificate in non-profit organisation management from Stellenbosch University. Zikhona has received leadership training through the DGMT Fellowship for Organisational Innovation, and the Desmond Tutu Leadership for Humanity.

Michael Gyan Nyarko is the Deputy Executive Director at the Institute for Human Rights and Development in Africa (IHRDA). He formerly managed litigation and implementation at the Centre for Human Rights, University of Pretoria. He serves on the Editorial Committee

of the *African Human Rights Yearbook* and edits *AfricLaw.com.* Michael is admitted to practice law in Ghana (2011) and was part of a pan-African commercial law practice headquartered in Accra, before joining the Centre for Human Rights where he has been mostly involved in human rights research, advocacy, capacity building and litigation. He has authored several academic papers on human rights and governance in Africa, including three co-edited books. His research interests include international human rights law broadly and the African human rights system in particular, human rights and vulnerabilities, democratic governance, business and human rights, open-source human rights investigations, human rights and the environment, economic, social and cultural rights, the legitimacy of international human rights adjudicative bodies, and the domestic impact/implementation of international human rights law.

Lungowe Matakala is a lecturer of law with 21 years of experience, currently based at the University of Zambia. She holds a PhD in human rights and constitutional law reform from the University of Cambridge. She is a member of the African Union Steering Committee on Guidelines on Constitutional Amendments, and she advises the National Assembly of Zambia on the SADC parliamentary project on sexual and reproductive health rights.

Lungowe has held various leadership positions, including that of senator, dean of Law, and head of department. Additionally, Lungowe is a consultant to the United Nations, GIZ, Danish Institute for Human Rights, and the government of Zambia. Among others, she trains judges and parliamentarians on human rights matters. Her achievements in 2023-2024 include leading the drafting of training manuals for Local Court magistrates and traditional leaders in Zambia. She also conducts a human rights audit of Zambia's prisons and correctional facilities. Her contributions in the areas of prisoners' rights and business and human rights earned her the 2023 Global Peace, Leadership and Excellence Award from the United Nations International Peace and Governance Council (UNIPGC).

Foreword

How the judiciary plans and manages its finances, and the nature of the role that other arms of government and external agencies play in the planning and management of resources allocated to it has a critical bearing on the independence, efficiency and operations of the judiciary. Specifically, how the judiciary determines its priorities for funding, which priorities are funded, and the manner of funding can limit or enhance its independence.

Judicial financial independence generally refers to the institutional arrangements, rules, structures, and processes put in place to ensure that the determination of, and access to resources availed to the judiciary, as well as its priorities and the management of those resources is safeguarded from interference or manipulation by other arms of government. Needless to say that the concept of judicial financial autonomy obliges the judiciary to be transparent and accountable in the way it manages and uses resources allocated to it.

This edited book provides us with analyses of the status of judicial financial independence in Africa, looking at the framework and practice in eleven sub-Saharan African countries. Through the specific experiences of the eleven countries, this book covers themes such as: the recognition and entrenchment of constitutional and legal frameworks as well as principles of judicial financial independence, the budgeting processes for the judiciary and accountability and transparency in the management, control and utilisation of the resources allocated to the judiciary among other issues. Thus, this book paints a landscape of the recognition, entrenchment, and practice of judicial financial independence in the African region.

More importantly, the country-specific analyses and the concluding sections of this book demonstrate that the frameworks put in place to ensure the pursuit and realisation of judicial financial independence may not always align with practice. Indeed, the manner in which the principle of judicial financial independence is realised depends on many other factors including the politics of funding the judiciary which vary across the studied countries and even over different periods of time in the same country.

A review of the experience in these eleven countries with recently adopted frameworks for judicial independence also demonstrates the need for sufficient detail in the constitutional framework in order to inform the practice. This is because the specifics and practical mechanics of judicial financial independence are often thought of as too mundane for inclusion during constitutional review. However, experience has shown that institutional structures and processes for judicial financial independence require sufficient detail in the constitutional framework, with only minor details left to later administrative arrangements.

Furthermore, some of the anecdotal evidence in this book suggests that moments of political upheaval tend to negatively affect the financing of the courts yet these are the times that require judiciaries and other institutions to be at their strongest in order to deal with such situations. The main solution therefore is to tighten and align practice frameworks to the independent and consistent funding and facilitation of the courts.

The demand by judiciaries for more resources, comes with pressure to be more accountable and transparent in the control, management and utilisation of those resources. This is imperative because some of the functions that judiciaries perform have expanded to new areas such as development and management of physical court infrastructure. It is, however, distressing that some of the examples discussed in the book show some judicial agencies in the region encouraging a culture of opaqueness around the utilisation of the resources allocated to the judiciary, to the extent of defying court orders that require the disclosure of financial information. Indeed, judiciaries have to lead the way in practising transparency, integrity, and accountability which are as important as the independence that they seek.

While the question of adequacy and control over resources belonging to the judiciary has been with us for long, this edited volume may very well be among the first to provide a systematic and comprehensive analysis of the mechanics and practice of the works on the subject of judicial financial independence in Africa. I therefore congratulate Dr Conrad Bosire for initiating the idea of the book and for editing this seminal and pioneering work on a topic that has received relatively little scholarly and policy attention. In the same spirit, I also congratulate the chapter contributors from the eleven sub-Saharan African countries whose experiences have enriched the discussions in the book.

This work would not have been possible without the generous financial and technical assistance of the Rule of Law Programme of the

Konrad Adenauer Foundation. That Programme has left an indelible stamp in the advocacy for the rule of law and administration of justice in the region since its establishment in 2006, and this book is part of the evidence of the great work done and that continues to be done. I appreciate the excellent work and commitment demonstrated by Dr Stefanie Rothenberger, the Programme Director, and her wonderful team in enhancing the rule of law in the region.

I also thank the publishers, Kabarak University Press, for their commitment to promoting African-led knowledge production on the themes and topics that contribute to the betterment of our societies. Kabarak University has also established a tradition of cutting-edge research and generating new knowledge products, some of which I have been associated with, which is highly commendable.

This book has answered the primary question, namely: what does judicial financial independence entail and what is its status and current practice in Africa? The next natural step is the development of regional standards on judicial financial independence, and a more detailed review of the prevailing national contexts, as well as measures to ensure that all countries in the region entrench principles of judicial financial independence in their frameworks and practice. I trust you will find it insightful.

Chief Justice (Emeritus) David K Maraga, FCIArb, EGH

Chief Justice of the Republic of Kenya, 2016-2021

Preface

Konrad Adenauer Foundation's (KAS) Rule of Law Programme for Anglophone Sub-Saharan Africa, based in Nairobi, has been actively promoting the rule of law, democracy, and human rights in the region since 2006. Recognising the pivotal role of a firm and impartial judiciary in upholding these values, the KAS Rule of Law Programme continues to dedicate significant efforts towards strengthening the separation of powers and the independence of the judiciary across the sub-Saharan region.

This book is the result of our commitment, exploring the crucial topic of judicial financial independence, a cornerstone for overall judicial autonomy and a critical element in ensuring a fair legal system. Unburdened by undue financial constraints, judges can uphold justice less limited by fear or favour, ensuring legal impartiality in the face of external pressure. Many countries in the region grapple with a legacy of colonial rule and authoritarian regimes, where the judiciary often remained subservient to the executive. This, combined with contemporary political and economic challenges, creates a complex landscape where safeguarding judicial independence is an ongoing struggle.

This publication offers valuable insights into the current state and recent developments of judicial financial independence in eleven African countries. It presents unique comparative data on budget allocations for the judiciary, analysing the concrete impact on institutional and individual decision-making autonomy. It focuses on legal frameworks, financial structures, practical challenges, and institutional mechanisms influencing judicial financial autonomy. Based on this analysis, concrete suggestions are provided aimed at enhancing judicial financial independence, serving as a guide to policymakers, legal practitioners, advocates, and stakeholders committed to a strong and independent judiciary.

The findings in this book underscore its necessity. They include the realisation that progress concerning judicial financial independence oftentimes stalls at implementation. It is particularly concerning when independent court rulings face political resistance through budget

control, resulting in severe budget cuts, thus undermining true autonomy of the judiciary and consequently tangibly weakening a core pillar of the rule of law.

We are convinced that this book will be a valuable guiding resource, highlighting the pivotal role of collaborative efforts in constructing a future where the scales of justice remain unswayed, and the judiciary untethered by financial constraints stands as a beacon of fairness and impartiality, contributing to the strengthening of democracy, good governance and human rights for the sake of more just, fair and prosperous societies on the continent.

KAS expresses its gratitude to Dr Conrad Bosire, the editor and inspiration for this book, for his outstanding project idea and unwavering commitment to make it a reality. Special thanks go to Prof Jason Lakin, former co-editor, for his contributions. We appreciate the authors and external reviewers for their high-quality work. Recognition also goes to Kabarak University Press for publishing, and to Mr Ben Nyabira, Program Manager at the Rule of Law Programme, for his skilful coordination of the project.

As eloquently put by the African Commission on Human and Peoples' Rights, '*A government that truly governs in the best interest of the people should have no fears of an independent judiciary*'.

May these words resonate throughout the pages that follow.

Dr Stefanie Rothenberger
Director of the Rule of Law Program for Sub-Saharan Africa
Konrad Adenauer Foundation

CHAPTER ONE: INTRODUCTION

Judicial financial independence in Africa: A comparative introduction

Introduction

Judicial financial independence and autonomy is widely recognised as a critical and necessary component of the full realisation of the independence of the judiciary. The need for judiciaries to have control over their resources, staff, and planning for their functioning is highlighted in various instruments as critical to the effective functioning of judiciaries, and achievement of the principles of judicial independence and separation of powers. However, the practice and trends in Africa reflect varying, and even contradictory practices to the stated and recognised principles that seek to enhance judicial financial independence in the region.

Using case studies of eleven African countries, this book examines the mechanics and design of administrative and institutional arrangements related to judiciary financing and their relationship with the general principles of judicial financial independence and autonomy. The Constitutional Court of Zambia has defined judicial financial independence in the following words:

> Financial independence relates to the manner in which the institution budgets for, accesses and disburses funds for the performance of its functions. This requires that each state organ should have reasonably sufficient control and freedom from interference from the other two state organs. This independence must be apparent from both the legislation and policy measures so as to be objectively viewed as such.[1]

The Court of Appeal of Uganda has also defined the general principle of judicial independence as,

> the capacity of courts to perform their constitutional function free from actual or apparent interference by, and to the extent that is constitutionally possible, free from actual or apparent dependence on upon, any persons or

[1] *John Sangwa v Attorney General and another*, 2021/CCZ/0012, at para 53.

> institutions, including, in particular, the executive arm of government, over which they do not exercise control.[2]

The Court of Appeal of Uganda also noted factors that define and shape judicial independence keep evolving and that there must be consciousness to ensure that such change does not impair the realisation of the principle of judicial independence.[3] Sir Anthony Gubbay (former Chief Justice of Zimbabwe) has also added that '[t]o secure financial autonomy, the judiciary must have budgetary independence, that is to say, the ability of the judiciary to exercise control over its own funds and apply these funds in accordance with its own priorities for better administration of justice'.[4]

The case studies covered in this book: Kenya, South Africa, Zimbabwe, Malawi, Uganda, Nigeria, Botswana, Tanzania, Zambia, Ghana, and Namibia, review the legal framework, policies, and practices regarding the administrative and financial arrangements in the institution of the judiciary. The issues covered in each of the chapters include: the level of control the judiciary has in the determination of its financial and administrative needs, the nature and extent of the judiciary's involvement of the executive and legislature in finances and administration of the judiciary, the management and execution of administrative and financial processes by the judiciary, and accountability of the judiciary, among other issues.

Specifically, in each country case study, the chapters have looked at the general framework for judicial independence and separation of powers, the design of the judiciary budgeting process and the management and execution of the budget, the trends in the quantum of finances availed to the judiciary, the judiciary administration model, and accountability of the judiciary in the use of finances allocated to it. In every chapter, the law and practice that prevails in each country is analysed against the general principles of judicial independence and separation of powers.

---

2 The rationale and some aspects of judicial independence' (1985), 59 ALJ 135, at 135, quoted in *Uganda Law Society v AG*, 26.

3 *Uganda Law Society v Attorney General,* 27.

4 Anthony Roy Gubbay, 'The independence of the judiciary with special reference to the parliamentary control of tenure, terms and conditions of service and remuneration of judges: Judicial autonomy and budgetary control and administration', quoted in *John Sangwa v Attorney General and another*, para 27.

The general doctrine of separation of powers between the traditional arms of government (executive, judiciary, and legislature) and the related principle of judicial independence are traceable to the earliest forms of democratic government. Indeed, even before the 18th century treatise by Montesquieu,[5] who is widely credited with the study of formal beginnings of the doctrine of separation of powers, there were earlier forms of democratic government that generally represented the separation of governmental power in an attempt to assure accountability in the manner governmental power was exercised.[6] On the other hand, the principle of judicial independence is traceable to the beginnings of the 'judicial review' role of the court over other arms of government, traceable to 16th and 17th century England and *Marbury v Madison* in the United States.[7]

The reception and application of the doctrine of separation of powers and judicial independence in Africa, however, followed a different trajectory. To start with, today's modern African judiciary was introduced as part of the package of the colonial state governance structures. While the hallowed doctrine of separation of powers and the principle of judicial independence were well developed by the time Western colonialism landed on the shores of Africa, these principles did not find space in the broader system of colonial governance. Colonial courts were subservient to the executive power of the colonial governor, had no independence, and could not check or review the acts of the governor or legislative branch.[8] The courts were used as 'an integral branch of the administration rather than institutions independent of the administration'.[9] Indeed, judicial power was fused with all other governmental power as exemplified by colonial administrators who doubled up as magistrates and such duties as revenue collectors.[10] As noted in chapter

---

5 Max Radin 'The doctrine of the separation of powers in the seventeenth century controversies' 86 *University of Pennsylvania Law Review* (1937-1938), 842-866.

6 See generally, Hans Beck (ed) A *companion to ancient Greek government,* 2013.

7 Edward S Corwin, '*Marbury v Madison* and the doctrine of judicial review' 12(7) *Michigan Law Review* (May 1914), 538-572.

8 Rachel E Ellet, 'Courts and the emergence of statehood in post-colonial Africa' 3(63) *Northern Ireland Law Quarterly* (2012) 343-63, 350.

9 Yash Pal Ghai & JPWB McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present*, 1970, 359.

10 C Gertzel 'The provincial administration in Kenya' (1966) 4 *Commonwealth & Comparative Politics,* 201-202.

eight, even the colonial courts interpreted their power and authority as having no role in limiting colonial executive authority.[11]

The outcome of the above context, as Rachel Ellet argues, is that the post-colonial African state inherited an institutionally and politically weak judiciary.[12] At the turn of independence, the Western-styled courts from the colonial period were established as part of the post-independence structures of government after negotiations with the departing colonial masters and secured in the independence constitutions. However, Africa's independence leaders were not keen to establish courts that were truly independent with power and capacity to check excesses of the executive and legislative arms.[13]

Many new African leaders challenged the idea that the powers they were consolidating could be subjected to any political or other challenge, including independent review by the courts.[14] The decades after independence, therefore, saw the rise of a powerful executive that was typically characterised by single or no party rule, or in worse cases, military regimes that had little regard for democracy, constitutionalism, or respect for the rule of law. Naturally, this environment did not allow the development of or the flourishing of effective court systems based on principles of separation of powers or judicial independence.

Chapter eleven describes how Kwame Nkrumah's government initiated the dismissal of the Chief Justice who presided over a case where persons suspected of planning the assassination of Nkrumah were freed. This was followed by a re-trial where the persons were sentenced and a change of the laws that empowered the president to overturn any court judgment 'on public interest'. In Kenya, at the height of the repression of courts, judges were stripped of independence of tenure and made to serve at the pleasure of the president. In Tanzania, as noted in Chapter eight, Julius Nyerere contemplated the sacking of a judge whose judgment he did not agree with, and argued that courts have to support the government philosophy, beyond the text of the constitution and democracy.

In South Africa and Namibia, the apartheid regime put in place several measures to ensure the tight control of courts, especially in

---

11 *Corbett Limited v Floyd* (1958), EA 389, discussed in Chapter eight on Tanzania.

12 Ellet, 'Courts and the emergence of statehood in post-colonial Africa' 350.

13 Ellet, 'Courts and the emergence of statehood in post-colonial Africa' 350.

14 Ellet, 'Courts and the emergence of statehood in post-colonial Africa' 352.

processes such as appointments in order to ensure that judges with 'the right ideology' were selected, who in turn would pass judicial decisions that furthered the ideology of apartheid through the interpretation and application of the law. Chapter eleven, for instance, notes that any judgment of court that declared a law invalid was reviewable by parliament.

Judiciaries were treated as a mere department within the executive, often subordinated to the ministry or department of justice, the Office of the Attorney General, or other bureaucracy in the executive. The separation of powers and checks and balances between the arms of government only existed on paper as the all-powerful executive controlled all operations of the judiciary. Thus, while the formal structures and institutions of constitutional and democratic governance were in existence, their mandate and powers often collapsed at the feet of the ruler.

Furthermore, the geopolitics of the independence decade and thereafter created an environment where the courts and institutions of political governance were undermined. Specifically, at independence and the decades that followed, politics of the Cold War pitting the Western and Eastern blocs led to competition for spheres of influence in Africa.[15] Consequently, the West turned a blind eye to domestic political repression and growth of brutal regimes in exchange for loyalty in the bi-polar politics and conflict that characterised the period.[16]

The end of the Cold War in the early 1990s brought sweeping constitutional and political changes across the African continent. In particular, political regimes that thrived during the Cold War found themselves under increased pressure, both at home and abroad, to institute internal political and governance reforms. The reform issues typically included: the introduction of multi-party politics and embrace of political pluralism, introduction of term limits for regime incumbents, guarantee of basic freedoms, and general good governance. In many cases, these reforms were carried out through piecemeal constitutional amendments, or as was the case in virtually all countries, the total overhaul of constitutions. Indeed, all African countries but two (Botswana and Mauritius) have had their constitutional systems

---

[15] Makau Mutua, 'Africa and the rule of law' 23 *SUR International Journal of Human Rights* (2016) 1-6.

[16] Gorm Rye Olson, 'Europe and the promotion of democracy in post-cold war Africa: How serious is Europe and for what reason?' 97(388) *African Affairs* (1998) 343-367.

overhauled as a result of the post-Cold War reforms in Africa.[17] In South Africa, the changes saw the collapse of apartheid, the release of Nelson Mandela and other anti-apartheid leaders, and the consolidation of democratic and constitutional reform.

A prominent and unmistakable feature of these post-Cold War constitutional changes is a more significant and pronounced role of the courts and judiciaries in constitutional and political governance. Courts are increasingly, and through direct constitutional invitation, adjudicating on political processes that were traditionally the preserve of political actors with little or no intervention from the courts.[18] A specific example is the role of courts in the adjudication of election petitions, especially presidential elections. While courts have always adjudicated on election matters, the scope, breadth, and nature of power with regard to elections has been constricted,[19] both by statute, practice, and the generally conservative jurisprudence and cautious approach of the courts.[20] However, courts are now explicitly invited and empowered to make far-reaching findings with regard to presidential contests and elections generally.[21]

Beyond judicial adjudication of electoral processes, courts have been vested with broadened constitutional powers to review and scrutinise the decisions and actions of the other arms of government from a constitutional lens. Again, while courts have long played a judicial review role, the scope of this power has been expanded and entrenched in these new constitutional orders. For instance, the constitutions of South Africa and Kenya have constitutionalised the right to fair administrative action, which has had the effect of expanding the remedies available for breach, beyond the traditional administrative law

---

17 CM Fombad, 'Some perspectives on durability and change under modern African constitutions' 11(2) *International Journal of Constitutional Law*, (April 2013), 382-13, 389.

18 Kwasi Prempeh, 'Comparative perspectives on Kenya's post-2013 election dispute resolution process and emerging jurisprudence' in Collins Odote & Linda Musumba (eds) *Balancing the scales of electoral justice: Resolving disputes from the 2013 elections in Kenya and the emerging jurisprudence,* 2016, 149-175.

19 For example, Section 41 (7) of the 1977 Constitution of the United Republic of Tanzania ousts the jurisdiction of courts to adjudicate a contested result from a presidential election and states that the result announced by the Electoral Commission is final.

20 Obrien Kaaba, 'The challenges of adjudicating presidential election disputes in domestic courts in Africa', 15(2) *African Human Rights Law Journal,* (2015) 329-354.

21 Prempeh, 'Comparative perspectives on Kenya's post-2013 election dispute resolution process and emerging jurisprudence' 149-175.

reach.[22] The inevitable outcome of this process is that courts have become constitutional umpires to major political processes, or constitutional and legal processes that have a significant impact on national political and governance processes in a manner that is unprecedented for courts in the region.

A number of major decisions by judiciaries in the continent demonstrate this trend. In October 2017, the Supreme Court of Kenya, which is constitutionally vested with powers to hear and determine presidential election disputes, annulled a presidential election and ordered a repeat poll, becoming the first court in Africa (and the fourth in the world) to do so.[23] Two years later, in 2020, the Malawi Constitutional Court annulled a presidential election, which was upheld by the Supreme Court. In Malawi, the second election led to an electoral victory of the opposition candidate.[24]

In Kenya, all the superior courts (the High Court, Court of Appeal, and the Supreme Court) declared a constitutional amendment process that was initiated and patronised by the president and his political allies unconstitutional.[25] The courts also declared that the president had breached the law and was liable to be sued in his personal capacity.[26] During the same week, a three-judge bench of the High Court in Zimbabwe declared a move by the president to extend the term of the chief justice unconstitutional,[27] although this decision was overturned on appeal.[28] In South Africa, the post-1994 courts have demonstrated fierce independence and have issued countless judgments against the executive, among the famous ones being the Constitutional Court judgment against former President Jacob Zuma where it ordered the then president to refund public moneys that were spent in renovating

---

22 Migai Akech, *Administrative law,* Strathmore University Press, 2016.

23 Jason Burke, 'Kenyan election nullified after result called before votes counted, says court' *The Guardian* 20 September 2017.

24 Malawi opposition leader Lazarus Chakwera wins historic poll rerun' *BBC* 28 June 2020.

25 Peter Muiruri 'Kenya's high court overturns president's bid to amend constitution' *The Guardian,* 27 May 2021.

26 *David Ndii* & others v *Attorney General* & others (Petition E282, 397, E400, E401, E416 & E426 of 2020 & 2 of 2021 (Consolidated)) [2021] KEHC 9746 (KLR) (Constitutional and Human Rights) (13 May 2021) (Judgment) eKLR.

27 Columbus Mavhunga, 'Zimbabwe High Court orders chief justice to step down' *VOA,* 15 May 2021.

28 'Constitutional Court quashes lower court ruling blocking extension of Malaba's term of office' *VOA,* 23 September 2021.

his private residence under the guise of 'security adjustments'. In this case, the Court famously stated that '…constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck'.

The decisions described above were virtually unthinkable a few decades ago when actions of the president or head of government could not be challenged in court and when illegitimate, constitutional and political changes were made to preserve the interests of the incumbent regimes, without any recourse to the courts.[29] This can, in the main, be attributed to the constitutional reforms that have enhanced the constitutional status of judiciaries and provided a core role for the courts in critical political and governance processes.

Many of the new constitutions now establish judiciaries as an independent arm of government that is co-equal to the other branches of government. The constitutions recognise that judicial power and authority emanates, not from the executive or the president, but like any state power, the judiciary draws its power and authority from the common sovereignty of the people.[30] These include Uganda, Kenya, Zambia, and Ghana, whose respective constitutions explicitly recognise judicial authority as emanating from the people. The current constitutions provide for a more independent and transparent process of appointment of judges and the heads of the judiciaries, which is a break from previous constitutions where the president or head of the executive was vested with the substantive power to appoint or control the process of appointment of senior judges, including the chief justice.

The expanded scope of judicial power over political matters, the enhanced constitutional significance and recognition judicial power, coupled with the emerging assertiveness of courts through their decisions, has the potential impact of evoking political reprisals. In Kenya, for instance, Chapter two observes that there were threats against the judiciary by the president and his allies after the September 2017 decision that annulled the presidential election, followed by a marked and drastic reduction of the judiciary budget.[31]

---

[29] Githu Muigai 'The structure and values of the independence constitution' in *Report of the Constitution of Kenya Review Commission*, Volume Five Technical Appendices Part One (2003); also, Githu Muigai, Dan Juma, *Power, politics and law: Dynamics of constitutional change in Kenya, 1887-2022,* Kabarak University Press, 2022.

[30] See Constitution of Kenya 2010, Article 1.

[31] Boaz O Were, 'Judicial independence as a contemporary challenge: Perspectives from Kenya' Comparative Law Working Paper, 2017.

In Uganda, after the courts declared a law[32] unconstitutional, the president told the courts and the public that the 'major work for the judges is to settle chicken and goat theft cases but not determining the country's destiny'.[33] In Malawi, former President Peter Mutharika purported to send the country's chief justice on terminal leave pending retirement. This was after the courts nullified Mutharika's win.[34] However, the courts declared the action of the President (through the Secretary to the Cabinet) null and void.[35] Mutharika went on to lose the election to the then opposition candidate, Lazarus Chakwera. In Zimbabwe, as chapter four highlights, the parliament amended the law to exclude court intervention in its controversial land reforms of early 2000s.

Even more critical to judicial independence and executive interference is the reality that the running of the public finance management system, including that of the judiciary, places a lot of reliance on the executive and the legislative arms of government. On the one hand, the legislature is usually vested with powers to make or approve the budget of the judiciary. On the other, the executive is vested with powers (which vary from one country to the other) on the planning and management of resources of all government agencies, the judiciary included. In some cases, control over court personnel lies with ministries or agencies within the executive branch.

Where such control overshadows the judiciary's own financial management structures and systems, it has an inevitable and critical bearing on the judiciary's autonomy and independence, and ultimately, the judiciary's overall effectiveness. In many cases, financial and administrative aspects of judicial administration, especially the mechanics of it, are treated as routine issues that do not find space in detailed constitutional and legislative prescription, yet they may have heavy implications on the autonomy and effectiveness of the judiciary.

Indeed, concerns regarding the adequacy and control over judiciary funds have emerged in several countries in the region, with emerging

---

32 Referendum (Political Systems) Act of 2000 [Uganda].

33 Busingye Kabumba, 'The illusion of the Uganda Constitution' *Africlaw,* 27 September 2012.

34 Charles Pensulo, 'Forced retirement of Malawi's chief justice before June election blocked' *The Guardian,* 16 June 2020.

35 Carmel Rickard '"Judicial independence on trial" in case involving Malawi's chief justice' *AfricanLii* 28 August 2020.

issues pointing at political interference in the independence of the courts. In Uganda, the courts have decried the unconstitutional and irregular manner in which courts have been denied funds, a practice which has turned the judicial arm of government into a 'beggar of resources' held by the executive arm, despite very clear constitutional provisions that guarantee judicial financial autonomy.[36] In Nigeria, too, the courts have had to issue orders to ensure that funds meant for courts are dealt with in a manner that respects the doctrine of judicial independence and separation of powers.[37] Courts in Kenya, Uganda and Zambia have had to issue orders against the executive touching on the manner of funding of the judiciary.

In many of the countries, the constitutions anticipate the risks inherent in expanding the powers of judiciaries in an environment where funding and financing of judicial operations is heavily dependent on the political arms of government. In this regard, besides the general principles of judicial independence, the constitutions and enabling laws provide various measures to safeguard judicial financial and administrative autonomy. Some constitutions provide for special budget making processes for the judiciary with the intention of shielding the judiciary's budget from political interference. Some of the constitutions also provide that judiciaries are 'self-accounting' institutions. This means that the manner of determining and managing resources and finances is largely independent of the ministry of finance or the national treasury. Furthermore, in a bid to secure the financial independence and autonomy of their judiciaries, some constitutions and laws provide for the establishment of judiciary funds, which allow for the separate and independent management of resources allocated to the judiciary.

Regional and international recognition of the principle of judicial financial independence

Judicial financial independence and autonomy has, for a long time, been recognised by various global and regional instruments on judicial independence and the rule of law. Indeed, reflections on the need for

---

[36] *Krispus Ayena Odongo v Attorney General Parliamentary Commission* Constitutional Petition No 30 of 2017; *Uganda Law Society v Attorney General* (Constitutional Petition-2017/52) [2020] UGCC 4.

[37] *Olisa Agbakoba v Federal Government, the NJC and National Assembly,* Suit No FHC/ABJ/CS/63/2013.

arrangements that facilitate judicial independence (including financial and administrative independence) have been expressed in multiple instruments related to the African region and in global fora. It can thus be stated that while domestic practice is yet to align to the recognised principles of judicial financial autonomy, the need for its entrenchment in frameworks and practice has long been expressed at the regional and global levels.

The African Charter on Human and Peoples' Rights, which was adopted in 1981 and came into force in 1986, requires states to 'guarantee the independence of the courts' and also calls on states parties to allow the establishment and operation of institutions necessary for the protection and promotion of Charter rights.[38] The Charter is thus wide enough, especially in the term 'guarantee' to include the provision of judicial financial independence and autonomy arrangements.

In 1996, the African Commission on Human and Peoples' Rights, the body established by the Charter to monitor its implementation, adopted the 'Resolution on the respect and the strengthening on the independence of the judiciary' which called on states party to the Charter to, among other measures, provide the judiciaries with adequate resources and ensure that their domestic laws are aligned to the respect for judicial independence, to protect the tenure and terms and conditions of service of judges, and further asked judges in the judiciaries to network in a bid to share lessons and standards on the strengthening of judicial independence.[39]

In 2023, the Commission further adopted a 'Resolution on the appointment of a focal point on judicial independence in Africa'[40] that appointed the Special Rapporteur on Human Rights Defenders as the focal point on judicial independence in Africa. As a focal point on judicial independence, the Special Rapporteur was to examine factors (including legislative and administrative practices) that undermine judicial independence in Africa and inform the Commission on practices and models that undermine judiciaries in the region. The Special Rapporteur was further tasked to study and make recommendations on actions to be taken to preserve and promote judicial independence.[41]

---

38 Article 7, African Charter on Human and Peoples' Rights (Banjul Charter), adopted on 27 June 1981, OAU DOC, CAB/LEG/67/3 rev.5, entered into force 21 October 1986.

39 ACHPR/ Res. 21 (XIX) 96.

40 ACHPR/ Res. 570 (LXXVII) 2023.

41 ACHPR/ Res. 570 (LXXVII) 2023, adopted at the African Commission on Human and

Several other regional instruments recognise, part of their objectives the need to promote and protect the independence of the judiciary.[42]

Globally, the UN Basic Principles on the Independence of the Judiciary[43] provide guidance to member states on judicial independence, but also contain provisions that are more specific to judicial financial independence. The Principles provide that 'it is the duty of each member state to provide adequate resources to enable the judiciary perform its functions'[44] and further states that each state has a duty to provide adequate resources 'to enable the judiciary to properly perform its functions'.[45] In 1989, and pursuant to the UN Basic Principles on the Independence of the Judiciary, UNESCO adopted procedures for implementation which called upon states to 'adopt and implement in their justice systems the Basic Principles on the Independence of the Judiciary in accordance with their constitutional process and domestic practice'.[46]

During the preparation of the UNESCO procedures, the special rapporteur prepared a report that came to be known as the Draft Universal Declaration on the Independence of Justice or the 'Singhvi Declaration'[47] that contained important statements on judicial financial independence, and which formed the basis of the UNESCO procedures. The Declaration notes the state should have, as its highest priority, the duty to avail adequate resources 'to allow due administration of justice' and this should include physical infrastructure and facilities, personnel costs, and operational expenses.[48]

Peoples' Rights meeting at its 77th Ordinary Session, held in Arusha, United Republic of Tanzania, from 20 October to 9 November 2023.

42 Article 2(5), African Charter on Democracy, Elections and Governance, adopted 30 January 2007.

43 Adopted 6 September 1985, by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

44 Principle 1.

45 Principle 7.

46 UN Economic and Social Council, Procedures for the effective implementation of the Basic Principles for the effective implementation (Procedure 1) Resolution 1989/60, 15th plenary meeting, 24 May 1989.

47 Report of Laxmi Mall Singhvi, Special Rapporteur on the impartiality and independence of the judiciary, E/CNA/Sub.2/1988/20/ Add.l and Add.lICorr.l, 40th session of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities. See also, *Resolution 1989/32 of the Sub-Commission.*

48 Declaration 33.

With regard to budget preparation, the Draft Declaration states that 'the budget of the courts shall be prepared by the competent authority in collaboration with the judiciary having regard to the needs and requirements of judicial administration.'[49] The Draft Declaration further requires states to consider budgetary priorities such as '[appointment] of a sufficient number of judges in relation to caseloads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments'.[50]

Beyond the UN and the African Union systems, there are numerous processes, some which contributed to the adoption, or to further realisation of, the UN and AU instruments on judicial independence. In Africa, two consequential meetings, touching on judicial financial independence took place, in 1986 and 1987.[51] During the two seminars, attended by judges, lawyers, academics, and representatives of other arms of government from the continent and around the world, important conclusions were made regarding judicial financial independence.

The 1986 Lusaka Seminar on Independence of Judges and the Legal Profession in English-speaking Africa identified important issues and factors concerning judicial financial independence, including, judicial control by the executive, funding, and terms and conditions of service of judges. In its recommendations, the Seminar noted that regarding administrative autonomy, the judiciary should be under the exclusive leadership of the chief justice.[52]

The 1987 Banjul Seminar delved deeper on the issue of judicial financial independence. A presenter on the topic, 'Judiciary as separate and independent arm of government'[53] argued thus on the question framed as 'remuneration and financial independence':

> It is possible that there is no problem of dependency in charging the salaries of judges to the Consolidated Revenue Fund, but there is definite lack of

---

49 Declaration 34.

50 Procedure 5, as above.

51 Centre for the Independence of Judges and Lawyers, African Bar Association, International Commission of Jurists, 'The independence of judges and the legal profession in English-speaking Africa: A report of seminars held in Lusaka from 10-14 November 1986 and in Banjul from 6 to 11 April 1987' International Commission of Jurists, 1988.

52 Centre for the Independence of Judges and Lawyers, African Bar Association, International Commission of Jurists, 'The independence of judges and the legal profession in English-speaking Africa', 86.

53 By Chief Debo Akande, a Nigerian lawyer and the then Secretary General of the African Bar Association.

> independence when the recurrent expenditure is left in the exclusive control of the executive, to be disbursed as it wishes. The efficient and courageous administration of justice depends upon things other than the salaries of judges, such as, for example, the provision of adequate and comfortable physical facilities, equipment and efficient personnel. Where these are entirely controlled by the executive, the judiciary may be unable to function effectively without executive backing. In such a situation, the independence of each affected judge and thus the judiciary as a whole will be eroded.[54]

At the end of the seminar, the recommendation adopted was that 'the judiciary alone should be responsible for the proper administration of its budget, and for the control of expenditure and administrative personnel.'[55] The Commonwealth Magistrates and Judges Association (CMJA) prescribes the precepts of judicial financial autonomy thus:

> Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary. The provision of adequate funding for the judiciary must be a very high priority in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of justice. However, it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints. Finance ministries are urged to engage in appropriate consultations in order to set realistic and sustainable budgets which parliaments should approve to ensure adequate funds are available.[56]

The Consultative Council of European Judges (CCJE) recognised that the funding of courts is closely linked to the independence of judges, in that it determines the conditions in which courts perform their functions.[57] The CCJE further notes that although the funding of

---

54 Centre for the Independence of Judges and Lawyers, African Bar Association, International Commission of Jurists, 'The independence of judges and the legal profession in English-speaking Africa', 122.

55 Conclusions and Recommendations of the Banjul Seminar on the Independence of Judges and Lawyers, in Centre for the Independence of Judges and Lawyers, African Bar Association, International Commission of Jurists, 'The independence of judges and the legal profession in English-speaking Africa', 79-93.

56 Commonwealth Principles on the Accountability of and the relationship between the three branches of Government, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003.

57 Consultative Council of European Judges: Opinion 2 for the attention of the Committee of Ministers of the Council of Europe on the funding and management of courts with

courts is part of the state budget presented to parliament by the Ministry of Finance, such funding should not be subject to political fluctuations. Although the level funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.[58]

The International Commission of Jurists too has noted that '[j] udicial participation in the delineation of the budget constitutes an important safeguard against insufficient funding'.[59]

The Sixth Conference of Chief Justices of Asia and the Pacific, held in August 1995, led to the adoption of 'Beijing Statement of the Principles of the Independence of the Judiciary in the LAWASIA Region' which laid down important principles for judicial financial independence. Article 36 of the Beijing Statement Principles states that all aspects of administrative control of the judiciary, including administrative and support personnel, 'must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role'. [60] More importantly, and with specific regard to judicial financial independence, Article 37 provides that: 'The budget of the courts should be prepared by the courts or a competent authority in collaboration with the judiciary having regard to the needs of judicial independence and administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.'

The International Association of Judges (IAJ) has also reflected on the theme of judicial financial independence under the theme 'resources for justice' which became part of the Universal Charter of the Judge. The Charter states that: 'The other powers of the state must provide the judiciary with the means necessary to equip itself properly to perform its function' and that '[t]he judiciary must have the opportunity to take

---

reference to the efficiency of the judiciary and to Article 6 of the European Convention on Human Rights.

58 Quoted in *Uganda Law Society v Attorney General,* 35.

59 International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors*, Practitioner's Guide 1, Geneva, 2007, 35.

60 6th Conference of Chief Justices of Asia and Pacific, Beijing on 19 August 1995 leading to the 'Beijing Statement of the Principles of the Independence of the Judiciary in the LAWASIA region'.

part in or to be heard on decisions taken in respect to the budget of the judiciary and material and human resources allocated to the courts.'[61]

Indeed, the specific question of quantum of resources allocated to the judiciary and the nature and level of access and discretion over the funds has been dealt with by different bodies with a common conclusion and observation that the greater the control over its resources and the greater the control or participation in planning and determining its allocation, the more independent the judiciary is.

Judicial interpretation and pronouncements on judicial financial independence

The entrenchment of judicial financial independence in constitutional and legal frameworks has led to court challenges in cases where the financial autonomy of courts is not being respected. This means that courts have had to wade into and adjudicate on matters involving the funding of courts, sometimes including matters that touch on their remuneration and benefits. While it is not desirable that judges should find themselves in circumstances where they have to make decisions that may affect their terms and conditions of service, or the funding of courts and judiciary, the reality has forced courts to make pronouncements on these issues.

While court jurisprudence with regard to judicial financial autonomy is a fairly recent phenomenon in the African region, other jurisdictions have settled jurisprudence on the 'rights of courts' in the separation of powers framework as it relates to the funding and resource autonomy of the courts. In the United States, state courts have had to decide matters involving judicial independence and resource autonomy of the courts. In *Smith v Miller*,[62] the Supreme Court of Colorado noted that:

> It is an ingrained principle in our government that the three departments of government are coordinate and shall co-operate with and complement, and at the same time act as checks and balances against one another but shall not interfere with or encroach on the authority or within the province of the other. The legislative and executive departments have their functions and their exclusive powers, including the 'purse' and the 'sword'. The judiciary

---

[61] International Association of Judges (IAJ), 'The Universal Charter of the Judge' adopted by the IAJ Central Council in Taiwan on 17 November 1999 (Article 2-4).

[62] *Smith v Miller*, 153 Colo. 35, 384 P.2d 738 (1963), 384 P.2d, 741.

> has its exclusive powers and functions, to-wit: it has judgment and the power to enforce its judgments and orders. In their responsibilities and duties, the courts must have complete independence.

The Court further added that '[i]t is abhorrent to the principles of our legal system and to our form of government that courts being a coordinate department of government, should be compelled to depend upon the vagaries of an extrinsic will. Such would interfere with the operation of the courts, impinge upon their power and thwart the effective administration of justice'. The Court concluded that ... '[t] he courts have the inherent power to carry on their functions so that they may operate independently and not become dependent upon or a supplicant of either of the other departments of government, and may incur necessary and reasonable expenses in the performance of their judicial duties.'[63]

In another matter, *Mowrer v Rusk*, the Supreme Court of New Mexico found that the requirement to submit the judiciary's budget to the executive first, before the legislature would impinge on judicial financial independence. The Supreme Court stated, '[a]ny requirement that the judicial branch first submits its budget request to the executive branch dilutes and could render impotent the inherent power of the judiciary'.[64] The Supreme Court of Pennsylvania has also ruled that courts have inherent jurisdiction to compel proper allocation of resources to them that enable administration of justice including their operations. The Court upheld a writ of mandamus issued against the mayor and city of Philadelphia to appropriate additional funds to the courts for their necessary operations.[65] In another similar case, *Judges of the Third Judicial Circuit v County of Wayne,* the Supreme Court of Michigan held that the inherent power of the court to compel allocation of funds should only be used when inadequate appropriations would impair the effectively continued functioning of the court. The Court added that '[t] he judiciary must be able to control its own finances, budgetary process as well as its funding needs. This is a logical consequence of the doctrine of separation of powers."[66]

---

63 *Smith v Miller*.

64 618 P.2d 886 (1980), No. 12841, Supreme Court of New Mexico, 22 October 1980.

65 *Com Ex Rel. Carroll v Tate*, 442 Pa, 45 (1971) quoted in *Uganda Law Society v Attorney General*, 32.

66 *Judges of the Third Judicial Circuit v County of Wayne* 383, Mich. 10, 172 N.w.d 436 (1969)

In Africa, courts in Uganda, Zambia, and Kenya have considered issues of judicial financial independence and autonomy. The Court of Appeal of Uganda has considered two cases that are consequential to judicial financial independence. In the case of *Krispus Ayena Odongo v Attorney General & the Parliamentary Commission,*[67] the Court of Appeal noted that the Constitution provided for special measures in the budgeting and management of finances and the executive and parliament ought to put in place measures that adhere to constitutional provisions on judicial financial independence. Specifically, the Court of Appeal noted that the Constitution provides for a self-accounting judiciary and this calls for minimal interference by the executive in the determination and management of allocations to the judiciary.

In another case, that dealt with similar issues, *Uganda Law Society v Attorney General*,[68] which was handed down a year after the first judgment, the Court of Appeal warned that the practice where a presidential appointee controlled the budgeting process of the judiciary was a usurpation of powers of the chief justice, who is the head of the judiciary under the Constitution.[69] The Court stated:

> The judiciary must be able to control its own finances, budgeting processes as well as its funding needs. This is a logical consequence of the doctrine of separation of powers. It is impossible for an arm of government wholly dependent for its financial decisions and budgeting processes on another arm to be described as independent in any sense.[70]

In the Zambian case of *John Sangwa v Attorney General and Law Association of Zambia*[71] case, the petitioner contended that the failure of the legislature and the executive to put in place measures for judicial financial independence laid out in the Constitution was a breach of the Constitution. The petitioner also cited *Uganda Law Society v Attorney General*[72] where the Constitutional Court of Uganda stated that judicial independence includes financial autonomy. The case also challenged the legality of the president's action of gazetting terms and conditions of judges under a repealed law.

---

67 Constitutional Petition No 30 of 2017.

68 Court of Appeal of Uganda, Constitutional Petition No 52 of 2017.

69 *Uganda Law Society v Attorney General*, (Constitutional Petition No 52 of 2017), 41.

70 *Uganda Law Society v Attorney General*.

71 *John Sangwa v Attorney General and Law Association of Zambia*, (2021/CCZ/0012) [2023] ZMCC 6 (31 July 2023).

72 Such as *Mackin v New Brunswick (Minister for Finance);* and *Rice v New Brunswick* No 2772 of 2002.

The Zambian constitutional court recognised the conflict of interest in presiding over a matter that involved its pecuniary interest but still decided to hear it on the basis of 'doctrine of necessity' in line with the court's mandate.[73] The Constitutional Court found the state in breach of the Constitution and ordered that parliament should prioritise the passing of legislation to secure the judicial financial autonomy of the judiciary and also ordered the finance minister to regularly report to parliament on measures being taken to comply with the resource autonomy of courts as provided for in the Constitution.[74]

Comparative trends in judicial financial independence in Africa

All the case studies covered in this book, save for Botswana, have had their independence constitutions overhauled. Botswana's independence constitution, adopted in 1966, still remains in place but with revisions over the years. The other 10 countries have had their independence constitutions overhauled at different times over the years: Kenya (2010), Uganda (1995), Zambia (1991 and 2016), Namibia (1990), Tanzania (1977), Ghana (1992), Zimbabwe (2011), Nigeria (1999), South Africa (1996), and Malawi (1994). The constitutions have also undergone several amendments, even after the overhaul.

All the eleven countries provide for the establishment of the judiciary as a separate arm of government, and further provide the basic minimums for the guarantee of judicial independence. The constitutions of Kenya, Zimbabwe, Uganda, Zambia, Ghana, all explicitly recognise judicial power or authority as emanating from the people.

While the eleven countries provide further details on the establishment and operations of the judiciary and the court system, the design and operation of judicial institutions vary and differ, sometimes significantly, across the eleven case studies that are covered in this book. Furthermore, apart from the design of the courts and judicial system, there are varying factors and contexts that define the environment in which the courts operate, and which have an inevitable impact of the independence of the courts, including the financing and resourcing of courts.

The eleven countries differ in the manner in which judicial officers are appointed and managed, the manner of determining terms and

---

[73] *Sangwa v Attorney General and Law Association of Zambia*, para 2.

[74] *Sangwa v Attorney General and Law Association of Zambia*.

conditions of serving judicial officers, the role of the judiciaries and the executive in the planning and management of judicial finances, the accountability mechanisms of the judiciaries and their effectiveness, the nature and level of judicial control over administrative matters, the level and quantum of resources availed to the courts and the judiciary, the diversity of sources of judicial revenue, among other factors.

Accordingly, a detailed and side-by-side comparison of the court or judicial systems in the eleven countries and how they fair may neither be suitable nor necessary. However, a scan of the general factors and the prevailing contexts reveal general trends and pattern with regard to judicial independence and the judicial financial independence, which is the central issue of analysis in this book.

Nature of judiciary administration and control

While the constitutions of the eleven countries provide for a separate judicial arm of government, there are differences in the design of the judiciary administration. The first categorisation is whether a country has a judicial service that is established separately from the mainstream public service. Kenya, Nigeria, Uganda, Zambia, Ghana, Tanzania, and Zimbabwe have separate judicial services that are managed separately from the mainstream civil service. On the other hand, the judicial service in Namibia, South Africa and Botswana is integrated with the mainstream public service with the administrative staff working in the judiciary remaining under the control of the Ministry of Justice, but also under the oversight of the judiciary. In Malawi, there are proposals to create a separate judicial service (to be under the Judicial Service Commission) that will include both judicial officers and the other administrative staff of the judiciary; the latter are currently under the mainstream public service.

However, the distinction above is not neat by any means. In Tanzania, Uganda, Zambia, Malawi, Botswana, for instance, the head administration in the judiciary (known as the Secretary to the Judiciary or the Chief Court Administrator, or the ministerial permanent secretary) are appointed by the president. In Ghana, the Constitution vests the power to appoint other judicial officers in the chief justice, however, it also provides that such appointments are subject to the approval of the president. Appointments are done by the Judicial Service Commission of Ghana that is chaired by the chief justice.

In the eleven countries, it is only three (Kenya, Zimbabwe, and Nigeria) where the accounting officer or the administrative head of the judiciary (different from the chief justice) is appointed independently by the judicial arm of government. Even then, and as the country-specific chapters demonstrate, there are concerns over the independence of the commissions or councils that have control of the judiciary.

In Botswana, Namibia and South Africa, appointments of the administrative heads of the judiciary (accounting officers) are done by the respective ministries of justice, but in consultation with and concurrence of the Office of the Chief Justice. The primary feature here being that administrative control of the judiciary lies with the executive but the practice has evolved to incorporate the input and even concurrence of the judiciary before appointments in the judicial service are made.

Nature of executive role in the budget and finances of the judiciary

As earlier defined, the principle of judicial financial independence and autonomy not only requires judiciaries to play an active role in the determination of their own priorities for funding and the allocation of resources, but also the active management and utilisation of the resources once allocated to the judiciary. However, the role that judiciaries play with regard to the determination and management of resources differs significantly among the eleven countries, but also with similar general patterns.

First, across all the eleven countries, parliamentary approval and appropriation is required for any resources to be used by the judiciary. However, the processes leading to parliamentary approvals and appropriation differ across the countries. Secondly, while the nature of the role that ministries of finance or national treasuries play in the eleven countries also differs, what is clear across the countries is that, in practice, the actual role that ministries of finance play in judiciary budgets (such as setting budget ceilings and overall fiscal policies) ends up determining the nature and level of funds that are availed to the judiciaries. Within these broad patterns, there are unique trends that emerge.

In the first category are countries where the most or all components of the judiciary budget are integrated with departments of the executive; South Africa, Namibia, and Botswana lie in this category. In South Africa,

the judiciary's development and infrastructure budget is incorporated in the budget of the Department of Public Works, and the budget for the operations of regional courts is in the estimates of the Department of Justice. Only the vote for management of superior courts is under the Office of the Chief Justice. In Namibia, the development budget of the Judiciary is in the Ministry of Justice while the recurrent budget is in the Office of the Judiciary.

In the second category are countries whose development and recurrent budgets are wholly resident within the judiciary and these include: Kenya, Uganda, Zimbabwe, Malawi, Tanzania, Ghana, Nigeria, and Zambia.

However, there are further and substantial differences in the way the budget of the judiciary is prepared, presented, and managed in the eleven countries. In Zimbabwe, Malawi, Tanzania, Ghana, Nigeria and Zambia, the executive (through the Treasury or the Ministry of Finance) has the explicit power to prepare budgets of the judiciary and may seek views and input of the judiciary in the preparation of the national budget that includes the judiciary. While the accounting officers and administrative heads are tasked with preparation of draft estimates for the judiciary in these countries, these are eventually submitted to the Treasury for onward submission to parliament for approval. The judiciary may be invited to parliamentary committees to make submissions on their financial need before parliamentary approval and appropriation is undertaken.

In Uganda and Ghana, the judiciary budget is prepared and presented to the president, as opposed to the Ministry of Finance or parliament. The president is then expected to lay the budget before parliament for approval.

However, in many case studies, the ministries of finance play a major role in guiding the final approvals and allocations, including the tabling of budget proposals by the president in parliament. In Kenya, the Chief Registrar of the Judiciary prepares the budget and presents to the Judicial Service Commission for approval, and later presents it to Parliament for approval. In theory, Kenya's Ministry of Finance or National Treasury has no role in the preparation of the budgets of the judiciary and Parliament. However, in practice, the budget ceilings that are prepared by the National Treasury for each institution, including the judiciary, end up determining the amount of resources that are approved and allocated by parliament in the final budget estimates.

Thus, while the Constitution seems to divest the National Treasury of the power to determine the allocation of resources to the Judiciary in Kenya, in practice, the National Treasury plays a major – and even a determinant – role on what resources the judiciary gets.

It can thus be concluded that, despite the seemingly different ways in which judiciary budgets are prepared and approved across the eleven countries, the ministries of finance or national treasuries play a dominant role in the determination of the final allocation to judiciaries. This is regardless of the budget-making powers that are vested in the judiciary. Indeed, even where the judiciary is said to have 'independent budget-making powers' or in Uganda and Ghana where the law requires the president to table the proposed budget of the judiciary in parliament without alteration, the final figures allocated to the judiciary end up varying significantly (always lower) than what the judiciary determines as its resource needs.

Finally, the establishment of judiciary funds has also emerged as a means of safeguarding judicial financial autonomy. Specifically, it is perceived that a separate fund for the judiciary will enhance access to much needed resources for the effective discharge of judicial services. However, whether or not the existence of judiciary funds actually enhances financial autonomy depends on a number of factors.

In Kenya, the Constitution sets up the Judiciary Fund and Parliament has established statute and regulations to provide for the management of the Fund. The Constitution provides that once moneys have been appropriated by parliament, the same should be deposited in the Fund. It was thought that the Fund will enhance access to and control over resources allocated to the Judiciary. However, and as chapter two demonstrates, the usual bureaucratic delays in administrative approvals have proved a challenge to access judiciary allocated funds. Furthermore, while it was thought that the judiciary will continue to access unspent funds at the end of the financial year, the unspent balances have to be taken through the ordinary budgeting process before access and utilisation.

While most of the study countries contain provisions that call for the opening and maintain of judiciary funds, the provisions for the management of such funds do not show any special safeguards for purposes of financial autonomy of the judiciary.

Special safeguards for judicial financial independence

In a bid to secure the independence of the judiciary, the eleven countries whose systems have been analysed in this book, have taken different approaches to secure the funds and funding mechanisms allocated to the judiciary. Such special measures have been provided for in the preparation of budgets, management of finances, and even the number and type of sources of funds. However, and as will be seen from the country case studies, the success or effectiveness of the special measures put in place is not always guaranteed, especially in assuring judicial independence.

In Ghana and Uganda, the respective constitutions provide that judiciary budget proposals are to be submitted to the president directly (and not to the ministries of finance or treasury, or the ministry of justice). The constitutions of Ghana and Uganda further provide that once submitted to the president, the latter is required to table the same in parliament without altering the proposed figures. This is ostensibly to insulate the judiciary resources from the normal budget-making process and to ensure that judicial autonomy and independence is safeguarded. However, in both countries, as the respective chapters demonstrate, the actual resources that are finally tabled before and allocated by parliament to the judicial arm are much lower than the estimates that are submitted to the president.

In Zambia and Uganda, the constitutions state that the judiciaries are self-accounting institutions. As earlier mentioned, the phrase 'self-accounting' has been defined to mean that the judiciary, or other self-accounting unit '… should have control over the financial accounting function' and should not be hampered by anyone in managing its own funds.[75] The courts in Zambia and Uganda have interpreted this specific requirement to mean that there should be minimal intervention in the processes involved in the determination and management of resources due to the judiciary and that the judiciary should be at the centre of any discussions involving its priorities and the funding needs. However, as the chapters further demonstrate, in Uganda and Zambia, there has been a dominant and overwhelming role played by the executive in judiciary finances, against the text and spirit of the Constitution.

[75] *John Sangwa v Attorney General and another* 2021/CCZ/ 0012, para 64.

In Kenya, as mentioned earlier, the Constitution envisages the development and approval of the judiciary's budget as a parallel process to the rest of the government budget. The Chief Registrar of the Judiciary is required to independently develop and submit budgetary proposals to the National Assembly. Initially, the judiciary's budgetary needs were considered alongside other justice sector institutions, including the police and prisons. It was felt that a separate process for the judiciary and especially independent determination of priorities may lead to better funding. However, despite such an arrangement, the judiciary's budgetary allocation has remained substantially the same and is subject to the priorities and funding needs as determined by the National Treasury. In Tanzania, the Budget Act provides that the Government shall ensure that adequate funds allocated are to the Judiciary Fund to enable the Judiciary to function effectively; similar provisions exist in respect of the Legislature.

Determination of terms and conditions of service of judges

The determination of the terms and conditions of service of judges and other judicial officers has a critical bearing to the independence of the judiciary. Where judicial officers are not adequately remunerated or where the determination of their benefits is not secured in a manner that enhances their independence, then the independence of their decisions or institutional independence of the judiciary will be compromised.

As Chief Justice Gubbay notes, '[a]nother factor that has considerable bearing on the independence of the judiciary is financial security – the receipt of adequate remuneration. Without it a judge cannot feel independent of the executive. A judge's work and thinking must not be frustrated by lack of money.'[76] It is for this reason that most constitutions or laws provide that the remuneration and benefits of a judicial officer shall not be varied to their detriment. It has been argued that remuneration of judges should be determined separately from the rest of the civil service and drawn from the Consolidated Fund so as to minimise scrutiny by parliament.[77] Muna Ndulo adds that, '[a]s a matter of

[76] Gubbay, 'The independence of the judiciary with special reference to the parliamentary control of tenure, terms and conditions of service and remuneration of judges', quoted in *John Sangwa v Attorney General and another*.

[77] Centre for the Independence of Judges and Lawyers, African Bar Association, International Commission of Jurists, 'The independence of judges and the legal profession in English-speaking Africa'.

principle, judicial salaries and benefits should be set by an independent commission. The salaries and benefits should be secured by law.'[78]

Various regional and global standards recommend for an independent body or agency to determine or review the terms and conditions of service for judicial officers as a means of guaranteeing their independence. The practice across the eleven countries also substantially varies. There are three main approaches to the determination of remuneration of judges and judicial officers: there are systems where this function is vested in the president (with others requiring that proposals on remuneration be proposed by the Judicial Service Commission or Council before the president decides); others vest the power to set and adjust remuneration in parliament, while others vest the power to adjust judges' benefits and remuneration in independent bodies established in the Constitution or by statute. Some are a mix of the three.

Kenya and Zambia vest the power to vest the remuneration of judges in independent commissions (Salaries and Remuneration Commission (SRC) and the Emoluments Commission, respectively) and neither the executive nor the legislature have any role in determining the benefits of judges. In South Africa, Nigeria, Tanzania, Zimbabwe, Ghana, Namibia, the power to determine the remuneration and benefits of judges is vested with the president, but in consultation with or upon the proposal by the Judicial Council or the Judicial Service Commission. In South Africa, the president sets the terms upon advice by an independent commission that advises on remuneration of bearers of public office. In Uganda, Botswana, and Malawi, parliament determines the remuneration of judges through legislation that is amended from time to time. Proposals for adjustment of remuneration (through legislation) are made by the Judicial Service Commission or by the judiciary itself.

There is a gradual movement from reliance on the executive and legislature to set the terms and conditions of service towards independent commissions or agencies that are set up for that purpose. Such a trend is justified on grounds that leaving such discretion (determining and varying the work benefits of judges) in political arms of government has its own inherent risks. Indeed, the experience in Malawi is that judges have been reduced to negotiating with politicians in parliament and the executive (through an *ad hoc* committee) set up by the chief justice for

[78] Muna Ndulo, 'Judicial reform, constitutionalism and the rule of law in Zambia: From a justice system to just system,' 2(1) *Zambia Social Science Journal* (2013) 13.

that purpose, and this has placed judges in a serious conflict of interest. As Chief Justice Anthony Gubbay notes, it is embarrassing to place the judiciary at the mercy of ministers or departments to plead for increases and allowances. This tends to undermine the dignity of judicial office.[79]

Sources of judiciary resources

It is common knowledge that the resources available for government use in Africa and around the world cannot fulfil any need; governments have to balance needs, including the needs of the judiciary. It is for this reason that inadequacy of finances is a perennial and common concern of all the eleven judiciaries that have been analysed in this book. In a bid to plug the resource gap, governments and judiciaries have sought to diversify their revenue sources so as to enhance the quantum of resources available for their respective judiciaries. In this regard, beyond the annual budgetary allocation to the judiciary, other sources have typically included: loans and grants from development partners, donations and gifts to the judiciary as recognised by the law, and revenue generated by the courts in the course of their work.

The patterns with regard to revenue diversification have two major trends, besides the annual allocation from national revenue, some judiciaries are permitted by law to retain part of the revenue they generate from their work so as to fund aspects of their functions. Zimbabwe, Zambia, Malawi, and Ghana, fall in this category. The law allows the judiciaries to retain and to account for the moneys that they generate from their courts. In Zimbabwe, the Courts Administration Fund is established under the Public Finance Management Act[80] but the revenue sharing formula of the Fund is regulated by the National Prosecuting Authority Act;[81] the Fund is shared among justice sector agencies in the following ratio: JSC/Judiciary - 40 percent; National Prosecuting Authority - 30 percent; Attorney General's Office - 30 percent, and; ministry responsible for justice - 10 percent.[82] As chapter four demonstrates, the Fund generates significant revenue.

---

79 Gubbay, 'The independence of the judiciary with special reference to the parliamentary control of tenure, terms and conditions of service and remuneration of judges', quoted in *John Sangwa v Attorney General and another.*

80 See Public Finance Management Act (No 6 of 2016), Section 93(3).

81 Act No 5 of 2014.

82 National Prosecuting Authority Act (No 5 of 2014), Section 32(2).

In Zambia, the judiciary is authorised under the Public Finance Management Act to retain part of the court fees only while fines are surrendered to the central government revenues account.[83] According to the Act, the collecting station is allowed to retain 40 percent of court fees collected and surrender 60 percent to the Judiciary Head Office for internal use. The Malawi Judiciary is also authorised to utilise the funds collected in the course of its work and to account for the funds.

The practice in other countries is different. In Kenya, the judiciary is required to remit all revenue collected to the national government. The Public Finance Management Act requires the Minister for Finance to appoint revenue collectors whose role is limited to acting as conveyor belts to the National Treasury. Accordingly, no revenue collected by the courts is utilised by the judiciary. The status of the other seven judiciaries covered in the book, with regard to utilisation of revenue collected by the courts, is not clear.

It is clear from the experiences of the eleven judiciaries that the judiciary allocation, from the national (and the state budget processes in the case of the federal system in Nigeria) that the annual allocation is the most significant of the sources of revenue. Indeed, in the three countries where the judiciaries are allowed to retain collected court revenues, there are common concerns regarding the relatively small share of resources that are collected by the courts and the need to revise court fees in order to make this revenue stream a viable one. Furthermore, there are concerns that executive control over the administration of the funds, including a final say on the revision of the rates, has a risk of infringing on the resource autonomy of the judiciary.

As a result, in order to ensure sustainable and viable revenue for the judiciary, much effort should be dedicated towards securing judicial financial independence as relates the national budgeting process. This includes the nature of involvement of the judiciary in the budgeting process as well as the level of control and management that the judiciary has over its budget.

General regional trends in the quantum of judicial resources

There may not be a neat comparison between the eleven case studies on quantum of resources that are availed to the judiciary for

[83] Judicature Administration Act, Section 6(1).

various factors. First, while the countries are developing economies, there are substantial differences in their levels of development, economic performance, geographical size, and other critical factors such as population and settlement in the countries. Furthermore, and as mentioned in earlier and in the case studies, the nature and depth of information that is available regarding the funding of courts differs significantly and does not render itself easily to exact comparison. Furthermore, the amount of resources that are dedicated to judicial services do not necessarily reside in one judiciary budget (as is the case with Namibia and South Africa for instance).

However, there are general trends that can be picked from the funding that judiciaries receive. A review of the quantum of resources availed to judiciaries reveals three main patterns. First, a review of the trends shows that there are judiciaries where there is a consistent increment of funds availed to the judiciaries over the years.[84]

However, the opposite is also true. The countries in the category of declining funds to the judiciary include: Zimbabwe, Zambia, Namibia, and Nigeria. In Zimbabwe, there was a drastic drop in funding from 0.4 percent of the total budget share in 2018 to 0.26 percent in 2019 and then rising to 0.46 in 2020. Chapter seven of the book shows that between 2010 and 2022, the federal funding to the Nigerian Judiciary declined from 2.2 percent of the total budget to 1.03 percent of the budget; between 2018 and 2020, the funding was below one percent. In Zambia and Namibia, the judiciary share of the budget shows a steady and consistent decline over the years. In Zambia, the budget sharply declined from 0.7 percent in 2016 to 0.5 percent in 2020. No clear reasons are advanced to explain this, but a review of the funding arrangements and politics of funding the judiciary show, either executive control of judicial finances (as is the case in Namibia, Zimbabwe, and Zambia) or outright political resistance to the judicial financial autonomy arrangements as demonstrated in the case of Nigeria.

In the second category are countries where judiciaries have shown consistent and incremental trends. Countries in this category are South Africa (based on the Department of Justice vote of 'court services,' Kenya (except in 2017/18), Uganda, and Ghana. Again, there are inconsistencies in the country information that do not allow for a

[84] Some of the figures may not be completely accurate as they are not adjusted to inflation or do not show increment in real terms.

neat comparison but the aggregate figures show progressive funding for the respective judiciaries. Uganda records the largest increment in the quantum of resources allocated to the judiciary, from a 0.58 percent in 2017/18 financial, the judiciary's budget has grown to 1.2 percent of the total budget allocation in 2022/23. However, this is attributed largely to the de-linking of the administrative staff of the judiciary from the mainstream service to the judiciary, which drastically increased the resources under the control of the judiciary.

While Tanzania has demonstrated some slight increment in some years, there are years where the overall allocation has declined slightly, but the overall funding is stable, oscillating between 0.42 percent and 0.45 percent between the years 2017/18 and 2021/2022. Only Malawi has demonstrated average funding over the years (0.8 percent, and 1.2 percent, respectively). It is not possible to tell the exact funding that goes to the judiciary in Botswana as the judiciary budget is lumped with other executive agencies in the justice sector, however, overall justice sector funding shows stability over the years.

The general trends reveal some observations regarding judicial funding in the region. It is clear, from the general trends, that the judicial arm of government receives comparatively minimal resources from the national budget. Indeed, Nigeria (before the decline in funding) was the highest at 2.2 percent of the national budget in 2010, followed by Uganda at 1.2 percent in 2023. The rest of the judiciaries in the region are below 1 percent. The fact that most, if not all, judiciaries in the region feel the need for more resources, with some operating at half their capacities, shows the dismal or inadequate funding that is availed to judiciaries. Malawi and Kenya have called for the increase of their allocation to 3 percent and 2.5 percent of the national budgets, respectively.

Judicial accountability

Accountability and transparency in the manner in which the judiciary manages resources availed to them is not only a requirement of the law in the countries covered in this study, but also a necessary component if judicial financial independence is to be fully realised. As Chief Justice Bart Katureebe notes, '[j]udicial independence and judicial accountability are not inconsistent and can therefore co-exist'.[85] Indeed,

[85] Law Association of Zambia (2012), Law Association of Zambia. 2012. Letter from the Law Association to the Minister of Justice dated 11 January 2012, quoted in Ndulo

a review of the country case studies shows that all laws in the eleven countries generally require the finances and accounts of the judiciary, like all public institutions, to undergo audit. Furthermore, judiciaries are also subject to parliamentary oversight and are also required to submit regular reports to parliament on the activities of the judiciary as part of its accountability.

In Malawi, it is reported that while the law allows the judiciary to retain moneys generated through the courts, there is no clear system through which these funds are managed and there are questions regarding the manner in which the funds are utilised. For instance, chapter five notes that information about yearly collections by the judiciary are not available and there does not seem to be any distinction between the annual budgetary allocation and the revenue generated internally.

However, among the eleven countries covered in this study, the Nigerian judiciary appears to have the most challenges with regard to judicial accountability and transparency. The National Judicial Council, the body in charge of courts, is reported to withhold details of judiciary budgets from the public, and the media is reportedly barred from legislative deliberations concerning the judiciary budget. There are reports that the Council has defied court orders to release information concerning judiciary finances. There is an apparent and persistent culture of opaqueness in the management of judiciary finances despite legislative and policy prescriptions (such as the country's National Judicial Policy) that require accountability and transparency, all this amidst reports of widespread corruption in the judiciary and a disregard of applicable laws in the management of federal judiciary funds.

Conclusion

There is no doubt that the principle of judicial financial independence is recognised in regional and global judicial standards as core and even a pre-condition to the general principle of judicial independence. However, the case studies covered in this book reveal that despite such consensus on the importance of resources for the judiciary, and despite the existence of such framework, their effectiveness depends on an array of context-specific factors.

'Judicial reform, constitutionalism and the rule of law in Zambia', 1.

However, beyond the country-specific frameworks and contexts, a common understanding of the essentials of judicial financial independence can emerge. These include specific issues such as: the role of the judiciary in budget development and execution; control over administrative and financial management processes; sources of judiciary resources; trends in the amount or quantum of finances availed to the judiciary; and transparency and the accountability of judiciaries in the management of resources. These common themes, and other related components covered in the book, demonstrate the existence of norms that can enhance the realisation of judicial financial independence, regardless of the context.

This introductory text has provided an overview of the issues covered in the book. The rest of the chapters offer detailed analyses of the frameworks and practices in the eleven countries that are covered in this volume.

CHAPTER TWO: KENYA

Caught between a progressive framework for judiciary financing and an unpredictable political terrain: The case of Kenya

Conrad M Bosire

Introduction

Kenya's 2010 Constitution fundamentally altered the structure, mandate, and operations of the judiciary and the judicial system. In a radical departure from the previous constitutional order, judicial power is now recognised as emanating from the people and vested in the judiciary and tribunals, which are ultimately accountable to the people, whom the Constitution recognises as the source of all state power and authority. The judiciary and the system of courts are established as an independent and co-equal organ of government through elaborate provisions that entrench its independence and autonomy.

The pre-2010 Constitution entrenched an imperial presidency where all institutions and arms of government, including the judiciary, were subordinated to the executive, and to the person of the president. The president had the sole powers and discretion to appoint the chief justice and judges of all courts; the Judicial Service Commission, which was composed of presidential appointees, played a marginal advisory role in judicial appointments.[1]

At the height of expansion of presidential powers, judges were stripped of their security of tenure and left to serve at the pleasure of the president.[2] During this period, the judiciary lacked independence in all its aspects. Judges and judicial officers who demonstrated any

---

1 The repealed Constitution (Act No 5 of 1969), Section 68 provided for five persons as members of the Judicial Service Commission; the chief justice as chairperson, Attorney General, two high court judges, and the chairman of the Public Service Commission, all of whom were direct presidential appointees.

2 Constitution of Kenya Act No 4 (1988); Henry O Maina, 'A case study on how the executive has compromised the security of tenure for judges' *Adili* 110 (2009) 4.

form of independence faced attacks and retribution while those who were deemed 'regime-friendly' were rewarded with promotions, state appointments, and other state favours.[3]

During the constitutional review process, public views presented to the constitutional review bodies decried the sorry state of the judiciary and the courts. Specifically, the people informed the constitutional review bodies that courts were no longer serving the interests of the ordinary citizenry and that the judiciary had become irrelevant to the justice needs of the citizenry. The people called for fundamental reforms to enhance the independence of the judiciary.[4]

In response to the views of the people, the Constitution now lays down explicit and core principles of the administration of justice. The principles include: the requirement of equality for all, expeditious delivery of justice, the embrace of alternative forms of justice (including traditional justice systems) and upholding substantive justice rather than undue regard to technicalities.[5] The Constitution also establishes a Judicial Service Commission that is more diverse and representative in its composition, more independent in the exercise of its powers, and with an expanded mandate of safeguarding the independence of the judiciary and facilitating the delivery of justice.[6] The Constitution recognises and provides for the institutional independence and autonomy of the judiciary as well as the independence of individual judicial officers serving in the courts.[7]

With regard to judiciary finances, there are two main aspects that are aimed at enhancing the financial autonomy of the judiciary. First, the Constitution prescribes a separate and special budgeting process for judiciary's resources; the judiciary's budget estimates and those of parliament, are, unlike other public institutions, to be submitted directly to parliament for approval.[8] Secondly, the Constitution provides for the establishment of a judiciary fund into which resources allocated to the

---

3 Makau Mutua, 'Justice under siege: The rule of law and judicial subservience in Kenya' 23 *Human Rights Quarterly* (2001) 96-118; Republic of Kenya, *Final report of the Taskforce on Judicial Reforms*, July 2010, (2010) 2.

4 Constitution of Kenya Review Commission, *Final report of the Constitution of Kenya Review Commission – final draft*, 2005, 205-210.

5 Constitution of Kenya (2010), Article 159.

6 Constitution of Kenya (2010), Article 171-172.

7 Constitution of Kenya (2010), Article 160.

8 Constitution of Kenya (2010), Article 173, 221(3) and 221(6).

judiciary are to be deposited and managed directly by the judiciary, rather than by the ministry of finance.[9]

Despite such critical provisions on the financial and institutional independence of the judiciary, the actual financing of the courts, and specifically the independence of the process, continues to face major challenges. While resources allocated to the judiciary increased substantially after the promulgation of the 2010 Constitution, ostensibly to facilitate post-2010 judicial transformation, funding for the courts gradually declined over the subsequent years. Some observers noted[10] that reduction of the judiciary budget was a reprisal by the executive against the judiciary for unpopular decisions made during that time, including the 2017 Supreme Court decision to annul the victory of the then sitting president. The judiciary has also faced abrupt, irregular, and sometimes illegal budget cuts in the mid-stream of the financial year, which have ended up disrupting service delivery and operations of courts.

It is in the above context that the chapter critically examines the normative framework for the funding of the judiciary and its effectiveness, or lack of it, in bolstering judicial financial independence in Kenya. Both the domestic (Kenyan) and regional/ international legal and normative frameworks lay down firm principles and standards to facilitate judicial financial independence. However, the argument presented in this chapter is that with specific regard to Kenya, the pre-2010 institutional and political culture of control and subjugation of institutions continues to persist and has a potential to negate, wholly or partially, the constitutional gains specific to judicial financial autonomy and independence. Accordingly, the full realisation of the financial independence of the judiciary depends on whether the national executive will embrace the institutional culture envisaged in the current constitutional, legal, and policy frameworks, and thereby, guaranteeing financial independence of the courts.

The chapter is divided into six sections. The next section briefly describes the structure of the judiciary and the context that led to the changes in the 2010 Constitution. Thereafter, the chapter delves into the institutional arrangements for the funding of the judiciary, the patterns of judiciary funding, and its impact on the independence of the judiciary.

---

9 Constitution of Kenya (2010), Article 173.

10 Morris Kiruga, 'Kenya's judiciary budget restored after outcry: "We are even unable to pay for wi-fi"', *The African Report* 8 November 2019.

A history of the judiciary and the political context in Kenya

As observed in the introductory chapter, at the formal beginnings of the court and the judicial system in the country, which were introduced with British colonial rule, the age-old principles of separation of powers and judicial independence were not part of the system. Judicial power was fused with all other governmental power and authority, and even exercised by the same colonial officials who worked both as administrators and magistrates, a practice that persisted, in some form, well into the independence decades.[11]

It was not until the run-up to independence, and soon thereafter, that there were serious attempts, at least formally, to establish the judiciary and system of courts as a separate arm of government.[12] Throughout the period of colonial rule (1895-1962) the colonial government ran a racially segregated system of justice comprising native tribunals (and later African courts), a system of courts for Indian and European races, as well as Muslim courts (classified at the level of subordinate courts) to adjudicate over matters of personal law for adherents of the Islamic religion.[13] The colonial-era courts were consolidated under a modern and expanded judiciary through the independence Constitution, and legislation was enacted soon thereafter to govern specific aspects of the judiciary and the courts.

Despite the independence era reforms to the judiciary, fundamental features that undermined financial and general independence of the judiciary remained intact and even prevailed. For many years after independence, the judicial service remained part of the mainstream civil service. Critical functions such as human resources and financial controls were placed under the executive, specifically in the Office of the Attorney General.[14] The judiciary was not spared from centralisation and

---

11 Republic of Kenya, *Report of the Committee to inquire into the terms and conditions of service of the Judiciary 1991-1992*, August 1992, 20.

12 The major reforms were consolidated with the enactment of three pieces of legislation in 1967: Judicature Act, cap 8 Laws of Kenya; Magistrates' Courts Act, cap 10 Laws of Kenya, and the Kadhis' Courts Act, cap 11 Laws of Kenya.

13 Republic of Kenya, *Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary 1991-1992*, August 1992, 11.

14 Republic of Kenya, *Report of the Civil Service Review Committee 1979-80*, September 1980, at 108.

presidential control[15] and was no more than a file on the desk of the executive.

At the height of repressive tactics by the executive, the security of tenure of judges was stripped through an executive sponsored constitutional amendment in August 1988.[16] The amendment sought to enhance the president's power and control over judges and the courts and was justified on grounds that such security of tenure undermined the constitutional authority of the president to hire and fire.[17] The security of tenure was only restored in 1990 after an outcry and political agitation by local pressure groups.[18]

Judicial reforms during this period were considered alongside the main civil service. The first major report on judicial reform was contained in a committee report that focused on reform of the entire civil service.[19] The Committee recommended that, 'the independence of the judiciary should be maintained and that the judiciary should not be treated as an appendix of the Office of the Attorney General'.[20] The Committee went on to recommend security of tenure and permanent and pensionable terms for judges and magistrates, as well as improved and competitive remuneration to enhance their independence.[21] The Committee recommended that the Judicial Service Commission should have powers to appoint judges and magistrates and that all the other employees in the judicial service should be delinked from the public service and brought under the control of the Judicial Service Commission.[22] These recommendations were, however, not implemented.[23]

---

15 D Olowu, J Wunsch, *The failure of the centralized state: Institutions and self-governance in Africa,* Westview Press, Boulder, 1990, 18.

16 Constitution of Kenya (Amendment) Act (No 14 of 1986), Section 4.

17 Sections 24 and 25 of the repealed Constitution of Kenya vested all powers of appointments and dismissal from all public officers in the president. Section 25 of the repealed Constitution provided that persons holding public office did so at the pleasure of the president.

18 Maina, 'A case study on how the executive has compromised the security of tenure for judges', 4. See discussions regarding the impact of the amendment in G Muigai & D Juma, *Power, politics and law: Dynamics of constitutional change in Kenya, 1887-2022*, Kabarak University Press, 2022, 232-233.

19 Republic of Kenya, *Report of the Civil Service Review Committee 1979-80*, September 1980, Chapter XII, 106-111.

20 Republic of Kenya, *Report of the Civil Service Review Committee 1979-80*, September 1980, 106.

21 Republic of Kenya, *Report of the Civil Service Review Committee 1979-80*, 107.

22 Republic of Kenya, *Report of the Civil Service Review Committee 1979-80*, 108.

23 Republic of Kenya, *Report of the Civil Service Review Committee 1979-80*, 2-3.

While the recommendations above were made back in 1979, it was not until 1992 that the question of judicial structures and remuneration of judges and magistrates was revisited by yet another committee specifically tasked look at the judicial service. The Committee's mandate was to 'inquire into ways and means of establishing a structure of salaries and conditions of service and related benefits of the judiciary, separate from the civil service'.[24]

In its final report, the 1992 Committee noted the immediate need 'to develop and sustain the capacity and competence of the judiciary to shoulder and discharge its onerous responsibilities in the administration of justice'.[25] The 1992 Committee recommended the transfer of all other cadres of the judicial service to the Judicial Service Commission.[26] The Committee also recommended the restructuring of the Judicial Service Commission to include two representatives of the public appointed by the president.[27]

The Committee further noted that judicial independence in commonwealth systems of government is mainly achieved through legal provisions that treat salaries of judges as a direct charge on the consolidated fund as opposed to the appropriation process through parliament.[28] The Committee also observed that beyond just elimination of executive and legislative control of the judiciary, there was a need for further measures to enhance the competence and capacity the judiciary.[29]

With regard to the remuneration of judicial officers, the Committee observed that it was important for judicial officers to have a salary structure and terms of service that not only eliminated anxiety as to adequacy but were also commensurate with the status of a judicial officer. The Committee concluded that the society must be ready to

---

[24] Republic of Kenya, *Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary 1991-1992*, 1.

[25] Republic of Kenya, *Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary 1991-1992*, 6.

[26] Republic of Kenya, *Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary 1991-1992*, iii.

[27] Republic of Kenya, *Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary 1991-1992*, 75.

[28] Republic of Kenya, *Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary 1991-1992*, 7.

[29] Republic of Kenya, *Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary 1991-1992*, 7-8.

make the necessary investment if it expected the judiciary to perform in accordance with the desired standards.[30]

While some of the 1992 Committee recommendations were implemented, the main ones being the delinking of the judicial service from the mainstream civil service and the development of different conditions and schemes of service and career progression, most of the other major recommendations were not carried through. For instance, the judiciary still remained under the administrative control of the Attorney General and the Judicial Service Commission still had a narrow composition made exclusively of presidential appointees. Furthermore, the judiciary staff was only partially delinked from the mainstream public service as some positions (such as internal auditors) were filled by officers deployed from the national treasury.[31]

The need for further judicial reform prompted the establishment of other committees appointed by the respective chief justices to look at internal reforms in the governance and administrative structures of the judiciary. The various committees looked into issues such as judicial integrity and efficiency in court operations, and proposals for broader reforms to law and policies that affect the judiciary. The committees were established in 2005,[32] 2008,[33] and in 2010.[34]

During this period, the country was gearing up for constitutional reforms and these reports, especially the 2010 report, informed the current constitutional provisions on the judiciary. The report of the Constitution of Kenya Review Commission (CKRC) observed that the Judicial Service Commission was no longer regarded as truly independent and the judiciary was seen as vulnerable to executive pressure.[35] The Act that guided the constitutional review process required the Constitution of Kenya Review Commission to introduce reforms 'aiming at measures necessary to ensure competence, accountability, efficiency, discipline and independence of the judiciary'.[36]

---

30 Republic of Kenya, *Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary 1991-1992*, 8.

31 This remained the position until the promulgation of the 2010 Constitution.

32 Republic of Kenya, *Report of the Sub-Committee on Ethics and Governance of the Judiciary*, November 2005.

33 Republic of Kenya, *Report of the Committee on Ethics and Governance of the Judiciary 2007*, October 2008.

34 Republic of Kenya, *Final Report of the Taskforce on Judicial Reforms*, July 2010.

35 Constitution of Kenya Review Commission, *Final report of the Constitution of Kenya Review Commission – final draft*, February 2005.

36 Constitution of Kenya Review Act, 1997, Section 17 (d) (iv).

The 2010 report[37] spelt the core tenets of judicial financial independence, which include that adequate resources are provided for the judiciary to operate without any undue conflicts which may hamper its independence.[38] The report also recommended that the judiciary's budget should be separately presented for approval to the legislature and managed autonomously and the judiciary itself should undertake its planning and management of the Judiciary Fund.[39] The report further recommended that the funds allocated to the judiciary must be sufficient and sustainable and that resources allocated to the judiciary through the budget process should be '"ring-fenced" so that the resources are not subject to reduction by Treasury.'[40] Other aspects of judicial independence mentioned in the report included: decisional independence of judges, security of tenure, competitive remuneration, among other principles.[41]

The report noted that the required resources around the time the report was prepared were around KES 6 billion, while the allocation received by the Judiciary was between KES 800 million and KES 1.2 billion which was less than 0.3 percent of the total government budget. In the Financial Year 2009/10 when the report was submitted, the judiciary received 0.5 percent of the total budget while the national assembly and the executive received 1.3 percent and 98.2 percent respectively.[42] The judiciary's budget, at the time the report was finalised, was determined together with other justice sector institutions such as the police, prisons, and national government administration. The report observed that, 'while the sector approach [to national budgeting and planning] is intended to achieve a coordinated approach to financing public expenditure, the judiciary has not received funding commensurate with its needs'.[43]

The report made a number of recommendations to address resource and budgetary challenges, key among them that a minimum of 2.5 percent of the annual national budget should be allocated to meet

---

37 Republic of Kenya, *Final report of the Taskforce on Judicial Reforms*, July 201o, which was christened 'Ouko Report' after Justice William Ouko who chaired the Committee.

38 Republic of Kenya, *Final report of the Taskforce on Judicial Reforms*, 18.

39 Republic of Kenya, *Final report of the Taskforce on Judicial Reforms*, 18.

40 Republic of Kenya, *Final report of the Taskforce on Judicial Reforms*, 18.

41 Republic of Kenya, *Final report of the Taskforce on Judicial Reforms*, 18.

42 Republic of Kenya, *Final report of the Taskforce on Judicial Reforms*, 20.

43 Republic of Kenya, *Final report of the Taskforce on Judicial Reforms*, 19.

the resource needs of the judiciary.[44] The report also recommended that a judiciary fund should be established and arrangements put in place to ensure that the funds are 'ring-fenced' and that the control and administration of the funds should be moved to the judiciary.[45] District treasuries of the executive branch, for instance, controlled and managed revenue generated by court stations in the respective districts; the report called for the independent management of revenue collected by courts.[46]

Most of the recommendations were incorporated in the 2010 Constitution, perhaps with the exception of the recommended minimum allocation. The general framework in the Constitution and enabling legislation is briefly analysed below.

The post-2010 constitutional and legal framework

Judicial power and authority of the courts are recognised in the Constitution as emanating from the people and delegated to the courts and tribunals. In turn, the courts are required to exercise their powers subject only to the Constitution and not under the control or direction of any person or authority.[47] The Constitution further lays down principles that are to guide courts in the exercise of judicial authority. These include: equality in the administration of justice, efficiency in the delivery of justice, the use of alternative systems of justice (including traditional justice systems), upholding substantive justice without undue regard to technicalities, and promoting and protecting constitutional principles and purpose.[48]

Judiciary structure

In terms of structure, the judiciary consists of the judges of the superior courts, magistrates, and other judicial officers and staff.[49] The leadership of the judiciary comprises the chief justice who is the head

---

44 Republic of Kenya, *Final report of the Taskforce on Judicial Reforms*, 19.

45 Republic of Kenya, *Final report of the Taskforce on Judicial Reforms*, 19.

46 The judiciary has been gradually de-linking court station revenues from the district treasuries but the process was slowed down due to a shortage of key personnel at court stations to take over this function.

47 Constitution of Kenya (2010), Article 160 (1).

48 Constitution of Kenya (2010), Article 159 (2).

49 Constitution of Kenya (2010), Article 161 (1).

of the judiciary and the deputy chief justice who deputises the chief justice. The chief justice and the deputy chief justice are appointed by the president in accordance with the recommendation of the Judicial Service Commission, and with the approval of the National Assembly. All other judges are appointed by the president in accordance with the recommendation of the Judicial Service Commission. The courts have interpreted this provision and held that the recommendation from the Judicial Service Commission to appoint a judge, chief justice, or deputy chief justice does not leave any discretion on the part of the president.[50]

Furthermore, while the executive insisted that the Judicial Service Commission should provide more than one name of nominees for the president to choose from, the courts have held that the Judicial Service Commission has no such obligation and the practice of providing only one name (as has always been the case) is within the law.[51] The chief registrar, who is appointed by the Judicial Service Commission,[52] is the chief administrator and the accounting officer of the judiciary.[53] The Judicial Service Commission is also bestowed with the power to establish other offices in the judiciary as may be necessary.

The superior courts comprise the Supreme Court, the Court of Appeal, the High Court, and the Employment and Labour Relations Court and the Environment and Land Court that are established with the same status as the High Court. Subordinate courts comprise the Magistrates' Courts, the Kadhis' Courts, the Courts Martial, and tribunals and other courts established by statute.[54]

The Supreme Court consists of the chief justice (the president of the court) the deputy chief justice (vice-president of the court) and five other judges, and is vested with exclusive power to hear and determine disputes relating to the elections to the office of the president, and appellate jurisdiction to hear appeals from the Court of Appeal on questions of constitutional interpretation and application and on matters of general importance to the public.[55] Decisions of the Supreme Court

---

50 *Adrian Kamotho Njenga v Attorney General, Judicial Service Commission and two others* (Interested Parties), Petition No 369 of 2019, Judgment of the High Court, 6 February 2020, [eKLR].

51 *J Harrison Kinyanjui v Attorney General and Another*, Constitutional Petition No 74 of 2011, Judgment of the High Court, 26 May 2016 [eKLR].

52 Judicial Service Act (No 1 of 2011), Section 8.

53 Constitution of Kenya (2010), Article 161(1)(c).

54 Constitution of Kenya (2010), Article 169(1).

55 Constitution of Kenya (2010), Article 163 (1), (3) & (4).

are binding on all the lower courts.[56] The Supreme Court is also vested with jurisdiction to render advisory opinions on any matter concerning county governments.[57]

The Court of Appeal shall have a minimum of 12 judges and is headed by the president of the Court of Appeal, elected from among the judges. The High Court is headed by the principal judge who is also elected by all judges of the High Court.[58] The Environment and Land Court and the Employment and Labour Relations Court too elect their principal judges from among the judges.[59]

Judicial independence

Judicial independence is safeguarded through a number of constitutional and legal provisions that not only protect individual judicial officers but also institutional independence of the judiciary. The office of a judge of a superior court shall not be abolished when there is a substantive holder of the office[60] and the remuneration and benefits payable in respect of judges shall be a charge on the Consolidated Fund.[61] The Constitution is also explicit that the remuneration and benefits payable to a judge shall not be varied to the disadvantage of the judge, and that retirement benefits shall not be varied to the disadvantage of the retired judge during the lifetime of the retired judge.[62] Finally the Constitution provides for judicial immunity for all judicial officers in respect of any action or omission done in good faith in the lawful performance of a judicial function.[63] These measures are to ensure that judicial officers can make decisions independently without any influence in the course of their judicial work.

The Judicial Service Commission is established with the main mandate of promoting and facilitating the independence and accountability of the judiciary as well as the efficient, effective and

---

56 Constitution of Kenya (2010), Article 163 (7).

57 Constitution of Kenya (2010), Article 163 (6).

58 Constitution of Kenya (2010), Article 165 (2).

59 Employment and Labour Relations Court Act (Cap 234b Laws of Kenya), Section 5(2); Environment and Land Court Act (Act No 19 of 2011).

60 Constitution of Kenya (2010), Article 160 (2).

61 Constitution of Kenya (2010), Article 160 (3).

62 Constitution of Kenya (2010), Article 160 (4).

63 Constitution of Kenya (2010), Article 160 (5).

transparent administration of justice. In terms of composition, the Judicial Service Commission comprises the chief justice as chairperson, representatives (one each) elected from the Supreme Court and the Court of Appeal, a High Court judge and one magistrate (a man and woman) elected from the association of judges and magistrates, the Attorney General, two advocates (a man and woman) elected by members of the Law Society of Kenya, one person nominated by the Public Service Commission, and two people (a man and a woman) nominated by the president and approved by the National Assembly, to represent the public.[64] The chief registrar is the secretary to the Commission.[65] All members of the Commission (apart from the Chief Justice and the Attorney General) shall hold office (provided they remain qualified) for a term of five years and shall be eligible to be nominated for only one further term of five years.[66]

The specific responsibilities of the Judicial Service Commission are to recommend to the president persons for appointment as judges, and to make recommendations on the conditions of service of judges and judicial officers (other than their remuneration) and the staff of the judiciary.[67] The mandate of reviewing and recommending remuneration for all state officers (including judges) is vested in an independent commission; the Salaries and Remuneration Commission whose core mandate is described as to 'set and regularly review the remuneration and benefits of all State officers'.[68] In the performance of this function, Salaries and Remuneration Commission is required ensure a competitive but also sustainable public sector wage, and to observe transparency and fairness in its responsibility.[69]

The Judicial Service Commission is required to appoint and manage judiciary staff and judicial officers (magistrates, registrars, and other judiciary staff) and exercise control including discipline in a manner prescribed by law.[70] Further, the Judicial Service Commission is required to prepare and implement programmes for continuing education and training of judges and judicial officers, a mandate that it has delegated to

64 Constitution of Kenya (2010), Article 171 (2).
65 Constitution of Kenya (2010), Article 171 (3).
66 Constitution of Kenya (2010), Article 171 (4).
67 Constitution of Kenya (2010), Article 172 (1) (a) & (b).
68 Constitution of Kenya (2010), Article 230 (4) (a).
69 Constitution of Kenya (2010), Article 230 (5) (a).
70 Constitution of Kenya (2010), Article 172 (1) (c).

the Kenya Judiciary Academy, and advise the national government on improving the efficiency of the administration of justice.[71] The Judicial Service Commission is to be guided by competitiveness, transparency and the promotion of gender equality in the retention of judicial officers and staff.[72]

The Judicial Service Commission and the Salaries and Remuneration Commission have differed publicly on the issue of existing benefits for judges, with each body accusing the other of making incursions into their territory. In October 2022, the Judicial Service Commission accused the Salaries and Remuneration Commission of interfering with the terms and conditions of service of judges by recommending the scrapping of a taxable car allowance that was given to judges by the head of the public service in 2011 and enhanced in 2015 and 2018.[73] The Judicial Service Commission claims that this is a benefit that already accrued to a judge and cannot, under the Constitution, be taken away during the lifetime of a judge.[74]

On the other hand, the Salaries and Remuneration Commission claims that this allowance was given to judges after passage of the Constitution and 20 days before the Salaries and Remuneration Commission commenced operations, and is thus irregular under the current Constitution since it is only the Salaries and Remuneration Commission that is authorised to set terms and benefits for judges.[75] The Salaries and Remuneration Commission further claims that the car grant (at KES 10 million) every four years for every judge is a double benefit as judges are already entitled to a government chauffeured car.[76] Judges insist that the car grant is necessary to cater for situations when the government car breaks down or is unavailable.[77]

The matter has found its way to the courts and judges are confronted with a situation where they have to decide on matters directly

---

71 Constitution of Kenya (2010), Article 172 (1) (d).

72 Constitution of Kenya (2010), Article 172 (2).

73 Kitavi Mutua, 'Salaries commission accuses Judiciary of conflict of interest in judges' car grants' *Nation* 22 October 2023.

74 Constitution of Kenya (2010), Article 160 (4).

75 Mutua, 'Salaries commission accuses Judiciary of conflict of interest in judges' car grants'.

76 Mutua, 'Salaries commission accuses Judiciary of conflict of interest in judges' car grants'.

77 Mutua, 'Salaries commission accuses Judiciary of conflict of interest in judges' car grants'.

affecting their benefits in office. Indeed, the Salaries and Remuneration Commission has claimed that any judge considering this matter is conflicted and a decision in their (judges) favour may be construed as abuse of authority.[78] In a judgment handed down by a three-judge bench of the High Court, in May 2024, declared that the car grant was a benefit payable to the judge under Article 160(4) and can, thus, not be altered to the disadvantage of an holder of office. The Court, therefore, held that the letter issued by the Salaries and Remuneration Commission, purporting to revoke the car grant was unconstitutional, and further issued an order compelling the National Treasury to continue processing and paying the car grant.[79]

These seemingly conflicting roles between the Salaries and Remuneration Commission and other independent commissions have previously been the subject of litigation in courts, with the Supreme Court noting in one case concerning the police, that the setting of facilitative allowances is a mandate that belongs to the National Police Service Commission.[80] Pursuant to this, the National Assembly introduced an amendment to vest in the Judicial Service Commission the mandate of reviewing and determining 'the nature of transport facilitation and the rates of reimbursement of the daily subsistence costs expended by judges, judicial officers and staff of the Judiciary in the performance of their duties'.[81]

Financial autonomy of the judiciary

The Constitution provides for a number of measures to safeguard the finances and financial autonomy of the judiciary. These include the establishment of the Judiciary Fund, which is to be administered by the Chief Registrar.[82] The main purpose of the fund is to facilitate the administrative expenses and other functions, including capital budget

---

78 Mutua, 'Salaries commission accuses Judiciary of conflict of interest in judges' car grants'.

79 *Peter Mwangi v State Law and the Salaries and Remuneration Commission and two others*, High Court of Kenya at Nairobi (Constitutional and Human Rights Division) HCC/HRPET/E304/2023.

80 *Evans Muriuki Muthuri and 4 others v National Police Service Commission and 2 others* [2019] eKLR.

81 Statute Law (Miscellaneous Amendments) Bill (National Assembly Bill No 67 of 2023); the Bill seeks to amend the Judicial Service Act to introduce Section 13A to vest this mandate on the Judicial Service Commission.

82 Constitution of Kenya (2010), Article 173 (1).

of the judiciary.[83] In this regard, the Chief Registrar is required by the Constitution to prepare and submit expenditure estimates directly to the national assembly for approval.[84] Once approved, the expenditure estimates shall be a charge on the Consolidated Fund and shall be paid directly to the judiciary fund after approval.[85]

While the judiciary collects revenue from court fines and filing fees, it is only mandated, under the Public Finance Management Act, to collect the same and hand it over to the National Treasury.[86] There is no authority to spend any funds or revenue collected in the course of performing its functions; the National Treasury sets annual revenue targets for each stream and the judiciary is required to submit all monies to the national treasury.[87]

The Constitution requires parliament to enact legislation to provide for the regulation of the fund, which was enacted in 2016. The objectives of the Judiciary Fund Act are listed as, among others, to safeguard the financial and operational independence of the judiciary, to ensure accountability for funds allocated to the judiciary, and to ensure that the judiciary has adequate resources for its functions.[88] The Act provides that all balances and accruals at the end of the financial year shall be retained in the fund.[89] The Chief Registrar is required to maintain books of accounts in respect of the fund, which shall be subject to annual public audit. Additionally, the Chief Registrar is required to submit an annual report of the operations of the fund to the National Assembly, with a copy to the Chief Justice.[90]

The Judiciary Fund Act further provides that the Chief Justice may, in consultation with the Chief Registrar, make regulations for the proper management of the Judiciary Fund.[91] The regulations, which were finalised in 2019, provide further arrangements to secure the financial independence of the judiciary. The Judicial Service Commission reviews judiciary estimates before submission to the National Assembly for

---

83 Constitution of Kenya (2010), Article 173.

84 Constitution of Kenya (2010), Article 173.

85 Constitution of Kenya (2010), Article 173.

86 Public Finance Management Act (No 18 of 2012), Section 75.

87 Judiciary, *State of the Judiciary and administration of justice 2022/23*, 272-273.

88 Judiciary Fund Act (No 16 of 2016), Section 3.

89 Judiciary Fund Act (No 16 of 2016), Section 7.

90 Judiciary Fund Act (No 16 of 2016), Section 11(2).

91 Judiciary Fund Act (No 16 of 2016), Section 15.

approval as provided in the Constitution.[92] This is a departure from previous practice where all estimates were approved by the National Treasury; the regulations only require that a copy of the estimates is submitted to the National Treasury.[93] The regulations also provide that the Chief Registrar may, within certain restrictions,[94] reallocate funds between budget vote heads as approved, also within certain conditions.[95]

More importantly, the Judiciary Fund Regulations state that the approval of judiciary estimates by the National Assembly is authorisation to the Chief Registrar to incur expenditure and obligations in accordance with the use of amounts so approved by the National Assembly.[96] Furthermore, the Chief Registrar only requires approval of the Judicial Service Commission to open and close bank accounts related to the Judiciary Fund.[97]

The constitutional and legal framework sets out structures and systems that seek to enhance the broader institutional and financial independence of the judiciary. Indeed, the main recommendations that were made in the past reports were incorporated in the current constitutional framework. The 'Ouko Report' of 2010, for instance, made recommendations for the establishment of the Judiciary Fund, and separate and special budgeting process for the judiciary, all of which were incorporated.

