

# The independence of the judiciary: Constitutional guarantees and practical clout

A major task of the judiciary is to provide criminal justice and ensure that citizens obey the laws of the country. However, an equally important task, particularly for the higher courts, is to function as the third independent arm of government, checking the legality of the executive's policies and balancing the executive's urge for far-reaching powers with the constraints of the constitution. An independent of the judiciary, especially as a non-partisan guardian of the constitution, is therefore a necessary component of a well-functioning and vibrant democracy. It is a safeguard against arbitrary use of power and coercion by the executive branch against individuals and groups within the population.

As in previous chapters, a distinction is made between, on the one hand, constitutional and legal guarantees of the judiciary's independence and, on the other, the degree to which this independence is respected in practice by the executive powers as well as by judges themselves. For the sake of comparison, the countries are grouped into four categories. First, countries that have strong constitutional and legal safeguards against political interference in the work of the judiciary, and where political actors also respect these in practice. In this group we find South Africa in a class of its own. In the second group are the countries that have the necessary constitutional guarantees but experience some problems of abuse or lack of capacity in practice. These are Nigeria, Uganda (both of which perform better in this chapter than in any previous ones) and Kenya. Third, Ghana and Senegal, which have both tended to score higher on the other commitments reviewed in this study, have some flaws in the

constitutional guarantees and institutional arrangements of the judiciary – flaws that are reflected in some political abuses of the legal system. Fourth come Algeria and Ethiopia, the two countries that by now can be singled out as having come the least far in their democratisation process according to the commitments discussed in this shadow peer review. The constitutions of both countries provide too weak protection of the judiciary against serious political manipulations and abuses of the judicial system that have taken place during the review period.

Before we turn to the four categories, it is important to highlight a problem common to all eight countries under review – the judiciary’s lack of resources, staff and infrastructure. While this problem may be more acute in some countries (Nigeria) than others (South Africa), it is a serious hindrance for the judiciary’s ability to perform its proper role. The consequences of resource problems and a backlog of cases pose a less serious threat to democracy in countries that suffer little political interference with the judiciary than in countries where the law is used as an illegitimate political tool of coercion.

**A problem common to all eight countries [is] the judiciary’s lack of resources, staff and infrastructure.**

Some countries, like South Africa and Ghana, have or are about to put in place particular mechanisms to make sure that politically sensitive or otherwise important cases are fast-tracked.<sup>101</sup> In other countries, political disputes have to wait for as long as other cases, thus undermining the workings of democracy. In Nigeria, for instance, none of the hundreds of petitions filed immediately after the 2003 general election complaining about aspects of how the election was held had been heard eight months later. In Nigeria, the court backlogs constitute a serious human rights problem with some suspects having been kept in detention for up to ten years awaiting trial.<sup>102</sup>

101 For example, the Constitutional Court ruling on the use of different types of identity documents to register for the election in 1999 (see *New National Party v Government of the Republic of South Africa*, 1999 (3) SA 191 (CC)); and on voting rights for prisoners in March 2004 see *Court Lets Prisoners Vote*, Mail & Guardian Online, 3 March 2004, [www.mg.co.za](http://www.mg.co.za), accessed 4 March 2004).

102 Civil Liberties Organisation, *1999 Annual Report: A CLO report on the state of human rights in Nigeria 1999*, CLO, Lagos, 1999, p 37.

## 8.1 The power of a strong constitution

South Africa's constitution is famous across the world as a strong and liberal document. This can be seen in the numerous safeguards put in place to ensure the independence and power of the judiciary. Apart from guaranteeing that "the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice",<sup>103</sup> it has also put in place strict procedures for the hiring and tenure of judges, particularly the judges of the Constitutional Court. This ensures that qualified candidates without obvious party-political connections and biases are appointed, and that appointees have security of tenure and cannot be fired for reasons of political expediency.<sup>104</sup> No major abuses of the system have taken place.<sup>105</sup>

The courts have functioned well as the third independent arm of the state and exercised meaningful oversight over executive and parliamentary actions. The judiciary is generally considered to be politically neutral and non-partisan. Although there have been instances where complaints have been lodged over partisan judges, the Constitutional Court has in such cases unanimously rejected the claims.

