

**SYMPOSIUM ORGANISED BY FREEDOM HOUSE (SA) ON CHALLENGES AND OPPORTUNITIES
FOR STRENGTHENING JUDICIAL INDEPENDENCE AND INTEGRITY IN SOUTHERN AFRICA**

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[1] I have been asked to speak about the Independence of the Judiciary. In particular, I have been asked to comment on the challenges and opportunities for cooperation in that field in our sub-region.

[2] The subject of the Independence of the Judiciary has been discussed at many fora, and no doubt will continue to be discussed both nationally and internationally. So when I was asked to speak about it at this forum, I pondered what I could possibly say which you have not already heard. When I reviewed some of the talks I had given on the subject over the years, I realized that if I repeat it here I might bore you.

[3] I say that to make the point that we all accept the imperative of the Independence of the Judiciary, but the discourse must progressively focus on the practical steps we are or should be taking to give it meaning and content. That debate must, in my view, move beyond Judiciaries asking for financial and administrative autonomy, to measures which Judiciaries must take so that ordinary people derive real benefits from it. The Independence of the

Judiciary must not be an end in itself. It must be the means to promoting societal harmony, peace, equality, freedom and justice for all under Law.

[4] What is the point if a Judiciary has all the independence and autonomy it seeks but the people it is supposed to serve have no access to the courts or, when they do, become frustrated because legal costs are high, court rolls so congested, or judgments delayed, that justice becomes a chimera?

[5] I have therefore fashioned my address today to speak to those concerns.

[6] The basic proposition on the Independence of the Judiciary is rather uncontroversial and can be repeated even by those who actually don't believe in the Independence of the Judiciary: The courts must be independent and subject only to the Law. In the case of my own country, Namibia, Article 78 of the Constitution deals with the subject as follows:

- “(1) The judicial power shall be vested in the Courts of Namibia, which shall consist of:
 - (a) a Supreme Court of Namibia;
 - (b) a High Court of Namibia
 - (c) Lower Courts of Namibia,
- (2) The Courts shall be independent and subject only to this Constitution and the law.
- (3) No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to

protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.”

[7] In 2014 the Namibian Parliament passed the Third Amendment to our Constitution, which added additional Articles to Article 78 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 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.”

[8] In the wake of the Third Amendment to the Constitution, Parliament enacted the Judiciary Act, No. 11 of 2015 which contains the following salient provisions:

“Establishment of Office

- 3. (1) There is established in the public service, an office to be known as the

Office of the Judiciary.

(2) The Office is the administrative component of the Judiciary responsible for handling all the administrative and financial matters of the Judiciary and related matters, with such powers, functions and duties as are provided for in this Act or any other law.

(3) The Office consists of judicial officers and staff members.

Appointment of staff members

4. (1) The Prime Minister must, subject to subsection (2), in accordance with the Public Service Act but subject to such terms and conditions as may be agreed between the Prime Minister and the Chief Justice, appoint the Permanent Secretary and other staff members as may be required for the proper performance of the functions of the Office.

(2) Despite section 5(1) of the Public Service Act or a provision in any other law, an appointment made in terms of subsection (1) is made on the recommendation of the Chief Justice.

...

Capital projects of Office

9. The Ministry responsible for the administration of Justice is responsible for the capital projects of the Office, except that the Minister must consult the Chief Justice regarding the construction or renovation of courthouses and other buildings that are to be used or are being used by the Office.

...

Representation of Office

13. The Minister represents the Office –

- a) In the Cabinet; and
- b) In the National Assembly”

[9] As is apparent, the Judiciary of Namibia not only enjoys constitutionally guaranteed independence but also administrative and financial autonomy.

[10] The Chief Justice has since established several Committees to assist him in the running of the affairs of the Judiciary.¹ Each committee is chaired by a Judge who is deputised by a Magistrate and it also includes civil servants designated to a committee by the permanent secretary of the Office of the Judiciary.

[11] That said, challenges remain. The main one being securing sufficient financial resources to properly and effectively execute the Judiciary’s mandate to administer justice fairly and impartially to all. The financial crisis afflicting the world economy has not spared us and we acknowledge that as an institution of the State we are just as affected by the scarcity of resources as the other agencies of the government.

[12] Having given you an idea of the situation in Namibia, I now proceed to make brief remarks on the challenges to judicial independence and the opportunities for cooperation.

¹ 1. General Administration, Budget, Finance and Capital Projects
2. Court Administration and Reform (CAR)
3. Information Technology and Special Projects Management (ITSPM)
4. Public Affairs and External Relations (PAER)
5. Education and Professional Development (EPD)
6. The Executive Committee

Threats: challenges

[13] The most important guarantor of the independence of the judiciary is public confidence in the Judiciary.

[14] I proceed to highlight what, in my view, are the vices which undermine public confidence in the Judiciary and for which we must actively seek solutions.