The Judiciary Fund was finally operationalised from the beginning of July 2022, after administrative systems and arrangements were made between the judiciary, the National Treasury, the Controller of Budget, and the Central Bank of Kenya. The Fund and its operational components (recurrent, development, and deposits) were set up and activated. There is a Judiciary Fund Management Committee to oversee operations of the Fund. More critically, the annual budgetary process and appropriation will still be through the National Assembly and there is no guaranteed share (minimum or specified allocation for the Fund).

---

92 Judiciary Fund Regulations (2019), Section 6.

93 Judiciary Fund Regulations (2019), Section 6(1).

94 For instance, reallocation from recurrent to capital, and from wage to non-wage expenses is prohibited.

95 For instance, Section 7 (2)(b) of the Regulations provide that the Chief Registrar of the Judiciary cannot reallocate funds that amount to more than 10 percent of the total allocation to a particular programme or sub-vote.

96 Judiciary Fund Regulations (2019), Section 8(1).

97 Judiciary Fund Regulations (2019), Section 25.

According to the judiciary, the establishment of the Fund will ensure retention of unspent balances and their utilisation (subject to the appropriation authorised by the National Assembly), and greater control over resources allocated to the judiciary, thereby facilitating more efficient budget execution.[98] The 2023/2024 judiciary budget was loaded onto the Judiciary Fund system and the administrative structure of the Fund activated; emerging challenges regarding the management and administration of the Fund are dealt with later below.

The earlier reports also made a case for the delinking of judicial service from the mainstream civil service and the development of separate conditions of service for judicial officers and judicial staff, all of which were implemented by vesting this responsibility on the Judicial Service Commission. Furthermore, critical aspects of the judiciary budget, such as review and approval, have been removed from the national executive and now lie with the legislature (National Assembly) and the Judicial Service Commission.

The only other significant recommendation which was made in the 'Ouko Report' and was not taken on board in the constitutional and legal framework is the prescription of a minimum percentage share of the total budget, which was proposed as 2.5 percent of the budget. While, for instance, there is a minimum county government share of revenue raised nationally, of 15 percent,[99] there is no such minimum share for the judiciary. The omission to include a minimum share, among other necessary and material safeguards, is one of the banes in securing predictability in resourcing of courts and enhancing the financial and overall judicial independence of the judiciary in the current constitutional dispensation. The Judiciary Blueprint for 2023-2033 calls for enhancement of the minimum allocation to 3 percent.[100]

Judiciary finances and financing: Issues and trends

There was a substantial shift in the funding of the judiciary immediately after the adoption of the 2010 Constitution. The approved budget of the judiciary shot up from a net allocation of KES 4.37 billion

---

[98] Judiciary [of Kenya], *State of the Judiciary and administration of justice report 2021/2022,* 210.

[99] *Constitution of Kenya* (2010), Article 203 (2).

[100] Judiciary [of Kenya], *A blueprint for social transformation through access to justice 2023-2033,* 74.

in 2011/2012 to 12.16 billion 2012/2013, representing a 288 percent net increment in the overall budget.[101] This period was characterised by major institutional changes heralded by the current Constitution, which had just been promulgated. The increment was meant to facilitate the transformation of the judiciary, as was envisaged in the Constitution that had just been promulgated.

At around the same time, a World Bank loan facility to the judiciary, through the National Treasury (named Judiciary Performance Improvement Project (JPIP)) which had been in the pipeline since the mid-2000s was concluded in 2012 and brought in an additional KES 10.2 billion to the judiciary. The JPIP loan was aimed at supporting three main areas: court administration and case management, judiciary training and staff development, and court infrastructure.[102] The loan facility was guaranteed by the National Treasury and was to run for an initial period of seven years (from 2012-2018). The JPIP loan facility aided in the building of 28 new courts and together with the capital budget allocation, the Judiciary was able to carry out a total of 54 court building projects (new courts as well as the repair and maintenance of existing court facilities).[103]

The resources availed to the judiciary also enabled the judiciary to hire more judges, magistrates, and judicial staff to assist in the clearance of case backlog, as well as filling other human resource gaps that affected the judiciary's performance. For instance, while the number of High Court judges was statutorily capped at 40 in the period before 2010,[104] the new Constitution and the additional resources enabled the hiring of more judges and magistrates. The judiciary has significantly more judges (total of 189 across all courts) and 523 magistrates,[105] numbers that were unheard of in the previous constitutional dispensation. The expanded resources have also allowed the judiciary to engage tools aimed at measuring and achieving efficiency, such as performance management, case clearance tracking, among other major gains.

However, despite the substantial leap in terms of resources in the transition year, a number of processes that were envisaged did not

---

101 Judiciary, *State of the Judiciary and administration of justice report 2013/2014*, 107.

102 Judiciary [of Kenya], *1st quarter July-September 2023 progress report*, 2013.

103 *State of the Judiciary and administration of justice report 2017-2018*, 254-258.

104 Judicature Act, Section 7 (2) (repealed section).

105 *State of the Judiciary and administration of justice report 2022-2023*, 229. The numbers are steadily growing.

happen immediately as provided for in the constitutional and legal framework. First, the Judiciary and the National Treasury continued with the pre-2010 procedure of submitting budget estimates to the National Treasury and participating in sector budget processes with other institutions under the executive. The judiciary was lumped together with institutions such as the ministry of interior, the police, and other executive agencies in one of the seven budget sectors named 'Governance, Justice, Law and Order Sector' (GJLOS). While the National Treasury claimed that these sectors were for the efficiency of planning for distribution of resources, it went against the explicit constitutional provisions that required the expenditure estimates of the judiciary (together with those of parliament) to be tabled directly at the National Assembly for approval.

The judiciary resourcing needs were subjected to the resource envelope that was available to justice sector institutions generally and the judiciary felt that this arrangement undermined and diminished the negotiations and balancing of judiciary resource needs.[106] It was not until the preparation of the 2021/2022 budget estimates that the Chief Justice directed the judiciary to cease its participation in the GJLOS budget negotiations and instead carry out an independent process of budget preparation and stakeholder consultation, and then submit the expenditure estimates directly to the National Assembly. This is the procedure that has since been adopted by the judiciary in the preparation of all its annual and supplementary budgets.

Secondly, while the Judiciary Fund Act was enacted in 2016, the relevant agencies (mainly the national treasury and the central bank) did not take the requisite administrative steps to establish and operationalise the Judiciary Fund. It was only in 2018 that the Judiciary Fund Regulations were finalised and gazetted. The Chief Justice announced in early 2022 that the judiciary allocation for the year 2022/2023 will be deposited in the Judiciary Fund and that administrative arrangements were already in place to ensure that the Judiciary Fund is operational from 1 July 2022, the start of the 2022/2023 financial year.[107]

Even after operationalisation of the Fund, the judiciary later noted a number of challenges, which sound like the 'old problems':

---

[106] *Statement by the Hon Justice David K Maraga, Chief Justice and President of the Supreme Court of Kenya, on judiciary budget cuts*, 4 November 2019.

[107] Jeremiah Wakaya, 'Judiciary Fund to be operationalized by July 1' *Capital FM News* 10 March 2022.

inadequate and unpredictable frequency of deposits to the Fund that are not aligned to the cash flow plan and always inadequate to clear pending bills, bureaucratic delays in exchequer request processes from the Consolidated Fund to the Judiciary Fund and from the latter to the operational accounts of the judiciary. The judiciary has also cited challenges of in-flexible payment especially where there is a need for emergency spending as payments are queued based on First-in-First Out (FIFO) basis, and a lack of framework to allow the judiciary to access unspent balances from the previous financial year.[108] The judiciary has called for a review of the relevant laws in order to allow the full and smooth implementation of the Fund.[109]

The Controller of Budget (the body mandated to authorise all public expenditure) has, for instance, accused the judiciary of making withdrawals of 'confidential expenditure' from the Fund without disclosing details, and of adjusting subsistence allowance to judicial staff above the rates in the public sector, and has declined to authorise such expenditure.[110] On its part, the judiciary insists that 'certain expenditures' should not face impediments and roadblocks from the Controller of Budget.[111]

Thirdly, while the judiciary budget rose substantially in 2012/13, the total budget allocation to the judiciary has generally remained static over the years, and in some cases, the overall share has declined from the previous year's allocation despite a significant growth in the government's overall budget. For instance, between the financial years 2018/2019 and 2019/2020, the judiciary's overall allocation reduced from 0.93 percent of the total government budget to 0.86 percent of the total government budget.[112]

Parliament and the executive's own budgets have grown substantially over the years with the increase in the annual budget of the government.[113] For instance, while the judiciary's own budget between financial years 2018/19 and 2020/2021 rose at an average of

---

108 *State of the Judiciary and administration of justice report* 2022/ 23, 259.

109 Public Finance Management Act (2012); Judiciary Fund Act (2016); Judiciary Fund Regulations (2019); and Judicial Service Act (2016).

110 Sam Gituku, 'Judiciary now accuses SRC and Controller of Budget of "interference"' *Citizen Digital* 20 September 2023.

111 Gituku, 'Judiciary now accuses SRC and Controller of Budget of "interference"'.

112 *State of the Judiciary and administration of justice report*, 233.

113 *State of the Judiciary and administration of justice report,* 233.

3 percent,[114] Parliament's own budget has grown at an average of 15 percent. This is despite the fact that the judiciary has a higher number of staff (compared to parliament) and has physical presence (through decentralised courts) across the country.[115]

Fourthly, the judiciary has, over the years, faced direct threats of budget cuts, some of these threats arising as a result of court decisions that affect politicians' interests. A relevant example is the High Court decision of 2015 that declared the Constituency Development Fund (CDF), a fund that is used to support local service delivery and development projects and that is patronised by members of the National Assembly, unconstitutional.[116] The Constituency Development Fund provides members of the National Assembly with a channel for political patronage and they have fought to keep the fund despite legitimate doubts about its purpose and constitutionality in view of the introduction of county governments with a clear and primary role in local service provision and development. The Supreme Court confirmed the decision of the lower courts.[117]

After the High Court judgment in 2015, Parliament threatened to cut the judiciary budget, prompting the then Chief Justice and members of the Judicial Service Commission to decry such an intention given the strained resources available vis-à-vis requirements of the Judiciary.[118] However, Parliament did not cut the judiciary budget for the financial year (2015/16) that followed the judgment; there was a slight increment from KES 14.2 billion in 2014/15 to KES 14.8 billion in 2015/16.[119] Below is a summary of the size of the budget (as a percentage of the overall budget) over the years:

---

[114] *State of the Judiciary and administration of justice report 2020/2021*, 196.

[115] The Judiciary had, as at the end of 2020/2021, a total staff complement of 5,277. See, *State of the Judiciary and administration of justice report 2020/2021*, 196. Parliament has around 1500 staff members.

[116] *The Institute of Social Accountability and another v National Assembly and 4 others* Constitutional Petition, No 71 0f 2013.

[117] *The Institute of Social Accountability and another v The National Assembly of Kenya and 4 others*, Supreme Court Appeal (Application) No 1 of 2018.

[118] Godfrey Mosoku, 'CJ: Public will suffer the most if MPs slash courts' budget' *The Standard,* 2014; Angwenyi Gichana, 'Two legislators fault High Court ruling that CDF is illegal' *The Star,* 24 February 2015.

[119] *State of the Judiciary and administration of justice report 2016/2017*, 161.

Financial Year	Judiciary allocation (percentage) of total budget
2015/2016	0.96 percent
2016/ 2017	0.99 percent
2017/ 2018	0.9 percent
2018/ 2019	0.98 percent
2019/ 2020	0.86 percent
2020/ 2021	0.92 percent

While conflicts between the judiciary and other arms of government have always existed, and which, in some cases, percolate into discussions regarding judiciary funding, the nullification of the 2017 presidential election (via a majority decision of the Supreme Court) reverberated the most ripples across the judiciary, including funding and all other aspects of judicial independence.

Immediately after the judgment, which was delivered on 8 of September 2017, the judges who nullified the election faced personal attacks from politicians allied to the ruling coalition, led by the then President.[120] The official car of the Deputy Chief Justice was shot at and the driver seriously injured during the hearing of one of the presidential petitions; an incident that was widely interpreted as intimidating the judges, although the government dismissed such allegations and promised to carry out investigations.[121]

The judiciary faced the largest cut to its budget in the financial year that followed the presidential election petition. In the 2018/2019 financial year, the Budgetary Policy Statement had capped the capital expenditure allocation to the judiciary at KES 1.05 billion, which was approved by the National Assembly. However, when the National Assembly passed the Appropriation Act for that financial year, the Judiciary's share of the capital expenditure had been reduced to a mere KES 50 million.[122] This was a drastic reduction from the previous year, which was KES 2.6 billion.[123] This explains the sudden drop in the overall allocation to the judiciary between 2018/19 and 2019/20 in the

120 Michael Oduor, with AFP, Reuters, 'Politicians, judges slam Kenyatta over attacks on judiciary' *Africanews* 12 September 2019.

121 VOA News, 'Kenya Deputy Chief Justice's driver shot, injured' *VOA News,* 24 October 2017.

122 S Namusyule, L Mueni, 'Impact of judiciary budget cut', 21 August 2018.

123 Judicial Service Commission 'Statement on the state of the judiciary in light of drastic cuts in budgetary allocation' 27 July 2018.

table above. Parliament restored some of the funds that were deducted in the middle of the financial year through a supplementary budget.

In 2020/2021, the judiciary was hit by an abrupt administrative cut to its budget by the National Treasury that was not sanctioned by Parliament. In a circular sent from the Cabinet Secretary for National Treasury, the National Treasury proposed to cut KES 1.493 Billion from the judiciary's recurrent budget and KES 1.404 billion from the development budget.[124] The cuts were justified on the basis that there were shortfalls in the projected government revenues hence the need for re-prioritisation of government projects. These cuts immediately reflected on the balances of the judiciary in its finance management system, causing an immediate derailment of many activities in courts across the country.[125]

The action of the National Treasury led the Law Society of Kenya to file a petition challenging the action[126] and the court issued interim orders halting the budget cuts. The budget cuts were done administratively by the National Treasury without the authority of the National Assembly. The National Treasury restored the balances that had been cut from the Judiciary's Integrated Financial Management Information System (IFMIS) that is controlled by the National Treasury.[127] However, after a short while, the National Treasury formally wrote to Parliament to have the Judiciary's budget allocation adjusted downwards through a supplementary budget, but the National Assembly rejected the proposal to slash the Judiciary's budget.[128]

Incidentally, the tumultuous experience above regarding the judiciary's finances and budget cuts started almost immediately after the Supreme Court's annulment of the presidential election results. Indeed, it is the financial year that followed after the annulment of the election that the judiciary faced the largest decline in the allocation of budgets. This was followed by the irregular and illegal cuts to its budgets occasioning disruption of critical processes in the judiciary and the courts.

---

124 Temilade, 'Law Society of Kenya takes steps against budget cuts in Kenyan judiciary' *Courtroom Mail* 30 October 2019.

125 Namusyule, Mueni, 'Impact of judiciary budget cut', 21 August 2018.

126 *Law Society of Kenya v Cabinet Secretary Treasury & others,* Constitutional Petition No 425 of 2019.

127 Mwakaneno Gakweli, 'Treasury restores judiciary's 2019/2020 budget' *The Kenyan Wall Street* 7 November 2019.

128 David Mwere, 'Reprieve for Judiciary as MPs veto budgetary cut' *Nation* 28 June 2020.

The National Treasury had even shown hesitancy to issue a 'no cost' extension of the JPIP World Bank loan facility, but finally did so after some pressure.[129] The halting of the loan facility would have thrown the court construction projects, many of which were nearing completion, into uncertainty. The project came to an end in late 2021.

Apart from budget cuts and underfunding of key mandates of the judiciary, another major concern that has always been raised regarding funding is the disbursement of moneys to the judiciary. There are perennial complaints about late disbursements from the National Treasury to the judiciary to support operations. In some cases, the disbursements arrive too late or too close to the end of the financial period and the judiciary practically has no time to absorb such funds given the limited time. The judiciary, for instance, notes that the average absorption rate of the development budget between the financial years 2018/19 and 2020/21 was 60 percent compared to the recurrent budget expenditure whose average absorption rate is 90 percent.[130]

Arguably, the establishment of the Judiciary Fund, and placing the controls under the judiciary, would have ensured predictability in the availability and flow of funds throughout the financial year. However, the Judiciary has been depending on irregular and unpredictable disbursements from the National Treasury. This has especially affected the capital expenditure and other non-wage recurrent expenses that usually have no definite disbursement schedule.

For the financial year 2022/2023, the Judiciary proposed a budget of KES 39.6 billion[131] against a budget ceiling of KES 17.599 billion.[132] The National Treasury proposed an allocation of KES 18.9 billion to the Judiciary for the financial year 2022/ 2023 and the judiciary finally received 18.6 billion, which represented an increase of almost KES 1 billion from the KES 17.336 billion that the judiciary was allocated in 2021/2022. In 2023/2024, the judiciary was allocated KES 21.1 billion, which represented a further growth. The graph below shows the general

---

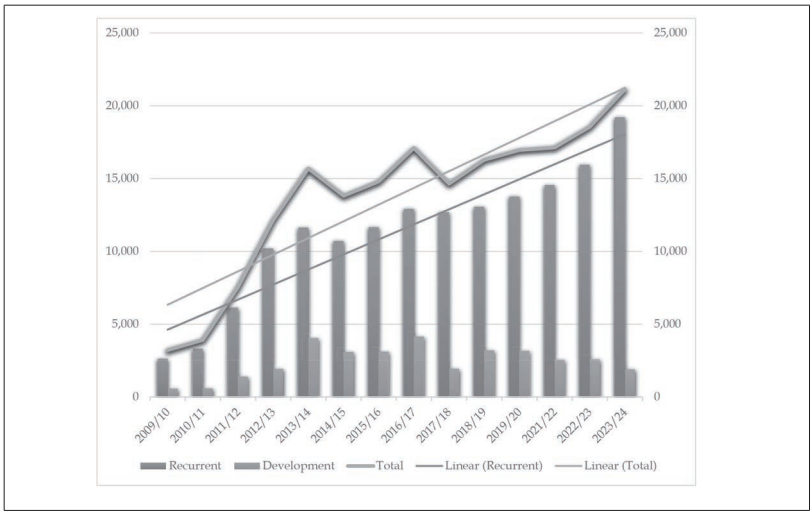
129 Sam Kiplagat, 'State seeks extension of World Bank funding for judiciary' *Nation* 24 September 2018.

130 Judiciary [of Kenya], *A blueprint for social transformation through access to justice 2023-2033*, 74.

131 Judiciary budget for the FY 2022/23 and medium term presentation'14 October 2022, 14 October 2022 https://www.judiciary.go.ke/download/judiciary-budget-for-the-fy-2022-23-and-medium-term-presentation on 17 April 2022.

132 'Judiciary budget for the FY 2022/23 and medium term presentation' 14 October 2022, 14 October 2022.

trend in the funding of the Judiciary between financial years 2009/2010 and 2023/ 2024.



Graph showing the growth Judiciary budget between FY 2009/10 and 2023/24. Figures in KES '000' millions.

While there has been a general growth in the budget of the judiciary, the slight dip in the overall funding of the Judiciary in 2017/18 and 2018/19 has been linked to politically unpopular decisions of the courts.[133] However, it is also the case that funds allocated to the Judiciary have always fallen far below the projected revenue needs of the judiciary.

In early 2022, for instance, Chief Justice Martha Koome reiterated in a consultative forum between the judiciary leadership and three parliamentary committees of the National Assembly (the Budget and Appropriations Committee, the Justice and Legal Affairs Committee, and the Public Accounts Committee) that the Judiciary was operating with a substantial deficit of its resource needs, and pointed out that the deficit for the year 2022/2023 translated to around 56 percent of the resource requirement. Chief Justice Maraga also reiterated that the National Assembly should consider funding the judiciary, at least to the tune of 2 percent of the national budget.[134]

---

[133] Judicial Service Commission 'Statement on the state of the Judiciary in light of drastic cuts in budgetary allocation' 27 July 2018.

[134] 'National Assembly, Judiciary hold consultative forum, agree to ringfence the JSC budget – 10 March 2022' n.d. http://www.parliament.go.ke/national-assembly-judiciary-hold-consultative-forum-agree-ringfence-jsc-budget on 25 April 2022.

Accountability of the judiciary

The principle of accountability is entrenched in the 2010 Constitution and binds all public institutions, including the judiciary. The judiciary is, therefore, accountable to the public in the manner it exercises judicial authority. There are laws and policies put in place to enhance accountability of the judiciary. The Judicial Service Act provides that the Chief Justice shall give an annual report to the nation on the state of the judiciary and the administration of justice and is required to publish the report in the Gazette, and submit copies to the National Assembly and the Senate, for debate and adoption.[135]

The Act further requires the judiciary and the Judicial Service Commission to submit annual financial and activity reports of the Judiciary and the Commission to the President and Parliament. The Act specifies that the annual reports should include: information on the disposal of court cases, access to justice, performance of the judiciary and the attendant challenges, statistics and information relating to the performance of the functions of the Judiciary and the Judicial Service Commission, among other issues.[136] The Act also requires the Chief Registrar to maintain proper books of account for the judiciary and the Judicial Service Commission, all of which should be submitted to the Auditor General and to Parliament at the end of each financial year.[137]

The Judiciary and the Judicial Service Commission have generally complied with these provisions. The Chief Justice routinely delivers the annual report of the Judiciary which contains information on the performance of the Judiciary and the challenges the judiciary and the justice sector face in the administration of justice. The reports are usually widely disseminated and are available on the Judiciary website. The judiciary has also established the Office of the Judiciary Ombudsman and reports annually on the number of complaints received from the public and how the same have been addressed or resolved. General statistics of the number and nature of complaints received by the Judicial Service Commission against judges and staff, and the number resolved or addressed or pending, are published in the annual judiciary report.[138]

---

135 Judicial Service Act (No 1 2011), Section 5 (2) (b).

136 Judicial Service Act (No 1 2011), Section 38.

137 Judicial Service Act (No 1 2011), Section 39.

138 *State of the Judiciary and administration of justice report 2022/23*, 216-219.

The Judiciary also carries out an elaborate public consultation process in the development of its budget proposals before the same are submitted to parliament for debate and approval. Furthermore, the Judicial Service Commission and the Judiciary usually present their budgetary proposals before the Budget and Appropriations Committee of the National Assembly where the proposals are defended. The Chief Registrar is routinely summoned by committees of Parliament, such as the Justice and Legal Affairs Committee, the Public Accounts Committee, and the Budget and Appropriations Committee, to respond to specific questions and issues.

However, in 2021, the Chief Justice wrote to the Speaker of the National Assembly protesting the 'frequent, multiple, overlapping and duplicating summonses' by various committees to the judiciary and called for a suspension of summonses pending an agreement on how parliamentary oversight would be conducted.[139] The Speaker of the National Assembly wrote back affirming the power of the National Assembly to exercise oversight and summon any person to provide information necessary for the exercise of oversight.[140] There have also been calls for a more transparent manner in which complaints against judges and other judicial officers to the Judicial Service Commission are handled and disposed.[141]

Assessment of judicial financial independence in Kenya

The Constitution provides for the concept of constitutional supremacy, the import of which is to place the text and spirit of the Constitution at the apex of all governance institutions (political and non-political).[142] More significantly, the duty to interpret the Constitution and build its normative content is bestowed on the judiciary. In turn, the renewed and invigorated judiciary has asserted its role and place in Kenya's constitutional governance. This has been demonstrated through its decisions that have scrutinised the actions of parliament and those of the executive, and issued orders and judgments against any

---

139 Luke Awich 'Koome warns Parliament over frequent summonses' *The Star* 13 July 2021.

140 Moses Nyamori, 'Justin Muturi asks judiciary to respect MPs summonses' *The Standard* 2021.

141 ICJ Kenya, 'Judicial accountability and independence must be upheld' *ICJ Kenya* 23 October 2023.

142 Constitution of Kenya (2010), Article 2(1).

actions that the courts felt fell short of the constitutional prescriptions,[143] and including the unprecedented invalidation of a presidential election. The promulgation of the Constitution, coupled with an ambitious and progressive judicial transformation agenda, created the impetus for courts to play their role.

The approach of the courts and the changed constitutional context disrupt the previous culture of subordination of the judiciary and other public institutions to the whims of politicians. It is because of this tension that James Gathii notes, for instance, that 'Parliament has yet to accept a bolder Judiciary'[144] and that the 'the resistance to the renewed authority of the judiciary is subjecting previously unaccountable political authority in ways parliament and the executive have found largely unacceptable'.[145] Yet, the very powers and authority bestowed upon the judiciary are a response to the political journey that the country has travelled, and the need to tame political arms of government and entrench a culture of constitutionalism and the respect of and adherence to the rule of law.

As Gathii adds, 'the supremacy debates show … a rejection of the view that parliament and the president should defer to the judiciary's interpretations of the Constitution – in short a rejection of what the political branches see as assertions of judicial supremacy over issues and areas which the political branches argue they have exclusive competence under the 2010 Constitution'.[146] Predictably, these debates have percolated into issues of funding, with the Speaker of the National Assembly, at one time in 2013, threatening to initiate the cutting of funding to the judiciary and the vetting of newly appointed judges.[147]

Given the history and journey that the Judiciary of Kenya has travelled, the makers of the Constitution were alive to the possible threats and reprisals that the Judiciary could face if it asserted its role

---

143 *In the matter of the Speaker of the Senate and another* (Supreme Court Advisory No 2 of 2013) Chief Justice Willy Mutunga in his concurring opinion (at para 160) emphasised that, 'The courts must patrol Kenya's constitutional boundaries with vigour, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order.'

144 JT Gathii, *The contested empowerment of Kenya's Judiciary, 2010-2015: A historical institutional analysis*, Sheria Publishing House, Nairobi, 2016, 69.

145 Gathii, *The contested empowerment of Kenya's Judiciary, 2010-2015,* 69.

146 Gathii, *The contested empowerment of Kenya's Judiciary, 2010-2015,* 74.

147 Gathii, *The contested empowerment of Kenya's Judiciary, 2010-2015,* 74.

(as it has done), hence the array of measures that were put in place in the Constitution to bolster its independence, including financial independence. The measures, which were discussed in detailed earlier in this chapter, revolved around individual and institutional independence and autonomy and the securing of finances of the judiciary.

However, and as the preceding sections have adumbrated, there is no full guarantee of financial independence of the judiciary. A number of major structures and systems put in place to safeguard judiciary finances have either been ignored or efforts to put those systems in place have faced resistance. Indeed, and at one point, there were reports of resistance to provide administrative systems that would enable the Judiciary Fund to take off and run smoothly.[148] Other evidence includes the earlier refusal to implement the process of budgeting for the judiciary that is envisaged in the Constitution, and the abrupt and irregular budget cuts through administrative fiat by the national treasury. These cuts prompted courts to rule and declare them irregular and order for restoration of the balances.

While there was a substantive recommendation by judiciary report in 2010 for the minimum allocation of 2.5 percent to the judiciary, this recommendation has never been considered either by Parliament or the National Treasury in the annual budget projections. The underfunding of judicial operations continues to grow and the allocations for the financial year 2022/2023 have a 56 percent deficit as earlier indicated. Being a developing economy with limited resources, one would understand the real possibility that the government may not meet all the resource requirements of the judiciary. However, a comparative analysis of, for instance, the growth of the budget of parliament vis-à-vis the judiciary and the size of budgets relative to the needs of the two institutions, reveals a trend that disadvantages the judiciary.

Calculations show that parliament's budget has grown at an average of 15 percent while that of the judiciary has grown at an average rate of 3 percent.[149] Parliament's budget projection for 2022/2023 is KES 50.2 billion while the judiciary's projected budget is KES 18.5 billion.[150] Parliament's budget has significantly grown over the years, compared to that of the Judiciary. In 2012/13, for instance, the Judiciary was

---

148 Sam Kiplagat, 'Maraga differs with CBK boss over Judiciary finances' 19 September 2020.

149 *State of the Judiciary and administration of justice report 2020/2021*, 196.

150 George Maringa, 'The 2022/23 budget at a glance' *The Standard,* 7 April 2022.

allocated 12.16 billion and Parliament was allocated KES 14.54 billion;[151] representing a growth of 245 percent for Parliament and 52 percent increase between 2012/13 and 2022/23.

Comparative budget allocation of the National Government budget (KES billions)[152]

	FY 2019/20	FY 2020/21	FY 2021/22	FY 2022/23
Executive	1,947.87	1,816.34	1.886.34	2,050.15
Parliament	39.89	37.31	37.88	50.22
Judiciary	19.2	18	17.92	21.13
Total	**2,006.96**	**1,871.65**	**1,942.14**	**2,121.50**

While the two institutions are by no means comparable in terms of size, nature of functions, and other factors that may warrant a difference in the levels of funding, some factors are actually relevant and make one arrive at a conclusion that the judiciary is being starved of resources. The Judiciary has a much larger workforce than Parliament (even when the workforce in the Senate and the National Assembly are combined).[153] Furthermore, the nature of the judiciary's functions calls for the decentralisation of its services. With over 173 court stations and over 500 courtrooms around the country, there is a basic justification for additional resources. Indeed, the funding gap expressed by the Judiciary (of around 56 percent) is clear and plain evidence of the underfunding of the judiciary and the courts.

Explicit threats by politicians, especially at the height of tensions with the Judiciary, have not always been followed through. There is a general pattern in which the judiciary finds itself in a less than desirable position with specific regard to finances and financial independence. It is not just the quantum of resources made available to the judiciary that has presented challenges, but also the resistance or just plain nonchalance regarding the need to implement such systems in order to secure and bolster the financial independence of the judiciary, as required in the relevant constitutional and legal framework.

Furthermore, the political threats to the judiciary and incursions into the judiciary's financial and other operations happen during times

---

151 *State of the Judiciary and administration of justice report 2014/2015,* 127.

152 *State of the Judiciary and the administration of justice report, 2022/23.*

153 Judiciary has approximately 6000 members of staff while Parliament has around 1500 members of staff.

of heightened political activity and especially where the judiciary has an adjudicatory role to play, and which role has a potential or actual impact on the interest of politicians. For instance, and as the preceding parts of this chapter have demonstrated, the harshest reprisals were visited on the judiciary after the delivery of the judgment that annulled the 2017 presidential election result. The president and politicians aligned with him had promised to 'fix' what they thought was wrong with the Supreme Court, and this was followed by a systematic decline of resources to the judiciary as well as abrupt, irregular, and disruptive cuts to its budget midstream the financial year.

More significantly, the processes and issues that lead to political reprisals against the courts and the judiciary will continue into the future. There is no doubt that for as long as the courts adjudicate over matters that affect politicians' interests, there will be attempts to either circumvent such authority or to frustrate the courts. Even recently, the proposals for constitutional change through the Building Bridges Initiative (BBI), a process that was initiated by the president and the opposition leader soon after the 2017 general election,[154] had proposed changes that would introduce an ombudsman, appointed by the President and approved by the Senate, whose role would be to handle complaints against judges.[155]

It is also worth pointing out that there were submissions by the Judicial Service Commission to the BBI Taskforce on constitutional entrenchment of a guaranteed percentage of the budget towards funding the judiciary, but these were ignored. Similar suggestions were made in 2023 by the Judicial Service Commission in its presentation to the National Dialogue Committee. A good faith approach by the political class intended to fortify judicial independence would have taken these proposals into account. While the BBI process was halted by the courts on grounds of unconstitutionality, there is no assurance that this was the last of assaults on judicial independence by the political class.

In view of the context above, it is only necessary that the structures, systems, and measures aimed at enhancing and effectuating judicial independence are implemented. An emerging and critical concern is the manner in which matters such as benefits of judges should be

---

[154] Republic of Kenya, *Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce*, October 2020.

[155] *Report of the Committee on the Judiciary Response to the Proposals in the Final Report of the Building Bridges Initiative,* November 2020.

negotiated between the concerned agencies and the manner of access to funds of the judiciary. An amicable agreement between the concerned agencies within the law, and outside of acrimonious and contentious proceedings in court, may provide the necessary guarantees for judicial independence.

Conclusion

This chapter has discussed the historical, institutional, and political context that has defined and continues to define the financing and finances of the Kenyan Judiciary. The undermining of the rule of law and the subjugation of the judiciary to the executive led to calls for judicial reforms to enhance the independence of the judiciary. While there were many progressive proposals that were made to enhance the independence of the judiciary, it is the 2010 Constitution, and the attendant processes of making the Constitution, that finally provided a progressive framework where the independence of the judiciary (together with financial independence) was incorporated.

However, and as highlighted in the preceding parts of this chapter, the implementation of the seemingly progressive constitutional and legal framework has, for various reasons, not been effective. The old political culture of impunity has led to a resistance to judicial authority as defined and applied in the Constitution. The judiciary has firmly asserted its constitutional role and place through a string of independent decisions and this very approach has irked the political arms of government, who have, in turn, used the power of the purse to inhibit the judiciary from achieving full effectiveness.

The political class across the board should come to the realisation that the constitutional objectives as relates to the judiciary and judicial power can only be fully implemented when the Judiciary develops and acquires full capacity to undertake and discharge its mandate. In turn, such a realisation should lead to a more objective and honest conversation about the very legitimate resource needs of the judiciary vis-à-vis the various factors that such resources or resourcing needs to be balanced against. Furthermore, such an approach, which is currently sorely lacking, can only be undertaken where the structures and systems intended to cushion the judiciary against interference are put in place and are respected by the executive and the legislature.

CHAPTER THREE: SOUTH AFRICA

Judicial financial independence in South Africa – a judiciary-based-administration versus the executive control of the judiciary

Alison Tilley, Vuyani Ndzishe,
Mbekezeli Benjamin & Zikhona Ndlebe

Introduction

In apartheid South Africa, the administration of the courts, inclusive of financial matters, fell under the purview of the Department of Justice.[1] Additionally, traditional courts, presided over by chiefs to resolve disputes within indigenous communities, were recognised by the Black Administration Act No 38 of 1927 but were excluded from the formal judiciary.[2]

The transition to democracy in 1994, as delineated by the Interim Constitution,[3] did not entail structural changes to the existing judiciary. However, it unequivocally affirmed the constitutional principle of judicial independence, established the doctrine of constitutional supremacy, and vested the judiciary with the authority to interpret the Constitution's provisions vis-à-vis the executive and parliament. Subsequent to the Interim Constitution[4], the final Constitution of 1996[5] instigated substantial changes, officially proclaiming the autonomy of the judiciary. Crucially, it enshrined key principles, such as the exclusive judicial authority vested in the courts, their independence subject only to the Constitution and the law, and the prohibition of interference in the functioning of the courts by any person or organ of the state.

---

1 HR Hahlo and E Kahn *The Union of South Africa: Development of its laws and Constitution*, 1960, 270.

2 C Hoexter 'The structure of the courts' in C Hoexter, M Olivier (eds) *The judiciary in South Africa,* 2014, 10.

3 Constitution of the Republic of South Africa, Act 200 of 1993.

4 Constitution of the Republic of South Africa, Act 200 of 1993.

5 Constitution of the Republic of South Africa, 1996, Section 165.

Despite these constitutional provisions, a persistent struggle between the executive and the judiciary regarding judicial financial independence has endured. This chapter delves into the historical and legal backdrop of the South African Judiciary, exploring the constitutional framework instituted during the transition to democracy. The narrative encompasses reform initiatives aimed at enhancing institutional and budgetary autonomy, including those spearheaded by Chief Justice Ngcobo and the establishment of the Office of the Chief Justice. Subsequent developments under Chief Justice Mogoeng Mogoeng, such as the Seventeenth Amendment to the Constitution and the Superior Courts Act, are scrutinised. Furthermore, the chapter meticulously examines the legislative framework governing the financing of the judiciary, delving into actual budgets and expenditure in South Africa. The intricate interplay between constitutional mandates and practical financial considerations forms the crux of this analysis.

A mixed methods approach was utilised in the research. The analysis of quantitative data involved the use of publicly available budget data. The objective of the budget analysis was to determine whether the budget and actual spending for specific programmes and subprogrammes within the justice cluster, as well as the compensation of judges in the superior courts and magistrates, are keeping pace with inflation. The mixed methods approach combines elements of quantitative research and qualitative research to provide a more comprehensive understanding of the research question.

Historical and legal background of the Judiciary in South Africa

In 1994, with the advent of constitutional democracy, South Africa inherited a court system structured according to the 1910 Union of South Africa. The Union, formed by the South Africa Act of 1909, merged coastal colonies of the British crown with Boer Republics from four provinces. The colonial government, apartheid era, and the transition to democracy have all played significant roles in shaping the operations and systems of the South African Judiciary. The design, structure and financing of South Africa's Judiciary derives from the historical legacy of colonial governments, followed by several decades of apartheid, and later the transition to democracy.

At the dawn of constitutional democracy in 1994, South Africa inherited a court system that was still structured according to the design first introduced nearly a century prior, in the 1910 Union of South Africa. Created by the South Africa Act of 1909,[6] the Union was an amalgamation of the two coastal colonies of the British Crown with two Boer Republics to form four provinces.

The South Africa Act created a single Supreme Court of South Africa with four provincial divisions each situated in the provincial capital, with several satellite local divisions in secondary cities, including an Appellate Division. The Appellate Division was presided over by the chief justice, and the provincial divisions headed by judges president. As the population grew, several other provincial divisions were established, such that in 1959, when the Supreme Court Act was passed, there were 6 provincial divisions spread across 4 provinces plus South West Africa (today called Namibia). As part of the apartheid government's segregationist policy, superior courts were also established in Bantustans – 'independent' states established along tribal lines within the South African territory.

In this pre-democratic era, the courts were considered part of the justice system under the purview of the department of justice. Appointment of judges was almost exclusively in the hands of the minister for justice, with the state president having a 'rubber stamp' function.[7] Similarly, the judiciary's administration and financing, including judges' salaries, formed part of the department's budget, ultimately under the control of the minister for justice. In this context, judicial independence in the form of the institutional structure and function was non-existent.

In exercising power in the appointment of judges, the minister for justice's influence also added further constraints to judicial independence. At the time, judges were appointed from the ranks of senior counsel, who were almost exclusively white and male.[8] There

---

6 South African Act of 1909.

7 M Wesson and M du Plessis 'Fifteen years on: Central issues relating to the transformation of the South African judiciary' 2008 *South African Journal of Human Rights,* 187 at 190.

8 The tradition of conferring silk status, denoting senior counsel status for accomplished advocates, finds its historical roots in the reign of Queen Elizabeth I. During this period, senior barristers were appointed based on merit by the Crown to safeguard and represent the Crown's interests. This practice, colloquially known as 'taking silk,' was a prerogative of the Crown and is now vested in the President or head of state. South Africa adopted this practice upon transitioning into a Republic, with both the

was also political manipulation of the judicial appointment process by the ruling National Party as it entrenched its policy of apartheid.[9] Judges who shared the ideology of the apartheid government were appointed and rapidly promoted, with the most notable example being Chief Justice LC Steyn.[10] Hugh Corder argues that apartheid's judges:

> saw their dominant roles as the protectors of a stability … [and]… expressed it in terms of a positivistic acceptance of legislative sovereignty, despite a patently racist political structure, and a desire to preserve the existing order of legal relations, notwithstanding its basis in manifest social inequalities.[11]

At the point of the democratic transition in 1994, the Interim Constitution[12] retained the court structure as it existed at that point. This judiciary was almost exclusively white and, bar two women,

---

1961 and 1983 Constitutions endowing the President with the authority to confer such honours. This presidential power and function persists in the final Constitution under Section 84(2)(k), wherein the President is empowered to bestow honours. The rationale behind this practice in contemporary democratic South Africa rests on the premise that senior counsel, or silks, possess specialised expertise in forensic advocacy, indicative of seasoned experience and excellence. The procedural trajectory commences with a candidate applying to the relevant Bar. A committee of silks within that Bar meticulously considers the application, recommending names for approval. Subsequently, the judge president of the pertinent High Court reviews and endorses the recommendations, forwarding them to the Minister for Justice. The Minister for Justice, in turn, submits a recommendation to the President, who ultimately confers the honours. Notably, this longstanding practice faced legal scrutiny in the case of *Mansingh v General Council of the Bar*, wherein Advocate Mansingh challenged the process, asserting that the denial of silk status to advocates like herself posed a substantial disadvantage. The central legal question revolved around whether the executive powers granted to the President, as articulated in Section 84(2)(k) of the Constitution, encompassed the authority to confer silk status on an advocate. The North Gauteng High Court initially ruled in favour of the challenge, asserting that the President did not possess such prerogative powers formerly bestowed upon the Crown. Subsequently, the General Council of the Bar appealed to the Supreme Court of Appeal, which expanded the interpretation of the President's power to confer honours, including the conferral of silk status. This interpretation was ultimately affirmed by the Constitutional Court, which held that the wording in Section 84(2) is both permissive and broad enough to authorise the President to confer honours on any category of person, encompassing the bestowal of silk status upon advocates. See Prathik Mohanlall, 'The beginning of the end for silks? The law' 13(9) *Without Prejudice* (2013) 52; and *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC).

9 H Corder 'Judicial authority in a changing South Africa' 24 *Legal Studies* (2004), 253 at 255.

10 C Forsyth 'The judiciary under apartheid' in C Hoexter, M Olivier (eds) *The judiciary in South Africa,* 2014, 61.

11 H Corder *Judges at work: The role and attitudes of the South African appellate judiciary 1910-1950*, 1984, 237.

12 Constitution of the Republic of South Africa (Act 200 of 1994).

almost exclusively male.[13] However, the Interim Constitution expressly affirmed judicial independence as a constitutional principle.[14] The Interim Constitution also vested judicial authority in the courts.[15] It also established the principle of constitutional supremacy and gave the judiciary the enormous power to interpret the scope and powers of both the executive and parliament in terms of the Constitution. This was a distinct break from the past system of parliamentary sovereignty. This 'strong form' of judicial review would, in later years, bring the judiciary in conflict with the political branches of government and lead to threats against its independence.

Furthermore, the Interim Constitution created two new institutions that would entrench that judicial independence. The first was the Constitutional Court at the apex of the court structure. Borne out of mistrust and scepticism that the apartheid judiciary would seek to restrain the transformative potential of the new Constitution,[16] the Constitutional Court would have the final say over all matters relating to the interpretation, protection and enforcement of the provisions of the new Constitution.[17] The Court's first 11 justices were drawn from a variety of backgrounds. A small number of the court's first judges were drawn from the extant judiciary, but many came from a wider pool than senior counsel, including Kate O'Regan and Yvonne Mokgoro, who were law professors, and anti-apartheid activist Albie Sachs. Arthur Chaskalson, who had represented Mandela in the 1963 Rivonia Treason Trial that led to his long-term imprisonment, was appointed president of the court.

The second institution was the Judicial Service Commission, which would be an independent institution that would make recommendations on the appointment and removal of judges from office following a transparent process.[18]

Although the magistrates' courts were not explicitly named in terms of the Interim Constitution, they nevertheless received recognition by

---

13 In April 1994 there were 165 judges: 160 were white men, 3 were black men, and 2 were white women.

14 Interim Constitution, Section 96(2)-(3).

15 Interim Constitution, Section 96(1).

16 P Mtshaulana 'The history and role of the Constitutional Court of South Africa' in P Andrews and S Ellmann (eds) *The post-Apartheid constitutions: Perspectives on South Africa's basic law* (2001), 535.

17 Interim Constitution, Section 98(1).

18 Interim Constitution, Section 105(2).

indirect reference as courts 'prescribed by or under a law' in Section 103(1) of the Constitution. Furthermore, the Interim Constitution formally established the Magistrates Commission as an independent institution to regulate the appointment, promotion, transfer, and the discipline of magistrates.[19] These steps transformed magistrates from petty civil servants to judicial officers, relocating them from the executive arm of government to the judiciary. Further changes in the structure of the courts came with the enactment of the Final Constitution in 1996 under the Mandela government (1994-1999).

The new constitutional legal framework for the judiciary in a democratic South Africa

The Final Constitution ushered in the promise of an independent judiciary with the inclusion of Section 165 which states,

(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.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) 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.

The former Supreme Court of South Africa was disestablished including each provincial and local divisions, to be replaced with individual high courts attached to their specific city. The Appellate Division became the Supreme Court of Appeal and had the final word on all non-constitutional matters.

[19] Interim Constitution, Section 109.

Hassen Ebrahim[20] separates institutional independence of the judiciary into: a) individual or subjective independence which is covered by conditions of service of judges, financial security and security of tenure and b) collective or substantive independence, and this he argues 'demands that individual judges be free from influence of any other person or institution when they perform their judicial functions', whereby the judiciary has autonomy in its day-to-day operations without the intervention of the executive. Cathleen Powell[21] aligns with the classification of Ebrahim by noting the proposal in *Valente v The Queen*.[22] In *Valente*, the Court held that the three elements that fully encapsulate judicial independence include security of tenure, financial security, and independence of the judiciary as an institution. The Court warned that if a judge in the court that they preside in, is not independent of other branches of government, then they cannot be considered as independent.

That being said, the literature suggests that institutional independence is bolstered when the judiciary has control and oversight of matters of administration bearing directly on the exercise of judicial functions.

Powell's[23] discussion goes beyond what *Valente* proposed and addresses the critique of *Reference re Public Sector Pay Reduction Act*.[24] Here, the Court held that one cannot fully separate individual and institutional independence, they go together and are required for the functioning of the judiciary. Drawing on this Canadian authority, the judiciary – as foundational to the doctrine of separation of powers – needs to be independent by being economically free from political interference.

Powell[25] notes that the discourse does not provide a coherent and cohesive definition of what constitutes administrative aspects of judi-

---

20 Hassen Ebrahim, 'Governance and administration of the judicial system' in Cora Hoexter and Morné Olivier (eds) *The judiciary in South Africa,* 2014, 103.

21 CH Powell, 'Judicial independence and the Office of the Chief Justice', 9 *Constitutional Court Review* 2019, 497-519.

22 *Valente v The Queen* (1986) 24 DLR (4th) 161 (SCC) (*Valente*). Also see, Ebrahim, 'Governance and administration of the judicial system', 103.

23 Powell, 'Judicial independence and the Office of the Chief Justice', 497-519.

24 *Reference re: Public Sector Pay Reduction Act (PEI), s10; Attorney General of Canada et al Intervenors: Reference re: Independence of Judges of Provincial Court, Prince Edward Island, Provincial Court Act and Public Sector Pay Reduction Act; Attorney General of Canada et al, Intervenors* (1997) 150 DLR (4th) 577 (SCC) *(Reference re Public Sector Pay Reduction Act).*

25 Powell, 'Judicial independence and the Office of the Chief Justice', 497-519.

cial functions. However, she references the former Chief Justice Sandile Ngcobo who said that 'executive handling of budgetary and financial management, space and equipment management and other administrative functions as "incompatible with the judicial independence"'.[26]

The International Commission of Jurists cites the United Nations Basic Principles on the Independence of the Judiciary when explaining the preconditions of independent judiciaries.[27] These include that judges must have personal autonomy, and be protected from external or political pressures, inducements or influence. Judges should be appointed based on objective criteria, and have fixed and adequate remuneration during their tenure. They should serve for a long fixed-term, or for life, and are not to be removed from office unless there are capacity related reasons. Lastly, they state that 'judges must also have institutional independence regarding administration of courts and assignments of judges'.[28]

In her doctoral thesis, Pawranavilla Rawheath[29] states that if the remuneration of judges is continuously reduced in that it is not adjusted in line with inflation, 'it will not induce the ablest lawyers to accept judicial office which then seriously impacts the administration of law and impairs intellectual standards of excellent legal systems'.[30] And 'importantly, society is entitled to only the highest quality of dispute resolution at the trial level in order that costly and time consuming reviews and appeals can be avoided.'[31] In essence, Rawheath contends that adequate remuneration for judges is essential for maintaining a robust and effective legal system.

---

[26] Justice Sandile Ngcobo 'Delivery of justice: Agenda for change' 120(4) *South African Law Journal* (2003) 688, 691-92, delivered before Ngcobo J took on the role of chief justice in 2009. See also, Powell, 'Judicial independence and the Office of the Chief Justice', 503.

[27] International Commission of Jurists '*International Principles for the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioner's Guide* 1 (2007) Geneva; *United Nations Basic Principles on the Independence of the Judiciary, (UN Basic Principles*) adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Also see, Article 10 *Universal Declaration of Human Rights,* United Nations General Assembly December 10 1948. http://www.unhcr.org/refworld/docid/3ae6b3712c.html accessed 15 April 2018.

[28] Centre for the Independence of Judges and Lawyers of the International Commission of Jurists *Attacks on justice*: *A global report on the independence of judges and lawyers* (2002), 11.

[29] P Rawheath, 'Independent and effective adjudication in the lower courts of South Africa' unpublished PhD dissertation, University of Cape Town, 2022.

[30] Rawheath, 'Independent and effective adjudication in the lower courts of South Africa', 73.

[31] Rawheath, 'Independent and effective adjudication in the lower courts of South Africa'.

We would argue that the structure of the judiciary and whether there is a judiciary-led administration which is able to keep salaries in line with inflation is a core part of the independence of the judiciary.

Reforms towards further institutional and budgetary independence

In 1997, then Minister for Justice Dullah Omar released a broad policy document titled *Justice Vision 2000*, which was meant to guide the management and functioning of the courts, including rationalising their jurisdictions among others.[32] However, very little practical change happened by way of such rationalisation.[33] Worse still, the little power that judges and magistrates had over the administration of the courts would be ripped from their hands under the justification that 'judges and magistrates do not have the necessary professional and administrative skills', that it 'distracts them from their judicial work', and that it 'undermines the separation of powers between the judiciary and the administration'.[34]

In 1999, President Thabo Mbeki was elected to office and appointed Dr Penuell Maduna as minister for justice. In 2001, still at the height of the South African government's positive relationship with the judiciary, the Minister for Justice initiated an amendment to the Constitution that would shift the title of chief justice from the head of the Supreme Court of Appeal to the head of the Constitutional Court. [35] This was part of the recognition of the Constitutional Court as the apex court. This meant that Justice Chaskalson became the first chief justice and head of the judiciary. He was succeeded in 2004 by his deputy, Justice Pius Langa as chief justice.

Around the same time, nascent discussions about the structure of the judiciary, particularly the governance and administration of the courts, were emerging. At the Judges Symposium in July 2003, then Constitutional Court Justice Sandile Ngcobo lamented the problems faced by the judiciary having its financing and administration sitting in the executive. In a wide-ranging address evocatively titled *'Delivery*

---

[32] Department of Justice and Constitutional Development, *Justice Vision 2000*.

[33] C Hoexter 'The structure of the courts' in C Hoexter, M Olivier (eds) *The judiciary in South Africa,* 2014, 12.

[34] Justice Vision 2000, 25.

[35] Substituted by Section 3 of the Constitution Seventeenth Amendment Act of 2012.

of justice: Agenda for change', Ngcobo drew attention to some of these problems, including the fact that judges have to rely on bureaucrats in the executive in order to receive basic tools of trade like stationery, accommodation, and personnel.

> As a result, the provision of administrative functions and other services connected with the administration of justice are bound up with the bureaucracy of the broader public service.[36]

Importantly, Ngcobo highlighted how little say the judges had in determining the funding and financing priorities of the judiciary and the courts. He stated:

> The court budget is a line item in the overall budget of the Department of Justice. For most courts the budget is prepared by officials of the Department who make their own assessment as to what the needs of the court are. In most cases the budget is prepared without consulting the various courts on their respective needs. When it becomes necessary to reduce the allocation of funds to various sections, including courts, the allocation is reduced by a uniform percentage. This percentage bears no relationship to the needs and priorities of the various sections within the Department. And this is done without consulting heads of courts.[37]

He then forcefully argued that the judiciary cannot be said to be a genuinely independent and autonomous branch of government if it is 'substantially dependent upon the executive branch not only for its funding but also for many features of its day-to-day functions and operations'.[38] Finally, he said that 'an executive-based court administration system compromises the independence of the judiciary, and… is not as effective or efficient in delivering services as other administration models in which the judiciary plays a key role'.

Then Minister for Justice Dr Penuell Maduna was also at the Judges Symposium, and while he did not respond directly to Ngcobo, he touched on some of the issues Ngcobo raised. In his remarks, the minister said,

> Although in the very long term we need to move to a situation of the judiciary controlling its own services and having its own budget, at present we do not have such resources and the Department provides such services to all courts. This is not contrary to judicial independence or separation of powers and

---

36 S Ngcobo 'Delivery of justice: Agenda for change', 689.

37 S Ngcobo 'Delivery of justice: Agenda for change', 690.

38 S Ngcobo 'Delivery of justice: Agenda for change', 690.

> functions. The fact that there are court managers also does not detract from this, as they operate under the control of the judicial head of the office.[39]

The debate clearly shows that there were differences in what the two stakeholders understood to be their role in judicial administration and the principle of judicial financial autonomy. The executive seemed content with retaining the status quo, while judges were clearly dissatisfied, and were bold enough to speak openly about it – which was unheard of at the time. Although there were no immediate ramifications for Ngcobo and the judiciary, the debate did seem to trigger action on the side of the executive.

In subsequent years, two pieces of draft legislation which could have had an impact on the structure of the courts were developed. Under the constitutional injunction to rationalise the courts[40] and affirm the principle of judicial independence, the Department of Justice introduced the Constitution Fourteenth Amendment Bill with a complementary Superior Courts Bill in 2005. The Bills aimed to explicitly affirm the chief justice as the head of the judiciary, 'responsible for maintaining the norms and standards for the exercise of judicial function of all courts other than adjudication of any matter before a court of law'.[41]

> In the memorandum to the Bill, the purpose of the Bill is to 'rationalise the various superior courts and the legislation applicable to them in order to establish a judicial system suited to the Constitution. It repealed the outdated Supreme Court Act, 1959 (Act No 59 of 1959), and the corresponding legislation of the former TBVC[42] states (Bantustans) [Transkei, Bophuthatswana, Venda and Ciskei]. It also consolidates the laws pertaining to the Constitutional Court, the Supreme Court of Appeal and the High Courts in a single Act of Parliament and, lastly, makes provision for the merging of the existing Labour Court and Labour Appeal Court with the (new) High Court of South Africa and the Supreme Court of Appeal, respectively.[43]

The Bills also aspired to maintain the 'Commonwealth model' of the separation of powers between judicial functions (for which the chief justice would be responsible) and administrative functions which the executive would be responsible for. Ironically, the Fourteenth Amendment Bill seemed more preoccupied with entrenching the role

---

39 P Maduna 'Address at the banquet of the Judicial Officer's Symposium', 667.

40 Item 16(6) of Schedule 6 to the Constitution of the Republic of South Africa, 1996.

41 Fourteenth Amendment Bill Clause 1.

42 Transkei, Bophuthatswana, Venda, and Ciskei.

43 Superior Courts Bill 52 of 2003.

of the minister for justice in the administration and financing of the judiciary.[44] Unsurprisingly, both Bills were met with strong objection from the organised legal profession but also withering academic criticism.[45] Jonathan Klaaren argues that this was in fact an attempt by the executive to effectively review the powers of the judiciary, particularly the Constitutional Court, and civil society and opposition parties opposed it.[46]

In 2012, the ruling African National Congress (ANC) consolidated its policy on transforming or transfiguring the judiciary, at a larger scale consideration of separation of powers from the perspective of the governing party. That very year, the ANC in the elective conference approved a recommendation which affirmed all arms of state as co-equal parties

> entrusted with distinct constitutional powers in their quest to realise the ideals of a democratic South Africa. Each branch of the state must therefore observe the constitutional limits on its own power and authority and that no branch is superior to others in its service of the Constitution.[47]

Although this was an adopted resolution, the ANC still considered the judiciary outside of governance in the 'Legislature and governance' policy document.

In the face of this resistance, the Department of Justice pulled both bills back and placed them on the backburner.

It is worth stating here that there were major political developments in the country. In December 2007, Mr Jacob Zuma, who had previously been dismissed as deputy president, was elected as president of the African National Congress, the ruling party at the time. In the subsequent months, the ANC's national executive 'recalled' then President Thabo Mbeki, forcing him to resign as president of South Africa in September 2008.

---

[44] Clause 1 states 'the Cabinet member responsible for the administration of justice exercises authority over the administration and budget of all courts'.

[45] See C Albertyn 'Judicial independence and the Constitution Fourteenth Amendment Bill' (2006) 22 *South African Journal of Human Rights,* 126; C Lewis 'Reaching the pinnacle: Principles, policies and people for a single apex court in South Africa' 21 *South African Journal of Human Rights*, (2005), 509.

[46] J Klaaren 'The transformation of the judicial system in South Africa, 2012-2013' 47 *George Washington International Law Review* (2015), 484-485.

[47] Republic of South Africa, Department of Justice and Constitutional Development, 'Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state' February 2012.

In 2009, Mr Zuma was elected as President of South Africa and appointed Mr Jeff Radebe as Minister for Justice. At the same time, the last remaining founding members of the Constitutional Court retired after serving the mandatory 15-year term. This included then Chief Justice Pius Langa. Following public interviews by the Judicial Service Commission, four new justices were appointed by President Zuma: Chris Jafta, Sisi Khampepe, Johan Froneman and Mogoeng wa Mogoeng. Justice Ngcobo was appointed as chief justice.

The Ngcobo reforms, and the creation of the Office of the Chief Justice

The problems with judicial administration and financing that Ngcobo had identified in 2003 still remained. At the Second National Judges Symposium held in July 2009, the judiciary, now led by Chief Justice Ngcobo, resolved that the judiciary should be empowered to administer the courts and its own budget.[48]

Around the same time, strong winds of change were blowing that would significantly change the structure of the courts and impact the financing of the judiciary. In 2010, the Department of Justice revived the two bills it had jettisoned in 2005, although the new versions of the Constitutional Amendment Bill and the Superior Courts Bill were redrafted to allay the concerns of the judiciary.[49] Shortly after, the Department also produced a policy framework document that set out its position on governance and administration.[50]

In 2010, there was a significant development that signalled the Zuma Government's intention to formally grant the judiciary some independence over the administration of the courts and financing of the judiciary. In August 2010, President Zuma signed a proclamation establishing the Office of the Chief Justice as a national department that would administer the courts and support the chief justice in their role as head of the judiciary in terms of Section 165 of the Constitution. Although it would take several years for the Office of the Chief Justice to be up-and-running as a fully-fledged entity, its legal establishment was nevertheless important.

---

48 Ebrahim, 'Governance and administration of the judicial system', 103.

49 Ebrahim, 'Governance and administration of the judicial system', 104.

50 Ebrahim, 'Governance and administration of the judicial system', 104.

In 2012, Minister Jeff Radebe released a *Discussion document on the transformation of the judiciary* as part of the executive's commitment to bring about national legislation and policy in terms of Item 16(6) of Schedule 6 of the Constitution that requires the rationalisation of the court system.[51] This was to be done by the Minister for Justice in consultation with the Judicial Service Commission. The document explored more than that; it discussed in detail the need for the judiciary to be independent and considered reforms on remodelling administration and judicial governance away from the purview of the executive. This was to be done through introduction of two Bills to Parliament: the Constitution Seventeenth Amendment Act, which was to formalise the chief justice as the head of the judiciary, and the Superior Courts Act, which proposed to rationalise the structure of the courts, creating a single High Court of South Africa and vesting powers and functions relating to court administration in the chief justice.

The document acknowledged the importance of judicial independence by citing the UN Basic Principles on the Independence of the Judiciary which assert that this includes: security of tenure, financial security, and institutional independence.[52] This is important for the judiciary to effectively ensure that it exercises its duty as the guardian of the Constitution in the public interest in limiting abuse of public power. Decisional and institutional independence is necessary for the public to see the courts as independent and able to carry out their day-to-day functions without interference by the executive.

However, the document still maintained a presence of the executive in the affairs of the judiciary by retaining some aspects of court administration, policy related matters and most importantly, the financing of the courts. The discussion document could not be read in isolation without considering the attempts to keep the judiciary as an extension of the executive. Part of executive resistance to a judiciary-led administration and governance is in part due to the ANC conference resolutions alluded to above. Such a reinvention required both the executive and the judiciary to grasp the cumbersome task of this process.[53]

---

[51] Department of Justice and Constitutional Development 'A discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State' February 2012, 11.

[52] Department of Justice and Constitutional Development 'A discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state', 11.

[53] Ebrahim, 'Governance and administration of the judicial system,' 102-103.

The new model meant that were the judiciary to completely move to a judiciary-based system of court administration, then most of the Department of Justice mandate and budget would be moved. This would require 'the establishment of administrative capacity within the judicial branch to assume authority that is currently vested in the executive'.[54]

Chief Justice Sandile Ngcobo viewed the judiciary as not entirely independent because of its dependence on the executive for administration and its budget. Ebrahim describes Ngcobo's vision for the judiciary's control over court administration and its budget as central to effective administration of justice.[55]

> In the judiciary-based model, the judiciary controls the administration of justice directly, or it does so indirectly through one or more independent institutions. The administration of justice thus functions independently from executive-based control, oversight and management… there is a broad agreement that a judiciary-based administration would be the most appropriate one for South Africa.[56]

To further the work of the judiciary, Ebrahim suggests that the judiciary-based model would also have an agency that would be responsible for court administration. This agency, much like the Auditor General, would source its funding through parliamentary appropriation outside the realm of the executive.[57]

The approach taken to lead to the eventual judiciary-led administration was tabled in three phases. In phase one, the Office of the Chief Justice would be established as a national department within the public service. This step aimed to assist the chief justice in their dual role as the head of the Constitutional Court and the head of the judiciary. Moving on to phase two, the Office of the Chief Justice would transition from a national department to an independent entity, similar to the Auditor General. This transition would grant more autonomy and authority to the Office of the Chief Justice. Finally, in phase three, the plan involved the creation of a structure that would facilitate a judiciary-led administration. The specifics of this structure were not explicitly mentioned, but it was envisioned as a means to ensure that the

---

54 Ebrahim, 'Governance and administration of the judicial system', 102-103.

55 Ebrahim, 'Governance and administration of the judicial system', 102-103.

56 Ebrahim, 'Governance and administration of the judicial system', 105.

57 Ebrahim, 'Governance and administration of the judicial system', 108-109. Also see, Judges Matter 'Discussion document on governance of the judiciary in South Africa', 2022.

judiciary played a prominent role in the administration of justice. These three phases aimed to strengthen the independence and effectiveness of the judiciary while upholding its crucial role in the legal system.

The Mogoeng Court, the Seventeenth Amendment to the Constitution, and the Superior Courts Act

The appointment of Justice Mogoeng Mogoeng as Chief Justice and head of the Constitutional Court in 2011 by President Jacob Zuma was widely perceived as a cold shoulder to the then Deputy Chief Justice, Dikgang Moseneke who was arguably more qualified, senior, and experienced to take the role of chief justice. However, the Mogoeng Court showed itself to be independent, and made a number of courageous decisions. Chief Justice Mogoeng also carried out the reform project of the judiciary.

In February 2013, Parliament passed two pieces of legislation that significantly restructured the judiciary towards independent control of the judiciary's administration and financing by judges themselves. These were the Seventeenth Amendment to the Constitution,[58] and the complementary Superior Courts Act.[59] Part of the most important of the changes brought on by the legislation was to designate the Constitutional Court as the apex court and final court of appeal on all matters of the law (and not just constitutional issues). The legislation also affirmed the chief justice as the head of the judiciary, responsible for the management of judicial functions.

To recap, in the pre-1994 era, as earlier observed, the judiciary was managed within the Department of Justice. The mandate was clear: parliament had supremacy and the judiciary was tasked with the literal interpretation of the law. The judiciary, as the third sphere of government, had no say over its budget, or staff appointments to ensure day-to-day functions. This was solely in the realm of the Department of Justice. This changed with the adoption of the final Constitution.

To set the tone for judicial independence, as accorded in the separation of powers and the rule of law, Chief Justice Mogoeng Mogoeng in his speech 'The implications of the Office of the Chief Justice for constitutional democracy in South Africa' arguing for a Judiciary-

[58] Constitution Seventeenth Amendment Act 72 of 2012.

[59] Superior Courts Act 10 of 2013.

led administration reminds the audience that 'just as there is no cabinet member responsible for Parliament, there should be none for the court administration structure led by the judiciary'.[60]

Constitutional Seventeenth Amendment Act

This Act was enacted to bring about Item 16(6)(a) of Schedule 6 of the Constitution to rationalise all courts in a new judicial system suited for the final Constitution, by making the Constitutional Court the apex court and amending Section 165 of the Constitution to make the chief justice the head of the judiciary who is responsible for judicial functions of all courts and monitoring of norms and standards that is vested with this power.

The amendment does not address the model of judicial governance but a simple reading of the Constitution sets the tone that judicial governance and administration should lie within the purview of an independent judiciary. What the Seventeenth Amendment did was lay the foundation for the Superior Courts Act[61] to pave a way forward for a new judiciary-led administration. Does the Superior Courts Act, in fact, do this?

Superior Courts Act

The preamble to the Superior Courts Act[62] addresses the constitutional imperative outlined in section 165 of the Constitution that judicial authority belongs to the judicial arm and that no person or organ of state should interfere with the functioning of the courts. This provision effectively mandates other organs of state through legislative and other means to ensure the independence, integrity and effectiveness of the courts. The vision is clear as stated in item 16(6)(a) of Schedule 6 of the Constitution, which this Act acknowledges, that rationalisation of the courts is an on-going mission to ensure a judicial system that is in line with the requirements of the Constitution.

---

60 Quoted by the former Chief Justice in Mogoeng Mogoeng, 'The implications of the Office of the Chief Justice for constitutional democracy in South Africa' Annual Stellenbosch Law Faculty Human Rights Lecture (University of Stellenbosch, Cape Town, 25 April 2013).

61 Act 10 of 2013.

62 Act 10 of 2013.

Section 8 of the Act entrusts the chief justice with judicial management of judicial functions by allowing the chief justice to convene forums to allow for establishing norms, standards and directives for the performance of judicial functions. This in practice has been with the heads of courts to assist the chief justice in attending to the management of the judiciary.

A perusal of the Act reveals that there is no default role of heads of courts with vested powers apart from the chief justice assembling a forum for performance of judicial functions. The Superior Courts Act does not centralise the role of the minister for justice as was done historically. But the minister's role in judicial administration and financial accountability remains extensive.

Section 11 of the Act vests the role of appointment of court personnel to further court administration and enable effective performance of judicial functions in the minister for justice. The heads of court can only exercise control over the personnel after their appointment by the executive. This provision is not compatible with the requirements of the Constitution in terms of Section 165. The judiciary has little or no say in appointments or even the determination of what is required for the proper functioning of court administration, which impedes their day-to-day functions. When it comes to establishing rules for the superior courts, the chief justice has to consult the minister for justice in terms of Section 30 of the Act for the Constitutional Court and in accordance with the Rules Board for Courts of Law Act for other superior courts.

Section 49 of the Act vests the governance and making of regulations in the minister, on advice of the chief justice, where it is deemed necessary for making regulations that deal with administrative functions of the courts or performance of judicial functions. The budgeting aspect, as stated above, is the role of the minister. The requests for funding for effectiveness of courts and administration are determined by the chief justice in consultation with the heads of court and considered and addressed by the minister for justice.

What is evident from the assessment of the Constitutional Seventeenth Amendment Act and the Superior Courts Act is their failure to bring about or even come closer to the realisation of a judiciary-led administration. Both the Acts took no heed of the proposals of the Chaskalson-Langa report commissioned by former Chief Justice Ngcobo on what system would best serve the judiciary in this current dispensation.

Nothing much is said about furthering the independence of the judiciary or breaking away the chokehold by the executive as forewarned by Ebrahim by not making any provision for a judiciary-led administration.[63] In her critique of the Superior Courts Act as a conduit for driving judicial governance, Powell explains that the Act failed to take this further by mentioning the role of the Office of the Chief Justice in this current setup and considering a judiciary-led administration and a Judicial Council, as a governing body.[64]

Instead, what the Act does is give scant powers and functions to the heads of courts but still retains the extensive role of the Ministry. Chief Justice Ngcobo called this executive-led court administration where the judiciary is 'substantially dependent on the executive branch not only for its funding but also for many features of its day-to-day functions and operations',[65] and is possibly unsustainable in delivering services that the judiciary is constitutionally mandated to.

Chief Justice Mogoeng Mogoeng expressed himself on the frustration the judicial arm of government experiences when it comes to taking control of its own affairs. He noted that the other two arms of government have their own vote accounts, in that they are bestowed powers to determine their administrative support and effectively decide how they go about their business within the Constitution, but the judiciary is not extended this courtesy.

> The judiciary in this country has over the years looked very much like a unit within or an extension of the Department of Justice and Constitutional Development. It had no say on any major project intended to improve the efficiency and effectiveness of the courts, no control over the budget, very little if any say on the IT that could best serve its needs, the appointments of the limited support staff the Judiciary has been assigned by the Executive.[66]

Presenting the frustration and difficulty the Judiciary experiences, former Chief Justice Mogoeng Mogoeng said that the 'virtual non-existence of institutional independence perceived to be in conflict with

---

63 Ebrahim, 'Governance and administration of the judicial system'.

64 Powell, 'Judicial independence and the Office of the Chief Justice', 500.

65 Quoted by the former Chief Justice Mogoeng Mogoeng, 'The implications of the Office of the Chief Justice for constitutional democracy in South Africa' Annual Stellenbosch Law Faculty Human Rights Lecture (University of Stellenbosch, Cape Town, 25 April 2013).

66 Mogoeng Mogoeng, 'The implications of the Office of the Chief Justice for constitutional democracy in South Africa'.

the Constitution has also presented a whole range of practical challenges to the Judiciary'.

Oxtoby details the resourcing issues judges are facing in the day-to-day performance of their duties found in the 2022 State of Judiciary report by the Democratic Governance and Rights Unit. The problems include lack of access to tools of trade, with 'insufficient online resources and poor digital infrastructure being raised prominently'.[67] The State of Judiciary report[68] paints a glaring picture of what the Judiciary is facing with expired software licences, suspended online services, internet security and unsuitable building infrastructure. These issues around governance and administration were supposed to be attended to with the inception of the Office of the Chief Justice.

The establishment of the Office of the Chief Justice was a political compromise between the judiciary and the Executive. Why a political compromise? The Office of the Chief Justice is not a creature of statute but rather a creation of regulation by means of a Presidential Proclamation in terms of the Public Services Act in 2010. This move was intended to be a temporary arrangement, moving away from an executive-controlled court administration to a judiciary-led administration.

Ebrahim explains that the intention behind the creation of the Office of the Chief Justice was to ensure that capacity was built to allow for the Chief Justice to be able to attend to the burgeoning functions accorded to him/her by the Constitution and the Superior Courts Act – the dual role of being the head of the Constitutional Court and the head of the Judiciary.[69] Ebrahim notes what seems to be the 'permanence' of the structure of the Office of the Chief Justice, a direct departure from the proposed policy and strategy contemplated by the judiciary.[70] First, the Office of the Chief Justice was intended to be established as a national department to support the Chief Justice in their dual role and the second phase was instructive that the Office of the Chief Justice was to be transformed into an independent entity, just as the Auditor General, and the final phase be a complete judiciary-led administration.

---

67 C Oxtoby 'Give those judges a Bell's - and resources, reform and recourse' *Business Day*, 15 May 2022.

68 Democratic Governance and Rights Unit 'The state of judiciary in Malawi, Namibia and South Africa' April 2022.

69 Ebrahim, 'Governance and administration of the judicial system', 114.

70 Ebrahim, 'Governance and administration of the judicial system'.

The Office of the Chief Justice, in its current form, oversees the bulk of administration that was in the realm of the executive such as judicial court services, case flow management and public communication. Even though the minister for justice is responsible for the appointment of court officials and personnel in terms of the Superior Courts Act, the management of the personnel is within the Office of the Chief Justice through delegation by the minister. When considering this theoretical framing of what court administration is, there has been a transfer from the Department of Justice and Constitutional Development to the Office of the Chief Justice to account for some institutional independence as mentioned in the *De Lange*, *Valente* and *Reference re Public Sector Pay Reduction Act* discussed above.

Powell laments that 'there is no regulation how these functions are to be managed or how the persons to monitor judicial officers' fulfilment of their responsibilities are to do so'.[71] She notes that the Office of the Chief Justice is still a national government department and has not advanced to an agency entity just like the Auditor General as contemplated in the three-stage approach.[72] She argues that what the current system symbolises is the conflation of institutional independence with 'the notion of administrative independence' which the Office of the Chief Justice has taken over.[73]

The legislative framework for financing of the judiciary

The finances of the Judiciary are based on the Constitution and various pieces of legislation. However, the Constitution does not provide specifics in relation to the finances and budget of the judiciary, it is the other pieces of legislation which make extensive provision for the finances and budget of the judiciary.

The Superior Courts Act, 2013[74] regulates the allocation of financial resources of the Office of the Chief Justice and designates the Secretary General as the Accounting Officer. In addition to the Superior Courts Act, the Public Finance Management Act, 1999 (Act 1 of 1999) regulates the financial management for national government departments (the Office

---

71 Powell, 'Judicial independence and the Office of the Chief Justice', 500.

72 Powell, 'Judicial independence and the Office of the Chief Justice', 500.

73 Powell, 'Judicial independence and the Office of the Chief Justice', 510.

74 Act 10 of 2013.

of the Chief Justice is a national government department). Further, the Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001) deals with the remuneration and employment conditions of judges. These are the various pieces of legislation which will be considered closely in relation to the constitutional and legal framework of the finances and budget of the judiciary.

Section 176 of the Constitution of the Republic of South Africa, 1996, makes provision for the terms of office and remuneration of judges. This section 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'.[75] The Constitution also provides that '[o]ther judges hold office until they are discharged from active service in terms of an Act of Parliament.'[76] Most importantly in relation to the finances of the judiciary, the Constitution also provides that '[t]he salaries, allowances and benefits of judges may not be reduced'.[77]

The objects of the Superior Court Act 2013, are

> to consolidate and rationalise the laws pertaining to Superior Courts as contemplated in item 16(6) of Schedule 6 of the Constitution;[78] to bring the structure of the Superior Courts in line with the provisions of Chapter 8 and the transformation imperative of the Constitution;[79] and to make provision for the administration of judicial functions of all courts, including governance issues over which the Chief Justice exercises responsibility.[80]

The Superior Courts Act must be read in conjunction with Chapter 8 of the Constitution. Chapter 8 of the Constitution 'contains the founding provisions for the structure and jurisdiction of the superior courts, the appointment of judges of the superior courts and matters related to the superior courts'.[81] The provisions of the Superior Courts Act relating to Superior Courts other than the Constitutional Court, the Supreme Court of Appeal or the High Court of South Africa, are complementary to any

---

75 Section 176(1), Constitution of South Africa, 1996.
76 Section 176(2), Constitution of South Africa, 1996.
77 Section 176(3), Constitution of South Africa, 1996.
78 Section 2(1)(a), Superior Courts Act, 2013.
79 Section 2(1)(b), Superior Courts Act, 2013.
80 Section 2(1)(c), Superior Courts Act, 2013.
81 Section 2(2), Superior Courts Act, 2013.

specific legislation pertaining to such other Courts, but in the event of conflict between the Superior Courts Act and such other legislation, such other legislation must prevail.

The Superior Courts Act specifically makes provision for finances in relation to the Superior Courts. The Act states that '[e]expenditure in connection with the administration and functioning of the Superior Courts must be defrayed from moneys appropriated by Parliament'.[82] In addition to this provision in the Superior Courts Act, the Act also makes provision for financial accountability in relation to the Courts. In terms of the Act, the Minister for Justice and Constitutional Development 'must consider and address requests for funds needed for the administration of the Superior Courts, as determined by the Chief Justice after consultation with the other heads of Court, in the manner prescribed for the budgetary processes of departments of state'.[83]

Further,

> [t]he Secretary-General, as accounting officer of the Office of the Chief Justice in terms of the Public Finance Management Act, 1999 (Act No 1 of 1999), is charged with the responsibility of accounting for money received or paid out for or on account of the administration and functioning of the Superior Courts, and must cause the necessary accounting and other related records to be kept, in terms of that Act.[84]

The Public Finance Management Act, 1999 (PFMA)[85] regulates financial management for national government departments. The object of the Public Finance Management Act 'is to secure transparency, accountability and sound management of revenue, expenditure, assets and liabilities of the institutions to which this Act applies'.[86]

The Office of the Chief Justice was proclaimed a national government department in terms of the Public Service Act, 1994 (Proclamation 103 of 1994), which provides for the organisation and administration of the Public Service. Therefore, the Office of the Chief Justice functions as a public service department with its own budget vote and the Public Finance Management Act applies to the Office of the Chief Justice.

---

82 Section 10, Superior Courts Act, 2013.

83 Section 54(1), Superior Courts Act, 2013.

84 Section 54(2), Superior Courts Act, 2013.

85 Act 1 of 1999.

86 Section 2, Public Finance Management Act, 1999.

Chapter 5 of the Public Finance Management Act makes provision for departments and constitutional institutions, specifically for the appointment of accounting officers. 'Every department and every constitutional institution must have an accounting officer.'[87] '[T]he head of a department must be the accounting officer of the department;[88] and the chief executive officer of a constitutional institution must be the accounting officer of that institution.'[89] 'The relevant treasury may, in exceptional circumstances, approve or instruct in writing that a person other than the person mentioned in subsection (2) be the accounting officer'.[90] 'The employment contract of an accounting officer for a department, trading entity or constitutional institution must be in writing and, where possible, include performance standards. The provisions of Section 38 to 42, as may be appropriate, are regarded as forming part of each such contract'.[91]

The accounting officer for a department, trading entity or constitutional institution must ensure that the department, trading entity or constitutional institution has and maintains the following:

- An efficient, effective and transparent system of financial and risk management, and internal control.
- A system of internal audit, directed and controlled by the audit committee which complies and operates in accordance with the instructions and regulations, as prescribed by Sections 76 and 77.
- An appropriate provisioning and procurement system that is fair, transparent, equitable, cost-effective and competitive.
- A system which thoroughly evaluates all major capital projects before a final decision on the project is taken.

It further provides that the accounting officer for the trading entity, department, or constitutional institution is responsible for the efficient, effective, transparent and economical use of resources of the department, constitutional institution, and trading entity. The accounting officer must take the appropriate and effective steps to 'collect all money due' to said department, constitutional institution, and trading entity. Further, they

87 Section 36(1), Public Finance Management Act, 1999.
88 Section 36(2)(a), Public Finance Management Act, 1999.
89 Section 36(2)(b), Public Finance Management Act, 1999.
90 Section 36(3), Public Finance Management Act, 1999.
91 Section 36(5), Public Finance Management Act, 1999.

must prevent irregular, unauthorised, fruitless, and wasteful losses and expenditure resulting from criminal conduct. They must also manage available working capital economically and efficiently.

Further, the accounting officer 'must promptly consult and seek the prior written consent of the National Treasury on any new entity which the department or constitutional institution intends to establish or in the establishment of which it took the initiative'[92]; and must comply, and ensure compliance by the department, trading entity or constitutional institution, with the provision'[93] of the Public Finance Management Act.

The accounting officer also has important responsibilities relating to budgetary control. 'The accounting officer for a department is responsible for ensuring that expenditure of that department is in accordance with the vote of the department and the main divisions within the vote';[94] and 'effective and appropriate steps are taken to prevent unauthorised expenditure.'[95]

The accounting officer must 'take effective and appropriate steps to prevent any overspending of the vote of the department or a main division within the vote'.[96] The accounting officer must 'report to the executive authority and the relevant treasury any impending under collection of revenue due';[97] 'shortfalls in budgeted revenue';[98] and 'overspending of the department's vote or a main division within the vote'.[99]

The Judges' Remuneration and Conditions of Employment Act[100] applies to all Constitutional Court justices and to all other judges who are in permanent and acting positions and who are in active and non-active service. 'Any person who holds office as a Constitutional Court judge or as a judge, whether in acting or permanent capacity, shall in respect thereof, in addition to the amounts referred to in section 13 and an allowance of R3 500 per annum, be paid an annual salary at

---

92 Section 38(1)(m), Public Finance Management Act, 1999.
93 Section 38(1)(n), Public Finance Management Act, 1999.
94 Section 39(1)(a), Public Finance Management Act, 1999.
95 Section 39(1)(b), Public Finance Management Act, 1999.
96 Section 39(2)(a), Public Finance Management Act, 1999.
97 Section 39(2)(b)(i), Public Finance Management Act, 1999.
98 Section 39(2)(b)(ii), Public Finance Management Act, 1999.
99 Section 39(2)(b)(iii), Public Finance Management Act, 1999.
100 Act 27 of 2001.

a rate determined by the President by proclamation in the *Gazette*.'[101] 'The amount of the annual salary and allowance payable…shall not be taxable, unless Parliament expressly provides otherwise'.[102] 'The amount of the annual salary and allowance payable… shall be paid as a direct charge against the National Revenue Fund'.[103]

In addition to the annual salary and allowances due to Constitutional Court justices and other judges, a motor vehicle may be made available.

> A motor vehicle owned by the state may, on such conditions as the minister may determine with the concurrence of the Minister for Transport, be made available to any person who holds office as a Constitutional Court judge or judge in a permanent or acting capacity, whether he or she performs active service or service, for use, in accordance with the conditions so determined, in the course of his or her official functions as well as for his or her private purposes.[104]

In relation to the methods of payment of the salaries, allowances and benefits, these 'shall be paid as a direct charge against the National Revenue Fund and on such dates and in such manner as the Minister may from time to time determine'.[105] Further, '[t]he Director-General: Justice and Constitutional Development shall, subject to the directions of the Minister, be charged with the general administration of this Act'.[106]

The judiciary and courts are paid for out of the National Revenue Fund, which is created by the Constitution.[107] Money is withdrawn from the National Revenue Fund either by an act of Parliament, or as a direct charge on the Fund, where that is provided for in the Constitution or an Act of Parliament. The Judges' Remuneration and Conditions of Employment (Act 47 of 2001) provides the framework for remuneration of superior court judges, which is determined by the president after taking into consideration the recommendations of the Independent Commission for the Remuneration of Public Office Bearers.[108]

The Appropriations Bill and Division of Revenue Bill are passed annually, and provide for the budget of the Department of Justice, the

---

101 Section 2(1), Judges' Remuneration and Conditions of Employment Act, 2001.
102 Section 2(4), Judges' Remuneration and Conditions of Employment Act, 2001.
103 Section 2(5), Judges' Remuneration and Conditions of Employment Act, 2001.
104 Section 12, Judges' Remuneration and Conditions of Employment Act, 2001.
105 Section 15, Judges' Remuneration and Conditions of Employment Act, 2001.
106 Section 14, Judges' Remuneration and Conditions of Employment Act, 2001.
107 Section 213, Constitution of the Republic of South Africa, 1996.
108 Ebrahim, 'Governance and administration of the judicial system' 208.

Department of Public Works, and the Office of the Chief Justice, all of which play a role in funding magistrates and superior court judges. Each budget is part of an ongoing three-year plan called the Medium-Term Expenditure Framework (MTEF). Planned expenditure for the year immediately ahead (year 1 of the MTEF cycle) is fixed while the two years after that (years 2 and 3 of the cycle) are revised in the next budget cycle.

The Department of Justice Budget Vote funds the activities and operations of various regional and district courts. 'Regional courts adjudicate serious criminal and civil matters, whereas district courts adjudicate less serious civil and criminal cases. There are roughly 2 147 district and regional courts in South Africa'.[109] It also funds Facilities Management, which provides for 'the provision of accommodation for courts and justice service delivery points, including the construction of new and additional accommodation, and the leasing of privately owned premises for use by the department'.[110]

The Office of the Chief Justice Vote funds superior courts, the Supreme Court of Appeal and the Constitutional Court, and the specialised courts. These are the Labour Court, the Labour Appeal Court, the Land Claims Court, the Competition Appeal Court and the Electoral Court. These courts adjudicate various types of matters excluded from the jurisdiction of the various high court divisions and lower courts.[111]

The salaries of the superior court judges and magistrates are reflected in this budget as a direct charge on the National Revenue Fund.[112] This is in terms of the Public Finance Management Act Schedule 5, which lists the Judges' Remuneration and Conditions of Employment Act, 1989 (Act 88 of 1989) and the Magistrates Act, 1993 (Act No 90 of 1993) (covering remuneration of magistrates in terms of Section 12) as being legislation which creates such a direct charge.

---

109 National Treasury 'Budget 2022 estimates of national expenditure' 2022, 446.

110 National Treasury 'Budget 2022 estimates of national expenditure' 2022, 446.

111 National Treasury 'Budget 2022 estimates of national expenditure', 458.

112 National Treasury 'Budget 2022 estimates of national expenditure', 454.

The effects of sourcing the infrastructural needs of the courts on the independence of the judiciary

As mentioned, the relationship between the executive and the judiciary is vital to establishing the full independence of the judiciary.[113] The judiciary cannot be substantially dependent on the executive branch of government for day-to-day functions and services. However, certain issues of access to justice, such as court infrastructure, distances travelled to courts, accommodation, and supporting legal infrastructure, can only be provided by the Department of Public Works and Infrastructure.[114]

The mandate of the Department of Public Works is primarily to provide the adequate infrastructure for implementing quality services for the public good, and to address the ever-increasing needs across the country which include court buildings, and court accommodation services.[115]

Most litigants in rural areas have to travel long distances, sometimes up to 1-2 hours at a huge cost, to access the nearest court.[116] In addition, court buildings are unsafe, inside and outside the courts. This can be attributed to court buildings that are inadequate and falling apart.[117] In terms of physical safety, there is a lack of security personnel and police protection for litigants and court personnel, and as a result, a large number of litigants felt safer outside the courts.[118] Furthermore, due to high temperatures and no air conditioning, electricity and water in the courts, both the chambers and the courtrooms are extremely hot and uncomfortable. This affects the functioning of the courts leading to failure to hear and deliver cases timeously, and unfairly prejudices witnesses who give testimonies as the stress and discomfort affects their ability to recall facts properly.[119]

---

113 Oxtoby, 'Judicial governance in South Africa,' 6.

114 Republic of South Africa, Department of Public Works and Infrastructure, *2020-2025 Strategic Plan*, March 2020.

115 Department of Public Works and Infrastructure, *2020-2025 Strategic Plan*, 9.

116 Interim report of the Committee on the rationalisation of areas under the jurisdiction of the divisions of the High Court of South Africa and judicial establishments (Moseneke High Court rationalisation report), 15 November 2022, 61; Democratic Governance and Rights Unit 'The state of judiciary in Malawi, Namibia and South Africa', 52.

117 Moseneke High Court rationalisation report, Appendices chapter, 189-246.

118 Democratic Governance and Rights Unit 'The state of judiciary in Malawi, Namibia and South Africa', 52-55, 108.

119 Democratic Governance and Rights Unit 'The state of judiciary in Malawi, Namibia and South Africa', 108.

Additionally, one of the prominent resource needs is digital infrastructure.[120] Judicial officers are unable to access basic online resources for legal research and writing.[121] The lack of digital infrastructure is a glaring issue that affects the efficiency of judicial officers.[122] Judicial officers are unable to access basic up-to-date online resources for legal research and case writing and finalisation.[123] This affects the delivery, finalisation and the quality of judgments. It became even more pressing under the Covid-19 lockdown in 2021. Not only does this make the work of judicial officers more cumbersome, it also increases the vulnerability of the institution in that draft judgments, e-mails, and communication face security breaches. In addition, the lack of network and internet connection in courts affects the reliability and the quality of judicial writing. As a result, many judicial officers have to rely on internet access in their homes, or from others.[124]

These issues can only be fixed by the creation of more courts, accommodation, refurbishments and renovations of the courts.[125] This falls squarely in the realm of public works, as it is the only department that is legislatively and financially authorised to take on this mandate.[126] This undeniably affects both individual and institutional judicial independence, in that the infrastructural issues not only affect the functioning of the court physically, but also affect court hours, leading to delays in delivering judgments, and impairing the ability to access and receive justice.[127]

Individual independence is not just the capacity to write and deliver judgments without fear, favour, or prejudice, but also requires the ability to do so.[128] Institutional independence is also therefore compromised in

---

120 Oxtoby, 'Judicial governance in South Africa'; Democratic Governance and Rights Unit 'The state of judiciary in Malawi, Namibia and South Africa'.

121 Oxtoby, 'Judicial governance in South Africa' 14.

122 Oxtoby, 'Judicial governance in South Africa'; Democratic Governance and Rights Unit 'The state of judiciary in Malawi, Namibia and South Africa' April 2022.

123 Oxtoby, 'Judicial governance in South Africa' 14.

124 Oxtoby, 'Judicial governance in South Africa,' 14.

125 Democratic Governance and Rights Unit 'The state of judiciary in Malawi, Namibia and South Africa', 107.

126 Department of Public Works and Infrastructure, *2020-2025 Strategic Plan*, 17; Infrastructure Development Act, 2014 (Act 23 of 2014); Schedules 4, 5 and 6 of the Constitution.

127 Oxtoby, 'Judicial governance in South Africa,' 7; Democratic Governance and Rights Unit 'The state of judiciary in Malawi, Namibia and South Africa', 55.

128 Oxtoby, 'Judicial governance in South Africa,' 7.

that the extent to which the judiciary has financial control of the court and adjudicative functions is affected by the state's budget and polices. Considering that these issues directly affect the functioning of the judiciary, it means that the judiciary can never be fully divorced from the executive branch as the judiciary again depends on the executive for financing court resources. This has severe implications for judicial independence, and could be manipulated into financial dependence.[129]

Analysis of the budgets and expenditure of the Judiciary in South Africa

The purpose of this section is to analyse whether the determination of the budget and remuneration for the judiciary is in any way impacted by factors that would tend to undermine the independence of the judiciary.

Department of Justice

When looking at the share of budget per programme for the Department of Justice, the programme that gets the greatest share of the budget is court services (ranging from 32 percent to 36 percent), followed by the National Prosecuting Agency (ranging from 19 percent to 20 percent), then Auxiliary and Associated Services (ranging from 16 percent to 19 percent). Administration receives the lowest share of the budget (ranging from 10 percent to 12 percent). Magistrates' salaries account for a similar share of the budget to administration (10 percent to 11 percent).

In nominal terms, the Department of Justice budget has been increasing over time. In most of the years depicted, the spending was less than the budgeted amount. In 2011/12 and 2018/19, the spending exceeded the budgeted amount. (Figure 1)

[129] Rawheath, 'Independent and effective adjudication in the lower courts of South Africa' 71 and 91.

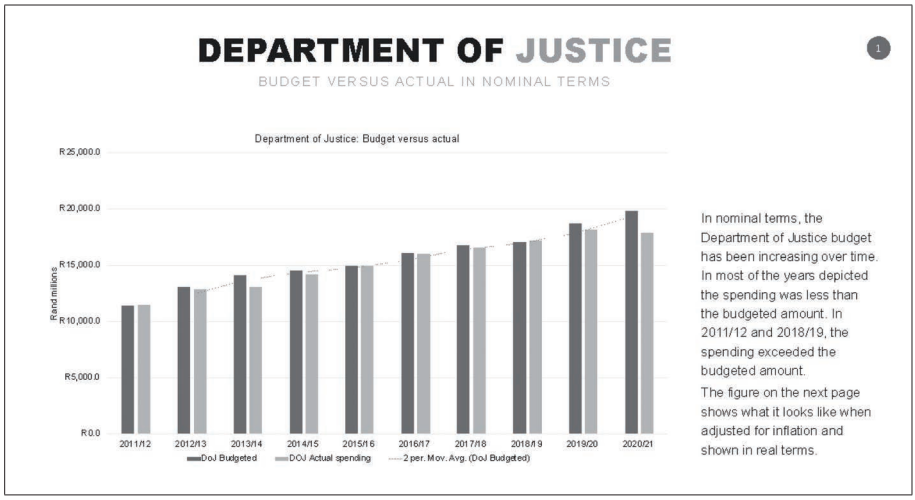


Figure 1.

We were alert to the question as to whether the spending had kept pace with inflation. In Figure 2 below, we adjust for inflation. The Department of Justice budget versus actual spending is adjusted for inflation and shown in real-terms. What can be seen is that the Department of Justice's budget is growing in real-terms. There are some years in which the actual spending is lower than the budgeted amount.

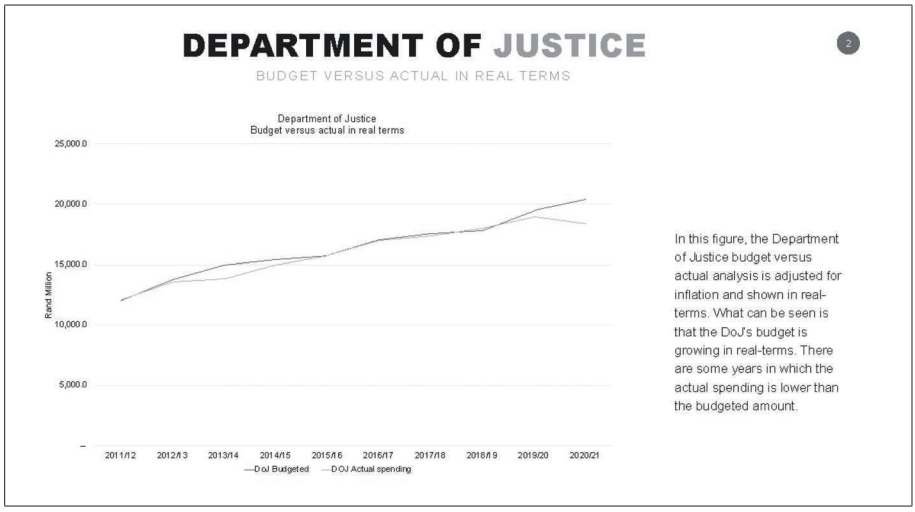
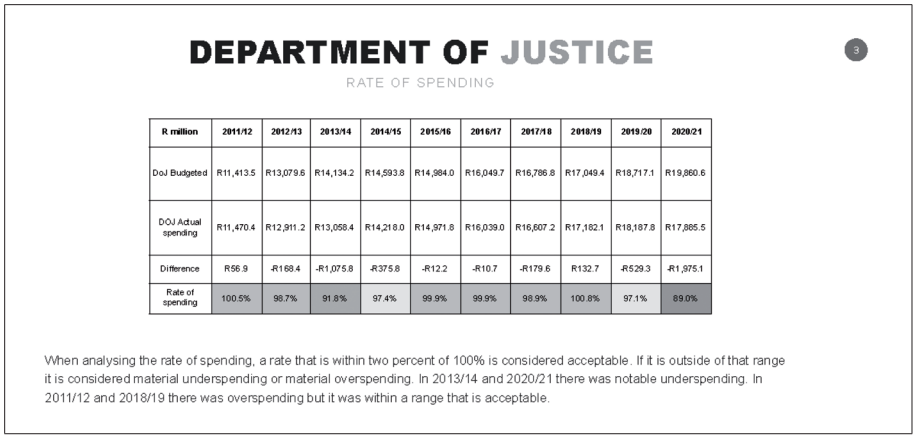


Figure 2.

We notice that in the financial years 2019/2020 and 2020/2021 the actual spending was lower than budgeted for. When analysing the rate of spending, a rate that is within two percent of 100 percent

is considered acceptable. If it is outside of that range, it is considered material underspending or material overspending. In 2020/21 there was notable underspending, but COVID-19 was prevalent in South Africa during those years, and we would expect to see less than 100 percent of the budget spent. We show in Figure 3 the rate of spending in the Department of Justice.



DEPARTMENT OF JUSTICE

RATE OF SPENDING

3

R million	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21
DoJ Budgeted	R11,413.5	R13,079.6	R14,134.2	R14,593.8	R14,984.0	R16,049.7	R16,786.8	R17,049.4	R18,717.1	R19,860.6
DOJ Actual spending	R11,470.4	R12,911.2	R13,058.4	R14,218.0	R14,971.8	R16,039.0	R16,607.2	R17,182.1	R18,187.8	R17,885.5
Difference	R56.9	-R168.4	-R1,075.8	-R375.8	-R12.2	-R10.7	-R179.6	R132.7	-R529.3	-R1,975.1
Rate of spending	100.5%	98.7%	91.8%	97.4%	99.9%	99.9%	98.9%	100.8%	97.1%	89.0%

When analysing the rate of spending, a rate that is within two percent of 100% is considered acceptable. If it is outside of that range it is considered material underspending or material overspending. In 2013/14 and 2020/21 there was notable underspending. In 2011/12 and 2018/19 there was overspending but it was within a range that is acceptable.

