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The Judicial Role in the Legislative Lawmaking Process in Africa: the South African Case

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Abstract

The independence of the judiciary is crucial for an effective functioning democracy. Yet, the questions are; what is the role of the judicial system in the legislative lawmaking process, which is supposed to be an exclusive constitutional responsibility of the legislatures? How does the judiciary account and in what manner? Reviewing literature and using data from focus group interviews with relevant stakeholders in South Africa, this study tries to solve this dilemma posed by the doctrines of separation of powers and checks and balances in a constitutional democracy. The paper found that in practice the South African judiciary plays a very minimal role in the legislative lawmaking process. Its role is only limited to judicial interpretation and review of government policies. In addition, it has been found that the judges of the courts only account directly to the law.

Introduction

In the 1980s and 1990s, many African states (e.g. Kenya, South Africa, Nigeria, Tanzania, and Ghana) undertook massive constitutional reform process as they adopted a multi-party democracy. This process resulted into the adoption of new constitutions based on universal principles of separation of powers and checks and balances. South Africa adopted its new democratic Constitution in 1996; Nigeria adopted the same in 1999 and Kenya adopted its new democratic Constitution in 2010. Despite the new constitutions, these principles of the separation of powers and of checks and balances amongst the legislature, the executive and the judiciary are considered the most defining characteristics of a constitutional democracy. In South Africa, for example, this is provided for in Chapter 4 of the Constitution of the Republic of South Africa (Constitution, 1996). The role of the judiciary in the legislative

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lawmaking process is not well defined and as a result it has not been given much attention in the scholarship of the legislative studies. Instead, much attention has been given to the issue of judicial independence and transformation not only in South Africa but Kenya and Nigeria as well. Undoubtedly, the new democratic constitutions of many African nations sought to overcome executive dominance of the judiciary, as it is the case with many African legislatures.[1] Executive domination over the judiciary undermines and compromises the independence of the African judicial systems. As noted by the International Commission of Jurists (2005: 5), historically the judiciary in Kenya, for example, has suffered from the domination by the powerful executive. Therefore, with the new liberal constitutions, judiciaries in Africa seek to free themselves from the reach of the executive. The role of the judiciary in lawmaking has its roots in the principle of separation of powers by John Locke (1632-1704) and then developed further by Baron de Montesquieu in his "Spirit of the Law" published in the 18th century. Some scholars argue that the role of the judiciary is limited to statutory interpretation and review while others argue that it also makes laws. Therefore, this paper explores this critical debate in the legal fraternity. The puzzling questions become: what is the role of the judicial system in the "legislative" lawmaking process? How is the independence of the judiciary guaranteed when the Executive, especially the state President, appoints judges of the Constitutional Court and Supreme Court of Appeals? To whom does the judicial system account to and in what manner? Before attempting to answer these theoretical questions, the paper begins by discussing the historical background of African judiciary, with specific reference to the South African judicial system during the apartheid era. This is followed by the discussion of the post-apartheid legal system in order to locate the role of the judiciary in the legislative making process.

Methodology

The methodology employed for this study included a literature review of relevant articles, reports and books. In addition, fifteen people were solicited for focus group interviews in Limpopo province, South Africa. These people were mainly from the provincial legislature as an oversight and lawmaking institution in Limpopo province. However, for the purpose of confidentiality and anonymity, no names are used when interviewees are cited in the paper, except the name of the Chief Justice of the South African Constitutional Court. This is because his interview was made on public radio of which one of the authors to this paper was able to listen and followed the interview on SAFM (2013, Sept 17th) and jotted down the notes. With the focus group

discussions, only interview dates are provided. In addition, one judicial officer who works as a legal advisor to the Limpopo provincial legislature was also interviewed. Although many other people, especially in the executive branch of government, were targeted for interviews, they were just not available for interviews due to reasons of complexity. However, it is important to mention that the face-to-face in-depth interviews for this study were largely drawn from interviews conducted between September and December 2013 for another study which explored the independence of the legislatures *vis-a-vis* the executive. Nevertheless, this study was finalised in early January 2013.

The Principle of Separation of Powers in Africa

Montesquieu's principle of separation of powers inspired the writing of the constitutions of many African countries such as Ghana, Nigeria, Uganda, Kenya, Tanzania, South Africa, Malawi and other developing as well as developed world. The constitutional design of especially democratic nations made a clear separation of powers amongst the legislative, executive and the judicial powers and each branch acting independently. According to this principle, the legislature is solely responsible for enacting the laws of the state and appropriate public funds to enable policy implementation by the executive branch. The judiciary on the other hand is responsible for interpreting and reviewing these laws in accordance with the national constitution and further applies the legal interpretations to controversies brought before it by either branch. In addition, the principle of checks and balances is embedded within the doctrine of separation of powers to balance the autonomy of each branch to ensure that there is no "absolute" separation of powers.