Court rulings are respected by the executive. For instance, President Mandela had to obey a Constitutional Court order after a judgment ruled that he had acted unconstitutionally in amending the Local Government Transition Act, 209 of 1993.<sup>106</sup> The only wobble in the South African government's respect for the decisions of the courts came in 2002, when the Minister of Health, Manto Tshabalala-Msimang, for a brief time indicated her intention to ignore a Constitutional Court ruling that the state must provide the anti-retroviral drug Nevirapine to prevent mother-

<sup>103</sup> South Africa's Constitution, section 165.

<sup>104</sup> *Ibid*, Act 108, sections 174(4), 176 and 177 (1).

<sup>105</sup> Some minor issues were raised by the UN rapporteur on the independence of judges and lawyers in his country report in 2001, but overall the South African judiciary branches, particularly the higher courts, were regarded as mostly independent. See P Cumaraswamy, Civil and Political Rights, Including Questions of Independence of the Judiciary, Administration of Justice, Impunity: Report of the Special Rapporteur on the independence of judges and lawyers, submitted in accordance with Commission resolution 2000/42: Addendum, Mission to South Africa, Commission on Human Rights, fifty-seventh session, doc. no. E/CN.4/2001/65/Add.2, 2001.

<sup>106</sup> Executive Council of the Western Cape Legislature v President (1995), (4) SA 877 (CC)

to-child transmission of HIV.<sup>107</sup> However, the minister soon backtracked after a media storm of criticism.

## 8.2 Arriving at judicial independence

Compared to the many problems Nigeria faces regarding the other commitments to democracy studied in this monograph, the country's judicial system is faring relatively well. One reason for this may be the country's choice of an American model of democracy where the supreme court has a strong, independent and highly respected role within the political system. The independence of the judiciary is guaranteed in the Nigerian constitution, but with fewer safeguards regarding hiring and firing than in South Africa. The president needs a two-thirds majority in the Senate to back his appointments to the supreme and high courts.<sup>108</sup>

The courts have generally exercised real oversight over executive and parliamentary actions. For instance, in May 2002 the supreme court nullified as unconstitutional an electoral act passed and signed into law a year earlier which extended the tenure of local government councils by one year.<sup>109</sup> Similarly the courts called the electoral commission to order when it imposed unconstitutional guidelines for the registration of political parties.<sup>110</sup>

However, some individual judges have blemished the Nigerian judiciary's reputation of being politically unbiased. For instance, Justice Fred Egbo-Egbo of the Federal High Court in Abuja had over time established a reputation as a judge who always made rulings in favour of the federal government, particularly the presidency. However, the National Judicial Council suspended the judge indefinitely on 8 October 2003 after he made one of his most controversial verdicts.<sup>111</sup>

107 Minister of Health v Treatment Action Campaign (2002), (5) SA 721 (CC).

108 Nigeria's Constitution, section 6.

109 M Ikhariale, The Rule of Law Triumphs as Supreme Court Nullifies Obnoxious Sections of Electoral Law, [www.gamji.com/NEWS1260.htm](http://www.gamji.com/NEWS1260.htm) (accessed 10 March 2004).

110 See Chapter Three.

111 K Ogedengbe, Justice Egbo-Egbo Suspended, *Daily Trust*, 9 October 2003; and J Nwankwo, Quit office now, Ngige tells Egbo-Egbo, *Daily Times*, 9 September 2003.

Uganda's 1995 constitution also provides adequate guarantees for the independence of the judiciary.<sup>112</sup> The president appoints the chief justice, justices of the supreme court, justices of the court of appeal and judges of the high court, on the advice of the Judicial Service Commission and the approval of parliament. Judges have security of tenure and, as is the case in South Africa, the constitution sets stringent provisions for their removal from office.

Despite operating in a difficult political context, and at times being objects of criticism by high-level politicians, the courts often provide meaningful oversight over executive and parliamentary actions. The judiciary has jealously guarded its independence and has made some courageous decisions that are unfavourable to the ruling government. While the lack of party politics and attempts to suppress opposition perspectives have shown up as serious impediments to further democratisation in Uganda, the strength of the judiciary may become an important pillar on which to build a stronger democracy in the future.