Figure 3.

Office of the Chief Justice

In nominal terms, the Office of the Chief Justice's budget has been increasing over time. In the most recent financial years the increase has been more gradual. (Figure 4)

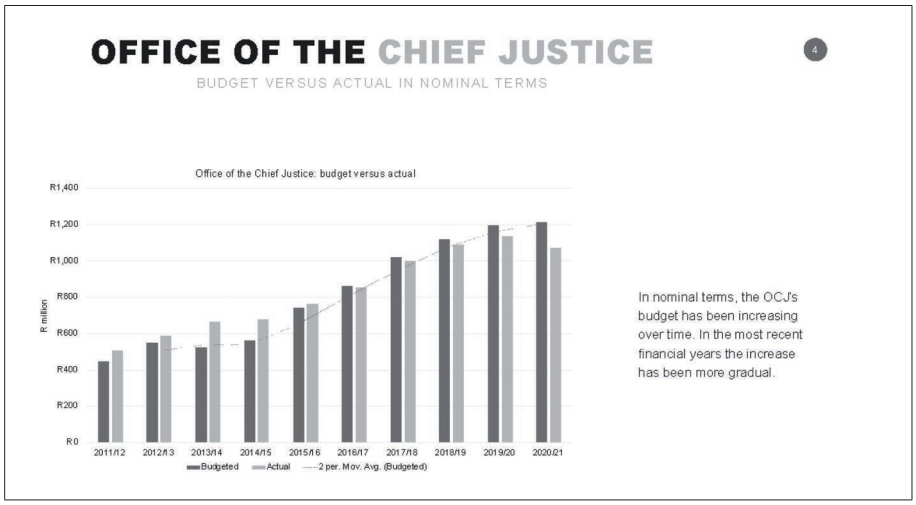


Figure 4.

At this stage, we can say that we do not see any dramatic shifts downwards in the budgets of the Department of Justice or the Office of the Chief Justice.

This may not indicate that each judge's salary is increasing, as it can also imply an increase or decrease in headcount. To determine what is happening at the individual salary level requires analysis at that level. The headcount for the higher courts has remained consistent over time. However, if we adjust for inflation, we can see that the salaries remain at the same value, until 2020. (Figure 5) There have been 0% increases over the last 2 years which explains the downward trend over the last 2 years.

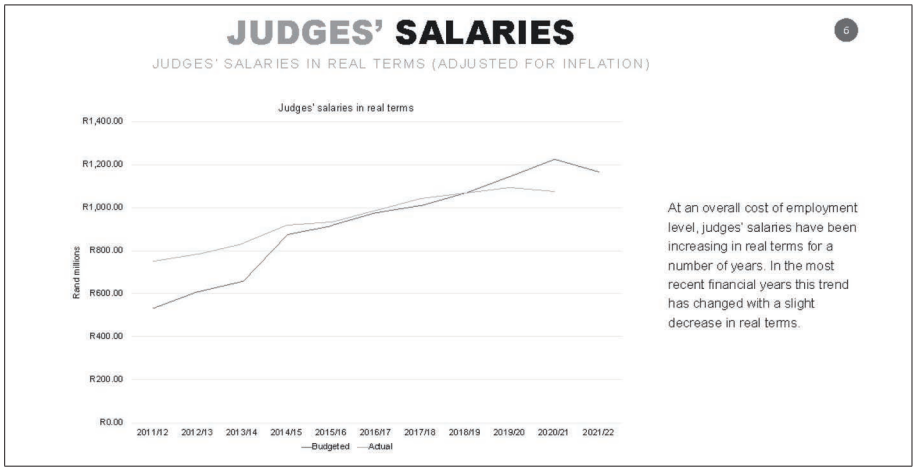


Figure 5.

The bulk of the work of the courts takes place at the level of the magistracy. Here too we find that in nominal terms, the department's budget for magistrates' salaries has been increasing over time. This may not indicate that each magistrate's salary is increasing, it can also imply an increase in headcount. To determine what is happening at the individual salary level requires analysis at that level.

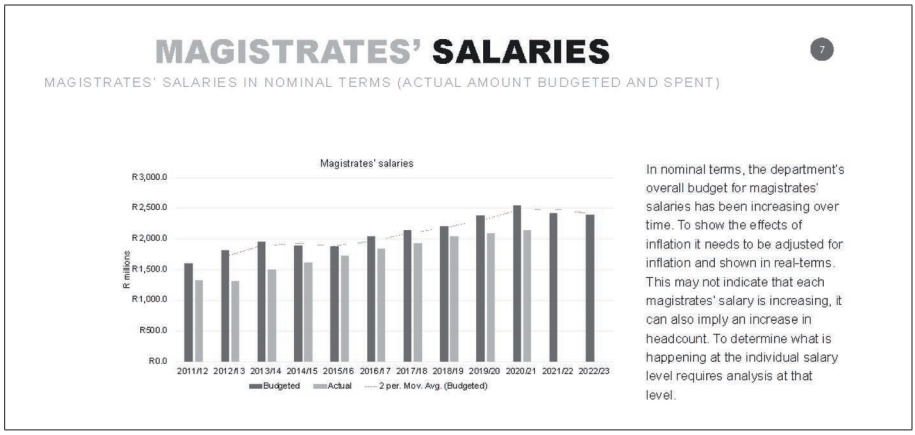


Figure 6

To show the effects of inflation, it needs to be adjusted for inflation and shown in real-terms, as in Figure 7.

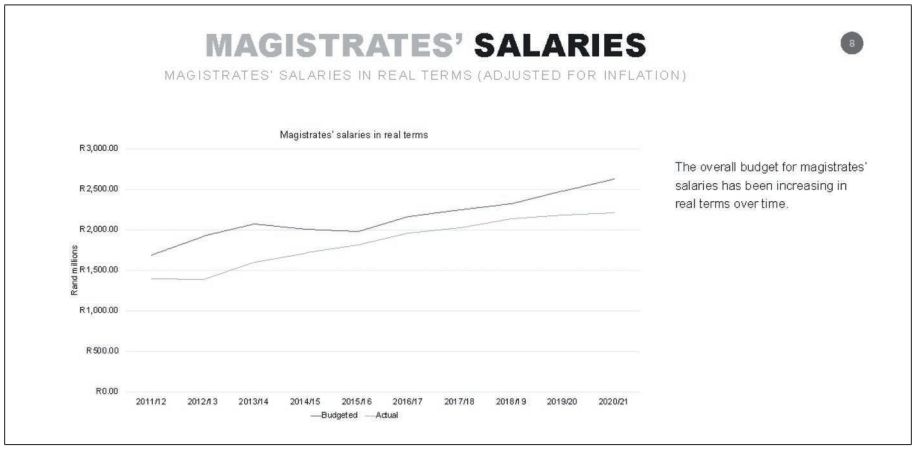


Figure 7.

It does appear that the salary for magistrates has increased over time.

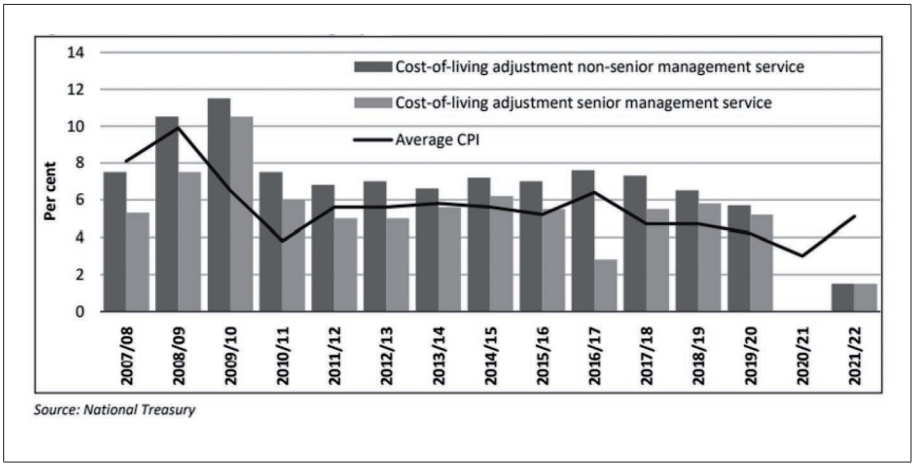
In conversation with magistrates themselves, they express a lack of satisfaction with their working conditions. The Democratic Governance Research Unit (DGRU) conducted a survey in 2019 of magistrates, in order to try and gauge the views, attitudes and experiences of the more than 2000 magistrates that work across 1886 courts in South Africa.

The survey included 48 questions and was administered online using Survey Monkey.[130]

One of the complaints about the current system is the delay in adjusting pay to increased living expenses. It was outside the purview of this study to determine the proper level of compensation, but it is nonetheless important to provide some background for magistrates' perceptions of their existing level of compensation. Magistrates make significantly more money than the typical South African worker in the formal, non-agricultural sector, who makes about R257 000 annually (*Business Tech*, 2019; *The Presidency of South Africa*, 2018). Magistrates make between R971 649 (magistrate) and R1 436 913 (special grade chief / regional magistrate).

However, in this study DGRU also found that 'a senior associate at a South African law firm earns approximately R900 000 per year. A litigation specialist and deputy director of public prosecutions earns more than R1.9 million a year, and a judge in the High Court earns almost R1.9 million a year'.[131]

We can theorise that it is not the absolute level of pay that is a concern, but pay relative to what can be seen as equivalent work. It is also true that public servants have received above CPI cost of living adjustments over several years, as shown in Figure 11.



Source: National Treasury

[130] Democratic Governance and Rights Unit, '2019 survey of South African magistrates' perception of their work environment' August 2020, 3.

[131] Democratic Governance and Rights Unit, '2019 survey of South African magistrates' perception of their work environment' August 2020, 39.

What is certainly true is that magistrates perceive themselves to carry a heavy workload in highly unsatisfactory conditions.

Their terms and conditions are managed by the Independent Commission for the Remuneration of Public Office-Bearers. In terms of Sections 219(1), (2) and (5) of the Constitution, read with Sections 8(4) and (5) of the Independent Commission for the Remuneration of Public Office-Bearers Act, 1997 (No 92 of 1997) (Commission Act), the Independent Commission for the Remuneration of Public Office Bearers (Commission) is mandated to make annual recommendations relating to the salaries and/or the upper limits of the salaries, allowances, benefits, and resources required by Public Office Bearers (POBs) to enable them to perform their respective duties effectively. The Chief Justice makes submissions through the Heads of Court Committee on Judges remuneration (Committee) on how salaries should be increased. The Lower Courts Remuneration Committee (LCRC) also makes submissions.

The question of course must be asked whether the actual establishment of judges has grown in line with the need for their services. This is currently being addressed in South Africa by the former Deputy Chief Justice Dikgang Moseneke by matching high court jurisdictions with municipal and magisterial boundaries and taking population densities into consideration. The High Court Rationalisation Committee, which is led by former Deputy Chief Justice Dikgang Moseneke, hopes to improve access to justice.[132]

Conclusion

The scope of work of our judiciary has increased exponentially since the transition to democracy. A concomitant increase in the resources allocated to the judiciary has followed. There is no doubt that the funding of the judiciary must be considered as part of the discussion on an independent judiciary. The evidence presented shows that the financial resources allocated to the judiciary have a direct impact on its ability to deliver justice efficiently and effectively. Therefore, it is essential to ensure sufficient funding and resource allocation to maintain a well-functioning judiciary.

---

[132] Moseneke High Court rationalisation report.

We have attempted to show that there have been changes made to the judicial structures and operations which have been undertaken to promote transformation in a democratic South Africa, creating a bridge from the culture of the past to one of justification for the use of state power. These changes have been made with the independence of the judiciary as a goal, and many of the preliminary steps taken have moved South Africa to a judiciary-led administration in practice and in theory, especially with the creation of the Office of the Chief Justice. Additionally, the Mogoeng Court, the Seventeenth Amendment to the Constitution, and the Superior Courts Act have played pivotal roles in shaping the judiciary's functions and structure.

These legislative and other measures have aimed to strengthen judicial accountability, promote transparency, and streamline court operations. The mechanisms for an independent judiciary in the Constitution, including a public appointments process, a robust conduct process, separation of powers and the salaries of judges, ring-fenced as we have described, we would argue have created the underpinnings of an independent judiciary. Additionally, the Mogoeng Court, the Seventeenth Amendment to the Constitution, and the Superior Courts Act have played pivotal roles in shaping the judiciary's functions and structure. These measures have aimed to strengthen judicial accountability, promote transparency, and streamline court operations.

This chapter delves into the intricate realm of financing and budgeting within the South African judiciary. Through a comprehensive analysis encompassing historical and legal contexts, the evolving constitutional framework, initiatives fostering institutional independence, and the legislative underpinnings of financing, we have gleaned significant insight into the challenges and advancements within this pivotal domain. Notably, our scrutiny reveals that actual spending on the judiciary, encompassing salaries, has not been deliberately diminished to a level suggestive of a calculated effort to compromise the judiciary's independence, notwithstanding the recent challenge of salaries falling behind inflation in the last two years.

The ongoing work of the High Court Rationalisation Committee assumes critical importance, poised to provide guidance on the adequacy of judges and courts. Should recommendations for an increase in their numbers be proposed, the ensuing implementation will be subject to meticulous scrutiny. Furthermore, prospective strides may involve the integration of lower courts with their higher counterparts, forming a

judiciary-led administration within the Office of the Chief Justice. Such a paradigm shift would necessitate alterations in the structural allocation of the judiciary's budget and prompt a revaluation of parliamentary oversight over these expenditures. In these unfolding developments, the preservation of judicial independence stands as a paramount concern.

CHAPTER FOUR: ZIMBABWE

Judicial financial (in)dependence in Zimbabwe: The law, politics, and finances

Tinashe C Chigwata

Introduction

The 2013 Constitution states that Zimbabwe is founded on respect for the supremacy of the Constitution, the rule of law, fundamental human rights and freedoms and separation of powers among other values and principles.[1] It is inconceivable how these founding values and principles can be realised without an independent judiciary. Judicial independence aims to 'secure for individual judges, courts, and court systems the independence to resolve disputes according to the law and to shield them from improper interference from the other branches of government, or private or partisan interests.'[2] Thus, the two intrinsically linked dimensions of judicial independence are institutional and individual or decisional independence.[3]

Inherent in the institutional dimension of judicial independence is the element of judicial financial independence, which relates to how courts are funded, the control they have over their budgets and the financial security of judicial officers. Judicial independence is not just about the control and authority which individual judges have over legal decisions. It is also about 'an array of administrative powers of courts and judiciaries as organisations, including authority over budgeting, information technology, human resources, allocation of judicial services (supply chain management), judicial selection, retentions, assignment, and the education and training of judges and justice system staff.'[4]

---

1 See Constitution of Zimbabwe (2013), Section 3.

2 Ingo Keilitz, 'Viewing judicial independence and accountability through the 'lens' of performance measurement and management' 9(3) *International Journal for Court Administration* (2018) 23.

3 Owen Fiss, 'The limits of judicial independence' (25) *Inter-American Law Review* (1993), 57-58.

4 Keilitz, 'Viewing judicial independence and accountability through the 'lens' of performance measurement and management', 23.

This chapter examines the financial dimension of independence in Zimbabwe, whose 2013 Constitution provides measures aimed at promoting judicial financial autonomy. However, the judiciary stills lack adequate financial independence due to a variety of reasons, including the fact that the judiciary only has a limited voice in the determination of its budget. It is against this background that the Judicial Service Commission has identified the enhancement of judicial independence and administrative autonomy of the judicial service as one of its high priority areas.[5]

The chapter is divided into four parts. The first part provides a historical overview of judicial reforms followed by an analysis of measures aimed at enhancing judicial financial independence in Zimbabwe. The third part discusses how the Judicial Service Commission accounts for financial resources allocated to the judiciary. In part four, the chapter proposes three measures aimed at enhancing judicial financial independence, followed by the conclusion.

An overview of the status of judicial independence

A historical overview of judicial reforms

Zimbabwe achieved its independence from British colonial rule in 1980 under a negotiated Constitution (the Lancaster House Constitution).[6] The Lancaster House Constitution provided for, among other things, democratic governance, limited government, fundamental human rights and freedoms, and an independent judiciary, headed by the chief justice, with the Supreme Court as the highest court in the land.[7] The Lancaster House Constitution enshrined various mechanisms aimed at protecting judicial independence, including the role of the Judicial Service Commission to advise government on judicial matters, among other responsibilities.[8] The rule of law was generally observed during the early years of independence, enabling the judiciary to protect fundamental human rights and freedoms as well as check the executive and legislature.[9] The political and legal developments that followed, according to the former Chief Justice Anthony Ray Gubbay,

5 Judicial Service Commission, 'Strategic plan (2021-2025)', 2020, 4.

6 Lancaster House Constitution of Zimbabwe (1980).

7 Lancaster House Constitution of Zimbabwe (1980), Section 79.

8 Lancaster House Constitution of Zimbabwe (1980), Sections 90 and 91.

9 Robert Martin, 'The rule of law in Zimbabwe' 95 *The Round Table* (2006) 248.

progressively weakened individual liberties, limited government, democratic governance and the rule of law.[10]

The turn of the millennium came with significant political, economic and social challenges. Brian Raftopoulos states that the situation degenerated into 'crisis' characterised by, among other things, massive economic decline, record hyperinflation, erosion of livelihoods and human rights violations.[11] From 2000, the Zimbabwe African National Union-Patriotic Front (ZANU-PF) led government began implementing the Fast Track Land Reform Programme (FTLRP) under which white-owned farms were compulsorily acquired by the government without compensation for redistribution to Black Zimbabweans. It was not long before the courts collided with the government on the legality of the Fast Track Land Reform Programme.

In a series of judgments,[12] the courts outlawed land acquisition without compensation but the court decisions and orders were not implemented.[13] Hatchard *et al* argued that choreographed harassment and intimidation of judges that followed forced many of them to resign and/or take early retirement in 2001, including Chief Justice Gubbay.[14] The resignations made way for the appointment of judges who were sympathetic to the politics of the day, with Justice Godfrey Chidyausiku as the Chief Justice.[15] In 2005, the government instituted a Constitutional Amendment[16] which limited the jurisdiction of the courts on matters relating to land acquisition. This curbing of judicial power continues to serve as a frightening reminder to the judiciary of the limits of its power.[17]

---

10 See Anthony Gubbay, 'The progressive erosion of the rule of law in independent Zimbabwe', Third International Rule of Law Lecture: Bar of England and Wales, December 2009, 1-26; John Hatchard, Muna Ndulo and Peter Slinn, *Comparative constitutionalism and good governance in the Commonwealth: An eastern and southern African perspective*, Cambridge University Press, 2004, 170.

11 Brian Raftopoulos, 'The crisis in Zimbabwe, 1998-2008' in Brian Raftopolous and Alois Mlambo (eds) *Becoming Zimbabwe: A history from the pre-colonial period to 2008*, Weaver Press, 2009, 201-203.

12 See for example, *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* [2000] ZLR; *Commissioner of Police v Commercial Farmers Union* [2000] BCLR.

13 Martin, 'The rule of law in Zimbabwe', 250; Raftopoulos and Mlambo, 'The crisis in Zimbabwe, 1998-2008', 213.

14 Hatchard, Ndulo and Slinn, *Comparative constitutionalism and good governance in the Commonwealth*, 170.

15 Gubbay, 'The progressive erosion of the rule of law in independent Zimbabwe', 2; See also Raftopoulos and Mlambo, 'The Crisis in Zimbabwe, 1998-2008', 213.

16 Constitution of Zimbabwe Amendment (No 17, Act 5 of 2005).

17 See Fiss, 'The limits of judicial independence', 63.

The economic crisis,[18] which has not been resolved at the point of writing, did not spare the judiciary and contributed significantly to the diminishing of judicial financial autonomy. Salaries of public servants, including those of judicial officers, lost value due to the hyperinflation. The government extended benefits under the Fast Track Land Reform Programme, farm indigenisation programme, and other government programmes to the judges to access farming land, cheap loans, machinery, and electronic equipment, among other benefits. The extension of these schemes to judges, while may be intended to enhance their welfare, may have compromised judicial independence and brought into question the impartiality of judges to adjudicate matters related to any of these schemes or political institutions such as the executive.[19]

Any 'donations' to the judiciary or benefits programmes for judges 'inevitably raises the taint of undue influence'.[20] They may make the judiciary and individual judges beholden to whoever is making the 'donation', which in this case is the executive. Besides, there will always be scope for discretion when distributing these benefits, and this poses a potential threat to judicial independence.[21] Many scholars argue that by the time the disputed 2008 harmonised elections were held, the judiciary was no longer independent and, therefore, could no longer effectively protect human rights and check the executive and legislature.[22]

It is, thus, unsurprising that judicial reforms dominated the constitutional review process of 2009 to 2013 which culminated in the adoption of a new Constitution in 2013. Keilitz contends that '[w]ell designed and executed, judicial independence instils legitimacy and public trust and confidence in the judicial system of a country'.[23]

---

18 While there was relative economic stability during the GNU period (2009-2013) the underlying economic challenges were not really resolved and still evident in 2023.

19 Alex Magaisa, 'Beneficiaries of the RBZ farm mechanisation scheme', *The Big Saturday Read* 17 July 2020; Justice Mavedzenge, 'Questioning the constitutionality of the 99-year lease agreement between judicial officers and the Government of Zimbabwe', 4(2) *SOAS Law Journal* (2017) 92; Gubbay, 'The progressive erosion of the rule of law in independent Zimbabwe', 3.

20 Gubbay, 'The progressive erosion of the rule of law in independent Zimbabwe', 2.

21 Venice Commission, Report on the independence of the judicial system Part 1: The independence of judges, Adopted by the Venice Commission at its 82nd Plenary Session, Venice, 12-13 March 2010, 10.

22 Martin, 'The rule of law in Zimbabwe', 249; Magaisa, 'Beneficiaries of the RBZ farm mechanisation scheme'.

23 Keilitz, 'Viewing judicial independence and accountability through the "lens" of performance measurement and management', 23.

The 2013 Constitution has progressive provisions aimed at promoting judicial independence.

The Constitution entrenches the principle of judicial independence and further provides a framework for guaranteeing both institutional and individual judicial independence. Section 164(2) of the Constitution states that '[t]he courts are independent and are subject only to th[e] Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice'. Madhuku submits that this clear constitutional statement stating the independence of the judiciary is significant in two ways.[24] First, it 'enables members of the public to criticise any tendencies by the executive to interfere with the work of the judiciary'.[25] It also provides a basis for the use of the courts to stop any law or act undermining judicial independence.

The Constitution further recognises the importance of an independent, impartial and effective judiciary to the rule of law and democratic governance.[26] It prohibits the state, institutions of government and ordinary citizens from interfering with the functioning of the courts.[27] Section 164(3) of the Constitution states that '[a]n order or decision of a court binds the [s]tate and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them'.

Further, the Constitution mandates the '[s]tate, through legislative and other measures, [to] assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles' guiding the exercise of judicial powers in Zimbabwe.[28] This provision imposes a 'negative duty to refrain from acting in any way which interferes with the judicial functions of judges and magistrates'[29] while simultaneously imposing a positive duty on the state to assist the courts with resources needed for them to function effectively and independently.

---

24 Lovemore Madhuku, 'Constitutional protection of the independence of the judiciary: A survey of the position in Southern Africa' 46(2) *Journal of African Law* (2002) 232.

25 Madhuku, 'Constitutional protection of the independence of the judiciary', 232.

26 Constitution of Zimbabwe (2013), Section 264(2).

27 Constitution of Zimbabwe (2013), Section 164(2)(a).

28 Constitution of Zimbabwe (2013), Section 164(2)(b).

29 Mavedzenge, 'Questioning the constitutionality of the 99-year lease agreement between judicial officers and the Government of Zimbabwe', 98.

Structure of the current judicial system

The Constitution states that judicial authority is derived from the people of Zimbabwe and is vested in the Constitutional Court, the Supreme Court, the High Court, the Labour Court, the Administrative Court, the Magistrates' Courts, the Customary Courts and in other courts established by or under an Act of Parliament.[30] The judiciary consists of judges and judicial officers of the various courts.[31] The Constitutional Court, Supreme Court and High Court are the only courts with 'inherent power' to regulate their respective processes and to develop the common law or the customary law.[32] The chief justice is the head of the judiciary, and is also in charge of both the Constitutional Court and the Supreme Court.

One of the positive changes brought about by the 2013 Constitution is the introduction of the Constitutional Court which is a superior court of record consisting of the chief justice, the deputy chief justice and five other judges.[33] The Constitutional Court is the highest court in all constitutional matters and its decisions bind all other courts.[34] It makes 'the final decision on whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter'.[35] It is also the only Court competent to advise on constitutionality of proposed legislation and to rule on disputes relating to the election of the president.[36] The court 'makes the final decision [on] whether an Act of Parliament or conduct of the president or parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force'.[37] The role of the Constitutional Court is commendable and may, among other things, enhance the protection of human rights in Zimbabwe as well as the ability of the judiciary to check the other arms of government.[38]

---

30 Constitution of Zimbabwe (2013), Section 162.

31 Constitution of Zimbabwe (2013), Section 163(1).

32 Constitution of Zimbabwe (2013), Section 176.

33 Constitution of Zimbabwe (2013), Section 166(1).

34 Constitution of Zimbabwe (2013), Section 167(1)(a).

35 Constitution of Zimbabwe (2013), Section 167(1)(c).

36 Constitution of Zimbabwe (2013), Section 167(2).

37 Constitution of Zimbabwe (2013), Section 167(3).

38 Lovemore Chiduza, 'Towards the protection of human rights: do the new Zimbabwean constitutional provisions on judicial independence suffice?' 17(1) *Potchefstroom Electronic Law Journal* (2014) 373.

The Supreme Court is constituted by the chief justice, deputy chief justice, and at least two other judges.[39] It is the final court of appeal, except on matters falling under the jurisdiction of the Constitutional Court.[40] Section 169(2) of the Constitution allows parliament to confer additional jurisdiction and powers on the Supreme Court. When the Constitution was adopted in 2013, as part of the transitional measures, the implementation of the constitutional provision providing for the composition of the Constitutional Court was deferred until May 2020.[41] During this period, judges of the Supreme Court automatically constituted the bench of the Constitutional Court. The separation of the two courts only took place on 21 May 2020 and since then, the two courts are constituted by separate judges and housed at different courthouses.

The High Court is a superior court of record inferior to the Supreme Court, and which consists of the chief justice, deputy chief justice, the judge president of the High Court, and other judges.[42] The High Court has original jurisdiction over all civil and criminal cases. It supervises and reviews decisions of magistrates' courts and other lower courts.[43] The High Court may also decide on constitutional matters except those reserved for the Constitutional Court.[44] Unlike the High Court, which has inherent and unlimited criminal and civil jurisdiction, the labour and administrative courts have jurisdiction only over labour or employment and administrative matters, respectively. They are each led by a judge president.[45] There are other lower courts in Zimbabwe whose role and jurisdiction are provided for under legislation.[46]

The Judicial Service Commission

The Judicial Service Commission has been an important feature of Zimbabwe's judiciary, both under the old and new constitutional orders. The Commission was, however, weak under the previous constitutional order. Its composition was extremely dominated by presidential appointees which adversely affected the Commission's

---

39 Constitution of Zimbabwe (2013), Section 168(1).

40 Constitution of Zimbabwe (2013), Section 169(1).

41 Constitution of Zimbabwe (2013) Part 4 of the Sixth Schedule, para 18(2).

42 Constitution of Zimbabwe (2013), Section 170(1).

43 Constitution of Zimbabwe (2013), Section 171(1)(b).

44 Constitution of Zimbabwe (2013), Section 171(1).

45 See Constitution of Zimbabwe (2013), Section 172 and 173.

46 See Constitution of Zimbabwe (2013), Section 174.

independence from the executive.[47] The Commission's advice relating to appointments did not bind the president and, therefore, the Judicial Service Commission could not effectively check the president.

The Commission also lacked administrative and financial autonomy as it operated under the Ministry responsible for justice. The Judicial Service Act[48] was enacted in 2006 to strengthen the Commission by giving it administrative and financial autonomy. This enactment paved way for the separation of the Judicial Service Commission from the ministry responsible for justice. From June 2010, the Commission became an independent institution responsible for the administration of justice and control of all judicial facilities.[49] The 2013 Constitution further strengthened the role of the Judicial Service Commission by reforming its composition and equipping it with more powers.

Composition of the Judicial Service Commission

The 2013 Constitution makes provision for a 13-member Commission consisting of the: chief justice, deputy chief justice, the judge president of the High Court, one judge nominated by the judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court.[50] The Commission also consists of the: attorney-general, chief magistrate, chairperson of the Civil Service Commission, three practising legal practitioners with at least seven years' experience designated by the Law Society of Zimbabwe, one law professor or senior lecturer designated by an association of law lecturers,[51] an accountant or auditor with at least seven years' experience designated by the relevant association, and a human resource practitioner with at least seven years' experience appointed by the president.[52]

The Commission has a diversity of representation required to achieve a balance between members from the bench, legal fraternity and professionals from other relevant fields. This diversity 'presents the advantages both of avoiding the perception of self-interest, self-

---

47 Madhuku, 'Constitutional protection of the independence of the Judiciary', 238-239.

48 Act 10 of 2006.

49 Judicial Service Commission, 'Annual report, 2023' 2; Judicial Service Commission, 'Address by the Honourable Mr Justice Luke Malaba, Chief Justice of Zimbabwe, on the occasion of the official opening of the 2021 legal year on 11 January 2021,' 4.

50 Constitution of Zimbabwe (2013), Section 189(1).

51 In the absence of such an association, the person is appointed by the president.

52 Constitution of Zimbabwe (2013), Section 189(1).

protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy'.[53]

However, the president still plays a central role in determining its composition as the president appoints, whether directly or indirectly, seven of the 13 members. The chief justice and in his or her absence, the deputy chief justice, chairs the meetings of the Judicial Service Commission and if both are not available, the Commission can elect one of its members to chair the meeting.[54] Like other constitutional commissions, the Judicial Service Commission is a body corporate with perpetual succession and is capable of suing and being sued in its own name.[55] The Commission has its own secretariat headed by a secretary and employs its own staff. This enhances judicial independence since the Commission does not rely on the public service or the executive for administrative support.

Powers and functions of the Judicial Service Commission

Section 190(1) of the Constitution states that the Judicial Service Commission 'may tender advice to the government on any matter relating to the judiciary or the administration of justice, and the government must pay due regard to any such advice'. Thus, the government is obligated by law to consider such advice. Section 190(2) provides that the Judicial Service Commission 'must promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe, and have all the powers needed for this purpose'.[56] The Constitution further equips the Judicial Service Commission with the power to make regulations in furtherance of its role.[57]

However, such regulations must be approved by the Minister responsible for justice. Section 190(4) states that an Act of Parliament may confer on the Judicial Service Commission functions in relation to the employment, discipline and conditions of service of persons employed in the courts. The Judicial Service Act, which was aligned

---

53 Venice Commission, 'Report on the independence of the judicial system Part 1: The independence of judges', 2010, 8.

54 Constitution of Zimbabwe (2013), Section 189(2).

55 Constitution of Zimbabwe (2013), Section 319.

56 Constitution of Zimbabwe (2013), Section 190(2).

57 Constitution of Zimbabwe (2013), Section 19(3).

with the Constitution 2013, gives the Commission the power to make regulations providing for, among other things, the appointment, qualifications, remuneration and code of conduct of members of the Judicial Service – which is constituted by both judicial and non-judicial staff.[58] The Constitution requires the Judicial Service Commission to 'conduct its business in a just, fair and transparent manner'.[59] This is important to instil public confidence in the judiciary.

In practice, the independence of the Judicial Service Commission has progressively improved since its separation from the ministry responsible for justice in 2010. The 2013 Constitution solidified this independence significantly. There are a number of measures aimed at enhancing the independence of the Judicial Service Commission which have enabled the Commission the space to conduct its business with limited interference from the other branches of government.

Appointment, dismissal and security of tenure of judges

Appointment and qualifications

The calibre of judicial officers and the manner in which these officers are appointed are significant factors for judicial independence.[60] Judicial selection methods must instil public confidence in the judiciary both at institutional and individual levels.[61] The selection and career of judges should thus be 'based on merit, having regard to qualifications, integrity, ability and efficiency'.[62] In addition, the appointment process should not be left entirely in the hands of politicians even though they have the legitimacy to make such appointments by virtue of being elected officials.[63] The 2013 Constitution regulates both substantive and procedural selection requirements to ensure that the 'right' persons are appointed as judges. The Constitution states that persons appointed as

---

58 Judicial Service Act (Act 3 of 2016), Section 25.

59 Constitution of Zimbabwe (2013), Section 191.

60 David Hofisi and Geoff Feltoe, 'Playing politics with the Judiciary and the Constitution?' 1, *Zimbabwe Electronic Law Journal*, 2016.

61 Gift Manyatera, 'Conceptualising judicial independence under Zimbabwe's constitutional framework' in Tsabora J (ed) *The judiciary and the Zimbabwean Constitution*, University of Zimbabwe Press, 2022, 20.

62 Venice Commission, Report on the independence of the judicial system Part 1: The independence of judges, 6.

63 Madhuku, 'Constitutional protection of the independence of the Judiciary', 241.

judge must be qualified, fit and proper to occupy the office of a judge.[64] This emphasises the need for appointments to be based on merit and ethics, among other considerations.

When the Constitution was adopted, it required that all judges, including the chief justice and deputy chief justice, be appointed by the president on the recommendation of the Judicial Service Commission.[65] The Judicial Service Commission was required to start the appointment process by advertising the position, inviting the public and the president to make nominations, conducting public interviews, preparing a list of three qualified persons as nominees for the relevant office and submitting the list to the president. The president was further required to appoint one of the nominees.[66] If the president considered that none of the persons nominated were suitable, he or she was mandated to cause the Judicial Service Commission to submit another list from which the president was required to make an appointment.[67] This selection procedure was participatory, transparent, ensured the appointment of best available candidates and promoted judicial independence by limiting executive control of the process.[68] Subsequent constitutional amendments weakened this progressive selection procedure.

Constitutional Amendment (Number 1) Act of 2017 removed the requirement for all judges to be appointed following this participatory and transparent process. The new provision, Section 180(1) & (2) of the Constitution, now gives the president the power to appoint the chief justice, deputy chief justice, and the judge president of the High Court after consulting the Judicial Service Commission. In the event that the president's appointment to any of these positions is inconsistent with the recommendations of the Judicial Service Commission, the president is required to notify the senate.[69] This Constitutional Amendment was heavily criticised by scholars and stakeholders in the legal fraternity.

The Law Society of Zimbabwe, for example, argued that the Amendment replaced a 'relatively transparent system of judicial appointments with a murky executive driven system, resurrected from

---

64 See Constitution of Zimbabwe (2013), Section 178-179.

65 Constitution of Zimbabwe (2013), Section 180(1).

66 Constitution of Zimbabwe (2013), Section 180(2).

67 Constitution of Zimbabwe (2013), Section 180(3).

68 Hofisi and Feltoe, 'Playing politics with the Judiciary and the Constitution?'.

69 Constitution of Zimbabwe (2013), Section 180(3).

the old Constitution'.[70] There is merit in this argument since the views of the Judicial Service Commission do not bind the president while the requirement for the senate to be notified is merely academic as the legislative body cannot veto the president's decision. As a result, the window for political appointments into these senior judicial positions has been left wide open.[71] However, the Judicial Service Commission's public process for the appointment of all other judges remains unchanged.

In 2019, another Constitutional Amendment Act[72] was passed which provides for two ways of appointing other judges to the Constitutional Court, Supreme Court, High Court, Labour Court or Administrative Court. First, other judges can be appointed through the Judicial Service Commission-led public process discussed above.[73] The second method of appointment involves the president, acting on the recommendation of the Judicial Service Commission, appointing a sitting judge of the Supreme Court, High Court, Labour Court or Administrative Court to the next higher court without the Judicial Service Commission following the public interview process.[74] The government argued that this method will enable the 'tapping of judicial experience for longer'.[75]

The question is at what expense? This method further vests additional powers in the president. In cases where the Commission lacks independence from the executive, the president can use the Judicial Service Commission to hand pick 'acceptable' judges for promotion.[76] It may, thus, force sitting judges to dance according to the 'political tune' to secure promotion at the expense of judicial independence. The method also takes away the much-needed transparency and public scrutiny in the appointment and promotion of judges. However, the method is not necessarily problematic if the Judicial Service Commission is independent and progressive.

---

70 Law Society of Zimbabwe, 'Statement on the introduction of Constitutional Amendment Bill No 1 of 2016' 2018.

71 Hofisi and Feltoe, 'Playing politics with the Judiciary and the Constitution?'.

72 Act No 2 of 2019.

73 Constitution of Zimbabwe (2013), Section 180(4).

74 Constitutional Amendment (No 2, Act of 2019), Section 12.

75 Tonderai Matanda, 'Democratic erosion in Zimbabwe through constitutional amendments', *Human Rights Pulse*, 2022.

76 Hofisi and Feltoe, 'Playing politics with the Judiciary and the Constitution?'.

Removal from office

A transparent and independent process of removing judges from office is needed to ensure judicial independence.[77] The 2013 Constitution provides only three circumstances upon which a judge can be removed from office: inability to perform his or her functions (due to mental or physical incapacity), gross incompetence or gross misconduct.[78] The president is empowered to initiate the removal of the chief justice from office while the process for the removal from office of any other judge is initiated by the Judicial Service Commission.[79]

Section 187(3) states that 'if the [Judicial Service Commission] advises the president that the question of removing any judge, including the chief justice, from office ought to be investigated, the president must appoint a tribunal to inquire into the matter'. The tribunal consists of three members appointed by the president, who also appoints the chairperson of the tribunal from its membership.[80] This body is required to investigate whether the ground(s) for removal exist and recommend whether the judge must be removed from office.[81] The recommendations of the tribunal bind the president.[82] This is important to ensure that the tribunal process is not merely a tick box exercise.

Section 187(10) of the Constitution states that a judge under investigation by the tribunal is 'suspended from office until the president, on the recommendation of the tribunal, revokes the suspension or removes the judge from office'. The initiation of the removal of a judge from office by the Judicial Service Commission, as opposed to the president, may enhance judicial independence. It reduces the opportunities for the executive to use the removal procedure to 'intimidate judges and thus help create or maintain a pliant judiciary'.[83] However, the president still has a substantial role in the removal of judges by virtue of the president's power to initiate the removal of the chief justice and to appoint members of the tribunal. On the whole, the Constitution promotes judicial independence in that it clearly stipulates

---

77 Madhuku, 'Constitutional protection of the independence of the judiciary', 240.

78 Constitution of Zimbabwe (2013), Section 187(1).

79 Constitution of Zimbabwe (2013), Section 187(2)(3).

80 Constitution of Zimbabwe (2013), Section 187(6).

81 Constitution of Zimbabwe (2013), Section 187(7).

82 Constitution of Zimbabwe (2013), Section 187(8).

83 Hatchard, Ndulo and Slinn, *Comparative constitutionalism and good governance in the Commonwealth*, 171.

circumstances upon which a judge can be removed from office and prescribes a transparent procedure for the removal.[84]

Security of tenure of judges

Security of tenure of judges is an important contributor to judicial independence. It is aimed at ensuring that a judge 'is not a victim of fear of losing the job should he or she make a decision unfavourable to the state'.[85] This is why it is important to appoint judges on a permanent basis and for their tenure of office not be terminated without their consent.[86]

However, Madhuku argues that the fact that judges have long tenure necessitates the setting of a compulsory retirement age so that judges can be replaced.[87] He advances two main points in support of this argument. First, judges exercise enormous power yet they are not politically accountable to the citizens.[88] This makes unlimited tenure inappropriate. Second, he submits that a compulsory retirement age is needed to foreclose extension of tenure for favourable judges relative to other judges at the expense of judicial independence.[89]

When the 2013 Constitution was adopted, Section 186 guaranteed the security of tenure of judges in a way which enhanced judicial independence. The provision stated that Constitutional Court judges are appointed for a non-renewable term of not more than 15 years but must retire if they reach the age of 70 years. As for all other judges, the Constitution required that they hold office until they reach 70 years, when they must retire. Hence, the tenure provision enabled regular rotation of judges at the Constitutional Court and with this rotation comes new ideas on constitutional interpretation as the society changes. This provision was reformed in 2019 to provide for different tenure requirements for judges.

---

84 Malaba, 'Definition and importance of judicial independence as a concept', in *Judges Induction Compendium,* Judicial Training Institute of Zimbabwe, Harare (2021), 13; Manyatera, 'Conceptualising judicial independence under Zimbabwe's constitutional framework', 19.

85 Malaba, 'Definition and importance of judicial independence as a concept', 13.

86 Hatchard Ndulo and Slinn, *Comparative constitutionalism and good governance in the Commonwealth*, 158.

87 Madhuku, 'Constitutional protection of the independence of the judiciary', 242.

88 Madhuku, 'Constitutional protection of the independence of the judiciary', 242.

89 Madhuku, 'Constitutional protection of the independence of the judiciary', 243.

A constitutional amendment[90] introduced a 'new' Section 186 of the Constitution, which provides that the chief justice and the deputy chief justice hold office until they reach the age of 70 years, when they must retire. However, upon reaching the retirement age, they may choose to continue in office for an additional term of five years upon submission to the President of a medical report on their mental and physical fitness to continue in office, and upon acceptance by the president of the report after consulting the Judicial Service Commission.

There are similar provisions or requirements for all other judges of the Constitutional Court as well as those of the Supreme Court.[91] Thus, the president now has an avenue to essentially extend the retirement age of judges, as was the case under the old Constitution, and this may provide room for the executive to influence the behaviour of judges.[92] On the other hand, it can be submitted that the constitutional amendment provides an avenue to retain old but experienced judges which comes with continuity in key judicial positions.

Following the Constitutional Amendment, Chief Justice Luke Malaba exercised the option to extend his tenure of office with the approval of the president. The extension was subsequently challenged in the High Court, which ruled that his tenure could no longer be extended and, therefore, Justice Malaba ceased to hold the office of the chief justice when he reached the retirement age.[93] The Court also ruled that this Constitutional Amendment could not benefit Justice Malaba and other judges who were occupying the office of a judge before the Amendment, as required by Section 328(7) of the Constitution.[94]

On appeal, the Constitutional Court ruled that the orders of the High Court are orders of constitutional invalidity and hence have

---

90 Constitutional Amendment Act (No 2 of 2019).

91 Constitution of Zimbabwe (2013), Section 186(2)(3). Upon the end other term, judges of the constitutional court may be appointed as judges of the Supreme Court or High Court if they are eligible for such an appointment and at their own will.

92 Madhuku, 'Constitutional protection of the independence of the judiciary', 243.

93 See *Musa Kika v Minister of Justice, Legal and Parliamentary Affairs and others* HC 2128/21, *Young lawyers of Zimbabwe and Another v Judicial Service Commission and Others* HC 2166/2021, 28.

94 Section 328(7) of the Constitution of Zimbabwe (2013) states that '…an amendment to a term-limit provision, the effect of which is to extend the length of time that a person may hold or occupy any public office, does not apply in relation to any person who held or occupied that office, or an equivalent office, at any time before the amendment'.

no force or effect unless confirmed by the highest court.[95] The Court further refused to confirm the orders and instead set them aside on the basis that the High Court made a 'fundamental error concerning the interpretation and constitutionality of Section 186 of the Constitution'.[96] This is because it wrongly conflated age limits with term limits. The Constitutional Court established that the new provisions of Section 186 only amended the previously stipulated retirement age limit, from 70 to 75 years but did not extend the non-renewable term limit of judges of the Constitutional Court.[97] Hence, Chief Justice Malaba was legally in office. The Court also found value in the Constitutional Amendment:

> …allowing presumably experienced and seasoned judges of the superior courts to remain in office for a longer period should, all other things being equal, serve to enhance and optimise, rather than diminish or compromise, the delivery of independent and impartial justice across the entire legal system.[98]

However, some scholars argue that the Court's decision was not legally sound but was based on political considerations, which reflects the judiciary's lack of adequate judicial independence.[99] On the other hand, High Court judges and any other judges hold office until they reach the age of 70 years.[100] There is no provision for an additional five-year term upon reaching the retirement age. Judges appointed on a fixed term basis, other than in an acting capacity, hold office until they reach the age of 75 years even if their appointment will not have expired.[101]

One of the most significant safeguards for the tenure of judges is the constitutional requirement that the 'office of a judge must not be abolished during his or her tenure of office'.[102] A judge can also resign at any time by a written notice to the president through the Judicial Service Commission.[103]

---

95 *Max Mapungu v Minister of Justice, Legal and Parliamentary Affairs and Others* CCZ 07/2021, 59.

96 *Max Mapungu v Minister of Justice, Legal and Parliamentary Affairs and Others*, 57.

97 *Max Mapungu v Minister of Justice, Legal and Parliamentary Affairs and Others,* 49.

98 *Max Mapungu v Minister of Justice, Legal and Parliamentary Affairs and Others,* 55.

99 Justice Mavedzenge, 'The Zimbabwean Constitutional Court as a key site of struggle for human rights protection: A critical assessment of its human rights jurisprudence during its first six years', 20 *African Human Rights Law Journal* (2020), 185; Alex Magaisa, 'The chief justice who refuses to go', *Big Saturday Read*, 2021.

100 Constitution of Zimbabwe (2013), Section 186(5).

101 Constitution of Zimbabwe (2013), Section 186(6).

102 Constitution of Zimbabwe (2013), Section 186(7).

103 Constitution of Zimbabwe (2013), Section 186(8).

While the 2013 Constitution provided a sound foundation for an independent judiciary, subsequent constitutional amendments might have weakened judicial independence. In practice, like any other public institution, the judiciary has not been immune from political and other developments in the country. Notwithstanding these challenges, the courts continue to act as guardians of the Constitution and law particularly in ordinary cases. However, the courts have been found wanting on certain high profile and/or politically sensitive cases as widely confirmed. For instance, Parliament's Thematic Committee on Human Rights established that there are concerns that there is political interference in the performance of judicial functions in some instances.[104] Chiduza concluded that the 'confidence of the public in the current judiciary has been eroded as judicial decision-making has been perceived to be subject to inappropriate outside influence'.[105]

The above view is supported by Mavedzenge who established that courts in Zimbabwe lack the independence to enforce the law especially in high profile or politically sensitive cases involving the government or the ruling party.[106] Their arguments have been corroborated by the results of the Afrobarometer Survey on Zimbabwe which revealed that the public perception is that 'the courts are universally seen as independent for ordinary apolitical cases but are seen as handing down biased judgments in politically sensitive cases'.[107] Hence, the concern that the judiciary still lacks adequate independence despite the adoption of a progressive constitution.

Financing the judiciary

As mentioned in the introduction, judicial financial independence is about the judiciary's access to adequate resources, control over its budget and financial security for judicial officers. In cases 'where the judiciary does not have an independent source of income, its independence is dependent on the other organs of state from which it

---

104 Parliament of Zimbabwe, 'First Report of the Thematic Committee on Human Rights: State of the judicial delivery system in Zimbabwe SC 10/2015', 7.

105 Chiduza, 'Towards the protection of human rights', 400.

106 Mavedzenge, 'The Zimbabwean Constitutional Court as a key site of struggle for human rights protection', 184

107 Matthias Kronke, 'Bounded autonomy: What limits Zimbabweans' trust in their courts and electoral commission?', Afrobarometer Policy Paper No 52, December 2018, 14.

obtains its funding'.[108] Hence, international principles and guidelines stress the need for financial autonomy of the judiciary, as an institution and judges as individuals.[109] The UN Basic Principles mandates each member state to ensure that the judiciary has adequate resources needed for it to properly perform its functions.[110]

The Commonwealth's Latimer House Guidelines also emphasises that 'sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards'.[111] The 2013 Constitution recognises the need for the state to adequately resource the judiciary in order to ensure the effective delivery of justice.[112] The judiciary in Zimbabwe is funded through parliamentary appropriations, direct charges on the Consolidated Revenue Fund (CRF) and revenue from the Court Administration Fund. The Judicial Service Commission also receives support from other sources, such as donors.

Parliamentary appropriations

The larger part of public expenditure, including that of the Judicial Service Commission but excluding salaries for judges, is authorised by parliament through an Appropriation Act which is passed annually. While it is acknowledged that parliament has the right to allocate public funds, insufficient and arbitrary funding of the judiciary can make judicial independence hollow.[113] Hence, this right must be exercised in a way which respects the separation of powers and judicial independence to 'ensure that the other two arms of government do not exert any pressure on the judiciary when setting the budget'.[114]

The process of allocating funds to the Judicial Service Commission is aligned with the national budget adoption process. Section 305(3) of the Constitution states that when presenting revenue and expenditure estimates for government, the minister responsible for finance must

---

108 Malaba, 'Definition and importance of judicial independence as a concept', 14.

109 Malaba, 'Definition and importance of judicial independence as a concept', 14.

110 See UN Basic Principles on the Independence of the Judiciary, Principle 7.

111 Commonwealth Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, United Kingdom, 1998, Principle II, para 2.

112 Constitution of Zimbabwe (2013), Section 325(1).

113 Frans Van Dijk and Geoffrey Vos, 'A method for assessment of the independence and accountability of the judiciary 9(3) *International Journal for Court Administration* (2018) 8.

114 Venice Commission, Report on the independence of the judicial system Part 1: The independence of judges, 11.

present separate estimates for constitutional entities such as the Judicial Service Commission.[115] This is meant to ensure that, among other things, the funding for these constitutional entities receives dedicated attention from parliament and once the funds have been appropriated, the entities have the freedom to spend the revenue.

The International Commission of Jurists states that '[j]udicial participation in the delineation of the budget constitutes an important safeguard against insufficient funding'.[116] Section 325(2) of the Constitution requires constitutional entities to be given a 'reasonable opportunity to make representations to a parliamentary committee as to the funds to be allocated to them in each financial year'. This requirement is significant for two reasons. First, it implies that the Judicial Service Commission determines the financial requirements of the judiciary. Second, it guarantees the Commission of a 'reasonable opportunity' to make representations to parliament so that the judiciary can be allocated sufficient funds to meet these requirements. How has this taken shape in practice?

The budget process

The Annual Budget Strategy Paper of the minister responsible for finance, issued around mid-year, provides the basis for discussions between National Treasury, government agencies, and constitutional entities on national policies, strategies and budgetary allocations for the upcoming financial year.[117] The publication of the Paper paves way for these institutions to start preparing their budgets. The Paper is followed by a Budget Circular from Treasury, around August, which is directed at all accounting officers, including the secretary of the Judicial Service Commission. The Circular provides requirements that they must follow in the preparation of estimates of revenue and expenditure for the upcoming year. Treasury's Budget Circular Number 1 of 2021, for instance, required accounting officers to develop their expenditure proposals for 2022 and 2023 guided by the indicative estimates for

---

115 Constitution of Zimbabwe (2013), Section 305(3).

116 International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors*, Practitioner's Guide 1, Geneva, 2007, 35.

117 See Ministry of Finance and Economic Development, 'Budget strategy paper: Reinforcing sustainable economic recovery and resilience', 29 July 2021.

these years as contained in the 2021 national budget.[118] This shows that the Judicial Service Commission can only determine its financial requirements within Treasury's framework.

The Circular further required ministries, agencies and constitutional entities to comply with the programme structures for expenditure and seek the approval of Treasury in cases where they sought to make substantial changes to the programmes.[119] This suggests that the Judicial Service Commission cannot change its expenditure structure without the approval of Treasury, which may be indicative of limited expenditure autonomy. The Budget Circular also indicated that Treasury was not going to approve funding for new projects when the relevant institution still has a stock of on-going and stalled projects and that '[n]ew projects were only going to be approved only in exceptional circumstances'.[120]

This illustrates that Treasury can refuse to fund projects of the Judicial Service Commission, which again may be indicative of the Commission's limited budget autonomy. However, it must be acknowledged that the Treasury has a difficult task of balancing the books, especially when resources are limited, as is the case in Zimbabwe. Hence, the Treasury's role is justifiable as long as it is not (ab)used to influence the exercise of judicial authority.

The final budget circular, which is published together with expenditure ceilings for each ministry, agency or constitutional entity, is issued around September.[121] Upon receipt of these expenditure ceilings, government institutions and constitutional entities are expected to prioritise and rank costed interventions or projects as well as consolidate proposals for discussion with Treasury.[122] Treasury usually reserves the period from September to October for budget consultations and hearings with government ministries, agencies and constitutional entities, with the presentation of the budget to parliament usually taking

---

118 Ministry of Finance and Economic Development, 'Treasury budget call circular number 1 of 2021: Preparation for the 2022 budget including the indicative years 2023 and 2024', 17 August 2021.

119 Ministry of Finance and Economic Development, 'Treasury budget call circular number 1', 5.

120 Ministry of Finance and Economic Development, 'Treasury budget call circular number 1, 6.

121 See Ministry of Finance and Economic Development, 'Treasury budget call circular number 1', 8.

122 Ministry of Finance and Economic Development, 'Treasury budget call circular number 1', 8.

place in November or December. Once the budget has been presented, it is interrogated by members of parliament and other stakeholders may provide input. The parliamentary process may culminate in changes to amounts allocated to various votes by the minister responsible for finance. In practice, such changes are rare or minor. In 2022, the Judicial Service Commission requested ZWL$37 000 000 000 but it was allocated only ZWL$12 183 194 286,[123] which is less than 33 percent. Thus, while the Judicial Service Commission has opportunities to influence parliamentary appropriations to the judiciary, it only has a limited voice. The minister responsible for finance and parliament plays the decisive role.

Adequacy of the parliamentary allocation

The Judicial Service Commission's Strategic Plan (2021-2025) states that:

> The years gone by were not without their challenges. Resource constraints, inadequate court infrastructure, and inadequate investment in technology and human capital development as well as the scourge of corruption which reared its ugly head not just in the broader society but even within the justice sector. While significant measures have already been taken to counter some of the challenges, the current planning cycle will focus on dealing decisively with these and other strategic priorities identified.[124]

Chief Justice Malaba had this to say while opening the 2022 legal year:

> The Judicial Service Commission experienced the challenge of inadequate funding. Time and again, a range of the activities that are carried out for the judiciary, from the day-to-day administration of the courts to the construction and upgrading of infrastructure, were hindered by the challenge of inadequate funding. In certain instances, the Judicial Service Commission has had to cut down on its operations or rely on support from development partners.[125]

These quotes suggest that the state is consistently failing in its duty to provide adequate financial resources to the judiciary with adverse ramifications on the delivery of justice.

---

123 Judicial Service Commission 'Annual report, 2022' 3.

124 Judicial Service Commission 'Strategic plan, 2021-2015' 2020, 4.

125 Address by the Honourable Mr Justice Luke Malaba, Chief Justice of Zimbabwe on the occasion of the official opening of the 2022 legal year on 10 January 2022, 2022, 27.

An analysis of the parliamentary appropriations to the three arms of government shows that the Judicial Service Commission is allocated only a small portion of the budget. Table 1 below shows the budget share of selected votes for the 2018 financial year up to 2020. The budget share for the office of the president and cabinet constituted 4.4 percent, 4.23 percent, and 3.70 percent for the 2018, 2019 and 2020 national budget, respectively. Parliament received 1.1 percent, 1,14 percent and 2,94 of the budget for the same years. In comparison, the budget of the Judicial Service Commission during the same period was only 0.4 percent, 0.26 percent, and 0.46 percent of the national budget. With such a small share, it is almost impossible for the judiciary to act as a coequal partner with the other two arms of government.

Table 1: Budget share for selected budget votes for the period 2018 to 2020

Vote	**Budget Share 2018 (%)**	**Budget Share 2019 (%)**	**Budget Share 2020 (%)**
Office of the President and Cabinet	4.4%	4.23%	3.70%
Parliament of Zimbabwe	1.1%	1.14%	2.94%
Audit Office	0.1%	0.09%	0.24%
Judicial Service Commission	0.4%	0.26%	0.46%
Public Service Commission	0.4%	2.48%	2.37%
Council of Chiefs	0.1%	0.07%	0.04%
Human Rights Commission		0.05%	0.04%
National Peace and Reconciliation Commission		0.04%	0.05%
National Prosecuting Authority		0.14%	0.11%
Zimbabwe Anti-Corruption Commission		0.19%	0.11%
Zimbabwe Electoral Commission		0.12%	0.14%
Zimbabwe Land Commission		0.13%	0.26%
Zimbabwe Media Commission		0.02%	0.02%
Zimbabwe Gender Commission		0.03%	0.04%

Source: Portfolio Committee on Budget, Finance and Development (2020),[126] *Annexure 1*

[126] Portfolio Committee on Budget, Finance and Development, '2020 national budget: Report of the Portfolio Committee on Budget, Finance and Development presented by Honourable Gandawa, in the National Assembly, Tuesday 3 December 2019'.

The drastic reduction in the judicial budget from 0.4 percent in 2018 to 0.26 percent in 2019 adversely impacted the work of the Commission, as detailed in its 2019 Annual Report.[127] It is unclear why the judicial budget was slashed by almost half in 2019; save to say that the 2019 national budget was adopted following the dramatic departure from office of President Robert Mugabe.

The disbursements of appropriated funds to the judiciary

After the approval of the estimates by parliament, the minister responsible for finance is required to present an Appropriation Bill providing for money to be withdrawn from the Consolidated Revenue Fund for the different heads of expenditure that have been approved.[128] The process of allocating funds to government ministries and constitutional entities commences once the Bill has been signed into law by the president. The appropriation of funds by parliament does not necessarily mean that the allocated funds are immediately transferred to the Judicial Service Commission for use.

Section 17(1) of the Public Finance Management Act states that 'no payment involving a charge upon the Consolidated Revenue Fund shall be made without the written authority of the Treasury'. Thus, the Treasury plays a central role in the disbursement of appropriated funds to the relevant institutions and constitutional entities. Given the economic challenges that Zimbabwe is currently experiencing, which has constrained the ability of the state to mobilise sufficient financial resources, Treasury usually disburses portions of the appropriated funds when the resources are available and depending on its own prioritisation.[129] A number of challenges have arisen in practice.

First, not all of the appropriated funds are disbursed to relevant institutions by the end of the financial year. The Judicial Service Commission's Annual Report for 2013 notes that while the monies appropriated by Parliament 'might have gone a long way in funding all the operations of the Commission if they had been made available to the Commission, the disbursed amounts were in reality paltry and

---

127 Judicial Service Commission 'Annual report, 2019', 24-28.

128 Constitution of Zimbabwe (2013), Section 305(4).

129 See Judicial Service Commission, 'Address by the Honourable Mr Justice Luke Malaba, Chief Justice of Zimbabwe on the occasion of the official opening of the 2022 legal year on 10 January 2022', 27.

had the effect of slowing down some of the envisioned activities of the Commission'.[130]

In 2014, the Judicial Service Commission was allocated US$23 440 881 but only US$ 13 924 396 was actually disbursed, amounting to just 59.5 percent.[131] The Judicial Service Commission's Annual Report for 2017 indicates that whereas a budget of US$134 000 had been set aside for maintenance, Treasury only released US$ 44 912.[132] The Commission's Annual Report for 2018 also states that the Judicial Service Commission did not get its full budgetary allocation.[133] Thus, there is an established culture where amounts appropriated by Parliament are not disbursed fully to the Commission. The Judicial Service Commission is not unique in this regard as other government institutions and independent constitutional entities face the same challenge.

Second, Treasury often disburses funds appropriated for certain projects late into the year whilst funds for some projects are not disbursed at all. The late disbursement of funds is cited in the Judicial Service Commission's 2019 Annual Report as the main reason behind the late completion of the construction of Chinhoyi Magistrates' Court, which was initially scheduled for December 2019.[134] The late disbursement of funds presents an additional challenge given the macroeconomic instability being experienced in Zimbabwe. The value of the funds allocated to the Commission is eroded by inflation, which was as high as 104.7 percent (annual inflation) in 2022.[135] This problem is captured well in the extract below from the Judicial Service Commission's Annual Report for 2019:

> The Commission was allocated ZWL$79 981 831.00 for the year ending 31 December 2019. Inflationary pressures left this allocation without any significance. This obviously had adverse effects on the intended outcomes of the Commission's budgetary performance. The Commission closed the year with a debt over-hang of ZWL$ 14 561 458.54. This figure excludes the outstanding purchase of conditions of service vehicles for constitutional appointees which amounts to ZWL$ 25 722 180.00.[136]

---

130 Judicial Service Commission 'Annual report, 2013' 14.

131 Judicial Service Commission 'Annual report, 2014' 12.

132 Judicial Service Commission 'Annual report, 2017' 15.

133 Judicial Service Commission 'Annual report, 2018' 23.

134 Judicial Service Commission 'Annual report, 2019' 25.

135 World Bank Group, Zimbabwe data <https://data.worldbank.org/country/zimbabwe?view=chart> on 22 August 2023.

136 Judicial Service Commission 'Annual report, 2019' 27.

The Judicial Service Commission also lamented the adverse impact of price volatility on its budget as well as its inability to settle creditors' payments on time.[137]

Last, the Venice Commission recommends that, as an independent arm of government, the 'courts should not be financed on the basis of discretionary decisions of official bodies but in a stable way on the basis of objective and transparent criteria.'[138] Even though the Judicial Service Commission might have its own timeframes for implementing certain projects, in practice, the actual implementation timeframes are significantly shaped by when the Treasury makes the funds available. Treasury disburses funds depending on what it considers to be a priority against the available resources.

It is thus not surprising that the Judicial Service Commission, like other public institutions, often lobbies Treasury to release the funds. The danger with this approach is that, unlike other government institutions, the judiciary cannot vigorously lobby Treasury to release funds without risking its independence.[139] By delaying or withholding the disbursement of funds to the Judicial Service Commission, the Treasury is in fact indirectly controlling the delivery of justice.

Remuneration of judicial officials

The Latimer Principles stress that 'appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary'.[140] The International Charter of the Judge also emphasises the need for judges to be sufficiently remunerated 'to secure true economic independence.'[141] The Constitution recognises the need to award judicial officers sufficient remuneration to secure their economic independence.[142] The Constitution provides a number of measures aimed at securing this economic independence. The discussion below focuses on these measures.

---

137 Judicial Service Commission 'Annual report, 2020' 29, 30.

138 Venice Commission, Report on the independence of the judicial system Part 1: The independence of judges, 11.

139 Address by the Honourable Mr Justice Luke Malaba, Chief Justice of Zimbabwe on the occasion of the official opening of the 2022 legal year', 27.

140 Principle II, para 2.

141 International Charter of the Judge, adopted by the Central Council of the International Association of Judges, Taiwan, 17 November 1999, Article 13.

142 Constitution of Zimbabwe (2013) Section 164(2)(b) read together with Section 165.

Financial security of judicial officers

The salaries and other benefits of members of the judiciary constitute part of a limited public expenditure that is a permanent direct charge on the Consolidated Revenue Fund. Section 188(3) of the Constitution provides that '[t]he salaries, allowances and other benefits of members of the judiciary are a charge on the Consolidated Revenue Fund'. This provision insulates judges from legislative bargains during the annual appropriations.[143] The Constitution further prohibits the reduction of the salaries, allowances and other benefits of members of the judiciary while they hold office or act in the office concerned.[144] This provision is significant as without it 'the provision as to tenure of judicial office would be nugatory and indeed a mockery'.[145] By reducing the salaries of judges, the political branches of government can force judicial officers out of office and therefore, limit their tenure.[146]

This provision is thus 'an important bulwark against political control'.[147] This safeguard came out of the realisation that 'consideration of the job or reduction of remuneration for judicial service may overcome a judge's ability to obey the obligation to exercise judicial authority in accordance with the Constitution and the law only'.[148] Thus, judges are required to use the freedom accorded by this safeguard to adjudicate cases on the basis of the law and facts.[149] On the other hand, the arbitrary increment of remuneration of judicial officers when it suits the politics of day,[150] equally undermines judicial financial autonomy.[151]

Who determines the remuneration of judicial officials?

The question of who determines the salaries and other benefits of judicial officers is significant for judicial financial independence. The

---

143 Madhuku, 'Constitutional protection of the independence of the judiciary', 244; Chiduza, 'Towards the protection of human rights', 393.

144 Constitution of Zimbabwe (2013), Section 188(4).

145 Chief Justice Luke Malaba, 'Definition and importance of judicial independence as a concept' in *Judges Induction Compendium* (2021), 14.

146 Malaba, 'Definition and importance of judicial independence as a concept', 14.

147 Fiss, 'The limits of judicial independence', 63.

148 Malaba, 'Definition and importance of judicial independence as a concept', 13.

149 Malaba, 'Definition and importance of judicial independence as a concept', 13.

150 For instance, when electoral disputes are or likely to go before the courts.

151 Manyatera, 'Conceptualising judicial independence under Zimbabwe's constitutional framework', 23.

Latimer House Guidelines recommend that salaries and benefits of judicial officials be determined by an independent body.[152] This ensures that the process of determining the remuneration in not in the hands of politicians who may seek to influence the exercise of judicial authority. The Constitution gives the Judicial Service Commission the power to determine the salaries, allowances and other benefits of judges. This is however subject to the approval of the president after consulting the minister responsible for justice and with the recommendation of the minister responsible for finance.[153] This arrangement may undermine judicial financial independence since the executive has the final say. The conditions of service of other judicial officers are set under an Act of Parliament which can only be enacted with the approval of the Judicial Service Commission.[154]

The relevant Act, the Judicial Service Act, empowers the Judicial Service Commission to make regulations providing for among other things, the salaries, allowances and other remuneration and benefits of members of the judicial service.[155] Besides the fact that the Regulations are approved by the ministry responsible for justice as discussed above, Section 25(3) of the Judicial Service Act states that any regulations that may increase expenditure chargeable on the Consolidated Revenue Fund must also be approved by the minister responsible for finance. Thus, there is also a substantial role for the executive in the determination of the remuneration of other judicial officers.

The review of salaries, allowances and other benefits

When the minister responsible for finance reviews the salaries and benefits of members of the public service, he or she must also review those of judges.[156] If the minister decides that the salaries and benefits of judges should be increased, he or she is required to table the relevant recommendations before the president, who makes the final decision.[157] Thus, the review of salaries and benefits of judges is again in the hands of the executive. The danger is that mindful of executive control over their salaries, judges trying to keep up with economic developments

---

152 Principle II, para 2.

153 Constitution of Zimbabwe (2013), Section 188(1).

154 Constitution of Zimbabwe (2013), Section 188(2).

155 Judicial Service Act (Cap 7:18), Section 25 (1)(2).

156 Judges Salaries, Allowances and Pensions Act (6 of 2005), Section 5(1).

157 Judges Salaries, Allowances and Pensions Act (6 of 2005), Section 5(2)(3).

and to protect their welfare may be forced to decide cases before them in such as a way as to win the goodwill of the executive.[158]

In practice, the salaries and benefits for public servants, including judicial officers, are not adjusted as often enough in line with economic trends. The hyperinflation easily erodes the value of their earnings. As a result, members of the judicial service are poorly remunerated and their conditions of service make it difficult for the Judicial Service Commission to establish a professional, ethical and independent judiciary.[159] The failure of the executive to adjust salaries in the face of hyperinflation can also act as a severe sanction.[160]

The Judicial Service Commission had identified the '[u]ncompetitive conditions of service due to Treasury constraints' as one of the underlying causes behind its failure to attract and retain adequate staff.[161] This has been the case for a while, with isolated improvements. As far back as 2012, Chief Justice Godfrey Guwa Chidyausiku lamented the poor working conditions of judicial officials particularly at lower levels.[162] His successor, Chief Justice Luke Malaba, continues to sing the same tune. In his speech for the opening of the 2018 legal year, Chief Justice Malaba stated that:

> the salaries of magistrates are still not commensurate with the important judicial positions they hold. It is accepted that low salaries cannot be a justification for lack of judicial integrity, but payment of a living wage can go a long way towards enhancing that integrity. Might I also add my voice to the call to review conditions of service for all members of staff in the judicial service, as this will not only cushion them from financial hardships but also boost their morale in the workplace.[163]

Poor remuneration is cited as the main reason behind the high number of resignations in the judicial service particularly at the magistrate level.[164] The remuneration of judges, which is better compared to that of

---

158 Fiss, 'The limits of judicial independence', 63.

159 See, Speech by the Chief Justice Honourable Godfrey Guwa Chidyausiku, on the occasion of the official opening of the 2015 legal year on 12 January 2015, 6.

160 Fiss, 'The limits of judicial independence', 63.

161 Judicial Service Commission 'Strategic plan, 2021-2025', 20.

162 Judicial Service Commission 'Annual report, 2013', 12-13.

163 Speech delivered by Honourable Justice Luke Malaba, Chief Justice of Zimbabwe, on the occasion of the official opening of the 2018 legal year on 15 January, 2018, 14.

164 Of the 163 members that left the judicial service in 2022, 69% resigned due to poor working conditions. The exit interviews conducted by the Commission revealed that those that left sought 'greener pastures'. See Judicial Service Commission 'Annual Report, 2022' 9.

magistrates, also does not correspond to the dignity of the profession and the work they do.[165] The Judicial Service Commission's 2019 Annual Report indicates that the purchase of conditions of service vehicles for judges, which is their constitutional entitlement, was not undertaken since Treasury did not disburse the relevant funds.[166]

A year later, the Judicial Service Commission, in its 2020 Annual Report, revealed that the failure to provide these vehicles was affecting 'the morale and motivation of the judges'.[167] Without adequate remuneration, judges are prone to outside interference.[168] Hence, the Judicial Service Commission has been left with no choice but to lobby for improved financial support and other interventions from the government to enhance the conditions of service of members of the judicial service.[169]

Courts Administration Fund

The day-to-day operations of the judiciary and other stakeholders in the justice sector are funded partially from funds generated by the Courts Administration Fund. The Fund, into which all fines and fees imposed on justice delivery related matters are deposited, was established to provide resources to the justice system, including the courts, so as to enhance effective and efficient administration of justice.[170] The Fund is provided for under the Public Finance Management Act[171] while the sharing of revenue from the Fund is regulated by the National Prosecuting Authority Act.[172] The latter Act provides the following sharing ratios: 35 percent to the Judicial Service Commission, 25 percent to the National Prosecuting Authority, 15 percent to the Attorney General's Office, 10 percent to the ministry responsible for justice, and 15 percent to the Zimbabwe Prisons and Correctional Services.[173]

---

165 Judicial Service Commission 'Annual report, 2022', 32.

166 Judicial Service Commission 'Annual report, 2019', 27.

167 Judicial Service Commission 'Annual report, 2020', 30.

168 Venice Commission, Report on the independence of the judicial system Part 1: The independence of judges, 10.

169 Judicial Service Commission 'Annual report, 2022', 9.

170 Auditor General, 'Report of the Auditor General for the financial year ended 31 December, 2018 on appropriation accounts, finance and revenue statements and fund accounts, presented to Parliament of Zimbabwe', 2019, 457.

171 See Public Finance Management Act (No 6 of 2016), Section 93(3).

172 Act No 5 of 2014.

173 National Prosecuting Authority Act (No 5 of 2014), Section 32(9). [subsection (9) amended by Section 48 of Act 2 of 2016 *and substituted by* Section 8(b) of Act 7 of 2020].

In 2011, 2012, 2013, 2014, 2015, 2016 and 2017, the Fund raised US$ 4 081 688; US$ 4 073 322; US$ 5 300 561; US$ 6 312 168; US$ 8 536 003; US$ 7 061 434; and US$ 120 000 000, respectively.[174] Thus, the Fund has the potential to generate significant revenue. In its 2022 Annual Report, the Judicial Service Commission bemoaned the suppression of revenue collection to the Fund due to low court fees which were unviable.[175] With the hyperinflationary environment, the fees have to be adjusted regularly to make economic sense. However, this fee adjustment does not occur timeously. For instance, in 2022, the fees were only revised in November against spiral inflation.[176] While the Judicial Service Commission can make recommendations regarding this adjustment, the final decision rests with the minister responsible for justice.[177] This again is another reflection of how the judiciary is reliant on the executive for funds.

The judiciary requires financial autonomy both at institutional and individual levels to deliver justice effectively. The discussion above has examined a number of constitutional measures aimed at enhancing judicial financial independence. It was established that the judiciary is institutionally beholden to the executive and legislature for financial resources. The Judicial Service Commission does, however, have the means to influence the executive and parliamentary decision-making processes relating to the allocation of resources to the judiciary.

In practice, the state has been consistently failing to provide the Judicial Service Commission with adequate resources needed for the effective delivery of justice. This failure must be understood against the background of the government's inability to mobilise sufficient resources mainly due to the ailing economy. With these limited resources, the government has to balance the demanding and diverse priorities of various state institutions, including those of the judiciary. What this means is that the judiciary does not yet enjoy adequate judicial financial independence and therefore, is not in a position to stand shoulder to arm with the other two arms of government. How does the judiciary account for its financial resources? The succeeding part strives to answer this question.

---

174 Judicial Service Commission, 'Annual report, 2016' 12; Judicial Service Commission, 'Annual report, 2017', 15.

175 Judicial Service Commission, 'Annual report, 2022', 3, 12.

176 Judicial Service Commission, 'Annual report, 2022', 3.

177 See Judicial Service Commission, 'Annual report, 2022', 12.

Judicial financial accountability

Judicial independence without accountability is a danger to the judiciary, undermines the balance of power among the three arms of government and will not be accepted by the society.[178] Accountability entails that the judiciary is 'morally obliged to inform society about all aspects of its functioning and explain its policies, procedures and decisions'.[179] Accountability does not, however, mean that the judiciary is responsible or subordinate to the executive or legislature. If that were the case, the judiciary would not be able to act independently especially in cases involving these arms of government.[180]

Section 190(2) of the Constitution recognises the need for the judiciary to be accountable to ensure the efficient, effective and transparent administration of justice in Zimbabwe. It is out of this recognition that the Judicial Service Commission seeks to strike a balance between accountability and independence by adopting a policy of 'responsible independence or independence with accountability'.[181] In general, accountability in the judiciary can be fostered through appeal procedures, codes of conduct, complaints procedures, and performance evaluations among other means.[182] However, in this part, the chapter will focus on judicial financial accountability which is achieved mainly through parliamentary oversight, regular reporting and auditing.

Oversight by parliament

There is an elaborate constitutional and legislative framework on public finance management, which is applicable to the Judicial Service Commission. Section 298(1)(a) of the Constitution requires transparency and accountability in 'all' aspects of public finance in Zimbabwe, including funds allocated to the Judicial Service Commission. Section 308(2) states that public funds must be safeguarded and spent legally,

---

178 Van Dijk and Vos, 'A method for assessment of the independence and accountability of the judiciary', 20.

179 Van Dijk and Vos, 'A method for assessment of the independence and accountability of the judiciary', 7.

180 Honourable Chief Justice Luke Malaba, 'Definition and importance of judicial independence as a concept' 24.

181 Judicial Service Commission 'Strategic plan 2021-2025', 5.

182 Keilitz, 'Viewing judicial independence and accountability through the "lens" of performance measurement and management', 28.

whereas Section 308(3) requires public property to be safeguarded and used legally. Section 299 imposes an obligation on parliament to oversee the expenditure of government and its agencies at all levels as well as of all constitutional entities. The provision further requires parliament to ensure that public funds are accounted for, all expenditure has been properly incurred and any limits and conditions on appropriations have been observed.[183]

The Public Finance Management Act gives effect to the Constitution, by, among other ways, regulating the control and management of public funds entrusted to public institutions and constitutional entities such as the Judicial Service Commission.[184] In practice, parliament scrutinises the expenditure of public funds through the relevant committee on finance.

Regular reporting

World over, 'justice systems do not exist for the benefit of judges but rather for the benefit of the citizens they serve'.[185] Thus, it is important that the judiciary is transparent to enable accountability. The Constitution recognises the need for the Judicial Service Commission to conduct its business in a transparent manner.[186] Section 323 (1)(a) of the Constitution further requires the Judicial Service Commission to submit to parliament, through the minister responsible for justice, 'an annual report describing fully its operations and activities'. This report must be submitted to parliament not later than the end of March in the year following the year to which the report relates. The requirement that the Judicial Service Commission submits its annual report to parliament through the minister gives the impression that the Commission administratively accounts to the minister.

A progressive approach would have been for the Judicial Service Commission to report directly to parliament. In practice, the Judicial Service Commission regularly reports to parliament and some of its annual reports can be easily accessed on the Commission's website.[187] The

---

183 Constitution of Zimbabwe (2013), Section 299(1).

184 See Public Finance Management Act (No 6 of 2016), Section 4.

185 Keilitz, 'Viewing judicial independence and accountability through the 'lens' of performance measurement and management', 31.

186 Constitution of Zimbabwe (2013), Section 191.

187 See Judicial Service Commission, 'Integrated case electronic management system' <http://www.jsc.org.zw/> on 24 August 2023.

publication of these reports enables civil society and the general public to provide an additional layer of oversight.[188] However, the Judicial Service Commission's annual reports are not comprehensive enough. They merely provide a summary of the general state of human resources, court operations, performance, and finances among other things.

The finance section of the 2022 Annual Report, for instance, only states that the Judicial Service Commission was allocated ZWL$ 12 183 194 286 and this money was spent on capital, recurrent expenditure and salaries.[189] The report does not give a detailed breakdown of this expenditure. Thus, unless one has the actual financial statements, which were not publicly available at the point of writing, it is difficult to determine how the Commission is spending public money.

Auditing

The Constitution makes provision for the role of the Auditor General whose responsibilities include the auditing of the accounts, financial systems and financial management of all government institutions and agencies as well as those of constitutional entities, such as the Judicial Service Commission.[190] When carrying out this mandate, the auditor general has far-reaching powers; the Auditor General can for instance 'order the taking of measures to rectify any defects in the management and safeguarding of public funds and property'.[191] Public officials are obliged to comply with such an order. Section 22(1) of the Judicial Service Act obliges the Judicial Service Commission to keep proper accounts and relevant records of its activities, funds and property, while Section 23(1) requires these accounts to be audited by the Auditor General.

In line with these requirements, the Judicial Service Commission regularly submits its financial books for auditing and often receives positive audit outcomes. In 2020, for example, the auditor general established that the accounts and statements of the Judicial Service Commission fairly represented the financial state of the Commission in accordance with generally accepted accounting practice.[192]

---

188 Manyatera, 'Conceptualising judicial independence under Zimbabwe's constitutional framework', 24.

189 Judicial Service Commission 'Annual report, 2022', 31.

190 Constitution of Zimbabwe (2013), Section 309(2)(a).

191 Constitution of Zimbabwe (2013), Section 309(2)(c).

192 Auditor General, Report of the Auditor General for the financial year ended 31

However, the Auditor General has also established that in some cases, the Judicial Service Commission has failed to comply with the law. For instance, the Auditor General's report for the 2018 financial year notes that the Judicial Service Commission collected and retained a total of 66 percent of funds in the Court Administration Fund against the 40 percent stipulated under Section 32(9) of the National Prosecuting Authority Act, as stated above.[193]

In response to this finding, the Judicial Service Commission indicated that Treasury authorised the Commission to retain 50 percent of the Fund for its capital expenditure projects and to share the remaining 50 percent with other partners in the justice sector. It is further indicated that the 50 percent for capital expenditure is approved by Treasury annually through the budget and this facility was included in the national budget from 2017. The Auditor General noted that while this arrangement may be aimed at ensuring that more resources are available to the judiciary, it however, contradicts the law.[194] This arrangement also indicates a practice of the Judicial Service Commission negotiating with Treasury to access more resources, a development which demonstrates the absence of adequate financial independence.

Towards enhancing judicial financial independence

The previous section discussed judicial financial accountability in Zimbabwe, which is not a major concern. The biggest concern is that the judiciary lacks adequate financial independence, which is adversely affecting its overall independence and the delivery of justice, as discussed above. Against this background, how can judicial financial independence be enhanced in Zimbabwe? This section proffers three proposals for consideration namely, reserving a minimum percentage of the budget for the judiciary, the disbursement of appropriated funds timeously and the provision of adequate remuneration for judicial

December 2020 on appropriation accounts, finance and revenue statements and fund accounts, Presented to Parliament of Zimbabwe 2021, 233.

193 Auditor General, 'Report of the Auditor General for the financial year ended 31 December 2018 on appropriation accounts, finance and revenue statements and fund accounts', 459.

194 Auditor General, 'Report of the Auditor General for the financial year ended 31 December 2018 on appropriation accounts, finance and revenue statements and fund accounts', 459.

officers. These and other proposals are necessary to change the current state of judicial financial dependency to independence.

Reserving a certain minimum percentage of the budget for the judiciary

The above discussion has shown that the Judicial Service Commission often receives less than one percent of the national budget. This explains why year after year there are calls from the Judicial Service Commission for more funding for the judiciary. Judicial financial independence may be enhanced if there is a fixed minimum percentage of the national budget that must be allocated to the judiciary annually.[195]

This approach of a fixed percentage has worked relatively well for local governments which, before 2013, were not constitutionally entitled to a share of nationally raised revenue in each financial year. As a result, national government's financial support to local governments was sporadic and inadequate. With the adoption of the 2013 Constitution, which requires that at least 5 percent of nationally raised revenue be allocated to provinces and local government, financial support to local government has significantly improved and guaranteed local governments of a reliable source of funding. A similar approach should be considered for the judiciary.

Disbursing appropriated funds on time

The Latimer Principles caution that the 'allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary'.[196] The discussion above has shown that the appropriated funds are not immediately disbursed. In addition, the judiciary often struggles to get its allocation on time and in some cases, it does not get the full allocation by end of the year. This has forced the Judicial Service Commission to continuously knock on Treasury's doors to ensure the release of the funds. Without ensuring that the judiciary's allocations are disbursed on time, the judiciary will continue to struggle to fund its activities. Hence, the suggestion from the Chief Justice to Treasury for 'the implementation of the system of block release of adequate funds to the judiciary from its appropriated budget funds to

---

[195] Chiduza, 'Towards the protection of human rights', 394.

[196] Principle II, para 2.

pre-empt the frequent visits to it by officers from the Judicial Service Commission pleading for money for its operational needs'.[197] Urgent practical reforms, which prioritise the timeous disbursement of funds to the judiciary, are required.

Providing sufficient remuneration for judicial officers

It is commendable that salaries and benefits of judicial officers cannot be reduced while they hold office. However, this protection is of no use if salaries and benefits of judicial officers are not protected against inflationary pressures. In his address on the occasion of the 2022 legal year, Chief Justice Malaba lamented the fact that 'members of the Judicial Service continue to experience financial hardships due to low remuneration levels.'[198] This is partially because their salaries and benefits are not reviewed regularly in line with economic developments. This is a severe sanction against the judiciary which may force judicial officers to tailor their decisions to win the goodwill of the executive.[199] Parliament noted that the improvement of conditions of service of members of the judiciary 'would help to minimise institutional lethargy, motivate employees, promote greater effectiveness and efficiency and reduce corruption'.[200]

Thus, there is an urgent need to provide sufficient remuneration to judicial officers which is commensurate with their work. Other jurisdictions and comparable sectors can be used to benchmark the remuneration of members of the judicial services.[201] Thereafter, the salaries and benefits should be adjusted on a regular basis in line with economic developments.[202]

---

197 Address by the Honourable Mr Justice Luke Malaba, Chief Justice of Zimbabwe on the occasion of the official opening of the 2022 legal year on 10 January 2022, 28.

198 Address by the Honourable Mr Justice Luke Malaba, Chief Justice of Zimbabwe on the occasion of the official opening of the 2022 legal year on 10 January 2022, 26.

199 See Fiss, 'The limits of judicial independence', 63.

200 Parliament of Zimbabwe, 'First report of the Thematic Committee on Human Rights', 9.

201 See 'Judicial Service Commission, 'Strategic plan 2021-2025', 20.

202 Burgh House Principles on the Independence of the International Judiciary International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, Article 4(2).

Conclusion

The 2013 Constitution recognises the need for and importance of an independent judiciary in Zimbabwe to the rule of law, human rights protection and limited government. The Constitution entrenches the principle of judicial independence and provides a number of measures aiming at ensuring that the judiciary is independent both at institutional and individual levels. While the Constitution provides a sound framework for judicial independence, recent constitutional amendments on the appointment and tenure of judges may have weakened this framework. Inherent in institutional independence is the element of judicial financial independence, which was the main focus of this chapter.

In this regard, the chapter examined, among other things, how the courts are funded, the remuneration of judges and judicial financial accountability. It was established that the judiciary is financially beholden to the executive and legislature and, therefore, not in a position to act as a co-equal partner with them. In addition, the state has been persistently failing in its obligation to provide the judiciary with adequate resources needed for the effective delivery of justice.

This failure is however not deliberately meant to 'control' the judiciary, as other state institutions are equally underfunded. The biggest impediment appears to be the inability of the state to mobilise sufficient resources due to the underperforming economy.

Nonetheless, there are weaknesses with the current funding model for the judiciary which must be addressed so that the Judicial Service Commission has the much-needed financial autonomy. It is in this spirit that the Chapter proposed three key recommendations: reserving a minimum percentage of the national budget for the judiciary, the disbursement of appropriated funds timeously and the provision of adequate remuneration for judicial officers.

CHAPTER FIVE: MALAWI

Exploring the normative and practical aspects of fiscal autonomy for the Malawi judiciary

Mwiza Jo Nkhata

Background

Malawi is a former British protectorate that attained independence on 6 July 1964. As was often the case with many British territories, Malawi's independence was consummated under a Westminster-style constitution (the 1964 Constitution or the Independence Constitution). Under the Independence Constitution, the British monarch was the Head of State while a Prime Minister, Dr Kamuzu Banda, headed the government. In 1966, Dr Kamuzu Banda and the Malawi Congress Party (MCP) instigated constitutional reforms that resulted in the repeal of the Independence Constitution and the adoption of a republican constitution (the 1966 Constitution). Under the 1966 Constitution, Dr Kamuzu Banda became Malawi's first president and remained in office until 1994. His tenure, however, was marked by authoritarianism and heavy-handed repression of all political opponents.[1]

Although the 1966 Constitution retained the judiciary as an independent branch of government, in reality, the judiciary was subordinated to the executive. Overall, the 1966 Constitution was remarkable; generally, for creating a one-party state with a very strong executive and specifically, for establishing an overly powerful presidency.[2] The

---

* Public information about the specifics, in relation to the financing of the Malawi Judiciary, is rather scanty. I owe a debt of gratitude to several senior serving and retired judicial officers, law officers in the Ministry of Justice and Constitutional Affairs and lecturers at the University of Malawi for sharing their views on this subject. While remaining ever-grateful for their insights, I have deliberately chosen not to name them individually. I take full responsibility for any shortfalls in this chapter.

1 Kings Phiri and Kenneth Ross, 'Introduction: From totalitarianism to democracy' in Kings Phiri and Kenneth Ross (eds) *Democratisation in Malawi: A stocktaking,* CLAIM, 1998, 11.

2 Msaiwale Chigawa, 'The fundamental values of the Republic of Malawi Constitution' Concept Paper One, The Law Commission Constitutional Review Conference, March 2006.

1966 Constitution remained in force until 1994 when it was, as part of Malawi's transition from a one-party state to a multiparty democracy, replaced by the Constitution of the Republic of Malawi of 1994 (the 1994 Constitution or the Constitution).[3]

The 1994 Constitution is arguably the brightest monument of Malawi's transition to a multiparty democracy. It reserves a very sanctified place for the judiciary. In part, largely due to the country's history of autocratic rule, the framers of the Constitution created an elaborate legal edifice meant to establish the judiciary as an independent and co-equal branch of government. Implicit in the judiciary's structuring under the Constitution is an acknowledgement that any system based on the rule of law must have a strong and independent judiciary with the necessary wherewithal to uphold the Constitution and all other laws. [4]

While bearing in mind the fact that judicial independence is multifaceted, the focus of this chapter is on fiscal autonomy. The fiscal autonomy of any judiciary is a critical component of its independence since it determines the conditions under which courts perform their mandate.[5] Organisationally, the next section of this chapter outlines the court system in Malawi. Thereafter, by focusing on some key aspects, this chapter provides an overview of judicial independence. Subsequently, this chapter attempts to unpack some topical issues in relation to judicial fiscal autonomy in Malawi. The penultimate section of this chapter highlights the implications, for judicial independence, of the situation in Malawi while at the same time offering suggestions for improving the judiciary's fiscal autonomy.

The court system in Malawi and the status of judicial independence

This section outlines the Malawian court structure as well as the general administration of courts. It also deals with judicial independence in Malawi generally before briefly exploring some aspects that have a particular bearing on judicial independence.

---

3 See, Jande Banda, 'The constitutional change debate of 1993-1995' in Phiri and Ross (eds), *Democratisation in Malawi,* 316-333 and Arthur Mutharika, 'The 1995 democratic constitution of Malawi' 40 *Journal of African Law* 2 (1996) 205-220.

4 See United Nations, 'Report of the General Secretary - The rule of law and transitional justice in conflict and post conflict societies' UN Doc S/2004/616, 23 August 2004.

5 United Nations, 'Report of the General Secretary - The rule of law and transitional justice'.

Court structure and administration

As conceived under the 1994 Constitution, Malawi's court system is a three-tiered arrangement. The Malawi Supreme Court of Appeal is the 'most superior court of record' in the country. [6] Its jurisdiction is appellate, and it is mandated to hear appeals from the High Court and such other courts and tribunals as may be prescribed by an Act of Parliament.[7] Directly beneath the Supreme Court of Appeal is the High Court of Malawi (the High Court). The High Court is established as a court of unlimited original jurisdiction both in civil and criminal matters.[8] The High Court operates through thematic divisions such as civil, commercial, criminal, family and probate, revenue, and financial crimes.[9] The lowest tier of courts are subordinate courts.[10]

The constitutional provisions dealing with the judiciary are supplemented by the Courts Act,[11] which contains general provisions about the operations of courts; the Supreme Court of Appeal Act,[12] which regulates the operations of the Supreme Court; and the Labour Relations Act[13] which deals with the Industrial Relations Court. Malawi does not have a specially designed constitutional court. Constitutional disputes are resolved by the High Court as a court of first instance, sitting with a minimum of three judges.[14] It is this reconfigured High Court that is often loosely referred to as the constitutional court in Malawi.

It is likely, however, that these arrangements may soon be altered. At the time of writing this chapter, proposals were being considered, the most significant of which would result in the introduction of a Court

---

6 Constitution of Malawi (1994), Section 104.

7 For example, under Defence Force Act (Cap 12:01, Laws of Malawi), Section 141, an appeal from a court-martial lies directly to the Malawi Supreme Court of Appeal (MSCA).

8 Constitution of Malawi (1994), Section 108(1).

9 The thematic divisions of the High Court are of recent origin, with the exception of the Commercial Division, having been introduced in 2016, see, Courts (Amendment) Act (No 23 of 2016), Section 6A. The Financial Crimes Division was introduced by Courts (Amendment) Act (No 36 of 2022), Section 5.

10 Constitution of Malawi (1994), Section 110(1). There are four types of courts subordinate to the High Court and these are: the Industrial Relations Court, the Magistrate's Court, the Child Justice Courts and the Local Courts.

11 Courts Act (Cap 3:02 Laws of Malawi).

12 Courts Act (Cap 3:02 Laws of Malawi).

13 Courts Act (Cap 3:02 Laws of Malawi).

14 Courts Act (Cap 3:02 Laws of Malawi), Section 9; *also,* Mwiza Nkhata, 'The High Court of Malawi as a constitutional court: Constitutional adjudication the Malawian way' 24 *Law Democracy and Development* (2020) 442-467.

of Appeal between the High Court and the Supreme Court of Appeal.[15] If these proposals come to fruition, the result will be a four-tiered court system which will retain the Supreme Court of Appeal as the ultimate appellate court. It has been postulated that the introduction of a court of appeal will help reduce the number of cases that end up in the Supreme Court of Appeal and speed up the conclusion of cases.

It is hard though to imagine that the introduction of a court of appeal by itself will achieve the results that have been suggested. Delays in the conclusion of cases in Malawi are arguably not simply due to the absence of another layer of courts between the High Court and Supreme Court of Appeal but due to systemic challenges within the judiciary. The judiciary's persistent failure to observe and enforce timelines for the delivery of judgments in civil cases before the High Court, for example, is indicative of these systemic challenges.[16]

The Chief Justice is the head of the judiciary. Courtesy of a recent amendment to the Constitution, for the first time in Malawi's post-independence history, provision has been made for the office of the Deputy Chief Justice.[17] In the day-to-day running of the judiciary, however, it is the Registrar of the Supreme Court and the Registrar of the High Court of Malawi who take a central role. Nevertheless, the registrar remains subject to the directions of the chief justice.[18] The registrar is assisted by deputy registrars, assistant registrars, and other officers, principal among them being the Chief Courts Administrator. The Chief Courts Administrator is mandated to 'oversee the general, financial and personnel administration of the judiciary' subject to any general or special directions of the Chief Justice.[19] However, the Registrar is the controlling officer of the judiciary.[20]

---

15 See, Government of Malawi, 'Functional review report on the Malawi Judiciary' (2021) and Government of Malawi, 'Authorised establishment warrant No 4 of 2020/2021' – both on file with the author.

16 Under Courts (High Court) (Civil Procedure) Rules, 2017, Order 16 Rule 9(1), the High Court must deliver judgment within ninety days from the date the parties file their written submissions. This is a prescription that is observed more in its breach than in compliance – Ntchindi Meki, 'Justice delayed, justice denied' *Nation Online* 22 April 2023.

17 Constitution (Amendment) Act (No 18 of 2021), Section 6. As at the time of writing, however, no-one had been appointed to serve as Deputy Chief Justice notwithstanding the adoption of the amendment.

18 Courts Act (Cap 3:02, Laws of Malawi), Section 8(1).

19 Judicature Administration Act (Cap 3:10 Laws of Malawi), Section 3.

20 Under Section 2 of the Public Finance Management Act of 2020 a controlling officer is 'a person who is (a) the head or principal officer in-charge of a Ministry, department

Independence of the judiciary

The Constitution does not define judicial independence. Nevertheless, it is manifest that this is a multifaceted concept.[21] Different institutional, legal, and operational arrangements can be employed to ensure judicial independence, and these will work differently depending on the historical, political, legal, and social contexts. The Constitution, however, is liberally laced with provisions that underpin judicial independence both from an institutional perspective and at a personal level,[22] that is, the independence of the individuals working in the judiciary.[23] For example, under Section 9, only the judiciary has 'the responsibility of interpreting, protecting, and enforcing [the] Constitution and all laws and in accordance with [the] Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.'

Further, Section 103(1) provides that 'all courts and all persons presiding over those courts shall exercise their functions, powers, and duties independent of the influence and direction of any other person or authority.' The 'judicial role' of the judiciary is cemented by Section 103(2) which stipulates that jurisdiction over all judicial issues rests with the judiciary and it is for the judiciary to decide whether a matter is within its jurisdiction or not. The Constitution also expressly prohibits any laws that may purport to outlaw the jurisdiction of courts to deal with matters related to it.[24]

---

or any government agency; or (b) charged with a duty to, or actually collect, receive, disburse or deal, in any way, with public money or charged with the purchase, receipt, custody, or disposal of, or the accounting for, public resources or public securities.'

21 United Nations Office on Drugs and Crimes, 'Judicial independence: The main factors aimed at securing judicial independence' *E4J University Module Series: Crime prevention and criminal justice - Module 14: Independence of the judiciary and the role of prosecutors* n.d. <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--the-main-factors-aimed-at-securing-judicial-independence.html> on 2 March 2022.

22 Judicial independence, at the normative level, focuses on at least two dimensions, first, the independence of the judiciary as an institution and, second, the independence of the individuals serving in the judiciary. It is in the latter sense that I speak of independence at the personal level.

23 According to Justice Charles Mkandawire, the Constitution 'has entrenched the doctrine of separation of powers whereby judicial independence has received a lot of prominence' – *The State (On the application of the Human Rights Defenders Committee and others) and President of the Republic of Malawi and others* Judicial Review Cause No 33 of 2020 (Unreported).

24 Constitution of Malawi (1994), Section 11(4).

Strikingly, the judiciary is the one branch of government that still retains high levels of public trust.[25] However, this, as demonstrated later in this chapter, is not to suggest that there have been no challenges to its independence. Many of the challenges to its independence have arisen in its interactions with the executive as well as the National Assembly, but some of the challenges arise from within.[26]

The internal challenges include allegations of corruption that are eroding the public's confidence in the judiciary.[27] Complaints about delayed judgments are also undermining the judiciary's integrity.[28] Examples of external threats to the judiciary's authority include executive non-compliance with judicial decisions and poor funding. These challenges confirm that real judicial independence requires more than the presence of supportive statutory provisions.[29] A key precondition to securing judicial independence lies in availing the judiciary adequate resources to enable it to carry out its mandate.[30]

---

[25] Mwiza Nkhata, A Mwenifumbo and A Majamanda, 'The nullification of the 2019 presidential election in Malawi: A judicial coup d'etat?' 20(2) *Journal of African Elections* (2021) 59. A recent study put the level of public trust in the judiciary at 68%, making Malawi second in a pool of thirty-four African countries that were surveyed – Democratic Governance and Human Rights Unit, *The state of the judiciary in Malawi, Namibia and South Africa: Court users' and judges' perspectives*' University of Cape Town n.d. <https://www.judgesmatter.co.za/wp-content/uploads/2022/04/The-State-of-the-Judiciary-in-Malawi-Namibia-and-South-Africa-Court-Users-and-Judges-perspectives-April-2022_FINAL.pdf> on 23 June 2022.