For instance, countries that apply the US's presidential form of governance have been considered to have a strict separation of powers, whereas countries that apply the Westminster parliamentary system inherited through the British colonial rule (e.g. the New Zealand, Australia, Botswana, Mauritius, South Africa and Canada) are considered to have the weak separation of powers but yet the Courts in the UK are amongst the most independent in the world (Libonati, 1989). In Africa, it is argued that 'l*usophone*' and 'f*rancophone*' have the strongest separation of powers while the 'A*nglophone*' countries have weak separation of powers caused by "fusion of powers" thus allowing executive dominance. Fusion of powers suggests that there is no separation of office between the executive and the legislature thus often weakening government accountability due to the dominance of

the executive over the institutions of regulations and oversight such as the legislatures.

The separation of powers is strongest, for example, in Benin, Comoros, Congo Brazzaville, Zambia, Djibouti, Malawi, Nigeria, and Sierra Leone due to the impossibility for censure and dissolution (van Cranenburgh, 2009: 52-53). In his analysis of thirty African countries, van Cranenburgh argues that due to majoritarianism of mostly governing parties and a strict party discipline factor, it is often very difficult to opposition parties or even the legislature to censure ministers or presidents in the executive. This suggests weak separation of powers. In addition, in all Anglophone countries except Malawi, Kenya and since 2008, Kenya and Zimbabwe, the governing political parties command large majorities in the legislatures (van Cranenburgh, ibid: 63). In contrast, in Francophone countries the offices of ministers and members of the legislature are generally incompatible. This is also provided for in the constitutions of these countries. The constitutions of countries such as Nigeria, Cape Verde, Mozambique, Mali, Senegal and Sierra Leone explicitly prohibit the combination of a seat in the legislature and a ministerial position (see Nijzink *et al*, 2006).

Based on universal standards of judicial autonomy, the constitutions of most African states such as South Africa, Ghana, Tanzania, Kenya, and Nigeria provide that the judiciary interprets and applies the law enacted by the legislature as well as adjudicating the legal disputes.[2] The need for post-colonial Africa to emphasise judicial independence in the democratic constitutions of individual states is undoubtedly informed by Africa's unsavoury judicial past. Therefore, the development of many African constitutions in the 1990s was based on international legal standards that entrenches and institutionalises the independence and accountability of the judiciary as key components of democratic consolidation in Africa, of course, with the support of the international community.

In similar tone as Onyia (2012) puts it "...no Nigerian judge can honestly say that the Nigerian judiciary is not independent enough to allow for honest discharge of the judicial function". Nevertheless, the Constitution of the UK is described as a fusion of powers, as Stewart (2002) argues, because the executive forms a subset of the legislature hence the Prime Minister sits as a member of the British legislature. This also holds for some states such as South Africa, Zimbabwe, Uganda, India, etc., that have adopted a parliamentary system of governance whereby the President and the

Ministers are also members of the legislature. It could be argued that though South Africa applies the British parliamentary system, there are some variations with the UK model in the sense that the judiciary in South Africa has powers to strike down the law deemed invalid or unconstitutional. This does not hold for the judiciary in the UK because it has no powers to strike down the primary legislation but can only rule on secondary legislation that it is invalid with regard to the primary legislation. Undeniably, the democratic Constitutions of Nigeria, Tanzania, Ghana, Kenya, etc., have all attempted to maintain the independence of the judicial system, as international standards unlike before whereby the citizens perceived the judiciary as being politically bias in favour of government. In other words, the democratization process in many African nations has helped to restore or retain the independence and impartiality of the judiciary. Principle 1 of the UN Basic Principles on Independence of the judiciary reads: "The independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."

To guard against political interference by either the executive and legislative branch, as noted by the International Commission of Jurists (ICJ) (2005), another UN Principle provides that neither should there be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. In Nigeria, for example, Aderibigbe (2012) gives an example of governorship election results being annulled in three states in Nigeria and also the court ordering re-election in Osun state.

Regarding appropriate judicial appointments, the democratic Constitutions of many countries also in Africa set out clear rules for the appointment, tenure and removal of judicial officials from office, through the creation of Judicial Service Commissions reflecting universal standards and the general principle of judicial independence. The 2010 Constitution of Kenya, for example, upgraded the criteria for appointment and promotion of judicial officials based on the international standards, which say that appointment of judicial candidates should be based on integrity, ability, and appropriate qualifications in law as well as legal experience. This was after the International Commission of Jurists found in Kenya that persons with inappropriate qualifications and experience were appointed to judicial office.

According to ICJ (2005: 29), this situation led to 'non-judicial decisions' and the low quality of judicial reasoning rendered by some judges.

However, in balancing the power of the judiciary, the legislature can propose constitutional amendments, which has happened several times in many African countries. The executive on the other hand has the power to appoint, while the legislature approves, appointment of judges to the High Courts (i.e. Constitutional Court and Supreme Court of Appeals). What the principle of checks and balances suggests is that in practice there is no pure separation of powers as the functions of each branch overlap. Onyia (2012) agrees that there cannot be a completely separation of powers in any modern democratic system of government. As elsewhere, the executive in Nigeria, for example, spearheads most of the bills that eventually become law and also plays an important part in the appointment of judges. Onyia further argues that the executive can withhold accent to legislative enactment by the legislature. Equally, the judiciary interferes with the functions of the executive and the legislature by means of the prerogative writs of '*certiorari*', '*mandamus*' and prohibition.