Kenya has more – and more serious – practical problems than the two previous countries in this group, but like those two, it has proper constitutional guarantees of the independence of the judiciary, most of which have been in place since 1963. These guarantees include the security of tenure for judges.<sup>113</sup> However, there have been cases of judges being squeezed out. In 1986 two high court judges retired early without giving reasons why, while two other judges resigned in a flurry of publicity in 1987 and 1988.<sup>114</sup>

While the judiciary and courts are formally independent from the executive, the president's wide-ranging powers and systems of patronage have led to individual members of the judiciary being indebted to him.<sup>115</sup> Kenya has as a result had a history of political interventions in individual legal cases. In 1998, the UN Special Rapporteur on the independence of judges and lawyers came out with strong criticism of Kenya's judiciary, drawing the government's attention to:

112 Constitution of the Republic of Uganda (1995), art. 128.

113 Kenya's Constitution (2001), section 61(1,2) and 62(4,5,6).

114 JT Gathii, *The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process*, Kenya Human Rights Commission, Nairobi, 1994, p 12–14.

115 Ng'ethe *et al.*, *op cit*, p 9.

the fact that the judicial system was under-funded and that the President of Kenya made “presidential comments” publicly predicting the outcome of pending cases. Pursuant to one such comment, former Chief Justice Hancox reportedly issued a circular to all magistrates ordering them to follow the President’s directive. Further, it was alleged that sensitive political cases were not allocated to judges who are regarded as being either pro-human rights or completely independent. In addition, the Special Rapporteur received allegations that lawyers supporting human rights or opposition parties were harassed and economically sanctioned. In this regard, lawyers suffered excessive tax demands and they often received threats, were summoned to the police station for questioning and were asked to surrender clients’ files.<sup>116</sup>

Kenya’s serious problems regarding the independence of the judiciary are less related to the judiciary’s constitutional status than to the fact that some officials, politicians and judges do not respect this constitutional status. Ghana and Senegal, discussed below, on the whole have a more independent judiciary than Kenya does, but are discussed separately because the problems faced in these countries are more often due to legal loopholes than outright disregard for the law.

### 8.3 Legal loopholes and political opportunism

Ghana’s constitution states that “the judiciary shall be independent and subject only to the Constitution” and that “[n]either the President nor Parliament nor any person acting under the authority of the President or Parliament or any other person whatsoever shall interfere with Judges or judicial officers (...) in the exercise of their judicial functions”.<sup>117</sup> However, some strategic loopholes undermine this constitutional guarantee. First among these are the vast appointing powers granted to the president and,

116 P. Cumaraswamy, *Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment: Report of the Special Rapporteur on the Independence of Judges and Lawyers*, The Commission on Human Rights, fifty-fourth session, doc. No. E/CN.4/1998/39, 12 February 1998.

117 Ghana’s Constitution (1992), articles 125 and 127.

particularly, his ability to appoint an unlimited number of judges to the supreme court. This means that, although the president cannot sack judges easily,<sup>118</sup> and must have the approval of the majority of parliament,<sup>119</sup> he can stack the supreme court with appointees who are friendly disposed to the government. For instance, when taking office in 2001, President Kufuor added four justices to the supreme court at a time when the court was hearing a politically controversial trial of officials of the former NDC government. Thus, presidential dominance, in law and in practice, undermines the effectiveness of the judiciary in functioning as a watchdog of the constitution and as a counteracting force *vis-à-vis* the executive.

Another potential loophole is the chief justice's power to determine the composition of the supreme court panel that gets to hear and decide a given case. This opens up for a politically malleable chief justice to use this power to benefit his or her political allies. However, the current chief justice, George Acquah, appointed in June 2003, is widely respected as a fair and impartial judge.

Ghana's juridical loopholes are compounded by practical limitations, including the judiciary's weak finances and operational dependence on the executive branch. Constitutionalism is also undermined by the prevailing culture of paternalism and patron–client relations. Politicians and public officials dispense patronage and largesse in exchange for votes and support. In such a system, patrons expect clients to show gratitude. Thus, questioning the actions of patrons or asserting one's rights under the constitution are actions viewed as unacceptable.

The independence of the judiciary has been tested many times since 1993 in cases brought by private parties challenging particular governmental acts as unconstitutional. The government is also routinely sued and named as defendant in commercial cases. The outcomes of these cases do not reveal a consistent or predictable pattern: the government has lost several but won others. Concerns about judicial independence nevertheless continue to be voiced. There is a widespread perception of judicial corruption which is made worse by the long time it takes from filing a case to the delivery of judgment.

118 *Ibid.*, art. 146.