[26] In identifying threats against the judiciary 'attempts at interference by the executive' was identified as one of the key threats facing the Judiciary – Malawi Judiciary, 'Strategic Plan 2019-2024' (undated) 13 – copy on file with author.

[27] Rizine Mzikamanda, 'Some thoughts on effective strategies for combating corruption in the Malawi judiciary' *Goal 16 of the Sustainable Development Goals,* n.d. <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Mzikamanda.pdf> on 10 March 2022.

[28] Beston Luka, 'Court delays affecting justice delivery' *Zodiak* 28 October 2022. In *HH Chikaoneka t/a Madalitso Clothing Factory v Indefund Ltd*, MSCA Civil Appeal No 22 of 2001, the Supreme Court of Appeal after bemoaning how long the High Court had taken to conclude the case, noted that '…such delay [in delivering judgments] is inexcusable and a disgrace to the Judiciary as regards the manner in which it performs its functions.'

[29] See Southern African Judges' Commission, 'Financial independence of the courts: A revisit of last year's discussion' Maseru, Lesotho, 30 March-1 April 2007.

[30] Katerina Kocevska, 'Budgetary constraints on judicial independence in western Balkan countries' n.d. <http://pf.ukim.edu.mk/wp-content/uploads/2020/02/7.-Katerina-Shapkova-Kocevska.pdf> on 31 March 2022.

Appointment and tenure of judicial officers

Appointment of judges in Malawi requires the involvement of the President and the Judicial Service Commission. Under Section 111 of the Constitution, the President on the 'recommendation of the Judicial Service Commission' appoints all judges. The Chief Justice, however, is appointed by the President subject to confirmation by the National Assembly, with a majority of two-thirds of the members present and voting.[31] Normally, for the appointment of judges, the first step is the public advertisement in local newspapers calling for applications. Applications are made to the Judicial Service Commission which presumably shortlists and vets the applications and comes up with a list of its recommendations for the President. The process is finalised when the President makes the appointments, again presumably, from the list submitted by the Judicial Service Commission.

The process of appointing judges under the 1994 Constitution leaves a lot to be desired.[32] Quite aside from the normative aspects, the manner in which the powers of appointment have been exercised has raised credible doubts about, among others, the propriety, objectivity, and transparency of the process. Previously, for example, allegations have been made that some presidents have made appointments to the bench without involving the Judicial Service Commission.[33] In other instances, allegations have also been levied against the appointing authority for politicising appointments to the bench, for example, by factoring tribal and regional origins into the appointment of judges.[34]

The biggest challenge with the entire process of appointing judges is its opacity. Once applications have been made to the Judicial Service Commission, nothing is publicly known about the process until after the President announces their appointees. Given this opacity, it is impossible to tell if, for example, the President has appointed people from the list submitted by the Judicial Service Commission, or the names recommended by the Judicial Service Commission are from those

---

31 Constitution of Malawi (1994), Section 111(1). In contrast, under the 1966 Constitution, Section 63(1) provided as follows: 'The Chief Justice shall be appointed by the President.'

32 For a full critique on the process of appointing judges in Malawi, see, Mwiza Nkhata, 'Safeguarding the integrity of judicial appointments in Malawi: A proposed reform agenda' 62(3) *Journal of African Law* (2018) 377-402.

33 Fidelis Kanyongolo, *Malawi: Justice sector and the rule of law*, Open Society Initiative for South Africa, 2006.

34 Rachel Ellet, *Politics of judicial independence in Malawi,* Freedom House, 2013.

who applied for the positions. This process is in dire need of reform, particularly to enhance its transparency and openness.[35]

In so far as tenure is concerned, judges in Malawi have a constitutionally guaranteed tenure. Under Section 119(6) of the 1994 Constitution, a judge was entitled to remain in office until he or she reached the age of sixty-five. This provision created an anomaly since the retirement age of magistrates was seventy years, and no justification was provided for the difference in retirement age. Fortunately, this position has since been changed, and the retirement age of judges is now also pegged at seventy years.[36]

The Constitution protects judicial officers from arbitrary removal from office. According to the Constitution, a judge of the High Court or Supreme Court of Appeal may be removed from office for either misconduct or inability to perform the functions of the office, arising either from infirmity of the body or mind.[37] Further, constitutional provisions on the security of tenure of judges require that the removal of a judge from office must comply with an elaborate procedure, which protects judges against unjustified or unfair removal from office.[38]

As prescribed by the Constitution, when the National Assembly has submitted a petition to the President seeking the removal of a judge, the President has the power to remove the judge from office only after consulting the Judicial Service Commission. A petition for the removal of a judge from office must be preceded by debate in the National Assembly and can only be submitted to the President if it is passed by votes from a majority of all the members of the National Assembly. The Constitution also requires that the process of the removal of a judge from office must comply with the principles of natural justice. The constitutional provisions regulating the removal of judges from office are an obvious bulwark in support of judicial independence, and they work to ensure that judges do not have to 'constantly look over their shoulders' when discharging their functions.

---

35 See, Nkhata, 'Safeguarding the integrity of judicial appointments in Malawi'.

36 Courts (Amendment) Act (No 18 of 2021), Section 5B.

37 Constitution of Malawi (1994), Section 119(2), as amended by Constitution (Amendment) Act (No 18 of 2021), Section 9.

38 Constitution of Malawi (1994), Sections 119(3) and 119(4).

The role of the Judicial Service Commission

The Judicial Service Commission is established under Section 116 of the Constitution for 'the regulation of judicial officers and [with] such jurisdiction and powers as may be conferred on it by [the] Constitution…' or an Act of Parliament. In terms of composition, the Judicial Service Commission consists of the Chief Justice, who is the chairperson, the chairperson of the Civil Service Commission or his designate, a justice of appeal or a judge designated by the President in consultation with the Chief Justice, a legal practitioner, and a magistrate both designated by the President in consultation with the Chief Justice.[39] Under Section 118, the Judicial Service Commission has, among other things, the authority to nominate persons for judicial office, exercise disciplinary powers over judicial officers, and recommend the removal of a person from judicial office subject to Section 119 of the Constitution. The Constitution envisages that the functions and powers of the Judicial Service Commission will be better explained in an Act of Parliament. However, the only statute that comes closest to performing this function is the Judicature Administration Act.[40]

Intriguingly, the Judicature Administration Act does not provide any clarity on the processes and procedures that the Judicial Service Commission must follow in its operations. It, however, empowers the Judicial Service Commission to make regulations for, among other things, the nomination of persons to judicial office or the disciplining of judicial officers. At the time of writing this chapter, no legislation, or even regulations, had been adopted to govern the operations of the Judicial Service Commission.[41] Since there are no publicly available documents shedding light on the operations of the Judicial Service Commission, there continues to be an air of mystery about how it conducts its operations, which does not augur well for the rule of law.

More pointedly, there are several areas of concern about the Judicial Service Commission which require immediate attention.[42]

---

[39] Constitution of Malawi (1994), Section 117.

[40] Cap 3:10, Laws of Malawi.

[41] As at the time of writing, the author's communication with the Malawi Law Society confirmed that the process of adopting legislation governing the Judicial Service Commission had finally commenced and that consultations on the draft bill were ongoing.

[42] For a critique of the Judicial Service Commission, see, Mwiza Nkhata, 'Spotlight on the guardians of the gatekeepers: An assessment of the judicial service commission of Malawi' 51(1) *Comparative and International Law Journal of Southern Africa* (2018) 66-96.

Given the strictures of space, only a cursory discussion of these concerns is attempted here. First, is the question of the composition of the Judicial Service Commission. As was pointed out by the Malawi Law Commission in 2007, the judiciary is overrepresented in the Judicial Service Commission – the Commission is composed of five people, yet three of them are appointed directly from the judiciary and the fourth person is a lawyer designated by the President acting in consultation with the Chief Justice.

The question that arises here is whether it is proper for the judiciary, and its representatives, to dominate the membership of the Judicial Service Commission. The danger is that while the Judicial Service Commission is supposed to be an institution separate from the judiciary, and its membership simply reflects the composition of the judiciary, it risks becoming a mere extension of the judiciary. Again, in relation to composition, one notes that while the Chief Justice is the chairperson, all other members of the Commission are appointed after consultations between the President and the Chief Justice. This practically means that the Chief Justice has a hand in the appointment of all members of the Commission except one. The danger here is that for such a small committee, the influence of the Chief Justice may be limitless.

Second, in terms of Section 118 of the Constitution, the Judicial Service Commission is mandated to exercise disciplinary powers over judicial officers. To date, however, the mechanisms for receiving complaints and disciplining judicial officers remain non-existent.[43] In the absence of special mechanisms for handling disciplinary matters affecting judicial officers, the Public Service Commission Regulations have been used to enforce discipline over judicial officers.[44] Given that these Regulations predate the Constitution, it is doubtful if they are in full consonance with it. The implications of the absence of clear mechanisms and procedures for disciplining judicial officers came to the fore in 2001 when Parliament attempted to impeach three High Court judges.[45] Once the impeachment motion fell through, the Judicial Service Commission

---

[43] Siri Gloppen and Fidelis Kanyongolo, 'Malawi' in Linda Van de Vijver (ed) *The judicial institution in Southern Africa: A comparative study of common law jurisdictions* Siber Ink, 2006, 83.

[44] James Kalaile, 'Judicial transparency' in Malawi judiciary (ed) *Judges conference on independence, accountability and transparency* Malawi Judiciary, 2007, 30 – copy on file with author.

[45] Rachel Ellett, *Pathways to judicial power in transitional states: Perspectives from African courts* Routledge, 2013, 120-123.

tried to discipline the concerned judges but could not proceed in the absence of the applicable rules of procedure.[46]

Centrally, the problem is that while the Constitution has vested general supervisory and disciplinary powers in the Judicial Service Commission, no enabling statute has been passed to provide details as to how this supervisory and disciplinary mandate must be exercised. This is a huge omission and, regrettably, the Judicial Service Commission has continued to operate without an enabling statute. It is also regrettable that the leeway created by Section 5 of the Judicature Administration Act, which allows the Judicial Service Commission to adopt regulations governing aspects of its work, has not been utilised. Perhaps as a result of the lack of a legislative framework for the disciplinary operations of the Commission, very little is known about its disciplinary work.[47] Concededly, proposals have now been floated for developing a legislative framework to govern the Commission. One can only hope that this opportunity will be utilised to create a robust framework for addressing all the challenges faced by the Judicial Service Commission.[48]

Ironically, the judiciary itself is aware of the challenges facing the Judicial Service Commission. In its 2019-2024 Strategic Plan, the judiciary identified some of the problems facing the Commission as follows: lack of necessary legislation and regulations for its operations, a narrow composition which is not ideal given its constitutional mandate, and credibility challenges due to a lack of transparency and accountability.[49] The judiciary also correctly noted that the failure to address the challenges of the Judicial Service Commission has a profoundly negative impact on its operations.

The judiciary, however, took the view that the Judicial Service Commission is an independent constitutional body whose challenges have to be addressed outside its Strategic Plan. Indeed, the Judicial Service Commission is an independent constitutional body but given its current structure and composition, the proposition that the judiciary is completely powerless to influence its operations seems rather lame. On the contrary, it is arguable that the Judicial Service Commission has

---

46 Gloppen and Kanyongolo, *Malawi*.

47 The judiciary has a code of ethics but this is neither well known nor effectively enforced.

48 Reforming the Judicial Service Commission requires centrally making its processes more transparent and creating mechanism for enforcing accountability on the part of the judiciary – see, Nkhata, 'Spotlight on the guardians of the gatekeepers'.

49 Malawi Judiciary, *Judges conference on independence, accountability and transparency*, 16.

remained docile due to inaction on the part of the leading lights in the judiciary. The next section of this chapter focuses on the financing of the judiciary.

Financing the Malawi judiciary

The funding of the judiciary as a separate and distinct branch of government is an essential component of judicial independence.[50] It is every state's duty to provide adequate resources to enable a judiciary to properly perform its functions.[51] The funding of the judiciary must also not be used as a means of exercising improper control over the judiciary.[52] Quite aside from ensuring that a judiciary is adequately funded, the dictates of judicial independence require that the judiciary must have the autonomy to determine how funds allocated to it must be utilised. This requires that the judiciary must be protected from external influences which may attempt to sway its priorities. Ultimately, the performance of a judiciary depends, to a large extent, on its fiscal autonomy.[53] This is because the judiciary requires resources to support the remuneration of staff, acquisition of equipment, and maintenance of facilities and all its operations, in general.

The executive is in charge of allocating funds to the judiciary. Although this arrangement is not unique to Malawi, it has been recognised as a potential threat to the independence of the judiciary.[54] After the adoption of the 1994 Constitution, the only legislative enactment meant to bolster the judiciary's fiscal autonomy has been the Judicature Administration Act. This Act, among other things, authorises the judiciary to retain any money that court users pay in the form of fees and other payments. It also gives the judiciary the freedom to raise

---

50 International Commission of Jurists, *Kenya: Judicial independence, corruption and reform*, International Commission of Jurists, Geneva, April 2005.

51 Commonwealth (Latimer House) principles on the three branches of government, As agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003; United Nations, *Basic principles on the independence of the judiciary,* adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

52 Commonwealth Latimer Principles 2003.

53 Southern African Judges' Commission, 'Financial independence of the courts'.

54 Fidelis Kanyongolo, 'State of the judiciary: Malawi 2003', International Foundation for Electoral Systems, 31 March 2004.

its own funds directly. As will be pointed out later in this chapter, in practice, there does not seem to be clarity on how the judiciary utilises funds raised under the Judicature Administration Act.

In practice, the judiciary's budgetary allocation is split into three broad categories as follows: the Other Recurrent Transactions (ORT), personal emoluments, and development.[55] The ORT covers expenses such as fuel, allowances, and other daily expenses necessary for the daily running of the judiciary. The allocation for personal emoluments is tied to the number of people employed by the judiciary and covers salaries and related benefits. The 'development' component is meant to cater for infrastructure development needs in the judiciary. The judiciary's budgetary allocation is largely informed by the activities that are projected for the particular year.

In this regard, it is important to note that while the judiciary is free to make proposals about its budgetary allocation, just like other government departments, Treasury imposes a ceiling in relation to all proposals.[56] The result is that whatever proposals the judiciary makes must conform to a maximum limit imposed by the executive. Budgetary ceilings, which apply across all government departments, are justified based on general resource limitations that afflict the government.[57]

However, while the judiciary has latitude in proposing its budget, it rarely receives the full amount requested. Even if the judiciary's proposals are accepted and included in the Appropriation Act for a particular year, the actual disbursement tends to be less than what is provided for in the Act.[58] Over the years, a consistent complaint, on the part of the judiciary, is that their annual allocation is always below the fiscal needs of the institution.[59] This is further complicated by delays in the disbursement of funds.

There is, however, no evidence to suggest that the delays in the disbursement of funds have maliciously, and specifically, targeted the judiciary. On the contrary, the problem of delayed disbursement of funds seems to affect almost all government ministries and departments.

---

55 Author interview respondent D, February 2022.

56 Author interview respondent C, February 2022. It is clear from Part V of the Public Finance Management Act, 2022, that budgetary appropriations are premised on anticipated revenue and are wont to change if the revenue estimates are not met.

57 Author interview, respondent E, March 2022.

58 Author interview, respondent C, February 2022.

59 Ellett, *Pathways to judicial power in transitional states,* 30.

Consequently, in any given year, the adoption of the Appropriation Act does not guarantee immediate access to funds by the judiciary, and only after the treasury transfers the allocation can the judiciary access the funds.[60] This unfortunate reality poses a challenge to judicial independence as it can compromise the judiciary's discharge of its constitutional mandate.[61]

The judiciary has an internal committee that it uses for its engagement with both the executive and National Assembly on matters pertaining to conditions of service – the Committee on Terms and Conditions of Service for Judicial Officers and Members of Staff (the Committee).[62] It is this Committee that articulates the judiciary's proposals for budgeting in a particular year, both in engagement with the Public Appointments Committee (PAC) of the National Assembly as well as in consultations with the Treasury. The members of the Committee are appointed by the Chief Justice and include representatives from all levels of the judiciary. The composition and operation of the Committee are an administrative arrangement since there is no statutory provision backing its establishment or operations.

It seems to be the case that members of this Committee serve at the pleasure of the Chief Justice and their terms are not fixed. Notwithstanding the existence of this Committee, the prevailing situation places judicial officers in a position where they must directly negotiate their conditions of service with the National Assembly and the executive. This is not ideal since the budgeting process is not simply technical but also profoundly political.[63] When judicial officers are directly involved in negotiating their conditions of service, especially through informal or administrative arrangements like the Committee, they are exposed to possible conflicts of interest since they must still maintain their neutrality even as they negotiate with politicians for more resources.

While the intervention of both the executive and the National Assembly in the judiciary's budgeting is legal, there must be caution on how this intervention is exercised. If, for example, both the executive

---

60 Under Section 5 of the Public Finance Management Act, 2022, 'Treasury' comprises the Minister of Finance, the Secretary to the Treasury and the Accountant General.

61 Inadequate salaries and resources have been identified, by the judiciary, as a major weakness plaguing the institution - Malawi Judiciary, 'Strategic plan, 2019-2024' 12.

62 Author interview, respondent C, February 2022.

63 Ellet, *Pathways to judicial power in transitional states,* 30.

and the National Assembly become too overbearing in their scrutiny of the judiciary's budget, there is a real risk that the outcome would be a budget tailored to the whims of the executive and the National Assembly and not necessarily the needs of the judiciary. Ideally, therefore, both the executive and the National Assembly must deal with the judiciary, not in the same manner that they deal with ministries and departments but as an equal partner that legally completes the constitution of government by law. This would be in line with Sections 7, 8 and 9 of the Constitution and would serve to safeguard the judiciary's separate status as a branch of government.

In an attempt to have a more focused discussion, the next section analyses the following issues, which are intimately related to the judiciary's fiscal autonomy: remuneration of judicial officers, infrastructure development, political influence in the financing of the judiciary, and the role of the Judicial Service Commission.

Remuneration of judicial officers

Section 114 of the Constitution provides as follows:

(1) The Chief Justice and all other holders of judicial office shall receive a salary and other employment benefits for their services and, on retirement, such pension, gratuity or other allowance as may, from time to time, be determined by the National Assembly.

(2) The salary, any allowance and other employment benefits of a holder of judicial office shall not without his or her consent be reduced during his or her period of office and shall be increased at intervals so as to retain its original value and shall be a charge upon the Consolidated Fund.

According to Section 114(1), the remuneration of judicial officers is determined by the National Assembly. In practice, the National Assembly makes this determination through its Public Appointments Committee. Once the National Assembly has made the determination, the executive is obliged to implement the same. As a matter of fact, subsequent to the National Assembly's determination, the executive 'cannot open fresh negotiations with the judiciary either collectively or with individual judicial officers'.[64] There is no clarity, however, as to the

[64] *The State and the President of the Republic of Malawi, Minister of Finance, Secretary to the Treasury Ex Parte Malawi Law Society,* Constitutional Cause Nos 6 of 2006, (being Misc Civil Cause No 165 of 2006).

exact processes or procedures that the Public Appointments Committee must, specifically, follow in its consideration of the remuneration of judicial officers and their conditions of service. This is problematic. For example, it is difficult to assume that the Public Appointments Committee, composed exclusively of members of parliament, would automatically contain the requisite competence and expertise to fairly adjudicate on all matters related to remuneration in the judiciary.

As per the terms of Section 114(2) of the Constitution, the benefits payable to judicial officers cannot be reduced without the consent of the concerned judicial officer and must be 'increased at intervals to maintain their original value'. According to the High Court, the rationale behind Section 114(2) is to protect the salaries and allowances of holders of judicial office for purposes of enhancing judicial independence.[65] The periodic increments to the salaries and other benefits are meant to protect the remuneration of judicial officers from the ravages of inflation.[66]

It is important to point out that the remuneration of judges, according to Section 183 of the Constitution, is charged to the Protected Expenditure Fund within the Consolidated Fund. The Protected Expenditure Fund, being a special fund within the Consolidated Fund, normatively, offers higher protection to the source of funds for the remuneration of judicial officers. It is also not insignificant that, ordinarily, proposals for inclusion of money into the Protected Expenditure Fund are meant to be passed by the National Assembly without revision.[67]

Notwithstanding the clarification offered by the High Court in *Ex Parte Malawi Law Society,* in relation to the steps that must be followed once the National Assembly has approved the remuneration of judicial officers, there is a challenge relating to the means for implementing the periodic review of salaries and benefits so that they retain their original value. In the past, differences over salaries and emoluments have, on more than one occasion, led to judicial officers going on strike.[68] A strike by judicial officers has significant implications for the rule of law, especially in terms of access to justice.

---

65 *Ex Parte Malawi Law Society*.

66 In the words of the High Court '…the purpose Section 114(2) seeks to achieve is to keep allowances and salaries abreast with inflation' – *Ex Parte Malawi Law Society*.

67 Constitution of Malawi (1994), Section 183(2).

68 'Malawi judges strike for new cars' *UPI* 21 January 2005; Suzgo Khunga, 'Malawi judges set to join judicial strike' *Nation Online,* 27 November 2014.

From the perspective of the judiciary, the 'regular' strikes by support staff, that is, clerks, interpreters, court reporters, court marshals etc, even when judicial officers themselves have not withdrawn their labour, further complicate access to justice in Malawi.[69] Given that the Constitution, in Section 111(4), excludes support staff from the definition of 'judicial office', it is fair to conclude that the constitutional guarantees meant to secure judicial independence do not extend to this class of employees, strictly speaking. Unsurprisingly, unlike judicial officers, support staff are, generally, not appointed by the Judicial Service Commission.

It bears pointing out that at the time of writing, as part of the proposed reforms to the Judicial Service Commission, a constitutional amendment has been suggested to create a judicial service which will be distinct from the Civil Service.[70] Under the proposed amendment, the Judicial Service shall comprise judicial officers and such other administrative, technical, and other support staff as are necessary to facilitate the operations of the judiciary. Appointments to the Judicial Service will, except where the Constitution provides otherwise, be made by the Judicial Service Commission. It remains to be seen whether this proposal will be adopted. In principle, however, it will serve to extend the blanket of judicial independence beyond judicial officers, as traditionally conceived, to cover administrative, technical, and other support staff in the Judicial Service.

As for the remuneration of judicial officers, the challenge of implementing the directive in Section 114(2) of the Constitution is aggravated by a fragile economic situation where inflation is high. Currently, the remuneration of judicial officers is reviewed once every three years – this is on top of the annual increments that all civil servants receive.[71] The three-year review cycle has no statutory basis since it is neither prescribed by the Constitution nor the Judicature Administration Act. In any event, given the volatile inflationary trends in Malawi, it

---

[69] See, Lameck Masina, 'Judicial strike paralyses court operations in Malawi' *Malawi 24,* 17 March 2022; Harry Chibwe, 'Malawi judiciary workers end strike, resume work Friday' *Nyasa Times,* 9 January 2015.

[70] Constitution (Amendment) Bill, 2023 and the Judicial Service Administration Bill, 2023 – copies on file with author. The author anticipates that these bills may be revised in the further consultations that are ongoing.

[71] Author interview respondent A, March 2022. One of the key informants suggested that the Judiciary was being double-faced in insisting on the three-year review of their remuneration while at the same time benefitting from the annual increments due to all civil servants – Author interview, respondent B, June 2022.

may very well be the case that a three-year review cycle is not ideal for purposes of ensuring that salaries and benefits maintain their original value. This could be what may have prompted calls for judges' salaries to be pegged in United States (US) dollars.[72]

While pegging judges' salaries in US dollars may, realistically, work to maintain their value in the long run, it remains to be seen whether the proposal will gain support given the current opposition to it. Notwithstanding the special constitutional status of the judiciary, a convincing case will have to be made to justify pegging judges' salaries in dollars. This is especially because no similar arrangement is available across government departments and ministries, yet everyone employed by the government is equally affected by inflation.

Infrastructure development

The High Court has registries in Mzuzu, Lilongwe, Zomba, and Blantyre, with the latter serving as the principal registry. The Supreme Court of Appeal and the principal registry of the High Court are within the same premises and share some of the same facilities. When the Supreme Court of Appeal sits outside of Blantyre, as it often does, it 'borrows' premises from the High Court. One of the two buildings making up the judiciary's Blantyre complex dates to colonial times and has seen little improvement over the years. The other building is relatively new, and it houses magistrates' courts and part of the High Court.[73] The commercial division of the High Court, however, sits outside of the principal registry in rented premises.[74]

In Zomba, the High Court is housed in the former parliament building, and it shares these premises with the magistrates' courts. This structure is another colonial-era relic befitting a museum rather than a seat for Malawian courts in the 21st century. Poignantly, in leaked communication in 2023, the judge-in-charge of the Zomba District Registry wrote to the Chief Justice indicating that the judges would

---

72 'Judges demand salaries in dollars' *Malawi 24,* 17 March 2022.

73 This building was opened in 2010 though construction began in the 1990s.

74 At the time of writing a purpose-built structure for the commercial division of the High Court in Blantyre was nearing completion. It is apparent though that the project has been delayed because in 2017 there were indications that the complex would be opened in December of that year – Ireen Kayira, 'New Blantyre commercial court opens in December' *Malawi News Agency (Lilongwe)* 27 September 2017.

stop operating from the former parliament building until its safety was assessed. As of the time of writing, however, no renovations or any other form of maintenance had been undertaken.

In Lilongwe, the High Court operates from at least three premises. The criminal division of the High Court shares premises with the magistrates' courts in structures that can barely accommodate the High Court alone. The civil division occupies rented premises in another part of the city. The commercial division is in a separate location but also in rented premises.

The judiciary's complex in Mzuzu is fairly modern and accommodates both the High Court and the magistrates' courts – the structure was officially opened on 1 August 2000. Strangely, for a long time, Mzuzu did not have a commercial division of the High Court, meaning that litigants filing commercial cases had to do so in Lilongwe, which is over three hundred kilometres away.[75] This created access to justice challenges for litigants. Presently, however, the commercial division has started operating from Mzuzu even though, at the time of writing, there was no resident judge in Mzuzu for the commercial division. Judges servicing the commercial division, therefore, have to travel from Lilongwe. Outside of the four major urban centres, magistrates' courts have their own structures, but there is a huge variation in respect of the actual physical state of their facilities.

As correctly noted, court infrastructure in Malawi has suffered from neglect for years.[76] The result is that 'facilities at courts are generally in a poor state'.[77] The investment into maintaining and improving court infrastructure has tended to be piecemeal and inadequate in resolving the years of neglect.[78] For example, under the Chilungamo Justice and Accountability Programme funded by the European Union, the Judiciary was able to rehabilitate several magistrates' courts in a bid to ease community access to courts.[79] Without support from the European

---

[75] Author interview with Victor Gondwe, legal practitioner based in Mzuzu, 25 March 2022.

[76] Ellett, *Pathways to judicial power in transitional states,* 35.

[77] Malawi Judiciary, 'Strategic plan 2019-2024', 15. In fairness it is not only the judiciary's infrastructure that has suffered from neglect. Government offices, across the country, more often than not, tend to be in a state of dilapidation. This suggests that the failure to maintain infrastructure is a general challenge affecting the government at large.

[78] Ellett, *Pathways to judicial power in transitional states,* 29.

[79] See, Delegation of the European Union to the Republic of Malawi, 'Chilungamo Justice and Accountability Programme,' 22 May 2020 <https://eeas.europa.eu/headquarters/

Union, it is doubtful whether the rehabilitation achieved under the Chilungamo project would have been done. Notably, the construction and rehabilitation projects that the judiciary has undertaken so far have not been done within the context of a long-term plan.[80] This does not bode well for the sustainability of the construction and rehabilitation efforts.

Poignantly, it is the lack of a dedicated complex for the Supreme Court of Appeal that best illustrates the infrastructure challenges facing the judiciary. Plans for the construction of a complex to house the Supreme Court of Appeal have been on the table for many years. According to these plans, the Supreme Court of Appeal will be housed in a purpose-built Judiciary Headquarters Complex to be built in Lilongwe, across from where the National Assembly is located.[81] One can only hope that the current plans will proceed apace, especially given the time it has taken waiting for the construction. Additionally, it can only be hoped that as the construction of the new complex is being planned, adequate thought has been given to the housing of the proposed Court of Appeal. Presently, it is hard to imagine how the proposed Court of Appeal will be accommodated if the current infrastructure is not expanded. Overall, the Government of Malawi's shortcomings notwithstanding, infrastructure remains important for purposes of not only sustaining the judiciary's operations but also its independence.

Political influence in financing the judiciary

Generally, political influence on a judiciary can happen at the personal or institutional level and can take many forms.[82] For example, political influence can be in relation to the process of appointing judicial officers, the manner in which the judiciary is funded, or even the executive's failure to guarantee the safety and security of judicial officers. At the personal level, attacks by individuals with political influence directed at judicial officers due to their pronouncements are

---

headquarters-Homepage/79760/chilungamo-justice-and-accountability-programme_me> on 21 March 2022. The Chilungamo Justice and Accountability Programme had a budget of €48 million (approximately MK41 billion at the time of commencement) - <https://www.eeas.europa.eu/node/48789_en on 10 June 2022>.

80 Malawi Judiciary, 'Strategic plan 2019-2024', 15.

81 At the time of writing, the author's information was that procurement processes to identify contractors for the complex were underway.

82 Ellett, *Pathways to judicial power in transitional states,* 55-56.

a threat to judicial independence. While mindful of the different forms of political influence on a judiciary, the discussion herein is limited to political influence in the financing of the judiciary.

In Malawi, relations between the executive and the judiciary, generally, have not always been amicable. Outright hostility against the judiciary, however, has tended to manifest itself when the judiciary is prevented from prosecuting politically sensitive cases.[83] As a result, in some instances, politicians have cast aspersions on the judiciary for meddling in politics.[84] It is argued that many of the podium attacks against the judiciary have followed from judicial decisions perceived to be unfavourable to those in power. However, the research for this chapter suggests that even in cases where the executive has felt aggrieved by judicial pronouncements, it has not overtly interfered with the judiciary's fiscal autonomy.

It seems to be the case, however, that as the purse holder, the executive finds subtle ways of managing the purse to express its displeasure with the judiciary.[85] It is thus difficult to deduce clear lines of causation between the rate of funding for the judiciary and the executive's displeasure with the judiciary. Further compounding the situation are the prevailing socio-economic conditions in Malawi. This makes it difficult to determine if there has been budget manipulation by way of withholding funding from the judiciary because almost all government departments are perennially underfunded, and even when funds have been allocated to them, they are generally not fully disbursed.[86]

Role of the Judicial Service Commission

The footprint of the Judicial Service Commission relative to the fiscal management of the judiciary seems rather muted.[87] If at all the Judicial Service Commission plays a role in moderating the judiciary's fiscal autonomy, then very little is known about this role. It is arguable though that statutorily, there is leeway for the Judicial

---

83 Author interview, respondent A and respondent B, March 2022.

84 See, for example, Peter Fabricius, 'Mutharika's last stab at the judiciary before elections' *ISS Today* 18 June 2020.

85 Author interview respondent A and Respondent B, March 2022.

86 Author interview, respondent E, March 2022.

87 Author interview, respondent B, March 2022.

Service Commission to influence the judiciary's fiscal autonomy. For example, Sections 118(d) and 118(e) of the Constitution are crafted in a very permissive manner, which could justify a more vibrant role for the Judicial Service Commission in relation to fiscal matters. According to Section 118(d), the powers of the Judicial Service Commission include making '…such representations to the President as may be prescribed by an Act of Parliament'.

Under Section 118(e), the Commission is permitted to exercise such powers as are conferred on it by the Constitution or 'as are reasonably necessary for the performance of its duties'. Further, Section 5(c) of the Judicature Administration Act permits the Judicial Service Commission to 'make regulations for the general administration of the judiciary'. Arguably, one way in which the Judicial Service Commission could have a role in the judiciary's financial autonomy is by leveraging its supervisory powers to contribute to accountability and transparency in the management of resources allocated to the judiciary. The chapter is alive to the fact that the judiciary is regularly audited by the National Audit Office (NAO), but a role for the Judicial Service Commission is being proposed here as a first line of accountability even before the involvement of the NAO.

Given the discussion above, the analysis that follows below provides suggestions for ameliorating some of the challenges relating to the judiciary's fiscal autonomy.

Moderating the judiciary's fiscal autonomy – some suggestions for reflection

The discussion thus far has indicated some of the challenges that the judiciary faces in relation to its fiscal autonomy. The challenges notwithstanding, it is important for the judiciary to keep striving for innovative reforms. Reforms affecting a judiciary have the potential of spurring broader socio-economic reforms in a country.[88] Specifically, this section of the chapter analyses the probable value of ring-fencing the judiciary's funding, the management and accountability of funds collected under the Judicature Administration Act, the powers of the

[88] The Constitution is imbued with transformative potential and it reserves a special role for the judiciary in the transformation project – Mwiza Nkhata, 'Rethinking governance and constitutionalism in Africa: The relevance and viability of social-trust based governance in Malawi' Unpublished LLD Thesis, University of Pretoria, 2010, 194-196.

Judicial Service Commission, the clarification of roles between the registrar and the Chief Courts Administrator, the moderation of the remuneration of judicial officers,[89] and infrastructure development in the judiciary.

Should funding for the judiciary be ring-fenced?

It is highly desirable that the judiciary should exercise administrative autonomy and budget independence since this operates to insulate it from threats by the other branches of government. One possible way of securing both administrative autonomy and budget independence is by guaranteeing a proportion of the national budget to the judiciary.[90] This is also referred to as ring-fencing. In ring-fencing, once a proportion of the budget, sufficient to meet the judiciary's needs, is agreed upon, it then becomes incumbent on the executive and legislature to avail that percentage to the judiciary. On this score, it is clear that the judiciary is in favour of ring-fencing.[91] Under its 2019-2024 Strategic Plan, the judiciary estimated that, on average, it receives about 0.8% of the national budget which is inadequate for its operations. It has thus proposed that 3% of the national budget should be ring-fenced for its operations.

The proposal for ring-fencing the judiciary's budgetary allocation evoked conflicting responses among the key informants interviewed for this chapter. Those in favour of the proposal argued that the judiciary, being a branch of government, should not be treated in the same way as ministries or departments.[92] The funding of the judiciary, according to this argument, should not, therefore, be the result of goodwill on the part of the other branches of government but the fulfilment of a constitutional obligation. It was also argued that ring-fencing would eliminate the appearance of constant negotiations between the judiciary and the other branches of government in relation to its funding.[93] It was

---

89 While the analysis herein focuses on the remuneration of judicial officers, the experience in Malawi clearly shows that remuneration of support staff in the judiciary is just as important. Resultantly, any efforts at improving the remuneration of judicial officers should simultaneously cover support staff as well.

90 Siri Gloppen, 'Courts, corruption and judicial independence' <https://www.cmi.no/publications/file/5091-courts-corruption-and-judicial-independence.pdf> on 1 March 2022.

91 Malawi Judiciary, 'Strategic plan 2019-2024', 23.

92 Author interview, respondent A, March 2022.

93 Ellett, *Pathways to judicial power in transitional states*, 32.

further contended that while it may be hard to implement the proposal, it is nevertheless the ideal way to go to ease the funding challenges in the judiciary.[94]

Those against the proposal argued that ring-fencing is unrealistic in Malawi.[95] It was argued that in a rather volatile and fragile economy, ring-fencing may place onerous duties on the executive to meet the statutory minimum regardless of the prevailing socio-economic conditions at the expense of other pressing national needs.[96] It was also argued that the funding challenges that the judiciary faces are not unique to it but affect all government ministries and departments.[97] According to this argument, government funding has to reflect the needs of each ministry and department in that particular year.

Another challenge with ring-fencing, as pointed out, is that it presumes that the needs of the judiciary will remain constant over time which may not be the case in practice. Further, it was argued that there could be challenges relating to the absorption of the funds by the judiciary. It was pointed out that an allocation based on a fixed percentage of the national budget may have the unintended consequence of 'forcing' the judiciary to make sure it exhausts all its allocation in a particular year without adequate regard to the activities planned.[98]

One informant also pointed out that, ominously, continental commitments to setting fixed allocations for particular sectors have not proved very successful.[99] For example, the resolution by African countries to allocate 15% of their budgets to health and 10% to agriculture has been unsuccessful.[100] This, it was argued, highlights the challenges of ring-fencing national budgets across Africa.

Both the proponents and opponents of ring-fencing agreed on one thing, that the judiciary requires adequate and timely funding. Additionally, there seems to be an agreement that as a branch of

---

94 Author interview, respondent A and respondent B, March 2022.

95 Ellett, *Pathways to judicial power in transitional states*, 31.

96 Author interview, respondent D, March 2022.

97 Author interview, respondent E, March 2022.

98 Author interview, respondent F, March 2022.

99 Author interview, respondent E, March 2022.

100 See, Agnes Gatome-Munyua and Nkechi Olalere, 'Public financing for health in Africa: 15% of an elephant is not 15% of a chicken' *Africa Renewal* 13 October 2020; Maputo Declaration on agriculture and food security, Assembly/AU/Decl. 7(II), Second Ordinary Assembly of the African Union in July 2003 in Maputo; AUDA-NEPAD *Comprehensive Africa agriculture development programme,* July 2003.

government, the judiciary should never be reduced to 'begging' the other branches of government for its budgetary allocation.[101] One informant even went further to suggest that once the Appropriation Act has been passed, it would be illegal for the treasury to not disburse the full allocated amount.[102]

Overall, it seems that the greatest challenge against ring-fencing stems from Malawi's perennially fragile economy. Although the judiciary is a branch of government and must be treated differently from ministries and departments, the financial challenges that the country faces also afflict the National Assembly, another branch of government, and cut across government departments generally. Unless the economic climate changes drastically, it may not yet be ideal to adopt ring-fencing. The inescapable reality is that the ability of the state to fully meet the budgetary needs of the judiciary will remain dependent on the general economic and financial conditions in the country.[103]

With respect to the specific proposal made by the judiciary for ring-fencing 3% of the national budget, it was not possible to determine how the judiciary arrived at this figure. Concededly, the judiciary in its 2019-2024 Strategic Plan estimated that the 0.8% that it has been getting is insufficient. Neither the Strategic Plan nor any other document issued by the judiciary, however, clarifies how the 3% was computed. In the absence of a clear justification for the 3%, the proposal is open to criticism for being arbitrary.

In the end, given the conflicting views on this proposal, the Chapter recommends that further consultations on the matter be conducted with stakeholders across the justice sector. It may also be useful to learn from other countries' experiences on ring-fencing.[104] Given that there

---

101 Author interview, respondent D, March 2022.

102 Author interview, respondent E, March 2022.

103 Under Section 39 of the Public Finance Management Act, once the Appropriation Act has been passed the Secretary to the Treasury makes funds available to the different votes according to (a) revenue performance; and (b) cash flow forecasts agreed between the controlling officer for the vote and the Secretary to the Treasury.

104 For example, Kenya's 2010 Constitution, under Article 173, creates a Judiciary Fund and legislation was adopted in 2016 – the Judiciary Fund Act - to facilitate the operation of the Fund. Operationalising the Fund, however, has proven to be a tall order, see, Jeremiah Wakaya, 'Judiciary Fund to be operationalised July 1' *Capital FM News,* 10 March 2022. As at the time of writing, the author had seen a draft bill proposing amendments to the Constitution for purposes of establishing a judiciary fund along the lines of the Kenyan model. It remains to be seen if this fund will escape the challenges that have come to pass in Kenya.

will always be competition for state resources, and that the country's leadership must of necessity choose which priorities to address, ring-fencing should only be adopted when there is adequate buy-in from all stakeholders.[105]

Transparency and accountability in managing funds raised under the Judicature Administration Act

The adoption of the Judicature Administration Act was hailed as an avenue for enhancing the financial autonomy of the judiciary.[106] As earlier pointed out, the Act allows the judiciary to retain any money that court users pay as fees and other payments.[107] The Act also permits the judiciary to raise funds for its operations through grants, be they conditional or not.

In researching for this chapter, it proved impossible to establish with certitude the amount of money that the judiciary raises yearly under the Judicature Administration Act. What seems to be clear though is that the funds raised under the Judicature Administration Act are administered by the registrar acting under the guidance of the Chief Justice. It is also noticeable that at the normative level, the Judicature Administration Act does not provide clarity as to how the funds collected under its authority must be utilised, especially as distinguished from those funds allocated by the National Assembly.[108]

It also proved difficult to discern how priorities for the utilisation of the funds raised under the Judicature Administration Act are set. As one informant pointed out, while some judicial officers would be struggling to access stationery to allow them to perform their daily chores,

---

105 See James Douglas and Roger Hartley, 'The politics of court budgeting in the States: Is judicial independence threatened by the budgetary process' 63(4) *Public Administration Review* (2003) 445. For example, the total budget for Malawi in the 2023/2024 Fiscal Year was estimated at 2.58 billion dollars (about 4.33 trillion Malawian Kwacha) following the November 2023 devaluation of the Malawi Kwacha as against the US dollar – Xinhua, 'Malawi's budget rises to 2.58 bln USD' *Xinhua,* 22 November 2023.

106 Kanyongolo, 'State of the judiciary report'.

107 Judicature Administration Act (Cap 3:10 Laws of Malawi), Section 4.

108 Under Section 4 (1) of the Judicature Administration Act, funds raised under the Act form part of what is generically referred to as 'the funds of the judiciary'. Under Section 4(3), the purposes for which 'the funds of the judiciary' can be utilised are listed. The challenge here is that there is no self-evident demarcation of what for example, can be fulfilled strictly using the parliamentary allocation as compared to what can be fulfilled using funds raised under the Act.

there could be, at the same time, others that would be sent to attend international conferences paid for by funds raised under the Judicature Administration Act.[109] The challenge with the preceding scenario is that notwithstanding the value of some international conferences to judicial officers, the judiciary's primary role is the dispensation of justice. It suggests a misalignment of priorities to pay for judicial officers to attend international conference(s) while at the same time failing to provide materials required for other judicial officers to discharge their core duties.

General accountability for the use of funds allocated to the judiciary is achieved through audits by the National Audit Office. A cursory review of the Auditor General's annual reports suggests that common challenges afflict the judiciary's management of its funds.[110] The challenges relate to a breach of procurement procedures and failure to adhere to public finance management guidelines, among others. What seems ominously missing from the Auditor General's reports is how funds raised under the Judicature Administration Act are managed.

Given the paucity of information around the issue, it is difficult to proffer a definite conclusion one way or the other. One informant, however, suggested that the Treasury does not systematically follow up on how these funds are utilised.[111] If this is true, then it is regrettable because all public funds must be managed with a sense of responsibility and accountability.[112] In the circumstances, it is recommended, for the better administration of the judiciary, to develop mechanisms that can enhance transparency and accountability in the utilisation of funds raised under the Judicature Administration Act. This, among other things, would dispel suggestions that there is mis-prioritisation in the utilisation of these funds.

Enhancing the supervisory powers of the Judicial Service Commission

As earlier pointed out, the Judicial Service Commission has wide statutory powers that could be leveraged to assist, for example, in

---

109 Author interview, respondent B, March 2022.

110 The reports are available at: National Audit Office, Auditor General's reports on accounts of government ministries, departments and agencies (MDAs) <https://www.nao.gov.mw/index.php/en/documents/audit-reports/category/28-final-performance-appraisal-system-pdf> on 26 March 2022.

111 Author interview, respondent E, March 2022.

112 Southern African Judges' Commission, 'Financial independence of the courts'.

generating accountability for funds allocated to the judiciary. However, the general challenges facing the Judicial Service Commission have been alluded to earlier in this chapter. At the time of writing, the author's information was that proposals for reforming the Judicial Service Commission were under consideration.

Nevertheless, it is too early in the reform process to state with any certainty if the proposed reforms will result in a more vibrant role for the Judicial Service Commission in terms of, for example, generating accountability for funds allocated to the judiciary or the superintendence of judicial officers. Presently, however, the Judicial Service Commission is barely functional, especially in terms of its disciplinary superintendence over judicial officers. This has significantly compromised efficiency in the judiciary where many a judicial officer have become a law unto themselves with no fear of reprimand or sanction for their conduct.

The constant underfunding of the judiciary is a fact. This can be ameliorated by increasing the judiciary's share of the national budget. In this, however, the Judicial Service Commission must have a role to play. Ultimately, however, the question is, what value is to be gained by increasing funding to the judiciary if the Judicial Service Commission is unable to provide meaningful oversight over judicial officers?[113] The Judicial Service Commission's failure to take an active oversight role over judicial officers engenders public scepticism about the need to adequately fund the judiciary. While, as earlier alluded to, the judiciary still retains fairly high levels of public confidence in the country, especially when compared to the executive and the National Assembly, constant complaints about delayed judgments and allegations of corruption are gradually diminishing its approval ratings.

It is thus recommended that the ongoing Judicial Service Commission reforms should also focus on bolstering its oversight role over judicial officers, including conferring on it an active responsibility in monitoring the management of all funds allocated to the judiciary. The Judicial Service Commission could also become a first line of accountability for funds raised under the Judicature Administration Act. This would be complementary to any audit processes undertaken by the National Audit Office.

---

[113] Author interview, respondent B, March 2022.

Clarity of roles between the Chief Courts Administrator and the Registrar

Under Section 3(1) of the Judicature Administration Act, the Chief Courts Administrator's office is a public office subordinate to the Registrar. By virtue of Section 3(2) of the Judicature Administration Act, the Chief Courts Administrator is mandated to 'oversee the general, financial and personnel administration of the judiciary' subject to any general or special directions of the Chief Justice.[114] On the face of it, the Judicature Administration Act gives the impression that it is the Chief Courts Administrator who is responsible for the general administration of the judiciary. This, however, is incorrect since the day-to-day running of the judiciary is entrusted to the Registrar, who is also the judiciary's controlling officer. However, by making the office of the Chief Courts Administrator subordinate to that of the Registrar, an unwitting duplication of roles may have been created since the Chief Courts Administrator must report to the Registrar in the discharge of their functions.[115]

Scharf and others state that the origin of the Office of the Chief Courts Administrator lies in a 1999 consultancy commissioned by the Judiciary.[116] The consultants noted that the judiciary had limited management skills to institute reforms and recommended that it appoint a chief courts administrator. As envisaged by the consultants, this person would be entrusted with the task of planning and delivering administrative reforms in the judiciary. In the end, according to Scharf and others, the chief courts administrator established under the Judicature Administration Act is not the one that was envisaged by the consultants because, this Office, as currently structured, is incapable of planning and implementing administrative reforms in the judiciary.[117] While the Office of the Chief Courts Administrator may have been

---

[114] Judicature Administration Act (Cap 3:10 Laws of Malawi), Section 3(2).

[115] The Judiciary itself has also noted the lack of clarity between the roles of the Registrar and the Chief Courts Administrator. Apart from the introduction of reforms to achieve the clarification of roles, the Judiciary has undertaken to implement a general strengthening of institutional capacity – Malawi Judiciary, 'Strategic plan 2019-2024', 17 and 25.

[116] Wilfried Schärf, Chikosa Banda, Ricky Röntsch, Desmond Kaunda, and Rosemary Shapiro, 'Access to justice for the poor of Malawi: An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums', *Dullah Omar Institute* n.d.

[117] Scharf and others, 'Access to justice for the poor of Malawi'.

intended to provide solutions to administrative inefficiencies in the judiciary, it is doubtful if this Office has delivered on this score.

The research for this chapter confirmed that there is dissatisfaction with the office of the Chief Courts Administrator.[118] Part of the dissatisfaction stems from the overlap between the Office's functions and those of the registrar and the lack of clarity on the boundaries of authority between the two offices. It was even suggested that given the powers vested in the Office of the Registrar, maintaining the office of the Chief Courts Administrator is an unnecessary expense.[119] It may be useful, therefore, to go back to the 1999 consultancy report, as a starting point, to determine whether the chief courts administrator needed for the judiciary is the one that was envisaged during the consultancy or not. In any event, there must be a review of the position of the Chief Courts Administrator, particularly for purposes of delineating and harmonising this Office's authority in relation to the Registrar's.[120] This will contribute to enhancing efficiency in the judiciary.

The Constitution and remuneration of judicial officers

The remuneration of judicial officers remains a key facet of judicial independence. Ideally, the remuneration of judicial officers should be set on terms that allow them to focus on their work and insulate them from improper influences. Poor remuneration is an invitation for judicial officers to engage in other money-earning ventures which could generate conflicts of interest and, even more dangerously, expose them to enticement by corrupt elements.

The Constitution fortunately does not leave to speculation its directives on the remuneration of judicial officers. As earlier pointed out, the remuneration of judicial officers must be determined by the National Assembly, cannot be reduced during the term of service without the consent of the concerned judicial officer, and must be increased at

---

118 Author interview, respondent B, March 2022.

119 Author interview, respondent B, March 2022.

120 The current draft of the Judicial Service Administration Bill 2023 provides that the chief courts administrator shall be appointed by the Judicial Service Commission which is an improvement on the position as captured in the Judicature Administration Act. However, overall, the Bill, apart from confirming that the chief courts administrator is subordinate to the registrar does not contain any significant proposals for reforming the relationship between the two offices.

intervals to retain its original value.[121] The High Court's decision in *Ex Parte Malawi Law Society* confirmed the role of the National Assembly in determining the remuneration for judicial officers and also emphasised the duty of the executive to implement the National Assembly's determination once it has been made aware of the same.

In practice, the remuneration of judicial officers in Malawi remains low and, regrettably, this is unlikely to change in the foreseeable future.[122] It is not surprising, therefore, that in a recent study, judicial officers from Malawi expressed dissatisfaction with their remuneration, including their retirement benefits.[123] Low remuneration, however, is in large part a reflection of the broad economic predicament that the country consistently faces. Consequently, remuneration across the Civil Service is generally low. However, in relation to the judiciary, the challenge is how to realise the Constitution's directive that remuneration for judicial officers must be increased at intervals to retain its original value. Two inter-related questions arise in relation to the prescription in Section 114(2) of the Constitution and these are: what exactly is the interval at which the remuneration of judicial officers must be increased, and what is the baseline that must be used in determining the 'original value' which all increments must seek to retain?

As to the first question, there is no statutory prescription of what this interval should be. In practice, and as earlier pointed out, the remuneration of judicial officers is reviewed and increased every three years in addition to the annual increments that all civil servants get. The research for this chapter failed to establish the parameters that were used to determine the three-year cycle. However, it seems to be the case that subsequent to the 2006 dispute about judicial remuneration, a compromise was reached with the executive and National Assembly, establishing that remuneration for judicial officers should be reviewed every three years.[124]

Given the clarity of the directive in Section 114(2) of the Constitution, it may be prudent to first provide statutory guidance

---

[121] Constitution of Malawi (1994), Section 114.

[122] See IBAHRI, *Rule of law in Malawi: The road to recovery,* Report of the International Bar Association's Human Rights Institute (IBAHRI), August 2012, 40-41.

[123] Democratic Governance Unit, 'The state of the Judiciary in Malawi, Namibia and South Africa: Court users' and judges' perspectives'.

[124] None of the informants contacted for this Chapter could confirm with certainty the basis on which the three-year review circle was premised.

about the period to be used for reviewing the remuneration. Given the rather volatile economic situation in Malawi, it may be prudent to conduct annual reviews for purposes of complying with Section 114(2) of the Constitution. The three-year period currently in use may be too lengthy to adequately protect the remuneration of judicial officers from the vagaries of inflation. Second, it is necessary to set out the parameters that will be considered during such a review. Guidance on the period to be used will bring about certainty as to when the review must be conducted and clarity on the parameters will eliminate controversies such as the recent one when judicial officers requested that their remuneration be pegged in US dollars.[125]

Overall, however, one notes that aside from Section 114 of the Constitution, there is a lack of well-defined statutory guidance for dealing with the management of remuneration of judicial officers. For example, and as earlier alluded to, the Committee on Terms and Conditions of Service for Judicial Officers and Members of Staff leads the engagement with the National Assembly and the executive on matters pertaining to remuneration. This, as was noted by one informant, is rather unsatisfactory because, in practice, judicial officers decide what they want as increments, take these to the Public Appointments Committee of Parliament, and get their proposals either approved or rejected.[126]

There is neither guidance nor clarity on how the interaction between the judiciary's committee and the Public Appointments Committee must be conducted or even on what considerations the Public Appointments Committee must bring to play in approving or rejecting the proposals by the judiciary. A possible solution here would be to provide for all these details, among others, in a revamped Judicature Administration Act or as regulations under the existing Act. As it is, the process of engagement between the judiciary on the one hand and the National Assembly and executive on the other hand is open to criticism for lacking transparency, among other things.

---

125 The Daily Times, 'PAC turns down judges pay hike' *Africa News Agency*, 18 March 2022.

126 Author interview, respondent B, March 2022.

Infrastructure development

Earlier, this chapter highlighted the infrastructure constraints that the judiciary faces. While the country's general lack of resources is likely to be flagged as the underlying cause of the infrastructural deficiencies, it requires no gainsaying that a lack of proper infrastructure hinders the judiciary's operations. From the budgeting trends, however, it is clear that the judiciary remains alive to the need for rehabilitating existing infrastructure and also constructing new structures. Consistently, the annual estimates by the judiciary include provision for 'development'. Unfortunately, even where the judiciary's estimates for 'development' have been approved, it seems that the disbursement has not been consistent.[127] The result is that the judiciary has been unable to fully solve its infrastructure challenges.

Pragmatically speaking, it is important to begin by conceding that the infrastructure challenges of the judiciary cannot be resolved at once. Therefore, a more reasonable arrangement would be for the executive to commit to a systematic long-term project for rehabilitating judicial infrastructure and where necessary, construct new structures. This proposal is being made because, given the prevailing socio-economic situation in Malawi, it is highly unlikely that all the infrastructure challenges of the judiciary can be resolved at once. A convenient starting point in this regard requires that the executive honour all annual 'development' allocations made in favour of the judiciary.

Conclusion

According to Ellet, 'chronic and acute underfunding has undermined judicial independence in Malawi'.[128] This notwithstanding, there is in place a reasonably sound legal framework for supporting judicial independence. The disjuncture, therefore, is between *de jure* and *de facto* judicial independence. As far as fiscal autonomy is concerned, a key factor is the limited resource envelope which affects all government ministries, departments, and agencies. Although the judiciary is legally recognised as a separate branch of government, at par with both the executive and the National Assembly, it is not insulated from the caprices of resource challenges.

---

127 Author interview, respondent A, March 2022.

128 Ellett, *Pathways to judicial power in transitional states,* 6.

As earlier pointed out, the budgeting process allows the judiciary to provide adequate input into its financing. The judiciary, however, does not have a final say in the allocation that the National Assembly grants it. Nevertheless, once the funds have been disbursed, the judiciary does have a free hand in determining how to utilise them. The challenge though is that even when funds have been allocated to the judiciary, by the National Assembly, there is no guarantee that the allocation will be disbursed. Practically, therefore, the judiciary's fiscal autonomy remains in limbo.

CHAPTER SIX: UGANDA

Judicial financial independence in Uganda: An analysis of the law and practice

Daniel R Ruhweza

Introduction

The political upheavals that have defined Uganda's journey as a developing democracy have had an impact on the independence and effectiveness of the judiciary. Social, political, and ethnic conflicts that have characterised Uganda's path have impacted on the judiciary and the courts in various ways. While the judiciary are ideally the custodians of law and order, the factors mentioned have on many occasions led to the judiciary playing a role of legitimising those in power as opposed to serving justice and ensuring the rule of law. In a few cases, courts have demonstrated courage and enforced the law but with stern opposition from those that control the gun and the purse. While attacks on the judiciary have taken different forms, the issue of funding the judiciary remains a critical factor, given the importance of adequate and consistent flow of funds to facilitate not only the core functions of the judiciary but also to bolster judicial independence.

Inevitably, the political arms of government, the executive and the legislature, play a defining role in the determination and availing of resources to the judiciary, and the question is whether the roles they play actually enhance the financial independence of the judiciary. Article 126 (1) of the Constitution of Uganda mandates courts to exercise their power in the name of the people in conformity with the law and with the values, norms and aspirations of the people. The political class is constitutionally required to give effect to this provision by providing funds to the judiciary while ensuring autonomy of the judiciary.

While the Constitution provides for the financial independence for the judiciary, in practice, the realisation of this objective has been affected by a range of political, social and economic factors that have compromised the envisaged independence. In turn, these issues, among other factors, have affected the efficiency of the judiciary and delivery of

services. This chapter assesses the influence the executive and legislature have had in advancing or curtailing judicial financial independence, which has ultimately affected the delivery of efficient judicial services. The chapter analyses the principle of judicial financial independence as it relates to Uganda's judiciary and the practice of judiciary financing and administrative facilitation and how this relates to the principles of judicial financial independence as set out in the Constitution of Uganda 1995.

A brief historical overview of the Uganda judiciary

The Uganda Judiciary was established after the promulgation of the 1902 Order-in-Council. This colonial law established the High Court of Uganda and the other subordinate courts. The Order-in-Council imported the application of English law into Uganda, which continues to form the basis of the country's legal tradition and judicial culture as understood in Uganda today.[1] The Order-in-Council only established the High Court but with no further appellate structures beyond the High Court. The High Court was vested with jurisdiction to hear cases involving murder, rape, treason and other crimes punishable by death or life imprisonment. The Order-in-Council empowered the Commissioner to make subordinate courts. These courts were vested with power to try crimes punishable by shorter sentences and whose decisions could be appealed to the High Court.[2]

After attaining independence in 1962, the need for an appellate court above the High Court became glaringly necessary. The 1967 Constitution made provision for the right of appeal from decisions of the High Court to the Court of Appeal for Eastern Africa or a new court of appeal established by parliament. This was the state of affairs until 1977 when the East African Community (EAC) collapsed and Uganda established a national Court of Appeal. Changes introduced in 1980 made the Chief Justice the head of the High Court and created the position of the President of the Court of Appeal. This created confusion in the leadership of the court system. However, this was later settled with the enactment of the 1995 Constitution of the Republic of Uganda that

---

1 Henry Peter Adonyo, 'Structure and functions of the judiciary' Paper presented during the induction of new Grade One magistrates at Ridar Hotel, Seeta, Mukono, 2012, 1-12.

2 George Kanyeihamba, *Constitutional and political history of Uganda from 1894 to present,* LawAfrica Publishing, Kampala, 2010, 29-30

established a clear hierarchy of Courts in Uganda.[3] The Court of Appeal came into existence after the promulgation of the 1995 Constitution and enactment of the Judicature Act of 1996.

The development of the current judicial system in Uganda commenced in 1986 when President Yoweri Kaguta Museveni ascended to the presidency. He pledged to end tyranny and reform the country's judicial system. The National Resistance Movement (NRM) which is also the current ruling party in Uganda, introduced the Constitution (Amendment) Bill of 1987 and the Judicature (Amendment) Bill of 1987. These Bills introduced a number of changes which included the creation of the Supreme Court. Another crucial development during this period was the commencement of the constitution-making process which started with nation-wide public consultations that produced a draft report. The debate on the draft report resulted in the formulation and promulgation of the 1995 Constitution of Uganda. The 1995 Constitution now sets out the current judicial structure with various courts of judicature as discussed below. The 1995 Constitution was a great milestone in as far as the judiciary was concerned and it set out various provisions geared towards judicial independence.

The Structure of the Uganda Judiciary

The Judiciary of Uganda has undergone various changes which were brought about by the various constitutions of Uganda since independence in 1962. The current judiciary structure was established by the 1995 Constitution. The judiciary comprises the courts of judicature which consist of: the Supreme Court, the Court of Appeal, the High Court and other subordinate courts.

The Supreme Court is the highest court of record and comprises the chief justice and other justices who should not be less than six in number. It is the final court of appeal and such appeals lie from decisions of the Court of Appeal as prescribed by law. To be fully constituted, the law requires the Supreme Court to consist of an uneven number of judges that is not less than five members of the court.

Immediately below the Supreme Court is the Court of Appeal, which consists of the Deputy Chief Justice and justices of Appeal that are not less than seven. Appeals lie to the Court of Appeal from decisions

[3] Constitution of the Republic of Uganda 1995, Articles 134-135.

of the High Court as the law prescribes. The court is considered duly constituted at any sitting if it consists of an uneven number that is not less than three. The Court of Appeal is also mandated by the Constitution to sit as the Constitutional Court while determining questions of the interpretation of the Constitution. The composition of the Court of Appeal, sitting as the Constitutional Court, should consist of a bench of five members.

The High Court is the third in hierarchy in the court system of Uganda. The court consists of the principal judge and such number of judges as prescribed by the Parliament of Uganda. As at 2024, Uganda has fifty-four High Court judges and 16 acting judges.[4] The High Court has unlimited original jurisdiction in all matters, and appellate jurisdiction from lower courts. The High Court is operated under the division system in the central region and is divided into seven divisions; land, civil, criminal, family, anti-corruption, commercial and international crimes. It is also operated using the circuit system servicing the rest of the regions of Uganda totalling to under 20 circuits.

Magistrates' Courts are the lowest in hierarchy. Their decisions are subject to appeal to the High Court. There are three levels of Magistrates' Courts: Chief Magistrates, Magistrates Grade I and Magistrates Grade II. These courts handle the bulk of cases in Uganda. The country is divided into chief magisterial areas administered by Chief Magistrates who have general powers of supervision over all magisterial courts within the area of their jurisdiction. Each Chief Magistrate's Court has a Chief Magistrate, and Grade I Magistrates. Grade II Magistrates have recently been posted to individual stations to provide wider coverage of services to the people. The judiciary also supervises the local council courts as well as tribunals.

Constitutional principles and the status of judicial independence

Judicial independence is enshrined in the 1995 Constitution which was birthed out of a deliberate effort to correct past wrongs. The doctrine of separation of powers was to play a central role in attaining a legitimate balance between the three organs of state. To ensure transparency in the constitution-making process, a commission headed by Justice Benjamin

[4] Judiciary of the Republic of Uganda, 'The honourable judges of the High Court' 1 August 2024 <https://judiciary.go.ug/data/incourt/16/The%20Honorable%20Judges%20of%20The%20High%20Court.html>.

Odoki was formed.[5] The mandate of the Commission as spelt out by the Uganda Constitutional Commission Statute[6] was to consult the people and make proposals for a popular and lasting constitution based on national consensus including judicial reform.

With regard to judicial independence, the Commission noted the blatant over-reach of the executive into the operations of the judiciary and stated that more had to be done to secure the integrity and independence of the judiciary as an institutional and separate organ of the state. The Commission recommended that in the performance of its functions, the judiciary should act independently and subject only to the Constitution and the law. The Commission recommended adequate remuneration and facilitation of judicial officers, and adherence to and respect of court decisions.

These recommendations crystallised into the now entrenched provisions on judicial independence and integrity and further influenced the various constitutional provisions relating to the judiciary. The 1995 Constitution, under the provision dealing with exercise of judicial power, provides that

> judicial power is derived from the people and shall be exercised by the courts under this Constitution in the name of the people and in conformity with the law and with the values, norms, and aspirations of the people.[7]

In this regard, the Constitution provides that courts shall dispense justice without discrimination, efficiently and without delay, and without undue regard to technicalities.[8] The Constitution further calls on the courts to promote reconciliation and ensure the compensation of victims who are wronged.[9]

Article 128 of the Constitution lists the principles that underpin the independence of the judiciary. The Constitution provides that in the exercise of their judicial power, courts shall be independent and shall not be subject to the control or direction of any person or authority[10] and that no person or authority shall interfere with the courts in the

---

5 Ali Mari Tripp, 'The politics of constitution making' in Laurel Miller (ed) *Framing the state in times of transition,* United States Institute of Peace, 2010, 158-175.

6 Statute No 5 of 1988.

7 Constitution of the Republic of Uganda (1996), Article 126 (1).

8 Constitution of the Republic of Uganda (1996), Article 126 (2).

9 Constitution of the Republic of Uganda (1996), Article 126 (2).

10 Constitution of the Republic of Uganda (1996), Article 128 (1).

exercise of their judicial power.[11] The Constitution further requires all organs of state to accord necessary assistance to the courts to ensure the latter's effectiveness.[12] To bolster the independence of individual judicial officers and critical offices in the judiciary, the Constitution provides that offices of the chief justice, deputy chief justice, judge of the Supreme Court, judge of the Court of Appeal, and judge of the High Court, cannot be abolished while there is a substantive office holder,[13] and further provides immunity to judicial officers in respect of decisions or actions taken in the course of performance of judicial duties.[14]

The president is vested with powers to appoint the chief justice, the deputy chief justice, and justices of the Supreme Court, Court of Appeal and the High Court, and does so acting on the advice of the Judicial Service Commission and with the approval of parliament.[15] The president may also, acting on advice of the Judicial Service Commission, appoint a qualified person in an acting position as a judge, even where the person is above the retirement age. Any person appointed in an acting capacity will continue acting unless the president, upon advice of the Judicial Service Commission, revokes such appointment.[16] The president's powers extend to appointment of the chief registrar and registrar of the judiciary on the advice of the Judicial Service Commission,[17] and appointment of the secretary of the judiciary (also known as permanent secretary of the judiciary) on the advice of the Public Service Commission.[18]

The Constitution further vests the president with powers to appoint members of the Judicial Service Commission with the approval of parliament. The Judicial Service Commission is composed of the chair and deputy who shall possess qualifications of a senior judge,[19] a nominee of the Public Service Commission, two representatives of Uganda Law Society, a judge of the Supreme Court representing the superior courts, two members of the public who are not lawyers, and the

---

11 Constitution of the Republic of Uganda (1996), Article 128 (2).
12 Constitution of the Republic of Uganda (1996), Article 128 (3) and (4).
13 Constitution of the Republic of Uganda (1996), Article 128 (8).
14 Constitution of the Republic of Uganda (1996), Article 128 (4).
15 Constitution of the Republic of Uganda (1995), Article 142 (1).
16 Constitution of the Republic of Uganda (1995), Article 142 (2).
17 Constitution of the Republic of Uganda (1995), Article 145 (2).
18 Constitution of the Republic of Uganda (1995), Article 174.
19 The qualification of a chief justice, deputy chief justice or principal judge.

Attorney General who shall be an *ex officio* member.[20] The President also has power to appoint the Secretary of the Judicial Service Commission on the advice of the Public Service Commission.[21]

The Judicial Service Commission is charged with the main duties of: advising the president in the discharge of his duties as provided for in the Constitution, reviewing and making recommendations on terms and conditions of service of judicial officers, capacity building and training of judicial officers.[22] The Judicial Service Commission is also expected to provide a link between the Judiciary and the public as well as receive public views regarding the administration of justice, among other functions.[23] More importantly, the Constitution explicitly provides that in the performance of its functions, the Judicial Service Commission shall not be subject to the control or direction of any person or authority.[24]

Finally, the Constitution provides that Parliament shall, subject to the provisions of the Constitution, have the power to make laws providing for the structures, procedures and functions of the Judiciary.[25] Specifically, the Constitution provides that parliament can make laws to facilitate the discharge of the functions of the president and the Judicial Service Commission.[26]

The Constitution, thus, provides for a system of checks and balances between the executive, legislature, and the judiciary in a manner that seeks to enhance and foster judicial independence and the effective separation of powers. Parliament, as the legislative organ, is vested with the primary power to make laws governing the Judiciary including defining relations between the executive and the judiciary. Furthermore, parliament is vested with the power to approve the appointment of judges and members of the Judicial Service Commission. The Constitution also provides express guarantees of independence to judicial officers and the Judicial Service Commission.

While there are elaborate provisions that seek to safeguard the independence of the judiciary, there is a pattern of attacks on the judiciary

---

20 Constitution of the Republic of Uganda (1995), Article 143 (2).
21 Constitution of the Republic of Uganda (1995), Article 146 (8).
22 Constitution of the Republic of Uganda (1995), Article 147 (1).
23 Constitution of the Republic of Uganda (1995), Article 147 (1).
24 Constitution of the Republic of Uganda (1995), Article 147 (2).
25 Constitution of the Republic of Uganda (1995), Article 150 (1).
26 Constitution of the Republic of Uganda (1995), Article 150 (2).

that even percolate into issues of funding and judicial independence. The use of military courts to try civilians, for instance, is an example of side-stepping regular courts in order to get favourable outcomes of such cases.[27]

Another example is the contentious bail debate that has haunted the courts since the promulgation of the 1995 Constitution. The state became increasingly frustrated by the grant of bail to suspects in politically sensitive cases brought before the courts. An all-out condemnation of the grant of bail ensued when the president openly called for the scrapping of bail.[28] In some cases, the grant of bail by courts has caused anger among the ordinary people in the public space who have then resorted to mob justice arguing that it imposes instant justice.[29] These trends have made the denial of bail, especially in politically related offences, become a general trend in Uganda. In an address, the president suggested that the increase of resources and prosecutorial capacity to enable effective crime investigation, case management and disposal was dependent on the limitation of bail.[30]

In some cases, President Yoweri Museveni has not hidden his displeasure with the courts. In June 2004, when the Court of Appeal declared the Referendum (Political Systems) Act of 2000 unconstitutional, the President told the courts and the public that the 'major work for the judges is to settle chicken and goat theft cases but not determining the country's destiny'.[31]

These attacks on the judiciary, which surprisingly include conditionalities related to funding and support of the judiciary if the courts do the executive's bidding, reveal a direct and overt interference in the decisional independence of the judiciary as well as core elements of financial and institutional independence. Furthermore, the vast powers to appoint judges and leadership of the judiciary as well as key positions in the institution enhance the perception of the control of the judiciary by the executive.

---

27 Adam Nuwamanya, 'Minister defends army's trial of civilians in Court Martial amid rule of law criticism', *Nile Post*, 4 December 2023.

28 Ian Katusiime, 'Museveni's stand on bail', *The Independent*, 4 October 2021.

29 Ian Katusiime, 'Museveni's stand on bail'.

30 'Museveni: No bail to the corrupt' *The Independent,* 11 July 2024.

31 Busingye Kabumba, 'The illusion of the Uganda Constitution', *AfricLaw,* 27 September 2012.

Financial autonomy of the judiciary

Constitutional principles on financial autonomy of the judiciary

The Odoki Commission, which was appointed to head the constitutional review process, noted that the inadequacy of funds for the judiciary impeded its operations and the persistent underfunding of the judiciary undermined the judiciary's institutional independence.[32] The people told the Commission that the Uganda Judiciary should be financially autonomous in order to facilitate the judiciary 'to plan and control its operations without getting permission from the Treasury'.[33] The Commission noted that while the judiciary generated revenue through court processes, the level of revenue generated was inadequate to substantially finance the judiciary's operations. The Commission also noted that the rampant corruption and embezzlement of funds by judiciary staff further affected the financial operations of the judiciary.[34]

The Commission recommended that the judiciary should be granted financial autonomy in two ways: first, funds in the form of a grant should be determined by Parliament and released regularly and directly to the judiciary.[35] Secondly, the Commission recommended that the judiciary should be allowed to utilise the revenue it collects in order to plug the perennial revenue shortfalls.[36] Along with these measures, the Commission further recommended that court fees and fines should be adjusted to take care of inflation rates and that the collection and administration of court revenues should be streamlined.[37]

The Constitution provides a number of measures with regard to finances and financial autonomy of the judiciary. First, it provides that the administrative expenses of the judiciary, including salaries and allowances, will be a direct charge on the Consolidated Fund.[38] The salaries and benefits of judicial officers play a vital role in securing the independence of the judiciary. The guarantee of competitive pension

---

32 Constitutional Commission, '1995 Uganda Constitutional Commission Report', 1995, 455-456.

33 Constitutional Commission, '1995 Uganda Constitutional Commission Report', 455-456.

34 Constitutional Commission, '1995 Uganda Constitutional Commission Report', 455-456.

35 Constitutional Commission, '1995 Uganda Constitutional Commission Report', 456.

36 Constitutional Commission, '1995 Uganda Constitutional Commission Report', 456.

37 Constitutional Commission, '1995 Uganda Constitutional Commission Report', 456.

38 Constitution of the Republic of Uganda (1996), Article 128 (5).

for judicial officers, for instance, provides judges with peace of mind to remain focused on their work and acts as a positive incentive to stay away from corrupt and unethical practices in a bid to secure their future after the judiciary.

Secondly, the Constitution provides that the judiciary shall be 'self-accounting' and may deal directly with the ministry responsible for finance in relation to its finances.[39] This provision seeks to facilitate the financial autonomy of the judiciary in accordance with the wishes of Ugandans, as expressed to the Odoki Commission. The prescriptions that judiciary expenses shall be a direct charge on the Consolidated Fund and that the judiciary can directly deal with the Ministry of Finance are meant to ensure that judiciary finances are not encumbered by legislative and bureaucratic hindrances put in place by the executive in the appropriation and utilisation of money set aside for the judiciary.

Challenges in implementation of constitutional principles of financial independence of the judiciary

While the 1995 Uganda Constitution contains progressive provisions that seek to bolster the financial and institutional independence of the judiciary, these arrangements have not been translated into practice in the planning, budgeting, and financial operation of the judiciary. Indeed, it is only in 2020 that Parliament passed the Administration of the Judiciary Act, which is meant to be the enabling law to operationalise the key constitutional principles regarding judicial, financial and administrative independence that are discussed above. The continued subjugation of the judiciary to the executive on matters of administration and finances led to two key court cases that resulted in judicial pronouncements regarding the judicial financial independence of the Uganda Judiciary as provided for under the Constitution.

In 2019, the Constitutional Court in *Krispus Ayena Odongo v Attorney General & the Parliamentary Commission*[40] considered the matter of the budget and finances of the judiciary vis-à-vis the constitutional arrangements that seek to guarantee the financial independence of the judiciary. The petitioner had challenged the submission of the judiciary budget to the executive, and the inclusion of the judiciary budget and

---

[39] Constitution of the Republic of Uganda (1996), Article 128(6).

[40] Constitutional Petition No 30 of 2017, UGCA 31 (7 February 2020).

funds in the Appropriation Act. The petitioner argued that the inclusion of judiciary funds in parliamentary appropriation was against Article 128(1) of the Constitution of Uganda that exempts judiciary funds from an Appropriation Act and instead provides for judiciary funds to be a direct charge on the Consolidated Fund.

The Court observed that the Appropriation Bill, which is submitted by the executive to parliament, goes against the constitutional provisions which require the laying of judiciary budget estimates before parliament as opposed to appropriation through an executive sponsored process.[41] The Court thus held that the funds required to meet judicial expenditure from this perspective do not require the mandate of parliament through an Appropriation Act. The Court noted that the budgets of the judiciary are exempt from appropriation under Article 128(5) of the Constitution while that of parliament is charged to the Consolidated Fund by Section 20 of the Administration of Parliament Act. In this regard, (now Supreme Court) Justice Christopher Madrama Izama, who wrote the unanimous decision, noted that:

> Save for the requirement to present financial year estimates which are not to be reviewed before laying before parliament by the president and which shall be presented by the president to parliament every financial year for purposes of the next financial year, the executive is not involved in the preparation and review of a budget of parliament, or the judiciary for approval by parliament. The only time and the only way the executive gets involved is in making comments supporting the laying in parliament of financial year estimates of revenue and expenditure of government by the president … the said financial year estimates are presented by the president without revision to parliament every financial year.[42]

Article 128 of the Constitution specifies expenses that are a direct charge on the Consolidated Fund as 'the administrative expenses of the judiciary including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the Judiciary.'[43] The Court elaborated the meaning of the term judiciary envisaged under Article 128(5) of the Constitution to mean:

> the institution of the judiciary including its administrative setup comprising of different categories of staff inclusive of judicial officers…it encompasses the administrative setup under which the courts of judicature are managed

---

41 *Odongo v Attorney General and the Parliamentary Commission*, 22.

42 *Odongo v Attorney General and the Parliamentary Commission*, 41.

43 Constitution of the Republic of Uganda (1995), Article 128(5).

> and of which the courts of judicature are the components of the structure with staff that includes staff to administer the judiciary as well as staff categorised as judicial officers.[44]

The Court construed these provisions as empowering the judiciary to be free from directions of the executive, especially with regard to determination of resource needs, and to bar any interference with the financial operations of the judiciary. The Court noted that:

> … what funding is required to be effective in the administration of justice should be within the determination of the judiciary with approval of parliament. To subject the funding of the judiciary to the executive arm of the state might involve them in determining what priorities the judiciary should fund. Such determination compromises on the independence of the judiciary in carrying out its judicial functions in the sense that the judiciary cannot prioritise its funding without an impute or direction of the executive arm of government.[45]

While the Constitution seems to vest the Judicial Service Commission with authority over the terms and conditions of judicial staff only, and thus appears to exclude the other non-judicial staff from the ambit of the Judicial Service Commission, the Court noted that the Constitution further requires the judiciary (as defined by the court) to be self-accounting under Article 128 (6) of the Constitution. In this regard, the Court observed that 'the Constitution envisages an independent judiciary in relation to administration and financial management.'[46] The Court observed thus, on import of the provision that declares the judiciary as a self-accounting institution:

> As a self-accounting organ, the judiciary is required to submit its budgetary estimates through the chief justice in respect of each financial year directly to the president and not anyone else. The said budget must be prepared by the chief justice or his delegate and not anyone else and once presented to the president, it must be tabled before parliament without revision. [47]

The Constitution places the duty to enact a law to govern the operations of the judiciary on parliament and states that parliament may enact laws prescribing procedures and functions of the judiciary.[48]

---

44 *Odongo v Attorney General and the Parliamentary Commission*, 35-36.

45 See *Odongo v Attorney General and the Parliamentary Commission*, 33-34.

46 *Odongo v Attorney General and the Parliamentary Commission*, 46.

47 As per Justice Cheborion Barishaki, in *Law Society of Uganda v Attorney General* (Constitutional Petition No 52 of 2017).

48 Constitution of Uganda (1995), Article 150.

Pursuant to this provision, Parliament enacted the Administration of the Judiciary Act in 2020, which seeks, amongst other objectives, 'to strengthen the independence of the judiciary by streamlining the provision and management of funds for the judiciary and establishing structures within the judiciary to improve the performance of the judiciary'.[49]

The letter and spirit of the Constitution and enabling provisions is to ensure that safeguards are put in place for the judiciary. The Constitution, for instance, requires the judiciary to present its budget to the president before it is tabled in parliament. However, the Constitution further provides that the budget should be tabled without amendments, and with accompanying comments. This is one such check envisaged in the Constitution.[50] It also recognises the role that the Judicial Service Commission has to play in the determination of judicial administrative expenses of the judiciary such as salaries, allowances, gratuities and pension concerning persons serving in the judiciary and whose expenses are to be charged on the Consolidated Fund.

In another judgment by the Court of Appeal in *Uganda Law Society v Attorney General*,[51] which was handed down a year after the first judgment, the Court dealt with similar issues of judicial financial independence. Uganda Law Society, the petitioner in the matter, had argued that the Judiciary falls under the Justice, Law and Order Sector (JLOS) which is under the Ministry of Justice and Constitutional Affairs, wherefrom its budgetary allocation is controlled and treated as if it is a department in the civil service under the ministry responsible for public service.[52] On the other hand, the state, through the Attorney General argued that 'Article 128 from which the judiciary derives its mandate refers to only independence in exercise of judicial functions and cannot have been intended to concern itself with issues of funding'.[53]

The Court made a number of important clarifications regarding judicial independence and the budgeting process. First, the Court noted that the practice where the Secretary to the Judiciary (a presidential appointee) led the budgeting process of the judiciary was a usurpation

---

49 Long title of the Administration of the Judiciary Act, 2020.

50 Constitution of Uganda (1995), Article 155(2).

51 *Uganda Law Society v Attorney General*, Court of Appeal of Uganda, Constitutional Petition No 52 of 2017.

52 *Uganda Law Society v Attorney General*, 17.

53 *Uganda Law Society v Attorney General*, 19.

of powers of the chief justice, who is the head of the judiciary under the Constitution. Justice Cheborion Barishaki noted that:

> Clearly, there is no doubt in my mind that the powers of the Chief Justice under Article 133 of the Constitution have, in practice, been usurped by the Secretary to the Judiciary. This is the clearest indication yet that the Judiciary is treated as a department under a ministry as opposed to an arm of government. The absence of legislation to clarify the accounting function and personnel matters for the Judiciary is partly responsible for this confusion. However, the legislative vacuum cannot be an excuse for compromising the independence of the judiciary.[54]

In this regard, the Court held that the proper arrangement should be that the Secretary to the Judiciary works under the direction and control of the Chief Justice and should not unlawfully assume control of the judiciary in terms of Article 174 of the Constitution. The Secretary to the Judiciary should report to and be under the supervision of the Chief Justice. The Court was also emphatic that the role of appropriating public resources belongs to parliament and not the executive, and condemned the practice where the secretary to the treasury determines the share of each self-accounting entity without proper decision from the legislature.[55]

With regard to the adequacy of resources allocated to the judiciary, the executive, through the Secretary to the Treasury had stated that available state resources were not adequate to fund all government requirements and there had to be reasonable distribution. To this assertion, the Court responded that, 'this is certainly not in dispute. The question is whether distribution of the available resources is done in an equitable and reasonable manner, taking into account the unique needs of each arm of government, in a manner consistent with the Constitution'.[56]

Regarding the attitude of the scarcity of resources and 'other more pressing functions', Justice Barishaki stated, that 'not only is such an attitude contrary to the Constitution,' which requires that adequate resources be given to the Judiciary as an equal arm of government but it seems to communicate a government position that the Judiciary should

---

[54] *Uganda Law Society v Attorney General,* 41.

[55] *Uganda Law Society v Attorney General,* 53.

[56] *Uganda Law Society v Attorney General,* 55.

be content with meagre resources allocated to it as it may not be part of 'certain sectors which should not be starved.'[57]

While the law and jurisprudence from the courts seek to secure the financial independence of the judiciary, this is not reflected in actual processes where the resources of the judiciary are allocated and managed. In actuality, the needs and priorities of the judiciary are not given the treatment and consideration that is expected or prescribed in the law. Judicial staff that participate in the processes indicate that the needs of the judiciary are usually relegated to third place, after the executive and the legislature, and the process does not reflect the parity or equality of arms of government. Insiders that participate in the process indicate that budget papers are nothing but a mere charade of dry compliance.[58]

The judiciary is routinely placed in a position where it has to compromise on its core protective function as an incentive to secure adequate funding; one such instance is when the President assured the courts of funding if bail is scrapped. This has, to a large extent, significantly impaired the judiciary's effectiveness especially in terms of addressing human rights violations arising from politically related cases. Ultimately, the issue was one of failure of separation of powers. Parliament on one end trying to keep the judiciary in check by effectively controlling its funding structures. It would be possible for on lookers to argue that this was and continues to remain an attempt to politicise the judiciary.

The Court in *Uganda Law Society v Attorney General*[59] noted that the legislation that is contemplated under Article 150 (1) of the Constitution would have provided a more detailed framework on the manner and approach to the Judiciary's financial autonomy and funding arrangements. The Court, however, also added that in the absence of such a law, the executive should use other means of ensuring judiciary finances, as opposed to intrusive actions of the executive and the Secretary to the Judiciary that impinge on the independence of the judiciary.[60]

---

57 *Uganda Law Society v Attorney General,* 54.

58 Interview notes on file with author.

59 *Uganda Law Society v Attorney General*, 57.

60 *Uganda Law Society v Attorney General*, 57.

Financing of the judiciary

Parliament took a while to put in place a law to provide for the financial and administrative management of the judiciary. In April 2014, there was an attempt to introduce the law envisaged under Article 150 of the Constitution through a private member's bill. However, the bill was not formally introduced in Parliament as the Ministry of Finance did not issue a certificate of financial implications as required in the law before the introduction of such a bill in Parliament.[61]

The enactment of the Administration of the Judiciary Act in 2020 led to some major changes in the administrative and institutional processes of the Judiciary. The Act seeks to give effect to Chapter 8 of the Constitution on the judiciary and specifically aims to, among other purposes, establish an efficient and effective administration of the judiciary, establish a judiciary service within the Judiciary, streamline the provision and management of judiciary funds, establish structures for the effective performance of functions of the Judiciary, and provide for retirement benefits of judicial officers.[62]

Prior to the enactment of the Administration of Judiciary Act, the extent of administrative control of the judiciary was not clear. Specifically, while the Constitution mentioned 'administrative systems', it was not entirely clear whether the Judiciary was in charge of all judicial staff, beyond judges, magistrates, and registrars. The Act establishes a separate service for the Judiciary.

With regard to finances, the Act recognises the sources of judiciary finances as moneys appropriated by Parliament for the Judiciary, grants and donations approved by the Secretary to the Treasury, and any other moneys raised by the Judiciary in the course of the performance of its functions.[63] The Act also establishes a Judiciary Fund into which all moneys due to the judiciary will be paid,[64] but does not provide for any structures or processes for the management of the Judiciary Fund. Specifically, there are no provisions in the Act for the budgeting process that is envisaged under the Constitution, and how the Judiciary is to access and manage the Judiciary Fund for its operations. In brief, the Act

---

61 *Uganda Law Society v Attorney General*, 50.

62 Long title to the Administration of the Judiciary Act, 2020.

63 Administration of the Judiciary Act, 2020, Section 33.

64 Administration of the Judiciary Act, 2020, Section 35.

does not clarify what entails the 'self-accounting status' of the Judiciary as provided for in the Constitution.

In 2021, after the Act came into operation, the Judiciary took over the entire complement of staff including non-judicial staff such as accountants, drivers, among others. This has ensured the complete delinking of the judicial service from the mainstream public service. After several administrative components were fused with the judiciary to reinforce its autonomy, a larger financing burden was added to the judiciary. This financial burden is inclusive of the costs of constructing additional Court of Appeal/Constitutional Court circuits across the country. The changed structure has led to an increased financial cost of up to over UGX 500 billion shillings.[65]

Section 6 of the Act further grants the chief justice power to establish committees within the judiciary to perform special designated roles. One of these committees is the Planning, Development and Finance Committee. Under Section 7, this Committee is enjoined to initiate, coordinate and implement judicial policies, strategic plans, research, budgeting, allocation and utilisation of resources.

One of the crucial roles of this committee revolves around discussion of approved budgets, allocation of resources and also ensuring proper maintenance of movable and immovable assets while also monitoring investment plans of the judiciary. On the basis of the newly enacted Administration of the Judiciary Act, it is possible for one to argue that the judiciary has been placed in total control on paper, of its financial planning in terms of drafting necessary budgetary needs for the judiciary, with the additional requirement of approval simply standing as a formality in government processes.

Even with these changes brought by the Administration of the Judiciary Act, and the stated constitutional status as an arm of government, in practice the Judiciary still operates as a government department.[66] The salaries and benefits, establishment, and structure of the Judiciary other forms of remuneration are in practice subject to the approval of the cabinet.

---

[65] Kenneth Kazibwe, 'Court of Appeal to extend to regions as cabinet approves new judiciary structure', *Nile Post*, 11 August 2021.

[66] Justice Law and Order Sector, 'Cabinet approves new Judiciary structure', 11 August 2021 < https://jlos.go.ug/index.php/com-rsform-manage-directory-submissions/services-and-information/press-and-media/latest-news/item/796-cabinet-approves-new-judiciary-structure> on 17 February, 2022.

Judiciary budgetary and financial planning and trends

The annual budget framework paper usually sets out key objectives informing the budget for the Judiciary in the coming years. Some of the driving objectives include increasing the index of judicial independence, improving the time in which justice is delivered, increasing the presence of justice delivery service points of districts with complete administration of justice service delivery points and also increasing public trust in the justice system.

These objectives are backed and also informed by national development plans, which recognise good governance as the basis for attaining accelerated development and the rule of law as the foundation of a free society. The third National Development Plan (NDP III), for instance, noted that delayed delivery of justice led to case backlog and thus argued for the use of alternative dispute resolution. It also noted the need to strengthen capacity and operations of the commercial justice institutions to provide fast and effective dispute resolution in all the specialised areas and in the area of alternative dispute resolution.[67]

The NDP III, in turn, proposed interventions that promote equitable access to justice through legal aid services, and the strengthening of transitional justice and informal justice processes, with some already under implementation such as the construction of spacious premises for the judiciary, effectively also cutting the cost of rent.[68]

First, it is important to note that the judiciary budget allocation in Uganda over the past 11 years has remained stunted, representing 0.10 - 0.14 percent of the country's gross domestic product which currently represents 1.2 percent of the total budget allocation.[69] In 2017/18, the judiciary was allocated UGX 172 085 000 000 out of a national budget of UGX 29 trillion, representing a total of 0.59 percent of the budget.[70] Commenting on the amount of resources availed to the judiciary, the Court of Appeal noted that '[it] is clear … that the Judiciary plays an important role in social and national transformation. It is demeaning that 0.59 percent of the national budget can be deemed sufficient for one

---

67 National Planning Authority, *Third national development plan (NDP III) 2020/21-2024/25,* National Planning Authority, Kampala, 2020, 178.

68 Judiciary of Uganda, 'Address of Honourable Justice Alfonse Chigamoy Owiny-Dollo, Chief Justice of Uganda, New Law Year Address', 2022.

69 Judiciary of Uganda, *Annual Performance Report FY 2022/23,* 2023, 15.

70 *Uganda Law Society v Attorney General*, 52-53.

of the three arms of state.'[71] At the budget, this share only represented a share of 0.4-0.45 percent.[72]

World Bank statistics reveal that between the financial years of 2009/10 to 2018/19, total budget allocation to the judiciary increased at an average of 11.6 percent in nominal terms, passing from 52 to 128 billion shillings. Factors like inflation ultimately meant that the budget remained flat, explaining the low gross domestic product (GDP) scores ranging between 0.10-0.14 percent.[73]

According to the World Bank, the judiciary's budget is divided into three large items: the wage budget which includes base salary for staff, the non-wage budget which covers other operating expenditures and extends to salary-like payments to staff, and the development budget which covers capital costs. The trend over the years has been that the non-wage budget has grown considerably faster than wage and development budgets primarily as a result of increased employee costs from UGX 19.53 billion to UGX 59.73 billion. After the transfer and fusion of particular administrative powers such as awarding of contracts to non-judicial staff, the judiciary as an autonomous body then becomes in charge of sourcing contract employees for roles such as drivers, accountants, among others.[74]

In the Financial Year 2021/22, the overall budget of the judiciary was substantially enhanced from UGX 199.1 billion to UGX 376.9 billion. UGX 146.6 billion was specifically earmarked for the recruitment and facilitation of judicial staff, maintaining the trend.[75] The trend is also carried on in the vote budget framework paper for FY 2022/23 whereby the recurrent non-wage expenditure is projected to raise wage expenditure over the next four projected financial calendar years.[76]

In the budget, UGX 18.2 billion from the UGX 376.9 billion was set aside to implement an Electronic Court Case Management Information

---

71 *Uganda Law Society v Attorney General*.

72 World Bank Group, *Judiciary of the Republic of Uganda rapid institutional and economic assessment*, June 2020, 39.

73 World Bank Group, *Judiciary of the Republic of Uganda rapid institutional and economic assessment*, June 2020, 39

74 World Bank Group, *Judiciary of the Republic of Uganda rapid institutional and economic assessment*, June 2020, 39

75 Ministry of Finance, *Budget Speech FY 2021/22*: *Industrialisation for inclusive growth, employment and wealth creation,* Ministry of Finance, Kampala, 10 June 2021, 28.

76 Ministry of Finance*, Vote Budget Framework Paper FY 2022/23*, Judiciary (courts of judicature), 1.

System and the Prosecution Case Management System in order to improve access to justice. The rationale behind these allocations is the drop in case backlog in the courts whereby the portion of cases that are over 2 years old dropped from 24 percent in 2017 to 17.5 percent in 2021, attributed to the implementation of a case backlog strategy and the use of alternative dispute resolution alongside conventional court proceedings.[77]

These increments continually show that the state deliberately takes budgetary measures to adjust to the needs of the Judiciary in Uganda. The budget framework paper for example shows that the justice sector took a relatively larger share of the budget compared to the legislature. The national budget framework paper for the 2021/22 financial year reveals that the Justice, Law and Order Sector was allocated 5.9 percent of the budgetary allocation, an increase from 5.3 percent in the previous financial year, while the legislature only received 2.2 percent, after an increase of 0.1 percent from the previous financial year. The Uganda Law Society has called for the funding of the Judiciary to be increased to up to 4 percent of the total budget for the Judiciary.[78]

Expenditure has been highlighted for 3 programmes for the judiciary: case management, general judicial administration which includes the recurrent expenditure on chambers for judges, inspectorate of courts, policy and planning among others, and capacity building. The vote budget framework also includes a breakdown of recurrent expenditure throughout a projected period of four years, ranging from construction of judicial premises, but these projections are constant and may not easily reflect how much is actually needed on the ground to meet the evolving needs of the judiciary. There are efforts to improve and increase financing to the judiciary to enable it to effectively address selected indicators in the different programmes above.

Over the past two financial years, the judiciary has received an incremental allocation in its budget representing 1.2 percent of the total budgetary allocation. This increment rose from a meagre UGX 199.0 billion to UGX 376.9 billion in the 2021/2022 and to UGX 381.6 billion in the 2022/2023 financial year.

The effectiveness of the judiciary using selected indicators under the judicial administration programme on the adjusted budgetary scale

---

77 Judiciary, Annual Performance Report FY 2022/2023, 19.

78 *Uganda Law Society v Attorney General,* Constitutional Petition No 52 of 2017.

implies a consistent increase in the presence and functionality of justice service points or indicators such as case disposal rate, periods spent on remand and length of time for disposal. The proposed budgetary adjustments also seek to strengthen regulatory and institutional frameworks for effective and efficient delivery of justice by improving a range of indicators both at an institutional and public level. These are geared at improving the judicial officer to population ratio and have significantly improved even before the conclusion for the financial year that saw the appointment and promotion of new and already serving judicial officers.[79] In a bid to improve the prosecutor to case ratio, a large number of state attorneys have been promoted to create room for new entrants to solve the staffing gaps.[80]

The reasoning behind this is that a growing population ought to be coupled with increased manpower in the judiciary and more infrastructure to cater to the ever-increasing number of districts in the country, among others.[81] The judiciary in the 2022/23 financial year has planned to undertake a number of building projects across the country to fulfil the vision of having all courts accommodated in judiciary-owned buildings while also embarking on expansion of the judicial training institute and the judiciary.[82]

Comparatively, actual budgetary allocation in light of these projections has had a 7.1 percent boost, with UGX 400 billion being allocated to the administration of justice.[83] Other sources have placed the actual budgetary allocation of the judiciary at UGX 381.6 billion for the 2022/23 financial year representing 1.2 percent of the budgetary share.[84]

While the breakdowns of non-wage and wage allocation still remain undisclosed, some programme outcome indicators have specifically been highlighted even in the budget speech. These include efforts to increase the judicial officer to population ratio, such as the recruitment of more judicial officers. This has already been put into effect with the appointment of sixteen High Court judges in acting capacity for two

---

79 Anthony Wesaka, 'Judicial Service Commission appoints 42 new officers', *Monitor,* 15 May 2023.

80 Derrick Kiyonga, 'Judiciary budget to jump from UGX 200b to UGX 800b', *NTV,* 10 April 2021.

81 Kiyonga, 'Judiciary budget to jump from UGX 200b to UGX 800b'.

82 Judiciary of Uganda, *First annual performance report*, Judiciary, Kampala, 2021.

83 PwC, 'Monetisation of Uganda's economy', *pwc.com* <https://www.pwc.com/ug/en/assets/pdf/budget-bulletin-2022-23.pdf> accessed 25 July 2022.

84 Ismail Musa Ladu, 'FY2022/23 Budget: What's in it for you?', *Monitor*, 15 June 2022.

years.[85] More efforts such as the construction of more courts have also been put in place to ensure increased presence and functionality of justice service points.

The new budget structure as of FY 2022/23 presents a lot of challenges as it significantly falls short of budgetary estimates as elaborated in this paper. This undermines opportunities to consolidate judicial independence in Uganda. While the power to govern its own affairs is in its hands, the judiciary can only do so much with a budget shortfall of over 200 billion from the estimates. This has taken the judiciary back to the drawing table and restricts its planning within meagre resources as it stands. These estimates indicate a mismatch between the budgetary needs of the judiciary and the allocations that are actually made. The economy took a blow from the COVID-19 pandemic and other global factors that have placed a strain on resources available for all public institutions, including the judiciary.

The 2022/23 financial year's budget focus points towards a steady approach taken by the state in attempting to ensure judicial efficiency, not through the use of finances in the remunerative sense but rather relying on a broader approach such as a capacity building approach to attain this goal as well as the enhancement of filing and records systems to speed up conventional court processes.[86]

Judicial financial accountability

Retired Chief Justice Bart Katureebe in his address at the 18th Annual Judges Conference in 2016 stated that the rule of law is not a self-effecting concept and therefore requires a strong, independent and accountable judiciary to uphold.[87] This is the principle that the courts are enjoined to abide by under Article 126(1) of the Constitution.

> Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity.