Moreover, most African states are party to several international human rights treaties or conventions including the United Nations International Covenant on Civil and Political Rights and the African Charter on Human and People's Rights adopted in 1992. That said, the most comprehensive international standards on the autonomy of the judiciary are set out in the UN Basic Principle on the Independence of the Judiciary, the UN Basic Principle on the Role of Lawyers and the Guidelines on the Role of Prosecutors. In addition, the Bangalore Principle on Judicial Conduct adopted by Chief Justices across the world in 2001 also set out other important standards for the ethical conduct of judicial officials.[3]

Apartheid South African judiciary

The South African judiciary under apartheid has been configured to protect and maintain the apartheid status quo of racial and gender discrimination, coercion and domination. It existed to perpetuate black people's and women's marginalisation as part of promoting white supremacy. Empirical evidence shows that the apartheid judiciary was almost exclusively white male dominated and its composition was influenced to some extent by apartheid political factors. Gordon and Bruce (2007: 19) argue that although the apartheid judiciary claimed to be independent, judges had repeatedly upheld discriminatory and repressive legislation. A similar observation was

made by Raymond Wacks that "talk of independence of the judiciary rings decidedly hollow in an environment in which an exclusively white judiciary applies unjust laws of an exclusively white legislature to an unconsenting majority" (Wacks, 1984: 281).

We believe strongly that the principles of independence and accountability are not closely associated with authoritarianism, but liberal philosophy hence accountability, independence, transparency and impartiality of the judiciary as an institution are important values and principles of constitutional democracy in liberal democracies. In other words, the judiciary during the apartheid era was neither independent nor accountable. Undoubtedly, there was no racial and gender integration and empowerment with the apartheid legal system in terms of South African racial demographics and gender. As noted by Czapanskiy (1995), Kadalie (1995) and Albertyn (1995), there were neither black nor Indian and women judges as much as there were no African members of the legislature. Therefore, the idea that there was at least the rule of law by the apartheid judiciary is misleading. Our claim is in consistent with the observation by Jeffrey Jowell who states that[4] "That view is a distortion of the proper meaning of the rule of law, which it confuses with the rule by law (or rule by the law, any law). It confuses legality, which is at the base of the rule of law, with legalism, which is a tool of tyrants. The apartheid government may have followed the tenets of legalism, but not the rule of law" (Jowell, n.d.: 1).

According to Davis, Chaskalson and De Waal (1994: 1), the rule of law implies that the regular law of the land such as the Constitution is supreme so that individuals should not be subjected to arbitrary power of the state. It further means that the state officials are subject to the jurisdiction of the ordinary courts in the same manner as individual citizens and lastly that the courts determine the position of the executive and the bureaucracy by the principles of the private law. It may not be feasible for the rule of law to be applied in an authoritarian regime than in liberal democracies.

Notwithstanding the rule of law, the first black South African judge was however appointed in 1991 while the first woman judge's appointment appeared to have been made after that period leading to the first democratic elections in 1994 (Wesson and Du Plessis, n.d.: 3). To understand the judicial system of the apartheid system, we first need to understand the tradition under which it was rooted. The apartheid judicial system was schooled in a tradition of parliamentary sovereignty with a concomitant emphasis upon

literalism in the interpretation of statutes rather than upholding and promoting the spirit, purport and objects of the apartheid Constitution and to some extent universal human rights.[5] The Westminster tradition of parliamentary sovereignty means that the judiciary enjoys no legal power to strike down or invalidate any legislation that seems incompatible with the purport and objects of the Constitution or infringed on universal human rights principles. As Gordon and Bruce (2007: 12) point out, section 34 of the 1983 amended Constitution of South Africa (Act No. 110 of 1983) stated, "no court of law shall be competent to inquire into or to pronounce upon the validity of an Act of Parliament". This means in practical terms that the legislature as a lawmaking, oversight and representative institution could enact whatever legislation it so wished without being worried about the reactions of other branches of the government, particularly the judiciary.

Furthermore under the Westminster tradition the legislature is supreme while the judiciary, especially the courts, is confined to statutory interpretation not judicial review of government laws. As Davis *et al* (1994: 9) points out, judicial review is a necessary part of a democratic system since it assists to protect individual rights which may not be adequately represented in the political process. In other words, judicial review, as Davis *et al* argue, is a conter-majoritarian force in the legal system. Then the limits or none existence of the courts to review legislation during the apartheid era suggests that apartheid judges made decisions they knew would be more acceptable to whoever had the right to decide whether they should continue serving as judges or be promoted. It could be argued that the supremacy of the white legislature forced the judiciary to behave in a "conformist" manner. This implies that judges were not at liberty to challenge policy decisions from government that infringed even on the operations and or activities of the judicial system.