119 *Ibid.*, art. 144.

Senegal's problems are similar to those of Ghana. The separation of powers has long been entrenched in Senegal's constitution.<sup>120</sup> However, in reality this independence is less assured. There is widespread belief that the holders of the highest judicial offices are politically biased. This is particularly the case for the Conseil Constitutionnel, all of whose members are nominated by the president. While President Wade repeatedly denounced the political nature of his predecessor President Diouf's nominations while he was in opposition, he has copied this tactic when in power. He replaced all of Diouf's nominees as soon as their mandates came to end, replacing them with a number of his own supporters – including Mireille Ndiaye, the widow of Fara Ndiaye, the former second in command of the ruling party.

In the lower sections of the judiciary, there is widespread knowledge of corruption and of judges letting themselves be influenced by political or religious notabilities. Before the change of government in 2000, the courts rarely acted against the ruling party in electoral matters. In 1993, electoral controversies led to the head of the Cour Constitutionnelle resigning and his deputy being murdered after he held back the publication of the election results. His murder is still unsolved. One positive outcome of this traumatic event was the momentum it gave to supporters of a stronger, more institutionalised and independent judiciary in Senegal. Finally, as in Ghana, lack of resources has greatly compounded the problems of political influence over low-paid and overworked judicial officers.

## 8.4 An arm of government rather than a check on power

Algeria and Ethiopia both have constitutional and practical impediments to an independent judiciary. In both cases the problem is that the judiciary is treated as an arm of government rather than as its counterweight. Both countries have nominal guarantees of judicial independence in their constitutions. However, in Algeria, the appointment of magistrates and their transfer and career progress are decided by the High Council of Magistrates,

<sup>120</sup> Senegal's Constitution (2001), articles 88 and 90.

which is presided over by the Algerian president. The president thus wields direct political control over such decisions. This control has shown itself in how the thousands of court cases concerning disappeared persons have fared in the legal system. About 7,000 people arrested by the various branches of the security forces since the outbreak of civil war in 1992 have “disappeared”. So far, not one case brought against security forces to criminal courts has led to a successful conviction, and state prosecutors and judges have found various ways of blocking such cases.<sup>121</sup>

Ethiopia does not have a tradition of courts acting independently as a constraint on the executive branch of government. Some judges in some parts of the country have at times attracted attention by asserting their independence of government officials in cases where the latter have had a private interest. Probably most famous is the case when an Addis Ababa judge sentenced the minister of justice to jail for four weeks for refusing to hand over a suspect to the courts. However, the minister was immediately pardoned by the president, at the prime minister’s request. The judge was soon transferred – a move widely seen as punishment.<sup>122</sup> Furthermore, although there is a constitutional court, it has no power to overrule legislation on constitutional grounds, but can only refer such cases to the House of the Federation (the part of the legislature that represents the different “nations, nationalities and peoples” of Ethiopia) for final decision.

In rural areas, the concept of judicial independence hardly exists in practice. Judges are partisan – on the side of the government – and do not see their role as that of upholding the constitution or exercising meaningful oversight over the executive or legislature.

In theory, judges have security of tenure until retirement. In practice, local administrators have removed judges they do not consider loyal. Finally, the Ethiopian judiciary is severely under resourced and struggles to recruit adequately qualified judges due to poor pay and difficult working conditions. Compounding this, the “ethnic federal” character of the Ethiopian state means that each region needs to fill its judicial positions with judges who belong to the appropriate nationality.

121 For evidence and details see Human Rights Watch, Truth and Justice on Hold: New state commission on disappearances, *Human Rights Watch Reports*, 15 (11) (E), 2003.

122 Pausewang, *op cit*, (forthcoming).

Courts are congested and extremely slow, with a long backlog of cases that have pended for years. This also affects politically sensitive cases. For instance, no sentences have yet been handed down for members of the previous regime who were charged with gross human rights violations after being overthrown in 1991.

## 8.5 Conclusion

Apart from Ethiopia and Algeria, the review of the independence of the judiciary reveals many positive policies and practices, as well as some problems and shortcomings. The overall conclusion based on this sample is that African judiciaries have often fought effectively for their independence and for the respect of their countries' constitution, even when faced with severe obstacles including the harassment and murder of judges.

**African judiciaries have often fought effectively for their independence even when faced with the harassment and murder of judges.**