Corruption

[15] A corrupt Judiciary has no legitimacy and can't lay claim to being the guardian and protector of the Constitution. If corruption takes root in the Judiciary the public will lose all trust and confidence in the entire institution and not just those who make themselves guilty of it. The personal integrity of all judicial officers is therefore of the utmost importance in retaining public confidence in the Judiciary.

Lack of diligence

[16] As judicial officers we occupy an exalted position of privilege in society. It is important that we are not perceived to be unaccountable for the way in which we perform our constitutional mandate. Our primary task is to adjudicate on disputes in a fair and impartial manner and to deliver judgments without delay. We should therefore police ourselves in that function and ensure that the public does not become frustrated by incessant delays in the delivery of justice.

Internal bickering

[17] It weakens the institution in the eyes of the public if judges are seen to be engaged in self-destructive and petty infighting. Inter-personal discord and bickering can do serious

damage to the Judiciary. When judges are at war with each other, for whatever reason - tribal, racial or otherwise - others may seize on the opportunity to accentuate those fissures and to manipulate the institution for their own ends. Internal harmony is therefore essential to maintaining and strengthening the Judiciary as a bastion for the protection of the rights of all our people.

The high costs of accessing justice

[18] An even more pernicious vice is if ordinary people on whose confidence we rely, are denied access to the courts to have their legal disputes heard and determined. The high cost of legal representation is a phenomenon not unique to any one country. No one can deny that access to justice is compromised thereby.

Opportunities

[19] In order to retain and strengthen confidence in the Judiciary, it is important that the Judiciary be the champion of reform and innovation aimed at delivering timely, impartial and fair justice. Therefore, the Judiciary should promote greater access to justice through well thought through judiciary-led reforms to promote access to court and to reduce delay and the costs of litigation. An even more important challenge is for the Judiciary to introduce reform of the rules of court to enable people to represent themselves in court in the simpler matters.

[20] The Judiciary-led reforms must:

- a) leverage technology to make court processes speedier;

- b) reduce delays in the finalisation of cases with the aim of wresting control of the pace of litigation from lawyers and make judges responsible for the progress of cases;
- c) seek ways to reduce legal costs; and
- d) encourage litigants to resolve disputes out of court through mediation and conciliation conducted by a neutral third party.

[21] In all the above areas, Namibia has made very significant progress. I highlight some of them.

Judicial Case Management

[22] We have completely re-written the Rules of the High Court of Namibia, which were modelled on the South Africa Uniform Rules, and introduced a comprehensive system of judicial case management. Judges have under the new rules assumed a central role in the finalisation of civil cases. We are however still struggling to find ways to speed up the completion of criminal trials. I am keen to learn from other jurisdictions how they have gone about addressing the problem of delays in the criminal justice system.

E-Justice

[23] On 27 June 2016, Namibia's e-Justice program is going live. *e-Justice Namibia* is a web-based end-to-end electronic filing and case management system developed for the High Court of Namibia's civil stream which will be accessible to all court users anytime, anywhere. The easy access auto-populated templates will assist in reducing errors frequently seen on court documents, process and pleadings. The system-generated documents and e-filing will also reduce on time and costs. It will enhance transparency and effectiveness, making court files and the content thereof available to all interested parties with great ease and at any time.

Alternative Dispute Resolution (ADR)

[24] The new rules of the High Court also introduced a system of compulsory court-connected alternative dispute resolution in the High Court. Under the rules, most cases are, upon being defended, referred for mediation to a court-accredited mediator who, without delay and with minimum formality, brings the parties together to find an out-of-court settlement. This programme has become so popular and successful that on last year's statistics just under 60 % of the cases referred to mediation were settled without going to court –thus saving the parties money and freeing up court time to be devoted to matters truly deserving of being tried.

[25] These initiatives and reforms at the High Court of Namibia have been so successful that we are now looking at ways to cascade them to the Magistrates courts.

Opportunities for co-operation

[26] Each of our jurisdictions has found unique ways of addressing the various issues I have touched on in this presentation. I have only shared our own experiences and my personal insights into the subject of the Independence of the Judiciary.

[27] Our diverse experiences offer a unique opportunity for us all to learn from each other in order to make our respective Judiciaries beacons of hope for our peoples. We should not be shy to discard bad practices and to adopt good practices that have been adopted by others through trial and error – of course always calibrated to meet our own circumstances. If as Judiciaries we do not learn and adapt, we are extending an open invitation to those who do not mean well to fill the void.

Conclusion

[28] A truly independent Judiciary must promote within its ranks a culture of fearlessness and aloofness from the daily controversies of society. It should under no circumstances give the independent observer to form the impression that it aligns itself to a particular political tendency in our increasingly politically polarised societies.

[29] Excellence can only be achieved through continuous training to improve our competencies as judicial officers so that we deliver quality justice and earn the respect of the community. In all that, we should not forget that the emotional and social well-being and financial security of judicial officers are the most important ingredients of a well functioning, credible and independent Judiciary.