Studies show that this was also the position of the judiciary in Scotland, for example, with regard to temporary criminal court judges who were appointed for a fixed-term periods and the renewal of their contracts was effectively at the discretion of the executive branch of government, especially the Minister who headed the relevant judicial portfolio. In similar vein as Jowell (n.d.: 6) points out, the subjugation of the judiciary to the whims of the government or the governing party was observed also in the former Soviet Union whereby when there was a case against the state, judges would telephone the relevant Minister to find out what they (judges) should decide. This shows clear lack of the independence and impartiality of the judiciary.

This again renders the doctrine of separation of powers less effective. This is, of course, always the case in authoritarian regimes like apartheid regime where judges were appointed specifically based on their loyalty to the incumbent regime, and will certainly always make court judgements in favour of the regime, regardless of the facts and the law.

Moreover, during the apartheid era black South Africans and women irrespective of race did not have or enjoy any of the human rights enjoyed elsewhere and this meant that the laws which infringed on their human rights were given thumbs up. This is because the judiciary did not have the power of judicial review by which the Courts could determine the legality of Acts of the legislature. The supremacy of the legislature over the judiciary is well captured by the legal scholars as follows: "Parliament may make any encroachment it chooses upon the life, liberty or property or any individual subject to its sway ... it is the function of the courts of law to enforce its will" (Gordon and Bruce, 2007:13). The quotation suggests that "secretly appointed" apartheid judges had no powers to overturn the laws set out by the elected white representatives in Parliament. It further suggests that the Courts were sometimes forced to comply with the directives from the government.

There is no doubt that human rights have played an important part in international law since the creation of the United Nations after the First World War. Therefore, lack of respect for human rights by the apartheid government is what actually pitted South Africa against the international community. Dugard (1994:171) argues, for example, that the courts and the legal profession during apartheid were largely isolated from international law of human rights because South Africa consciously violated almost every right recognised in the Universal Declaration of Human Rights (UDHR) of 1948. This was further compounded by the fact that South Africa was not a party to any human rights conventions since it abstained from voting on the UDHR, except the convention dealing with the suppression of slavery (Dugard, ibid:189). Therefore, in the absence of a Bill of Rights in the apartheid Constitution or other legal norms against which to measure official acts was often seen as an obstacle to the effective judicial system to protecting individual rights. Then it suffices to say that judges during apartheid era were accountable to the state not to the law as it is the case now in post-apartheid constitutional democracy in South African (Gutto, 2001). The apartheid constitutional law, according to Davis *et al* (1994), was a mixture of Diceyean constitutionalism and white majoritarianism in which the

democratic rights became conflated with the rights of the majority of the white people or their white parliamentary representatives at the expense of the black populations.

Although, there seems to be less commonality on how judges were appointed during apartheid and in post-apartheid South Africa, there were however variations in terms of appointment process and the composition of the courts. Just like in post-apartheid, judges of the Supreme Court which was the highest court then were appointed by the state President and without the involvement of the legislature. In addition, the appointments and promotions of judges during apartheid were made privately and solely on the ground of the political views and attachments of the judicial appointees to the apartheid political principals. As noted by Rickard (2003), this practice meant that the bench largely reflected the political establishment, virtually all white male and Afrikaans speaking judges. In similar tone, Gutto (2001: 186) argues that pre-1994 South African judicial system in its entirety represented perfection in and of legalised injustices. A similar trend was observed by Jowell (n.d) in most Commonwealth nations such as in Canada, Australia and the United Kingdom whereby the Minister of Justice appointed all judges. It then suffices to suggest that discriminatory political factors played a significant role in the recruitment and appointments as well as promotions of court judges. They also played a significant role on the operations of the Courts and enforcement of the law. It further suffices to say that the apartheid judicial system was not independent in exercising its formal powers of providing legal services to the citizens and impliedly judges were not honest and impartial in deciding legal cases before them.

Post-apartheid judicial system in South Africa

According to Wesson and Du Plessis (n.d.), the apartheid judicial system survived the political transition almost entirely intact for reasons of continuity despite the changes which occurred in other branches of government. In other words, even though the judicial independence was undermined or compromised during the apartheid era, it was not completely corrupted or destroyed because it provided the basis upon which a substantially independent judiciary could be built in post-apartheid South Africa. Undeniably, it was this judicial system through negotiation process in South Africa which was tasked with the responsibility of enforcing and developing a new post-apartheid legal order that culminated into the new democratic Constitution, what Davis *et al* (1994:169) calls "real" Constitution adopted in 1996 (Act No. 108 of 1996). This was after the political parties,

mainly the African National Congress, during the liberation struggle were unbanned, and thus Nelson Mandela and other political prisoners being released. Conspicuously, the major change of post-apartheid South African judiciary system was the creation of the Constitutional Court in terms of the new Constitution. As the Court of final say over any matter in connection with the interpretation, review, protection and enforcement of the provisions of the Constitution, the Constitutional Court has a material effect on the administration of justice in the country. That said on the existing courts which remained intact, the Supreme Court of Appeal was expressly precluded from adjudicating any matter within the jurisdiction of the Constitutional Court despite enjoying equal status.