---

85 Anthony Wesaka and Precious Delilah, 'Museveni appoints 16 judges of the High Court', *Daily Monitor,* 26 May 2022.

86 Budget Speech FY 2022/2023, 14 June 2022.

87 Judiciary, Remarks by the Chief Justice at the 18th Annual Judges Conference 2016, https://judiciary.go.ug/data/dpublications/16/Releases_publications.html accessed on 21 August 2024.

Institutionally, while the judiciary strives to become financially autonomous, there is a corresponding obligation, like any other public institution, to also maintain a high standard of judicial financial accountability. The Constitution provides that the Auditor General shall 'audit and report on the public accounts of Uganda and of all public offices including the courts...'[88] and 'conduct financial and value for money audits in respect of any project involving public funds'.[89]

Additionally, the Administration of the Judiciary Act requires the judiciary to keep proper books that are to be regularly audited by the Auditor General in accordance with the Constitution and the National Audit Act, 2008.[90] Furthermore, the chief justice is expected to prepare an annual report on the annual performance of all activities and functions of the judiciary, including the state of the judiciary, and submit the same to the president, the speaker of parliament, and other stakeholders.[91] The judiciary is, in turn, required to put in place structures to enable it perform its various functions and report on the same as required by the law.[92]

Conclusion

Despite the progressive constitutional provisions that seek to protect the financial independence of the Judiciary, it is clear that institutional measures and policies in place continue to undermine the independence of the judiciary. While Parliament enacted the Administration of the Judiciary Act in 2020, ostensibly to safeguard judicial independence in budgeting and financial processes, the relevant provisions do not explicitly alter the current practice.

Accordingly, the practice is that the executive issues circulars to departments setting a ceiling for the various departments, including the judiciary. While parliament makes the formal decision regarding actual budgetary allocations, the executive (through the Secretary to the Treasury) seems to hold the sword that cuts the cake. In the case of the judiciary, whenever decisions in politically sensitive cases appear to go

---

88 Constitution of Uganda (1995), Article 163 (3).

89 Constitution of Uganda (1995), Article 163 (4).

90 Administration of the Judiciary Act, 2008, Section 38.

91 Administration of the Judiciary Act, 2008, Section 39.

92 See, for example, the first Annual Report of the Judiciary FY2020/21.

against the interests of the executive and the legislature, there is an ever-present threat of being starved of resources to operate.

Furthermore, while salary scales are ultimately guaranteed for judicial officers, non-wage payments are never guaranteed. Yet, the administrative and development expenses of the judiciary have a significant impact on efficient delivery of services and the enhancing of access to justice, and the judiciary is overstretched.[93] Indeed, there is a mismatch in the budget target strategy and judicial goals such as reduction of case backlog. While the new budgetary structure means that the average time taken to dispose of a case is now 810 days, with a reduced backlog percentage at 18 percent, it does not take into account that the biggest victims of case backlog are the poor and vulnerable that may not be able to pay for legal services.

[93] Vote Budget Framework paper FY2022/23.

CHAPTER SEVEN: NIGERIA

Judicial financial independence and its effectiveness in Nigeria

Theresa U Akpoghome

Introduction

Judicial independence refers to the measures and arrangements necessary to ensure that the courts and the judiciary are independent from other branches of government, specifically, the executive and the legislature,[1] and even other external interests.[2] After almost six decades of independence, the Judiciary of Nigeria still faces challenges with regard to its independence. Despite very clear constitutional and legislative provisions, including the doctrine of separation of powers, Nigeria continues to face systemic challenges, including financial independence, that hinder judicial autonomy.

Judicial independence encompasses several processes, all of which contribute to trust in the judiciary and the courts. These processes include transparent appointments and control of the budget and funds allocated to the Judiciary. Indeed, without financial independence, the Judiciary cannot be fully independent. Matters such as dismissals and disciplinary actions should be controlled by the Judiciary.

The independence of the Judiciary of Nigeria is enshrined in the Constitution of the Federal Republic of Nigeria (1999) (CFRN) as amended.[3] Section 6 vests judicial powers in the courts and to show that judicial powers should not be meddled with by the legislature, Section 4(8) further provides that legislative power should be subject to judicial scrutiny. The independence of the judiciary is further strengthened by the establishment of the National Judicial Council (NJC).[4] The role of the National Judicial Council includes: the power to recommend the

---

1 Ehiogie West-Idahosa, 'Independence of the judiciary: A recipe for true democracy in Nigeria', *The Nation [Nigeria]*, 16 February 2021.

2 West-Idahosa, 'Independence of the judiciary', 1.

3 Constitution of the Federal Republic of Nigeria (1999), Section 6.

4 Constitution of the Federal Republic of Nigeria (1999), Section 153.

appointment and removal of judges at all levels, control of funds of the judiciary, disciplinary control of judges and judicial staff, and control of issues of policy and administration,[5] all of which are critical to the independence of the judiciary.[6]

This chapter explores the principles and practice related to judicial independence in Nigeria. The chapter is divided into nine parts including the introduction. Part 2 briefly discusses the historical background of the Nigerian Judiciary. Part 3 of the chapter presents the discussion on the structure of the Nigerian Judiciary. Part 4 examines judicial independence while part 5 discusses judicial financial autonomy in Nigeria. Part 6 presents the discussion on trends in financing the Judiciary. Part 7 discusses the accountability and transparency mechanisms in the Judiciary. Part 8 of this chapter is an assessment of judicial financial independence in Nigeria while Part 9 concludes the chapter.

A historical background of the Nigerian Judiciary

While there existed traditional court systems in the Southern part of Nigeria,[7] and a system of Islamic Law in the Northern region,[8] the current court system in Nigeria is based on the colonial court structure and system. During the colonial era, the British through a combination of Foreign Jurisdiction Act of 1843 and 1893 put in place laws under which various courts were set up in the Southern region of Nigeria. Courts were also established in the Northern region of Nigeria and all civil and criminal matters were handled using Islamic law.[9] By 1854 the British established 'courts of equity' in Southern Nigeria.[10] The establishment of the British courts did not prevent the native courts from administering justice provided the rules of custom were not repugnant to natural justice, equity and good conscience.

---

5 Powers under item (i) paragraph 21.

6 The powers are by virtue of item (i) paragraph 21 (a)-(i), third schedule (Part 1) Constitution of the Federal Republic of Nigeria (1999) as amended 2011.

7 Yusuf Ali, 'The evolution of ideal Nigerian judiciary in the new millennium, n.d. <https://yusufali.net/articles/the_evolution_of_ideal_nigeria_judiciary_in_the_new_millennium.pdf> on 3 November 2022, 3-5.

8 Yusuf, 'The evolution of ideal Nigerian judiciary in the new millennium'.

9 Yusuf, 'The evolution of ideal Nigerian judiciary in the new millennium'.

10 Yusuf, 'The evolution of ideal Nigerian judiciary in the new millennium'. These courts were in Brass, Benin, Okrika and Opobo.

By 1863 and 1900, the Supreme Court of Lagos and the Supreme Court for the protectorate of Southern Nigeria were established. While the Supreme Court of Lagos had both civil and criminal jurisdiction, the Supreme Court of the Protectorate of Southern Nigeria exercised the same power and jurisdiction vested in Her Majesty's High Court of Justice in England.[11] This arrangement continued until 1914 when the Southern and Northern protectorates were amalgamated. The amalgamation saw the abolition of Provincial Courts and in its place the High Courts were established. The High Courts had chief judges, judges and assistant judges. Below the High Courts were the Magistrates' Courts. The position of the Native Courts at the bottom of the judicial hierarchy did not change. The Supreme Court exercised appellate jurisdiction over the high courts. Appeals from the Supreme Court went to the West African Court of Appeal (WACA) and appeals from WACA went to the Privy Council between 1934 and 1954. In 1954 a federal Supreme Court presided over by a chief justice of the federation was established.[12]

In 1967 the country became a federation made up of 12 states with their respective judiciaries. Due to the rapid socio-political and economic development of the country, there was a need for a judiciary that is well structured and designed to face the challenges of a growing quasi-federal entity as the central government had more powers than the states or the federating units.[13] That same year, a Court of Appeal Edict[14] from the Western Region led to the establishment of a Regional Court of Appeal. The Federal Revenue Court was established by another decree[15] from the Federal Government to decide cases on the revenue of the federal government and it exercised exclusive jurisdiction throughout the entire nation on specific issues.[16]

Chidi Odinkalu traces the lack of independence of the judiciary to the system of the colonial courts. He argues that a decision of the Judicial Committee of the Privy Council in 1918 laid down the rule that African 'natives' were 'so low in the scale of social organisation that their usages

---

11 Yusuf, 'The evolution of ideal Nigerian judiciary in the new millennium'.

12 Yusuf, 'The evolution of ideal Nigerian judiciary in the new millennium'.

13 Onyekachi Wisdom C Duru, 'The role and historical development of the judiciary in Nigeria', SSRN, 6 September 2012, 5-6.

14 Court of Appeal Edict (No 15 of 1969).

15 Federal Revenue Court Decree (No 13 of 1973).

16 The court is known as the Federal High Court by virtue of Sections 230(2) and 251(1), Constitution of the Federal Republic of Nigeria (1999) as amended in 2011.

and conception of rights and duties [were] not to be reconciled with the institutions or legal ideas of civilised society… such a gulf [could not be] be bridged'.[17] Odinkalu further observes,

> [T]hus, the colonial rule which dispersed the common law traditions of the commonwealth – independence of the judiciary – across the British empire and beyond, was a system of one rule for the white colonialists and another for the black and brown 'natives'. This idea of inherent inequality of the 'natives' was itself central to the conception of law and its administration far from a system of rules of law. Colonial rule was a system of 'rule by law' in which judges were anything but independent.[18]

The colonialists relied on this inequality for enforcement of rules in the territories under them and not on the independence of the judges but on their subservience to the will of the colonial masters. To ensure that this remained, judges could be removed at will during the period.[19] Politicians that fought for the independence of the country had learnt and mastered the trend of controlling judges and it did not take long for the leaders to use the same tools to control courts.[20]

Aside from colonial rule, the military leaders and politicians in Nigeria have succeeded in truncating the judiciary in Nigeria. The military juntas made decrees that ousted the jurisdiction of courts on all matters except private disputes involving land and inheritance.[21] The military rulers went further to appoint judges from the civil service and this was because they wanted a bench whose habit of obedience to instruction they could trust.[22] Appointments to and benefits in the judiciary were

---

17 Chidi A Odinkalu, 'Judicial independence 62 years after Nigeria's independence', *Premium Times,* 2 October 2022.

18 Odinkalu, 'Judicial independence 62 years after Nigeria's independence'.

19 Odinkalu, 'Judicial independence 62 years after Nigeria's independence'.

20 Odinkalu, 'Judicial independence 62 years after Nigeria's independence'. He pointed out that 1961 was the last time a ruling government failed to get what it wanted from the courts. That year, Muhammadu Buhari was commissioned as an officer into the Nigerian army and the ruling political coalition unsuccessfully tried Joseph Tarka for treasonable felony. In 1962 Obafemi Awolowo was tried for treason and the government exhibited their mastery of not allowing the judiciary to be independent. Awolowo was denied the opportunity of choosing his own counsel as prescribed by the Constitution, then the judge who was assigned the case was side stepped because the government knew that he could not be influenced and they were not sure of achieving the pre-determined outcome for the case, so the case was re-assigned to Sodeine Sowemimo who wrote his own judicial epitaph with the words: 'my hands are tied'. Odinkalu, 'Judicial independence 62 years after Nigeria's independence'.

21 Decree No 28 of 1970.

22 Odinkalu, 'Judicial independence 62 years after Nigeria's independence'.

made only by the military and they also created the Advisory Judicial Council by Decree[23] which was later replaced by the current National Judicial Council.[24] Even with the military decrees,[25] it has been observed that the military regimes generally obeyed court orders and that there was some space for judicial activism. On many occasions, the military regime would readily sack the executive and the legislature, but they did not carry out the same actions against the judiciary but would rather want to ensure it 'buckled under its dictation'.[26] Under the military, the powers of the executive and legislature were fused but they allowed the courts to remain, albeit with limited jurisdiction.

The military made laws but the judiciary was allowed to adjudicate despite the fact that judicial officers cowered out of fear of victimisation, harassment and subsequent removal by military rulers. However, a few judges[27] resisted the lawless tendencies of the military by delivering landmark judgments against the military and their institutions.[28] Today, the judiciary has suffered unprecedented disruption in the democratic dispensation that began in 1999.[29] After ascending to power in 2015, President Muhammadu Buhari stated that the 'judiciary was his headache in his bid to combat graft'.[30] However, Buhari's term in office became the most 'turbulent' era in the history of Nigeria's judiciary, characterised by the undermining of courts.

The executive has been known for incessant disobedience of court orders, since the beginning of President Buhari's administration in 2015.

---

23 No 32 of 1975.

24 Odinkalu, 'Judicial independence 62 years after Nigeria's independence', 5. See also Constitution of Nigeria (1999), Section 153 (1).

25 Nnochiri Ikechukwu, 'Sowore re-arrest: Judiciary fared better under military rule, SANs lament', *Vanguard*, 9 December 2019.

26 J Onyekwere and BC Onochie, 'Nigeria's judiciary in retrospect: The vicissitudes of the third arm of government', *The Guardian [Nigeria]*, 8 October 2019. It is the only arm of government that survived all the military incursions between 1966 and 1979 as well as 1983 to 1999.

27 Such as Justices Chukwudifu Oputa, Kayode Eso, Mohammed Bello, Chukwunweike Idigbe, Andrew Obaseki and Augustine Nnamani of the Supreme Court. See *Federal Military Government v Sani* (SC 215/1989 [1990] NGSC 33 (19 July 1990), *Military Governor of Lagos State & Others v Chief Emeka Odumegwu Ojukwu*, Case number SC. 241/850 [1986] NGSC 13 (14 February 1986).

28 Ikechukwu, 'Sowore re-arrest: Judiciary fared better under military rule, SANs lament', 11.

29 Ikechukwu, 'Sowore re-arrest: Judiciary fared better under military rule, SANs lament', 1.

30 Onyekwere and Onochie, 'Nigeria's judiciary in retrospect: The vicissitudes of the third arm of government', 2.

For instance, the Socio-Economic Rights and Accountability Project (SERAP) had detailed the judgments the organisation secured against the government, but which the government had not complied with.[31] The government did not appeal or in any way challenge the judgments.[32] The judgments include the Federal Government's refusal to release persons held in custody after grant of bail by court, and facilitating access to legal representation and family contact to persons held in state custody. In one case, a suspect acquitted by the Abuja division of the Court of Appeal of terrorism-related charges in October 2022 is still being held in custody in 2024.[33]

However, in the latter case, the Government filed an appeal at the Supreme Court to challenge the Court of Appeal's decision. It also filed an application for the stay of execution of the judgment.[34] The

---

31 SERAP Nigeria, 'List and summary of resolved cases', <https://serap-nigeria.org/2020/10/04/list-and-summary-of-resolved-cases/> accessed 21 August 2024. See also H Ojelu and D Onozure, 'FG's disobedience to court judgments dangerous; *Vanguard,* 3 February 2022.

32 The judgments include but not limited to (1) the judgment of Justice Hadiza Shagari in the case between *SERAP v Minister of Information* delivered on 5 July 2017 marked Suit No FHC/L/CS/964/2016 ordering the federal government to tell Nigerians about the stolen asset it allegedly recovered with details of the amount recovered, (2) judgment of 26 February 2018 in the case between *SERAP v Accountant General of the Federation and Attorney General of the Federation* delivered by Justice Mohammed Idris ordering the federal government to publish details on the spending of stolen funds recovered by successive governments since the return of democracy 1999 in Suit No FHC/L/CS/1821/17; (3) On 26 November 2019, Justice Oluremi Oguntoyinbo ordered the federal government to challenge the legality of states pension laws permitting former governors now serving as ministers and national assembly members to collect pensions and to recover pensions already collected by these individual in the case of *SERAP v Attorney General of the Federation* in Suit No FHC/L/CS/1497/2017. On May 2018, in *SERAP v President of the Federal Republic of Nigeria and Attorney General of the Federation and Minister of Justice*, Justice Mohammed Idris ordered the federal government to prosecute senior law makers suspected of padding and stealing N481 billion from the 2016 budget and to widely publish the report of investigations into the alleged padding of the 2016 budget in Suit No FHC/L/CS/1821/17. In 4 July 2019, Justice Chuka Obiozor ordered the federal government to publish the name of companies and contractors that collected public funds from 1999 but failed to execute the electricity project that the funds were meant for in *SERAP v Minister for Power* marked as Suit No FHC/L/CS/105/19. In the same vein, the Kano state governor, Ganduje was ordered by the court not to install the newly appointed emirs in *Hon Rabiu Gwarzo v Speaker Kano State House of Assembly and 5 Others*, Suit No K/192/2019.

33 G Tsa, 'Court of Appeal acquits, discharges IPOB Leader, Nnamdi Kanu; Describes his rendition to Nigeria as unlawful', *The Sun Nigeria,* 14 October 2022. See also Sahara Reporters, 'Court of Appeal acquits, discharges IPOB leader Nnamdi Kanu, says rendition from Kenya illegal' *Sahara Reporters*, 13 October 2022.

34 B Olabimtan, 'Nnamdi Kanu heads to Supreme Court to appeal continued detention', *The Cable*, 3 November 2022.

disobedience of court orders by Government persists, despite clear court pronouncements regarding contempt of court in cases where parties disregard the decisions of the court.[35] Onyekwere and Onochie in their paper quoted the observation of a legal practitioner Stephen Azubuike. Azubuike notes thus on the general status of the independence of the Nigerian Judiciary:

> Nigerian Judiciary has known its highs and lows in the last 59 years. At its highest moments, we have seen Nigerian jurists on the Bench of some other African countries…. At its lowest ebb, we have seen the negative effects of political interference in the affairs of the third arm of government. Highly politically motivated appointments have left us with persons who should never have sat on the throne of the hallowed temple of justice… Nigerian Judiciary will regain its pride in place when meritorious appointments, true independence, and less political interference are enthroned.[36]

Odinkalu further notes on this issue that, 'judicial appointments now are for the most part allocated to system insiders'[37] who then owe their loyalty to politicians who lobby for their appointment to the judiciary. Appointments, promotions, and dismissals of judicial officers, such as judges and justices, are routinely done on the basis of political patronage.[38]

Structure of the judiciary in Nigeria

Section 6 of the Nigerian Constitution provides that 'the judicial power of the Federation shall be vested in the courts... being courts established by the Federation'.[39] This provision applies to all the federal and state courts of record that have jurisdiction to apply and interpret laws made by the National Assembly or a House of Assembly at the state level.[40]

---

35 *Atake v AG Federation* 3 PLR/1982/12 (SC) or (1982) NSCC 444 or (1982) SC 153, 175-176; *Attorney General v Magazine Ltd* (1979) AC 440.

36 Stephen Azubuike as cited by Onyekwere and Onochie, 'Nigeria's judiciary in retrospect', 5-6.

37 Odinkalu, 'Judicial independence 62 years after Nigeria's independence', 5.

38 President Mohammadu Buhari has had four chief justices during a 7 year period. The last two left office in very rapid succession under mysterious and undisclosed circumstances. This unusually high turnover also applies to the federal states.

39 Constitution of the Federal Republic of Nigeria (1999), Section 6(1).

40 Constitution of the Federal Republic of Nigeria (1999), Section 6(5) (a)-(k).

In terms of structure, the court system in Nigeria is divided into two: federal and state courts.[41] The federal courts include the Supreme Court[42] which is the highest court of the land. It exercises both original[43] and appellate[44] jurisdictions. It is also the final court of appeal[45] and is presided over by the Chief Justice of Nigeria and such number of justices not exceeding 21.[46]

The second court in the hierarchy is the Court of Appeal, which consists of the president of the Court and such number of justices, not less than 49 out of which not less than three shall be learned in Islamic personal law and not less than three shall be learned in customary law as may be prescribed by an Act of the National Assembly.[47] The Court of Appeal also exercises original[48] and appellate[49] jurisdictions which may be as of right or with leave. The Constitutional Federal High Court comes next in the line of federal courts.[50] It is composed of the chief judge and such number of judges as may be prescribed by an Act of the National Assembly.[51] It has exclusive jurisdiction to hear and determine civil causes and matters as articulated in the Constitution.[52] The civil causes are in respect of the revenue of the federal government.[53]

The High Court of the Federal Capital Territory (FCT), Abuja, is a creation of the Constitution[54] and consists of the chief judge[55] and such number of judges as may be prescribed by an Act of the National Assembly.[56] It has unlimited jurisdiction to hear and determine civil

---

41 Without the division, the judiciary is made up of the Supreme Court, Court of Appeals, the High Court including the Federal High Courts and other courts such as the Magistrate, Customary, Sharia Court and other specialised courts and tribunals like the National Industrial Court, Code of Conduct Tribunal, and Election Petition Tribunals etc.

42 Constitution of the Federal Republic of Nigeria (1999), Section 230(1).

43 Constitution of the Federal Republic of Nigeria (1999), Section 232(1).

44 Constitution of the Federal Republic of Nigeria (1999), Section 233(1).

45 Constitution of the Federal Republic of Nigeria (1999), Section 235.

46 Constitution of the Federal Republic of Nigeria (1999), Section 231(1).

47 Constitution of the Federal Republic of Nigeria (1999), Section 237 1) (2) (a) (b).

48 Constitution of the Federal Republic of Nigeria (1999), Section 239 (1) (a)-(c) (2).

49 Constitution of the Federal Republic of Nigeria (1999), Section 240 (1) (2) (a) (b).

50 Constitution of the Federal Republic of Nigeria (1999), Section 249 (1) (2) (a) (b).

51 Constitution of the Federal Republic of Nigeria (1999), Section 249 (1) (2) (a) (b).

52 Constitution of the Federal Republic of Nigeria (1999), Section 251(a)-(b).

53 Constitution of the Federal Republic of Nigeria (1999), Section 251(a)-(b).

54 Constitution of the Federal Republic of Nigeria (1999), Section 255(1).

55 Constitution of the Federal Republic of Nigeria (1999), Section 255(2).

56 Constitution of the Federal Republic of Nigeria (1999), Section 255(2)(a)(b).

proceedings subject to the provision of Section 251 of the Constitution.[57] It also has jurisdiction in criminal cases.[58] It is properly constituted with at least one judge.[59] The other federal courts are the Sharia Court of Appeal and the Customary Court of Appeal, both of the Federal Capital Territory.[60] The Sharia Court of Appeal consists of the Grand Kadi and such number of Kadis as may be prescribed by the National Assembly,[61] while the Customary Court of Appeal consists of the president of the Court and such number of judges as may be prescribed by the National Assembly.[62]

Regarding state courts, the Constitution provides for establishment of a High Court for every state of the Federation[63] consisting of a chief judge[64] and such number of judges as may be prescribed by state legislation.[65] The High Court of the state has a general jurisdiction to hear and determine civil cases subject to the provisions of Section 251 of the Constitution. They also have jurisdiction to hear and determine criminal cases.[66] The states have constitutional power to establish a Sharia Court of Appeal[67] and a Customary Court of Appeal of the state where necessary.[68] Where they are established, the two courts exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law,[69] and civil matters involving questions of customary law, respectively.[70]

States can also establish magistrate, area, district and customary courts or Sharia courts. These are not courts of record or courts of summary jurisdiction. Section 285 of the Constitution provides for the establishment of one or more election tribunals to be referred to as the National Assembly Election Tribunal and their jurisdiction is as specified in the Constitution. The state shall also have one or more

---

57 Constitution of the Federal Republic of Nigeria (1999), Section 257(1).
58 Constitution of the Federal Republic of Nigeria (1999), Section 257(2).
59 Constitution of the Federal Republic of Nigeria (1999), Section 258.
60 Constitution of the Federal Republic of Nigeria (1999), Section 260 and 265.
61 Constitution of the Federal Republic of Nigeria (1999), Section 260(2)(a)(b).
62 Constitution of the Federal Republic of Nigeria (1999), Section 265(2)(a)(b).
63 Constitution of the Federal Republic of Nigeria (1999), Section 270(2).
64 Constitution of the Federal Republic of Nigeria (1999), Section 270(2)(a).
65 Constitution of the Federal Republic of Nigeria (1999), Section 270(2)(b).
66 Constitution of the Federal Republic of Nigeria (1999), Section 272(1).
67 Constitution of the Federal Republic of Nigeria (1999), Section 275(1).
68 Constitution of the Federal Republic of Nigeria (1999), Section 280(1).
69 Constitution of the Federal Republic of Nigeria (1999), Section 277.
70 Constitution of the Federal Republic of Nigeria (1999), Section 282(1)(a)(b)(c)(d).

election tribunals to be known as the Governorship and Legislative House Election Tribunals and their jurisdiction is as specified in the Constitution.[71]

The procedure or process of appointing all judicial officers, from the Chief Justice of the Federation to judges of all federal courts and the Federal Capital Territory of Abuja courts is provided for in the Constitution. The Constitution provides that these officers of the courts should be appointed by the president on the recommendations of the National Judicial Council, subject to confirmation by the Senate.[72] The Constitution also specifies the minimum qualifications for persons to be appointed to the positions of Chief Justice or judge[73] and qualifications of judges for all the other courts.[74]

The Constitution provides that when a vacancy occurs in the Office of the Chief Justice, the president shall appoint the senior most justice of the Supreme Court in an acting capacity, for a period of three months. The appointment lapses after three months, unless the National Judicial Council recommends the judge acting in that position to be appointed substantively. Where the National Judicial Council has made no such recommendation, the president will appoint a different judge to act.[75] A similar process applies to all federal courts with respect to appointments.

Judicial independence in Nigeria

The tenure of judicial officers in Nigeria is secured and guaranteed under the Constitution.[76] The general rule is that a judicial officer shall not be removed from office before attaining the age of retirement. However, in the case of federal judicial officers, the President can remove any of them, acting on advice from the National Judicial

---

71 Constitution of the Federal Republic of Nigeria (1999), Section 285(2).

72 Section 231(1)-(5) cover the appointment of the Chief Justice of Nigeria (CJN) and the justice of the Supreme Court, Section 238 (1)-(5) deals with the appointment of the president and justices of the Court of Appeal; Federal High Court. Section 25(1)-(5) provides for the appointment of chief judge and judges of the Federal Capital Territory (FCT) Abuja. Section 261(1)-(5) cover the appointment of Grand Kadi and Kadis of the Sharia Court of Appeal of the FCT, Section 266(1)(5) covers the appointment of the president and judges of the Customary Court of Appeal of the FCT.

73 Constitution of the Federal Republic of Nigeria (1999), Section 231(4).

74 Constitution of the Federal Republic of Nigeria (1999), Section 271(3).

75 Constitution of the Federal Republic of Nigeria (1999), Section 231(5).

76 Constitution of the Federal Republic of Nigeria (1999), Section 291.

Council, and supported by two-thirds majority of the Senate.[77] Judges can be removed through this process, either due to an infirmity of mind or body, misconduct, or contravention of the Judicial Code of Conduct.

For state judicial officers, the governor can remove any of them, acting on a decision supported by two-thirds majority of the House of Assembly of a state.[78] The president or governor may remove a judicial officer, acting on the recommendation of the National Judicial Council that such officer has been unable to discharge the functions of their office due to an infirmity of mind or body, misconduct, or contravention of the code of conduct.[79]

While the procedure for removal of federal and state judges is clear, in practice, judicial officers are removed from office without regard to the laid down procedures. On many occasions, judges have been accused of breaching the code of conduct[80] or other 'misconduct' that is not clear, in a process orchestrated by the executive. Failure to assure the executive of a predetermined outcome of a case is sometimes masked as 'misconduct'. Independent-minded judges are particularly and routinely targeted for removal through such machinations.[81] A former chief justice targeted in this manner opted to retire in the middle of a tribunal hearing that was considering allegations of misconduct against him.[82]

The judiciary has lost credibility in the eyes of the people and belief that justice is for the highest bidder is commonplace. Where there is a dispute between the government and private citizens, it is almost always predictable that the judgment will be in favour of the government regardless of the nature of the case.[83] The lack of confidence in the courts has given rise to forum-shopping by litigants, and particularly politicians. Cases with same parties and subject matter are sometimes

---

77 Constitution of the Federal Republic of Nigeria (1999), Section 292(1)(a)(i).

78 Constitution of the Federal Republic of Nigeria (1999), Section 292(1)(a)(ii).

79 Constitution of the Federal Republic of Nigeria (1999), Section 292(1)(b).

80 As was the situation in the case of Justice Walter Onnoghen who faced charges on the allegation that he owned sundry account funded through cash deposits made by himself up to 10 August 2016 before he was appointed the Chief Justice. He was tried and found guilty and was made to forfeit the alleged stolen assets to the federal government. He was also barred from holding public officer for the next 10 years.

81 Anyebe Richard, 'Flashback: How Jonathan removed Justice Salami', *The Whistler,* 29 January 2019.

82 E Okakwu, 'Onnoghen retired not resigned – lawyer' *Premium Times,* 6 April 2019.

83 The case *Federal Government v Academic Staff Union of Universities (ASSU)* Suit No NICN/ABJ/270/2022 is quite instructive.

filed in different courts of coordinate jurisdiction leading to conflicting decisions and rulings on the same issues(s).

Judicial financial autonomy in Nigeria

The Constitution contains a number of salient provisions that seek to secure and assure the financial autonomy of the judiciary.[84] Section 81 provides that

> any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the Federation shall be paid and disbursed directly to the National Judicial Council for disbursement to the head of court established for the federation and the states…[85]

Section 84 (4) provides for the remuneration of the chief justice and other judges[86] and further states that the remuneration, salaries, and allowances payable to judges and other offices specified shall be a charge upon the Consolidated Revenue Fund of the Federation.[87] The Constitution is also clear that the remuneration and salaries payable to the holders of the said offices and their conditions of service other than allowances shall not be altered to their disadvantage after appointment.[88]

The salaries of federal judges are fixed and adjusted by the federal government, but this was last done in 2007. The 2007 review of judges' pay followed the enactment of the Certain Political, Public and Judicial Office Holders (Salaries and Allowances, etc.) (Amendment) Act of 2008. The Act came into force on 1 February 2007.[89] It is based on this law that the Revenue Mobilisation Allocation and Fiscal Commission, an agency of the federal government, fixes the salaries of public officers in addition to allocation of resources to states from federal allocation.[90] The federal budget is presented to the National Assembly by the president. In the states, the state governors have the responsibility of doing so for the judges and magistrates through the annual budgets presented to the state Houses of Assembly for approval.

---

84 These provisions are captured in Sections 81 (2)(3),84 (1)(2)(3)(4)(6), 121 (3) and 162 (9). These provisions will be cited verbatim.

85 Constitution of the Federal Republic of Nigeria (1999), Section 81 (3).

86 Constitution of the Federal Republic of Nigeria (1999), Section 84 (4).

87 Constitution of the Federal Republic of Nigeria (1999), Section 84 (2).

88 Constitution of the Federal Republic of Nigeria (1999), Section 84 (3).

89 Ise-Oluwa Ige, 'Examining Buhari's 'hanging' promise to give jumbo salaries to judges', *Vanguard,* 13 April 2023.

90 Constitution of the Federal Republic of Nigeria (1999), Section 153 (1)(n).

The salary structure of judicial officers including that of the National Judicial Council is determined by the Consolidated Judicial Salary Structure (CONJUSS). This is a set of guidelines that outlines the salaries and allowances of judicial officers in Nigeria.[91] CONJUSS is also applicable to states and is approved by the President of Nigeria. The National Judicial Council also collects, controls and disburses all money, capital and recurrent, for the judiciary. The judiciary contends that they want to be responsible for preparing their own budget.

The Constitution further provides that the recurrent expenditure of judicial officers of the Federation, in addition to salaries and allowances shall be a charge upon the Consolidated Revenue Fund of the Federation.[92] Section 121 provides that, 'Any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the State shall be paid directly to the heads of the courts concerned.'[93]

At the Federal Government level, Section 162 (9) provides that 'any amount standing to the credit of the judiciary in the Federation Account shall be paid directly to the National Judicial Councils for disbursement to the heads of courts established for the Federation and the states under Section 6 of this Constitution'.[94] This provision refers to the funding and the salaries of the judiciary and the judicial staff. Another provision in the fourth amendment, which amended Section 121(3) provides that, 'Any amount standing to the credit of the (a) house of assembly of a state and (b) judiciary in the Consolidated Revenue Fund of the state shall be paid directly to the said bodies respectively; in the case of the judiciary, such amount shall be paid directly to the heads of courts concerned'.[95]

The provisions above guarantee the financial autonomy of the judiciary but do not indicate that the heads of courts should prepare and handle their budgets. Payments of salaries and the general funding of the judiciary are determined by the ministries as earlier noted. Section 84(2)(3) of the Constitution is still subject to control by the executive as the remuneration, salaries and allowances are taken from the Consolidated Revenue Fund of the Federation and this process has failed to ensure

---

91 Federal Civil Service Commission Salary Structure 2024, 5 January 2024, <https://ekititrends.com/federal-workers-nigeria-salary-structure/> accessed 22 August 2024.

92 Constitution of the Federal Republic of Nigeria (1999), Section 84 (6).

93 Constitution of the Federal Republic of Nigeria (1999), Section 121 (3).

94 Constitution of the Federal Republic of Nigeria (1999), Section 162 (9).

95 Constitution of the Federal Republic of Nigeria (1999), Fourth Amendment to Section 121 (3).

judicial independence. While the Constitution requires that all resources be placed under the control of the courts, in practice, only personnel emoluments (salaries and allowances) are under the control of courts. The rest of the funds are disbursed from the executive to the courts as need arises.

The courts have made pronouncements on the issue of financial autonomy for the judiciary. In *Judiciary Staff Union of Nigeria v National Judicial Council, the Attorney General of the Federation and the Attorneys General of the States*,[96] the Court declared among others that the failure, neglect, and or refusal to pay the funds/amount standing to the credit of the states' judiciary to the heads of courts in the various states' judiciary is a constitutional breach which has to be abated and ordered the defendants to comply with provisions of Sections 81(3) and 162(9) of the 1999 Constitution (as amended) in the disbursement of funds to the heads of courts forthwith.

The Nigerian Judiciary has been battling the executive over the issue of financial autonomy. The Judiciary in Nigeria is funded in two ways – by the federal and state ministries of finance. The ministry of finance of a state prepares the budget for the judiciary. Furthermore, at the state level, the role of hiring judicial staff lies with the governor of a state. Based on the list submitted by the State Judicial Commission to the National Judicial Council, the National Judicial Council makes recommendations to the governor on persons for appointment to the offices of the chief judge of a state and judges of the high courts of the state. This is clearly stated in the Constitution of Nigeria.[97] What we have observed is that some governors will not follow the recommendations of the National Judicial Council in some cases especially where such names are not inclusive of the governors' nominees[98] and this attitude has generated discord in the judiciary.

The budget is not prepared and defended by the heads of court but by the minister or commissioner for justice, which means that the judiciary has no direct influence on what is put on the budget. They only receive what the ministry allocates to them. For some years now,

---

96 Suit No FCH/ABJ/CS/667/13, judgment delivered by the Federal High Court, Abuja Judicial Division on 16 January 2014.

97 Constitution of Nigeria (1999) as amended, Third Schedule, Part 1, para 21 (Powers of the National Judicial Council).

98 Joseph Onyekwere, 'The role of executive in appointing judges should be completely removed', *The Guardian* 24 September 2019.

the judiciary and other stakeholders have reemphasised the need to ensure financial autonomy in the sector and how the lack of it affects the judiciary in the discharge of its duties.[99]

The underfunding and neglect of the judiciary over the years have impacted negatively on the infrastructure and personnel within the system and affected morale and productivity of the judiciary staff.[100] This frustration led the Judicial Staff Union of Nigeria (JUSUN) to down its tools in April 2021 demanding for judicial financial autonomy.[101] JUSUN criticised the decision of the National Industrial Court that ordered the upward review of judges' salaries, noting that higher salaries for the chief justice and judges do not guarantee judicial autonomy.[102]

Agitation by lawyers, judiciary staff, and other justice sector stakeholders[103] for judicial financial autonomy and adequate resources led to the signing of Executive Order No 10 by then President Muhammadu Buhari on 22 May 2020. The Order sought to enforce

---

[99] Alex Enumah, 'Judiciary and challenges of financial autonomy, ex-parte orders', *This Day* 21 November 2021, the 2021 All Judges' Conference was an opportunity for the former chief justice of Nigeria, Justice Ibrahim Tanko Mohammad, to highlight the challenges facing the judiciary. The conference theme was: 'Promoting judicial excellence in the administration of justice,' <https://thisdaylive.com/index.php/2021/11/21/judiciary-and-challenges-of-financial-autonomy-ex-parte-orders/> on 1 November 2022. See also the position of the chief justice of Nigeria, Hon Justice Tanko Muhammad, during the opening of the new legal year of the Supreme Court on 23 September 2019 in consideration of the financial autonomy of the judiciary, *Nigerian Tribune Online*, 'Judicial financial autonomy: A way forward for the administration of justice in Nigeria (2) and (3)', 18 May 2021.

[100] EO Adegboruwa, 'Judicial financial autonomy: A way forward for the administration of justice in Nigeria-3', *Nigerian Tribune,* 18 May 2021.

[101] Ojelu H Nnochiri, D Badru and S Abubakar, 'Financial autonomy: Why we won't suspend strike, JUSUN tells CJN', *Vanguard* 23 April 2021; JUSUN strike: 'Independence of judiciary non-negotiable - Senate', *Vanguard,* 20 April 2022; A Adeshida, 'Judiciary autonomy' NBA, JUSUN protest in Enugu, *Vanguard,* 19 April 2021.

[102] A Okere, 'Allow financial autonomy in judiciary, union urges FG', *Punch,* 23 July 2023.

[103] Agitations came from the JUSUN, the Nigerian Bar Association (NBA) and Senior Advocates of Nigeria and the Nigerian Senate. Ikpeama Ngozi, 'Judiciary autonomy: NBA, JUSUN protest in Enugu', *Vanguard,* 19 April 2021; Agency Report, 'JUSUN strike: Independence of judiciary non-negotiable - Senate', *Vanguard* 19 April 2021; NAN, 'NBA insists governors must respect judicial autonomy', *Guardian [Nigeria],* 3 May 2021; Abdulah Abdulwahab, 'Judiciary must be truly independent - Justice Akande', *Vanguard* 14 June 2012; Joseph Onyekwere, 'Agbakoba charges governors to obey court decisions on judicial autonomy', *Guardian [Nigeria]* 13 April 2021; Abiodun Olatunji, SAN, 'Securing the independence of the judiciary: The way forward', *Vanguard,* 29 September 2022; Charles Mekwunye, SAN, 'Judiciary autonomy: The journey so far, way forward', *Vanguard,* 24 February 2022; Babatunde Tiniola, 'Financial autonomy for judiciary a mirage - Kazeem, ex Lagos AG', *Punch* 22 September 2022; Alexander Okere, 'Allow financial autonomy in judiciary, Union urges FG', *Punch* 23 July 2022.

the implementation of the fourth amendment and guarantee a feasible mechanism for the legislature and judiciary to attain financial autonomy.

The Executive Order sought to direct state legislatures that pursuant to the constitutional amendment, 'allocation of appropriated funds to the state legislature and state judiciary in the state appropriation laws in the annual budget of the State, shall be a charge upon the consolidated revenue fund of the state, as a first charge'.[104] The Order further directed that where the 'first charge' rule is not adhered to, the Attorney General of the Federal Government shall develop and issue guidelines or regulations requiring 'deduction at source' for states that do not follow the Order.[105] The Executive Order called for the formation of state-level committees composed of the executive, legislature and judiciary to deliberate on a 'workable budget' for each state organ[106] and further required states to incorporate the committee in the management of state funds.[107]

With specific regard to the state judiciaries, the Order called for the formation of State Judiciary Budget Committees, composed of representatives of different courts at state level and judiciary administrators, with a mandate to 'prepare, administer, and implement the budget of the state judiciary with such modifications as may be required to meet the needs of the state judiciary'.[108] The Committee was to utilise existing consultative structures in coming up with budgetary proposals, including hearing proposals for budgets from the different courts. The Committee was further directed to defend the budget before the state legislature, and to further request for regular disbursements of the approved budget.[109]

The Order directed state legislatures to amend their appropriation laws to encompass the financial autonomy of state legislatures and judiciaries. Section 6 of the Order called for 'special extraordinary capital allocations' for the first three years, to state judiciaries for building of court infrastructure. The Order called for the Presidential Implementation Committee to oversee the implementation of the various directions given in the order.[110]

---

104 Presidential Executive Order No 00-10 of 2020, Section 1(a).
105 Section 1(b), Presidential Executive Order No 00-10 of 2020.
106 Presidential Executive Order No 00-10 of 2020, Section 2.
107 Presidential Executive Order No 00-10 of 2020, Section 2.
108 Presidential Executive Order No 00-10 of 2020, Section 3(a).
109 Presidential Executive Order No 00-10 of 2020, Section 3(d).
110 Presidential Executive Order No 00-10 of 2020, Section 7.

However, the 36 states challenged the constitutionality of the executive order on the ground that the President acted beyond his powers. In February 2022, the Supreme Court, through a majority decision, declared the Executive Order unconstitutional.[111] The Court noted that 'President Buhari over-stepped his bounds with the Executive Order and thereby engaged in breach of the Constitution and usurpation of powers of heads of other arms of Government'.[112]

The dissenting judge, however, noted that the Executive Order was meant to facilitate the fiscal autonomy of the legislature and judiciaries at state level as envisaged in the Constitution and further noted that this would have remedied the flouting of constitutional provisions and court orders by state executives that deprive the other arms of government of resources necessary for efficient functioning.[113] The dissenting judge further noted that, 'the Presidential Executive Order 10 is meant to facilitate the implementation of constitutional provisions. The Executive Order is to aid the states legislature and judiciary in curing the constitutional wrong of their financial autonomy which the states have always denied. This is not unconstitutional.'[114]

While the 36 states challenged President Buhari's Executive Order, 24 of these states went on and passed laws to ensure the financial autonomy of the respective state judiciaries.[115] Furthermore, in another

---

111 E Ameh, 'Why Supreme Court nullified Buhari's Executive Order 10', *Premium Times,* 11 February 2022.

112 Nnochiri Ikechukwu, 'S Court voids Buhari's Executive Order 10, declares it illegal', *Vanguard,* 12 February 2022.

113 Ikechukwu, 'S Court voids Buhari's Executive Order 10, declares it illegal'.

114 Ikechukwu, 'S Court voids Buhari's Executive Order 10, declares it illegal' in *Hon. Attorney General of Abia State & 35 Others v Attorney General of the Federation of Nigeria* Suit No SC/655/2020.

115 Executive orders have been defined as rules issued by the President that have legal effect and this raises issues about the nature of executive orders. If it is agreed that executive orders have the force of law, it raises problem for the rule of law in a polity. The rule of law both from the constitutional and administrative laws perspectives, implies the separation of power which is the cornerstone of the rule of law. The Nigerian Constitution gave an elaborate expression to this fundamental idea by separating the legislative, executive and judicial powers and vesting each on three separate organs whose personnel should not be comingled. Separation of powers strictly is moderated by checks and balances which allows different organs of government to support one another for effectiveness. Section 58 of the Constitution provides clearly the law-making process in Nigeria. It is the National Assembly that has powers to make law. Where the process is not strictly followed, the Supreme Court will declare the exercise as unconstitutional. This was the position of the Supreme Court in the case of *Attorney General Bendel State v Attorney General of the Federation & Others* (1983) ANLR 208. Therefore, if the executive orders have the force of law, it means that the President makes laws by issuing executive orders. These breaches the clear processes of law

positive development, just before leaving office in 2023, President Buhari signed into law a constitutional amendment bill providing for financial autonomy of the state assembly and the judiciary.[116] The Act essentially made the content of the Executive Order No 10 part of the Constitution. An observer notes the following regarding the significance of the 2023 amendment:

> The issue of management of funds for the legislature and judiciary at state level has been a perennial problem. State governors are known to administer the funds of the other two arms thereby compromising their independence. This problem appears to be worse for the judiciary who is the least funded of the three arms and have had to contend for funding along with other arms and agents of government for its capital projects, e.g. purchase of vehicles, office equipment, construction of buildings, renovations, repairs, etc.[117]

Across many states, state judiciaries were allocated less than one percent of the total state budget, and in many states, capital budgets belonging to judiciaries were rarely released.[118]

This paper proposes the establishment of state judicial councils to handle issues of recommendations, appointments, payment of salaries, and discipline of judicial officers at the state level. This will yield better results than what is currently obtaining at the National Judicial Council. The National Judicial Council is currently burdened with the task of handling issues from all the courts in the 36 states of the Federation and the Federal Capital Territory. This proposal will also require the amendment of Section 153 (1)(n) and the Third Schedule, Part 1 of the Constitution.[119]

---

making in the Constitution. It vests on the President additional power that tilts the delicate balance in the power dynamics of a constitutional democracy, especially a democracy with a written constitution. It is based on this fact that the Supreme Court nullified the Executive Order 10 as being unconstitutional although executive orders are products of the exercise of presidential power under the Constitution. The President issues executive orders by virtue of his presidential powers and he signs the orders personally. For more details see Sam Amadi, 'Executive orders and presidential power in the Nigerian constitutional democracy', *Guardian [Nigeria],* 17 October 2018.

116 Constitution of the Federal Republic of Nigeria, 1999 (Fifth Alteration) (No 6) Act 2023. See also, Bakare Majeed, 'Updated - Constitution amendment: Buhari signs state assembly, judiciary independence bill, 18 others into law', *Premium Times,* 17 March 2023.

117 Policy and Legal Advocacy Centre, 'Constitutional amendment clarifies financial independence of the state legislature and judiciary' March 2023, Issue No 1.

118 Policy and Legal Advocacy Centre, 'Constitutional amendment clarifies financial independence of the state legislature and judiciary' March 2023, Issue No 1.

119 Olatunji, 'Securing the independence of the judiciary', 7.

Despite the fact that the content of Executive Order No 10 has been transformed into the constitutional amendment of 2023, measures are yet to be taken to see to its implementation. The implementation is yet to happen in the current regime headed by President Bola Ahmed Tinubu.

Trends in financing the judiciary

The national budget is prepared by the budget office of the Federation. Proposals are received from government agencies, ministries, and parastatals. The proposed budget is then sent to the president who, in turn, presents the same before the National Assembly for approval. The president, under Section 5 of the Constitution in the exercise of his exclusive powers, can effect changes to the budget the same way he can withhold his assent to the budget. It was expected that the president would withhold his assent to the appropriation bill and query the increase but he failed to do so. Comparing the increase in the National Assembly (NASS) budget and that of the judiciary is a way of showing the lopsidedness in the allocation of funds by the executive and the legislative arm of government. The National Assembly has less than 500 personnel in both chambers and they receive more budgetary allocation than the judiciary that caters for all the judicial staff in the Federation.

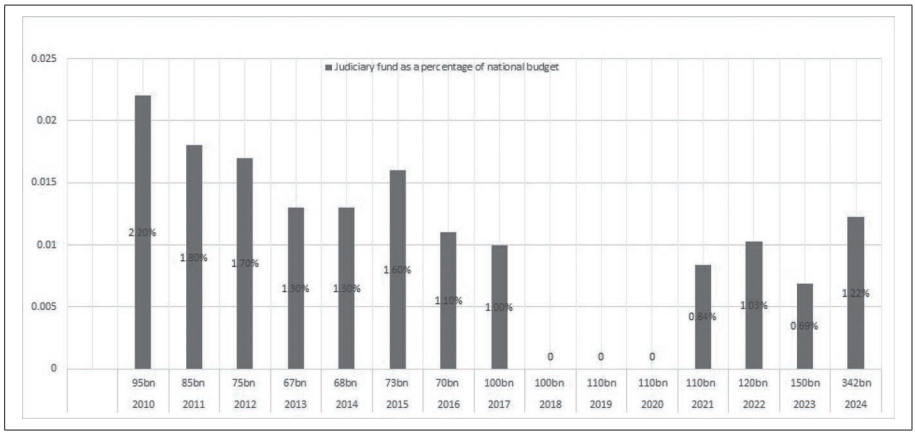
As observed, the finances of the judiciary are provided through the budget prepared annually. Information available shows that the budget approved for the judiciary in the last twelve years cannot be said to match the changing needs of the judiciary. The budgetary allocation for the judiciary and legislature in the past twelve years is presented in the table below:[120]

Year	Judiciary (in Naira)	National Assembly (in Naira)	Judiciary fund as a percentage of national budget
2010	95bn	154bn	2.2 %
2011	85bn	154bn	1.8 %
2012	75bn	154bn	1.7 %
2013	67bn	150bn	1.3%

[120] A Ejekwonyilo, '2022 Budget: Nigerian judiciary persists in budgetary secrecy as proposed spending hits all time high', *Premium Times*, 22 October 2021. See particularly Judiciary-versus National Assembly Budgetary Allocation over the years.

Year	Judiciary (in Naira)	National Assembly (in Naira)	Judiciary fund as a percentage of national budget
2014	68bn	150bn	1.3%
2015	73bn	120bn	1.6%
2016	70bn	115bn	1.1%
2017	100bn	125bn	1.0%
2018	100bn	139bn	Below 1%
2019	110bn	151bn	Below 1%
2020	110bn	125bn	Below 1%
2021	110bn	135bn	0.84%
2022	120bn	134bn	1.03%
2023	150bn	228.1bn	0.687%
2024	342bn	344.84bn	1.22%

Figures from the Budget Office of the Federation.



Graph drawn by Divine Iyawa of the Computer Science Department, Benson Idahosa University, Benin City, Nigeria.

The judiciary budget for 2024 is N342bn representing 1.22 percent of the national budget[121] while that of 2023 stood at N150bn which is about 25 percent increase from the budget of 2022 but represents 0.687 percent of the national budget.[122] In 2022 it stood at N120bn and represents

[121] Budget Office of the Federation, Ministry of Budget and Economic Planning, <https://budgetoffice.gov.ng/index.php/resources/internal-resources/budget-documents/2024-budget> accessed 22 August 2024. *See also* Onozure Dania, 'How far can Judiciary's N150bn go? *Punch,* 17 November 2022.

[122] Budget Office of the Federation, Ministry of Budget and Economic Planning,

about 9 percent increase from N110bn that they received for three years consecutively, 2019-2021 although it has been described 'as a far cry from satisfying the needs of the judiciary'.[123] These budgets have been considered as inadequate considering the enormous responsibility of the judiciary.[124]

Accountability and transparency in the judiciary

There is also a lack of transparency in the management of finances in the judiciary. The National Judicial Council and the National Assembly do not reveal the breakdown of their budgets to the public. Journalists are also prevented from witnessing legislative proceedings on the judiciary's budget defence. This is obviously the practice as budget defence is done in camera and requests for disclosure have been denied despite the fact that these requests are hinged on the Freedom of Information (FoI) Act. This lack of transparency and accountability is unconstitutional, illegal, immoral, unjust, and unfair as it runs contrary to the provisions of Section 20 of the Freedom of Information Act of 2011. It is also against the public whose taxes are being used to fund the affairs of the sector.[125]

The former Chief Justice Tanko Muhammad was challenged to disclose the budget details of the judiciary in line with a Federal High Court Order in 2013 in suit between *Centre for Social Justice v Hon Minister of Finance* marked FHC/ABJ/CS/301/2013.[126] The Court held that details of all statutory transfers in the 2013 Appropriation Act (budget) be released to the public.[127] The suit was brought by a civil society organisation, the Centre for Social Justice, which asked the court for an order compelling the Minister for Finance to grant access to the

---

<https://budgetoffice.gov.ng/index.php/resources/internal-resources/budget-documents/2023-budget> accessed 22 August 2024.

123 Ejekwonyilo, '2022 budget' *Premium Times*.

124 The judiciary is responsible for the salaries of all federal and state judges, capital and recurrent expenditure of all the nations' federal courts and institutions.

125 Ejekwonyilo, '2022 budget' *Premium Times*. See also Ejekwonyilo Ameh, 'AGF Malami challenges Nigerian Judiciary to open its budget', *Premium Times,* 25 January 2022.

126 Media Rights Agenda, 'A mixed bag of fortunes: Compilation of rulings and judgments in FOI cases in Nigeria (2012-2018) https://mediarightsagenda.org/publications/Compilation_of_Rulings_and-_Judgments_in_FOI_Cases_in_Nigeria.pdf accessed 23 August 2024.

127 In Suit No FHC/ABJ/CS/301/2013. Judgment delivered on 29 April 2014 by Justice Abdu Kafarati (as he then was). He retired as the chief judge of the Federal High Court.

details of the statutory transfers in the 2013 budget. This request was granted by the court but the National Judicial Council did not comply with the court order.[128]

The National Judicial Policy[129] notes that the judicial code of conduct or policy requires judges to be accountable for public funds and property in their care and should be prudent in the management and use of resources.[130] The policy makes no further mention of the processes or details for ensuring accountability for the resources allocated to the judiciary. There is a need to establish a framework for accountability in the judiciary. The Nigerian Bar Association has urged the judiciary to put in place an accountability and probity mechanism. The Nigerian Bar Association further noted that whilst the demand for increased funding continues, the resources allocated must be judiciously utilised for the welfare of judicial officers and in the improvement of infrastructure and facilities.[131]

A legal practitioner and human rights campaigner, Malcolm Omirhobo,[132] on the strength of the Freedom of Information Act 2011[133] wrote to the Chief Justice and the National Judicial Council requesting

---

128 Ejekwonyilo, '2022 Budget' *Premium Times*.

129 The National Judicial Policy is developed by the National Judicial Institute, a body established by the National Judicial Institute Act, Cap N55, Laws of the Federation of Nigeria (LFN) 2004. The Institute is overseen by the National Judicial Council established under Section 153(1) of the Constitution with powers relating to appointments and exercise of disciplinary control over judicial officers specified in paragraph 21 of Part I of the Third Schedule of the Constitution. The Institute is empowered in Section 2(2) of the Institute's Act to conduct courses for all categories of judicial officers; provide continuing education, organise conferences; develop policies for the efficient, effective and transparent judicial system. This policy can best be described as rules developed for administrative convenience. The National Judicial Council has failed to show by its conduct that the policy is anything to go by. There are allegations of corruption in the judiciary but the National Judicial Council has not on its own prosecuted or punished any judge except on the prompting of the executive arm.

130 National Judicial Policy-2.3.1 (a) <https://njc.gov.ng/national-judicial-policy?> on 9 November 2022.

131 Joseph Onyekwere and Egenuka Ngozi, 'NBA demands accountability on resources allocated to judiciary', *Guardian [Nigeria]*, 24 June 2022.

132 The application is titled *Re: Application brought pursuant to the Freedom of Information Act, 2011 for the certified true copies of certain public documents,* dated 22/6/2022 being a letter written and addressed to the Chief Justice of Nigeria, Supreme Court Complex, Three Arms Zone, Federal Capital Territory, Abuja, <https://citylawyermag.com/tag/probe/>accessed 24 June 2022. The same letter was also re-sent on the 01/3/2023 and received at the Supreme Court on 03/03/23. See Sahara Reporters, 'Lawyer, Malcolm Omirhobo writes Chief Justice of Nigeria, Muhammad, requests revenue, spending details of Supreme Court', *Sahara Reporters* 24 June 2022.

133 Freedom of Information Act 2011.

to be furnished with the details of the income and expenditure of the Supreme Court. He requested for the certified copies of documents under the custody of the Chief Justice on grounds that these are public documents. He threatened to bring an action within seven days if his demands were not met. The letter was dated 22 June 2022, and was acknowledged by the Office of the Chief Justice of Nigeria. The same letter was served on the National Judicial Council. The legal practitioner in his letter demanded proof of receipt of the total funds disbursed to the Chief Justice of Nigeria from 1 January 2019 to June 2022, the financial statement of accounts of the Supreme Court, and proof of the total expenditure of the Supreme Court for the period including the list of capital projects of the court within the period.[134] There is no established mechanism for accountability in the judiciary and the lack of accountability and probity makes the quest for financial autonomy of the judiciary more difficult.

In 2015, the office of the Auditor General's audit report revealed that N4.8 billion was either misappropriated or unaccounted for from 2012-2015 by the federal courts across the country. Analysis of the report spanning a period of four years shows how court officials illegally spent the taxpayers' money in complete disregard of the Fiscal Responsibility Act. The funds were siphoned through ghost contracts, non-remittance of taxes, failure of senior court officials to retire advances collected for assignments and refusal to repay vehicle loans. In some cases, items bought were overpaid and many payments made were without receipts. Interestingly, the 2015 audit was the last so far from the office of the Auditor General.[135]

A 2020 report by the Independent Corrupt Practices and Other Related Offences Commission (ICPC) titled 'Nigeria corruption index: Report of a pilot survey', covering the period from 2018-2019 placed the judiciary on top of the Nigeria corruption index.[136] The report read in part that:

---

[134] J Onyekwere and N Egenuka, 'Furnish details of S' Court income expenditure - Lawyer asks CJN and NJC' *Guardian [Nigeria],* 24 June 2022.

[135] B Akintunde, 'How Nigerian judges, other court officials defrauded government of N4.8 billion - Audit report', *Premium Times,* 27 December 2017.

[136] ICPC, *Nigeria corruption index: Report of a pilot survey*, Anti-Corruption Academy of Nigeria, Abuja, 2020.

> Six female judges reported that they were offered N3,307,444, 000 billion and five male judges reported N392,220,000. These amounts made up 34.97 percent and 4.15 percent respectively of the total amount reported by justice sector respondents. Judges reported 39.12 percent of the bribes offered and paid by justice sector respondents …. The total amount of money offered by the justice sector respondents as corruptly demanded, offered and paid between 2018-2020 was N9,457,650,000.00.[137]

The need to curb corruption in the judiciary cannot be overemphasised as, as in the words of Justice SO Uwaifo of the Supreme Court of Nigeria:

> a corrupt judge is more harmful to the society than a man who runs amok with a dagger in a crowded street. The latter can be restrained physically. But a corrupt judge deliberately destroys the moral foundation of society and causes incalculable distress to individuals through abusing his office while still being referred to as honourable.[138]

The National Judicial Council has not done much in this regard as no judge has been investigated or tried *suo motu*. It is only when the executive wants a judge removed that you see the National Judicial Council, the Economic and Financial Crimes Commission (EFCC), the Code of Conduct Tribunal (CCT) and the Directorate of State Services (DSS) falling over themselves in the name of investigating and prosecuting a corrupt judge. These shows of sanitising by the judiciary are seen as a charade and an act of 'witch hunting' judges who do not want to do the bidding of the executive arm.

Assessment of judicial financial independence in Nigeria

As earlier noted in the preceding sections, the Constitution, together with the latest amendments, contain provisions that seek to ensure financial autonomy and independence of the judiciary.[139] However, there are no measures prescribed to enforce these provisions; what happens where the executive and/or the legislature fails to disburse the funds as stipulated? Failure to transfer funds as prescribed in the law should be listed as 'gross misconduct' and made punishable by the provisions of

---

137 ICPC *Nigeria corruption index* 24-25.

138 Statement by Hon Justice SO Uwaifo, JSC in his valedictory speech on 24 January 2015 – May the Supreme Court never become an undergrowth in condemning any judge who is corrupt.

139 Sections 121 (3) and 162 (9), and Section 81.

the Economic and Financial Crimes (EFCC) Act or the Code of Conduct Bureau (CCB) Act or the Corrupt Practices and other Related Offences Act.

The constitutional provision in Sections 121 and 162 shows that funds can only be disbursed to the judiciary where the executive has prepared the budget, presented the same to the legislature and has secured approval for disbursement and spending from the legislature. The executive arm provides the funding of the judiciary. The judiciary budgetary estimates are prepared by the executive and laid before the legislature for appropriation. The executive disburses the funds to the judiciary as and when due for its operations.[140] The judiciary has the right to receive funds from the state legislatures and the executive at both levels but this does not guarantee financial autonomy due to the gap in the Constitution which the president tried to address by the issuance of the Executive Order No 10. So, it will not be absolutely correct to say that the judiciary enjoys financial autonomy in Nigeria.

For instance, during the Judicial Staff Union of Nigeria (JUSUN) strike, the union mandated their members to shut down the courts after the expiration of a 21-day ultimatum given to state governments to implement Executive Order No 10. In their demand for financial autonomy of the judiciary especially at the state level, they observed that the governors have deliberately denied the judiciary access to their funds in gross disregard of Section 121 (3) of the 1999 Constitution.[141] It is better if the judiciary sets up its financial committee that would be responsible for the judiciary budget and disbursement of funds as earlier articulated.

The chapter has highlighted the principles and practice of independence of the judiciary and more specifically the financial autonomy of the third arm of government in Nigeria. Financial autonomy of the judiciary remains vital to the attainment of the principle of the rule of law and effectiveness of courts. Some proposals have been made to ensure financial independence in Nigeria.

First, in 2013 the National Judicial Council set up a panel of five members of the Court of Appeal to find out the appropriate constitutional framework for funding the judiciary, determine funding

---

[140] J Onyekwere, 'The role of executive in appointing judges should be completely removed', *Guardian [Nigeria]* 24 September 2019.

[141] I Ogunyemi, 'FG meets striking judicial workers today', *Tribune,* 21 April 2023.

for the judiciary, and determine the modalities of ensuring compliance within the framework. The panel submitted its report which includes recommendation for the amendment of the Constitution to enable the judiciary to be responsible for preparing and managing its budget through the heads of the courts, but nothing has been done in this regard.[142]

The Nigeria Governors Forum (NGF) set up a committee chaired by a governor,[143] 'which subsequently proposed a template for the implementation of financial autonomy for the judiciary'.[144] In the proposal the National Governors Forum 'sought the creation of a State Account Allocation Committee (SAAC) to oversee the distribution of funds to the three arms of government at the state level',[145] and 'the enactment of funds management laws for the state judiciary and legislature'.[146] This law, according to the National Governors Forum, 'will grant each arm the power to manage its capital and recurrent expenditure'[147] as enshrined in the Constitution and enabling legislation.[148]

The Committee also proposed that the National Governors Forum ensures that what states 'pass and assent to the funds management law as well as put in place implementation structures within a time frame not exceeding 45 days from the date of signing this document'.[149] The chairman of the National Governors Forum says the 36 governors were in support of the autonomy.[150] The proposal of the National Governors

---

142 I Tambo, 'Financial independence of the judiciaries', 11.

143 Aminu Tambuwal, the Governor of Sokoto State.

144 Bolanle Olabimtan, 'Explainer: What financial autonomy means for judiciary and how it affects you' *The Cable* 27 May 2021.

145 Olabimtan, 'Explainer: What financial autonomy means for judiciary and how it affects you'.

146 Olabimtan, 'Explainer: What financial autonomy means for judiciary and how it affects you'.

147 Olabimtan, 'Explainer: What financial autonomy means for judiciary and how it affects you'.

148 Section 6(5) (a) - (a), 81 (3), 12 (3) items 21 (e) of Third Schedule of the Constitution as amended and other relevant laws.

149 Olabimtan, 'Explainer: What financial autonomy means for judiciary and how it affects you'.

150 Afolabi Ayodele, '36 governors for judicial autonomy, says Fayemi', *Guardian [Nigeria],* 18 August 2020. See R Oyewole, 'Bauchi ready for judicial autonomy, say governor Mohammad', *Guardian [Nigeria],* 7 January 2021; M Egbejule and O Davison, ' Edo government pledge financial autonomy for judiciary', *Guardian [Nigeria]* 28 April 2021; A Afolabi, 'Ekiti Assembly vote for state police, judicial autonomy, others in constitutional amendment', *Guardian [Nigeria],* 14 September 2022. Lagos State governor has promised to implement judicial autonomy. The governors of Rivers and Kano States said their

Forum did not include allowing the judiciary to set up their budget as it is currently done by the governors through the ministry of finance. This has led to the partial rejection of the recommendations by Judicial Staff Union of Nigeria.

Other proposals include the amendment of the relevant sections of the Constitution to expressly include judicial financial autonomy. This will forestall the control by the legislature and executive arms in the appropriation of funds for the judiciary.[151]

Conclusion

This chapter has examined financial autonomy of the judiciary in Nigeria. It traced the history of the judiciary and the current structure of the judiciary. Appointments, dismissals, and security of tenure of judges were examined. One fact that came out clearly is that although the Constitution guarantees the appointment and tenure of office for judicial officers, the rules are not observed in practice. Judges have been unceremoniously dismissed. Politicians explore the lacuna in requirements for appointment thereby appointing their cronies to the bench. Financial autonomy of the judiciary was extensively examined.

The Constitution makes several provisions on how to fund the judiciary. However, the study revealed that none of the existing provisions on financing the judiciary made mention of financial autonomy for the judicial arm. The attempt by the president to correct this via Executive Order No 10 was challenged and subsequently nullified. Based on this, it was concluded that there is no financial autonomy in the judiciary. The governors of the 36 states have promised to grant financial autonomy to the judiciary but none has implemented it despite the fact that they set up a committee to lay down the mechanisms for achieving financial autonomy for the judiciary.

The chapter has further examined the impact of financial autonomy on the judiciary and the challenges to overall judicial independence. The chapter noted that the power of dismissing or removing judges should

---

judiciary already enjoys full autonomy while the governor of Delta State announced that the state judiciary has been accorded full autonomy but JUSUN say no state has implemented autonomy.

[151] Kato Gogo Kingston, Victor Nonso Enebeli, Felix Chukwuemeka Amadi, 'Judicial financial autonomy and the inherent powers of the executive in Nigeria: Lessons from Australia, Britain and Canada', 12 (1) *African Journal of Social Sciences* March 2022, 31-32.

be removed from the executive. It further suggested the need to observe the rules in appointments and ensure that the salaries and wages of judicial staff are paid in order to stem the tide of corruption in the sector. It further noted the need for the rule of law to be observed by all arms of government and for the courts to have decisional independence. It finally observed that even where there is financial autonomy and an excellent process of appointment, judicial independence will be meaningless if the other arms of government fail to obey court orders and decisions.

CHAPTER EIGHT: BOTSWANA

Financial independence and effectiveness of the Botswana Judiciary

Onalethata Kambai & Tinotenda Kapatamoyo

Introduction

The current Constitution of Botswana, which was adopted in 1966, provides for the separation of powers between the three arms of government.[1] Being a post-colonial African state, its current systems and structures of governance, including those of the judiciary and system of courts, are inherited from the colonial period.[2]

Botswana is one of only two countries in Africa (the other being Mauritius) that have not had a complete overhaul of their independence constitution. As a result, many of the constitutional features, including the articulation of principles of judicial independence, remain unchanged from the era of independence constitutions. One of these features is the prominent role played by the presidency in matters of the judiciary, such as the sole and exclusive appointment of the chief justice and president of the Court of Appeal, among other features.[3]

However, while there have been challenges to the independence of the judiciary, some of which are tied to the president's constitutional powers over the judiciary and the courts, the courts have developed progressive jurisprudence that has ensured effective checks on the executive and further entrenched judicial independence.[4] The courts have also interpreted the principles of judicial independence as they relate to the financial independence of the judiciary.

---

1 Charles Manga Fombad, 'The separation of powers and constitutionalism in Africa: The case of Botswana' 25 (2) *Boston College Third World Law Journal* (2005), 302.

2 Justice Akinola Aguda, 'Legal development in Botswana from 1885 to 1966', 52.

3 Constitution of Botswana (1966), Section 96(1); Constitution of Botswana (1966), Section 100(1).

4 *Law Society of Botswana and Another v President of Botswana and Others* (2018), Court of Appeal of Botswana.

The administrative and institutional arrangements related to the funding of the judiciary and courts place the judiciary's affairs almost entirely in the hands of the executive. The judiciary's budget and financial affairs are managed under 'the administration of justice' cluster, which lumps the judiciary together with ministries, departments, and agencies in the justice sector. As a result, it is almost impossible to get a picture of how the judiciary's needs and priorities are factored in and facilitated through the budgeting and planning system.

The argument presented in this chapter is that while the courts and the leadership of the judiciary in Botswana have asserted the independence of the courts and the judiciary, judicial independence, and specifically financial independence, can only be guaranteed through fundamental constitutional reforms to provide the institutional arrangements and structures that can facilitate financial autonomy of the judiciary and the courts.[5]

History of the Botswana Judiciary

The present-day state of Botswana traces its beginnings to 9 May 1891 when it was established as the Bechuanaland Protectorate.[6] The Order-in-Council vested in the High Commissioner powers to appoint persons he deemed fit to be judges, magistrates, or other officers in the Protectorate.[7] On 10 June 1891, the General Administration Proclamation, which was promulgated pursuant to the Order-in-Council, conferred on administrators in the colony the powers of magistrates; these powers remained with the administrators years after independence. The Proclamation also established a system of appeals from the Magistrates' Courts to the High Court, with the final appeal to the Privy Council in England.[8] Lastly, by the same Proclamation, all powers that were exercised by the Supreme Court of South Africa were conferred on the High Court of the Bechuanaland Protectorate.[9] By such conferment, the Supreme Court of South Africa was effectively excised from

---

5 JC Wallace, 'An essay on independence of the judiciary: Independence from what and why' 58 (2), *University Annual Survey of American Law*, 2001, 246.

6 Bechuanaland Protectorate Order-in-Council, 1891.

7 Akinola Aguda, 'Legal development in Botswana from 1885 to 1966' 5 *Botswana Notes and Records* (1973), 52-63.

8 Akinola Aguda, 'Legal development in Botswana from 1885 to 1966'.

9 Akinola Aguda, 'Legal development in Botswana from 1885 to 1966'.

the Protectorate's court structure.[10] The authors note that the relevance of the Supreme Court of South Africa only extended to the powers and jurisdiction it possessed in 1891, including the rule-making power.[11]

In line with the theory of the separation of powers, Botswana's Constitution has carefully defined and divided the state's powers among the three institutions (with some overlap), namely the parliament, the executive, and the judiciary.[12] The courts also have the exclusive constitutional prerogative to define the scope and extent of the separation of powers for the other organs in accordance with the law, to which all state organs and the populace are subject. The Botswana Constitution guarantees rights, and the courts are required to enforce such rights.[13]

Akinola Aguda notes that while the 1891 Order-in-Council and the Proclamation had provided for the establishment of a High Court in the protectorate, High Court judges were appointed on an *ad hoc* basis to hear cases as special courts, until 1939 when the High Court was established as a superior court of record.[14] In the same year (1939), the Subordinate Courts Proclamation was passed. Earlier in 1919, a proclamation was passed, which provided for 'appeals against the judgment of Native Chiefs of Bechuanaland Protectorate'.[15] Two more proclamations, in 1934 and 1943, provided more detailed regulation of the customary courts.

Between 1939 and 1954, appeals from the High Court of the protectorate lay to the Privy Council. However, in 1954, an Order-in-Council established a Court of Appeal for the three High Commission territories (Bechuanaland, Basutoland, and Swaziland) which consisted of the three chief justices and judges appointed by the High Commissioner on an *ad hoc* basis.[16] This remained the situation until the 1966 Constitution created a separate Court of Appeal for Botswana.

---

10 Bankie Forster, 'Introduction to the history of the administration of justice of the Republic of Botswana' 13 (1) *Botswana Notes and Records* (1981), 89-100.

11 Geoffrey M Kakuli, 'The history and development of the rule-making power in the courts of Botswana and suggested reform' 30 (2) *Comparative and International Law Journal of Southern Africa* (1997), 190-198.

12 *Law Society of Botswana v President of Botswana*, High Court Case No MHGB-000383-15 (2016), at 2.

13 See *Law Society of Botswana v President of Botswana*, High Court Case No MHGB-000383-15 (2016); *Law Society of Botswana v President of Botswana*, Court of Appeal Civil Case No CACGB 031-16 (2017).

14 Akinola Aguda, 'Legal development in Botswana from 1885 to 1966'.

15 Akinola Aguda, 'Legal development in Botswana from 1885 to 1966'.

16 Akinola Aguda, 'Legal development in Botswana from 1885 to 1966'.

The structure of the judiciary

The courts

The Constitution classifies the courts into superior courts and subordinate or inferior courts.[17] Superior courts consist of the Court of Appeal, the High Court, the Court Martial, and the Industrial Court.[18] The Magistrates' Courts and the Customary Courts are deemed to be subordinate courts.[19] There are 27 branches of Magistrates' Courts[20] and as many Customary Courts as there are villages in Botswana, in addition to the Customary Court of Appeal. The Magistrates' Courts deal with common law and statutory law, while the Customary Courts deal with customary law.

The Court of Appeal and the High Court are identified as superior courts of record.[21] The High Court is vested with a distinct supervisory jurisdiction over the subordinate courts.[22] While the High Court has original jurisdiction,[23] the Court of Appeal is an appellate court. There are four branches of the High Court[24] and only one branch of the Court of Appeal.

Charles Fombad further classifies the courts of Botswana as courts of general jurisdiction and those of special jurisdiction, the former being empowered to deal with practically any case which is justiciable, either civil or criminal, and the latter being empowered to deal with limited issues.[25] Specialist courts have been established within the courts of general jurisdiction.

Specialist courts include Stock Theft Courts, established in response to the mischief of stock theft;[26] Small Claims Courts, established to

---

17 Constitution of Botswana (1966), Section 127(1).

18 Constitution of Botswana (1966), Section 127(1).

19 Charles Manga Fombad, *The Botswana legal system*, LexisNexis, 2006, 94.

20 Republic of Botswana, Administration of Justice, 'About magistrate courts' last updated 8 May 2022 <https://www.justice.gov.bw/services/about-magistrate-courts> on 3 January 2023.

21 Constitution of Botswana (1966), Section 95(3); Constitution of Botswana (1966), Section 99(4); Fombad, *The Botswana legal system*, 94.

22 Fombad, *The Botswana legal system*, 94; See also High Court Act (2009), Section 10(1); Customary Courts Act (2013), Section 42(3).

23 It is important to note that the High Court also has appellate jurisdiction, per High Court Act (2009), Section 10.

24 These branches are located in Gaborone, Lobatse, Francistown and Maun.

25 Fombad, *The Botswana legal system*, 96.

26 Fombad, *The Botswana legal system*, 120.

accommodate less affluent members of the public by reducing legal costs and simplifying complicated court procedures;[27] Family Courts, established to deal with issues of maintenance, adoption, and deserted wives;[28] and Traffic Courts, established to expeditiously deal with the large number of traffic offences committed each year.[29] The number of the above courts corresponds to the number of Magistrates' Courts.

Other specialist courts include the Industrial Court, established as a court of law and equity to resolve trade disputes and maintain good industrial relations in Botswana,[30] and the Children's Court, established for the trial of young offenders[31] and whose number corresponds with the number of Magistrates' Courts. The other specialist court is the Court Martial which was established to exercise jurisdiction over members of the Botswana Defence Force.[32] There is only one branch of the Court Martial which sits as and when necessary. Lastly, the Land Tribunal was established as a quasi-judicial body[33] to deal with disputes over land ownership and land rights[34] and has four branches in the country.[35]

In recent times, the judiciary has expanded its reach through the establishment of Small Claims Courts,[36] the establishment of Magistrates' Courts in 27 centres around the country,[37] the setting up of Special Courts dedicated to the hearing of gender-based violence cases at chief magistrate stations,[38] as well as the establishment of an additional division of the High Court at Maun.[39]

---

27 Small Claims Courts Act (2009), Section 3; Fombad, *The Botswana legal system*, 120.

28 Fombad, *The Botswana legal system*, 122.

29 Fombad, *The Botswana legal system*, 122.

30 Trade Disputes Act (No 6 of 2016), Section 14.

31 Children's Act (No 8 of 2009), Section 36; Fombad, *The Botswana legal system*, 125.

32 Botswana Defence Force Act (No 3 of 2018), Section 168; Fombad, *The Botswana legal system*, 128.

33 In *White v Kgalagadi Land Board* (2018), the Court of Appeal of Botswana held that the Land Tribunal is a court of equity.

34 Fombad, *The Botswana legal system*, 130-131.

35 Gov.bw 'Appeals to land tribunal' <https://www.gov.bw/legal/appeals-land-tribunal> on 3 January 2023.

36 Small Claims Courts Act (2013) [Botswana], Section 3.

37 Republic of Botswana, Administration of Justice, 'About magistrate courts' last updated 8 May 2022 <https://www.justice.gov.bw/services/about-magistrate-courts> on 24 December 2022.

38 Practice Directive No 9 of 2020.

39 Office of the Registrar and Master, High Court of Botswana, 'Press release: Additional division of the High Court at Maun' 9 December 2019 <https://www.justice.gov.bw/sites/default/files/Maun%20High%20Court%20Division.pdf> accessed 19 August 2024.

The judiciary has seen a number of changes in its structures and systems, which span across the scope of work of courts, court infrastructure and personnel. These include the appointment of more citizens as judges to the superior courts in order to address concerns regarding the localisation of labour.[40] There have also been improvements in service delivery that have been effected through the introduction of Judicial Case Management for more efficient management of cases,[41] Court Annexed Mediation for more expedient and cost-effective resolution of cases, and the Court Records Management System[42] for the computerisation of court records.[43] These changes are mainly a result of the efforts of the Rules Advisory Committee which has a mandate to review internal rules and procedures to improve the administration of justice.[44]

The Judicial Service Commission

The Judicial Service Commission is established under Section 103(1) of the Constitution.[45] The Judicial Service Commission is composed of six members, consisting of the Chief Justice (as the chairperson), the President of the Court of Appeal, the Attorney General, the Chairman of the Public Service Commission, a representative of the Law Society of Botswana, and a person of integrity (not being a member of the legal profession) appointed by the President.[46] Members of the

---

40 The concerns stemmed from the fact that from their establishment, the benches of the superior courts were occupied by mostly non-citizen judges. Over time, and with Botswana citizens gaining academic qualifications and experience in legal practice, the benches are occupied with mostly citizen judges. This change was observed from the 2000s to the 2010s.

41 *Rantabe v Kanjabanga and Others* (2009) High Court of Botswana, para 18 (unreported); *Botswana Telecommunications Authority v Koontse; In Re: Koontse v Botswana Telecommunications Authority* (2014) High Court of Botswana, 510; *Debswana Diamond Co (Pty) Ltd v Engen Botswana Ltd and Another* (2010) High Court of Botswana, 174.

42 Tshepho Lydia Mosweu, Lekoko Kenosi, 'Implementation of the Court Records Management System in the delivery of justice at the Gaborone Magisterial District, Botswana,' *Records Management Journal*, 2018 https://doi.org/10.1108/RMJ-11-2017-0033.

43 Republic of Botswana, Administration of Justice, 'Reforms and developments' last updated 8 May 2022 <https://www.justice.gov.bw/reforms-and-developments-0> on 29 December 2022.

44 See Constitution of Botswana (1966), Section 95(7); GN Nthomiwa, *Report on the introduction of court annexed mediation in the courts of Botswana* (undated), 9.

45 Constitution of Botswana (1966), Section 96(1).

46 Constitution of Botswana (1966), Section 103(1) (a) to (f).

Judicial Service Commission are not deemed public officers under the Constitution.[47]

The Judicial Service Commission's main responsibilities are to appoint certain judicial officers to various courts as prescribed by law,[48] recommend persons to the President for appointment as judges, and exercise disciplinary control over judges, judicial officers, and staff.[49] The Judicial Service Commission carries out the role of disciplinary control through regulations that mirror the provisions of the Judicial Code of Conduct.[50] The provisions establish a Disciplinary Panel,[51] Ethics Advisory Committee,[52] and a Tribunal,[53] each with its own function within the Judicial Service Commission. The regulations also include procedures and processes applied in the dismissal of judges, in accordance with relevant provisions of the Constitution.[54] The regulations outline the composition and procedures of the Tribunal and further set out the penalties for misbehaviour, which include a severe reprimand,[55] a written[56] and final warning,[57] or dismissal from employment.[58]

The Constitution provides that in the performance of its responsibilities, the Judicial Service Commission 'shall not be subject to the direction or control of any other person or authority'.[59] This provision aims at insulating the Judicial Service Commission from the influence of

---

47 Constitution of Botswana (1966), Section 127(3); *President of the Republic of Botswana v Ditlhong* (2022) (unreported) Court of Appeal of Botswana, para 20.

48 Constitution of Botswana (1966), Section 104 (2).

49 Constitution of Botswana (1966), Section 103(5); Judicial Services Act (2014), Section 13, and Judicial Services Regulations.

50 Republic of Botswana, Administration of Justice, 'General publications' last updated 8 May 2022, <https://www.justice.gov.bw/general-publications> on 28 December 2022.

51 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 14(10).

52 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 24(1).

53 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 21(1); see also, Constitution of Botswana (1966), Section 97(3), Section 101(3).

54 Constitution of Botswana (1966), Sections 97(3) and 101(3).

55 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 20(1)(a).

56 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 20(1)(b).

57 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 20(1)(c).

58 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 20(1)(f).

59 Constitution of Botswana (1966), Section 103(4).

the executive. The Commission is also empowered to regulate its own procedures. [60]

By extraordinary Gazette dated 12 March 2024, the government of Botswana intends to have constitutional amendments which if passed by parliament will impact the appointment of the Chief Justice and President of the Court of Appeal. In the proposed amendments, clauses 23, 26 and 28 of the Bill provide for the President to submit three nominees for the positions of Chief Justice and President of the Court of Appeal to a Judicial Committee for assessment and interview.

The Bill states that this will provide for 'transparency and credibility' in the appointment of the Chief Justice and President of the Court of Appeal. Under the current constitutional arrangement, this is clouded by secrecy as there is no requirement for nominations or even interviews by the Judicial Service Commission or any committee before the appointment of the Chief Justice and the President of the Court of Appeal. Finally, the Bill also seeks to amend the composition of the Judicial Service Commission by including the Permanent Secretary in the Ministry of Justice as well as a qualified auditor and a legal practitioner.

Save for the representative of the Law Society of Botswana, the composition of the Judicial Service Commission is dominated by presidential appointments. Currently, out of the seven appointments, only one is not appointed by the President.

The authors argue that if the Bill passes in its current form, it will not make the Judicial Service Commission more representative as there is still no representation from the legal academia, and more representatives from the bar association, which is the Law Society of Botswana.

The framework for judicial independence in Botswana

The 1966 Constitution of Botswana does not contain an explicit list of principles relating to judicial independence like most of the later constitutions in Africa. However, it does contain provisions that seek to protect the decisional independence of judges and judicial officers in matters that they preside over in court. The independence of the Judicial Service Commission is, as earlier indicated, also explicitly provided

[60] Constitution of Botswana (1966), Section 103(5); Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 23(1).

for in the Constitution. Furthermore, the courts in Botswana have, through jurisprudence, developed and asserted the principle of judicial independence.[61]

With regard to decisional independence in criminal matters, the Constitution provides that '[i]f any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognised by law.'[62] The Constitution also provides that '[a]ny court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established or recognised by law and shall be independent and impartial'.[63]

Justice Isaac Lesetedi of the Court of Appeal elaborated on the principle of judicial independence, stating that 'the concept of judicial independence applies both at an individual level[64] and at institutional level'.[65] The former is reflected in matters such as security of tenure, and the latter is reflected in the court or tribunal's institutional or administrative relationships with the executive and legislative branches of government.[66]

Justice Lesetedi further emphasised that 'an independent and impartial judiciary is a constitutional imperative in any functioning

---

61 *Boko v Speaker of the National Assembly and Another* (2019) Court of Appeal of Botswana, 452; *Kgafela II and Another v Attorney General and Others; In Re: Gabaokelwe v Director of Public Prosecutions* (2012) Court of Appeal of Botswana, 713; *Sesana and Others v Attorney General* (2006) High Court of Botswana, 645; *Kanane v State* (2003) Court of Appeal of Botswana, 77; *Attorney General v Dow* (1992) Court of Appeal of Botswana, 166.

62 Constitution of Botswana (1966), Section 10(1).

63 Constitution of Botswana (1966), Section 10(9).

64 The application of judicial independence at the individual level was explored in the case of *Tshosa v State* (2013) High Court of Botswana, 596-597. The learned Moroka J noted: 'There are times when a judge has to be independent of the influence of fellow judges. Judicial independence means the courage and ability to rule in accordance with the truth at all times and also in accordance with the dictates of one's conscience no matter what the consequence. Judicial independence without the courage to do what is just in a given case is meaningless. In handling a case a judge should never look over his or her shoulder for validation of his/her decision from others no matter whether the others are internals or externals'.

65 *President of Botswana and Others v Thabo Malambane* (2021) Court of Appeal of Botswana, para 45 (unreported); Vicki C Jackson, 'Judicial independence: Structure, context, attitude', in Anja Seibert-Fohr (ed) *Judicial independence in transition,* Springer Berlin, Heidelberg, 2012, 19-86, 22.

66 *Valente v The Queen (1985)* Supreme Court of Canada, 687.

judiciary'.[67] The judge added that it is imperative 'for the judiciary and the other branches of the state to jealously guard judicial independence from any interference, as it is in the interest of the proper functioning of the state that the judiciary acts independently and impartially to administer a fair dispensation of justice.'[68] The judge further noted that the principle of judicial independence and impartiality is enforced by the precept of equality before the law – seen under Section 10(1) of the Constitution – where the courts treat every litigant before it, including the state, equally.[69]

The Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (Judicial Services Regulations)[70] further recognise the independence of judicial officers. The Regulations provide that a judicial officer is required to exercise their judicial functions independently and free of extraneous influence;[71] reject any attempt to influence their decision in any matter before the court outside the proper process of the court;[72] and encourage, safeguard and uphold arrangements, and maintain and enhance the institutional and operational independence of the judiciary.[73]

The above stringent measures are taken to foster public confidence in the justice system and trust in the rule of law while encouraging an investment trust in the country which boasts of a reputation for an impartial and efficient justice system.[74]

Such independence does not appear to be absolute, owing to the fact that the judiciary is funded from the same public coffers as the other branches of the state and is supported by administrative staff from one public service roster.[75] In this regard, Irving R Kaufman states that under the doctrine of separation of powers, a limited overlap of

---

67 *President of Botswana and Others v Thabo Malambane* (2021) Court of Appeal of Botswana, para 45 (unreported).

68 *President of Botswana and Others v Thabo Malambane*, para 48.

69 *President of Botswana and Others v Thabo Malambane*, para 49.

70 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 4.

71 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 4(a).

72 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 4(b).

73 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 4(c).

74 *President of Botswana and Others v Thabo Malambane*, para 48.

75 *President of Botswana and Others v Thabo Malambane*, para 48.

functions among the branches promotes the effective operation of the government as a whole.[76]

The status of judicial independence in Botswana

Appointment, tenure, and dismissal of judges and judicial officers

The Chief Justice is appointed by the President.[77] There is no provision in law for the office of Deputy Chief Justice. However, the President may appoint a person qualified for appointment as a judge of the High Court to act as the Chief Justice, if the Chief Justice is, for one reason or another, unable to fulfil his or her duties.[78] Similar to the Chief Justice, the President of the Court of Appeal is appointed exclusively by the President.[79] If the President of the Court of Appeal is unable, for one reason or another, to perform his or her functions and duties, such functions shall be performed by such other judge of the Court of Appeal appointed for that purpose by the President.[80] There is also no provision in law for the position of Deputy President of the Court of Appeal.

The rest of the judges of the Court of Appeal[81] and the High Court[82] are appointed by the President, acting in accordance with the advice of the Judicial Service Commission, as provided under Section 96(2).[83] The President, just as he does in the appointment of a High Court judge, has little to no discretion to reject the recommendation of the Judicial Service Commission.[84] In the case of *Law Society of Botswana and Another v President of Botswana and Others*,[85] the former President rejected, via letter, without ascribing reasons thereto, a recommendation of the Judicial Service Commission to appoint the second appellant as a judge of the High Court. The main issue in the case was whether it is peremptory

---

76 Kaufman, 'The essence of judicial independence', 689.

77 Constitution of Botswana (1966), Section 96(1).

78 Constitution of Botswana (1966), Section 96(5).

79 Constitution of Botswana (1966), Section 100(1).

80 Constitution of Botswana (1966), Section 100(5).

81 Constitution of Botswana (1966), Section 100(3).

82 Formerly designated as 'puisne judges'.

83 Constitution of Botswana (1966), Section 96(2).

84 *President of the Republic of Botswana and Others v National Amalgamated Local Central Government and Parastatal Workers' Union and Others* (2017) Court of Appeal of Botswana, 149.

85 *Law Society of Botswana and Another v President of Botswana and Others* (2018), Court of Appeal of Botswana, 496.

under Section 96(2) of the Constitution for the President to decline or refuse to appoint a judge recommended for appointment by the Judicial Service Commission. In a full bench majority judgment of the appellate court, it was held that the President has little, if any, discretion to reject the recommendation of the Judicial Service Commission outrightly, and where he or she does so, such rejection is subject to judicial review on the ground of illegality.

The role of the Judicial Service Commission in making recommendations for appointments is now more transparent with the advertisement of vacant positions for judges of the High Court. As recently as December 2018, the Judicial Service Commission has introduced an annual call for expression of interest, floated to gauge the willingness of legal practitioners to ascend to the bench in the event of a vacancy. The appointments of the judges, being of public interest, are given due care to ensure that only those with high professionalism and those who are blameless in their private lives are appointed. To further bolster judicial financial independence, candidates are expected to be candid in their responses to inquiries into their private affairs, including their financial standing; such information of course provided in the strictest confidence.[86]

In terms of qualifications and criteria for appointment, the Constitution, couched in the negative, states that a person shall not qualify or be appointed as a judge unless such a person holds or has held office as a judge of a competent court in Botswana, in a Commonwealth country, or any other country outside the Commonwealth prescribed by Parliament;[87] such a person is qualified to practise as a legal practitioner in such a court and has been so qualified for not less than ten years;[88] such a person is qualified to practise as a legal practitioner and has had experience in the teaching of law in a recognised university for not less than ten years;[89] or such a person is a Chief Magistrate who has held that office for not less than five years.[90]

The criteria for the appointment of a Court of Appeal judge outlined under Section 100(3) is similar to that of the appointment of a High Court

---

86 Kgotsofalang Botsang 'Tsogwane explains appointment of judges' *Botswana Daily News,* 3 April 2022.

87 Constitution of Botswana (1966), Section 96(3)(a).

88 Constitution of Botswana (1966), Section 96(3)(b).

89 Constitution of Botswana (1966), Section 96(3)(c).

90 Constitution of Botswana (1966), Section 96(3)(d).

judge, save for the qualification that a person shall not be qualified to be appointed as a judge unless he or she is a High Court judge who has held that office for not less than five years. This means that there is no provision for the direct appointment to the Court of Appeal of a chief magistrate probably on the grounds that the office of justice of appeal requires years of experience on the bench of the High Court.

The security of tenure of High Court judges is outlined under Section 97 of the Constitution. The retirement age of a judge is set at 70 years or such other age prescribed by Parliament, with a proviso that such a judge who has attained the age of retirement may be permitted by the President, acting in accordance with the advice of the Judicial Service Commission, to continue in office for such period as may enable such a judge to deliver judgment or do any other thing in relation to proceedings initiated before the judge attained the age of retirement.[91] It is important to note that judges both of the High Court and the Court of Appeal are protected from forced retirement.[92]

The retirement age of a judge of the Court of Appeal is prescribed at 70 years of age according to Section 101(1).[93] The provisos state that the president, acting in accordance with the Judicial Service Commission permits such a judge that has attained that age to continue in office under the same conditions as a High Court judge in the same predicament under Section 97(1);[94] that a person may be appointed despite attaining the retirement age on a fixed period of three years;[95] and that a post-retirement-age appointment of a judge shall not affect the date at which such a judge is due to retire.[96]

The above-mentioned provisos, particularly under Section 101(1)(ii), gave rise to the development of a practice in which justices of appeal (commonly persons above 70 years) were appointed to more than one fixed term of three years,[97] which in turn gave rise to litigation in which the constitutionality of that practice was challenged. Ultimately, it was

---

91 Constitution of Botswana (1966), Section 97(1); Judges (Retiring Age) Act [Botswana] (1977), Section 2; *Diboneng and Others v State* (1997), Court of Appeal of Botswana.

92 Constitution of Botswana (1966), Section 127(7).

93 Constitution of Botswana (1966), Section 101(1).

94 Constitution of Botswana (1966), Section 101(1)(i).

95 Constitution of Botswana (1966), Section 101(1)(ii).

96 Constitution of Botswana (1966), Section 101(1)(iii).

97 *President of the Republic of Botswana and Others v National Amalgamated Local Central Government and Parastatal Workers' Union and Others*, (2017) Court of Appeal of Botswana, 138.

determined that the practice was constitutional as the notion that a judge who had already attained 70 years could only be appointed once on a fixed-term contract of three years was not borne out by the plain language of the third proviso of Section 101(1).[98]

A judge may be removed from office only for the inability to perform the functions of office – whether arising from infirmity of body or mind or any other cause – or for misbehaviour, such removal being effected in accordance with the provisions of Section 97 (2) of the 1966 Constitution. The Constitution provides that where the President considers that a question of the fitness of a judge to hold office is necessary, the President shall form a tribunal consisting of the chairman and not less than two members who have held high judicial office to consider the question.[99] The tribunal shall then advise the President regarding the inability to hold office or the misconduct. The President has the discretion to suspend the judge who is being investigated by the tribunal, but where suspended, such suspension ends if cleared by the tribunal.[100] The President is obliged to remove from office a judge who has been found unfit to hold office.[101] The dismissal of a judge of the Court of Appeal is outlined under Section 101(2),[102] setting out an identical dismissal procedure as that which applies to a judge of the High Court.[103]

In the case of *Dingake and others v President of the Republic of Botswana and others*,[104] 'misbehaviour' was stated to take its meaning from statutory context; that if the conduct of the judge is such that it is liable to bring the office itself into disrepute, it can properly be characterised as misbehaviour.[105] The inquiry into misbehaviour goes further in that even if the conduct of a judge can be characterised as misbehaviour, the question remains whether it is conduct of such a gravitas that is so manifestly and totally contrary to the impartiality, integrity and independence of the

---

98 *President of the Republic of Botswana and Others v National Amalgamated Local Central Government and Parastatal Workers' Union and Others,* (2017) Court of Appeal of Botswana, 151.

99 Constitution of Botswana (1966), Section 97(3)(a).

100 Constitution of Botswana (1966), Section 97(5).

101 Constitution of Botswana (1966), Section 97(4).

102 Constitution of Botswana (1966), Section 101(2).

103 Constitution of Botswana (1966), Section 101(2)-(5).

104 *Dingake and Others v President of the Republic of Botswana and Others* (2015) High Court of Botswana; *Lawrence v Attorney General of Grenada* (2007) Privy Council of the United Kingdom, 1474; *Clark v Vanstone* (2004) Federal Court of Australia, 1105.

105 *Dingake and Others v President of the Republic of Botswana and Others*, 619.

judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his or her office.[106]

The appointment, dismissal, and security of tenure for judges of the Industrial Court are set out by legislation.[107] The President appoints judges of the court in the same manner as those of the High Court and Court of Appeal,[108] with the same criteria and qualifications applying. The President of the Republic also appoints the President of the Industrial Court and other judges who shall then rank according to their appointment dates,[109] each appointment being gazetted.[110]

The retirement age of Industrial Court judges is set at 70 years of age. The President may permit a judge who has attained that age to continue in office for such time as to complete the proceedings commenced before him or her before attaining such age.[111] Further, a non-citizen judge or one not appointed on permanent and pensionable terms may be on contract and eligible for reappointment.[112]

Dismissal of an Industrial Court judge is provided under Section 19(1) of the Trade Disputes Act, which removal is only for inability to perform the functions of the office[113] or serious misconduct.[114] It is observed that the language used in this Section varies from that expressed in the Constitution as applies to judges of the High Court and Court of Appeal, it being recalled that removal therein may only be on account of 'misbehaviour' and not 'serious misconduct' as expressed in this section.

Concerning magistrates, there are seven grades of magistrates, namely regional magistrate, chief magistrate, principal magistrate, senior magistrate, and magistrate Grades I-III.[115] Section 8(2) of the Magistrates' Court Act provides that the qualifications for appointment to the above grades of magistrate shall be prescribed from time to time by

---

106 *Dingake and Others v President of the Republic of Botswana and Others*, 619.
107 Part III of the Trade Disputes Act (2016) [Botswana].
108 Trade Disputes Act [Botswana] (2016), Section 15(1).
109 Trade Disputes Act [Botswana] (2016), Section 15(2).
110 Trade Disputes Act [Botswana] (2016), Section 15(3).
111 Trade Disputes Act [Botswana] (2016), Section 18(1).
112 Trade Disputes Act [Botswana] (2016), Section 15(4).
113 Trade Disputes Act [Botswana] (2016), Section 19(1)(a).
114 Trade Disputes Act [Botswana] (2016), Section 19(1)(b).
115 Magistrates' Court Act [Botswana] (2010), Section 8(1).

the President acting in accordance with the advice of the Judicial Service Commission, provided that the President acting on the advice of the Judicial Service Commission, and in relation to any specific candidate, may waive the qualifications required for appointment to any grade of magistrate to facilitate the localisation of the public service.

In addition to the above, the President may, acting in accordance with the advice of the Judicial Service Commission, appoint administrative officers of and above the grade of District Officer as Magistrates Grade I, II, or III.[116] It is highlighted that the President, just as submitted above in regard to judges of the High Court and Court of Appeal, has little to no discretion to reject the advice of the Judicial Service Commission in this vein.