Nevertheless, the legal system needed to be transformed to mirror all the demographics of the South African population of all races and gender. The equality clauses in the democratic Constitution clearly reflect also the terrain of women struggle for gender equality. It could be said that women of all races and different political parties were also determined to challenge the patriarchal status quo in relation to such issues as socio-economic and political status; parental rights, customary practices and so forth (Kadalie, 1995: 66; Albertyn, 1995). The preamble to the 1993 interim Constitution, for example, envisaged a democratic society in which there is equality between males and females in their racial diversity. This was the vision which was practically carried over in the 'real' final Constitution. There is no doubt that the new Constitution of the Republic of South Africa (1996) entrenches a system of democratic government in which the Parliament is no longer sovereign. This explicitly suggests that the courts, especially the Constitutional Court, are empowered to strike down any legislation that is deemed to be unconstitutional or simply inconsistent with the provisions of the democratic Constitution, particularly the Bill of Rights.

More so, the Constitution of the Republic further seeks to promote representation in terms of race and gender. In other words, the democratic legal order seeks to transform the South African judiciary and also to promote as well as entrenching its independence. The transformation agenda of the judiciary included increasing access to justice for all people, particularly the poor, marginalised, women and disempowered sectors of society whose situations reflect the legacy of apartheid policies (Gordon and Bruce, 2007: 21). Notwithstanding judicial transformation, independence of the judiciary is very critical for the consolidation of democracy in any nation. The Chief Justice of the South African Constitutional Court -Mogoeng

Mogoeng noted that "if the other arms of the state get it wrong, citizens have hope as long as there is a competent and fully independent judiciary" (Mabuza, 2013: 2). It has been emphasised that the independence of the judicial systems in many countries is affirmed by provisions of their national constitutions and various international treaties including African Charter on Human and People's Rights of 1981, Article 10 and 6 of the Universal Declaration of Human Rights and the European Convention on Human Rights respectively (Jowell, n.d.). To ensure that the separation of powers is indeed secured, the important principle of independence of the judiciary is clearly expressed in section 165 of the South African Constitution. The issue of judicial independence will be explored in greater details later in this paper when we try to answer one of the questions posed by the study.

However, we need to point out that section 39(2) of the Constitution (1996) expressly rejects a literal approach to statutory interpretation and instead says that "when interpreting any legislation and also developing the common law or customary law, every court, tribunal or legal forum must promote the spirit, purport and objects of the Bill of Rights enshrined in the Constitution." In other words, it is the values of the democratic Constitution that guide statutory interpretation of the legislation, not the intentions of the legislation as was the case with the apartheid judiciary. Incontrovertibly, the new democratic Constitution exists not to preserve a particular state of affairs but to create a just society based on the universal human rights principles of a democratic society and the rule of law.

The judiciary and the legislative lawmaking process

In this section we attempt to answer the research questions raised in this study. To reiterate, in constitutional democracies like South Africa the notion of "judicial independence" is embedded within the doctrines of "separation of powers" and "checks and balances" amongst the three branches of government. Separation of powers and of checks and balances between the legislature, the executive and the judiciary are considered the most defining features of constitutional democracy. By providing for "checks and balances" by the South African Constitution (1996) for each branch of government was to ensure that no one branch becomes too powerful *vis-a-vis* others (Gordon and Bruce, 2007; Motala, 1995; Wesson and Du Plessis, n.d.). The doctrine of "checks and balances" seeks to make the separation of powers more effective by balancing the power of one branch of government against that of the other. This principle ensures that no one branch of government has absolute power or control over others. This simply means that duties and roles of each

branch of government are clearly and exhaustively defined; the upper and the lower limits of operational boundaries are well defined.

That said, the Constitutional Court is the highest Court for interpreting and deciding about constitutional matters, whereas the Supreme Court of Appeals is the highest Court for deciding about non-constitutional matters. To reiterate, the South African Constitution (1996) entrenches a system of a democratic state whereby the legislature is no longer sovereign because the Courts, especially the Constitutional Court has powers to strike down any legislation deemed inconsistent with the values explicitly expressed in the country's Constitution.

It suffices to say that the judges under constitutional democracy are able to rule that the acts of public bodies like the legislatures are unlawful. The court can further decide against the government in a particular case. Indeed, this is a powerful check on the power of the state against perhaps an individual. Cognisance should also be taken of the fact that the Courts do not always completely overturn legislation from either the legislature or the executive which suggests that such legislation is completely removed from the statute books. A declaration of incompatibility for legislation does not strike down legislation or remove it from the statute books, as it may sometimes be the case. Studies show that there are a number of legislations which were invalidated by the Constitutional Court and often the legislature(s) was required to amend the clauses that were deemed unconstitutional. Declarations of incompatibility leave the validity of the particular law intact. This legal process simply requires the legislature as a lawmaking institution to consider amending the proposed legislation to render it compatible with the provisions of the Constitution. In this case the ultimate decision remains with the legislature and not the judiciary to amend the identified loopholes in the legislation.