The case of *Ditlhong v President of the Republic of Botswana and Others*[117] appears to have broken the trend observed above in regard to the retirement age of magistrates, which was said in the case to be governed by the Public Service Act[118] and its Regulations.[119] This phenomenon was attributed to the distinction between magistrates and judges which manifests in many ways, chief of which is the direct management of magistrates by the Public Service Act.[120] However, on appeal, the Court of Appeal held that magistrates are not employees in terms of the Public Service Act and consequently are not governed by the Trade Disputes Act.[121] The logical result of the above pronouncement is that the retirement age of magistrates is not governed by the Public Service Act. This decision created a lacuna and uncertainty as to which legal instrument governs the retirement age of magistrates as the court did not provide guidance.

The dismissal of magistrates is dealt with under Section 104(1) as read with Section 104(2) of the 1966 Constitution, wherein it is stated that the power to appoint, exercise disciplinary control over, and remove persons from office vests in the President acting in accordance

---

116 Magistrates' Court Act [Botswana] (2010), Section 8(1).

117 *Ditlhong v President of the Republic of Botswana and Others* (2020) (unreported) Industrial Court of Botswana.

118 Public Service Act [Botswana] (2005).

119 *Ditlhong v President of the Republic of Botswana and Others* (2020) (unreported) Industrial Court of Botswana, para 15.

120 *Ditlhong,* para 14.

121 *President of the Republic of Botswana v Ditlhong* (2022) (unreported) Court of Appeal of Botswana, para 13-14.

with the advice of the Judicial Service Commission.[122] The criteria for dismissal is not outlined in that Section but rather in the Judicial Services Regulations[123] which deals with, *inter alia*, non-dismissible offences concerning judicial officers.[124] In this, we are left with a lacuna in the law, in that there is no prescribed criteria for dismissal as applies to magistrates.

Remuneration and salaries of judges and other judicial officers

The salaries and allowances of the judiciary are set as provided for in the Judicial Services Act[125] as amended from time to time,[126] essentially making Parliament the body that determines the remuneration of judges and other judicial officers. The Act specifically provides for the salaries and other allowances of the President of the Court of Appeal and other judges of the Court of Appeal;[127] the Chief Justice;[128] other judges of the High Court;[129] and magistrates.[130]

The salaries of the judiciary are guaranteed by the Constitution. According to subsection (2),[131] such salaries and allowances are charged to the Consolidated Fund established under Section 117, which Fund is audited by the Auditor General.[132] Taking it further, the salaries of the judiciary are barred from being altered to the disadvantage of the member of the judiciary after their appointment.[133] The pension benefits of the judiciary are provided for by the Judges' Pensions Act,[134]

---

122 Constitution of Botswana (1966), Section 104(1)-(2); *Ditlhong*, para 15; *President of the Republic of Botswana v Ditlhong,* para 14.

123 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (Botswana) (2021), Regulation 22.

124 Judicial Services (Code of Conduct and Enforcement Procedures) Regulations (2021), Regulation 2: '"judicial officer" includes the chief justice, the president of the Court of Appeal, justices of Appeal, High Court judges, magistrates…'.

125 Judicial Services Act (No 21 of 2014) [Botswana].

126 Judicial Services (Amendment) Act (No 25 of 2022) [Botswana].

127 Judicial Services (Amendment) Act (No 25 of 2022) [Botswana], Section 3.

128 Judicial Services (Amendment) Act (No 25 of 2022) [Botswana], Section 4.

129 Judicial Services (Amendment) Act (No 25 of 2022) [Botswana], Section 5.

130 Judicial Services (Amendment) Act (No 25 of 2022) [Botswana], Section 10.

131 Constitution of Botswana (1966), Section 122 (1), read along with subsections (2) and (5).

132 Constitution of Botswana (1966), Section 124(2).

133 Constitution of Botswana (1966), Section 122(3).

134 Judges' Pensions Act (Act No 13 of 2007) [Botswana].

which pension benefits are non-contributory in nature.[135] Exceptionally, Section 11 of the Judges' Pensions Act provides for the payment of a gratuity in lieu of pension to a judge who resigns and whose service has reached a prescribed threshold but does not qualify him or her for a pension.[136]

In the *Tshosa* case, a former judge sued for payment of gratuity after resigning. It was noted therein that the corollary to the payment of a gratuity in lieu of pension is that where a judge resigns before reaching the five-year threshold, they are not entitled to receive a gratuity.[137] The former judge's claim was dismissed for the reason that he had only served as a judge for two and a half years and was therefore not entitled to payment of a gratuity.[138]

Assessment of judicial independence in Botswana

Along with tenure of office, it is argued that nothing bolsters the independence of judges more than a fixed provision for their support. This then stands to prevent the inevitable predicament in human nature involving concerns over one's subsistence competing with one's will to ethical conduct.[139] In this vein, public confidence in the judiciary is established in that the public will be encouraged to approach the courts for redress as they know the judges are not influenced in their decisions by the hand that lines their pockets.

Legislative provision of salary and tenure protection is best entrenched in the constitutional order. An example is found in some constitutional provisions stating that judges' salaries may not be subject to diminution during their tenure.[140] Where provided in a constitution, these provisions stand as powerful obstacles to parliamentary attempts to reduce judicial compensation or remove judges from office by mechanisms other than dismissal.[141]

---

135 *Tshosa v Attorney General* (2017) Court of Appeal of Botswana, 275.

136 *Tshosa v Attorney General* (2017) Court of Appeal of Botswana, 277.

137 *Tshosa v Attorney General* (2017) Court of Appeal of Botswana, 277.

138 *Tshosa v Attorney General* (2017) Court of Appeal of Botswana, 279.

139 JC Wallace, 'An essay on independence of the judiciary: Independence from what and why' 58 (2) *University Annual Survey of American Law*, 2001, 248.

140 Jackson, 'Judicial independence: Structure, context, attitude', 36.

141 IR Kaufman, 'The essence of judicial independence' 80 (4) *Columbia Law Review*, 1980, 695.

However, the provision on tenure will not be fully effective in promoting judicial independence unless tenure is paired with some form of financial security upon the retirement of judges.[142] Adequate financial security, taking the form of a pension,[143] among other things, would then stave off the phenomenon of judges staying on the bench until their eventual death even in the face of unfitness on account of advanced age. An otherwise stagnant salary would in effect be reduced by inflation, forcing judges to seek better pay elsewhere. On the other hand, it appears that the setting of unduly high judicial salaries relative to other legal work available to prospective judges has the effect of attracting persons to judicial office solely for reasons of a lucrative salary.[144] The above shows how financial provisions may affect long tenures, therefore affecting judicial independence.[145]

However, it is observed that the legislature's control over the provision of funding for the judiciary impedes the judiciary's complete independence from the rest of the government. Seeing as budgetary decisions are made by the political branches of government, it is ever more vital that the budget not be used as a tool to undermine the independence of the judiciary.[146]

The guarantees for the independence of judges and judicial officers are generally observed in Botswana as there have been no incidents where the remuneration of courts has been affected as a result of the rendering of a negative judgment against the executive. However, there has been an incident wherein concerns voiced by judges over additional funding for the judiciary, ultimately resulted in the suspension of four judges.

Twelve judges wrote a letter to the Chief Justice that was critical of the administration of the judiciary by the Chief Justice and the general working conditions of the judges in Botswana. The said concerns were raised at the 2015 Annual Judicial Conference in Mahalapye. In a move that was widely perceived as retaliatory, the then Chief Justice Maruping Dibotelo, in his capacity as chair of the Judicial Service Commission, wrote letters to four judges: Justices Key Dingake, Modiri Letsididi, Mercy Garekwe (as she then was), and Ranier Busanang, informing

---

142 Jackson, 'Judicial independence: Structure, context, attitude', 39.

143 Siracusa Draft Principles on the Independence of the Judiciary, Article 26.

144 Jackson, 'Judicial independence: Structure, context, attitude', 38.

145 Jackson, 'Judicial independence: Structure, context, attitude', 39.

146 Wallace, 'An essay on independence of the judiciary', 246.

them that they had irregularly claimed and were paid double housing allowances. The judges were further informed that the matter would be reported to the police for investigation.

The judges denied the criminal misconduct alleged against them, which was followed by their suspension from office by the President, eliciting public uproar. An audit report later revealed that other judges had also received the allowances but no similar action was taken. This incident formed the facts around which *Dingake's* case was based; a case in which the relief sought by the judges was denied.[147] The suspension of the judges was lifted in March 2017 following an out-of-court settlement.[148]

The judges' suspension and potential expulsion from the judiciary turned into a political struggle over the continued existence of an independent judiciary.[149] After successfully advocating for and gaining the executive's authority to select judges in the *Motumise* case,[150] the Attorney General went on to argue that the executive could dismiss judges, supposedly for reporting the Chief Justice's actions to the Judicial Service Commission, a legitimate body.[151]

This series of events had ramifications that extended to the fundamental aspect of Botswana's democracy that had earned it recognition in the past: an independent judiciary. The suspended judges' case involves a larger principle that affects the country as a whole: the fight to defend democracy, which is at the heart of what makes Botswana a proud nation, in the words of Ian Seretse Khama.[152] This principle goes beyond the judges' right to free speech in which they can criticise the Chief Justice. Just like a little plant, democracy does not grow or develop on its own. If it is to develop and thrive, it has to be cared for and nourished. To be valued, it needs to be accepted and

---

147 *Dingake and Others v President of the Republic of Botswana and Others* (2015) High Court of Botswana, 621. See also *Law Society of Botswana v Oagile Bethuel Dingake and Others* CACGB-108-16; Tabeth Masengu, 'The vulnerability of judges in contemporary Africa: Alarming trends' 63 (4) *Africa Today* (2017), 3-19.

148 Masengu, 'The vulnerability of judges in contemporary Africa' 12.

149 David Sebudubudu and Bodilenyane Keratilwe 'Botswana' 12 *Africa Yearbook,* Brill, 2016, 427-432.

150 *Law Society of Botswana and Another v President of Botswana and Others* (2018), Court of Appeal of Botswana, 496.

151 Rachel Ellett, 'Importing justice' *Columbia Journal of Transnational Law* 283 (2013) 352.

152 Cited in Kholisani Solo and Godfrey Nsengaali Pitlagano 'Access to justice in Botswana' 13 *Beijing Law Review* (2022), 489.

put into action.[153] And if it is to endure, it needs to be battled for and protected.

It is impossible to ignore the larger political concerns that underpin the legal dispute and its possible national ramifications.[154] Whatever the root reasons for the dispute, it was clear from the court documents that this litigation established the judiciary's independence and its authority to supervise the executive and other branches of government.

Former President Lieutenant General Ian Khama stated on 21 June 2015, during the Annual Judicial Conference, that one of the characteristics that distinguishes Botswana as a democracy is its independent judiciary. Because Botswana has an independent judiciary, other nations look to it for leadership and inspiration in this area. He said further:

> As you are aware, international institutions rate Botswana governance very highly, and the independence of the judiciary is a yardstick used to measure our performance. As a country, we take great pleasure in the independence of our judiciary. Let me remind you before I wrap up that the government's view of our national civilisation is based on individual liberty and freedom, which the judiciary will continue to defend. Thus, our judiciary is a mirror of the rule of law and democracy in our country. To put it briefly, we expect a fair legal system in our country. Stated differently, the legal system of all legal systems is well-suited to our democratic, rule-of-law-based society – it is the kind of legal system that all other legal systems aspire to be![155]

Judicial financial independence in Botswana

The best intentions for the establishment of an independent and effective system of judicial review are meaningless without a guaranteed source of funding to carry out these tasks.[156] To this end, it is submitted that a legal framework protecting the financial independence of the judiciary is necessary to achieve the goal of an effective judiciary.

The local understanding of judicial financial independence was explored in the *National Amalgamated* case, wherein the Court of Appeal

---

153 Kenneth Good, 'Democracy and development in Botswana' 35 (1) *Journal of Contemporary African Studies* (2017), 113-128.

154 Nico P Swartz, 'Explication of the rule of law in Botswana judicature with regard to natural justice' 4 (3) *European Journal of Research in Social Sciences* (2016).

155 'The case of 4 judges' *The Botswana Gazette* 31 March 2016.

156 Wallace, 'An essay on independence of the judiciary', 246.

noted that 'Parliament has the ultimate responsibility to provide to the judiciary the resources it needs to function optimally.'[157] It was stated further that parliament 'provides the check on the executive to ensure that the judiciary is not rendered ineffective through lack of funding.'[158] Justice Petrus Damaseb of the Court of Appeal noted that 'the proper relationship between the judiciary and the other organs of the state and the adequate resourcing of the judiciary is a matter of grave and high policy in a democratic state.'[159] The financial independence of the judiciary is measured by the extent to which the judiciary complies with the international standards highlighted above for an independent judiciary.

The judiciary budgeting process and financial allocation

The institutional landscape underpinning public budgeting in Botswana facilitates a measure of predictability for Botswana's public finance system.[160] In this regard, the Minister for Finance is charged with preparing estimates of Botswana's revenues and expenditures for that financial year.[161] This process takes months of preparation and culminates in a budget speech or presentation by the Minister for Finance in February of every year. The process is initiated by each government department submitting its budget estimates to the Ministry of Finance Budget Estimates Committee. The proposal by each government department, including the Department of Justice, is subjected to scrutiny and may be reduced or rejected to align with the national budget priorities.

In this regard, Chief Justice Terence Rannowane recently argued that the Ministry of Justice should be established as a standalone ministry dealing with matters that affect the Administration of Justice

---

157 *President of the Republic of Botswana and Others v National Amalgamated Local Central Government and Parastatal Workers' Union and Others* (2017) Court of Appeal of Botswana, 147; *Tshosa v Attorney General* (2017) Court of Appeal of Botswana, 275.

158 *President of the Republic of Botswana and Others v National Amalgamated Local Central Government and Parastatal Workers' Union and Others* (2017) Court of Appeal of Botswana, 147.

159 *President of the Republic of Botswana and Others v National Amalgamated Local Central Government and Parastatal Workers' Union and Others* (2017) Court of Appeal of Botswana, 147.

160 Botswana Institute for Development Policy Analysis, Policy Brief No 10, 1.

161 Constitution of Botswana (1966), Section 119(1).

(AOJ).[162] This will result in unbundling the Ministry of Justice (MOJ) from the Police, Prisons Service, Attorney General, and the military which traditionally have high recurrent budgets.

The Administration of Justice (AOJ) is a unit or department under the MOJ which has four major divisions: legal, judicial, master's, and corporate services.[163] Prior to the establishment of the standalone MOJ, the Administration of Justice competed with other departments under the then Ministry of Defence, Justice and Security, that is the Botswana Police Service, Botswana Defence Force, Botswana Prisons Service, and Rehabilitation Services.

The Administration of Justice's annual budget allocations have been fluctuating between the second and third largest share of the Ministerial Recurrent Budget. However, the allocations have been steadily decreasing from second in 2019[164] to the fourth largest share in 2022.[165] After the establishment of the MOJ in 2023, the Ministry appears to have been left out in the cold, not even receiving a mention in the budget speech. It appears to have been classified under 'remaining ministries', which are to share BWP 7.48 billion or 12.2 percent of the budget.[166] Spending in the Administration of Justice appears to be on the increase, with BWP 261.8 million spent in 2018[167] and BWP 320.6 million spent in 2020.[168]

In terms of the 2022 Budget Speech, the funding, mainly allocated to Botswana Defence Force, Botswana Police Service, and Prisons and Rehabilitation Services was to be used to drive the following policy objectives: provide safety and protection to citizens; promote human rights and the rule of law; professional policing service in partnership with the community; provide legal advice, legal representation and

---

[162] Legal Year Opening Remarks, Honourable Chief Justice Terence Rannowane, delivered on the 7 February 2023.

[163] Gov.bw 'Administration of Justice' n.d. – <https://www.gov.bw/ministries/administration-justice-aoj> accessed 19 August 2024.

[164] 2019 Budget Speech by Honourable OK Matambo, Minister for Finance and Development, 4 February 2019, para 65.

[165] 2022 Budget Speech by Honourable Peggy O Serame, Minister of Finance and Economic Development, 7 February 2022, para 94.

[166] 2023 Budget Speech by Honourable Peggy O Serame, Minister for Finance, 7 February 2023, para 95.

[167] Report of the Auditor General on the Accounts of the Botswana Government for the Financial Year Ended 31 March 2018, para 68.

[168] Report of the Auditor General on the Accounts of the Botswana Government for the Financial Year Ended 31 March 2020, para 56.

public education on legal matters to the underprivileged and vulnerable sections of the population; and provide safe custodial care and correction to offenders through effective rehabilitation and integration programmes for social protection of the society.[169] The data for 2023 is undisclosed because the Administration of Justice was classified under 'remaining ministries' for the purposes of the 2023 Budget Speech.

Prior to 2023, the percentages for judiciary funding are difficult to determine as the judiciary does not fall under its own standalone ministry and was lumped together with the other departments in the Ministry of Defence, Justice and Security. Under that ministry, however, the percentages were 14.6 percent in 2019, 16.6 percent in 2021, 16.0 percent in 2022, and an undisclosed share of 12.2 percent in 2023. It follows that a comparison of the judiciary budget to that of the executive and legislature would be inaccurate, save to add that the other branches combined have a larger share of the budget than the judiciary.[170] Specifics on the parameters for judicial expenditure are unavailable due to the reasons stated above.

The judiciary accesses its funds through the Consolidated Fund for salary and allowances purposes. The Administration of Justice shares the budget allocation with the above-mentioned departments which is never enough and is exhausted at a rapid rate. Once depleted, the Administration of Justice has to request for supplementary funds. In 2020, the judiciary's financial woes were exposed when funds for paying *pro-deo* fees were exhausted three months after the start of the financial year 2020/2021. This resulted in the Law Society of Botswana writing a memorandum on 4 July 2020 to its members and promising to engage the Registrar of the High Court. Some trials could not proceed as there were no funds to pay *pro-deo* fees. The problem seems to have persisted in subsequent years, especially in 2021 and 2022.

That the Administration of Justice gets the least share within the Ministry of Justice Annual Budget Allocations has been established above. This is a concern identified by former Chief Justice Dibotelo,

---

169 2022 Budget Speech by Honourable Peggy O Serame, Minister for Finance and Economic Development, 7 February 2022, para 78.

170 This is a logical conclusion gleaned from the fact that even under the Ministry of Defence, Justice and Security, the judiciary had to share from the allocated budget with the Botswana Defence Force and Botswana Police Service, which form part of the executive. Taking it to another level, the Ministry of Defence, Justice and Security has not even taken the largest share of the budget allocation in the past 5 years as compared to other executive ministries.

who decried that he devoted himself to *advocating and ensuring that the funding of the judiciary takes centre stage*.

During the 2016 Judicial Conference, former Chief Justice Maruping Dibotelo stated that 'the budget allocation to the judiciary was inadequate which in turn hampered the judiciary's financial and institutional independence'. Chief Justice Dibotelo continued to state that the judiciary must be adequately resourced to enhance effective justice delivery. He lobbied for legislative reform that would ring-fence funds for the judiciary to ensure independence from the executive.[171]

It seems as though former Chief Justice Dibotelo's plea fell on deaf ears because almost a decade after his remarks were echoed, the next Chief Justice addressed the same at the opening of the Legal Year whose theme was '*Under resourced judiciary - An impediment to justice*'. Chief Justice Rannowane stated that the lack of sufficient funding hampers the delivery of justice and has reached a point of crisis which can be best described as 'precarious financial footing'.[172]

The Chief Justice continued to state that 'as a result of inadequate funding, we have (since August 2022) to date not been able to pay *pro-deo* fees, pay witnesses or take justice to the people by conducting circuit courts. The dire state has a direct bearing on the poorest of the poor, especially on the indigent as recently demonstrated by a criminal case where a man from the remote village of Kauqwi in the North West District of Botswana was acquitted by the Court of Appeal after spending four years in jail.[173]

The reason for the delay in processing the appeal is largely due to the delay in processing the record of proceedings from the lower courts as a result of a shortage of real-time court reporters or stenographers. The shortage of court reporters has directly been linked to a lack of resources for the Administration of Justice to train more staff in this regard. This contributes to a backlog of cases in the Botswana court system.

This case is not an isolated incident as there are many awaiting their turn for their trials or appeals to be processed in the court system. In 2017, the former Chief Justice Dibotelo opined that 'the acute shortage

---

171 *Judicial returns 2008-2017: Challenges & achievements,* Welcome remarks by Chief Justice Maruping Dibotelo at workshop delivered on 27 July 2017.

172 Chief Justice's Speech at the Legal Year Opening, 2023.

173 *Morerwa v The State* case no CLCGB-005-22 delivered by the Court of Appeal on the 14 April 2023.

of court reporters at the Magistrates' Courts and High Court result[s] in some of the appellants having their appeals heard after they have served their sentences'.[174]

The said conference resolved that, as a solution to the financial difficulties besieging the judiciary, the government should consider a specified percentage of the budget to the judiciary on an annual basis.

Judicial financial accountability

The Botswana Constitution provides the framework for managing the finances of the judiciary[175] which is fleshed out in detail in the Finance and Audit Act. The Botswana Court Finance Management Regulatory Framework is described in full in the Finance and Audit Act and its revisions. The Consolidated Fund, the budgetary process, expenditure controls, banking, internal audit, debt, reporting on public accounts, and the responsibilities of the Auditor General are all covered by the Finance and Audit Act in accordance with the Constitution.[176]

The guidelines for managing the finances of the judiciary are outlined in the Finance and Audit Act (FAA). These guidelines cover budget execution and control methods, differentiating between different activities, internal and external control, and situations in which a supplemental estimate is required.[177] Financial procedures and instructions offer comprehensive guidelines for the acquisition and use of monies by the judiciary. The Finance and Audit Act is expected to be revised soon.

Judicial accountability for individual decision-making or personal behaviour is typically accomplished by means of the judiciary's internal systems.[178] The general public is the primary beneficiary of the

---

174 *Judicial Returns 2008-2017: Challenges & achievements,* Welcome remarks by Chief Justice Dibotelo at workshop delivered on 27 July 2017. The speech by former Chief Justice Dibotelo at the Annual Judicial Conference in Mahalapye was held under the theme, '*A well-resourced judiciary is fundamental to the expeditious delivery of quality justice*'.

175 Daniel David Ntanda Nsereko, Jonathan Dambe Baboki and Ramadi Dinokopila Bonolo, *Constitutional law in Botswana,* Kluwer Law International BV, 2023.

176 Taolo B Lucas and Theophilus T Tshukudu, 'Public budgeting in Africa: the case of Botswana' in *Public Budgeting in African Nations*, Routledge, 2016, 32-51.

177 Olefhile Mosweu, 'Performance audit in the Botswana public service and arising records management issues' 44 *Journal of the South African Society of Archivists* (2011), 107-115.

178 Batlang Seabo, Mogopodi Lekorwe and Kabelo Moseki, 'Political accountability in Botswana's liberal democracy: A critical appraisal' 4(17) *Advances in Social Sciences Research Journal* (2017).

judiciary's institutional accountability.[179] The public's support for the courts is necessary, but it must be earned. Ensuring that the public is aware of the judiciary's decision-making process is the best method to get their support.

If the judiciary is to perform effectively, it must be respected by the general public, the legislature, and the executive.[180] Furthermore, one cannot demand that respect; it needs to be merited. Simply put, this implies that judges have to carry themselves with dignity, be courteous to everyone who appears before them, efficiently arrange their court roll, and provide decisions in a reasonable amount of time. To try to convey to the general public the significance of the legal system and judicial independence, perhaps they ought to go even further than that.[181] A significant portion of the duty to account for is the duty to explain.

The judiciary's budget, which must, of course, be approved by the Treasury and included in the Estimates of Expenditure, can occasionally cause issues.[182] Generally speaking, the judiciary cannot complain when it does not get its way. Likewise, the judiciary has a right to object if the government tries to stifle its freedom of action by controlling its financial resources. A certain amount of compromise is necessary between judicial financial accountability and independence.

Conclusion

In Botswana, the journey towards fully realised judicial independence is complex and nuanced. While legal safeguards have been established to protect judicial independence, these measures face significant challenges due to financial limitations. The judiciary's ability to function at its best hinges on having sufficient financial resources, which are

---

179 Key Dingake, Bethuel Oagile, Najla Hasic, Tomei Peppard and Stephen Hayden 'Appointment of judges and the threat to judicial independence: Case studies from Botswana, Swaziland, South Africa, and Kenya' *Southern Illinois University Law Journal* 44 (2019), 407.

180 Gosego Rockfall Lekgowe, 'Removing a High Court judge for misbehaviour under the Constitution of Botswana: Proposals for reform' 24 *University of Botswana Law Journal* (2017), 52.

181 S Balisi and T Ramoroka, 'Section 47 of the Constitution of Botswana: An ingredient for personal rule' International Conference on Public Administration and Development Alternative (IPADA), 2019.

182 Nico P Swartz 'Explication of the rule of law in Botswana judicature with regard to natural justice' 4 (3) *European Journal of Research in Social Sciences* (2016).

presently difficult to obtain. This situation calls for a reorientation of the Botswana government's budgetary priorities in favour of the judiciary.

Enhancing the budget allocated to the Administration of Justice is crucial. The Botswana government must prioritise this sector in its fiscal plans, a move that would considerably improve the judiciary's capability to deliver justice both effectively and efficiently. Additionally, the insights and recommendations from various judicial conferences within Botswana, advocating for the judiciary's financial independence, demand serious attention and action. Implementing these suggestions could markedly ameliorate the judiciary's current financial constraints.

This chapter proposes structural reforms to further support the judiciary. Establishing a standalone ministry of justice has been a significant step forward. What remains wanting is sufficient funding for the ministry, and this is recommended. Furthermore, this chapter recommends that departments such as the Attorney General, Directorate of Public Prosecutions, and Legal Aid Botswana be administratively and financially segregated from the Administration of Justice. This measure would reduce the competition for resources within the ministry, allowing for a more dedicated funding stream for the judiciary.

Conclusively, realising judicial independence in Botswana requires more than just legal frameworks; it also depends significantly on the practical aspect of financial autonomy. The willingness of the Botswana government to reconsider and possibly reform its approach to judiciary budgeting and administration is critical for enhancing the judiciary's effectiveness and independence. Through such dedicated efforts, the judiciary can truly fulfil its role as an unbiased dispenser of justice, upholding democracy and the rule of law in Botswana.

CHAPTER NINE: TANZANIA

Judicial financial independence in Tanzania

Grace Kamugisha Kazoba

Introduction

This chapter analyses judicial financial independence in Tanzania. It starts by providing a brief history of the judiciary in Tanzania, from the colonial era, the years shortly after independence, and the post-independence years. The chapter then explains the structure of the judiciary followed by a discussion on the Judicial Service Commission in the fourth section of the chapter. The fifth part is a discussion on the independence of the judiciary generally. This section is followed by the sixth section which covers an assessment of the judiciary's financial autonomy. It comprises of a discussion on the financial management framework of the judiciary (preparation, approval and execution); judicial accountability; and an assessment of judicial financial independence in Tanzania. Sections seven and eight cover judicial accountability in the management of finances of the judiciary and section nine contains the conclusion and recommendations.

The author employed field research and documentary review as data collection methods. The field research was comprised of face to face interviews with open ended questions which allowed further probing of information/data from key informants (who were purposively selected) on the subject of the paper. This method was used in relation to informants based in the judiciary and senior legal counsel considering their positions and wealthy experience. The author also employed the focus group discussion method through electronic means (using WhatsApp chart groups) involving graduates of the Bachelor of Laws (LL.B) programme of a particular year (graduated more than 15 years ago) and other professional chart platforms (with mixed graduates of different years), who are currently serving in different government and non-government departments, and some practising as private advocates. This allowed the author to inform the data from lawyers and non-lawyers, and from professionals with diverse experiences in terms

of years of experience and practice. The total number of respondents who participated were twenty-five. In relation to documentary review, the author mainly conducted desktop review of credible sources published online.

The United Republic of Tanzania is a union of two former independent states of Zanzibar and Tanganyika. Tanganyika attained its independence from British rule on 9 December 1961 whereas the Zanzibar Revolution of 12 January 1964 overthrew the Sultan of Zanzibar and ushered a new governmental dispensation. Eventually, the two sovereign states united on 26 April 1964 when the presidents of Zanzibar and Tanganyika signed the Articles of the Union to form Tanzania. Under the Articles of the Union, Zanzibar, or Revolutionary Government of Zanzibar as it is known in the Constitution, retains some distinct features of a sovereign state[1] (popularly regarded in Tanzania as features of an autonomous territory) such as having its own legislature over non-union matters.[2]

The Union has two parts namely mainland Tanzania and Zanzibar Tanzania.[3] The Constitution of the United Republic of Tanzania contains a schedule of union matters which are under the jurisdiction of the Union Government.[4] In this regard, Zanzibar, which has its own constitution, has full authority over all non-union matters. Tanzania Mainland and Zanzibar have separate judiciaries up to the level of the High Court. The two are however united by a single Court of Appeal headed by the Chief Justice in the Court of Appeal of Tanzania.

The mainland Tanzania judiciary has two broad functions: the administrative function headed by the Chief Court Administrator who is also the accounting officer of the judiciary, and dealing with administrative matters of a non-judicial nature; and Chief Court Registrar dealing purely with administration of judicial matters. Zanzibar, has a judiciary up to the level of the High Court of Zanzibar distinct from the High Court of Tanzania (whereas the latter has jurisdiction over mainland only). By virtue of Article 117 (1) - (4) of the Constitution of the United Republic of Tanzania, the Court of Appeal of Tanzania has jurisdiction over matters arising from the High Court of Tanzania and

---

1 Constitution of the United Republic of Tanzania (1977), Article 102(1).

2 Constitution of the United Republic of Tanzania (1977), Article 106(1), (2) and (3).

3 Constitution of the United Republic of Tanzania (1977), Article 1 and 2(1).

4 Constitution of the United Republic of Tanzania (1977), Article 4(3) and the Second Schedule.

High Court of Zanzibar and those arising from magistrates exercising appellate jurisdiction.

Zanzibar has its own president who is officially known as the President of the Revolutionary Government of Zanzibar[5] and several non-union matters such as the Electoral Commission of Zanzibar among others. Laws enacted by the legislature of the United Republic of Tanzania over union matters must be ratified by the House of Representatives of Zanzibar to be operational in Zanzibar.[6]

Tanganyika and Zanzibar have distinct histories in relation to the introduction of human rights through the bill of rights operating through the constitutions of each party to the Union (and upon which the doctrine of rule of law and independence of the judiciary principles are anchored).

The Judiciary of Tanzania draws its mandate from Articles 107A and 107B of the Constitution of the United Republic of Tanzania of 1977. The judiciary has a duty to dispense justice. Article 107B essentially entrenches the principle of independence of the judiciary by specifically providing that 'in exercising the powers of dispensing justice, all courts shall have freedom and shall be required only to observe the provisions of the Constitution' and those of the laws of the land.

Brief history of the judiciary of Tanzania

The colonial era

Prior to colonial rule, there were different traditional judicial institutions for administration of justice,[7] and whose structures varied depending on whether the respective society or community had centralised or non-centralised structures. Despite the differences, however, both types of societies applied procedures characterised by mediation, conciliation, arbitration and compromise.[8] The traditional judicial institutions, however, began to disintegrate with the introduction, along with of German colonial rule in 1884, of the adversarial court system. British colonial rule was established in 1919,

---

5 Constitution of the United Republic of Tanzania (1977), Article 103(1).

6 See however, Constitution of the United Republic of Tanzania (1977), Article 64.

7 Ellen R Feingold, *Colonial justice and decolonization in the High Court of Tanzania, 1920-1971,* Springer, 2018.

8 Feingold, *Colonial justice and decolonization in the High Court of Tanzania,* 1920-1971.

which further weakened the remaining traditional systems as the British colonial government sought to establish administrative structures (including courts), based on the laws established in India. The colonial era court structure largely survived through the independence and post-independence eras.[9]

In 1920,[10] the British established the High Court of Tanganyika and set up a dual hierarchy court system which consisted of the High Court and subordinate courts that primarily operated according to English Common Law.[11] The High Court was established under Article 17(1) of the Tanganyika Order-in-Council 1920 and was styled as His Majesty's High Court of Tanganyika. The court was vested with unlimited jurisdiction[12] and was presided over by judges. Courts subordinate to the High Court of Tanganyika were established by the Courts Ordinance 1920. They included the following courts: (1) courts of magistrate of district political officer; (2) courts of assistant district political officer; (3) courts of assistant political officer of the second grade.[13]

Judges in Tanganyika and the East African courts throughout the colonial period relied to a very large extent on the decisions of the English courts which were binding on their courts as a result of reception clauses that applied English common law in the region. Beyond the High Court, there was the East African Court Appeal (EACA) which received appeals from the High Court, before further appeals could be made to the Privy Council in England.

The East African Court of Appeal served as the appellate court for the British colonies in Eastern Africa and west Asia.[14] The court was based in Kenya and its jurisdiction was expanded to cover the Sultanate of Zanzibar, Tanganyika, British Somaliland, Aden Protectorate, Colony of Aden, Federation of South Arabia, Protectorate of South Arabia,

---

9 Robert B Seidman, 'Law and development: a general model' 6(3) *Law & Society Review* (1972) 311-342; Chris Maina Peter, 'The magic wand in making constitutions endure in Africa: Anything (lessons) to learn from East Africa?' 6(4) *African and Asian Studies (2007)* 511-535; Issa G Shivji, *Constitutional and legal system of Tanzania: A civics sourcebook*, Mkuki na Nyota Publishers, 2004.

10 Tanganyika Order-in-Council (1920), Article 17.

11 Tanganyika Order-in-Council (1920).

12 Yash Pal Ghai, 'Notes towards a theory of law and ideology Tanzanian perspectives' 8(13) *The Journal of Legal Pluralism and Unofficial Law* (1976) 31-105.

13 Tanganyika Order-in-Council (1920).

14 Bonny Ibhawoh, *Imperial justice: Africans in empire's court*, Oxford University Press, 2013.

British Mauritius, British Seychelles, and Saint Helena.[15] The court was established in 1902 as the Eastern African Court of Appeal and was the appellate court for British Kenya, Uganda Protectorate and Nyasaland. Later, the court's name was changed to the East African Court of Appeal, and in the 1950s to the Court of Appeal for East Africa or the Court of Appeal for Eastern Africa.

The judiciary of Tanzania in the post-independence era

The departing British colonial government negotiated an independence constitution in 1961 that embraced the doctrine of separation of powers, based on the 'Westminster model' that was applied to all former colonies.[16] In this arrangement, the judiciary, like in all other colonies in the region,[17] was placed as an essential institution which had a duty to interpret and apply the provisions of the written constitution of Tanganyika.

As a result of the central place that the judiciary and the courts occupied in the constitutional set-up, the judiciary of Tanganyika operated under tension, and later under tight control by the state. The attainment of independence of Tanganyika prompted significant legislative changes that affected the set-up and functioning of the judiciary.[18] The legislative provisions mostly affected the High Court, prompting the integration of the local court system with the High Court and subordinate court system.[19] As per the second schedule of the Tanganyika (Constitution) Order-in-Council, 1961, the High Court was established consisting of a chief justice and such number (with a minimum set to six) of other judges (also known as 'puisne judges') as could be prescribed by the Parliament.[20] The Chief Justice was appointed by the Governor General upon the advice of the Prime Minister. The 'puisne judges' were appointed by the Governor General

---

15 Ibhawoh, *Imperial justice: Africans in empire's court*.

16 SB Pfeiffer, 'The role of the judiciary in the constitutional systems of East Africa' 16(1) *The Journal of Modern African Studies* (1978) 33-66.

17 J McAuslan, 'The evolution of public law in East Africa in the 1960s' 3(4) *VRÜ Verfassung und Recht in Übersee* (1970) 549-550; Claire Palley, 'Rethinking the judicial role: The judiciary and good government' 1 *Zambia Law Journal* (1969) 1.

18 Eugene Cotran, 'Some recent developments in the Tanganyika judicial system' 6(1) *Journal of African Law* (1962) 19-28.

19 Cotran, 'Some recent developments in the Tanganyika judicial system' 19-28.

20 Tanganyika (Constitution) Order-in-Council (1961), Section 58.

upon the advice of the Judicial Service Commission and other general guidelines.[21]

While the minimum retirement age was set at 62 years, the Governor General could vary this subject to the advice of the Prime Minister, and could permit a judge to continue in office until they attained the age of sixty-five.[22] There was a clearly prescribed procedure for removal of judges from office and in all of them the Governor General was instrumental.[23] In cases of proposed removal of a judge from office based on misbehaviour or inability to perform functions, for example, the Governor General was mandated to appoint a tribunal, constituted by people who qualified for the position of a judge in the Commonwealth, to carry out an enquiry into the presented issues, reporting to Her Majesty. Depending on the outcome of the enquiry, the tribunal could recommend to the Governor General (and the GG was bound to act as recommended) to request that the question of the judge's removal be referred by Her Majesty to the Privy Council's Judicial Committee.[24]

If Her Majesty was advised by the Judicial Committee that the judge ought to be removed from office for inability or misbehaviour, then such judge would be removed from office by the Governor General. It is therefore clear that, despite the checks and balances that were inbuilt in the system seeking to safeguard security of tenure of judges and hence the judiciary's autonomy, the judiciary was not independent. The powers which were vested in Her Majesty and the manner in which the inquiry tribunal was appointed and functioned posed a threat to independence of the judiciary and could easily compromise national interests.

The mandate to appoint, discipline and remove other judicial officers from office was vested in the Judicial Service Commission by the 1961 Constitution.[25] The said judicial officers were: the Registrar of the High Court, Deputy Registrar of the High Court, Resident Magistrate, any magistrate and such other officers connected with any court (other than a court-martial) as, subject to the provisions of the independence constitution of Tanganyika, could be prescribed by Parliament.[26]

---

21 See Tanganyika (Constitution) Order-in-Council (1961), Section 59(1) and (2); Cotran, 'Some recent developments in the Tanganyika judicial system' 19-28.

22 See Tanganyika (Constitution) Order-in-Council (1961), Section 61.

23 Tanganyika (Constitution) Order-in-Council (1961), Section 60(3).

24 section 60(5) of Tanganyika (Constitution) Order-in-Council (1961)

25 Tanganyika (Constitution) Order-in-Council (1961), Section 64(1).

26 Tanganyika (Constitution) Order-in-Council (1961), Section 65(1) and (3).

It is argued that, during the colonial era, the judiciary was an integral branch of the executive rather than an institution for the administration of justice as the colonial administration was more concerned with the maintenance of law and order rather than respect for the independence of the judiciary or for the fundamental rights of the ruled.[27] As a result, the judiciary was regarded by the average citizen as an instrument of control of the executive power, and this made it lack credibility or respect. This suspicion continued after independence. The unchanged attitude on all sides (average citizen, judiciary and the executive) made it difficult to implement separation of judicial functions from legislative or political roles.

Despite the relationship that existed between the judiciary and the colonial administration prior to independence in Tanzania as described above, there was a lot of post-independence effort to change this dynamic. The newly instituted leadership attempted to forge an interdependent relationship of a completely new nature between the bench, bar, society and government.[28] Major legislative and political decisions were quickly made after independence to correct most of the challenges discussed above.

Julius Nyerere resigned as Prime Minister in order to focus on work for national unity through Tanganyika African National Union (TANU), followed by the formation of a republic on 9 December 1962. The government then embarked on an ideology of preference for economic development that was considered to override the claims of liberal democracy. This resulted in a strong desire for a centralised executive to push the development agenda. This crystallised into what was referred to by Steven Feiffer as Nyerere's philosophy of government.[29]

While there was no formally justiciable bill of rights in either the 1961 independence constitution, the 1962 republican constitution, or the 1965 interim constitution of the Union of Tanzania, Tanzania had consistently stressed the importance of the rule of law and the independence of the judiciary.[30]

---

27 Yash Vyas, 'The independence of the judiciary: A third world perspective' *Third World Legal Studies* (1992) 127.

28 Pfeiffer, 'The role of the judiciary in the constitutional systems of East Africa' 33-66.

29 Pfeiffer, 'The role of the judiciary in the constitutional systems of East Africa' 33-66.

30 Ghai, 'Notes towards a theory of law and ideology Tanzanian perspectives' 31-105.

Tanzania, unlike other countries of Africa and the Third World in general, is said to have largely respected the law and legal institutions post-independence, at least up to mid-1970s.[31] However, in the mid-1970s, Julius Nyerere acted in ways contrary to respect of judicial independence. In one case, Sufian Hermed Bukurura refers to a key informant in the Attorney General's Chambers who was well informed of President Nyerere's intention to sack a High Court judge for giving a judgment in the case involving a public corporation which the president was not happy about. It is reported that the president was however advised that the government could pursue an appeal to the Court of Appeal instead of sacking the judge, and eventually an appeal succeeded in favour of the government.[32]

However, as discussed earlier, Tanzania experienced better overall judicial independence in the post-independence era despite the threatening statements from the executive and *de jure* provisions that seemed to undermine it. One would argue, as others have and as discussed above, that the positive outcome of the implementation of the government ideology of that time was a result of well-intentioned perception of constitutionalism which went beyond what was written on paper.

The Tanzania experience on constitutionalism dates back to the founding of the Tanganyika African National Union (TANU) on 7 July 1954. The Constitution of the Party had a clause which provided for equality of all men in dignity as human beings and against discrimination of any kind. The Party Constitution together with the subsequent Independence and Republican Constitutions incorporated the notion of Universal Declaration of Human Rights.[33] For instance,[34] Nyerere argued that the constitution alone was not sufficient to guide democracy or that strict adherence to constitutionalism in a young democracy would render the rule of law itself to jeopardy. The success can be wholly attributed to the personality of a leader (including ability to mobilise the masses and explain his ideology).

---

31 Sufian Hermed Bukurura 'Judiciary and good governance in contemporary Tanzania. Problems and prospects' *CMI Reports R 1995:3*, Chr. Michelsen Institute, Bergen, 1995, 7.

32 Bukurura 'Judiciary and good governance in contemporary Tanzania', 7.

33 United Republic of Tanzania, Report of the Law Reform Commission, 1996, 5.

34 Ghai, 'Notes towards a theory of law and ideology Tanzanian perspectives' 31-105.

Structure of the courts in Tanzania

The legal framework in Tanzania provides some general principles that guide the structure and operations of the courts and the judiciary in general. Article 107B of the Constitution essentially enacts the principle of independence of the judiciary by specifically providing that in exercising the powers of dispensing justice, all courts shall be free and shall be required only to observe the provisions of the Constitution and those of the laws of the land. Moreover, the Constitution and corresponding Acts of Parliament establish the security of tenure of judges and provide for a stable remuneration system.

Court structure in Tanzania

Tanzania's current constitution was promulgated in 1977. By virtue of Article 117 (1) - (4) of the Constitution of the United Republic of Tanzania, the Court of Appeal of Tanzania, which is the apex court, has jurisdiction over matters arising from the High Courts of Tanzania (Tanganyika) and High Court of Zanzibar and those arising from magistrates exercising extended jurisdiction.

The Judiciary of Tanzania draws its mandate from Articles 107A and 107B of the 1977 Constitution.[35] The judiciary has a duty to dispense justice and therefore maintain peace and security. When the judiciary is viewed as a union matter, Tanzania has a two-tier court system up to the level of the High Court. The constitutions of the United Republic of Tanzania and that of the Revolutionary Government of Zanzibar establish the High Courts of Tanzania (for mainland Tanzania) and of Zanzibar respectively.[36] By virtue of Article 4, there are two judiciaries in Tanzania. Yet Article 117(1) of the Constitution of the United Republic of Tanzania establishes the Court of Appeal of Tanzania as the highest organ in the justice delivery system in Tanzania.

From the context of Tanzania Mainland, the judiciary operates in a four-tier system. There is the Court of Appeal at the apex; followed by the High Court of Tanzania; resident magistrate courts and district magistrate courts at the same level; and finally primary courts.[37] The chief

---

35 As amended up to 1 January 2005.

36 Constitution of the United Republic of Tanzania (1977), Article 4.

37 Judiciary of Tanzania, *Towards citizen-centric justice service delivery*, Judiciary Strategic Plan 2020/21-2024/25, July 2020.

justice is the head of the judiciary and is assisted by the principal judge or judge *kiongozi*. The judge *kiongozi* is responsible for judicial matters at the High Court and subordinate courts[38] whereas the Court of Appeal Registrar assists the Chief Justice in respect of Court of Appeal matters. The Chief Justice shall have no power over any matter concerning the structure and administration of the day-to-day business of the courts established in accordance with the Constitution of Zanzibar, 1984, or any law of Tanzania Zanzibar.[39] However, the Article 116 (2) of the Constitution of the United Republic of Tanzania requires the Chief Justice of the Judiciary of Tanzania to consult with the Chief Justice of Zanzibar concerning the administration of the business of the Court of Appeal in general, and also concerning the appointment of justices of Appeal.

The Chief Justice is appointed by the President of the United Republic of Tanzania from among persons who possess qualifications to be appointed as a justice of appeal. The tenure of the Chief Justice is until retirement except if the Chief Justice resigns, or the office becomes vacant on ground of illness, death or removal from office by the President of the United Republic.[40] The Court of Appeal is headed by the Chief Justice and the court has jurisdiction in both Mainland and Zanzibar. However, the Chief Justice of Tanzania does not have power over day to day business of courts established under the 1984 Constitution of the Revolutionary Government of Zanzibar or any law of Tanzania Zanzibar.[41]

Judicial administration is enshrined in the Judicial Administration Act (No 4 of 2011) and the Constitution of the United Republic of Tanzania (for mainland Tanzania and with bearing on the judiciary of Zanzibar) and that of the Revolutionary Government of Zanzibar for the case of the judiciary of Zanzibar. The Judiciary Administration Act establishes the office of Chief Court Administrator (for Mainland) who serves as the head of general administration and the accounting officer. The Act also establishes the office of Chief Registrar who is charged to ensure effective performance of the judicial functions. In its discharge of its primary role of dispensing justice, the judiciary is structured in different court levels. In Tanzania, the structure (and respective legal framework) of the judiciary is popularly referred to as court system.

---

38 Judiciary of Tanzania, *Towards citizen-centric justice service delivery*.

39 Constitution of the United Republic of Tanzania (1977), Article 116 (1).

40 Constitution of the United Republic of Tanzania (1977), Article 118.

41 Constitution of the United Republic of Tanzania (1977), Article 116 (1).

The Judicial Administration Act also establishes the offices of other court administrators at various levels where budgetary votes are held. For instance, there are court administrators in all administrative regions: there is Chief Administrator of the Court of Appeal of Tanzania; other administrators of the High Court of Tanzania, and different divisions of the High Court such as the Land Court Division, Labour Court Division, Commercial Court Division and the Corruption and Economic Crimes Division.

The Judiciary Administration Act[42] introduced the separation of the judicial functions from general administrative functions thus facilitating overall institutional efficiency through the division of labour and accompanying arrangements for the two respective functions of the judiciary. The Chief Court Administrator must have proven knowledge and experience in public administration and finance.

The chief justice, *judge kiongozi* and the chief registrar are left to oversee the judicial functions, the area they are best trained and experienced in. In practice, this is not devoid of challenges. It attracts tensions between the two 'branches' of officials within the same institution. This occurs mainly due to the difference of professional culture between lawyers and administrators. At best it can be said that the mixture of professions within the same institution is likely to enhance productivity and eliminate business as usual syndrome if any.

Moreover, there are always endless concerns with respect to the power of the president to appoint the chief justice, chief court administrator and the chief registrar (as well as justices of appeal and judges of the High Court) in relation to judicial independence and more so, judicial financial independence. There is a strong perception that while executive role in judicial appointments is inevitable, the powers of the president to solely appoint all major judicial leaders may result in a politically subservient judiciary. Case in point, in Tanzania, the chief justice is the overall head of the judiciary but the Chief Court Administrator and the Chief Court Registrar report directly to the President. But a more compelling discussion revolves around the accountability of the judiciary generally in relation to judicial independence in that all the leaders of the judiciary are accountable to the president who appoints them.

---

42 Act No 4 of 2011.

The Judicial Service Commission

The Judicial Service Commission, established under Article 112 of the Constitution, sets policies and provides direction as well as overall oversight for the judiciary.[43] The Judicial Service Commission is comprised of the chief justice of the Court of Appeal who is the chair, the Attorney General, a justice of appeal of Tanzania who shall be appointed by the president after consultation with the chief justice, the principal judge, and, the two members who are appointed by the president.[44] A member of Parliament cannot be appointed as a member of the Judicial Service Commission.[45]

The Judicial Service Commission advises the president in respect of appointments of judges of the High Court, matters related to discipline of judges, salaries and remuneration for judges, appointments and discipline of registrars of the Court of Appeal and of the High Court. Moreover, the Judicial Service Commission appoints and exercises disciplinary authority over magistrates. The Commission has established different committees for execution of its functions.

The Judicial Service Commission determines employment of judiciary employees and exercises disciplinary powers over employees of the judiciary. The Commission is vested with a duty to advise the president of the United Republic of Tanzania on the following administrative roles: appointment of the judge *kiongozi (principal judge),* chief court administrator, chief court registrar, chief registrar and registrar of the Court of Appeal. In addition to advisory role for appointments, the Judicial Service Commission also has a duty to advice the president in the event of inability by a judicial officer to perform their respective functions. Furthermore, the Judicial Service Commission also advises the president in respect to misconduct of judicial officers where

---

[43] However, the Chief Justice of Tanzania Mainland has no power over any matter concerning the structure and administration of the day-to-day business of the courts established in accordance with the Constitution of Zanzibar, 1984, or any law of Tanzania Zanzibar (See Constitution of the United Republic of Tanzania (1977), Article 116(1). Yet, the Chief Justice is required by Constitution of the United Republic of Tanzania (1977), Article 116(1) to consult with the Chief Justice of Zanzibar concerning the administration of the business of the Court of Appeal in general, and also concerning the appointment of Justices of Appeal from time to time.

[44] Constitution of the United Republic of Tanzania (1977), Article 112 (1) and (2) (a) - (e).

[45] (In respect of Constitution of the United Republic of Tanzania (1977), Article 113(2)(e), that is, members appointed by the President) Constitution of the United Republic of Tanzania (1977), Article 112(3).

the misconduct is inconsistent with the ethics of the respective office or with the law governing ethics of public officers. Finally, the Judicial Service Commission advises on the salary and remuneration of judicial and non-judicial officers in the Judiciary Service.[46]

The Judicial Service Commission is empowered to scrutinise a complaint against a justice of appeal, the judge *kiongozi,* or any other judicial officer and to take administrative measures regarding these complaints, except the measures that are referred to under the Constitution.[47]

The Judicial Service Commission has powers to appoint, promote, discipline or take administrative measures in respect of any judicial officer except the chief registrar, registrar of the Court of Appeal or registrar of the High Court and other general staff of the judiciary. Staff appointed by the Judicial Service Commission include the principal magistrate, senior magistrate, magistrates, judges' assistants and other court administrators. The Judicial Service Commission is also vested with powers in respect of dismissal and removal of its appointees, but subject to the law. There are a few cases where the Commission has handled disciplinary matters involving judicial officers and has even dismissed such staff from office on matters related to corruption and integrity.[48]

The Constitution and the Judiciary Administration Act provide for the membership of the Judicial Service Commission and they include: members of the bench (who are the majority); the government (Attorney General) and two other appointees from the civil society or academia. All members of the Judicial Service Commission, including representatives of civil society, have always been lawyers.[49]

The establishment of the Judicial Service Commission in the Constitution and the prescription of its membership in the Constitution arguably gives it more independence. However, the mode of appointment (by the president) creates a lingering perception of influence by the appointing authority. However, and this is significant, once appointed,

---

46 Judiciary Administration Act (Act No 4 of 2011), Section 29 (i) - (v).

47 Judiciary Administration Act (Act No 4 of 2011), Section 29(1)(b).

48 *Jonathan Mgongoro v Judicial Officers Ethics Committee, Judicial Service Commission and the Attorney General,* Civil Appeal No 26 of 2021, Court of Appeal of Tanzania, 2022.

49 The two appointees happen to be both members of the Tanganyika Law Society and one member of Tanzania Women Lawyers Association which is also a part of the Tanganyika Law Society.

their duties are clearly defined and delineated by law and this may provide a basis for their independence.

The mandate of the Judicial Service Commission with regard to appointment of judges of the High Court is limited to making recommendations to the president. The Judicial Service Commission has no role in the appointment of the Court of Appeal judges as the law stipulates that in the appointment of judges of appeal, the president only consults with the chief justice.[50] In either case, the recommendations made to the president are not binding and therefore, by virtue of Article 37 of the Constitution, the president is free to abide by the recommendations or not. However, there have been no reported cases where the president has disregarded recommendations of the Judicial Service Commission or the chief justice in the appointment of the respective judges.

In a bid to enhance the credibility of the appointment process (including transparency and competitiveness), the Judicial Service Commission in 2016 advertised vacant posts of judges.[51] However, the Commission has never carried adverts again and it is not clear how the Commission sources for nominees for position of judge. In practice, the Judicial Service Commission is said to conduct rigorous interviews to obtain candidates for recommendations.[52] Where members of the Commission dissent from the decision of the majority of the Commission, the dissent and reasons thereof are usually kept in the records of the Commission.[53]

According to judges appointed in the past, including in 2019, there was no interview that was conducted but the procedure involved requesting for and receiving submission of curriculum vitae and a vetting procedure that took place in camera. However, new regulations issued in 2021,[54] now make an interview a mandatory requirement. Yet, in practice the president, on an exceptional basis, can appoint without going through the process of interview, for instance, where a person was already appointed to another high-level position.

---

50 Constitution of the United Republic of Tanzania (1977), Article 118(2).

51 See *Mwananchi*, 19 July 2016.

52 Interview with members of the Judicial Service Commission and recently appointed judges in 2023.

53 Judiciary Administration (Service Scheme), Government Notice 10 of 2021, Regulation 10 (4).

54 Judiciary Administration (Service Scheme), Government Notice 10 of 2021.

With regard to recruitment of the general staff of the judiciary, the 2021 Regulations provide for the advertisement of positions in the service after the same has been determined by the chief court administrator in consultation with the respective head of department in the judiciary. The 2021 Regulations also provide that the selection of candidates to fill different posts in the Judiciary Service shall, except otherwise provided, be based on merit through an open competition and interviews.[55]

Assessment of independence of the judiciary

The courts have demonstrated general independence in matters that may be deemed politically sensitive. Indeed, there are several cases where either incumbent or former members of the executive were prosecuted successfully in Tanzania. Some recent cases include *R v Basil Pesambili Mramba and 2 Others*.[56] This was a corruption-related case where the former Minister for Finance, former Minister for Energy and Minerals, and former Permanent Secretary of the Treasury, were prosecuted for their alleged involvement in the decision-making process that wrongfully granted tax exemptions to the UK gold auditing company Alex Stewart (Assayers) Government Business Corporation. It was alleged that the transaction caused a loss of Tanzanian Shilling 11.7 billion to the government. The lower court found the first and second defendants guilty. The accused persons were sentenced to a three-year prison term. On appeal to the High Court of Tanzania, in the case of *Basil Pesambili Mramba and Another v R* consolidated[57] maintained the verdict. In another case, *Amatus Joachimu Liyumba v R*[58] the appellant was the Director of Administration and Personnel in the Bank of Tanzania. His conviction was confirmed by the High Court despite public perception of his wealth and influence.

On one occasion, the late former President John Pombe Magufuli said in a statement: 'Some 28 magistrates were prosecuted (in Tanzania) last year for various criminal offences, mostly corruption, but all 28 of them were acquitted. … It is hard to believe that all 28 of them were

---

55 Judiciary Administration (Service Scheme), 2021 Government Notice 10 of 2021.

56 Criminal Case 1200 of 2008, Court of Resident Magistrate of Dar es Salaam, at Kisutu.

57 Criminal Appeals 96 of 2015 and 113 of 2015, High Court of Tanzania, Dar es Salaam District Registry, at Dar es Salaam (unreported).

58 Criminal Appeal 56 of 2010, High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam, Criminal Appeal 56 of 2010 (unreported).

absolutely not guilty.'[59] However, the government did not go after the magistrates that were set free by the courts or pursue any other retribution following the decisions made. It can thus be concluded that there exists judicial checks and balances and the courts are able to carry out their work without undue interference.

The national budget-making and approval process

The national budgeting process, including approval and management of budgets for all public institutions in Tanzania, including the Judiciary, is governed by the Budget Act of 2015. However, the judiciary has important provisions under the Court Administration Act of 2011. Section 4 of the Budget Act 2015 provides for the principles of fiscal policies that all public entities including the judiciary must adhere to in their policy objectives. The Act requires a public finance management system that incorporates: a borrowing policy which ensures that public debt is sustainable; a fiscal policy that achieves and maintains an adequate buffer of the state's total net worth in the future; and, minimisation of fiscal risk to the country in respect of guaranteed loans, pension obligations and pending bills.

The effect of subjecting the judiciary to these policy objectives is to make the judiciary finances subject to the control of the Paymaster General[60] especially in the case of public loans directed to the judiciary. Other principles under the Budget Act include: observance of a national budget and budgetary process that promotes transparency, accountability and effective management of the economy and the public sector; and observance of the doctrine of separation of powers by ensuring that National Assembly only gets involved in the management of public resources in the instances set out by the Constitution and any other written law.

The overall budgeting process is managed by the Permanent Secretary in charge of finance and the Paymaster General. According to the Act, the Permanent Secretary and Paymaster General must ensure that there is timely and effective preparation of annual estimates of

---

[59] Reuters, 'Tanzania's President Magufuli vows to toughen tax evasion crackdown' *Reuters*, 2 February 2017.

[60] An officer who is vested with powers to control the issue of public money to accounting officers.

expenditure for consideration and approval by the Minister subject to approval by Cabinet before submission to the National Assembly.[61] The steps of budget preparation are elaborated in the Act and they include: preparing budget estimates of the government for approval by the Cabinet; and submission of budget estimates to the National Assembly for approval.[62]

In this regard, the Act provides that public entities shall prepare budget estimates and submit to the Permanent Secretary for scrutiny and approval, and receive funds from the Consolidated Fund based on the approved budget.[63] Upon receipt of budget estimates, the Permanent Secretary is required to either approve the budget estimates with or without variation, or reject the budget estimates.[64] Where the Permanent Secretary rejects the budget estimates, the law requires that he or she provides reasons for the rejection. The Permanent Secretary may also make variations or reject budget estimates on the ground that matters specified in line items do not fall within principal functions of the entity, or amount to an over-budgeted expenditure, or are not commensurate within supply or service obtaining in the market. The budget may also be varied or rejected for failure to correspond to austerity measures outlined in the National Development Plan. The Permanent Secretary may also order revenues collected by a public entity in excess of budget estimates to be remitted to the Consolidated Fund.

The prepared budget estimates are to be submitted to the cabinet by the minister responsible for finance and planning for approval.[65] More relevantly, the Budget Act states that during consideration of the budget estimates by the cabinet, the government shall, in respect of the National Assembly Fund and the Judiciary Fund, ensure that funds allocated are in such sufficient amount as would enable the National Assembly and the Judiciary to perform and discharge their respective functions and duties effectively.[66]

From the premise of control over budget making processes and decisions, it may be argued that the judiciary lacks financial independence as the entire management of budget preparation process is in the

---

61 Budget Act (No 11 of 2015), Section 12.

62 Budget Act (No 11 of 2015), Section 19.

63 Budget Act (No 11 of 2015), Section 22(1).

64 Budget Act (No 11 of 2015), Section 22(2).

65 Budget Act (No 11 of 2015), Section 23(1).

66 Budget Act (No 11 of 2015), Section 22(1).

hands of the executive, through the Ministry of Finance. The evidence of judicial financial independence is, in some cases, seen as a separate process of budget-making and determination of resource needs by the judiciary that is specifically insulated from the executive.[67] However, according to other senior officers in the judiciary, the process of budget making does not necessarily impair judicial financial independence.[68]

Judiciary budget preparation and submission

As mentioned earlier, the Court Administration Act 2011 provides for a specific process of budget development for the judiciary. The Act requires the Judicial Service Commission to initiate the preparation of budget estimates through the Chief Court Administrator. The budget estimates will constitute the sums of money which the judiciary may require for payment of cost and expenditure.[69] The Act also requires the Chief Court Administrator to present the complete budget estimates to the Workers' Council[70] before the estimates are presented to the Judicial Service Commission for formal adoption. The Workers' Councils are established as a forum for representation and participation by workers and are composed of trade union representatives, management, and other representatives of workers in public institutions.[71] Workers' Councils are usually powerful and respected organs and participate in and approve all major undertakings of public institutions including budgets in Tanzania.

After receiving budget estimates, the Judicial Service Commission may make alterations as it deems fit and the adopted budget is thereafter presented to Treasury by the Chief Court Administrator[72] for onward transmission to Parliament for appropriation. While the wording under Section 59(2) of the Judiciary Administration Act appears to suggest that what is submitted to the Treasury is final and awaits appropriation

---

67 Interview with senior official of the judiciary in March 2022.

68 Interviews with senior judiciary officers by the author.

69 Judiciary Administration Act (Act No 4 of 2011), Section 57.

70 Judiciary Administration Act (Act No 4 of 2011), Section 58.

71 Established under the Public Service (Negotiation Machinery) Act No 19 of 2003 (part V) with more elaborate provisions under the Public Service (Negotiation Machinery) Regulations of 2005 (part IV). They are also referred to under Section 73(1) and (2) of the Employment and Labour Relations Act Cap. 366 RE 2019.

72 This is in accordance to the Judiciary Administration Act (Act No 4 of 2011), Section 59(2).

by the Parliament, the marginal notes to that section in the Act read 'negotiations on budget estimates'.

In practice, according to some officials in the Judiciary, since the budget estimates must go through parliamentary committees before the National Assembly's approval, the Treasury and the Judiciary usually negotiate on what can be appropriated to the Judiciary rather than carrying out these negotiations before/during the parliamentary committees sessions.[73] This means that the actual negotiation of the quantum of resources for the Judiciary occurs between the Treasury and Judiciary, even before the budget is submitted to Parliament and such an arrangement carries with it the perception of a lack of independence on the part of the Judiciary.

According to the key informant interviews conducted, the Consolidated budget of the Ministry of Finance and that of the Judiciary is presented together to the Parliamentary Committee by the Minister of Finance but in the presence of the Chief Court Administrator. In practice, it is expected that the two organs – the Ministry of Finance and the Judiciary – will negotiate and agree on the budget and once agreed, the same will be presented by the Minister to the Parliamentary Budget Committee. Thus, if Judiciary resource needs (as required by the Judiciary Administration Act) exceed the ceiling provided to it by the Ministry of Finance, such excess proposals may not be funded in the financial year.

The process of determination of resources for the Judiciary, thus, remains largely uncertain and is sometimes dependent on the personalities involved in the negotiation with the Ministry of Finance. In some cases, where 'higher powers' are intensely involved in the division of resources between government agencies, there might be little room for the Judiciary to negotiate its share. It was also noted that there are other tools at the disposal of the Treasury, such as extra funds that would be allocated to the contingency category and made available to the Judiciary through supplementary funding.

It therefore appears that the decision to approve the judiciary budget proposal or to trim it depends on the political whim of the executive, at the Treasury and cabinet levels, although there is some evidence of the exercise of caution by the executive. For example, a

[73] Interviews with officials in the Directorate of Finance and Planning of the Judiciary in 2022.

respondent from the Treasury recalled an instance where a member of the executive requested to reduce the budget of the judiciary during the cabinet budget meeting and the then-president argued that it would not be reasonable to reduce the budget of the judiciary in a forum where the judiciary itself is not represented.[74]

Disbursement and access to funds

The Judiciary Administration Act[75] establishes the Judiciary Fund, into which all moneys due to the judiciary from the government and external sources, including donor funds, are to be deposited. The Act provides for the establishment, financial sources, management and accountability relating to the Judiciary Fund.[76] The funds due to the Judiciary Fund include those paid by the Treasury into the Fund (Section 52 of the Judiciary Administration Act and the Constitution).

The Chief Court Administrator is vested with sole power of control and administration of the Judiciary Fund. In addition to the moneys that may be paid by the Treasury to the Judiciary Fund, the Fund may receive any grant by a foreign government, international organisation, national organisation or association, or any individual person.[77] However, funds to the Judiciary in the form of government loans are managed through the Treasury and guaranteed by the government under the relevant law.[78]

Unlike other government institutions, the Judiciary has freedom to reallocate funds to different votes within the same budget. In practice, according to key respondents, this flexibility in reallocations is commonly used by the Judiciary. For example, reallocation/transfer of judges and magistrates (which may be necessitated by the nature of the cases they handle) so as to protect them, or transportation of witnesses (for instance in murder cases which may require a large number of them). In such scenarios, the expenditure may occur and/or change

74 Interview with an official in the Directorate of Planning and Finance of the Judiciary who had also worked at the Treasury before joining the Judiciary in 2022.

75 Act No 4 of 2011.

76 Judiciary Administration Act (Act No 4 of 2011), Section 52 and 56.

77 Judiciary Administration Act (Act No 4 of 2011), Section 53.

78 Government Loans, Guarantees and Grant Act and the Public Finance Act, Section 53(2).

as circumstances demand and such expenditure flexibility allows the judiciary to respond appropriately.[79]

The Budget Act of 2015 provides that the Treasury shall, within every quarter in each financial year, pay out of the Consolidated Fund into the National Assembly Fund and Judiciary Fund, as the case may be, all moneys appropriated by the Parliament to cover expenditures for activities of the National Assembly and the Judiciary in respect of such quarter.[80] The conditions that must be fulfilled before such disbursement include: submission of the annual cash flow plan, procurement plans and recruitment plans as approved by the National Assembly and by the minister responsible for planning. The annual cash flow plan is the basis for release of funds by the Accountant General to an accounting officer. The Chief Court Administrator, who is the accounting officer for the judiciary, must also commit the budget in accordance with the annual cash flow plan.[81]

Respondents from the judiciary confirmed that funds are usually released as per the above prescriptions of the law, and there is flexibility in the reallocation of funds, an arrangement that is unique for the Judiciary. However, respondents noted that judicial financial independence can be better achieved if the same arrangements are guaranteed through a constitutional framework. Respondents also expressed a strong view that there should be a guaranteed minimum percentage funding for the judiciary from the national budget. There are, however, no recorded instances or evidence (direct or implied) where court decisions (including those with political controversy) have affected (or seem to affect) the resourcing of courts. Furthermore, as the table below shows, the budget of the judiciary has been growing in real terms relative to the needs of the judiciary, although it has remained more or less the same proportion in terms of percentage.

---

79 Interview with an official at the judiciary in 2022.

80 Budget Act (No 11 of 2015), Section 48.

81 Budget Act (No 11 of 2015), Section 44(1) - (3).

Table 1: Trend of the budget allocation to the judiciary of Tanzania from 2017/2018-2021/2022

FY	Amount allocated (billion Tshs)	Total budget (trillion Tshs)	Percentage of judiciary budget
2021/22	153,228,859,000.00	36,300,000,000,000	0.42 %
2020/21	192,043,767,786.10 (after adjustment)	34,888,000,000,000	0.45 %
2019/20	132,641,297,534.00	33,100,000,000,000	0.40 %
2018/19	141,584,737,540.00	32,500,000,000,000	0.44%
2017/18	125,117,129,000.00	29,530,000,000,000	0.42 %

Source: Information provided by the Judiciary of Tanzania.

While there are no minimum constitutional guarantees regarding the resources and budget of the Judiciary, the legislative framework in place generally shields and insulates judiciary finances. The legislative provisions on the budget process enable the judiciary to budget according to its priorities. The law provides for the involvement of the Judiciary, through the Office of the Chief Court Administrator, and the manner of access to funds, including regular disbursements to the Judiciary Fund.

There has also been political will from the state to invest in the judiciary as well as to support it for external funding. Moreover, in practice, even though there is no constitutionally or legally fixed percentage of judiciary budget over national budget, there has been consistency of a particular trend of a certain percentage of the budget for the judiciary.

The judiciary has consistently received funding that ranges between 0.40 percent to 0.45 percent. However, respondents from the judiciary suggest that the minimum allocation should be secured at 2 percent of the total government budget. Furthermore, while the judiciary usually receives lower amounts than what is requested for, the gap between the amount requested and the amount actually received is not significant. For instance, in the financial year 2021/22, the judiciary requested a total of Tshs 171,248,952,000 and Tshs 153,228,859,000 was approved.

Judicial accountability in the management of finances

Section 54(1) of the Judiciary Administration Act 2011 requires the judiciary through the Chief Court Administrator to keep proper books of accounts, prepare a statement of income and expense during the financial year, no later than three months following the end of each financial year. The accounts relating to the operation of the Judiciary Fund on the last day of the financial year shall be submitted for audit by the Controller and Auditor General in accordance with the Public Audit Act, the Public Procurement Act and the Public Finance Act.

The law also requires the Judiciary through the Judicial Service Commission, in consultation with the minister responsible for finance, to make internal financial regulations for the proper management and financial control of the operations of the Judiciary Fund.[82] The Judicial Service Commission has the duty to ensure that the judiciary's financial regulations are in line with the Public Audit Act, the Public Procurement Act and the Public Finance Act.

Moreover, the law[83] provides that the Chief Court Administrator shall in each year submit to the minister copies of statement of income and expenditure and a copy of the Auditor General's Report together with a report on the activities of the Judicial Service Commission during the financial year. Once received, the minister is also required to submit it to the National Assembly.

In addition to the internal control mechanisms, as discussed earlier, the law also requires the judiciary through the Chief Court Administrator to submit the budget estimates to the Workers' Council before they are adopted by the Judicial Service Commission. This ensures transparency, ownership (as the members of the Workers' Council are elected and represent members of the judiciary). More importantly, the presentation to the Workers' Council enhances the principle of value for money because staff who work closely in daily projects of the organisations are more likely to comment on the feasibility of proposed budget estimates.

---

82 Judiciary Administration Act (No 4 of 2011), Section 55.

83 Judiciary Administration Act (No 4 of 2011), Section 56.

Assessment of judicial financial independence in Tanzania

The preceding sections have demonstrated that the independence of the judiciary in Tanzania is guaranteed by the Constitution and enabling legislative framework. While there are a number of processes that can be improved, there are general guarantees, in law and practice, of judicial financial independence. The securing of judicial financial independence has been enabled by the enactment of the Judiciary Administration Act, 2011 and the Budget Act 2015. These laws secure the budgeting and funding processes of the judiciary and further enable control of funds by the judiciary, and include stakeholder participation in the development of the judiciary budget.

The establishment of the Judiciary Fund under Section 52 of the Judiciary Administration Act 2011 was also a welcome development. The law clearly mandates the Chief Court Administrator to exercise the overall administration and control over the Judiciary Fund. More importantly, the judiciary can mobilise funding beyond the normal budgetary allocations of the government from donors, be they national or foreign, governmental or non-governmental.

However, major decision-making powers still remain with the executive, especially in determining the resources of the judiciary. The importance of ensuring that the judiciary not only determines its resources but also controls them cannot be overemphasised. For instance, the Budget Act 2015 clearly provides that the Parliamentary Budget Committee shall consider the Budget and make recommendations to the National Assembly,[84] and scrutinise the budget estimates of the National Audit Office, Judiciary and the National Assembly. This means that the budget of the judiciary is scrutinised by the Parliamentary Budget Committee which is part of the legislative arm of the state, and which then recommends its deliberations to the National Assembly, the legislative arm of the state.

Equally, the same Budget Act provides that before the National Assembly debates the budget estimates, the Parliamentary Budget Committee shall discuss the estimates and make recommendations to the National Assembly *taking into account views of the minister* and the public as submitted before the cut-off date prescribed in the regulations.[85]

---

[84] Budget Act (No 11 of 2015), Section 9(1)(b) and (c),

[85] Budget Act (No 11 of 2015), Section 25.

Again, the Act subjects the budget of the judiciary to views of the minister who is part of the executive.[86]

Finally, Section 26 of the Budget Act provides that the National Assembly shall, on or before 30th June each year and after debate in the National Assembly, approve the annual national budget of the Government for the next financial year by way of open vote and call of name of each member of Parliament. The National Assembly is headed by the Speaker (head of legislature), and it is only the views of the minister who is part of the executive (and the public) that are taken into account by the Parliamentary Budget Committee as it makes recommendations to the National Assembly for debate preceding approval. To the best knowledge of this author, nowhere does the law provide for the views of the Chief Court Administrator or the Judicial Service Commission to be considered at this higher level stage.

According to the law, after the Chief Court Administrator submits the budget estimates as approved by the Judicial Service Commission to the treasury with a copy submitted to the minister (which in practice might have taken into account the negotiation and discussions between the judiciary and the treasury, as discussed earlier above), the Chief Court Administrator then loses control over the budget estimates approval process. And as stated above, there is no legal requirement to solicit or consider the views of the Chief Court Administrator in the process. However, as stated earlier, Section 23(4) of the Budget Act provides that the government shall, in respect of the National Assembly Fund and *the Judiciary Fund*, ensure that funds allocated are in such sufficient amount as would enable the National Assembly and the Judiciary to perform and discharge their respective functions and duties effectively. It is submitted that without mechanisms for safeguarding this intention of the legislature which includes formal consultation and consideration of the views of the Chief Court Administrator, there is a danger of the budgetary needs of the judiciary being undermined.

Moreover, the Judiciary Fund (which includes money that may be solicited from outside the normal government budget allocations processes) is still subjected to the control of the executive by the Budget Act.[87] Thus, the judiciary lacks room to create financial autonomy. Again, the words of the former Chief Justice of Kenya, who said that

---

[86] Budget Act (No 11 of 2015), Section 25.

[87] As per Section 58(a) read together with Section 4 of the Public Finance Act (Cap 348 RE 2020) as well as Section 53(2) of the Judiciary Administration Act, Cap 35 RE 2019.

'the performance of the judiciary in its administrative matters depends directly upon financial autonomy of the court because effective and efficient administration requires resources',[88] call for some improvement for the effective operation of the judiciary in Tanzania.

Conclusion

The United Republic of Tanzania has made some important improvements in relation to the independence of the judiciary. However, it suffices to mention that the increased accessibility through increased use of information communication technologies (ICTs), the increase of women judges, among others, as well as taking bold stances in dealing with cases involving personalities associated with power (whether financially or politically), demonstrate the level of independence and assurance to the public that people can run to the judiciary for justice. There is also established the office of the Chief Court Administrator and associated officials, the Judicial Service Commission and other organs such as the Workers' Council which ensure good governance is adhered to, including accountability for the funds allocated to the judiciary. The Constitution provides for the independence of the judiciary, and the legislature has enacted laws to enforce the spirit of the Constitution. However, there is room for improvement as discussed in this chapter.

There is a problem of lack of room to consider the views of the Chief Court Administrator at the higher levels of the budget approval process as discussed. However, the views of the minister (for finance and planning) are considered. At the same time, the consideration or scrutiny of the submitted budget estimates is carried out by the members of Parliament (the Parliamentary Budget Committee) for recommendations to the National Assembly where the accounting officer of the judiciary is not a member. This makes the position of the judiciary inferior to the other two arms of the state in this context, whether *de facto* or *de jure.*

As much as absolute separation of powers has never been practical, there are still unexplored avenues that could be utilised to enhance appropriate separation of powers. This could include specifying the

[88] Evans Gicheru (CJ) 'Financial and administrative autonomy of the court'; A paper presented at Maputo, Mozambique on the occasion of the Southern African Judges Commission (SAJC) Meeting, 9-13 August 2006.

percentage of the government budget for allocation to the judiciary. This could limit the discretion of both the executive and the parliamentary committee or National Assembly.

Secondly, the views of the accounting officer of the judiciary should mandatorily be sought and considered and if not accepted, the reasons thereof should be provided, with the possibility that the National Assembly and the public have access to the views and reasons for not positively considering them. This is important because adjustments are necessary in all budgetary planning processes as competing priorities are balanced against existing scarce resources. However, priorities should foremost be considered from the perspective of the user department to ensure priorities for budgetary allocations are not made by people who are not best positioned to know the context for each proposal.

Finally, the judiciary should be allowed to independently utilise funds received from external sources. This will incentivise the judiciary in fundraising and exercising efficient management skills of the funds because their diligence can be attributed to the output within the judiciary.

CHAPTER TEN: ZAMBIA

Financial independence and effectiveness of the judiciary in Zambia: A reality or mirage?

Lungowe Matakala

Introduction

Judicial financial independence is the cornerstone of a just and effective legal system. Financial independence and autonomy contribute significantly to the ability of the courts to make decisions impartially, free from political or other external influences, and fulfil their role in upholding the rule of law and protecting individual rights. It is widely acknowledged by both legal practitioners and scholars that a judiciary that is not financially independent is bound to be ineffective. An ineffective judiciary is said to be, among others, one that fails to promote and protect human rights, the rule of law, the separation of powers, and the fair and effective administration of justice.

This chapter examines the financial independence and effectiveness of the judiciary in Zambia. It seeks to answer the question whether the financial independence and autonomy of the judiciary and courts in Zambia is a reality or mirage. The argument presented in this chapter is that the Zambian judiciary does not enjoy financial independence despite the safeguards provided by law. The chapter first gives a brief historical background of the Zambian judiciary and proceeds to highlight its constitutional framework as laid out in the Constitution Amendment Act of 2016[1] that overhauled the judiciary structure in Zambia. Next, the chapter discusses judicial independence by examining court cases that were deemed politically sensitive and how the courts adjudicated on such cases. The continued influence and authority of the President in key judicial appointments, such as the Chief Justice and judges, inherently limits the extent of the independence of the judiciary. The chapter further discusses the financing structure of the judiciary in terms of autonomy, accountability, and management.

[1] No 2 of 2016.

Brief history of the Zambian judiciary

During the colonial era, Zambia, then known as Northern Rhodesia, practised a dual legal system that comprised English law and African customary law. From inception, this system of judicial administration differentiated between Europeans and native Africans. Section 14 of the Royal Charter[2] entrusted the administration of Rhodesia to the British South African Company (BSA Company) and authorised a discriminatory dual legal system, but did not suggest its true dimensions as indicated below:

> In the administration of justice to the said peoples or inhabitants, careful regard shall always be made to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to the holding, possession, transfer and disposition of lands and goods, and testate or intestate succession thereto, and marriages, divorces, legitimacy, and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the peoples or inhabitants thereof.[3]

In actual practice, the BSA Company left the judicial administration of Africans to Africans.[4] The colonial judiciary comprised a hierarchical system with British judges overseeing local magistrates and headmen. The colonial judiciary was not designed to protect the rights and interests of the local population but rather to maintain control and order on behalf of the colonial authorities.[5] It served the interests of the colonial administration while limiting access to justice for the indigenous population.

Zambia gained independence from British colonial rule on 24 October 1964. At independence, Zambia developed a plural legal system that would provide legal protection to Zambians according to their values. The unique legal system comprised customary law, common law traditions, and modern constitutional principles such as the primacy of written laws and the Bill of Rights.[6]

---

2 British South Africa Company, Royal Charter of Incorporation of the British South Africa Company, 29 October 1889.

3 British South Africa Company, Royal Charter of Incorporation of the British South Africa Company, 514.

4 A Epstein, 'The administration of justice and the urban African' *London, HMSO* (1953) 20-21.

5 A Epstein, 'The administration of justice and the urban African' 20-21.

6 See for example L Mushota, 'How Zambia acquired a dual legal system' *The University of Zambia Law Association* (2002) 25-26.

Before independence, the Ministry of Native Affairs oversaw the native court system. This ministry was abolished at independence. The judiciary in Zambia then became a department under the Ministry of Justice, headed by a commissioner. The judiciary later developed into a fully-fledged organ of the state whose autonomy was protected in the 1991 Constitution of Zambia.[7]

When Zambia amended its Constitution in 2016, the judiciary underwent a major transformation that notably overhauled the structure of courts, the composition of Supreme Court judges, as well as the procedure for removal of judges from office. For instance, prior to 2016, Zambia did not have a Constitutional Court or a Court of Appeal. The number of Supreme Court judges was 9 and not 13, and the power to remove judges was vested in the Judicial Compliant Commission (JCC) and not the Judicial Service Commission (JSC), as is the case now. These changes are discussed in detail in Sections 3 and 4 below.

The institutional framework of the Zambian judiciary

Zambia's court structure

Judicial authority is vested in the courts and must be exercised by the courts in accordance with the Constitution and other laws.[8] The Constitution, via the 2016 amendment, recognises that the judicial authority of the Republic, as exercised by the courts, emanates from the people of Zambia, and shall be exercised in a just manner that promotes accountability.[9] Article 119 of the Constitution[10] vests the courts with the authority to hear and determine all civil and criminal matters, and matters relating to the Constitution. Thus, as in many other functional democracies, the judiciary in Zambia enjoys the position of the constitutional guardian of democracy, the rule of law and promotion of social order and justice.

The courts are guided to speedily administer justice to all without discrimination, award adequate compensation to claimants, promote alternative forms of dispute resolution, administer justice without

7 Act No 1 of 1991.

8 Constitution of Zambia (2016), Article 119.

9 Constitution of Zambia (2016), Article 118.

10 (Amendment) Act No 2 of 2016.

undue regard to procedural technicalities, and promote the values and principles of the Constitution.[11]

In Zambia, the courts consist of the superior and lower courts. Superior courts comprise the Supreme Court, Constitutional Court, Court of Appeal, and the High Court.[12] In addition, there are specialised tribunals such as the Lands Tribunal, Tax Appeals Tribunal, and the Competition and Consumer Protection Tribunal, all of which rank the same as the High Court. The lower courts consist of the Subordinate or Magistrates Court, the Small Claims Court, the Local Court, and other courts as may be prescribed by statute.[13]

The Supreme Court is established under Article 124 of the Constitution. It is the highest court in Zambia and the final appellate court.[14] It ranks at par with the Constitutional Court as the two highest courts in civil matters. It has jurisdiction to consider appeals from the Court of Appeal and any other jurisdiction conferred on it by legislation.[15] The decisions made by the Supreme Court are binding and form precedent, except when the interest of justice and the development of jurisprudence require a departure. In such cases, the Supreme Court is empowered to deviate from its previous decisions.

According to Section 2 of the Superior Courts (Number of Judges) Act,[16] the Supreme Court must have a total of 13 judges, including the Chief Justice and Deputy Chief Justice. However, presently, it only has 8 judges and sits in Lusaka, with circuits in Ndola and Kabwe.[17] This means that the legal establishment is not filled.

The Constitutional Court is established under Article 127 of the Constitution of Zambia[18] and has original and final jurisdiction in all matters regarding the interpretation and violation of the Constitution. Therefore, when a constitutional matter arises in a case before another court, it must be referred to the Constitutional Court. Like the Supreme Court, it has an establishment of a maximum of 13 judges, which

---

11 Constitution of Zambia (2016), Article 118.

12 Constitution of Zambia (2016), Article 266.

13 Constitution of Zambia (2016), Article 120.

14 Constitution of Zambia (2016), Article 124.

15 Constitution of Zambia (2016), Article 125.

16 (Amendment) Act No 9 of 2016.

17 Southern African Institute for Policy and Research, 'Zambia judicial sector public expenditure and institutional review' *PEIR* (2022) 18.

18 Constitution of Zambia (Amendment) Act (No 2 of 2016), Article 127.

includes the President and Deputy President of the Court.[19] Presently, it has 10 judges and sits only in Lusaka.[20]

The Court of Appeal is established under Article 130 of the Constitution[21] and has jurisdiction to hear appeals from the High Court and quasi-judicial bodies. Its jurisdiction excludes matters related to elections and matters under the exclusive jurisdiction of the Constitutional Court. Appeals in electoral matters from the High Court fall under the Constitutional Court's jurisdiction. The Court of Appeal is composed of the Judge President, the Deputy Judge President, and 17 Court of Appeal judges.[22] Presently, it is composed of the Judge President, the Deputy Judge President, and 10 judges. An uneven number of not less than three judges constitutes the Court of Appeal.[23] The Court has 10 gazetted sessions: five in Lusaka, three in Ndola, and two in Kabwe, to hear and determine criminal and civil appeals.[24]

Article 133(1) of the Constitution establishes the High Court.[25] The High Court has both original and appellate jurisdictions in civil and criminal matters, and it determines matters relating to the Bill of Rights as enshrined in Articles 11 to 26 of the Constitution. The primary mandate of the High Court is to conduct judicial review and interpretation of the law. If any statute or subordinate legislation is determined to be in violation of the Zambian Constitution, the High Court has the authority to declare it unconstitutional. Decisions from the Subordinate Court are appealed to the High Court.

The High Court consists of various divisions: the General List or Principal Registry, Commercial Division, Industrial Relations Division, Family and Children's Division (that has been enhanced by the provisions of the Children's Code Act (No 12 of 2022)), and the newly created Economic and Financial Crimes Division. It has permanent seats in Lusaka, Kitwe, Livingstone, Ndola, Kabwe, Chipata, Mongu, Solwezi, Kasama, and Mansa. The High Court has a maximum establishment of 60

---

19 Constitution of Zambia (Amendment) Act (No 2 of 2016), Article 127.

20 Southern African Institute for Policy and Research, 'Zambia judicial sector public expenditure and institutional review' 18.

21 Constitution of Zambia (Amendment) Act (No 2 of 2016), Article 130.

22 Constitution of Zambia (Amendment) Act (No 2 of 2016), Article 130; See also Superior Courts (Number of Judges) Act (No 9 of 2016).

23 Constitution of Zambia (Amendment) Act (No 2 of 2016), Article 132(1).

24 Judiciary of Zambia, 'Court of Appeal' 31 August 2023 - https://judiciaryzambia.com/court-of-appeal/.

25 Constitution of Zambia (2016), Article 133.

judges, of which 51 positions are filled.[26] Article 135 of the Constitution states that '[t]he High Court shall be constituted by one judge or such other number of judges as the Chief Justice may determine'. The Chief Justice of Zambia is an *ex-officio* judge of the High Court. This means that in certain matters, the Chief Justice may choose to 'descend' from the Supreme Court and take part in High Court hearings.

The subordinate or lower courts are established under Article 120 of the Constitution, with jurisdiction to hear and determine both civil and criminal matters, administer oaths and affirmations, visit prisons as justices of peace, and hear appeals from the local courts. The operations and functions of subordinate courts are regulated by the Subordinate Courts Act,[27] which provides for their constitution, jurisdiction, procedures, as well as appeals to the High Court. Subordinate courts are controlled and supervised by the High Court through reviews and appeals. Subordinate courts are presided over by magistrates. There are 64 subordinate courts operating in 117 districts in Zambia. The civil jurisdiction of the subordinate courts as provided for in the law[28] stipulates ZMW 100,000 as the maximum amount the court can hear and determine, while the Criminal Procedure Code provides nine years[29] as the maximum imprisonment term the court can give as punishment.

The small claims courts are established by Article 120 of the Constitution. A small claims court determines minor disputes by way of a fast-track procedure.[30] Except in limited instances, it deals with minor pecuniary claims that are under ZMW 20,000. It is a court of record, unlike the local courts. Processes and procedures are governed by the Small Claims Court Act.[31]

The local courts established by Article 120 of the Constitution are the lowest in the hierarchy of the judiciary. In terms of distribution and reach, they interface with the most vulnerable members of the community in all urban and remote areas of the country. In 2018, the total number of local courts was 529 across the country, a number greater than all superior courts combined. Section 12(1) of the Local Courts Act

---

26 Southern African Institute for Policy and Research, 'Zambia judicial sector public expenditure and institutional review' 18.

27 Subordinate Courts Act (No 28 of 1995).

28 Subordinate Courts Act (No 4 of 2018).

29 Criminal Procedure Act (No 88 of 2016).

30 Small Claims Court Act (No 14 of 2008).

31 Small Claims Court Act (No 14 of 2008).

(Chapter 29 of the Laws of Zambia) provides that the local court has jurisdiction over African customary law applicable to any matter if it is not repugnant to natural justice or morality, or incompatible with the provision of written law; all by-laws and regulations made under the provision of the Local Government Act and in the areas of jurisdiction of such local courts, and; any written law which such a court is authorised to administer under Section 13 of the Local Courts Act.

Local courts are courts of first instance, dealing primarily with civil matters. They may handle minor criminal cases, tort, and simple contracts as directed by the Chief Justice. Any sentence of imprisonment by a local court must be confirmed by an authorised officer of a local court. Cases relating to customary marriage, family matters, and property-related issues make up a great part of the cases that come before local courts.[32] Given that local courts are less complicated to access than superior courts, local courts hear more cases than any other court. In other words, the local courts are the backbone of civil justice in Zambia.

The Judicial Service Commission

The Judicial Service Commission (JSC) is established under Article 219 of the Constitution of Zambia. It is charged with the responsibility to regulate human resource management in the Judicial Service.[33] As such, it has the power to appoint (other than judges appointed by the president), confirm, promote, second, re-grade, transfer, discipline, and separate (that is, terminate employment contracts) employees in the Judicial Service. It is also authorised to withhold, reduce, defer, or suspend salaries of employees in the Judicial Service. Further, it has the right to hear and determine complaints and appeals from employees in the Judicial Service.

The Judicial Service Commission[34] is composed of: the chairperson, appointed by the president and who is a person who holds or qualifies to hold high judicial office or has held high judicial office; a judge nominated by the Chief Justice; the Attorney General, with the Solicitor General as the alternate; the Permanent Secretary responsible for Public

---

[32] Karol Limondin and Charles Dinda, 'National report – Zambia' Global access to justice, 1 August 2022 - https://globalaccesstojustice.com/global-overview-zambia/.

[33] Constitution of Zambia (2016), Article 220.

[34] Service Commissions Act (No 10 of 2016).

Service Management; a magistrate nominated by the Chief Justice; a representative of the Law Association of Zambia, nominated by that Association and appointed by the president; the dean of a law school of a public higher education institution, nominated by the minister responsible for justice, and; one member appointed by the president.

The Constitution provides for the independence of all commissions under the Constitution, including the Judicial Service Commission, and specifically prescribes that all commissions shall be subject only to the Constitution and the law; shall be independent and not be subject to the control of a person or authority in the performance of their functions; shall act with dignity, professionalism, propriety, and integrity; shall be non-partisan; and shall be impartial in the exercise of their authority.[35]

The Judicial Complaints Commission

The Judicial Complaints Commission (JCC) is established under Article 236 of the Constitution of Zambia. The Judicial Complaints Commission is charged with the responsibility to enforce the Code of Conduct for judges and other judicial officers. It ensures that judges and other judicial officers are accountable to the people for the performance of their functions. As such, it receives and hears complaints lodged against judicial officers, and makes recommendations to the appropriate institution or authority for action.

The Judicial Complaints Commission is composed of five members who have held or are qualified to hold high judicial office.[36] The members are appointed by the president subject to ratification by the National Assembly, and they hold office for a period of four years subject to renewal.

Appointments and removal of judges and judicial officers

Article 140 of the Constitution states that the Chief Justice, Deputy Chief Justice, President and Deputy President of the Constitutional Court, and other judges are appointed by the president upon the recommendation of the Judicial Service Commission, and subject to ratification by the National Assembly. Article 141 provides specifications

[35] Constitution of Zambia (2016), Article 216.

[36] Judicial Code of Conduct Act (No 13 of 1999), Section 20.

and minimum qualifications for persons to be appointed to various courts. The Chief Justice and President of the Constitutional Court can only hold office for a period of 10 years. If they have served for 10 years and wish to continue serving, they may do so as ordinary members of the court until they attain the retirement age of 75 years.

Article 145 of the Constitution provides for the Judicial Service Commission to appoint judicial officers. This includes the appointment of the Chief Administrator, who is responsible for the day-to-day running of the Judicature and the implementation of resolutions of the Judicial Service Commission. The Chief Administrator is the controlling officer of the Judicature's expenditure;[37] keeps books of accounts and other records in relation to the Judicature; and prepares financial reports on the activities of the Judicature and submits them to the President. The Chief Administrator is appointed by the President, following a recommendation by the Judicial Service Commission.[38] The Judicial Service Commission first advertises the position to the public and recommends to the president a suitable candidate for appointment. The appointment process can be said to be credible given that an appointed candidate has to meet minimum criteria including academic qualifications, experience and personal values.[39]

This process of appointment of the Chief Administrator can be argued to be transparent and ensures independence in the discharge of duties. In practice, persons appointed as Chief Administrators tend to serve in different political regimes. This may demonstrate relative independence in the office despite the requirement of presidential appointment.

A judge may be removed from office on grounds of mental or physical disability that makes the judge incapable of performing judicial functions: incompetence, gross misconduct or bankruptcy.[40] Article 144 of the Constitution stipulates the procedure of removing

---

37 Finance (Control and Management) Act (No 347 of 2018).

38 Judicature Administration Act (No 42 of 1994), Section 3(1).

39 Section 5(3) of the Judiciary Administration Act (No 23 of 2016) provides that 'a person qualifies for appointment as Chief Administrator if the person has, as a minimum academic qualification, a degree in public administration, law or other Social Science from a – higher education institution established, declared or registered under the Higher Education Act, 2013: or foreign higher education institution whose qualifications are recognised by the Zambia Qualifications Authority; has proven knowledge and experience in public administration; and is of high integrity and good character.'

40 Constitution of Zambia (2016), Article 143.

a judge from office. It states that the process can be initiated by the Judicial Complaints Commission or by a complaint made to the Judicial Complaints Commission, based on grounds specified in Article 143 of the Constitution. The Judicial Complaints Commission decides if a *prima facie* case is established against a judge and submits a report to the president. Upon receiving the report, the president must within seven days inform the Judicial Complaints Commission of the judge's suspension and in return, the Judicial Complaints Commission must within 30 days, hear the matter against the judge and recommend either the revocation of the judge's suspension or removal of the judge from office. While there are no overt examples of a lack of independence on the part of the Judicial Complaints Commission, the manner of appointment of its members, specifically the appointment by the president, casts a shadow on its independence.

Independence of the judiciary

In terms of the framework, Zambia has adequate legal provisions to protect the independence of the judiciary from interference and ensure financial autonomy. For instance, Article 122 of the Constitution of Zambia provides for the judiciary to operate free from external interference. Furthermore, the Constitution provides for the financial independence of the judiciary. It states that the 'Judiciary shall be a self-accounting institution' and that it will 'deal directly with the ministry responsible for finance in matters relating to its finance'. It provides further that 'the Judiciary shall be adequately funded in a fiscal year to enable it to effectively carry out its functions'.

However, the question whether the actual practice of judicial independence reflects the constitutional framework is less clear. The role of the Judicial Service Commission is critical to the safeguarding of the independence of the judiciary. However, the manner of selecting representatives to the body, as earlier demonstrated, does not guarantee confidence in the independence of the body. Specifically, despite the laws of Zambia clearly providing for the independence of the Judicial Service Commission, the connection or rather close proximity between the executive and the Judicial Service Commission is too visible to ignore. For instance, only one out of the eight[41] Judicial

[41] A representative of the Law Association of Zambia nominated by that Association and appointed by the President.

Service Commission members can be said to have been appointed free of the executive. The rest are appointed by the president or persons appointed by the president. The Judicial Service Commission has too many representatives of political parties and persons nominated by the president, in comparison to representatives of the judiciary, the legal profession and academia.

The centrality of the presidency in the appointment of persons charged with the responsibility of ensuring the credibility of the judiciary is equally seen in the appointment of members of the Judicial Complaints Commission. Though the appointments are subject to ratification by the National Assembly, where the ruling party has the majority members of parliament, such an oversight role is weakened as members of the legislature are likely to endorse decisions of the executive without question.

Statements by politicians and their allies that touch on cases that are in court are a common occurrence, and this has a bearing on judicial independence. In 2017, former President Edgar Lungu warned the Constitutional Court judges against preventing him from running for another term in office, warning that such a step would plunge the country into chaos if they made any 'adventurous' ruling.[42] The statement was made during an active court case *Dr Daniel Pule, Wright Musoma, Pastor Peter Chanda, and Robert Mwanza v Attorney General and Davies Mwila*[43] where the four sought the interpretation of Articles 106 (1), (3), (6) and 267 (3) (C) of the Constitution of Zambia in the matter of tenure of office and the eligibility of Mr Edgar Chagwa Lungu as presidential candidate in the presidential election that was to be held in 2021. The Law Association of Zambia[44] condemned the statement by the then President stating that it served 'to undermine the authority of the judiciary and erode public confidence in the institution'. The Constitutional Court went on to rule that President Lungu was eligible to vie for the General Election on 12 August 2021. While there is no evidence that the statement laid the basis for the decision, the character and attitude of the executive demonstrated a readiness to interfere with decision-making in court processes.