A recent example of a legislation which was declared incompatible with the South African Constitution is the Financial Management of the Limpopo Provincial Legislature Bill of 2009. This Bill was referred to the Constitutional Court in 2010 by the executive, specifically the provincial Premier after doubting its constitutionality. A respondent mentioned that the Bill was referred to the Court after the executive "rightly so" doubted the competency of the Provincial Legislature to pass a law dealing with its own financial management of which the Constitutional Court found the Limpopo Legislature's Financial Management Bill to be unconstitutional (2013,

September 10th). In addition, the respondents to the focus group interviews agree that the Limpopo Provincial Legislature had contravened section 104(1) (b) of the South African Constitution.[6] This was emphasised by the Constitutional Court in its judgement against the Limpopo Provincial Legislature when stating that "a provincial legislature may be competent to legislate on its own financial affairs only if this is a matter that has been expressly assigned to it by national legislation or is a matter of which a provision of the Constitution stipulates" (Constitutional Court Judgement Report, 2012: 3).

Another respondent mentioned that "unfortunately the Constitutional Court's judgement against the Limpopo Provincial Legislature's Financial Management Bill nullified by 'extension' the similar Acts of other five South African provincial legislatures" (2013, Sept 10th) . The respondent views the decision against Limpopo Legislature as a blow to the entire legislative sector in South Africa. This was well captured by the Constitutional Court Judgement Report which declared that "it suffices to state that, for the same reasons cited in Limpopo I, we find these statutes to be unconstitutional" (2012: 10).[7] We have just mentioned that a declaration of incompatibility by the judiciary does not suggest that the legislation is completely removed from the statute books; the six provincial legislatures were given a timeframe of eighteen months from the date of court judgement to amend the identified technical loopholes of their respective individual Financial Management Bills. By the time when this paper was completed, it was not yet clear whether the six provincial legislatures had concluded their amendment process around these financial management bills individually or collectively as a sector.

Since the judges of the courts interpret and decide about the law, some scholars (e.g. Ngandwe, 2006) argue that the judiciary is practically involved in the lawmaking process without making a distinction between "legislative lawmaking" and "judicial lawmaking". Ngandwe posits that through precedents and pronouncements of statutes being unconstitutional and also the "null and void", the judicial is practically involved in the lawmaking process. Ngandwe supported by Steinman (2004) goes further to argue that judicial discretion is another means at the disposal of the judicial system to make laws. For these scholars, the interpretative and review processes the courts adopt in arriving at particular decision(s) in itself amounts to lawmaking process. But the lawmaking process these scholars talk about here in not legislative lawmaking initiated by the legislatures but the one the

court conducts. The South African law is very clear on public participation process to be followed in legislative lawmaking processes. For, example, legislatures conduct public hearings on bills that have been introduced and considered by the legislature in order to get citizens' comments and inputs before the bill could be finalised, assented to and signed into a law by the head of the executive either at national level or sub-national level.

Cognizance is taken of practical reality that legislative lawmaking is not an exclusive responsibility of the legislature of which this is an outdated theory but other branches of government, particularly the executive is also involved. According to Gutto (2001: 17), the element of truth in this outdated theory however lies in the formal constitutional requirement that the legislature is the principal branch of government with the primary authority and responsibility to legislate. Given the knowledge and information disadvantage of the legislative branch, as suggested by the principal-agent theory, the bulk of the legislation in South Africa is initiated by the executive rather than the legislature itself. According to Booysen (2001: 135), the lawmaking process has taken what she calls "executive centralism" in the policy making process. This means that it is often the executive who draft early versions of the legislation, designs and approves the process of policy consultations; devise the measures for implementation and process feedback.

Notwithstanding the debate, Steinman (2004: 552-3) however makes a clear distinction between the legislative lawmaking and judicial lawmaking of which, we believe, Ngandwe fails to draw a distinction. Steinman points out that the legislative lawmaking is normally constrained by the national constitution while it is not clear what limits the judicial lawmaking but he believes that the limits of the constitutional principles apply. As Steinman (ibid: 548) points out on judicial lawmaking, "Judges make law even when their decisions are inelegant, incoherent or inconsiderate of the relevant legal sources, arguments and implications". Similarly, the Chief Justice of the South African Constitutional Court in a radio interview also pointed to instances of "poor judicial judgements" by some judges (2013, Sept 17th). It could be argued that the judicial lawmaking is not subjected to the national constitution in the sense that a poorly reasoned decision can still be used as an effective act of future judicial reference by law students as a case study. Steinman agrees that the substantive and procedural limits on judicial lawmaking are not expressly articulated in any written document.

It then suffices to say that the judicial role, especially the Constitutional Court, in the legislative lawmaking process which is the main focus of this paper is limited to interpretation and review of legislation particularly when referred to it by either one of the two other branches unless if the proposed legislation directly infringes on the operations and activities of the courts. Incontrovertibly, the process of judicial review provides for meaningful enforcement of the national constitutional values or norms since unconstitutional laws can be invalidated by the court. Undoubtedly, the Constitution of the Republic of South Africa set out substantive and procedural limits of the legislative lawmaking process. Procedurally, a Bill becomes a law if it is passed by two-thirds majority in the legislature and assented to and signed by the head of the executive specifically the President for national legislation or the Premier for the provincial legislation. To demonstrate the independence of the South African judicial system, Gordon and Bruce (2007) give examples of various Bills which were rejected in the past because they sought to undermine or threaten the independence of the judiciary. Some of these Bills, among others, include a Bill that sought to appoint the members of the executive into the judicial committees or forums and also a Bill on death penalty in post-apartheid South Africa which was declared unconstitutional despite the widespread popular support for death penalty.

Judicial independence

Moreover, we have stated that the judiciary plays an important role in the system of checks and balances, whereby the relationship demands accountability and independence of the judiciary from the executive and the legislature. The Courts are often requested to review the validity of legislation either from the legislature or the executive, and also members of the executive branch often appear before the courts as litigants (Gordon and Bruce, ibid: 7). To be viewed as independently carrying out their functions and impartially deciding the legality of legislation as judges or the institution, the courts must be free from any actual or perceived interference by other branches of government. There is general consensus in the legal scholarship that judicial independence has two components- one being individual independence of judges and the other one being institutional independence, what Peri (2012: 3) refers to as "external and internal independence". Institutional independence refers to the existence of "structures and guarantees to protect the courts and judicial officers from interference by other branches of government", while individual independence refers to judicial officers' acting independently and impartially

when deciding legal cases before them (International Bar Association, 2006: 4).

Unlike the apartheid Constitution of 1983, the new democratic Constitution of South Africa provides various provisions that facilitate the appointment of diverse, well-qualified candidates in an open and fair process. For example, Section 174(1)(2) of the Constitution states that anyone who is "appropriately qualified and is a fit and proper persons may be appointed as a judge, and the need for the judiciary to reflect broadly the racial and gender composition of South Africa should be considered for appointment" (Constitution, 1996: 97). The Judicial Service Commission (JSC) plays an active oversight role on the appointment of the judges to all courts in the country. The JSC is praised by Davis *et al* (1994) as being widely representative of the legal profession with its three-pronged mandate. For example, the JSC researches and interviews candidates; makes recommendations on appointment of the judges to the high courts, advice the executive on all matters pertaining to the judiciary and the administration of justice in South Africa. This is something that never happened before with the apartheid judicial system.

Yet the appointment of Chief Justice, Deputy Chief Justice and other judges of the two high courts (Constitutional Court and Supreme Court of Appeal) by the executive, specifically the state President and also the involvement of certain executive officials to serve in the Judicial Service Commission (JSC) in South Africa has led to many scholars to question the independency of the judicial system. We mentioned that the independence of the judicial system is not only guaranteed by national Constitutions but by also various international treaties adopted by different states around the world of which South Africa is a party. These international treaties provide a framework for safeguarding the principle of separation of powers and, of course, the judicial independence.

Moreover, the legal profession itself demands independence and impartiality of individual judicial officials such as judges, magistrates, advocates and attorneys when deciding on court cases. This suggests that high professional standard is one of the important indicators of the values, which is rooted in the judicial selection procedure for Constitutional Courts around the world. According to Peri (2012: 8), a judicial system composed mainly of professionals pursues a *modus operandi* which is typical of a judicial culture. Peri gives a number of countries whereby precise professional requirements

are stipulated in written documents for candidates to be appointed to the Constitutional Court and Supreme Court of Appeal. This is because all jurists are members of the legal profession and they are required to meet the legal requirements set out in the legislation governing this profession.[8] The importance of individual independence by judicial officials is further well captured by Paul Stevens as thus, "...It is the nation's confidence in the judge as the impartial guardian of the rule of law" (Stevens cited in Peri, 2012: 12).

To reiterate, security of tenure either in the form of life-long appointments and or mandatory retirement age in the legal fraternity has been viewed to ensure that individual judges remain autonomous in exercising their judicial functions. Unlike the American judges to the US Supreme Court who leave the office only in the case of resignation, retirement or death, South African judges in the two highest Courts leave the judiciary after serving a period of twelve years or until he or she reaches the age of 70, whichever occurs first in accordance with section 176(1) of the Constitution (1996: 99). The age limit to 70 years surely benefits the judiciary in the sense that more old and experienced judges would mentor and transfer skills to younger jurists who have just started their career as legal professionals.

The country's judicial code of conduct also aligned to international standards and principles in terms of ethics may serve as a guard against arbitrary actions by judicial officials for fear of being punitively reprimanded, impeached, suspended and or eventually banned from the legal profession. The judicial code of ethics has implications for the judges because a well defined process for removing or impeaching judges from office can prevent the executive or the legislature from attempting to dismiss judges in retaliation for an unfavourable court judgement. Gordon and Bruce (2007) point out that judges may only be removed from office on the grounds of incapacity or unethical behaviour that render them unfit to hold office or fail to discharge their legal duties.