---

42 Reuters, 'Zambian President warns judges of chaos if they block his re-election' *Reuters*, 4 November 2017.

43 CCZ Judgement No 36 of 2017.

44 Reuters, 'Zambian President warns judges of chaos if they block his re-election' *Reuters*, 4 November 2017.

In the 2018 case of *The People v Hakainde Hichilema and 5 Others,*[45] it was alleged that Hakainde Hichilema (then opposition leader) and others had prepared and endeavoured to overthrow by unlawful means the Government of Edgar Chagwa Lungu. The accused were also charged with disobeying an order or command by a public officer to give way to the presidential motorcade, and that Hichilema had used insulting language contrary to the law.[46]

The arrest and charge of treason against Mr Hichilema (who was by then the leading opposition political party leader) was widely perceived as a result of political pressure and interference in the investigative and prosecution agencies of the government. The arrest and arraignment of Hichilema was preceded by political statements by allies of the then president and the ruling party.[47] It is reported that then President Edgar Lungu resisted requests to intervene in the case, stating that he had no power to intervene in criminal justice, and that, as a lawyer, he understood that his power was only limited to the pardoning of convicts as opposed to suspects on trial.[48] Charges against Hichilema and others were later withdrawn through a *nolle prosequi* by the Director of Public Prosecutions, following an intervention by the Secretary General of the Commonwealth.[49]

In the 2019 case of *Chishimba Kambwili v Attorney General,*[50] Chishimba Kambwili, a member of parliament for the then ruling Patriotic Front (PF), had his seat declared vacant in February 2019 by the Speaker of the National Assembly, Dr Patrick Matibini, on the basis that by acting as a consultant for an opposition party (under which he was not elected to Parliament), he had 'crossed the floor' against constitutional provision. The Constitutional Court ruled as unconstitutional the action of the Speaker of the National Assembly to declare Chishimba Kambwili's seat vacant. The ruling against the Speaker inspired confidence in the independence of the judiciary in Zambia.

---

45 *Hakainde Hichilema & Others v Government of the Republic of Zambia* (Appeal 28 of 2018) [2020] ZMSC 37 (11 June 2020).

46 Penal Code, Cap 87 of the Laws of Zambia, Section 179.

47 Mwebantu, 'Mumbi Phiri attacks police over Mongu motorcade incident' on Facebook - < https://www.facebook.com/Mwebantu/photos/a.247946581992111/1288372951282797/?type=3&_rdc=2&_rdr > on 1 September 2023.

48 Africa News, 'Zambia President "won't intervene" in opposition chief's treason case' *Africa News*, 12 September 2019.

49 The Commonwealth, 'Secretary General "delighted" with Zambian opposition leader's release' 16 August 2017.

50 2019/CC/009.

Historically, and to its credit, the judiciary has consistently asserted its independence, especially in politically sensitive cases, for instance in the 1990 High Court case of *The People v Kambarange Kaunda and Raffick Mulla and in the Matter of Art. 23(9) of the Constitution*.[51] The facts of the matter were that Kambarange Kaunda, the son of then Republican President Kenneth Kaunda, was accused of firing a shot that killed a woman. The Director of Public Prosecutions (DPP) had directed that criminal proceedings should not be instituted against Kambarange and Raffick. However, an inquest was held and the coroner ruled that Kambarange and Raffick should be arrested and charged with murder. The police followed the coroner's ruling, prior to receiving directions from the DPP.

Kambarange and Raffick applied to the High Court contending that the decision of the coroner, which was acted upon by the police, amounted to a violation of their constitutional rights in Article 13 (liberty, security of person, association and property, among others) and Article 20 (protection of the law) of the Constitution of Zambia; and that it was an infringement of the DPP's free and fair exercise of his powers in conducting prosecution. On 6 September 1990, Justice Mumbilima ruled that while the police are responsible to the DPP's office, they do not need the DPP's authority to arrest and charge suspects. She also held that arresting the applicants did not violate their constitutional rights. The matter proceeded to trial and Kambarange was prosecuted and convicted of murder. This decision sent a clear message that the rule of law applies impartially to all citizens.[52]

Kambarange, however, appealed against this decision and the matter was heard by the Supreme Court in 1992. In the case of *Kambarange Mpundu Kaunda v the People*,[53] the decision of the High Court was set aside based on the argument that Kambarange had fired the shot in self-defence as the deceased and other people continued to advance despite him having fired warning shots.

Similarly, in the 1995 case of *Christine Mulundika and 7 Others v The People*,[54] the Supreme Court decided to strike down Section 5(4) of the Public Order Act, which had granted excessive powers to the police in

---

51 (1990 - 1992) ZR 30 (HC).

52 JB Sakala, 'The role of the judiciary in the enforcement of human rights in Zambia' unpublished PhD thesis, University of Zambia, 1999, 127.

53 *Kambarage Mpundu Kaunda v The People*, 1992 SJ 1 (SC).

54 *Christine Mulundika and 5 others v The People* (SCZ Appeal) No 95 of 1995.

overseeing public gatherings and processions. For instance, a political party needed to apply for a permit to hold a rally, and the police had the power to decline such an application. The Court deemed this to be a violation of the freedom of association and assembly.

In the 2016 case of *Steven Katuka and Law Association of Zambia v Attorney General and Ngosa Simbyakula and 63 Others*,[55] the Constitutional Court ordered ministers and their deputies to vacate their ministerial offices and pay back salaries and allowances that they had been drawing from public coffers since 12 May 2016 when parliament was dissolved. The Patriotic Front ministers who stayed on after the dissolution of Parliament refused to pay back the salaries and allowances. The Secretary General of the Patriotic Front contended that the decision was improper, oppressive, unjust and contrary to national values of human dignity and equality.

Four years later, there were still calls for the ministers to pay back the monies per the ruling. In 2020, President Lungu in a press release urged his ministers to follow the law stating that '…we all must respect the rule of law because no one is above the law, therefore, the ruling of the Constitution Court must be complied with. My administration will always uphold separation of powers in respect to the Executive, the Judiciary, and the Legislature.'[56]

The above case is an example of judicial decisions being obeyed by the political arm of government, even though it happened four years later. By and large, the cases reviewed above show that independence from the executive does not come easy, and it is not always enjoyed by the judiciary in Zambia.

The independence of the judiciary can also be assessed from the appointment process of the Chief Justice who is the head of the judiciary. In Zambia, the Chief Justice is appointed by the president following a recommendation from the Judicial Service Commission, and subject to ratification by the National Assembly, as provided for in Article 140 of the Constitution. Varied views have been raised on the appointment process of the Chief Justice and the independence of the judiciary in Zambia. In a letter to the President[57] dated 1 October 2021, a prominent

---

55 Selected Judgement, No 29 of 2016.

56 Lusaka Times, 'Respect the law and pay back the money, President Lungu tells former ministers' *Lusaka Times*, 9 December 2020.

57 Lusaka Times, 'John Sangwa writes to HH asking him to advertise position of Chief Justice, attacks Zambian Judiciary' *Lusaka Times*, 3 October 2021.

lawyer, State Counsel John Sangwa, advised on the need for change in judicial appointments if the country is to restore credibility in the judiciary. Part of the letter read:

> Previously, the process of appointing judges was a sham: The independence of the judiciary became a fiction. The judiciary was reduced from a branch of government co-equal with the executive and legislature to a department within the executive branch of government. It did not have any semblance of transparency or fairness. It eroded the independence and integrity of the judiciary and institutionalised political nepotism in the judicature. … I implore you Mr President to allow the position of the Chief Justice to be publicly advertised, followed by a transparent and rigorous process to find the most qualified, competent, and experienced person to head the judiciary.

The Law Association of Zambia in its press release dated 3 October 2021, in response to Sangwa's letter, accepted that a more transparent process in the appointment of the Chief Justice would assist the judiciary. However, the Law Association of Zambia referred to Article 216 of the Constitution which provides for the autonomy of the Judicial Service Commission.

Further, the Law Association of Zambia mentioned Section 23 of the Service Commissions Act (No 10 of 2016) which permits the Judicial Service Commission to regulate itself. In regulating its procedure, the Law Association of Zambia argued that the Judicial Service Commission is at liberty to adopt a more transparent method of scrutiny of candidates before it makes a recommendation to the President. In short, the Law Association of Zambia did not fully agree with John Sangwa and instead emphasised the strength of the current appointment system which gives powers to the Judicial Service Commission.

During the constitutional review process, views that were given to the Constitution Review Commission, as captured in its 2005 report, called for the overhaul of the appointment processes in the judiciary. The Constitution Review Commission reported thus:

> Some of the submissions made by petitioners on this subject were that the Constitution should vest judicial powers in the Judiciary and guarantee its independence and autonomy; that the Chief Justice and other judges should not be appointed by the President; the Office of Deputy Chief Justice should be abolished; that the Chief Justice and other judges should enjoy security of tenure and their salaries and conditions of service should be determined by the National Assembly in consultation with the Judicial Service Commission;

> and that the President should have no role in the removal of the Chief Justice and other judges.[58]

Judicial financial autonomy and independence

Concerns regarding the financial autonomy challenges of the Zambian Judiciary were noted during the constitutional review process back in 2005. The Constitution Review Commission noted in its final report that 'in the exercise of the judicial power of Zambia, the Judiciary, in both its judicial and administrative functions, including financial administration should be subject only to the Constitution and should not be subject to the control or direction of any person or authority.[59]

Flowing from the recommendations above, the financial autonomy of the judiciary is provided in Articles 122 and 123 of the Constitution. Article 122 provides for the 'functional independence of the Judiciary' and provides, in the relevant part that, 'the Judiciary shall not, in the performance of its administrative functions and management of its financial affairs, be subject to control or direction of a person or authority'.[60] Article 123 states that the 'Judiciary shall be a self-accounting institution'; and that it will 'deal directly with the Ministry responsible for finance in matters relating to its finances'.

The Constitutional Court has interpreted the phrase 'self-accounting' in relation to the financial autonomy of the judiciary. The Constitutional Court stated that:

> Self-accounting requires that the judiciary should have control over the financial accounting function. Therefore, the preparation of the budget and release or access of funding to the judiciary should not be hampered by the executive's discretion over the level of funding and access thereto. This should be reflected in the administrative and institutional relationship of the judiciary with the other two state organs. Parliament must legislate that the Judiciary is adequately funded. The funds, once appropriated by parliament, should be under the control of the Judiciary. The Judiciary is equally required to be accountable for the funds. This is what is required to fulfil the demands of Article 123 of the Constitution.[61]

---

58 Constitution Review Commission Secretariat, 'Report of the Constitution Review Commission' 29 December 2005, 433.

59 Constitution Review Commission Secretariat, 'Report of the Constitution Review Commission' 433.

60 Constitution of Zambia (2016), Article 122.

61 *John Sangwa v Attorney General and Law Association of Zambia* 2021/CCZ/0012, para 64.

The financing structure of the judiciary is given in the Judicature Administration Act of 2022.[62] According to the Act, the funds of the Judicature consist of moneys appropriated by Parliament for the Judicature; moneys paid to the Judicature by way of court fees or by way of such grants as the Chief Administrator may accept; or other moneys that vest in or accrue to the Judicature.[63] The Constitution further provides that, 'the Judiciary shall be adequately funded in a financial year to enable it effectively carry out its functions'.[64]

The Act further states that the Chief Administrator may accept money by way of grants, whether subject to conditions, for the benefit of any activity, function, fund or asset of the Judicature or any part thereof or not.[65] The Act further states that the funds of the Judicature shall be paid out to: the salaries and allowances of members of the Judicature in accordance with the Constitutional Offices Emoluments Act; the loans of members of the Judicature; the salaries, allowances and loans of the staff of the Judicature; such as travelling, transport, and subsistence allowances for staff of the Judicature as may be determined by the Commission with the approval of the President; and any other expenses incurred by the Judicature in the exercise and performance of its powers and functions, other than capital expenditure chargeable to the government under Section 12.[66]

The judiciary budgeting process

The budgeting process of the judiciary is basically executive-led. The planning and allocation of resources to the judiciary is done through the Ministry of Finance and National Planning. The judiciary's budget is appropriated through the National Assembly, as is the case with every government agency. The Ministry of Finance and National Planning carries out public and stakeholder participation in the preparation of the national budget, which includes that of the judiciary.[67]

---

62 Chapter 24 of the Laws of Zambia.

63 Judicature Administration Act (2022), Section 6(1).

64 Constitution of Zambia (2016), Article 123(2).

65 Judicature Administration Act (2022), Section 6(2).

66 Judicature Administration Act (2022), Section 6(3).

67 World Bank, 'Zambia judicial sector public expenditure review and institutional review' (2022) 28.

Based on this consultative and planning process, the Ministry of Finance and National Planning determines ceilings for the sector based on all projected revenues for the government. The Ministry of Finance and National Planning then prepares the Budget Call Circular, which is subject to executive and parliamentary adjustment, but which are rarely adjusted in practice. The ceilings are then provided to the Chief Administrator of the Judiciary and all other government agencies.

In the judiciary, the sector ceilings provided by the National Treasury are communicated to lower levels of the judiciary, including the courts, and form the basis of the preparation of the judiciary budget. The budgets are then consolidated and forwarded to the Ministry of Finance and National Planning. During the constitutional review process, the Constitution Review Commission justified the role of the executive in the judicial budget process, despite pronouncements of judicial financial autonomy. The report of the Commission notes that:

> like any other Government institution, the Judiciary should be subject to the superintendence and prescription by the minister responsible for finance before submission of the estimates of revenue and expenditure by the Government to the National Assembly.[68]

The question of judicial autonomy in the determination and management of finances of the judiciary reached the courts. In *John Sangwa v the Attorney General and Law Association of Zambia*,[69] the petitioner contended that the failure or omission by the minister responsible for finance and the legislature to enact legislation and put measures in place to promote the judiciary's financial autonomy is a breach of Articles 122(3) and 123(1) of the Constitution. Citing various case law, the petitioner argued that keeping with the doctrine of separation of powers, judicial independence has individual and institutional dimensions as well as three essential characteristics of financial security, security of tenure, and administrative independence. The petitioner also cited *Uganda Law Society v Attorney General*[70] where the Constitutional Court of Uganda stated that judicial independence includes financial autonomy.

---

[68] Report of the Drafting Committee on Drafting the Zambian Constitution (2013), 446 and 448; quoted in *John Sangwa v Attorney General and Law Association of Zambia*, (2021/CCZ/0035) [2023] para 59.

[69] *John Sangwa v Attorney General and Law Association of Zambia*.

[70] Such as *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick (2002) 1 SCR 405*.

In defence, the government argued that the judiciary had functional freedom as envisaged in Article 122 of the Constitution and noted that measures had been put in motion by the enactment of the Judiciary Administration Act. The respondents noted that the functional independence of the judiciary is not attributable to a single factor but a combination of many factors including the fortitude of the individual adjudicators. Citing case law,[71] the respondents asserted that a combination of a number of safeguards is needed to attain and guarantee independence from outside forces operationally and that the judiciary cannot disengage from other players in public governance.

In its determination, the Constitutional Court ruled that the Attorney General was in breach of Articles 122(3) and 123 of the Constitution by not putting in place legislation and measures that ensured that the judiciary is fully financially independent and adequately funded. Also, the Court ruled that parliament should, as a matter of priority, 'ensure that appropriate legislation is enacted to fully actualise the financial independence of the judiciary and that the judiciary is adequately funded as required by Articles 122 (3) and 123 of the Constitution.'

The Court also ordered that the Attorney General, in consultation with the judiciary, should at the earliest opportunity, sign off bills to effect the constitutional provisions as mandated by Article 177(5)(b) of the Constitution.[72] To ensure compliance with the orders, the Court ordered the minister responsible for finance to report to parliament every 6 months on measures being taken to ensure that the judiciary is financially independent and self-accounting and is adequately funded as required by the Constitution.[73]

The control over judiciary finances is traced to the period when the judiciary was under the Ministry of Justice. While the judiciary is now established as an independent arm of government, it is noted that the judiciary's affairs, especially financial and administrative, remain integrated with the Ministry of Justice.[74] In practice, the Ministry of Justice represents and speaks on behalf of the Judiciary in Parliament

---

71 *Communications Commission of Kenya and 5 Others v Royal Media Service and 5 others,* Petition no 14, 14 A, 14 B & 14 C of 2014 (consolidated), Judgement of the Supreme Court of Kenya of 29 September 2014 (eKLR).

72 *John Sangwa v Attorney General and Law Association of Zambia*, para 76.

73 *John Sangwa v Attorney General and Law Association of Zambia*, para 76.

74 World Bank, 'Zambia judicial sector public expenditure review and institutional review' (2022) 28.

and both the Ministry and the Judiciary have the same stated objectives of promoting the administration of justice and observance of the rule of law.[75] It has been noted that 'while the government largely refrains from direct interference, the executive control of judiciary finances (through the Ministry of Finance and National Planning) continues to limit judicial independence'.[76]

Trends in judiciary financing

The judiciary in its 2021 annual report[77] showed glaring inconsistencies in judiciary funding, a situation that is a far cry from the provisions of Article 123(2) which requires that the judiciary be adequately funded for service delivery. The annual report showed that the judiciary was grappling with huge unpaid personal emoluments such as pension benefits, settling-in allowances, leave pay, and repatriation allowances which had been outstanding for years due to the national fiscal challenges. This correlation between the fiscal challenges and funding to the judiciary brings to question the financial autonomy of the judiciary as funding seems to be tied to the priorities of the executive.

Table 1 below helps to show that financing to the judiciary is at the whim of and dictated by priorities of the executive in that financial year. The table shows financial allocation to the four strategic objectives of the judiciary: adjudication services (to hear and resolve constitutional, civil, commercial and criminal matters), legal and law reporting (to publish court proceedings and resolutions to be used by legal practitioners and other stakeholders), judicial enforcement (to execute court orders), and management, and support services (to ensure effective service delivery in support of the operations of the judiciary).

The head total from 2021 to 2023 shows an increasing trend. In percentage terms, the funding to the judiciary in 2022 from 2021 increased by 82.8 percent and 83.5 percent in 2023 from 2022. In absolute figures, the funding increased by K106,021,200 in 2022 and K121,903,952 in 2023.

---

75 World Bank, 'Zambia judicial sector public expenditure review and institutional review' 28.

76 Bureau of Democracy, Human Rights and Labour, '2022 county reports on human rights practices: Zambia' US Department of State, 2022.

77 Judiciary of Zambia, 'Annual Report' 2021, published by the Government Printers of Zambia.

Table 1: Budget allocation by programme[78]

Code	Programme	2021 Approved Budget (K)	2022 Approved Budget (K)	2023 Budget Estimates (K)
4132	Adjudication Services	431,820,474	517,088,890	583,445,071
4133	Legal/ Law Reporting	1,000,000	1,000,000	2,500,000
4134	Judicial Enforcement	2,402,342	2,702,014	2,838,202
4199	Management and Support Services	75,797,749	96,250,861	150,162,444
	Head Total	511,020,565	617,041,765	738,945,717

A cursory review of the table shows progress in terms of allocation of funds each preceding year. However, a substantial portion of the funds is for personnel remuneration, which leaves areas such as court order enforcement underfunded. An excerpt from the estimates of revenues and expenditure for the year 1 January to 31 December 2023 on page 215 reads:

> The judiciary's 2023 budget summary by economic classification shows that out of the budget of K738.9 million, K496.2 million (67.15 percent) has been allocated to personal emoluments, K163.9 million (22.19 percent) to use of goods and services while transfers and assets have been allocated K5.6 million (0.76 percent) and K73.3 million (9.91 percent) respectively. The increase in the allocation to personal emoluments from K411.6 million in 2022 to K496.2 million is explained by the provision that has been made to facilitate recruitments under the judiciary in 2023.

The Adjudicator 2023 edition[79] – a publication of the Judiciary of Zambia – brings the funding issues into context: 'The situation is getting desperate and some people do not seem to know it. The files claiming payments are congesting offices more than ever. Every time someone goes to follow up on a payment, they are told there is no funding.' The newsletter further reads, 'Some employees spend more time chasing files and payments at the expense of important tasks'.

Inadequate funding has come out prominently in the judiciary annual report as far back as 2017. This prevailing situation threatens its independence to carry out its mandate. For instance, in 2018, a sum of K6,118,435.00 was granted for staffing against a total request of K69,079,181.50, representing funding of only 8.9 percent.

---

78 National Budget (2023).

79 *The Adjudicator (2023)*, a newsletter of the Judiciary of Zambia, 1.

Since 2020, however, the situation has improved. To ensure the credibility of the judiciary in carrying out its mandate, the Judicial Service Commission has recommended the appointment of judicial officers, and the President has appointed them subject to ratification by the National Assembly. A considerable number of positions have been filled, such that by December 2021, only 1,832 remained unfilled from 6,843 outstanding in 2020. The number is expected to reduce by the end of 2023 following an increase in funding as explained in the excerpt above.

There is need to adequately solve the judiciary funding woes in Zambia, as instances exist where a court session has not taken off on account of lack of funds for a judge or magistrate to travel to hear the case.

A World Bank report that analysed the judiciary budget between the years 2016 and 2020 noted thus on the funding trends of the judiciary:

> Over the reference period (2016-2020), the judiciary budget showed downward trends both in real terms and as a share of the total budget. In nominal terms, the judiciary budget increased from K350.55 million (US$17.5 million approx.) in 2016 to K516.35 million (US$25.81 million approx.) in 2020, representing a 47.3 percent increase. However, in real terms, the judiciary allocations declined by 4.9 percent over the same period (that is, from K385.94 million to K367.20 million). This translates into an annual average growth of 10.5 percent in nominal terms, and a drop of 0.6 percent in real terms. Consistent with trends in real terms, the share of the judiciary budget in the total budget sharply declined from 0.7 percent in 2016 to 0.5 percent in 2020, suggesting that the overall national budget grew relatively faster than the judiciary budget allocation. Overall, the share of judiciary allocations in the total budget averaged 0.6 percent per year. Expressed as a percentage of GDP, the results indicate stagnation in the judiciary budget over this period. The share of the judiciary budget in GDP averaged 0.2 percent per year and stagnated at that rate between 2016 and 2020.[80]

The judiciary is mandated to collect court fees and fines, as well as receive funds in the form of gifts, donations, and bequests, which are managed in accordance with the Public Finance Management Act. Only court fees are retained by the judiciary. It is required to remit all other revenue received to the central government revenues account. The law allows the revenue collecting centre for the judiciary to retain 40 percent

[80] World Bank, 'Zambia judicial Sector public expenditure review and institutional review' 45.

of court fees collected and to surrender 60 percent to the Judiciary Head Office for internal use. However, the perennial concerns regarding the adequacy of judicial finances demonstrate the inadequacy of the current sources of revenue for the judiciary's effective functioning.

Terms and conditions of service of judicial officers

In 1996, the Judges (Conditions of Service) Act conferred on the president power to set the terms and conditions of service. However, this changed with the constitutional amendments of 2016 that vested the Emoluments Commission with the power to determine the terms and conditions of service of all public officers, including judges.[81]

In *John Sangwa v the Attorney General and Law Association of Zambia*[82] discussed earlier, the petitioner raised issues regarding the power to determine and set the salaries and other benefits of judges. The petitioner argued that Sections 3 and 12 of the Judges (Conditions of Service) Act – to the extent that they confer authority on the president to prescribe the emoluments and other conditions of service, including car loans, assistance and travelling allowance for judges – are *ultra vires* Article 122(3) and 123(1) of the Constitution and therefore, null and void. President Edgar Lungu had issued Statutory Instrument No 80 of 2018, which contained the salaries of judges prescribed by the president.

The Court noted that this was a new matter in Zambia and therefore decided to explore comparative jurisprudence on the practice. The Court observed that the proper procedure is that the emoluments, pensions and other conditions of service of judges should be reviewed and recommended in the first instance by the Judicial Service Commission and submitted to an independent National Fiscal and Emoluments Commission which should make recommendations to the National Assembly.[83]

However, while the Court agreed with the petitioner that both the provisions of the Judges (Conditions of Service) Act and the Statutory Instrument were against the spirit of the 2016 constitutional provisions on the financial independence of the judiciary,[84] the Court noted that

---

81 Constitution of Zambia (Amendment) 2016, Article 232.

82 *John Sangwa v Attorney General and Law Association of Zambia*.

83 *John Sangwa v Attorney General and Law Association of Zambia*.

84 *John Sangwa v Attorney General and Law Association of Zambia*, para 78.

there was a need for a transitional measure before a new law was passed. Therefore, it did not annul the presidential declaration of judges' terms pursuant to the Judges (Conditions of Service) Act.[85] The Court also declined to quash the presidential Statutory Instrument on salaries and terms of judges, on the same transitional provisions.[86]

Similarly, the power of the minister to set pension contributions of judges in the Judges (Conditions of Service) Act was equally found unconstitutional, in view of Articles 122 (1) and 123 of the Constitution.[87] The Court called on the Attorney General to introduce amendments to make the Judges (Conditions of Service) Act conform with the constitutional principles of judicial financial independence.[88]

Accountability in the management of finances

The judiciary is not immune to public scrutiny and is measured with the same lenses in matters of corruption, misapplication of funds and financial management. Surveys show that experiences with and perceptions of corruption in the judiciary are widespread.[89]

This section examines the Public Finance Management Act of 2018 in relation to the Judiciary. As the World Bank reports regarding accountability of the Judiciary in Zambia:

> The judiciary is subject to the internal audit and control systems, procurement, and periodic external audits of their accounts by established government systems. The budget implementation and reports of the Auditor General are also scrutinised by the Public Accounts Committee of the National Assembly, which can seek any additional information. To enhance control over the preparation, release, and accounting for budgeted expenditures, as well as to strengthen the internal and external audit, the government rolled out the IFMIS to various MPSAs as part of its efforts to improve public financial management.[90]

---

85 *John Sangwa v Attorney General and Law Association of Zambia*, para 83.

86 *John Sangwa v Attorney General and Law Association of Zambia*, para 103-104.

87 *John Sangwa v Attorney General and Law Association of Zambia*, para 100.

88 *John Sangwa v Attorney General and Law Association of Zambia*, para 100.

89 Afrobarometer, 'Zambians' trust in the judiciary is failing, as well as legitimacy' Afro barometer, 5 May 2015.

90 World Bank, 'Zambia judicial sector public expenditure review and institutional review' 43.

Part VI of the Public Finance Management Act of 2018 stipulates that a controlling officer shall for each fiscal year, be required to prepare a financial report to account for all public funds appropriated to the head of expenditure for which that controlling officer is responsible. In terms of the judiciary, the Chief Administrator prepares the financial statements and submits them for auditing to the office of the Auditor General in line with Article 250 (1) of the Constitution and Section 73 of the Public Finance Management Act (No 1 of 2018). Article 250(1) of the Constitution of Zambia stipulates that the Auditor General shall audit the accounts of state organs and institutions; and institutions financed from public funds.

After conducting the audit, the Auditor General is required by Article 212 of the Constitution[91] to submit to the President and the National Assembly an audit report on the accounts of the Republic audited in respect of the preceding fiscal year, not later than nine months after the end of a financial year. The Public Accounts Committee which comprises nine members appointed by the Speaker examines the accounts showing the appropriation of sums granted by the National Assembly to meet the public expenditure, and the Report of the Auditor General according to powers vested in it under Article 117(5) of the Constitution of Zambia.[92]

Given the above procedure – that is, submitting a budget proposal to the minister for finance, debate by Parliament and audit of accounts by the Auditor General, it could be argued that there is an independent and transparent method of financial management which is bound to increase accountability in state departments, including the judiciary.

Assessment of judicial financial independence

A common maxim that whoever pays the piper calls the tune stands true in the analysis of financial judicial independence. It is no wonder that a consensus exists among scholars that a judiciary that lacks financial independence is not independent at all. Therefore, the Judiciary of Zambia, like all state organs and departments, can be said to lack financial independence as it does not control its own budget. The National and Public Management Act of 2022 gives the executive power

[91] Constitution of Zambia (2016), Article 212.

[92] Constitution of Zambia (2016), Article 11.

over the appropriation of judiciary funds. The Act calls for all state departments to submit their budgets for the forthcoming fiscal year to the minister for finance for consideration. It is important to note that the judiciary is given ceiling figures in which to propose budget estimates according to its need and it then remains for the National Assembly to vary or not the proposed estimates[93] – the National Assembly Committee of Supply debates, passes or varies head estimates for each expenditure.

The process of financing the judiciary shows that it has no discretion on amounts allocated to it and must work within a ceiling given to it by the executive. Given the above, deductive conclusions on judicial independence can be drawn about the centrality of the president in the operation of the judiciary, from appointments of judges to financing.

Progressively, with growing calls for judicial independence and remuneration harmonisation, the Executive bowed to the pressure and enacted the Judiciary Administrative Act of 2018 and the Emoluments Commission Act of 2022 established under Article 232 of the Constitution[94] which transferred the responsibility of setting conditions of service for judges from the president to the Emoluments Commission.

The Emoluments Commission Act of 2022 provides for a harmonised framework to govern the determination and management of emoluments for chiefs and officers in state organs and institutions.

It is worthy of note that the Emoluments Commission was a response to a comprehensive government review of the salaries and conditions of services which found shocking discrepancies. The Director General of the Commission stated that the discrepancies were up to 1500 percent between the highest paid and lowest paid chief executive officers. The Emoluments Commission determines the salaries of not only members of the judiciary but also the president, other members of the executive, parliamentarians, military, civil service, and employees of state-owned enterprises. As such, it has enormous potential to result in a motivated public service with output tied to pay.

The setting of conditions of service of the judiciary away from the executive is a positive stride in ensuring the separation of powers and curing the problem of patronage in government. However, as stated earlier in this chapter, the centrality of the president in the appointment of officers attached to the judiciary brings the question of independence

---

93 A standard for auditing government revenue and expenditures.

94 Constitution of Zambia (2016), Article 232.

to disarray. It would therefore be a good practice if commissioners of the Emoluments Commission were not appointed by the president as this may indirectly influence the way the executive exercises power over the judiciary.

Part 6(1) of the Emoluments Commission Act states that the Commission shall consist of: the Chairperson; a representative of the Attorney General; a representative of the ministry responsible for finance; a representative of the Clerk of the National Assembly; a representative of the Chief Justice; a representative of the Public Service Management Division, and; a person nominated from the most representative federation of trade unions, all of whom are appointed by the President.

Despite the seemingly deep involvement of the president in these appointments, the comprehensiveness of the Act and its inclusion of various other personnel is unique and will positively contribute to the financial independence of the Judiciary in Zambia as far as operating free of the executive is concerned.

In comparison to Ghana, for instance, Ghana's Fair Wages Commission determines emoluments only for the mainstream civil service and not for ministers and members of parliament. In South Africa, the Salaries Review Commission focuses on the positions of officeholders, but it does not make the final decision as it only advises the president. Kenya has a similar institution to the Emoluments Commission but it does not determine the emoluments of senior government officials.[95]

The Southern Africa Judges Commission emphasises the importance of the administration of the judiciary being carried out by the judiciary itself or by a professional agency under the superintendence of the judiciary.[96] Indeed, for financial judicial independence to be achieved in earnest, there is a need to reform the financing structure of the judiciary in a way that it too has control over its own funds and applies funds according to its judgement. Otherwise, it will be difficult to achieve financial independence for as long as its financing is determined by the executive and parliament. As Muna Ndulo posited, 'without financial autonomy of the judiciary, the executive may impinge judicial independence by limiting access to funds voted to it by parliament and

---

[95] Mwamba Peni, 'Harmonising emoluments pays off for Zambia' *Governance Matters Magazine,* n.d. https://www.chandlerinstitute.org/governancematters/harmonising-emoluments-pays-off-for-zambia 15 August 2024.

[96] Southern Africa Judges Commission (SAJC), 'Financial independence of the courts' 28-29 December 2007.

or by assuming control of the services and staff which the judiciary depends upon'.[97]

Conclusion

This chapter has studied judicial financial independence in Zambia and found that despite the constitutional safeguards, provisions in other laws and the legal framework, achieving financial autonomy remains elusive. This finding is arrived at after delving into the historical background, constitutional and legal framework, as well as court cases. The study indicates that there is a significant influence of the executive and the legislature on the way judges and other judicial officers are appointed and dismissed, and in budgetary matters.

The United Nations Basic Principles of the Independence of the Judiciary underscore the state's duty to provide adequate resources to the judiciary for it to operate effectively and properly. In sum, as determined in the case *of John Sangwa v Attorney General and Law Association of Zambia*, Zambia's judiciary lacks financial independence, which is a violation of Article 123 of the Constitution. Despite the few strides in the right direction such as the enactment of the Judiciary Administrative Act and the Emoluments Commission Act, judicial financial independence remains a mirage and not a reality.

[97] Muna Ndulo, 'Judicial reform, constitutionalism and the rule of law in Zambia: From a justice system to a just system' 2(1) *Zambia Social Science Journal*, 3.

CHAPTER ELEVEN: GHANA

Judicial financial independence and effectiveness of the judiciary in Ghana

Michael Gyan Nyarko

Introduction

Ghana has been described as 'a beacon of hope in Africa',[1] mostly on account of three decades of democratic governance which was ushered in by the 1992 Constitution. Over the last three decades, democratic consolidation, political stability, and respect for human rights and the rule of law have been some of the hallmarks of the Ghanaian state. Despite this progress, commentators continue to decry the over-concentration of power in the executive branch of government and the rubber stamp approach of the legislature which makes it an ineffective oversight body over the executive.[2] This places an enormous responsibility on the judiciary as the last resort to safeguard the rule of law and protect rights and freedoms. The ability of the judiciary to effectively perform this function partly depends on the independence it enjoys from the other arms of government and society.

Judicial independence ensures that the public has a certain level of trust in the judiciary and judicial processes generally so that they can entrust them with the important functions of peaceful adjudication of disputes rather than resorting to 'self-help' by reason of mistrust in the judicial process. Judicial independence is therefore essential to the

---

1 Anyway Sithole, 'Ghana: A beacon of hope in Africa', 018 *ACCORD Policy and Practice Brief,* 29 October 2012 -<https://www.accord.org.za/publication/ghana/>.

2 See Ransford Edward Van Gyampo, 'Dealing with Ghana's winner-takes-all politics: The case for an independent parliament' 42 *The African Review: A Journal of African Politics, Development and International Affairs* (2015) 63. The current parliament (2021-2024) with a 136-136 equal split of legislators between the ruling government and the main opposition and 1 independent member, may be the only semblance of a parliament which has attempted to hold the executive to account. The opposition has recently been able to force the ruling government to cut budget allocations to a national cathedral project which the opposition MPs considered to be an unnecessary drain on the national purse. See Nana Konadu Agyeman, 'GH¢80m budget for National Cathedral blocked by parliament', *Graphic Online*, 23 December 2022 -<https://www.graphic.com.gh/news/politics/gh-80m-budget-for-national-cathedral-blocked-by-parliament.html>.

legitimacy and institutional authority of the courts[3] and 'fundamental to the rule of law, to the right to a fair trial, to the right to liberty and security of persons, and to the right to effective remedy for violations of human rights'.[4] With this background in mind, this chapter discusses judicial financial independence in law and practice in Ghana. After the introduction, the next section provides a historical overview of the judiciary and judicial independence before venturing into discussions on judicial financial independence and accountability in subsequent sections.

Overview of judicial independence in Ghana

Historical background

Ghana's judiciary traces its roots to the reforms introduced by the British colonial government through the enactment of the Judicature Acts of 1873 and 1875, which aimed to streamline the judicial system of England and Wales.[5] Subsequent to this, the colonial administration enacted the Supreme Court Ordinance of 1876 to formally establish two tiers of courts in the Gold Coast (the pre-independence name of the territory now known as Ghana), with the Divisional and District Commissioners' Courts established as the lower tier and the Supreme Court as the higher tier and the final appellate tribunal.[6] During the colonial period, appeals from the Supreme Court could be made to the West African Court of Appeal (WACA), with a further right of appeal to the Judicial Committee of Privy Council in Great Britain, until Ghana withdrew from WACA following independence.[7]

---

3 Henry Kwasi Prempeh, 'Towards judicial independence and accountability in an emerging democracy: The courts and the consolidation of democracy in Ghana', *Institute for Economic Affairs,* Occasional Papers Number 11 (1997) 9.

4 Kaajal Ramjathan-Keogh, 'The importance of promoting judicial independence in the Southern African region' in Anneke Meerkotter and Tyler Walton (eds) *Goal 16 of the Sustainable Development Goals: Perspectives from judges and lawyers in Southern Africa on promoting rule of law and equal access to justice,* Southern Africa Litigation Centre (SALC), Judiciary of Malawi & National Association of Women Judges and Magistrates of Botswana (NAWABO), 2016, 10. See also, Basic principles on the independence of the judiciary, 6 September 1985, A/RES 40/32 and 40/146, Article 2.

5 Republic of Ghana, Judiciary, Summary -<https://www.judicial.gov.gh/index.php/about-the-judiciary/history/#:~:text=Pre%2DIndependence&text=Supreme%20Court%20remained%20highest%20tribunal,withdrew%20from%20WACA%20following%20independence>.

6 Republic of Ghana, Judiciary, Summary.

7 Republic of Ghana, Judiciary, Summary.

The structure of the judicial system remained largely the same under the 1957 Independence Constitution.[8] Even though the Independence Constitution was silent on the judicial power of the state,[9] the Supreme Court was granted a limited power of judicial review, having 'original jurisdiction in all proceedings in which the validity of any law is called in question'.[10] The 1960 Republican Constitution of Ghana introduced a more streamlined judicial structure, conferring the judicial power of the state on the Supreme Court and High Court, designated as superior courts, and inferior courts to be established by statute.[11]

The 1960 Constitution also fortified the Supreme Court as the final court of appeal and endowed it with 'original jurisdiction in all matters where a question arises whether an enactment was made in excess of the powers conferred on Parliament by or under the Constitution'.[12] This power of judicial review extended to subsidiary legislation enacted by the President.[13] However, the wording of the provision suggests that the judicial review powers of the Supreme Court under the 1960 Constitution were much more circumscribed and confined to *ultra vires* acts of parliament rather than the constitutional validity of legislation.[14]

When the military overthrew the government of Kwame Nkrumah in 1966 and formed the National Liberation Council (NLC) as the ruling regime, they 'abolished the Supreme Court and vested judicial power in two sets of courts: the superior courts of judicature and the inferior courts'.[15] Following the return to constitutional civilian rule, the 1969 Constitution established a Supreme Court, Court of Appeal, and High Court of Justice, forming the superior courts of judicature, which were complemented by inferior courts established by statute.[16] The judicial structure has remained largely the same since then, except the period between 1979 and 1993 during the military regimes spearheaded by

---

8 Constitution of Ghana (Order-in-Council 1957), Articles 54-57.

9 Kofi Kumado, 'Judicial review of legislation in Ghana since independence' 5(2) *National Black Law Journal* (1977) 208.

10 Constitution of Ghana (1957), Article 31(5).

11 Constitution of Ghana (1960) Article 41; WB Harvey, 'The evolution of Ghana law since independence' 27 *Law and Contemporary Problems* (1962) 581, 586.

12 Constitution of Ghana (1960) Article 42; for discussions on implications of this article see Egon Schwelb, 'The Republican Constitution of Ghana' 9(4) *American Journal of Comparative Law* (1960) 634.

13 Constitution of Ghana (1960) Article 55(4).

14 Kumado, 'Judicial review of legislation in Ghana since independence' 208.

15 Republic of Ghana, Judiciary, Summary.

16 Republic of Ghana, Judiciary, Summary.

Jerry John Rawlings under the Armed Forces Revolutionary Council (AFRC) and Provisional National Defence Council (PNDC). During this period, the military regime established public tribunals parallel to the regular courts tasked to achieve social justice through predominantly adjudicating on offences against the state such as economic crimes.[17]

The historical development of judicial independence has been as chequered as the political history of Ghana. During the colonial period, judges of the Supreme Court 'were appointed by royal letters patent, and served at the pleasure of the monarch', while other judicial officers were appointed by the Governor of the Gold Coast without any legal protection of their tenure nor independence.[18] However, as independence became more imminent, the colonial government became concerned about judicial independence and therefore the 1954 Constitution contained a provision that judges of the Supreme Court could only be removed from office on stated misconduct or infirmity of mind or body, subject to a resolution passed by a two-thirds majority of the members of parliament. The 1954 Constitution also guaranteed that the salaries of the judges of the Supreme Court could not be reduced during their term of office.[19] Similar protections were, however, not extended to judges and judicial officers of the other courts.[20] The judicial structure and protection accorded to Supreme Court judges were maintained in the 1957 Constitution, which ushered Ghana into independence.[21]

Executive interference in the judiciary in post-independence Ghana began in 1960 when the 1957 Independence Constitution was replaced with the First Republican Constitution of 1960.[22] Notably, while the 1960 Constitution vested judicial power in the Supreme Court, High Court and a number of lower courts, Article 20(6) guaranteed the power of parliament to make laws without any 'limitation whatsoever'.[23] Thus, even though the 1960 Constitution granted the Supreme Court judicial review powers, they were limited to instances where Parliament

---

17 Republic of Ghana, Judiciary, Summary.

18 William Burnett Harvey, 'The judiciary in Ghana', *Articles by Maurer Faculty*, Indiana University, 1966, 222-224.

19 Harvey, 'The judiciary in Ghana', 224.

20 Harvey, 'The judiciary in Ghana', 224.

21 Harvey, 'The judiciary in Ghana', 224.

22 Prempeh, 'Towards judicial independence and accountability in an emerging democracy', 23.

23 Prempeh, 'Towards judicial independence and accountability in an emerging democracy', 23.

exercised legislative powers in excess of what had been granted by the Constitution, consequently depriving the judiciary of extensive powers of judicial review to check the excesses of legislation and other actions of the executive.

This position was confirmed by the Supreme Court in the case of *Re. Akoto and seven others*,[24] where the applicants, members of the opposition, had been arrested and detained in November 1959 under the Preventive Detention Act of 1958 on the orders of the Governor General, on suspicion of having instigated violence in some parts of Ghana. An application brought to the Supreme Court on appeal from the High Court challenging among others the constitutionality of the Preventive Detention Act was dismissed by the Court on several grounds including that Parliament being 'sovereign' under Article 20 of the Constitution 'can make any law it considers necessary'.[25] This further weakened the judicial review powers of the Supreme Court and hence the independence of the judiciary under the 1960 Constitution.

Another challenge to judicial independence under the 1960 Constitution related to the appointment and removal of judges. Even though judges of the superior courts consisting of the Supreme Court and High Court enjoyed the protection of the security of tenure and salary, the power of appointment was vested exclusively in the president without the need for parliamentary confirmation, and the chief justice could be removed from office at the pleasure of the president.[26] The official explanation for this state of affairs at the time, which was contained in the government White Paper that preceded the Constitution, was that as the administrative head of the judiciary, 'the Chief Justice ought to give loyal cooperation to the President'.[27] It is also worth noting that while the constitutional guarantees for the judges of the Supreme Court and High Court did not extend to judicial officers of the lower courts, the Judicial Service Act of 1960 made provision for judicial officers of the lower courts who were subject to discipline to receive a fair hearing.[28]

---

24 *Re. Akoto and 7 others* [1961] GLR 523.

25 For more detailed discussion on this case see William Burnett Harvey, *Law and social change in Ghana*, Princeton University Press, 1966, 281-295; Henry Kwesi Prempeh, 'Neither "timorous souls" nor "bold spirits": Courts and the politics of judicial review in post-colonial Africa' 45(2) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* (2012) 157.

26 Harvey, 'The judiciary in Ghana', 225.

27 Harvey, 'The judiciary in Ghana', 225.

28 Harvey, 'The judiciary in Ghana', 225.

Executive interference with the judiciary was exacerbated in 1963 when Kwame Nkrumah, the first president of Ghana, summarily dismissed the Chief Justice on account of the fact that three persons who had been charged with his attempted assassination in 1962 had been acquitted[29] by a court presided over by the Chief Justice.[30] Nkrumah did not stop at the dismissal of the Chief Justice but further demanded that the acquittals be overturned. Nkrumah then proceeded to enact an executive order – Special Criminal Division Instrument, 1963 (EI 161) declaring the decision of the court null and void.[31] This was followed by the subsequent conviction of the accused persons by a new panel of judges presided over by a new chief justice appointed by the president.[32]

Thereafter, legislation was enacted by parliament to empower the president to set aside any judgement of the courts if it was in the national interest.[33] The independence of the judiciary was further undermined when in 1964, the Constitution was amended to empower the president to dismiss judges of the superior courts at any time and for whatever reasons he considers sufficient.[34] This was part of broader constitutional amendments that turned Ghana into a *de jure* one-party state.[35] At this point, Nkrumah had complete control over all three arms of government and almost completely eroded judicial independence, giving the executive effective control over the judiciary. For instance,

---

29 *State v Otchere* [1963]2 GLR 463; see also A Amisah, 'Recent developments in Ghana', The Scandinavia Institute of African Studies, Upsala (1973).

30 Prempeh, 'Towards judicial independence and accountability in an emerging democracy'; Harvey, 'The judiciary in Ghana', 226; Kofi Quashigah, 'Defying assumptions about the nature of power relations between the executive and judiciary: An overview of approaches to judicial and executive relations in Ghana' in Charles Manga Fombad (ed) *Separation of powers in African constitutionalism,* Oxford, 2016, 226.

31 Quashigah, 'Defying assumptions about the nature of power relations between the executive and judiciary', 229; Kwame Frimpong and Kwaku Agymeman-Budu, 'The rule of law and democracy in Ghana since independence: Uneasy bedfellows?' 18 *African Human Rights Law Journal* (2018) 244 251; SY Binpong-Buta, 'The role of the Supreme Court in the development of constitutional law in Ghana', Unpublished PhD Thesis, University of South Africa, 2005, 54.

32 Prempeh, 'Towards judicial independence and accountability in an emerging democracy', 26.

33 Prempeh, 'Towards judicial independence and accountability in an emerging democracy', 26.

34 Sections 44 and 45 of the 1960 Constitution as amended by Section 6 of the Constitution (Amendment) Act, 1964 (Act 224); see also UU Uche, 'Changes in Ghana Law since the Military Take-Over' 10 *Journal of African Law* (1966) 106-111; EWC Daniels, 'Legislation: Constitution (Amendment) Act, 1964 (Act 224)' 2 *University of Ghana Law Journal* (1964) 136-144.

35 Prempeh, 'Towards judicial independence and accountability in an emerging democracy', 26.

after the adoption of the constitutional amendments in January of 1964, Nkrumah in March 1964 dismissed three Supreme Court judges, including Justice Akuffo Addo, the last remaining member of the panel that dismissed the charges brought against the persons accused of Nkrumah's attempted assassination.[36] Nkrumah later dismissed Justice Henry Prempeh of the High Court in Kumasi, without any explanation.[37]

Following the military overthrow of Nkrumah in 1966 and the many subsequent military regimes that followed, interspersed with short stints of democratic civilian regimes, judicial independence was further eroded. Notably, while the military regimes did not completely abolish the judiciary, they ousted the jurisdiction of the regular courts over some matters, set up their own military tribunals and so-called 'people's courts' through decrees, to adjudicate on cases they could not entrust to the regular courts. In a similar vein, the military regimes could nullify judicial decisions by decree, including retroactive nullification.[38] This turn of events under long periods of military regimes further eroded the independence of the judiciary.

The return to constitutional democracy in 1993 following the adoption of the 1992 Constitution provided a new impetus for the independence of the judiciary. Article 125(3) of the 1992 Constitution establishes the judiciary as an independent organ of the state vested with judicial authority and prohibits the executive and legislature from having final judicial power. The new impetus given to judicial independence under the 1992 Constitution resulted in a number of notable decisions against the first government under the Fourth Republic, that is, the National Democratic Congress (NDC) under the leadership of Jerry Rawlings. These included a number of politically sensitive decisions including the use of public funds to celebrate the anniversary of the second military coup that brought Jerry Rawlings into power in 1981.[39] Others involved the requirement of prior police permits to protest[40] and failure to grant opposition parties fair and equal access to state-owned media,[41] which were all declared unconstitutional.

---

36 Harvey, 'The judiciary in Ghana', 227.

37 Harvey, 'The judiciary in Ghana', 227.

38 See Prempeh, 'Towards judicial independence and accountability in an emerging democracy' 23-37, for further discussion on the role military regimes played in diminishing judicial independence in Ghana.

39 *New Patriotic Party v Attorney* General, (31st December case, 1993-94) 2 GLR 35 SC.

40 *New Patriotic Party v Inspector General of Police,* (1993-94) 2 GLR 459 SC.

41 *New Patriotic Party v Ghana Broadcasting Corporation* (1993-94) 2 GLR 354 SC.

These decisions incurred the displeasure of President Rawlings who lashed out publicly at the judiciary. For instance, during a State of the Nation address, Rawlings accused the judiciary of using judicial review to undermine the elected branches of government.[42] President Rawlings subsequently appointed Justice Isaac Abban, who had been closely associated with the two military regimes headed by Jerry Rawlings, as Chief Justice. This move was challenged by the Ghana Bar Association at the Supreme Court, though unsuccessfully, on the basis that Justice Abban was not a person of high moral character and proven integrity as required by the Constitution for appointment into the office of Chief Justice.[43] Prempeh suggests that the Ghana Bar Association took this step on suspicion that President Rawlings, dissatisfied with the 'defeats' of the government at the Supreme Court in a number of cases, was attempting to pack the courts with judicial officers who had favourable dispositions towards the government.[44] This suspicion appears to be supported by anecdotal evidence as the string of losses against the government abated subsequent to the appointment of the new Chief Justice.[45]

The structure of the judiciary under the 1992 Constitution

The current structure of the Judiciary of Ghana is set out under Chapter 11 of the 1992 Constitution. Article 125 outlines the basic philosophy underpinning the judiciary, which is that justice emanates from the people and is to be administered 'by the Judiciary which shall be independent and subject only to this Constitution'. The Constitution divides the judicial structure into superior courts consisting of the Supreme Court, Court of Appeal, the High Court, and Regional Tribunals; and such lower courts as may be established by legislation.[46] To this end, the Courts Act, 1993 (Act 459) (as amended) establishes in addition to the superior courts, lower courts, namely circuit courts,

---

42 Prempeh, 'Towards judicial independence and accountability in an emerging democracy', 39.

43 Prempeh, 'Towards judicial independence and accountability in an emerging democracy', 39-40.

44 Prempeh, 'Towards judicial independence and accountability in an emerging democracy' 39-40.

45 Prempeh, 'Towards judicial independence and accountability in an emerging democracy', 43.

46 Constitution of Ghana (1992), Article 26(1).

district courts, juvenile courts, and customary courts designated as the National House of Chiefs, Regional Houses of Chiefs, and Traditional Councils, which have jurisdiction over chieftaincy issues.[47]

The Supreme Court is constituted by the Chief Justice and not less than nine other justices, even though 5 justices form a quorum for the court to be duly constituted.[48] The Supreme Court is the apex and final court of appeal.[49] It exercises supervisory jurisdiction over all other courts and other bodies with adjudication authority.[50] Additionally, the Supreme Court has exclusive original jurisdiction over all matters relating to the enforcement and interpretation of the Constitution and 'all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.'[51] The exclusive jurisdiction of the Supreme Court in this regard, however, does not affect the jurisdiction of the High Court to enforce the fundamental human rights guaranteed in the Constitution, pursuant to Article 33 of the Constitution.[52]

In instances where matters relating to the enforcement and interpretation of the Constitution and the validity of legislation arise before a court other than the Supreme Court, the relevant court is required to stay proceedings and refer the particular issue to the Supreme Court for determination before proceeding with the adjudication of the case.[53] In limited instances involving trials for treason and high treason emanating from the High Court, the Supreme Court has exclusive appellate jurisdiction.[54] Appeals from decisions of the Judicial Committee of the National House of Chiefs also go directly to the Supreme Court.[55] The Supreme Court is further empowered to review its own decisions,[56] where there are exceptional circumstances which have resulted in the

---

47 Section of the Courts Act, 1993 (Act 495, as amended); In terms of Article 270 of the 1992 Constitution of Ghana, chieftaincy issues relate to 'the validity of the nomination, election, selection, installation or deposition of a personas a chief' and or other traditional leaders.

48 Constitution of Ghana (1992), Article 128.

49 Constitution of Ghana (1992), Articles 129 and 131.

50 Constitution of Ghana (1992), Article 132.

51 Constitution of Ghana (1992), Article 130(1).

52 Constitution of Ghana (1992), Article 130(1).

53 Constitution of Ghana (1992), Article 130(2).

54 Courts Act 1993 (Act 459) as amended, Section 4(3).

55 Courts Act 1993 (Act 459) as amended, Section 4(4).

56 Constitution of Ghana (1992), Article 133.

miscarriage of justice or new and important facts have been discovered which were not available at the time of the decision.[57]

The Court of Appeal is composed of the chief justice and at least 10 justices of the Court of Appeal, even though a quorum of 3 justices is sufficient for the performance of its regular appellate work.[58] The Court of Appeal exercises appellate jurisdiction over cases emanating from the High Court, Regional Tribunals, and other bodies as may be designated by legislation.[59] It also exercises appellate jurisdiction over civil appeals emanating from judgements of the circuit courts and interlocutory decisions or orders of the circuit courts.[60]

The High Court comprises the Chief Justice and at least 20 justices of the High Court and other judges of superior courts as the Chief Justice may in writing designate.[61] The High Court has original jurisdiction over all criminal and civil matters, including the enforcement of the fundamental human rights guaranteed in the Constitution.[62] It exercises supervisory jurisdiction over all lower courts and lower adjudicative authorities.[63] The High Court also has appellate jurisdiction in criminal matters emanating from the circuit courts and in all decisions of the district and juvenile courts.[64]

Regional Tribunals consist of the chief justice, a chairperson, and other members as may be designated by the chief justice in writing.[65] For the exercise of their jurisdiction, Regional Tribunals are duly constituted by a chairperson and not less than two[66] nor more than four panel members.[67] The Regional Tribunals have concurrent criminal jurisdiction with the High Court, but are specifically focused on handling cases involving offences against the state.[68] These include crimes related to taxation, narcotics and 'other offence[s] involving serious economic fraud, loss of state funds or property'.[69]

---

57 Supreme Court Rules 1996 (CI16) as amended by CI 24, Rule 54.
58 Constitution of Ghana (1992), Article 136(1) and (2).
59 Constitution of Ghana (1992), Article 137.
60 Courts Act 1993 (Act 459) as amended, Section 11(3) and (4).
61 Constitution of Ghana (1992), Article 139.
62 Constitution of Ghana (1992), Article 140.
63 Constitution of Ghana (1992), Article 141.
64 Courts Act 1993 (Act 459) as amended, Section 15(1)(b) and (c).
65 Constitution of Ghana (1992), Article 142(2); Section 23(1), Courts Act 1993.
66 Constitution of Ghana (1992), Article 142(3).
67 Courts Act 1993 (Act 459) as amended, Section 23(2).
68 Constitution of Ghana (1992), Article 143(1).
69 Courts Act 1993 (Act 459) as amended, Section 24.

The lower courts are established under the Courts Act of 1993 (as amended) with mandates to adjudicate various criminal and civil cases. Specific legislation also set up various tribunals with specific mandates relating to the adjudication of specialised cases.

Judicial Council

The Constitution establishes a Judicial Council, which is composed of the Chief Justice, the Attorney General, a representative of each of the various courts and tribunals, representatives of the Ghana Bar Association, the Judge Advocate General of the Ghana Armed Forces, Head of the Legal Directorate of the Police Service, and Editor of the Ghana Law Reports.[70] Others include a representative of the Judicial Service Staff Association, a chief nominated by the National House of Chiefs and four other persons, who are not lawyers, appointed by the President.[71] The Judicial Council is mandated to propose for the consideration of the government judicial reforms for the effective and efficient administration of justice, and assist the Chief Justice in the performance of his or her duties through deliberations of matters relating to the proper functioning of the judiciary.[72]

While not expressly stated in the Constitution,[73] the Judicial Council performs the role of nominating and recommending judges of the superior courts for appointment by the President, in terms of its advisory role under Article 144(2) and (3) of the Constitution.

---

70 Constitution of Ghana (1992), Article 153.

71 Constitution of Ghana (1992), Article 153.

72 Constitution of Ghana (1992), Article 154.

73 Article 144(2) and (3) of the 1992 Constitution provides as follows:

'2. The other Supreme Court justices shall be appointed by the President acting on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament.

3. Justices of the Court of Appeal and of the High Court and Chairmen of Regional Tribunals shall be appointed by the President acting on the advice of the Judicial Council.'

In contrast, Article 172(1) of the 2010 Constitution of Kenya 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'.

The Supreme Court has however held in the case of *Ghana Bar Association and others v Attorney General and Others*[74] that the President is not bound by the advice of the Judicial Council. The applicants, in this case, sought, among others, a declaration that in terms of Article 144(2) and (3) of the Constitution, the Judicial Council has a constitutional obligation to nominate persons best qualified to serve as judges of the superior courts, whom the President was obliged to appoint (for superior court judges other than those of the Supreme Court) or forward to Parliament for approval after consultation with the Council of State (for judges of the Supreme Court). The Judicial Council in this case had sent a list of judges nominated for appointment to the Supreme Court and Court of Appeal. The President decided to appoint some of the judges on the list and rejected others, causing the plaintiffs to challenge the constitutional propriety of the President's ability to reject persons nominated by the Judicial Council.

The plaintiffs contend[ed] that to secure the independence and best quality of the Judiciary, the advice of the Judicial Council on appointments to the Supreme Court should be binding on the President.[75]

While agreeing with the plaintiffs in part, the Supreme Court held that though the involvement of the Judicial Council and Council of State in the appointment of judges of the superior courts is meant to be a restraint on the appointing power of the President, such advice was not binding. The Supreme Court, however, clarified that even though the President is not bound by the advice of the Judicial Council, no appointments can be made by the President outside the recommendations of the Judicial Council.[76] Thus, the Judicial Council

---

[74] *Ghana Bar Association and others v Attorney General and Others* [2016] GHASC, 43.

[75] *Ghana Bar Association and others v Attorney General and Others*, [2016] 49.

[76] Both the main judgements of Justice William Anaam Atuguba and the separate concurring opinion of Justice Jones Mawulom Dotse were clear on this point; See also Anselmus Kodzo Paaku Kludze, 'To cap or not to cap: The Supreme Court of Ghana', *Institute for Economic Affairs,* Constitutional Review Series 4 (2010). Writing in 2010, Justice Kludze, then a member of the Supreme Court expressed that, 'The constitutional provision is explicitly clear on this point. According to Article 144 (2) of the Constitution, the President can only nominate a person for appointment as a Justice of the Supreme Court, if, but only if, that person has been recommended by the Judicial Council'. The Article says that the President, 'acting on the advice of the Judicial Council', may nominate a person for appointment as a Justice of the Supreme Court. The President cannot act on his own. He cannot also act contrary to the advice of the Judicial Council. The role of the Judicial Council in this context is not merely consultative. It is a *sine qua non* for the valid appointment of a justice of the Supreme Court that, that person must be recommended by the Judicial Council.'

plays an important role in appointment of judges of the superior courts, the performance of which mandate is essential to maintaining the independence and efficiency of the judiciary. The process, though enjoying a degree of independence from the executive, is not completely immune from executive influence, given that the Attorney General and four other nominees of the President are members of the Judicial Council.[77]

What remains a cause for significant concern about the role of the Judicial Council in the appointment of judges of the superior courts is the lack of transparency in the nomination process. Typically, the practice has been that the Judicial Council sends a list of nominees to the President for consideration and appointment. There is, however, no publicly available information on the guidelines that are used for these nominations, nor are vacancies in the superior courts publicly advertised.[78]

Similarly, there are no public interviews of the persons nominated for positions in the superior courts as is the practice in South Africa and Kenya. Publicly advertising vacancies and interviewing candidates ensures transparency in the process and public confidence in the integrity of the candidates.[79] The absence of such a process has resulted in much criticism[80] of the role played by the Judicial Council in the appointment of superior court judges, with the former Chief Justice Sophia Akuffo at one point expressing that '[the Judicial] Council is comparatively weak in its powers and responsibilities, in comparison with its functional counterparts in other Commonwealth countries'.[81]

---

77 Samuel Kofi Date-Bah, *Reflections on the Supreme Court of Ghana,* Wildy Simmonds and Hill Publishing, 2016, 212.

78 The Judicial Council has recently begun to publish vacancies for positions in the High Court, but the practice has not been extended to vacancies in the Court of Appeal and Supreme Court. See a 2019 advertisement for vacancies in the High Court here https://www.ghanacurrentjobs.com/job-vacancy-for-high-court-judge/.

79 Jan van Zyl Smit, *The appointment, tenure and removal of judges under Commonwealth Principles: A compendium and analysis of best practice,* Report of Research Undertaken by Bingham Centre for the Rule of Law, 2015, 47.

80 Frimpong and Agyeman-Budu, 'The rule of law and democracy in Ghana since independence', 263, describing the role of the Judicial Council in the appointment of superior court judges as merely ceremonial, granting the President unfettered appointment powers even in the face of clear constitutional provisions to the contrary; See also a review by Africa Governance Monitoring and Advocacy Project (AfriMAP), Open Society Initiative for West Africa (OSIWA) and Institute for Democratic Governance (IDEG), *Ghana: Justice sector and the rule of law*, The Open Society Initiative for West Africa, 2007, 11.

81 Chief Justice Sophia Akuffo, 'Challenges to separation of powers in constitutional

Appointment, dismissal and security of tenure of judges

The appointment of judges of the superior courts is set out under Article 144 of the 1992 Constitution. In particular, the chief justice is appointed by the president acting in consultation with the Council of State[82] and with the approval of parliament.[83] Other justices of the Supreme Court are appointed by the 'President acting on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament'.[84] Judges of the Court of Appeal, High Court, and chairpersons of Regional Tribunals on the other hand are appointed by the President acting on the advice of the Judicial Council,[85] while other panel members of the Regional Tribunals are appointed by the chief justice after consulting with the Regional Coordinating Council of the particular region and upon the advice of the Judicial Council.[86]

The Constitution provides a number of safeguards to guarantee the independence of the judiciary and judges and judicial officers in particular. For instance, it provides a guarantee against arbitrary dismissal of judges: Article 144(7) of the Constitution prohibits the abolishing of the office of a justice of the superior courts while a substantive officer holder is in office. This prevents the president, who has the ultimate prerogative for the appointment of judges of the superior courts, from indirectly dismissing judges by simply abolishing a particular office.

The Constitution similarly provides very strict requirements for the discipline, resignation, removal and retirement of judges of the superior courts, which are ultimately aimed at securing the independence of the judiciary. For instance, judges of the superior courts have secured tenure

---

democracies', Judiciary of Ghana, n.d. https://www.judicial.gov.gh/index.php/publications/news-publications/presentations.

82 The Council of State is an advisory body of eminent persons established under chapter 9 of the 1992 Constitution to advice the President, ministers of state, parliament and other constitutional bodies on various issues. In terms of Article 89 of the 1992 Constitution, the Council of State is composed of persons appointed by the President in consultation with parliament and includes persons who have previously served in the position of Chief Justice, Chief of Defence Staff, and Inspector General of Police. Others include the President of the National House of Chiefs, one representative of each of the administrative regions of Ghana (elected by the local government authorities within that region) and 11 other members appointed by the President.

83 Constitution of Ghana (1992), Article 144(1).

84 Constitution of Ghana (1992), Article 144(2).

85 Constitution of Ghana (1992), Article 144(3).

86 Constitution of Ghana (1992), Article 144(4).

as they may retire voluntarily upon reaching the minimum age of 60 years.[87] Compulsory retirement is set at the age of 70 years for Supreme Court and Court of Appeal judges[88] and 65 years for High Court judges and chairpersons of Regional Tribunals.[89]

Concerning the removal of judges of the superior courts from office, Article 146 of the 1992 Constitution provides that a judge may only be removed from office 'for stated misbehaviour or incompetence or on grounds of inability to perform the functions of his office arising from infirmity of body or mind'.[90] The Constitution also sets out the procedure which must be followed for the removal of superior court judges. Thus, the removal of judges of the superior courts, except for the chief justice, must be commenced by a petition submitted to the president, who is mandated to forward the petition to the chief justice for determination as to whether a *prima facie* case has been made against the judge.[91] Where the chief justice determines that the petitioner makes a *prima facie* case, then the chief justice is required to set up a committee of 3 justices of the superior courts appointed by the Judicial Council and two other persons who are non-lawyers and are neither members of the Council of State nor parliament appointed by the chief justice on advice of the Council of State.[92] The committee is mandated to investigate the complaint and make its recommendations to the chief justice for onward transmission to the president.[93]

If the petition for removal concerns the chief justice, the president is required, acting in consultation with the Council of State, to set up a committee consisting of 2 justices of the superior courts and three other persons who are non-lawyers and are neither members of the Council of State nor parliament.[94] The committee is mandated to investigate the complaint and make a recommendation to the president as to whether or not the chief justice ought to be removed from office.[95]

---

87 Constitution of Ghana (1992), Article 145(1)
88 Constitution of Ghana (1992), Article 145(2)(a).
89 Constitution of Ghana (1992), Article 145(2)(b).
90 Constitution of Ghana (1992), Article 146(1).
91 Constitution of Ghana (1992), Article 146(3).
92 Constitution of Ghana (1992), Article 146(4).
93 Constitution of Ghana (1992), Article 146(5).
94 Constitution of Ghana (1992), Article 146(6).
95 Constitution of Ghana (1992), Article 146(7).

Proceedings regarding the removal of judges of the superior courts are to be held in camera, and the judge against whom a petition has been submitted has the right to a defence in person or by a lawyer or expert(s) of their choice.[96] It may reasonably be argued that the holding of proceedings in camera was meant to ensure that the dignity of the judge against whom the complaint is made and the judiciary as a whole is protected. This is in line with Article 17 of the UN Basic Principles on Independence of the Judiciary, which requires that the initial stages of the examination of complaints against judicial officers be kept confidential. However, keeping the entire proceedings in camera may also have the negative consequence of being tagged as a process that is not transparent and shields the judiciary and judges from public scrutiny.

A reasonable middle ground could be to have public disciplinary hearings once the chief justice makes a finding that a *prima facie* case has been made by the petitioner and the petition has been formally transmitted to the Committee set up to investigate the alleged misconduct.[97] Hearings in private could then be allowed on a case-by-case basis where the interest of justice requires. The Constitution Review Committee established in 2010, for instance, recommended that 'improvement and enforcement of transparent complaints procedures and disciplinary mechanisms for judges, judicial officers…' are necessary for improving public confidence in the judiciary.[98] Public hearings protect the integrity of the judiciary, especially in cases where the alleged misconduct is publicly known, and the proceedings of the disciplinary committee are the subject of rumour and speculation.[99]

While the disciplinary proceedings are pending, the president may, acting in accordance with the advice of the Council of State in the case of the chief justice, and the advice of the Judicial Council in the case of a

---

96 Constitution of Ghana (1992), Article 146(8).

97 This is in line with Rule 11 of the American Bar Association's Model Rules for Judicial Disciplinary Enforcement.

98 Constitution Review Commission, 'Report of the Constitution Review Commission: From a political to a developmental constitution', Republic of Ghana, 2011, 211. The Constitution Review Commission was established by the President in January 2010 through the Constitution Review Commission of Inquiry Instrument 2010 (C.I. 64) to undertake nationwide consultations with the people of Ghana on the operation of the 1992 Constitution and to make recommendations for needed constitutional changes.

99 See Commentary on Rule 11 of the ABA Model Rules for Judicial Disciplinary Enforcement; see also Robert H Tembeckjian, 'Judicial disciplinary proceedings should be open' 28 *The Justice System Journal* (2007) 419.

judge of a superior court, suspend the judge against whom a petition has been submitted to the relevant committee.[100] In each case, the president is bound by the recommendations of the relevant committee and only performs a ceremonial function of complying with the recommendations of the committee.[101] The process therefore significantly provides guarantees against arbitrary dismissal or suspension of judges of the superior courts by the president.

For instance, in 2015, Vice President Kwesi Amissah-Arthur (acting as President) acting on the advice of the Judicial Council, suspended seven High Court judges who were accused of involvement in bribery and other corrupt practices. This was after the Chief Justice made a determination that a *prima facie* case of stated misbehaviour had been established against the judges on the basis of a petition submitted by an investigative journalist together with evidence of the judges caught on video allegedly receiving bribes.[102] In 2018, a similar suspension was meted out to four High Court judges by the President on the advice of the Judicial Council for corruption-related misconduct. The suspension followed the establishment of a *prima facie* case by the committee set up by the Chief Justice to investigate the corruption allegations against the judges.[103]

The appointment and removal of judges and magistrates of the lower courts and other judicial officers, on the other hand, are done by the chief justice, acting on the advice of the Judicial Council.[104] The practice in recent years has involved a merit-based process involving examinations and interviews by the Judicial Council. However, this is not guaranteed in any legally binding instrument.[105]

Judicial officers may be removed from office by the chief justice on similar grounds as those applicable to superior court judges – stated misbehaviour, incompetence and inability to perform functions due to infirmity of the body or mind. The removal must be premised on a resolution passed by at least two-thirds of the members of the Judicial Council after the judicial officer has been given the opportunity to be

---

100 Constitution of Ghana (1992), Article 146(10).

101 Constitution of Ghana (1992), Article 146(9).

102 Ghana suspends seven high court judges amid bribery allegations, *The Guardian*, 6 October 2015.

103 Ghananewsagency.org, 'President suspends four High Court judges', *Ghanaweb*, 9 May 2018.

104 Constitution of Ghana (1992), Article 148; *Agbevor v Attorney General* [2000] SCGLR 403.

105 AfriMAP, OSIWA and IDEG, *Ghana: Justice sector and the rule of law,* 11.

heard in their defence, either personally or by a lawyer or other expert of their choice.[106]

On retirement, judges of the superior courts who have served for 10 continuous years or more on the bench or twenty years or more in public service, of which at least 5 continuous years of that period must have been served on the bench, are entitled to pension equivalent to the salary payable to serving judges in the position from which they retired. This includes any changes and increases to the salaries of serving justices of the superior courts.[107]

Challenges to judicial independence

Despite the safeguards highlighted above, a number of challenges to judicial independence continue to persist. Primary among them relates to the significant influence that the president has in the appointment of the chief justice and all the judges of the superior courts. As discussed earlier, even though the Judicial Council plays an important role in the nomination of judges for appointment to the superior courts, the president still has significant influence over these nominations. For instance, the Attorney General, who is the principal legal advisor of the President and at least four other representatives of the President are members of the Judicial Council.[108] This is coupled with the fact that there is limited transparency in the nomination process, which is evident in vacancies not being publicly advertised, the public not being able to nominate qualified persons for consideration for vacant positions and the lack of public interviews for candidates. These shortcomings obscure the nomination process and have the potential to dent public trust and confidence in the judiciary.

The appointment of the chief justice has also come under scrutiny. Even though the president is required to consult the Council of State in the process, the reality is that '[t]he President plays a dominant role in the appointment of the 25 members of the Council of State.'[109] The Constitution is also not clear on the nature of the consultation that the president must have with the Council of State, which means that in

106 Constitution of Ghana (1992), Article 151.

107 Constitution of Ghana (1992), Article 155.

108 Constitution of Ghana (1992), Article 143(1).

109 Ernest Owusu-Dapaa, 'An exposition and critique of judicial independence under Ghana's 1992 Constitution' 37 *Commonwealth Law Bulletin* (2011) 531-550.

practice, the president may actually only inform them of the decision taken.[110]

Similarly, parliamentary approval of the appointment of the chief justice, while ordinarily meant to provide oversight over the executive appointment of judges of the superior courts to prevent politically motivated appointments, has proven to be much less effective in achieving this aim. Experience has shown that the majority party in parliament which has always been the party in charge of the executive branch of government as well, has always supported and approved judicial nominations of the president without serious scrutiny.[111] The serious lack of parliamentary scrutiny of nominees for the Supreme Court did not escape the comment of Justice Kludze, a former judge of the Supreme Court, who expressed that:

> The record since 1993 is that Parliament has not been very critical in exercising its approval power. The parliamentary vetting sessions for all Presidential nominees have been rather perfunctory, and practically all nominees of all Presidents have received the approval of Parliament. Where there have been rejections, most of the grounds have been related to technical matters like the citizenship status of nominees, issues which could have been resolved administratively in the Office of the President before seeking parliamentary approval.[112]

This is partly enabled by Article 78 of the Constitution requiring that at least 50 percent of ministers be appointed from among members of parliament,[113] which means that a significant number of members of parliament (especially those belonging to the ruling party) are also members of the executive. Additionally, Parliament does not have the complement of research staff needed to assist members of parliament to adequately investigate judges nominated for appointment to the Supreme Court.[114] This substantially weakens parliamentary oversight over executive decisions.[115]

---

110 Owusu-Dapaa, 'An exposition and critique of judicial independence under Ghana's 1992 Constitution', 531-550.

111 Owusu-Dapaa, 'An exposition and critique of judicial independence under Ghana's 1992 Constitution', 531-550.

112 Kludze, 'To cap or not to cap: The Supreme Court of Ghana', 12.

113 Constitution of Ghana (1992), Article 78.

114 Kludze, 'To cap or not to cap: The Supreme Court of Ghana', 13.

115 Rasheed Draman, 'Parliamentary oversight and corruption in Ghana', African Center for Parliamentary Affairs (ACEPA), Accra, Ghana, 2020.

Notably, the last time a nominee for chief justice or the Supreme Court was rejected by parliament was in 1980 when Justice Fred Kwasi Apaloo, who had already served as Chief Justice under the military government of Jerry Rawlings in 1979, was nominated by President Hilla Limann in 1980 to serve as Chief Justice under the terms of the then newly promulgated 1979 Constitution. Parliament rejected his nomination for Chief Justice, together with the nomination of Justice Issac Kobina Abban as a judge of the Supreme Court.[116] The rejection of Justice Apaloo was, however, subsequently annulled by the Supreme Court, which held that Justice Apaloo's position as Chief Justice was retained by the 1979 Constitution and therefore there was no need for re-nomination by the President and approval by parliament.[117]

A typical example of parliament's failure to seriously scrutinise appointments to the position of chief justice may be illustrated by the 1995 case of *Ghana Bar Association v Attorney General and Another (Abban case)*.[118] The plaintiff in this case sought a declaration that the appointment of Justice IK Abban to the office of Chief Justice by the President with the approval of parliament was in violation of Article 128(1) of the Constitution, on the basis that Justice Abban was not a person of high moral character as required by this provision. Prempeh asserts that the plaintiff's objection to Justice Abban's appointment as Chief Justice was on account of his close association with the military regimes of Jerry Rawlings under the Armed Forces Revolutionary Council (AFRC) and Provisional National Defence Council (PNDC).[119] Of significance was the fact that Justice Abban had been appointed by the AFRC to serve as Chairman of the AFRC Social Tribunal, established to complete the outstanding docket of the AFRC people's courts. Justice Abban was subsequently nominated by President Limann to serve as a judge of the Supreme Court during his brief civilian government in 1980, but his appointment was rejected by parliament.

When Jerry Rawlings again took over the reins of government through a military coup in 1981 that established the government of the PNDC, he appointed Justice Abban to the Court of Appeal (which doubled up as the Supreme Court) with a six-month retrospective

---

116 'House rejects Chief Justice', *Ghana News*, June 1980, 2.

117 *Tuffuor v Attorney General* [1980] GLR 637.

118 *Ghana Bar Association v Attorney General and Another* [1995-96] 1 GLR 598.

119 Prempeh, 'Towards judicial independence and accountability in an emerging democracy', 41-43.

effect (that is, even before the PNDC became the government).[120] The close association between Justice Abban and President Rawlings should therefore have exercised the minds in Parliament when he was nominated by President Rawlings for the office of Chief Justice in 1995. Despite these glaring circumstances, Parliament nonetheless approved the nomination of Justice Abban for the office of Chief Justice, causing the Ghana Bar Association to challenge his appointment before the Supreme Court. The Supreme Court dismissed the case on the basis that what the plaintiff was requesting was effectively for the court to dismiss the Chief Justice from office, contrary to the constitutionally laid down procedure for removing the Chief Justice.[121]

The recent example of the appointment of Justices Ernest Yao Gaewu and George Kingsley Koomson to the Supreme Court, despite glaring public outcry and disagreement from opposition members of parliament about their suitability, further illustrates the limited scrutiny exercised by the Parliament of Ghana and its potential to serve as an effective oversight authority over executive appointments to the judiciary.[122] Notably, the two justices had been nominated by the President in consultation with the Judicial Council and Council of State for appointment to the apex court in July 2022, together with two other nominees, Justices Barbara Frances Ackah-Yensu and Samuel Kwame Adibu Asiedu. While the nominations of the latter two were approved by the Appointments Committee and subsequently the plenary of Parliament in December 2022, that of the former two were withheld, with opposition members of the Appointments Committee citing among others the fact that Justice Ernest Yao Geawu had partisan inclinations as he had held leadership positions in the ruling New Patriotic Party (NPP), including serving as constituency chairman and parliamentary candidate for the NPP prior to his appointment to the bench.[123]

With regards to Justice George Kingsley Koomson, opposition members of parliament cited his relative inexperience, having been appointed to the Court of Appeal less than two years earlier in August 2020.[124] Additionally, there was a petition received from the public

---

120 Prempeh, 'Towards judicial independence and accountability in an emerging democracy', 41-43.

121 *Ghana Bar Association v Attorney General and Another* [1995-96].

122 Elsie Appiah-Osei, 'Minority opposes approval of two Supreme Court justice nominees', *Ghana News Agency*, 24 March 2023.

123 Appiah-Osei, 'Minority opposes approval of two Supreme Court justice nominees'.

124 Edna Agnes Boakye, 'Minority MPs kick against approval of 2 Supreme Court nominees', *Citi Newsroom*, 24 March 2023.

against the nomination of Justice Koomson, citing his role as chairperson of an Inter-Ministerial Committee that had been set up by the President to investigate excessive use of violence by the police against protesters in Ejura in the Ashanti region. The protestors were protesting police inaction to investigate and hold accountable individuals responsible for the murder of a community activist, Ibrahim Mohamed Anyass alias Macho Kaaka, who was reported to have been fatally attacked by assailants in June 2021 on account of his community activism, where he drew attention to the failing infrastructure in his community on social media, which was allegedly making the ruling government unpopular.

This protest was violently suppressed by the police, resulting in further fatalities and violence which the Inter-Ministerial Committee chaired by Justice Koomson was tasked to investigate. In the petition to Parliament's Appointment Committee, the families of the victims of police violence in Ejura alleged that as chair of the Inter-Ministerial-Committee:

> Justice Koomson did not approach this national duty with the level of humanity, sensitivity and impartiality that this important assignment demanded. Instead, the Committee became more interested in sanitising the image of certain political interests, and setting in place a narrative and agenda that was intended to not only exonerate partisan wrongdoing but also expose the families and victims to ridicule.[125]

Despite these glaring concerns about the suitability of the two justices for appointment to the apex court, their nominations were approved by the plenary of parliament in March 2023, mainly on partisan lines by votes of 138 (yes) to 134 (no) for Justice Gaewu and 139 (yes) to 133 (no) for Justice Koomson,[126] further exemplifying the almost rubber stamp approach of Parliament with regard to executive nominations to the judiciary.

It is worth noting that the membership of the current Parliament is evenly split between the ruling NPP and the main opposition NDC, with each party having 137 members of parliament and one independent candidate joining the NPP to form the majority in parliament.

---

[125] Joseph Appiah-Dolphyne, 'Group petitions Parliament over Justice Koomson's nomination to the Supreme Court', *Asaase Radio*, 21 October 2022; Joint Committee of Victims of the Ejura Incidents, 'Joint Memorandum to Petition against Recommending or Confirming the Nomination of Justice Kingsley Koomson to the Supreme Court', 20 October 2022 (on file with author).

[126] GhanaWeb, 'Parliament approves Akufo-Addo's nominees to Supreme Court in tight, tense vote', *GhanaWeb* 25 March 2023.

Consequently, if even a hung parliament could not stand firm against questionable nominations by the executive for judicial appointments, one would not be out of place to have doubts about whether there is any hope for proper scrutiny of judicial nominations in a parliament with a significant majority for the party in government.

Additionally, it is quite curious that even though the Constitution vests the power to appoint judicial officers[127] in the chief justice acting on the advice of the Judicial Council, this is subject to the approval of the president.[128] It is not clear why the president is given any role in the appointment of judicial officers given that the chief justice is the head of the judiciary and the Judicial Council and should, together with the Judicial Council, be able to make relevant appointments for the effective running of the judiciary without reference to the president.

It is also curious, though not quite surprising, that even though the chief justice is vested with the power of appointment of judicial officers, the Constitution vests the power to determine their salaries, allowances, facilities, and privileges in the president.[129] This gives the perception that the executive and in particular, the president, has excessive powers in the functioning of the judiciary as an institution even if this does not directly impact on the independence and impartiality of judicial officers.

The excessive powers exercised by the president over most institutions of state date back to 1960 when Kwame Nkrumah consolidated his hold on power through the adoption of the First Republican Constitution. This First Republican Constitution transformed Ghana from a Westminster-style parliamentary system into an executive presidential system within which the president almost singlehandedly wielded powers comparable to that of a monarch.[130] This has persisted throughout the various post-independence constitutions including the current 1992 Constitution which grants the president enormous

---

127 Article 161 of the Constitution defines judicial officers to include presiding officers of the lower courts and tribunals (i.e. judges of circuit courts, magistrates and chairpersons of tribunals), the judicial secretary, registrars of the superior courts and others as the Chief Justice may designate in a constitutional instrument.

128 Constitution of Ghana (1992), Article 148.

129 Constitution of Ghana (1992), Article 149.

130 Henry Kwesi Prempeh, 'Presidential powers in comparative perspective: The puzzling persistence of imperial presidency in post-authoritarian Africa' 35 *Hastings Constitutional Law Quarterly* (2008) 761.

appointing powers, in what has been described by most commentators as an 'imperial presidency'.[131]

The significant role of the president in the discipline and removal of justices of the superior courts has also raised concerns about its impact on judicial independence. As remarked by the former Chief Justice Sophia Akuffo, it is 'curious why a petition for the removal of a justice of the superior courts should be sent to the President and not the Chief Justice who is the head of the Judiciary'.[132] 'The role of the President in the suspension of the Chief Justice and justices of the superior courts is puzzling and could in certain circumstances pose a challenge to judicial independence.'[133] This is a role that could be performed by a properly empowered and resourced Judicial Council.

Another issue that may undermine the independence of the judiciary is that there is no cap on the number of justices that the president can appoint to the Supreme Court, which 'has the tendency of diluting the judicial philosophical approach of the Court in the most important cases of public concern'.[134] This situation in particular allows the president to appoint as many justices to the Supreme Court as they please, which may be abused to ensure that a majority of the judges on the Court align with the socio-political philosophy of the government in power and therefore able to influence the decisions of the court in a particular direction.[135] The Constitution Review Commission expressed similar concerns in the following terms:

---

131 See generally Prempeh, 'Presidential powers in comparative perspective', 761; Henry Kwesi Prempeh, 'Progress and retreat in Africa: Presidents untamed' 9 *Journal of Democracy* (2008)109; Stephen Kwaku Asare and Henry Kwesi Prempeh, 'Amending the Constitution of Ghana: Is the imperial President trespassing?' 18 *African Journal of International and Comparative Law* (2010) 192; Daniel Bioye Bewel, Ebebezer Adjei Bediako and Kwadwo Bio Agyei, 'Imperial President and constitutionalism under the 1992 Constitution of Ghana' in Addadzi-Koom, Maame Efua, Michael Addaney and Lydia A Nkansah (eds) *Democratic governance, law, and development in Africa: Pragmatism, experiments, and prospects,* 2022, 37.

132 Akuffo, 'Challenges to separation of powers in constitutional democracies', 4. Justice Sophia Akuffo served as Chief Justice of Ghana from 2017 to 2019.

133 Akuffo, 'Challenges to separation of powers in constitutional democracies', 5.

134 Frimpong & Agyeman-Budu, 'The rule of law and democracy in Ghana since independence', 264.

135 The Minority Leader and Ranking Member of the Appointments Committee of Parliament, Hurna Idrisu, has recently re-echoed this concern, which is shared by other commentators. He who expressed concern over the lack of an upper sealing on the number of judges that can be appointed to the Supreme Court, which 'could lead to a situation where a future President with tyrannical tendencies could take advantage of the lacuna to pack the court for his interest'. See Julius Yao Petetsi, 'Ghana: Parliament approves 2 Supreme Court nominees freezes nomination of two others', *AllAfrica Ghanaian Times*, 10 December 2022 -<https://allafrica.com/stories/202212130405.html>.

> The Commission finds that an uncapped Supreme Court is objectionable because it provides an incentive and temptation for a government at any time to attempt to pack the Court when it wishes the Court to give decisions that it may need or want at that particular time. This is by no means a fanciful supposition. There have been such attempts in other countries, and there have in fact been claims that this has actually been done in this country.[136]

To cure this loophole, the Constitution Review Commission recommended that Article 128(1) of the Constitution be amended to provide for a maximum of 15 judges of the Supreme Court. This recommendation was accepted by the government in its White Paper on the Report of the Constitution Review Commission,[137] even though these amendments are yet to be effected more than a decade later.

A good illustration of how this situation can be abused may be the case of *Attorney General (No 1) v Tsatsu Tsikata (No 1)*.[138] The plaintiff, a prominent member of the then main opposition political party (NDC), had been charged with criminal offences before the Fast Track High Court for causing financial loss to the state. The Fast Track High Court system was introduced in 2001 by then Chief Justice Edward Kwame Wiredu, involving the automation of court processes to ensure speedy delivery of justice. The applicant went to the Supreme Court challenging the constitutionality of the creation of the Fast Track High Court by the Chief Justice. The Supreme Court by a 5-4 majority declared the Fast Track High Courts unconstitutional on the basis that the Chief Justice did not have the administrative power to create these courts in the absence of constitutional or legislative authorisation to do so.[139] The Attorney General made an application to the Supreme Court for a review of the decision. However, before the review application could be heard by the Supreme Court, President John Kufour nominated Justice Dixon Kwame Afreh, a Court of Appeal judge who was at the time sitting as an additional judge of the Fast Track High Court, to serve as a judge of the Supreme Court. The Supreme Court at this time had 10 judges

---

136 Constitution Review Commission, 'Report of the Constitution Review Commission: From a political to a developmental constitution', 223.

137 Government of Ghana, 'White Paper on the Report of the Constitution Review Commission presented to the President', The report of the Constitution Review Commission of Inquiry, 20.

138 *Attorney General (No 1) v Tsatsu Tsikata (No 1)* [2001-2002] GLR (SC) 189.

139 *Attorney General (No 1) v Tsatsu Tsikata (No 1)* [2001-2002] GLR (SC) 189.

and required at least an odd number of judges to ensure that a decision could be made on the review application.[140]

This turn of events raised the suspicion of the applicant and the main opposition party that the appointment was done with the sole purpose of ensuring that the newly appointed judge would provide an additional vote to overturn the earlier decision of the Court. The suspicion was mainly based on the fact that Justice Affreh was at the time of his nomination sitting as an additional Fast Track High Court judge, the same court the establishment of which was to be determined by the Supreme Court in the review application.[141] The enlarged panel of the Supreme Court, by a 6-5 majority, overturned its earlier decision,[142] further giving some credence to the suspicions of ulterior motives in the appointment of Justice Afreh to the Supreme Court.

Dissatisfied with the decision of the Supreme Court on review, the applicant approached the African Commission on Human and Peoples' Rights (African Commission), alleging among others political interference with the composition of the Supreme Court. The African Commission agreed that the appointment of an additional judge was necessary for the Supreme Court to be able to have a quorum to decide on the review application. However, it held that:

> when the measures are considered together as a series of concerted and escalated actions towards a desired outcome on the review of the decision that rendered the Fast Track Court unconstitutional… [t]hose measures constitute tacit escalated interference with the independence of courts by the executive through what appears to have been targeted appointment of a justice of Appeal and a strategic reconstitution of the Supreme Court bench that would determine the application for review.[143]

The African Commission proceeded further to hold that,

> it is convinced that cumulatively the conduct of the Respondent State regarding the review of the Supreme Court's decision declaring the Fast Track Court unconstitutional, and in particular the manner of reconstituting the Supreme Court's panel constitute tacit interference with the independence

---

140 'Attorney General loses against Tsikata', *Ghanareview.com* -<http://www.ghanareview.com/int/tsatsu.html>.

141 'Attorney General loses against Tsikata', *Ghanareview.com*.

142 *Attorney General (No 2) v Tsatsu Tsikata (No 2)* [2001-2002] SCGLR 620.

143 *Tsatsu Tsikata v Republic of Ghana*, 322/2006, ACmHPR (2014), para 155.

> of that court. That court cannot be regarded to have had the appearance of independence, let alone impartiality.[144]

The African Commission therefore recommended that the state take the necessary measures 'to guarantee the independence of courts, by among others, desisting from any measures or tactics such as in the appointment of judicial officers that would undermine the independence of, and public confidence in courts'.[145]

Compliance with judicial orders and public perception of judicial independence

While court decisions are generally implemented by the political arms and other state institutions, there are a number of instances where there has been failure or refusal to implement court decisions. Prominent among them include the decision of the Human Rights Division of the High Court ordering the Electoral Commission in 2017 to put measures in place to ensure that Ghanaians living abroad are given the opportunity to vote, in compliance with the Representation of the People Amendment Act, 2006 [Act 699].[146] The Electoral Commission was ordered to implement this decision within 12 months which meant that measures should have been put in place to enable Ghanaians living abroad to vote in the 2020 national presidential and parliamentary elections. However, there is no evidence that this order was implemented by the Electoral Commission as measures were not put in place to ensure that Ghanaians living abroad voted in the 2020 elections.[147] The Electoral Commission cited the COVID-19 pandemic as the reason it could not register Ghanaians living abroad to vote in the 2020 elections.[148]

Another example of the state refusing to comply with orders of the courts involves a decision of the High Court, which granted bail to Gregory Afoko, a politically exposed individual, who was charged

---

144 *Tsatsu Tsikata v Republic of Ghana,* ACmHPR, para 159.

145 *Tsatsu Tsikata v Republic of Ghana,* ACmHPR, para 163(d).

146 Citifmonline, 'Court clears Ghanaians abroad to vote in 2020 polls', *Citifmonline*, 18 December 2017.

147 Delali Adogla-Bessa, 'Ghanaians in the diaspora are tired of being disenfranchised during elections', *Ubuntu Times*, 27 August 2020.

148 African Union, 'Preliminary Statement: AU Election Observation Mission to the Presidential and Parliamentary Elections in the Republic of Ghana', 9 December 2020, para 30-31.

with the murder of a prominent member of the ruling New Patriotic Party in 2015. Even though the High Court granted bail to Mr Afoko on 14 March 2019, the state refused to release him on bail despite having fulfilled all the bail conditions.[149] Instead, the state held him in custody for 120 days after the decision of the High Court and proceeded to make an application before a different High Court which rescinded the earlier bail granted by another High Court judge.[150] This gives the appearance that the state, unsatisfied with the court order, refused to comply with the order until they found a more pliant judge who was willing to make a decision. It consequently raises suspicion of executive interference with the functioning of the courts as well as evidence of refusal to comply.

In other instances, the executive has used the power of presidential pardon arbitrarily to undermine the independence and authority of the courts. The most recent example relates to the sentencing in 2016 of two members of the then ruling National Democratic Congress and the host of a radio show to fines and terms of imprisonment by the Supreme Court for contempt of court. The contempt conviction related to death threats that were made by the three against two judges of the Supreme Court, including the then Chief Justice, during a radio show on 29 June 2016.[151] The president at the time, John Mahama, issued presidential pardons to the convicts a few weeks later.[152] Even though the Supreme Court declared the pardons constitutional,[153] it creates the impression that the executive can arbitrarily utilise the prerogative of mercy to undermine the judicial authority of the courts.

On the issue of public confidence in the judiciary, while surveys suggest that there is generally high public confidence in the judiciary,[154] perceptions of corruption in the judiciary which has been proven in a number of instances by investigative journalists continue to diminish the public's trust in the independence of the judiciary.[155]

---

149 Denis Pwaberi, 'High Court overturns Afoko's bail after 120 days of illegal detention', *3 News*, 15 July 2019.

150 Pweberi, 'High Court overturns Afoko's bail after 120 days of illegal detention'.

151 Media Foundation for West Africa, 'Ghana update: Supreme Court jails radio presenter, panelists for 4 months', 27 July 2016.

152 Abdur Rahman Alfa Shaban, Africanews, 'Ghana's President pardons controversial trio who threatened judges', *Africanews*, 9 December 2019.

153 *Agbemava, Tuah-Yeboah & Bediatuo v Attorney General* (J1 20 of, 21 of, 23 of) [2018] GHASC 52 (21 November 2018).

154 Lionel Osse Essima and Gildfred Boateng Asiamah, 'Ghanaians cite high cost, bias, and long delays as barriers to using formal justice sytem', *Afrobarometer AD347*, 2020, 2.

155 Ghana suspends seven High Court judges amid bribery allegations, *The Guardian*, 6 October 2015.

Judicial financial autonomy in Ghana

The judicial financial architecture

Article 127 of the 1992 Constitution provides the foundation for the financial independence of the judiciary in Ghana. Article 127(1) guarantees that 'the Judiciary, in both its judicial and administrative functions, including financial administration, is subject only to this Constitution and shall not be subject to the control or direction of any person or authority'.[156] This includes the ability of the judiciary to operate banking facilities 'without the interference of any person or authority, other than for the purposes of audit by the Auditor General, of the funds voted by Parliament or charged on the Consolidated Fund' for the purpose of the running of the judiciary'.[157]

This is further bolstered by Article 127(4) which requires that 'the administrative expenses of the Judiciary, including all salaries, allowances, gratuities, and pensions payable to or in respect of, persons serving in the judiciary' be charged on the Consolidated Fund.[158] In addition, Article 127(5) prohibits the variation of the salaries, allowances, conditions of service, pension, and other benefits due to justices of the superior courts, judicial officers, and other persons exercising judiciary authority to their disadvantage. Article 127(6) mandates that the funds voted by parliament or charged on the Consolidated Fund by the Constitution for the purpose of the judiciary be released to the judiciary in quarterly instalments.

In terms of the preparation of the budget of the judiciary, Article 179(3) of the Constitution requires the chief justice in consultation with the Judicial Council to submit to the president at least two months before the end of each financial year, and subsequently as and when the need arises, estimates of the administrative expenses and development expenditure for onward transmission to parliament for approval. Thus, the judiciary does not submit its budget directly to parliament for approval, unlike Kenya, for instance, where the Chief Registrar of the Judiciary submits the judicial budget directly to parliament for

---

156 Constitution of Ghana (1992), Article 127(1).

157 Constitution of Ghana (1992), Article 127(7).

158 Article 175 of the 1992 Constitution creates the Consolidated Fund and Contingency Fund as the main public funds of Ghana. In furtherance of this, Article 176 provides that all revenues raised or received by the government be paid into the Consolidated Fund unless legislation provides otherwise.

approval.[159] While this is not ideal as it places a fetter on the ability of the judiciary to directly get appropriation of its budget from parliament, it is not surprising given the nature of the powers that most of the post-independence constitutions of Ghana have entrusted to the president – what has been earlier described as an 'imperial presidency'.[160] That said, the responsibility for the preparation of the national budget is vested in the president, who is required to 'cause to be prepared and laid before parliament at least one month before the end of the financial year, estimates of the revenues and expenditure of the Government of Ghana for the following financial year'.[161]

Despite this deficiency, the text of Article 179(3), (4) & (5) of the Constitution suggests that the president is only supposed to play a passive role of forwarding the budget of the judiciary submitted by the chief justice to parliament for approval. Article 179(5) is quite instructive in providing that '[t]he estimates [submitted by the Chief Justice] shall be laid before Parliament under clause (4) by the President without revision but with any recommendations that the Government may have on them'. The Constitution therefore provides a firm basis for the financial independence of the judiciary.

However, in practice, 'the administrative expenses, are subjected to the national budgetary process and are therefore proposed by the Executive (the Minister for Finance) to be approved by Parliament'.[162] Estimated budgets are submitted to the Minister of Finance for inclusion in the national budget which is subsequently submitted to parliament for approval. Thus, being part of the national budget, the Minister of Finance may revise or place caps on the allocation that may be submitted to parliament on behalf of the judiciary. For instance, in March 2021, the Judiciary Committee of Parliament reported the following:

> The Judiciary and the Judicial Service submitted total budgetary requirements of GH¢470,415,847.78 for the 2021 financial year. An amount of GH¢332,478,549.00 was however provided as the total allocation for the Judiciary and the Judicial Service in the Budget Statement and Economic Policy of the Government of Ghana for the 2021 financial year. The Judiciary and Judicial Service petitioned the President to act in accordance with the

159 Constitution of Kenya (2010), Article 173(3).

160 Prempeh, 'Towards judicial independence and accountability in an emerging democracy', 41-43.

161 Constitution of Ghana (1992), Article 179(1).

162 Akuffo, 'Challenges to separation of powers in constitutional democracies', 5.

> dictates of Articles 127 and 179(4) and (5) which charges the President to cause the estimates of the Judiciary and the Judicial Service to be laid in Parliament without a revision but with any recommendations that the Government may have. In view of the fiscal constraints on the national budget however, Government has recommended to the House a downward review only in the CAPEX request from GH¢109,975,638 to GH¢77,193,047.00 thus reducing the total budgetary request of the two institutions to GH¢437,397,064.00.[163]

The Committee then proceeded to recommend that the plenary of parliament approve the figures as recommended by the President in spite of the protest of the judiciary and Judicial Service.[164] A similar scenario occurred in 2022, with the President recommending an allocation of GH¢576,412,000 against the GH¢621,658,441.00 requested by the judiciary, citing the prevailing economic circumstances.[165] This caused the Judicial Committee of Parliament to recommend that in future budgets, the Office of the President should engage with the Judicial Service on the budget proposals of the judiciary in order to comply with Article 179(4) of the Constitution.[166] Ultimately, the Committee recommended to the plenary of Parliament to approve the figures recommended by the President.[167]

While one could agree that the lower budget figures were unavoidable given the economic challenges following the onslaught of the COVID-19 pandemic, historical records suggest that the President has usually used economic challenges as an excuse to recommend lower allocations to the judiciary. For instance, the amount recommended by the President to parliament for the judiciary in 2015 was 78.9 percent of what was requested by the judiciary,[168] while in 2016 the President

---

163 Judicial Committee of Parliament of Ghana, 'Report of the Judicial Committee on the annual budget estimates of the Judiciary and Judicial Service for the 2021 financial year', (2021) 6.

164 Judicial Committee of Parliament of Ghana, 'Report of the Judicial Committee on the annual budget estimates of the Judiciary and Judicial Service for the 2021 financial year', 8.

165 Judicial Committee of Parliament of Ghana, 'Report of the Judicial Committee on the annual budget estimates of the Judiciary and Judicial Service for the 2022 financial year (2021) 4-5.

166 Judicial Committee of Parliament of Ghana, 'Report of the Judicial Committee on the annual budget estimates of the Judiciary and Judicial Service for the 2022 financial year', 5.

167 Judicial Committee of Parliament of Ghana, 'Report of the Judicial Committee on the annual budget estimates of the Judiciary and Judicial Service for the 2022 financial year', 6.

168 Judicial Committee of Parliament of Ghana, 'Report of the Judicial Committee on the

recommended to parliament to approve a budget equivalent to 97.1 percent of what was requested by the Judicial Service.[169] This state of affairs, coupled with the fact that, as discussed in Section 3.2 below, the actual disbursements to the judiciary are usually lower than the approved budget, raises significant concern over the effective funding of the judiciary.

Again, even though the Constitution requires the executive to release funds voted by parliament or charged to the Consolidated Fund for the judiciary in quarterly instalments, this rarely happens and the judiciary is usually left with having to enter into discussions with the executive to expedite the release of funds.[170] While this is not peculiar to the judiciary and is indeed a usual challenge with most state institutions, it nonetheless poses a threat to the financial autonomy of the judiciary as it 'might create negative public perception, which implies that the executive can, through withholding funds, tinker with the autonomous financial functioning of the judiciary'.[171] This ability of the other branches of government and in particular the executive to influence or take charge of the budget planning and privileges of the judiciary 'has the potential to bring the judiciary into public ridicule' and impede its ability to function optimally.[172]

The salaries, allowances and other emoluments of the chief justice and judges of the superior courts are determined by the president in terms of Article 71 of the 1992 Constitution. The president, acting on the advice of the Council of State, is mandated to set up a committee of not more than 5 persons to make recommendations to the president on the salaries and other emoluments of the judges of the superior courts.[173] The salaries and emoluments of lower court judges and other judicial officers are similarly determined by the president, acting on the advice of the Judicial Council.[174] The current Chief Justice, Lady Justice Gertrude Sackey Torkorno has also decried the fact that the judiciary

---

annual budget estimates of the Judiciary and Judicial Service for the 2015 financial year' (2014) 7.

169 Judicial Committee of Parliament of Ghana, 'Report of the Judicial Committee on the annual budget estimates of the Judiciary and Judicial Service for the 2016 financial year' (2015) 7.

170 Akuffo, 'Challenges to separation of powers in constitutional democracies', 5.

171 Akuffo, 'Challenges to separation of powers in constitutional democracies', 5.

172 Akuffo, 'Challenges to separation of powers in constitutional democracies', 5.

173 Constitution of Ghana (1992), Article 71(1).

174 Constitution of Ghana (1992), Article 149.

needs financial clearance from the executive 'to engage staff, clearance to access money generated from court services, [and] clearance to procure any asset to do our work' which undermines the institutional independence of the judiciary.[175]

Admittedly, the president wields enormous power in determining the salaries and conditions of service of judges of the superior courts and judicial officers. Additionally, the executive, through the Ministry of Finance controls the budgeting and allocation of funds for the functions of the judiciary, which places a significant dent on the financial independence of the Judiciary. There is, however, no evidence to suggest that the decisions of the courts have at some point been affected by the resourcing of the courts.

Trends in the judiciary budget and finances

The budget trend over the last eight years shows increasing yearly allocations to the Judicial Service even though actual disbursements were lower than the budgeted amounts. There are however a few exceptions in the year 2016, wherein the budget for the Judicial Service was slightly lower than the budget for 2015 and 2019 where the allocated budget was about 10 percent lower than the previous year. However, the seeming decline in the 2016 budget is explained by the fact that in 2015, the Judicial Service received part payment of GH¢35,945,776.55 of[176] a loan of GH¢55,884,449.25 it had taken to fund the construction of a 34-unit court complex in Accra, which increased the asset expenditure for the judiciary exponentially that year.[177]

The budgeting and allocation trends for the past 8 years are briefly highlighted in the following paragraphs. In the year 2015, the approved budget for the Judicial Service was GH¢199,576,866.92 comprising GH¢193,090,718.92 from the government, GH¢3,749,132.00 from donor funding and GH¢2,737,016.00 from internally generated funds. The total

---

175 Republic of Ghana Judiciary, 'CJ reiterates financial independence for judiciary to enhance justice delivery', Speech delivered at the 2023 Annual General Meeting (AGM) of the Association of Magistrates and Judges of Ghana (AMJG) held at the Labadi Beach Hotel in Accra under the theme 'A financially independent and accountable judiciary: The key to effective justice delivery' https://judicial.gov.gh/index.php/publications/news-publications/js-latest-news/item/464-2023-10-02-17-20-47.

176 Judicial Service of Ghana '2015-2016 annual report' (2016) 23.

177 Republic of Ghana, National Development Planning Commission (NDPC), 'Medium term expenditure framework (MTEF) for 2017-2019: 2017 budget estimates', (2017) 6.

funds released to the Judiciary for the period was GH¢171,851,947.03.[178] The actual expenditure for the Judicial Service in that year was GH¢204,423,574.43,[179] which shows a slight deficit in the budget of the judiciary for that year. The deficit was however offset by an exponential increase in internally generated funds, which rose from the initial budgeted amount of GH¢2,737,016.00 to GH¢28,773,584.26 due to the implementation of Constitutional Instrument No 86, which increased court fees.[180] In 2016, the total budget approved by parliament for the Judicial Service was GH¢193,702,296.99 comprising GH¢188,500,667.99 from the government, GH¢1,746,469.00 from donor funding and GH¢3,455,159.00 from internally generated funds. However, the actual amount released to the Judicial Service was between GH¢140,823,010.28[181] and GH¢156,537,974.56.[182]

The budget allocated to the Judicial Service in the year 2017 increased to GH¢331,185,839.65 comprising GH¢293,649,147.00 from the government, GH¢26,179,743.00 from donor funding and GH¢11,356,949.65 from internally generated funds.[183] Out of this amount, GH¢253,431,809.73 was released comprising GH¢241,844,336.75 from the government, GH¢9,450,772.98 from internally generated funds and GH¢2,136,700.00 from donor funding.[184] The actual expenditure of the Judicial Service for the year was GH¢257,650,449.37, representing 78 percent budget performance.[185] A similar increase in budget occurred in 2018, where the allocated budget was GH¢375,009,466.00 comprising GH¢341,508,154.00 government funding, GH¢14,334,672.00 donor funding and GH¢19,166,640.00 internally generated funds,[186] while the

---

178 Judicial Service of Ghana '2015-2016 annual report' (2016) 23.

179 National Development Planning Commission (NDPC), 'Medium term expenditure framework (MTEF) for 2017-2019: 2017 budget estimates', 6.

180 Judicial Service of Ghana '2015-2016 annual report' (2016) 23-24.

181 National Development Planning Commission (NDPC), 'Medium term expenditure framework (MTEF) for 2017-2019: 2017 budget estimates', 6.

182 Judicial Service, 'Medium term expenditure framework (MTEF): Programme based budget estimate for 2018 (2018) 3. The 2017 and 2018 budget statements record different amounts as actual disbursement to the Judicial Service for the year 2016.

183 Judicial Service, 'Medium term expenditure framework (MTEF): Programme based budget estimate for 2018 (2018) 3.

184 Judicial Service of Ghana '2017-2018 annual report' (2018) 20.

185 Judicial Service of Ghana, '2017-2018 annual report' (2018) 21.

186 Judicial Service of Ghana (as above).

actual expenditure was GH¢255,790,147.01,[187] representing a budget performance of 68 percent.

The budget for the judiciary allocated and approved in 2019 was GH¢338,687,128.00. Out of this amount, GH¢269,840,715.72 was released by the Ministry of Finance to the Judicial Service as at the end of the budget year.[188] Meanwhile, the total expenditure of the judiciary for the year 2019 was GH¢258,910,578.91 comprising GH¢237,919,737.06 from the government, GH¢19,896,086.34 of internally generated funds and GH¢1,094,755.51 of donor funding, resulting in a budget performance of 76.4 percent.[189] For the year 2020, the approved budget for the judiciary and the Judicial Service was GH¢356,743,004.10 comprising GH¢333,076,145.10 from the government and GH¢23,666,859.00 from internally generated funds. Out of the approved budget, a total of GH¢306,226,445.95 was released and GH¢296,088,187.03 was spent by the judiciary over that period, representing a budget performance of 82.9 percent.[190]

In 2021, a total budget of GH¢437,397,064.36 comprising GH¢418,277,958.36 government funding and GH¢19,119,106.00 internally generated funds was approved for the judiciary and the Judicial Service. At the end of the year, a total of GH¢457,083,193.62 had been released and GH¢434,841,546.84 was spent by the judiciary over that period,[191] representing a budget performance of 99.4 percent. For the year 2022, the Judicial Service was allocated a total budget of GH¢534,935,135.28 with GH¢513,626,759.28 being government funding and GH¢21,308,376.00 from internally generated funds.[192] Out of this amount, a total of GH¢471,297,401.20 was released and GH¢483986854.80 was spent over the period,[193] representing a budget performance of 90.48 percent.

---

187 Judiciary and Judicial Service 'Medium term expenditure framework for 2020-2023: Programme based budget estimates for 2020 (2020) 4.

188 Judicial Service of Ghana, 'Medium term expenditure framework (MTEF) for 2022-2025: Programme based budget estimates for 2022' (2022) 1.

189 Judicial Service of Ghana, 'Medium term expenditure framework (MTEF) for 2022-2025, 1.

190 Judicial Service of Ghana, 'Medium term expenditure framework (MTEF) for 2022-2025, 1-2.

191 Judicial Service of Ghana, 'Medium term expenditure framework (MTEF) for 2024-2027, 9.

192 Judicial Service of Ghana, 'Medium term expenditure framework (MTEF) for 2024-2027, 9.

193 Judicial Service of Ghana, 'Medium term expenditure framework (MTEF) for 2024-2027, 9.

Table 1 showing judicial budget trends 2015-2022

	2015[194]	2016[195]	2017[196]	2018[197]
USD rate	1US$-3.2GH¢	1US$-3.8GH¢	1US$-4.2GH¢	1US$-4.4 GH¢
Approved budget	GH¢199,576,866.92 ($62,367,770.91)	GH¢193,702,296.99 ($59,974,288.68)	GH¢331,185,839.65 ($78,853,771.35)	GH¢375,009,466.00 ($85,229,424.09)
Government funding	GH¢193,090,718.92 ($60,340,849.66)	GH¢188,500,667.99 ($49,605,438.94)	GH¢293,649,147.00 ($69,916,463.57)	GH¢341,508,154.00 ($77,615,489.55)
Donor funding	GH¢3,749,132.00 ($1,171,603.75)	GH¢1,746,469.00 ($459,597.12)	GH¢26,179,743.00 ($5,949,941.59)	GH¢14,334,672.00 ($3,257,880.00)
Internally generated funds	GH¢2,737,016.00 ($855,317.50)	GH¢3,455,159.00 ($909,252.37)	GH¢11,356,949.65 ($2,704,035.63)	GH¢19,166,640.00 ($4,356,054.55)
Actual disbursement	GH¢171,851,947.03 ($53,703,733.45)	Between GH¢140,823,010.28 ($37,058,686.92) and GH¢156,537,974.56 ($41,146,835.41)	GH¢253,431,809.73 ($60,340,907.08)	-
Actual expenditure	GH¢204,423,574.43 ($63,882,367.01)	-	GH¢257,650,449.37 ($61,345,345.09)	GH¢255,790,147.01 ($58,134,124.32)
Budget performance	102.4%	-	78%	68%

194 The Bank of Ghana records the historic interbank exchange rates for 2 January 2015 as at 1US$-3.2001GH¢ <https://www.bog.gov.gh/treasury-and-the-markets/historical-interbank-fx-rates/>. Exchange-rates.org provides the following as the exchange rate history for 2015 <https://www.exchange-rates.org/exchange-rate-history/usd-ghs-2015>: Highest: 4.4151 GH¢ on 24 June 2015; Average: 3.7711 GH¢ over this period; Lowest: 3.2150 GH¢ on 1 January 2015.

195 The Bank of Ghana records the historic interbank exchange rates for 4 January 2016 as at 1US$-3.7823GH¢ <https://www.bog.gov.gh/treasury-and-the-markets/historical-interbank-fx-rates/>. Exchange-rates.org provides the following as the exchange rate history for 2016 < https://www.exchange-rates.org/exchange-rate-history/usd-ghs-2016>: Highest: 4.3605 GH¢ on 30 November 2016; Average: 3.9451 GH¢ over this period; Lowest: 3.7847 GH¢ on 5 May 2016.

196 The Bank of Ghana records the historic interbank exchange rates for 3 January 2017 as at 1US$-4.2007GH¢ <https://www.bog.gov.gh/treasury-and-the-markets/historical-interbank-fx-rates/>.

197 The Bank of Ghana records the historic interbank exchange rates for 2 January 2018 as at 1US$-4.4167GH¢ <https://www.bog.gov.gh/treasury-and-the-markets/historical-interbank-fx-rates/>.

	2019[198]	2020[199]	2021[200]	2022[201]
USD rate	1US$-4.8GHc	1US$-5.5GHc	1US$-5.8GHc	1US$-6.0GHc
Approved budget	GHc338, 687,128.00 ($70,559,818.33	GHc356,743,004.10 ($64,862,364.38)	GHc437,397,064.36 ($75,413286.96)	GHc 534,935,135.28 ($89,155,855.88)
Government funding	GHc237,919,737.06 ($49,566,611.89)	GHc333,076,145.10 ($60,559,299.11)	GHc 418,277,958.36 ($72,116,889.37)	GHc513,626,759.28 ($85,604,459.88)
Donor funding	GHc1,094,755.51 ($228,074.06)	-	-	-
Internally generated funds	GHc19,896,086.34 ($4,145,017.99)	GHc23,666,859.00 ($4,303,065.27)	GHc 19,119,106.00 ($3,296,397.59)	GHc21,308,376.00 ($3,551,396.00)
Actual disbursement	GHc269,840,715.72 ($56,216,815.78)	GHc306,226,445.95 ($55,677,535.63)	GHc 457,083,193.62 ($78,807,447.18)	GHc471,297,401.20 ($78,549,566.87)
Actual expenditure	GHc258,910,578.91 ($53,939,703.94)	GHc296,088,187.03 ($53,834215.82)	GHc434,841,546.84 ($74,972,680.49)	GHc483,986,854.80 ($80,664,475.80)
Budget performance	76.4%	82.9%	99.4%	90.48%

Nota bene:

- The financial year in Ghana runs along the calendar year, that is, January to December.
- The GH¢-US$ exchange rate is set as of 1st January at the beginning of the financial year.
- The aim is to give some comparative guidance as to the moneys approved and appropriated as at the time of the approvals and appropriations.
- Obviously, fluctuations in exchange rates are expected during the financial year. This indicative comparator rate is aimed rather to speak to the relative values as at the time of budgetary approval.

198 The Bank of Ghana records the historic interbank exchange rates for 2 January 2019 as at 1US$-4.8267GH¢ <https://www.bog.gov.gh/treasury-and-the-markets/historical-interbank-fx-rates/>.

199 The Bank of Ghana records the historic interbank exchange rates for 2 January 2020 as at 1US$-5.5342GH¢ <https://www.bog.gov.gh/treasury-and-the-markets/historical-interbank-fx-rates/>.

200 The Bank of Ghana records the historic interbank exchange rates for 4 January 2021 as at 1US$-5.7602GH¢ <https://www.bog.gov.gh/treasury-and-the-markets/historical-interbank-fx-rates/>.

201 The Bank of Ghana records the historic interbank exchange rates for 4 January 2022 as at 1US$-6.0061GH¢ <https://www.bog.gov.gh/treasury-and-the-markets/historical-interbank-fx-rates/>.

The trends in the budget and allocations to the judiciary suggest a significant disparity between what the Judicial Service budgets for and are approved by parliament as the funds it requires to perform its functions effectively and the funds that are released by the Ministry of Finance. Notably, the funds released by the Ministry of Finance have been consistently lower than what is budgeted by the Judicial Service, with the exception of the year 2022 where the funds released by the government exceeded the budget by about 2 percent, signalling consistent underfunding of the judiciary relative to its budget.

Despite these glaring funding shortfalls, another worrying trend relates to underspending by the judiciary as expressed by lower expenditures in a number of years relative to the funds that are released by the Ministry of Finance, even where those released funds are lower than budgeted amounts. This could signal a lack of capacity by the judiciary to execute its programmes, resulting in its failure to expend moneys it has budgeted for, and which have been allocated to it. It could also signify over-budgeting by the judiciary, though this is not likely the case, given the persistent complaints by staff of the Judicial Service for improvement in conditions of service, often resulting in protracted strike actions. It could also signal a weak administrative capacity within the Judicial Service to administer new or expanding projects. This may be the result of a decades-long focus on the recruitment of judges and judicial officers, which while critical, does not address the need for the judiciary to administer its own activities, a task best carried out by highly qualified administrative office structures.

Whichever explanation rings true, the disparities between the judicial budget, funds released by the Ministry of Finance and actual expenditure of the judiciary raise concerns which need to be addressed. It must, however, be noted that the budget performance has significantly increased over the years, from 68 percent in 2018 to 99.4 percent in 2021, signalling improved efficiency in the utilisation of the judicial service budget. The budget performance for 2022, however, dropped to 90.4 percent. This downward trend needs to be closely monitored and curtailed before it spirals into further budget inefficiency.

Another noticeable trend is the increase in government funding and internally generated funds against donor funding. Notably, the judiciary seems to have weaned itself off donor funding since 2020 and has been funding its activities solely from government funding and internally generated funds. This is a commendable improvement

which will ensure sustainable funding for the judiciary, especially in an era where donor funding has become increasingly less available or reliable. Moreover, it has the potential to enhance the independence of the judiciary in the absence of any undue pressure from external donors.

Challenges to judicial financing

The continued practice of the executive 'purporting to set ceilings, cut down, and revise budgetary estimates submitted by the Judiciary… clearly violates Article 127…of the 1992 Constitution'.[202] This practice enables the executive to control the funding of the judiciary and in effect, the ability of the judiciary to recruit essential staff and acquire infrastructure needed for efficient functioning.

As discussed in the preceding section, the data shows that even though the judiciary usually receives less than the allocated budget in actual disbursements, the actual expenditure of the judiciary over the last five years has been less than the amounts disbursed, which presents an interesting puzzle requiring comprehensive inquiry as to why a chronically underfunded institution does not often exhaust the funds that are released to it.

Thus, even though the judiciary seems not to be deprived of essential funding in the face of the fact that it has over the past 5 years not exhausted the funds released to it by the treasury, the data shows that the percentage of increase in the budgetary allocations to the executive and the legislature within this period far exceeds that of the judiciary. One report suggests that while the budgetary allocation to the Office of Government Machinery[203] has increased by a whopping 937.73 percent and that of the legislature by 48.71 percent, the budget of the judiciary has only seen an increase of 18.49 percent over the past 5 years.[204]

---

202 Francis-Xavier Kojo Sosu, 'Allocation to Office of Gov't Machinery increases by 937.73% over 5 years', *Business and Financial Times Online*, 24 March 2021.

203 The Office of Government Machinery is the main core of the executive branch of government and comprises of the Office of the President and a number of institutions directly falling under the administrative purview of the Office of the President. For details of these institutions see 'Report of the Finance Committee on the annual budget estimates for the Office of Government Machinery for the year ending 31st December 2021'.

204 Francis-Xavier Kojo Sosu, 'Allocation to Office of Gov't Machinery increases by 937.73% over 5 years', *Business and Financial Times Online*, 24 March 2021.

Another challenge to judicial funding as can be gleaned from the available data is the disparity in the allocated budget against the funds that are actually released to the Judicial Service. Thus, even though for the past five years the Judicial Service has consistently spent less than the funds disbursed by the executive, which have been consistently less than the allocated budget of the Judicial Service, the judiciary continues to publicly complain about the lack of adequate funding for its functions.[205]

This is an interesting trend in the face of the various challenges that the judiciary faces, including infrastructure deficit and complaints about staff remuneration. Notably, the Judicial Service has been plagued with recurring strikes by staff members belonging to the Judicial Service Staff Association of Ghana (JUSAG) since 2016, who have been complaining about the failure of the government to increase salaries and improve conditions of service.[206] Similar industrial action was undertaken by members of JUSAG in 2019[207] and threatened in 2021.[208]

The most likely explanation for this state of affairs is either the weak administrative capacity of the Judicial Service to spend the funds it budgets for, resulting in underspending as discussed in the preceding section, or the late release of funds by the executive to the judiciary or both. The latter would mean that by the time the funds are released to the Judicial Service, there is not enough time left for its programme to be fully implemented which results in underspending. Whichever hypothesis rings true, this situation needs to be addressed to ensure that the judiciary has adequate funding and has the capacity to utilise its budget for its effective functioning.

Assessment of judicial financial independence

The current model of judicial financing can best be described as the executive usurping the constitutional guarantee of judicial

---

205 Republic of Ghana Judiciary 'CJ reiterates financial independence for Judiciary to enhance justice delivery'.

206 Dasmani Laary, 'Ghana: Courts shutdown in countrywide judicial service strike', *The Africa Report*, 24 May 2016.

207 APA News, 'Ghana: Judicial Service workers call off strike', *APA News*, 15 November 2019.

208 Delali Adogla-Bessa, 'JUSAG threatens strike over delayed salary review', *Citi Newsroom*, 4 October 2021; JoyOnline, 'JUSAG calls off strike', *MyJoyOnline,* 28 October 2021.

financial autonomy. At present, the judiciary essentially relies on the 'benevolence' of the executive to make adequate budgetary allocations for its functioning, including providing clearance for the recruitment of essential support staff. As the preceding discussion shows, the president has almost exclusive powers (through the ad hoc committee the president is mandated to set up to determine the emoluments of judges and other judicial officers) to determine the salaries and emoluments of the chief justice, judges of the superior courts, and other judicial officers. To make matters worse, the Minister for Finance has usurped the ability of the judiciary to control its budgeting and obtain adequate financing for the judiciary by allocating to himself the power to amend, provide ceilings, or otherwise interfere with budget estimates submitted by the Judicial Service.

This state of affairs where the executive controls the financing of the judiciary poses significant challenges to the financial autonomy of the judiciary. It places it at the mercy of the executive to provide adequate funding for the judiciary. This ultimately undermines judicial independence as it 'creates a financial dependence of the judiciary on the executive, which if not expertly managed, can compromise the rule of law'.[209]

There is therefore the need to ensure that the judiciary is financially independent and not subject to the control of the executive branch of government. There are a few options[210] that may be adopted to ensure that the judiciary is truly financially autonomous from the executive branch of government as anticipated by the 1992 Constitution. These include allowing the Judicial Service to submit its budget directly to parliament for approval outside the control of the Minister for Finance. This will ensure that the judiciary can independently budget for its functioning while maintaining checks and balances through the parliamentary approval process.

Another option is the establishment of an independent judiciary fund to be administered by the Judicial Council or another designated

---

[209] Akuffo, 'Challenges to separation of powers in constitutional democracies', 8; see also recent comments of the current Chief Justice Tokornoo, reiterating similar concerns in Republic of Ghana Judiciary, 'CJ reiterates financial independence for judiciary to enhance justice delivery'.

[210] For more detailed discussion on the various models of judiciary financing across the world, see Alexander Rosselli, 'Judicial independence and the budget: A taxonomy of judicial budgeting mechanisms' 5 *Indiana Journal of Constitutional Design,* Articles by Maurer Faculty, Indiana University, (2020).

body for the functioning of the judiciary. This model is exemplified by Article 173 of the 2010 Constitution of Kenya and its enabling legislation, the Judiciary Fund Act,[211] which establishes the Judiciary Fund into which budgetary estimates submitted to and approved by the legislature are paid for the administration and function of the judiciary.

Yet another option which may be utilised to ensure judicial financial autonomy is following the example of 'most Latin American judiciaries [that] automatically receive a fixed share of the budget as part of the apparatus for insulating the judiciary from undue influence.'[212] The Constitution of Honduras, for instance, guarantees that not less than 3 percent of the current revenues of the government be allocated to the judiciary.[213] This model ensures that the judiciary is guaranteed sufficient funding which automatically increases as the economy of the state grows and government revenues increase.

Judicial financial accountability

The financial accountability of the judiciary is underpinned by Article 127(7) of the Constitution which empowers the Auditor General to audit the accounts of the judiciary. Article 187(2) of the Constitution further mandates the Auditor General to audit and report on the accounts of all public institutions including the judiciary. In the process of auditing public accounts, the designated official of the Auditor General's office is entitled to 'have access to all books, records, returns and other documents relating or relevant to those accounts'.[214] The Auditor General is also entitled in the performance of their duties to determine the form in which the accounts of the Judicial Service shall be kept and is obligated to report to parliament on the audited accounts of all public institutions including the judiciary. The Auditor General in

---

211 Act No 16 of 2016.

212 Siri Gloppen, 'Courts, corruption and judicial independence' in Tina Søreide and Aled Williams (eds) *Corruption, grabbing and development: Real world challenges,* Edward Elgar, Cheltenham and Northampton, 2014, 68-72; Siri Gloppen (ed) *Courts and power in Latin America and Africa*, Palgrave MacMillan, Basingstoke, 2010; see also *Kor v Attorney General and Another* (JI 16 of 2015) [2016] GHASC 71 (10 March 2016), for the views of the Supreme Court on the impact of financial security of judges on the independence of the judiciary.

213 Honduras Constitution tit. V, ch. 12, Article 318, cited in Alexander Roselli, 'Judicial independence and the budget: A taxonomy of judicial budgeting mechanisms', 5 *Indiana Journal of Constitutional Design* (2020), 2.

214 Constitution of Ghana (1992), Article 187(3).

the submission of this report may draw the attention of the legislature to any irregularities in the accounts of the judiciary. This is to ensure that all public institutions including the judiciary diligently account for the funds allocated to them by parliament.

In compliance with this mandate, the Auditor General of Ghana submitted a report to parliament in September 2022 highlighting irregular expenditure on the accounts of public institutions.[215] The report indicated a number of irregular expenditures accruing to various public institutions including the judiciary, which was reported to have made some irregular expenditures that had been recovered or needed to be recovered.[216] Thus, the Auditor General serves as an important accountability mechanism for the finances budgeted for and disbursed to the judiciary and has the power to disallow or even surcharge responsible officials of the Judicial Service for irregular expenditures. The Judicial Service also publishes annual reports on its website indicating its activities, budgeted amounts as well as actual allocations it received from the Ministry of Finance which enables the public to track issues relating to the financing of the judiciary in the spirit of transparency and accountability.

Conclusion

The judiciary plays an important role in any serious constitutional democracy which values the separation of powers. Consequently, while checks and balances are an important component of the separation of powers in a democracy, the unbridled interference or power of the other arms of government to affect the functioning of the judicial arm of government poses a threat to judicial independence. This chapter has shown that the 1992 Constitution of Ghana provides quite a liberal framework for judicial independence, including the financial autonomy of the judiciary, even though there is some variance in the practical implementation of the constitutional guarantee of the financial autonomy of the judiciary. Additionally, the almost exclusive powers of

[215] Auditor General, 'Special audit report on the recoveries made from disallowed expenditure in the Auditor General's Reports from 2017 to 2020 and payroll saving as at 30 September 2020', Ghana Audit Service 2022, 3 October 2022.

[216] Auditor General, 'Special audit report on the recoveries made from disallowed expenditure in the Auditor General's Reports from 2017 to 2020 and payroll saving as at 30 September 2020'.

the president to appoint the chief justice and other justices of the superior courts, with limited independent input from constitutional bodies such as the Judicial Council, creates the impression that the president can negatively impact the independence of the judiciary by appointing judges who have a particular political or philosophical leaning, without much scrutiny.

Again, despite constitutional guarantees of judicial financial autonomy, the executive seems to have usurped this power and arrogated to itself the power to amend, set ceilings or otherwise impact the budgetary estimates submitted by the Judicial Service. To cure this, there is the urgent need to amend the Constitution to ensure that appointments of the chief justice and other judges of the superior courts include the meaningful involvement of the Judicial Council such as through empowering the Judicial Council to receive nominations and make recommendations to the president for appointment.[217] This could include public announcement of vacancies, request for nominations and public interviews by the Judicial Council, subsequent to which recommendations would be made to the president for appointment, as pertains in jurisdictions such as South Africa. This will enhance transparency in the nomination and appointment process, which will further enhance the integrity and independence of the judiciary. Adequate mechanisms also need to be put in place to ensure that the removal of the chief justice from office undergoes proper scrutiny, as is the case in the removal of other justices of the superior courts where the establishment of a *prima facie* case for misconduct is required for the commencement of disciplinary proceedings.[218]

In terms of the financial autonomy of the judiciary, there is a need to ensure that budgets of the judiciary submitted to the executive for onward submission to and approval by parliament are insulated from executive interference. Specifically, the Treasury should be expressly prohibited from setting ceilings or arrogating to itself the power to amend the budget submitted by the Judicial Service. There is also the need to explore other funding models such as setting the judicial budget as a percentage of the national budget so that the political branches are prohibited from interfering with the financial autonomy of the judiciary, as well as a judiciary fund where allocated funds are transferred for use by the judiciary to curb disbursement delays.

---

217 AfriMAP, OSIWA and IDEG, *Ghana: Justice sector and rule of law*, 11.

218 AfriMAP, OSIWA and IDEG, '*Ghana: Justice sector and rule of law*', 11.

Suffice it to conclude that an independent judiciary is indispensable in a constitutional democracy to ensure that the rule of law is protected. This should ultimately include the adequate financing of the judiciary which should be guaranteed by giving the judiciary autonomy over budgeting and receiving funding independent of the control of the executive. Any ambiguity on the role of the executive in the budgeting and financing of the judiciary would inure to the benefit of the executive, which may take advantage of the ambiguity to control the financing of the judiciary. Clear and unambiguous rules concerning the financial autonomy of the judiciary need to be urgently put in place to ensure the financial autonomy and overall independence of the judiciary.

CHAPTER TWELVE: NAMIBIA

Financial independence and effectiveness of the judiciary in Namibia

Kennedy Kariseb

Introduction

Judicial independence is no new topic. Scholarship relating to the judiciary has predominantly been saturated around this notion,[1] especially in Africa, given the geopolitical challenges on the continent.[2] Whilst judicial independence has undoubtedly been of academic consideration, including in Namibia,[3] its contemplation within the context of fiscal independence is a rather recent development. This chapter, as is the case with the scholarship in this book, seeks to reflect on the financial autonomy of the judiciary in Namibia, itself an inextricable component of judicial independence.

---

1 See generally, BC Smith, *Judges and democratization: Judicial independence in new democracies*, Routledge, London, 2019, 1-232; Mike McConville and Luke Marsh, *The myth of judicial independence,* Oxford University Press, 2020, 1-312; Shimon Shetreet and Wayne McCormack (eds), *The culture of judicial independence in a globalised world*, Brill Nijhoff, Boston, 2016, 1-345; Shimon Shetreet, Hiram Chodosh and Eric Helland, (eds) *Challenged justice: In pursuit of judicial independence*, Brill Nijhoff, Boston, 2021, 1-234; Shimon Shetreet and Christopher Forsyth, (eds), *The culture of judicial independence: Conceptual foundations and practical challenges*, Martinus Nijhoff, Boston, 2011, 1-276; Shimon Shetreet, and Jules Deschenes, (eds), *Judicial independence: The contemporary debate*, Brill Nijhoff, Boston, 1985, 1-345; Adam Dodek and Lorne Sossin, *Judicial independence in context,* Irwin Law Publishers, Toronto 2010, 1-234; Peter H Ruseel and David M O'Brien, *Judicial independence in the age of democracy: Critical perspectives from around the world*, University Press of Virginia, Virginia, 2001, 1-334; Stephen B Burbank and Barry Friedman, (eds), *Judicial independence at the crossroads: An interdisciplinary approach*, SAGE Publications, London, 2002, 1-233; Tom S Clark, *The limits of judicial independence*, Cambridge University Press, 2010, 1-345; and Shimon Shetreet, (ed), *The culture of judicial independence: Rule of law and world peace*, Brill Nijhoff, Leiden, 2014, 1-334.

2 See for instance, Wahab O Egbewole, *Judicial independence in Africa*, Wildy, Simmonds & Hill Publishing, London, 2017, 1-225; Lovemore Madhuku, 'Constitutional protection of the independence of the judiciary: A survey of the position in Southern Africa', 46(1) *Journal of African Law* (2002) 355-372; and Akinola Aguda, 'The judiciary in Africa', 9(1) *The Fletcher Forum* (1985) 13-35.

3 See generally, Nico Horn & Antol Bosl, (eds), *Independence of the judiciary in Namibia*, Windhoek, 2008, 1-311.

The judiciary in Namibia, as in most parts of the Commonwealth, is a constitutional imperative.[4] With the attainment of independence in early 1990, the Namibian Constitution came into effect as the supreme law.[5] Hailed by the international community as a liberal constitution,[6] it embraces amongst others, the independence of the judiciary. The Constitution broadly provides for the independence of the judiciary and specifically states that the 'courts shall be independent and subject only to the Constitution and the law' and that 'no member of the Cabinet or the Legislature or any other person shall interfere with judges or judicial officers in the exercise of their judicial functions'.[7] The Constitution further provides 'all organs of the State to accord such assistance as the courts may require to protect their independence, dignity and effectiveness' subject to the terms of the Constitution or any other law.[8] Moreover, Article 78(5) of the Namibian Constitution prescribes the financial and other administrative matters of the superior courts be performed in such a manner that the independence of the judiciary can be effectively and practically promoted and guaranteed.

Following the express guarantee of the financial independence of the judiciary in the Constitution, there remains a need to analyse the contours and degree of the fiscal autonomy of the judiciary, both in its institutional and operational form; a gap this chapter's contribution, by reference to the Namibian judiciary, seeks to fill. As its central focus, this chapter broadly considers the question: To what extent is the financial independence and efficiency of the judiciary in Namibia protected and promoted? In considering this question, this chapter argues that whilst Namibia has a commendable legal framework that guarantees the financial independence of its judiciary generally, this can further be enhanced practically by introducing some major reforms.

---

4 See Constitution of Namibia (1990), Article 78(1) read with Article 1 (3), which establishes the judiciary, together with the legislature and the executive as an organ of the State.

5 Constitution of Namibia (1990), Article 1(6).

6 Edward Schmidt-Jortzig, 'The Constitution of Namibia: An impressive example of a state emerging under close supervision and world scrutiny', 34(1) *German Yearbook of International Law* (1991) 341-251; Oliver Ruppel and Katharina Ruppel-Schlitchting, 'Legal and judicial pluralism in Namibia', 34(1) *Journal of Legal Pluralism* (2011) 37. In contrast others have also raised concerns on the neo-liberal nature of the Namibian Constitution. On this point see for instance, See Job Shipululo Amupanda, 'Constitutionalism and principles of economic order: Examining Namibia's "mixed economy" and the economic asylum of neoliberalism', 21(1) *Journal of Namibian Studies* (2017) 7.

7 Constitution of Namibia (1990), Article 78 (2) and (3).

8 Constitution of Namibia (1990), Article 78 (3).

First, by ensuring that the Office of the Judiciary exercises full financial control over both its capital and operational expenditure and second, by introducing a ceiling amount on Treasury appropriations to the Judiciary. This chapter argues that these reforms are necessary given Namibia's vulnerability to economic shocks and its plural political system.

The chapter is divided into three main sections. To fully comprehend and appreciate the state of the judiciary in Namibia, the chapter begins with a brief background of the structural and institutional orientation of the judiciary in Namibia, including its framework for judicial independence. In the second section, the chapter considers the financial efficiency and independence of the judiciary, by reference to the terms and conditions of service of judicial officers and staff, judicial financing and financial management framework, judicial budgetary process and appropriations and judicial financial accountability mechanisms. It then ends with a terse conclusion, highlighting potential and actual challenges to the financial independence of the judiciary in Namibia.

Structural and institutional independence and functioning of the judiciary in Namibia

Prior to the attainment of independence, the courts of Namibia were an extension of the judicial system of South Africa.[9] Following the imposition of South African administration over South West Africa (now Namibia), after the granting of the League of Nations mandate over the territory to the Union of South Africa, one obvious historical fact was the assumption of legislative powers over the territory by South Africa and the resulting extension of the South African legal system.[10] This shared heritage with the South African legal system not only resulted in the resemblance of the two jurisdictions but also in the manner in which its courts are administered and structured.

Consequently, the Namibian Constitution vests judicial power in the courts, resembling that of the South African court system[11] which

---

[9] Samuel Amoo, 'The structure of the Namibian judicial system and its relevance for an independent judiciary' in Nico Horn & Anton Bosl (eds), *The independence of the judiciary in Namibia*, Windhoek, 2008, 69.

[10] Supreme Court Act (No 59 of 1959), extended to South West Africa establishing a 'provincial division'.

[11] Constitution of Namibia (1990), Article 78(1) as amended. See also the Judiciary Act (No

comprises the superior courts (the Supreme Court and the High Court) and lower courts (Magistrates' Courts and Community Courts). In addition, there has been a growth of specialised courts, established by legislation, that are mandated to deal with specialised fields of the law. These specialised courts are part and parcel of the mainstream judicial structure since their jurisdiction and powers are either complemented or originate from the inherent jurisdiction of 'mainstream' courts.

The judiciary is headed by the chief justice, who serves as the principal judge of the courts and the head of the Supreme Court. In that capacity, the chief justice supervises the judiciary, exercises responsibility over it and monitors the norms and standards for the exercise of the judicial functions of all courts.[12] In discharging these functions, the chief justice is supported by a deputy chief justice, who serves as an *ex officio* member of the Supreme Court, and such additional judges as the president, acting on the recommendation of the Judicial Service Commission, may determine.[13] There are currently three permanent judges at the Supreme Court, in addition to the chief justice and deputy chief justice.

The Supreme Court has inherent jurisdiction which was vested in the Supreme Court of South West Africa immediately prior to the date of independence, including the power to regulate its own proceedings.[14] It has powers to preside over appeals emanating from the High Court, including appeals which involve the interpretation, implementation and upholding of the Constitution and fundamental rights and freedoms guaranteed thereunder.[15] It also has jurisdiction to entertain matters referred to it for consideration by the Attorney General.[16]

The High Court, which is the second highest court, is sub-divided into a Northern Division (with its seat in Oshakati) and a Main Division (with its seat in Windhoek). It is headed by the judge president, who also

---

11 of 2015), Section 1, which defines the Judiciary as the Supreme Court and the High Court referred to in Constitution of Namibia (1990), Article 78 (1) (a) and (b) and the Magistrates' Ccourts established in terms of the Magistrates' Courts Act (No 32 of 1944), as amended.

12 Constitution of Namibia (1990), Article 78(7), as amended.

13 Constitution of Namibia (1990), Article 79(1), as amended.

14 Constitution of Namibia (1990), Article 78(4), as amended. By virtue of being Judge-President, the Judge-President is seconded *ex officio* as the Deputy Chief Justice to the Supreme Court of Namibia. He therefore presides in both courts.

15 Constitution of Namibia (1990), Article 79(2), as amended.

16 Constitution of Namibia (1990), Article 79(2), as amended.

serves as the deputy chief justice, with judicial support from the deputy judge presidents and additional judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.[17] In practice, there is one judge president (also serving *ex officio* as the deputy chief justice) and twenty-two judges of the High Court serving both the northern and main divisions of the Namibian High Court. As far as its jurisdiction is concerned, the High Court has original jurisdiction to hear and adjudicate on all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder.[18] It also has powers to hear appeals from lower courts or any specialised court or tribunal created in terms of a statute.[19]

In addition to the Supreme Court and the High Court, the Constitution recognises 'lower courts'.[20] What constitutes 'lower courts' is not as yet a settled matter. The confusion seems to emanate from the creation of Community Courts,[21] and by extension, one can argue of late, the increasing number of specialised courts which have more or less the same level of jurisdictional powers as the Magistrates' Courts. Moreover, the definition of the 'Judiciary' as captured in the Judiciary Act 11 of 2015 limits the judiciary only to the superior courts and Magistrates' Courts,[22] raising questions about the other courts and tribunals within the framework of the Judiciary. Despite this uncertainty, there is generally wide acceptance that in addition to the Magistrates' Courts, Community Courts also form part of the lower courts as envisaged in Article 78(1) (c) of the Constitution.

Magistrates' Courts are creatures of statute, established in terms of Section 2 of the Magistrates' Court Act.[23] They are headed by the chief of lower courts and take either one of three forms, namely Regional,

---

17 Constitution of Namibia (1990), Article 80(1), as amended.

18 Constitution of Namibia (1990), Article 80(2), as amended.

19 Constitution of Namibia (1990), Article 80(3), as amended.

20 Constitution of Namibia (1990), Article 78(1)(c) as amended.

21 See on this point Manfred Hinz, 'Traditional courts in Namibia-part of the judiciary? Jurisprudential challenges of traditional justice' in Nico Horn and Anton Bosl (eds) *The independence of the judiciary in Namibia*, Macmillan Publishers, Windhoek, 2008, 149-176; Oliver Christian Ruppel and Katharina Ruppel-Schlichting, 'Legal and judicial pluralism in Namibia and beyond: A modern approach to African legal architecture', 33-64.

22 See generally, Judiciary Act (No 11 of 2015), Section 1.

23 No 32 of 1944.

District, or Periodic Magistrates' Courts,[24] distinguishable primarily on the basis of the jurisdiction each enjoys. Magistrates' Courts, like superior courts, are courts of records, and their proceedings in both criminal cases and trials of all defended civil actions are carried out in open court.[25] In practice, Magistrates' Courts are divided into five main magisterial administrative districts.[26] These five (5) main magisterial administrative districts are further divided into thirty (30) districts, with a total of seventy-eight (78) places where Magistrates' Court proceedings can be held.[27] All Magistrates' Courts have equal civil jurisdiction, except Regional Magistrates' Courts which have only criminal jurisdiction. As the apex courts of the magistracy, Regional Magistrates' Courts have full criminal jurisdiction, except for the crime of treason.

Given that the Namibian Constitution recognises customary law as a source of law,[28] there arose a need for the creation of courts that would administer the various customary laws of the traditional communities in Namibia. The Community Courts Act 11 of 2003 ushered in Community Courts as courts endowed with the primary mandate of administering customary law. The specialised nature of these courts not only gives legitimacy to the customary laws of the indigenous communities but it also, as Dahlmanns and Wielerga rightly argue, lies rooted in the fact that the proceedings of these courts are understood and appreciated by local communities.[29]

Community Courts are courts of record[30] and may be held in any indigenous language, provided that such courts shall cause their records, which are the subject of appeals to the Magistrates' Courts,[31] to be translated into the official language.[32] While community courts are

---

24 Magistrates' Court Act (No 32 of 1944), Sections 2(a)-(f), as amended.

25 Magistrates' Court Act (No 32 of 1944), Section 5, as amended.

26 These are the District Divisions of Keetmanshoop, Windhoek, Otjiwarango, Oshakati, and Rundu.

27 See generally, Government Notice (No 799 of 1994), Schedule 1, on the Creation of Districts Divisions and Establishment of Courts for such Divisions: Magistrates Courts Act (No 32 of 1944).

28 Constitution of Namibia (1990), Article 66(1), as amended.

29 Erika Dahlmanns and Cori Wielerga, 'Innovating governance - Integrating judicial systems in hybrid political orders: A case study of the justice practices in the Namibian Erongo Region', Working Paper Centre for the Study of Governance Innovation, 2019, 8.

30 Community Courts Act (No 11 of 2003), Section 18(1), as amended.

31 Community Courts Act (No 11 of 2003), Section 27, as amended.

32 Community Courts Act (No 11 of 2003), Section 15, as amended.

presided over by justices appointed by the Minister for Justice,[33] any person may make appearances and representations in these courts, including legal practitioners.[34] As far as jurisdiction is concerned, all community courts may hear and determine any matter relating to a claim for compensation, restitution or any other claim recognised by the customary law of that specific community, provided that the cause of action of such a matter or any element thereof arose within the area of jurisdiction of that community court, and/or, the person or persons to whom the matter relates are in the opinion of that community court closely connected with its customary law.[35]

Operating under the above set out structure, the judiciary has functioned relatively autonomously with minimal interference. With the assistance of mechanisms such as the Judicial Service Commission, the courts' independent functioning so far, to a large extent, has not been compromised. The structural composition of the Judicial Service Commission gives very little room for political manipulation, given the fact that only the Attorney General is a direct appointee of the President.

The Judicial Service Commission, established in terms of the Judicial Service Commission Act 18 of 1995,[36] is mandated to, among other duties, make recommendations to the president with regard to the appointment of persons to judicial offices, whether in a permanent or acting capacity, and the removal from office of persons holding or acting in such offices;[37] review or make recommendations on the terms and conditions of service, including retirement benefits, of persons holding or acting in judicial offices;[38] conduct disciplinary inquiries into the conduct of persons holding or acting in judicial offices, and receive and investigate complaints from the members of the public concerning the conduct of such persons or the administration of justice at superior court level;[39] make recommendations to the minister concerning any matter which by law pertains to the judiciary or the administration of

---

33 Community Courts Act (No 11 of 2003), Section 8(1), as amended.

34 Community Courts Act (No 11 of 2003), Section 16 as amended.

35 Community Courts Act (No 11 of 2003), Section 12(a) and (b), as amended.

36 The object of the Act is *inter alia,* to provide for the manner of nomination of members of the legal profession as members of the Judicial Service Commission; to prescribe the tenure of office of the members of the Judicial Service Commission; to consolidate the functions of the Commission; to provide for a balanced structuring of judicial offices; and to provide for other incidental matters.

37 Judicial Service Commission Act (No 18 of 1995), Section 4(a).

38 Judicial Service Commission Act (No 18 of 1995), Section 4(b).

39 Judicial Service Commission Act (No 18 of 1995), Section(c).

justice, with a view to the improvement thereof;[40] and perform any other function assigned to the Judicial Service Commission by the president or under the law.[41]

Although structurally functioning, another metric for measuring the independence of the judiciary is the influence the judiciary has. That is, are its judgements respected and enforced by the executive, legislature and the general public who have a constitutional mandate to do so? There has not been reported contumacy for court judgements in Namibia. While expression of disappointment in an outcome might be welcome and does appear, in line with constitutional traditions the world over, outright contumacy and attack on the judiciary, although intolerable, does feature periodically.[42]

Most recently, for instance, the Supreme Court ruled in *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others*,[43] looking at the plain language in Section 2(1)(c) of the Immigration Control Act 7 of 1993, that spouses of same-sex couples whose marriages are legally consummated outside the republic, are 'spouses' within the meaning of the statute, therefore exempting them from applying for the plethora of permits required to enter Namibia under Part V of the Act. Following this decision, it seems that the Namibian parliament will pass legislation that will effectually nullify the Supreme Court judgement which may amount to undermining the rule of law. While the practice of judicial deference appears to be the exception rather than the rule, one cannot erase the possibility of such becoming the norm and thus undermining the independence of the judiciary in the near future.

Financial independence and autonomy of the judiciary in Namibia

Terms and conditions of service of judicial officers and staff

The financial efficiency of any judiciary depends on a system that not only secures tenure but also provides adequate conditions of service. This is usually reflected by human and capital security, tenure security,

---

40 Judicial Service Commission Act (No 18 of 1995), Section 4(d).

41 Judicial Service Commission Act (No 18 of 1995), Section 4(e).

42 See for instance decisions such as *S v Heita* 1992 (NR) 403 (HC),

43 *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023).

adequate remuneration and conditions of service, including pension afforded to judicial officers. Moreover, to ensure the financial stability and efficacy of the courts, the appropriation of sufficient funds to the judiciary is a precondition that must be secured by law.

Generally, the law provides for the conditions of service of judicial officers and the funding of the judiciary. This has been the position in most jurisdictions in Africa, including Namibia. In the case of Namibia, and with the exception of judges of the superior courts, judicial officers such as legal officers, magistrates, clerical officers, and others, are dealt with in terms of general public service legislation, such as the Public Service Act, 1995 (as amended) and the Magistrates' Act, 2003. As the focus of this chapter is on the superior courts, and more so judges, this legislation will not be addressed here, safe to draw attention to the forestated fact that there are separate legislative instruments that apply to these officers.

The basic conditions of service of judges in Namibia, as the most senior members of the judiciary, are regulated by the Judges Remuneration Act, 1990 (as amended). Section 5 of the Act authorises the president, after consultation with the Judicial Service Commission, to make regulations regarding the benefits of judges. This in principle means that the executive arm of government, through the agency of the president and input of the Judicial Service Commission, thus administers the remuneration and conditions of service of judges in Namibia. Although there have been no formal reports of abuse of such powers by the presidency in the past, especially given that the remuneration, benefits and other conditions of service of judicial officers have consistently only increased over the years, it does not erase the possibility of political (ab)use of such wide powers in future.

The reasons why there is no formal record of abuse of the powers granted to the president or no reason to suspect abuse can be attributed to one observation – the oversight function of the Judicial Service Commission. Although merely consultative, Regulation 5(1) of the Judicial Service Commission Regulations No 60 of 2011 enables the Judicial Service Commission from time to time to appoint a committee to investigate and consider any matter relating to the remuneration, benefits and other conditions of service of judicial officers, and after consulting with the ministers responsible for justice and finance respectively, to make recommendations in that regard to the president for his or her

consideration.[44] Accordingly, and contrary to the formal legal position, the Judicial Service Commission has had a 'recommendary' role rather than merely a 'consultative' one, contrary to the provisions of section 5 of the Judges Remuneration Act, 1990 (as amended). [45]

The regulations and schedules provide for a variety of service conditions, including issues such as salary (see Table 1 below), leave of absence of judges, sick leave and special leave, accommodation, allowances, safety and security, personnel, official vehicles, transport and travelling, as well as specific conditions applicable to acting judges. In addition to these benefits, judges are also entitled to housing and vehicle allowances for vehicles bought in terms of a motor vehicle scheme.[46]

An important improvement relating to the conditions of service of judges is the provision of judges' professional support staff. In the past, judges were forced by a heavy roll to spend nearly full time in court to do their own research, write judgements and struggle to have such judgements typed, without proper support. As a consequence, equally important processes of the court, such as judicial case management were severely affected. This has now been remedied as judges are entitled, depending on their rank or court, to a legal officer, a special assistant, and an executive private secretary.[47]

---

[44] In terms of Regulation 5 (2) of the Judicial Service Commission Regulations (No 60 of 2011), a committee appointed in terms of sub regulation (1) may, with the approval of the Commission, seek assistance from any fit and proper person whose expertise can, in the opinion of the committee, lead to the proper and expeditious investigation of the matter relating to remuneration, benefits and other conditions of service of judicial officers, including judges.

[45] Such regulations were indeed made in 1990 and had been replaced by new regulations in 2003. Schedule two of the regulations, which sets out the basic conditions of service to which judges are entitled has been amended at least five times, the most recent being in 2018. Amendments to the Schedules appended to the Judges Remuneration Act (No 18 of 1990) are as follows: Proc 12/1994 (GG 848) amends the First Schedule to the Act; Act 24/1994 (GG 966) repeals Proc 12/1994, substitutes the First Schedule, adds a new Second Schedule, and makes the original Second Schedule into the Third Schedule (laws repealed by the principal Act); Proc. 2/1999 (GG 2022) amends the new Second Schedule; Proc 14/2003 (GG 2974) substitutes the Second Schedule; Proc 11/2007 (GG 3869) substitutes the Second Schedule; Proc. 10/2012 (GG 4941) substitutes the Second Schedule; Proc 6/2014 (GG 5451) substitutes the Second Schedule; Proc 5/2015 (GG 5689) substitutes the Second Schedule; Proc. 45/2015 (GG 5914) substitutes the Second Schedule; and Proc 10/2018 (GG 6584) substitutes the Second Schedule.

[46] Regulations Relating to Conditions of Service of Judges (Proc 28 of 2015), Regulation 7: Judges' Remuneration Act (No 18 of 1990).

[47] Regulations Relating to Conditions of Service of Judges (Proc 28 of 2015), Regulation 12: Judges' Remuneration Act (No 18 of 1990).

Table 1: Judges' remuneration schedule

Designation of Office	Salary per annum (N$)
Chief Justice	N$1,706,144 (US$ 90,731)
Deputy Chief Justice	N$1,645,406 (US$ 87,501)
Supreme Court judge	N$1,540,896 (US$ 81,943)
Supreme Court acting judge	Salary equal to that of a Supreme Court judge proportionate to the period during which he or she acts as acting judge
Supreme Court ad hoc judge	Salary equal to that of a Supreme Court judge proportionate to the period during which he or she acts as *ad hoc* judge
Deputy Judge President	N$1,354,556 (US$ 72,034)
High Court judge	N$1,248,636 (US$ 66,401)
High Court acting judge	Salary equal to that of a High Court judge, proportionate to the period during which he or she acts as acting judge

Source: Government Gazette (2018)[48]

Judges form part of the legislative pension system under the members of parliament and office bearers following the amendments that were brought about by the Judges Pensions Act 13 of 2011. The purpose of this Act was twofold. First, it sought to transfer judges' pensions and gratuities from the State Revenue Fund to the Members of Parliament and other Office Bearers Pension Fund;[49] and second, to repeal the then applicable Judges' Pensions Act, 1990 (as amended). The Act therefore can be viewed as an intermediary between the 'old' Judges' Pensions Act, 1990 and the Members of Parliament and other Office Bearers Pension Fund Act 20 of 1999. The shift appears to be guided by the fact that judges are regarded as duly appointed office bearers of the third arm of government.

As part of its transitional provisions, the Judges Pensions Act, 2011 retrospectively prohibits the applicability of any rules that 'diminish or otherwise detrimentally affect any right or benefit to which judges were entitled under the pension scheme before the transfer date set

[48] See generally Proclamations No 10, Amendment of Second Schedule to Judges' Remuneration Act, 1990.

[49] See generally Judges Pensions Act (No 13 of 2011), Section 3(1).

on 30 March 2012;[50] or that introduce any requirement, restriction or qualification in respect of continued participation as a member or pensioner of the pension fund of any judge, and being a condition or obligation which did not apply to that person under the pension scheme is invalid in relation to that person.'[51]

The conditions of service available to judges, save for the chief justice and deputy chief justice, after their tenure on the bench remains limited. For the most part, their integrity and financial security are largely covered by their pensions. The Regulations make terse reference to any benefits after tenure, save that the Chief Justice and Deputy Chief Justice are, for the rest of their lives, each entitled to an official vehicle and a driver for private purposes.[52] Although not specified, other service benefits, as may be determined by the Judicial Service Commission, apply to a former chief justice or a former deputy chief justice, subject to any adjustments applicable to a sitting chief justice or a sitting deputy chief justice.[53] All judges, except for a judge who was dishonourably discharged from office, retain their diplomatic passports for the rest of their lives.[54]

Viewed comparably with other jurisdictions, especially in southern Africa, the conditions of service of senior judicial officers are reasonably adequate to encourage a culture of transparency as well as to protect the financial integrity of the person of judges and the institutional independence and effectivity of the judiciary. What is however concerning is the neglect of other members of the judiciary, especially magistrates and senior legal officers. Their *de facto* treatment as public servants with limited financial and professional support has repercussions on the effective functioning of the judiciary as a whole. In one recent speech, the Chief Justice drew attention to the deplorable state of service conditions for ordinary members of the judiciary, triggered primarily by budgetary cuts. In the words of the Chief Justice:

> The impact of the pandemic on the national fiscus has been devastating. The true state of affairs has been laid bare by the Hon. Minister for Finance in his

---

50 Judges Pensions Act (No 13 of 2011), Section 3(3)(a).

51 Judges Pensions Act (No 13 of 2011), Section 3(3)(b).

52 Regulations Relating to Conditions of Service of Judges (Proc 28 of 2015), Regulation 14, Judges' Remuneration Act, 1990.

53 Regulations Relating to Conditions of Service of Judges (Proc 28 of 2015), Regulation 14(2), Judges' Remuneration Act, 1990.

54 Regulations Relating to Conditions of Service of Judges (Proc 28 of 2015), Regulation 14(3), Judges' Remuneration Act, 1990.

> budget speeches to parliament. As a result, the judiciary's budget has not only shrunk in real terms in the past two financial years, but we have been asked by treasury on several occasions to make cuts during the course of budget implementation. The prospects, therefore, look bleak for the future. I mention this obvious reality to convey to judicial officers that the chances of improvement in our conditions of service are not promising and that other state employees find themselves in similar circumstances.[55]

The deplorable working conditions for ordinary members of the judiciary have been a breeding ground for unethical conduct. While there is no empirical evidence that the lower-level budget constraints affect the outcome of decisions in the judiciary, particularly in the lower courts, it is not surprising that fraudulent conduct has increasingly become a concern in the judiciary, especially as far as its professional support staff in the lower courts are concerned. Statistically, in the 2021 legal year, a high incidence of cases of misconduct was reported.[56]

This conduct not only reflects the declining moral grounding of the ordinary members of the judiciary caused primarily by poor service conditions, but it also has the potential to undermine public confidence in courts. This could, if not addressed, affect the independence of the judiciary, particularly amongst magistrates and support staff of the lower courts. In the past, there have been instances of magistrates found guilty of corruption and other forms of financial misconduct.[57] To this end, magistrates and other support staff of the courts are potentially lured into unethical conduct such as bribery and corruption. This affects the ethical standing of the judiciary and is therefore an imminent threat to its financial stability, functioning, and overall independence as some of these funds are intended for capital projects relating to the courts.

---

[55] Speech by his Lordship, the Hon Peter S Shivute, Chief Justice of the Republic of Namibia, on the occasion of the virtual opening of the 2022 legal year, Supreme Court, Windhoek, 10 February 2022, 5 (on file with the author).

[56] Speech by his Lordship, the Hon Peter S Shivute on the occasion of the virtual opening of the 2022 legal year. In his speech the Chief Justice reported ninety-four percent (94%) of cases of misconduct dealt with by the Human Resources Directorate of the Office of the Judiciary are from the Directorate: Lower Courts. Of this number, sixty-five percent (65%) involved theft or fraud.

[57] See for instance, *S v Theron* (3) (CC 27 of 2012) [2019] NAHCMD 237 (11 July 2019).

Judicial financing and financial management framework

As earlier mentioned, the Namibian Constitution explicitly provides for the protection of the judiciary. The pulse of Article 78(2) of the Constitution relates to judicial independence. It provides that 'the courts shall be independent and subject only to the Constitution and the law.' In turn, sub-article 3 of Article 78 places a positive obligation on '…all organs of the state to render assistance as the courts may require to protect their independence, dignity, and effectiveness…' while reprimanding 'members of the executive, legislature or any other person from interfering with judges or judicial officers in the exercise of their judicial functions.' A neat reading of this provision clearly shows that the duty not to interfere is an absolute one; the violation of which can lead to contempt of court.[58]

With the most recent amendments made to the Namibian Constitution, Article 78 has been slightly recrafted. Section 19 of the Namibian Constitution Third Amendment Act of 2014 makes three additional provisions to Article 78 of the Constitution. The three additional provisions read as follows:

(5) The financial and other administrative matters of the High Court and Supreme Court shall be performed in such a manner that the independence of the Judiciary can be effectively and practically promoted and guaranteed by means of appropriate legislative and administrative measures.

(6) In accordance with the relevant laws, an accounting officer shall be designated who shall, subject to the direction and control of the Chief Justice, perform the functions of an accounting officer as head of the

[58] The scope and context of Article 78 formed the substantive basis in the Namibian Supreme Court decision of *S v Heita & Another* 1992 NR 403 (HC). This decision dealt primarily with a recusal by a judge from presiding over a particular case after fervent attacks and threats by members of the ruling party and the general public against the judge for imposing a 'perceived lenient' sentence in a treason trial where the accused was a white adult male. The judge himself was a white adult male. Consequently, the issue of recusal from the ongoing treason trial by the trial judge was raised by the court *ex mero motu*. Deliberating on the contours of judicial independence the Court held three notable points, although merely *obiter dicta*. Firstly, the Court stressed that the prohibition not to interfere with judges or judicial officers as the case may be was an absolute bar applicable at any stage – before, during or after – a verdict has been made by a Court of law. Secondly, that the prohibition envisaged in Article 78 (3) was not only restricted to members of the executive or legislature but applicable to individuals, both in the public or private sphere. Thirdly, that the prohibition envisaged by Article 78 (3) was directed at ensuring that judges and, or, judicial officers perform their duties effectively and responsibly.

administration of the Judiciary with the assistance of such other staff members designated from the public service for such purpose.

(7) The Chief Justice shall supervise the Judiciary, exercise responsibility over the Judiciary, and monitor the norms and standards for the exercise of the judicial functions of all courts.

The above provision to a great extent provides for a legal basis for the protection of the financial independence of the judiciary in Namibia. That is commendable as most African constitutions fall short of similar protection.

Whereas Namibia appears to provide a sound model for constitutional protection of the financial independence of the judiciary in Africa, the model remains problematic. Its generic weakness can be attributed to its vague orientation in that it merely provides that matters relating to the superior courts be carried out in such a manner that it promotes its financial independence. How this should be promoted is left unanswered; and whether the same protection should be accorded to lower courts, given the explicit reference to superior courts, also remains a matter of concern. What is however encouraging is that there is, although generally broad, some level of explicit constitutional guarantee for the financial independence of the judiciary. This constitutional guarantee is further corroborated by the Judiciary Act, 2015, which provides for financial and administrative matters relating to the judiciary.

The fiscal position of the judiciary is regulated by the Judiciary Act, 2015. The Judiciary Act, 2015 aims 'to strengthen the independence of the Judiciary in line with Article 78(5) of the Namibian Constitution; and to provide for the administrative and financial matters of the Office of the Judiciary'.[59] In principle, the Act seeks to entrench, through statutory means, the financial independence of the judiciary. To this end, the Act establishes the Office of the Judiciary as part of the public service.[60] Consisting of both judicial officers and staff members, the Office of the Judiciary is the administrative component of the judiciary responsible for handling all the administrative and financial matters of the judiciary and related matters.[61]

---

[59] See generally the long title of the Act.

[60] Judiciary Act (No 11 of 2015), Section 3. In terms of section 2 of the Judiciary Act, 2015, the Public Service Act, 1995 and the regulations and directives made thereunder apply in respect of the administration of the Office of the Judiciary and to staff members only in so far as such provisions, regulations and directives are not inconsistent with the provisions of the Judiciary Act, 2015.

[61] Judiciary Act (No 11 of 2015), Section 3(2).

Although headed by the chief justice, the executive director serves as the principal accounting officer on behalf of the Office as contemplated in Section 8 of the State Finance Act, 1991.[62] Appointed by the prime minister in accordance with Section 5 (1) of the Public Service Act, 1995 (as amended), but subject to such terms and conditions as may be agreed between the prime minister and the chief justice, the executive director is a political appointee, although made on the recommendation of the chief justice.[63]

Subject to the obligations in terms of Section 25 (1) (c) (iii) of the State Finance Act, 1991 (Act 31 of 1991), the executive director, as the chief accounting officer, is required to manage and maintain the *operational* budget of the Office of the Judiciary. However, the chief justice may establish one or more committees, consisting of judicial officers and staff members, judicial officers only, or staff members only, to investigate and make proposals in connection with the operations of the office, including budgeting, organisational excellence of the courts, conditions of service of judicial officers, ways and means of improving on judicial work, and output and relations with the other organs of the state.[64]

Judicial budgetary process and appropriations

The funding of the judiciary in Namibia, as is the case with most African jurisdictions, is done through the national treasury. In terms of procedure, the process of soliciting funds for the judiciary, as is the case with the other state departments, is carried out through two stages.[65] The first stage starts with the articulation of national development goals in the national development plan. To implement the national development plan, the government develops a medium-term expenditure framework (MTEF), which shows fiscal policy direction as well as projected revenues and expenses, usually for a 3 to 5-year period. This is usually done by the Ministry of Finance and the National Planning Commission (NPC), alongside other players.

The Ministry of Finance assists with information on the macroeconomic outlook to understand the 'fiscal space' available. Based on the

---

62 See generally Judiciary Act (No 11 of 2015), Section 6.

63 Judiciary Act (No 11 of 2015), Section 4(2).

64 Judiciary Act (No 11 of 2015), Section 15.

65 See generally for a thorough explanation National Assembly, *The parliamentarians handbook: National budgeting process in Namibia*, 2022, 25-26.

macroeconomic outlook, budget guidelines and ceilings are developed by the ministry responsible for finance, which are then shared with all line ministries. In the case of the judiciary, the minister responsible for justice prepares and motivates the capital budget of the Office of the Judiciary to the minister responsible for finance on behalf of the chief justice, while the executive director is tasked with the operational budget to the same political authority for appropriation purposes. In parliament, the minister responsible motivates and tables both the capital and operational budget of the Office of the Judiciary.

Under phase two, which includes the budget proposal, debate and approval guided by the budget ceilings set by the Ministry of Finance, the Office of the Judiciary in collaboration with the Ministry of Justice develops their budget estimates, the executive director in the Office of the Judiciary being responsible for the operational estimates while the minister responsible for justice prepares the capital projects expenditure estimates. This process is followed by the minister responsible for finance then compiling estimates from all ministries and agencies into a government budget, which will be guided by ceilings and priorities outlined by the government.

After compilation, the minister responsible for finance presents the budget estimates to parliament. The draft budget is then subjected to scrutiny by parliamentarians for a given period before it is approved by the entire parliament and signed into law by the president. As far as the overall budget allocation of the Office of the Judiciary is concerned, the minister responsible for justice prepares and motivates its budget, including responding to any questions that may be raised.

Past practice generally indicates that most of the appropriation motivations for the judiciary are approved by the Minister for Finance with minimal adjustments. However, it is worth noting that, at least for the past five years, the fiscal allocations to the judiciary have been relatively fluctuating. Even before the budget suspension of 2020, the judiciary had over the years had a significant deficit on its budgetary apportionment. The table below roughly illustrates the trend.[66]

[66] Statistics drawn from Peter Shivute, 'Speech of the Chief Justice at the annual opening of the legal year', Windhoek, Office of the Judiciary, 2021, 6.

Table 2: Fund allocation for the judiciary over the years

Financial Year	Amount (N$)
2017/2018	N$424,588,000 (US$ 22,579,079)
2019/2020	N$375,652,000 (reduced during mid-term review by N$4,500,000) (US$ 239,305)
2020/2021	N$371,152,000 (US$ 19,976,722)
2021/2022	N$371,200,000 (US$ 19,739,970)
2022/2023	N$369,480,000 (US$ 19,648,502)[67] (after mid-term review it increased to N$386,714,000 (US$ 20,564,986)) (comparatively, 9% lower than the previous fiscal year) (US$ 19,648,502)[68] The Chief Justice noted that the actual amount needed to reach judicial goals was N$397,853,627 (US$ 21,157,377)[69]
2023/2024	N$421,500,000 (US$ 22,414,863)

In the latest 'State of the Judiciary' address, the Chief Justice noted that the judiciary received a total of N$369,480,000 (US$ 19,648,502) with a welcome increase of N$17,200,000 (US$ 914,675) after a mid-term review. The amount that the judiciary needed to meet its goal was N$397,853,627 (US$ 21,157,377).[70] For the 2022/2023 financial year, the judiciary spent N$288,078,822 (US$ 15,319,685) of the total funds allocated and received an unqualified audit from the Office of the Auditor General.

Like previous years, however, unpaid invoices are carried from previous financial years. Currently, the judiciary has a whopping N$1.8 million (US$ 120,883) in unpaid invoices[71] pertaining to witness fees as but one example. Perhaps notably, the Chief Justice explains that no budgetary provision was 'made for the filling of critical vacant posts for judicial officers and staff members'.[72] This shortage of staff does not comport with the growing workload of the courts.

As of this year, the judiciary boasts a total of 994 approved posts, with five permanent judges of appeal serving at the Supreme Court, 30

---

67 Shivute, 'Speech of the Chief Justice at the annual opening of the legal year', 2021, 3-4.

68 Shivute, 'Speech of the Chief Justice at the annual opening of the legal year', 2021, 6.

69 Shivute, 'Speech of the Chief Justice at the annual opening of the legal year', 2021, 6. A difference of N$ 11,139 627.

70 Shivute, 'Speech of the Chief Justice at the annual opening of the legal year', 2021, 3-4.

71 Shivute, 'Speech of the Chief Justice at the annual opening of the legal year', 2021, 5.

72 Shivute, 'Speech of the Chief Justice at the annual opening of the legal year', 2021, 5.

judges at the High Court and 104 magistrates. These judicial officers are supported by 855 staff members.[73] Due to a lack of funding, 253 posts are vacant, half of which are in the lower courts. This is naturally alarming because those are the courts of first instance and dispense justice much more regularly than say the Supreme Court.

While that may well be a little too peripheral to an 'independence of the judiciary' inquiry, it illustrates the importance of financing the judiciary and the dispensation of justice. Without sufficient funding, justice stands in great peril. It is implausible to argue that any shortness in financing is a deliberate attempt to starve the judiciary, in an attempt to acquiesce its independence. If anything, the courts will take on fewer cases. This is evinced by the statistics. The magistracy dealt with 64,536 cases, a 10.4 percent increase from 2021, and only 26,756 cases were finalised, with a deficit of 37,780 cases not finalised and therefore carried over to 2023.[74]

Chief Justice Shivute also noted in his latest report that the judiciary, in 'collaboration'[75] with the Ministry of Justice, embarked on the 'construction, renovation and rehabilitation' of courthouses countrywide. In 2022, the construction of the Seeis Periodical Magistrate's Court in the Khomas Region and the Katima Mulilo Magistrate's Court in the Zambezi Region was undertaken. Renovations to the Magistrate's Courts at Okakarara, Walvis Bay, and Gobabis have also been done.[76]

As aforementioned, the capital budget of the Office of the Judiciary vests with the ministry responsible for the administration of justice.[77] To this end, the Minister for Justice in consultation with the Chief Justice remains responsible for all capital projects of the Office of the Judiciary. These projects primarily relate to the construction or renovation of courts and other buildings that are to be used or are being used by the Office of the Judiciary.

---

73 Shivute, 'Speech of the Chief Justice at the annual opening of the legal year', 2021, para 25.

74 Shivute, 'Speech of the Chief Justice at the annual opening of the legal year', 2021, para 43.

75 Shivute, 'Speech of the Chief Justice at the annual opening of the legal year', 2021, para 27.

76 Shivute, 'Speech of the Chief Justice at the annual opening of the legal year', 2021, para 27.

77 Judiciary Act (Act No 11 of 2015), Section 9(1).

For budgeting purposes, the development projects are classified into five broad sectors, namely public administration,[78] safety and security,[79] social,[80] economic,[81] and infrastructure sectors.[82] The Ministry of Justice, under which the capital budget of the judiciary falls, forms part of the safety and security cluster under vote 16. For the financial year 2022/2023, the capital budget of the ministry was projected to be N$28,000,000 (US $1 880 402).[83] This amount is portioned into six main capital projects, four of which have a direct bearing on the judiciary. It may be worth highlighting these projected and budgeted activities: The Office of the Judiciary building renovations (estimated expenditure amounting to N$500,000 (US$ 26,563));[84] upgrading of the High Court

---

78 The broad Public administration sector comprises of programmes such as; provision of state security, public works and property/asset management, international relations (for the construction of missions infrastructure abroad), and labour and industrial relations to enhance public service delivery. Its budget allocation is entirely from the State Revenue Fund, with urban land delivery accounting for 73 percent of the total MTEF allocation.

79 Funds for this sector are invested in programmes such as, civil registration, provision of social protection, combating of crime, professionalised force, prisons reforms and administration of justice, immigration and boarder control, rehabilitation and re-integration. The Safety and Security sector received an allocation from the Government only and on average has the least allocation over the MTEF period.

80 Investment in this sector is earmarked for the implementation of programmes such as veteran's welfare, youth training and development programme, tertiary and clinical health care services, health system planning and management, capacity building for gender mainstreaming, ECD facilities, primary education, senior secondary education, high education and vocational education and training. This sector is the second highest recipient of the Development Budget over the MTEF period and benefits from Outside the State Revenue Fund, with an amount of N$260 million (U$ 17,460,877) in the next financial year of 2022/2023.

81 This sector receives the third highest allocation and benefits from Development Partners. Its budget allocation is to implement programmes such as: energy infrastructure development, integration and diversification of mining industry, tourism industry led capacity, management of State protected areas, investment and trade promotion, industrial infrastructure development, micro and small medium enterprises (MSMEs) and entrepreneurship development, live-stock production, integrated water resource management, crop and horticultural production, water infrastructure development, fisheries infrastructure development and land purchase and ownership.

82 Finally, as per the previous MTEF period, the infrastructure sector receives the highest development budget share and benefits from Outside the State Revenue Fund for the implementation of programmes such as Road construction and upgrading, Air transport infrastructure, Railway network development and Water infrastructure.

83 This is a two-fold decrease from the previous 2021/2022 capital budgetary allocation which amounted to N$ 58,530,000 (U$ 3,109,412).

84 Office of the President, 'Development programmes estimates of expenditure; Medium terms expenditure framework 2022/2023-2024-2025', Windhoek, National Planning Commission, 2022, 130.

(estimated expenditure amounting to N$2,328,000 (US$ 123,675));[85] construction, upgrading and renovation of lower courts in the regions (estimated expenditure amounting to N$7,500,000 (US$ 398,438));[86] construction of fabricated courts in the regions (estimated expenditure amounting to N$800,000 (US$ 42,500);[87] purchase of buildings and houses (estimated expenditure amounting to N$1,172,000 (US$ 62,263));[88] and the construction, upgrading and renovation of the Ministry of Justice building (estimated expenditure amounting to N$85,000,000 (US$ 515,634)).[89]

The capital budget of the Ministry of Justice, in its current form, prioritises the judiciary. As indicated, of the six projected capital projects, four focus on the Judiciary, especially infrastructural upgrades and construction. This implies that over three-thirds of the overall capital budget of the Ministry of Justice, at least for the current financial year, is dedicated to the court system. In fact, the judiciary has been a priority in this budget, unless the capital needs of the Ministry of Justice otherwise demand.

Although the use of one financial year may not be an adequate matrix for analysing whether the judiciary is adequately funded, it may to some extent indicate the orientation of the judiciary within the capital budgetary framework of the Ministry of Justice. Such a matrix may be realistic, if not fair, especially in the context of budgetary cuts triggered by the novel coronavirus, which should more or less indicate government priorities in a time of economic downfall, such as the current times. But these cuts are in a sense ubiquitous; they are not portfolio targeted. There is, for example, a staggering 46 percent reduction in budget allocation to public enterprises from the N$791 million (US$

---

85 Office of the President 'Development programmes estimates of expenditure; Medium terms expenditure framework 2022/2023-2024-2025', Windhoek, National Planning Commission, 2022, 127.

86 Office of the President 'Development programmes estimates of expenditure; Medium terms expenditure framework 2022/2023-2024-2025', Windhoek, National Planning Commission, 2022, 126.

87 Office of the President 'Development programmes estimates of expenditure; Medium terms expenditure framework 2022/2023-2024-2025', Windhoek, National Planning Commission, 2022, 128

88 Office of the President 'Development programmes estimates of expenditure; Medium terms expenditure framework 2022/2023-2024-2025', 2022, 129.

89 Office of the President 'Development programmes estimates of expenditure; Medium terms expenditure framework 2022/2023-2024-2025', 2022, 125.

420,220) budgeted last year to N$425 million (US$ 225,782) in 2023.[90] It is therefore no evidence that the judiciary is the victim of particularised budgetary restraints. There is also no way of knowing for certain why what portfolio gets what cut of the pie.

The numbers in terms of the Judiciary are somewhat consistent. If it were the case that the judiciary was being targeted, the numbers would have plunged steeply. If anything, the complaint is that the current allocation is insufficient to meet set goals. A (Section 15) committee (see immediately below) is perhaps the only instrumentality that can speak up and demand more, backed naturally with empirical evidence and justification as to why the judiciary deserves more in spite of other vital sectors such as health, education etc.

One further point begs mentioning. The doctrine of separation of powers is one of the bedrock principles of this nation,[91] and the judiciary, while asserting its place in the *trias politica*, customarily exercises a restraint from the political arena. It would thus be anomalous for the Chief Justice to stand in parliament and argue for budget allocation, for example. The Judiciary Act[92] entitles the Minister for Justice, in the loosest sense possible, as a proxy for the judiciary in parliament and cabinet under Section 13. As a preliminary digressive observation, this is merely a mechanism, one supposes, of convenience, not necessarily that the Minister for Justice 'manages' the judiciary such that judicial independence etched into the Constitution is rendered futile. So, this is merely a formality because the minister just represents the judiciary in parliament and in the cabinet but does not exercise any real authority over it.[93]

The Chief Justice plays an equally important background role; the ministry simply conveys the message. For instance, under Section 15, the Chief Justice has the power to establish committees 'consisting of judicial officers and staff members, judicial officers only, or staff members only' for purposes of 'investigating and making proposals in connection with the operations of the office, including budgeting, organisational excellence of the courts, and conditions of service of judicial officers'.

---

90 See the watchdog Institute for Public Policy Research 'National budget review report', Briefing paper, Namibia's national budget 2023/24, 2023, 5.

91 Constitution of Namibia (1990), Article 1(3).

92 Judiciary Act (No 11 of 2015).

93 See generally Yvonne Dausab 'Budget speech for the Office of the Judiciary Vote 21 for the 2023/2024 financial year', Budget Vote 21 Ministry of Justice, Windhoek, 2022, 1-4.

This ensures that the judiciary plays an active integral part in budget proposals. This provision, axiomatically, gives the judiciary a voice in matters of budgeting and other operational aspects of the judiciary. It must be reiterated that the minister is merely a messenger of the judiciary's wishes, lest it be perceived as executive oversight.

Judicial financial accountability mechanisms

Since 2018, the Chief Justice has constituted an Audit Committee in the Office of the Judiciary, tasked with the primary responsibility of monitoring the integrity of the judiciary's financial statements and the effectiveness of the systems and internal controls, as well as monitoring the effectiveness, performance, and objectivity of the internal auditors. The Audit Committee also monitors the implementation of the recommendations from the Auditor General.

The funds of the judiciary consist primarily of such moneys as appropriated by parliament for purposes of the Office. However, the judiciary may source funds by way of grants from whatever source in or outside Namibia, which the executive director as the principal accounting officer may, with the approval of the chief justice and the minister responsible for finance, accept.[94] To this end, the executive director may accept grants that are for the benefit of projects, activities or functions of the Office of the Judiciary.

The Office of the Judiciary is solely responsible for the management of its operational budget. Thus, the funds received are administered solely for *inter alia* remuneration of judicial officers, staff members and any other persons that have been engaged to do remunerative work for the office; travelling, transport, and subsistence allowances for judicial officers and staff members as determined by any law; and other general operational costs incurred by the Office of the Judiciary.[95]

Because funds allocated to the judiciary are 'public funds', that is taxpayers' money, they must be administered subject to the State Finances Act.[96] In the management of the operational budget of the judiciary, the executive director must keep proper accounts of the funds of the Office of the Judiciary in accordance with the State Finances Act.

---

94 Judiciary Act (No 11 of 2015), Section 8(2).

95 Judiciary Act (No 11 of 2015), Section 8(3).

96 State Finance Act (No 31 of 1991).

As part of the accounting process, the executive director must as soon as practicable, but not more than three months after the end of the financial year, submit to the chief justice and the minister responsible for the administration of justice a report concerning the activities of the judiciary during that financial year, including information on the financial affairs of the judiciary.[97]

As a primary matter, this reporting requirement ensures that the process is open and transparent. In any event, as intimated above, the external audit will be conducted by the Auditor General, who has a statutory mandate to scrupulously go through financial reports and return a report.[98] Under its Section 27 report, the Auditor General must point out any unauthorised expenditure, wasteful expenditure or one that is detrimental, or any other impropriety that in the public interest should be brought to the attention of the National Assembly. This ensures that an extra layer of transparency exists, serving as an incentive against mismanagement of funds. The fact that the judiciary, as aforementioned, has passed its audits with flying colours for consecutive years now is evidence that it manages its funds effectively and for their intended purposes, and most importantly in compliance with the State Finances Act.

Conclusion

This chapter has shown that judicial independence, including financial autonomy, in Namibia, is a constitutional imperative that should not be taken lightly. In terms of Article 78(5) of the Namibian Constitution, the financial and other administrative matters of the superior courts shall be performed in such a manner that the independence of the judiciary can be effectively and practically promoted and guaranteed. To give effect to this constitutional provision, the Judiciary Act, 2015 (No 11 of 2015) was passed. While this Act further cements the financial autonomy of the judiciary in Namibia, it does so with some noticeable shortcomings. First, it divorces the capital budget of the judiciary by mainstreaming it with that of the executive through the justice ministry, which is an area of concern. However, such a concern ought to be minimal at this stage as there is no express past

[97] Judiciary Act (No 11 of 2015), Section 12.

[98] See State Finance Act (No 31 of 1991), Section 25.

precedent that warrants serious concerns. The capital budget looks at infrastructural ameliorations, for instance, and nothing that actually goes to the kernel of the judiciary's independence. While a 'renovation budget' may hamper the effective dispensation of justice, it may not necessarily encroach upon the judiciary's independence per se. What can be done, perhaps, to assuage such a concern is to allow the Office of the Judiciary, through its principal accounting officer, to exercise full and exclusive control over both the capital and operational budget of the judiciary.

The second concerning issue as shown in this chapter is the relatively fluctuating fiscal appropriations made to the judiciary. The budgetary allocations made to the judiciary can be relatively categorised as modest, even though the chief justice has repeatedly indicated concerns over underfunding.[99] Such a conclusion can be made on the basis that the judiciary has consistently received an unqualified audit from the Office of the Auditor General with a high budget execution rating.[100] While there appears to be no annual steady decline in the funds appropriated to the judiciary, it has also shown that the fiscal appropriations to the judiciary have been steadily declining. Economic stresses, caused predominantly by the global economic recession of the last two decades or so, coupled with the disruptive effects of the novel coronavirus, are advanced as key reasons for the sustained decline in sound financial appropriation to the judiciary.

These notwithstanding, although reasonably fair in terms of reasoning, the sustained decline of funding for the judiciary needs to be addressed as it can become a political weapon to cripple the judiciary. To this end, there may be a need to protect the judiciary from financial starvation in the near future through a 'ceiling amount' cap. There should be an amount formulated as a minimum base from which budgetary allocation to the judiciary cannot deviate. Ceilings generally have their fair share of shortcomings, but they have the potential to protect the judiciary from severe underfunding by placing a limit on the funding amount at a minimum, regardless of economic shocks.

Viewed comparably with other jurisdictions, especially in southern Africa, the conditions of service of senior judicial officers as illustrated

---

[99] See for instance Hon Peter S Shivute, 'Speech of the Chief Justice at the opening of the 2023 Legal Year', 2023, 4.

[100] Shivute, 'Speech of the Chief Justice at the annual opening of the 2023 Legal Year', 2023, 4.

in this chapter are reasonably adequate to encourage a culture of transparency as well as to protect the financial integrity of the person of judges and the institutional independence and effectivity of the judiciary. What is however concerning, as also indicated elsewhere above, is the neglect of other members of the judiciary, especially magistrates and support staff. Their *de facto* treatment as public servants with limited financial and professional support has repercussions on the effective functioning of the judiciary as a whole.

Finally, whilst the focus of this chapter was on the financial independence of the judiciary in Namibia, one needs to highlight some other determinants, other than the above listed shortcomings, that may have actual or potential implications for the effectiveness (and by extension financial independence) of the judiciary. These determinants, which require reconsideration and urgent redress, include the extensive centralism of the judiciary in the hands of the chief justice, who enjoys far-reaching powers over the judiciary, the *ex officio* functioning of the judge president as a member of both the High Court and the Supreme Court, the extreme reliance on foreign judges, the under-representation of women within the superior courts, and the growing syndrome of judicial deference in the decisions of the courts.

Chapter thirteen: Conclusion

Introduction

While judiciaries in Africa have different frameworks for the practice of judicial financial independence, the preceding chapters demonstrate a gradual movement from executive and legislative domination in judicial affairs, towards more progressive frameworks and approaches for the guarantee and management of judicial finances and administration. This is the case for judicial systems where new constitutional frameworks have been adopted, such as Uganda and Zambia and even in judicial systems where there are older constitutions but are witnessing progressive practice related to judicial independence. In the latter category is Botswana whose courts continue to develop progressive jurisprudence despite the old constitution that was adopted in 1966.

The drivers of this gradual movement, as can be deduced from the preceding chapters, include: first, the constitutional reforms that have and continue to take place on the continent, and which have heralded new legal dispensations that are conscious of the need to entrench and ensure independence in the manner in which judiciaries operate and manage their finances and administration. Second, progressive national jurisprudence by courts in Africa is also assisting in creating consciousness and the need for the political arms of government to respect the autonomy of courts and even being called upon by courts to develop legislation and policies that will provide resource and administrative autonomy to the judiciary.

Third, there is pressure at the national, regional, and global levels for the entrenchment of judicial financial autonomy. This pressure comes from judiciaries themselves (through judges' associations and other judicial fora), civil society actors, and development partners and stakeholders in judicial governance. The development of standards and norms on judicial financial independence, for instance, have an impact on how countries approach the issue of resourcing judiciaries.

However, this gradual movement is by no means uniform, smooth, or predictable. There are instances where retrogressive practices that are harmful to judicial financial independence have persisted, even in

the face of progressive constitutional and legal frameworks that seek to entrench judicial financial independence.

The defining factors in judicial financial independence in Africa

The legacy of colonialism and financial control of courts

Courts and the general institution of the judiciary have their origins in the colonial systems of governance that were introduced across Africa. Accordingly, they have a heavy stamp of the colonial philosophy, especially with regard to their administration and governance. The preceding chapters have demonstrated the persistence of the colonial legacy and culture, and especially the domination of the executive in judicial affairs. Examples of these from the preceding chapters include: the role of the executive in the appointment of judicial officers, the role of the executive in the determination and control of judicial finances, the role that the executive plays in the administrative processes of the judiciary, among other issues.

Indeed, and as many of the chapters have demonstrated, it was not the intention of the colonial government to create truly independent court systems in the colonies. The scope of power of the courts was limited by law and decree and made subject to the colonial administration, and even by court pronouncements themselves. While there were some changes to the judicial systems, such as the merger of racially divided court systems and adoption of modern principles of judicial independence and separation of powers, the philosophy and governance tradition inherited from the colonial dispensation has persisted in the post-colonial era. While the situation differs from one country to the other in the region, the challenges to judicial financial independence that are currently experienced can actually be traced to the beginnings of the court systems at the onset of colonialism.

Conscious of this heritage, countries have attempted to depart from this system by instituting major constitutional and legal reforms aimed at transforming how judiciaries are governed. Some of these changes include: the establishment of judicial services that are distinct from the mainstream public service; the establishment of new courts and court hierarchies; the establishment of departments of judiciaries as independent administrative structures and accounting units, among other changes. Indeed, such reforms have even extended to the need to

develop new judicial philosophies that are different and have led to the emergence of what is termed as indigenous jurisprudence by the courts.

However, and as the country case studies have demonstrated, it takes conscious effort, starting with the legislative and executive arms, to adopt a new culture and system of relating with the judiciary that respects the doctrine of separation of powers and is respectful of judicial independence and autonomy in all its aspects.

Post-colonial politics and policies of judicial subjugation

The end of colonialism and the crossing over to independence presented an opportunity to recalibrate governance institutions that were inherited from the colonial era. Indeed, many countries had an opportunity to put in place new institutions and systems of administration, including judiciaries. However, and as experiences from the different countries show, there was little change in structures and even philosophy of the courts, especially with regard to issues of judicial independence and separation of powers.

As observed in the preceding chapters, the leaders of the newly independent African states frowned at any measures that were intended to curtail or place a check on the power that they were consolidating. Examples have been given where independence era leaders intervened in judicial affairs and sought to control the manner in which the courts were carrying out their work. These included: the sacking of judges deemed hostile to the political regime, the stripping of independence of tenure of judges, and even the enactment of legislation that conferred power on the president to overrule courts on grounds of 'national interest'. Obviously, the prevailing post-colonial political context did not even provide space for judiciaries to have independent administrative and financial management powers. Indeed, and as has been demonstrated through the eleven case studies, discussions about the administrative models of the judiciary only started emerging long after independence, specifically in the post-cold war nineties.

The gradual judicial reforms that are taking place in the region are as a result of the realisation of the need to transform judiciaries in order to reflect the expanded role that they are increasingly playing. As observed in the preceding chapters, judiciaries now play a major role in umpiring disputes, including political matters, and this has brought about the need to review the structure of the judiciary, including issues

of administrative and financial independence. However, this does not mean that political resistance to such progressive change, especially from incumbent regimes, has dissipated. It is a struggle against a recalcitrant political culture in most cases.

Economic context

The eleven country case studies have shown that the actual amounts of resources allocated to judiciaries in Africa are generally dismal. The reality in most or all of the countries is that there are competing priorities, alongside the needs of judiciaries, and in the context of limited resources that are available. Thus, while judiciaries and courts require sustainable, predictable, and progressive financing, the reality in many of the countries is that governments may not afford the ideal level of resources that are needed to ensure that courts work efficiently.

However, and as courts in Uganda and Zambia have observed, scarcity of resources and competing needs in government is a common phenomenon; the more important and fundamental principle is the attitude and approach of the government towards the resource priorities and needs of the judiciary. Specifically, an approach that recognises the need to preserve judicial independence and to facilitate courts to carry out their work resulting in a culture of judicial financial autonomy.

There is no doubt that the 'developing country economic context' is a looming shadow in discussions regarding the financing of the judiciary and building the capacity of courts and generally ensuring their financial independence. However, it is still possible for governments to entrench and adhere to the ethos of judicial financial independence, even in the prevailing economic context.

Political will to resource courts

While some countries have adopted progressive frameworks and have developed equally progressive jurisprudence with regard to the funding and facilitation of the judiciary, the executive and the legislature are yet to recognise or entrench (in actual practice) these provisions. Indeed, and as observed in Kenya, Uganda, Zambia, and Nigeria, the executive and legislature are yet to comply with normative requirements regarding judicial financial independence. There are reported instances of open defiance to what the law requires with regard

to budget preparation and approval, and even the disbursement and management of funds due to the judiciary. Furthermore, in many cases where courts and judiciaries have demonstrated courage and exercised their powers independently, there have been retaliation, including the targeting of judiciary finances by the political arms of government.

Until there is political will to embrace constitutionalism, rule of law, and the facilitation of courts to pursue their mandate independently, there will be no realisation of true independence of the judiciary in Africa. The path that countries have trudged: from colonial rule and its legacies in governance, to post-independence politics, and the current times, have taken countries through different epochs that have impacted governance, including the place of courts and judicial reform.

However, the necessary transformation will only be possible where political leaders and the relevant public institutions embrace the transformation agenda that will place courts in an optimal position. In Tanzania[1] and Botswana,[2] for instance, whose constitutions were adopted in 1979 and 1966 respectively. There have been attempts to overhaul constitutional systems, but there is reported resistance, especially from politicians to embrace such change.

What is the future of judicial financial independence in Africa?

The role that judiciaries play in systems of constitutional and political governance has transformed fundamentally. As Henry Prempeh observes, through direct constitutional invitation, judiciaries are now adjudicating over matters that have a profound impact on political processes, including the validity of election of a president and review of decisions of the executive and legislature.[3] Initially, judiciaries and courts, and especially their financial and administrative arrangements were under the control of the executive. Ministries of finance were in

---

1 Dan Paget,'Tanzania: The authoritarian landslide' 32(2) *Journal of Democracy* (2021) 61-76.

2 Christian John Makgale, Ikanyeng Stonto Malila 'Challenges of constitutional reform, economic transformation, and COVID-19 in Botswana'49(172) *Review of African Political Economy* (2022) 303–314.

3 Kwasi Prempeh, 'Comparative perspectives on Kenya's post-2013 election dispute resolution process and emerging jurisprudence' in Collins Odote & Linda Musumba (eds) *Balancing the scales of electoral justice: resolving disputes from the 2013 elections in Kenya and the emerging jurisprudence* International Development Law Organization, Judiciary Training Institute, 2016, 149-175.

total control of budgets of the judiciary and court personnel were under the control of the executive.

However, with the fundamental change in the role played by judiciaries, it is inevitable that the structures of court and judicial administration change to ensure that the new and expanded role of the courts is not jeopardised by the old and executive-centric judicial administrative and financial management systems. Indeed, it is no longer tenable that courts, which routinely make orders and judgments against the executive and the legislature, have their administrative and financial systems totally at the whims of the executive and legislature. Examples drawn from the eleven countries reveal that 'the purse' becomes the easiest way to control courts.

Where such transformation has commenced, the pace is usually slow, as demonstrated by the country experiences in Uganda, Zambia, Kenya, and Nigeria. First, administrative arrangements to facilitate judicial financial independence are disruptive of pre-existing systems that have always served the judiciary and other public institutions. Indeed, the technical teams in the ministry of finance and the national treasury, or even teams in the financial departments of judiciaries are accustomed with government systems that are centralised in the executive.

In Kenya, the judiciary and other agencies involved in public finance management are dealing with uncertainties in the management of the Judiciary Fund. These include processes. These include administrative approvals to access the funds, and disbursements from the general government revenue accounts to the Judiciary Fund, among other teething problems. The experience with the Judiciary Fund in Kenya can be characterised as a transition challenge, which requires discussions between the judiciary and other agencies involved in public finance management.

In Uganda, the delinking of administrative personnel serving courts from the mainstream public service also requires a number of administrative issues to be clarified. These include: the transition of pension management, training and capacity building of administrative staff, career progression and other issues of public service management. Inevitably, judiciaries such as Uganda have to develop the capacity and structures to manage personnel who are transferred to the judiciary from the mainstream public service.

Specifically, during transition to full judicial administrative and financial management systems, there is also need for policy discussions on how such a process is managed and what relationships between the judiciary and other agencies in public finance management need to be forged in order to ensure effective arrangements that provide and facilitate judicial financial independence. In Kenya, for instance, internal auditors from the national treasury stayed on, long after the delinking of judicial personnel from the mainstream public service. There is a need for careful management of the transition process in order to usher in new regimes.

Finally, any form of resistance to the transformation that is deemed necessary for autonomous judicial financial management will affect the intended outcome. Resistance to restructuring and transformation of judicial structures and systems appears to come from the political arms, specifically the legislature and the executive, but also from the habituations of the administrative establishment in the civil service. This is evidenced by either the delay or failure to develop and enact legislation and putting in place policy and administrative measures to facilitate judicial financial autonomy. The Zambian, Nigerian, and Ugandan case studies reveal the reluctance to put in place such measures, leading to litigation in courts touching on judicial financial independence. This leads to the inevitable conclusion that a political culture that is accommodative of the principles of judicial financial independence is critical to the success and effectiveness of the judiciary.

Judicial Financial Independence in Africa

A study of eleven sub-Saharan countries

This book explores the crucial topic of judicial financial independence, a cornerstone for overall judicial autonomy and a critical element in ensuring a fair legal system. Unburdened by undue financial constraints, the courts can uphold justice less limited by fear or favour, ensuring legal impartiality in the face of external pressure.

Many countries in Africa grapple with a legacy of colonial rule and authoritarian regimes, where the judiciary often remained subservient to the executive. This, combined with contemporary political and economic challenges, creates a complex landscape where safeguarding judicial independence is an ongoing struggle.

This publication offers valuable insights into the current state and recent developments of judicial financial independence in eleven African countries. It presents unique comparative data on budget allocations for the judiciary, analysing the concrete impact on institutional and individual decision-making autonomy. It focuses on legal frameworks, financial structures, practical challenges, and institutional mechanisms influencing judicial financial autonomy. Based on this analysis, concrete suggestions are provided aimed at enhancing judicial financial independence, serving as a guide to policymakers, legal practitioners, advocates, and stakeholders committed to a strong and independent judiciary.

KONRAD ADENAUER STIFTUNG

KABARAK UNIVERSITY PRESS
publishing excellence · academic rigour · biblical perspective

ISBN 978-9914-9964-3-2
9 789914 996432