Arguably, a group that is homogenous in terms of its professional norms or requirements tend to advance the values of its profession in order to protect and maintain its integrity. Our observation is consistent with the findings by Habyramana *et al* (2007) and Ferrer (2004) that a group that is ethnically or racially homogenous, for example, tend to be often characterised by good institutional quality or performance. According to Habyramana *et al* (ibid), a homogenous group of similar profession has an advantage of performing

better due to the threat of sanctioning which serves as deterrent to police the behaviour of group members.

Financial security is also viewed to assist in maintaining individual independence of judicial officials from attempts by other branches of government threatening their (judges) salary reduction or suspension to influence court decisions. However, other empirical studies not only in Africa but elsewhere suggest that public servants have been found to augment their salaries through bribery, rent-seeking and other fraudulent activities. This suggests that paying adequate salaries can never serve as "preventive mechanisms" for judges to accept bribes or be engaged in fraudulent activities to augment their salaries.

In a radio interview on SAFM the Chief Justice Mogoeng argued that provision of adequate resources such as funding and other working tools such as technology allow the judicial officials to operate efficiently and effectively without any undue constraints which may hamper their performance relating to exercising their judicial functions (2013, Sept 17th). He gave an example of Ghanaian judiciary which determines and controls its own budget, which suggests that the judiciary in Ghana has what he terms "absolute independence". The same also holds for the judiciary in Kenya whereby the Constitution (2010) secured the financial autonomy of the judiciary by creating the Judiciary Fund (Rawal, 2013: 7). Once the national legislature approves the judiciary's budget estimates, funds are then paid directly into the Judiciary Fund. Studies show that South African judiciary is not an exception in this regard since many other judicial systems also do not determine their own budget. Contini and Mohr (2007: 33) noted that a budgetary law in France, for example, requires the executive through the Ministry of Justice to submit judicial budgets according to its missions and programs whose objectives and results were to be assessed by Parliament as part of the annual financial allocation process.

Judicial accountability

In this section we now turn our attention at the numerous ways in which the judicial systems, especially the judges, are restrained in order to ensure their accountability. In the judicial reform debate, the notion of judicial accountability and independence has been seen by some scholars as pitting the judiciary against the executive or the legislature.[9] This simply suggests that judicial accountability and independence are constitutional democratic values that are considered to be in tension. They argue that judicial

independence represents a value in itself but it is then damaged by the mechanisms of accountability. To them, the liberal principles of judicial independence and impartiality run up against the democratic principle of accountability in democracies.

Surely the judicial response to this debate has been that the judiciary is accountable on its conduct because it also delivers legal services to the society and the state. Contini and Mohr (2007: 29) correctly point out that greater judicial accountability may instead strengthen other key constitutional values such as independence and impartiality. But they point out that there are certain phenomena such as involvement of judges in arbitrations which may appear to compromise their independence and or impartiality. These scholars cite a number of research publications which expose the risks associated with the phenomenon of arbitration as a sideline job for judges. To address this challenge, some countries such as Denmark and Italy, for example, introduced laws which prevent judges from engaging in private matters as arbitrators.

This paper argues that judicial accountability is a 'must' and indeed happens but it takes a different form from other well known forms of accountability like societal accountability, political accountability and so forth (see, Contini and Mohr, ibid: 31). Accountability refers to a contractual relationship between an actor(s) and a forum(s) in which the actor is obliged to explain and justify his or her conduct or decision before an oversight forum and the forum can pose questions, demand answers and pass judgement based on evidence and facts and the actor may face consequence which may be positive or negative, formal or informal.

A conventional wisdom is that accountability means that an individual who fails to perform satisfactorily in his or her job should be fired or be persuaded to voluntarily resign. In South African context, various media reports have highlighted that certain government officials such as Ministers and Premiers have been forced to resign or dismissed for behaviour which is perceived as inappropriate or even for incompetence in performance of their duties. But in the legal fraternity, this is not the case since legal guarantees exist to ensure that judges are free to make their judicial judgements without fear, favour or prejudice; thus preserving their independency and that of the institution. The judiciary has been sometimes criticised for certain poor judgements but the judge in question has never resigned or been dismissed as a result of the criticism. In similar vein, the Chief Justice of South African Constitutional

Court Mogoeng agrees that "there are always weaknesses in some judgement writings in this country" (Mogoeng, 2013, 17th September). However, judges are protected from political or societal prosecution for poor judgement writings by the law since UN Basic Principle 4 provides that "judicial decisions by the courts shall not be subject to revision" (International Commission of Jurists, 2005). It could be argued that judicial accountability takes a different form, which we refer to as "explanatory accountability". This form of accountability suggests that individual judges can be requested to give an account as to why one has behaved in a particular way not expected in accordance with prevailing ethical procedures and professional norms by legal forums such as Judicial Service Commission. In South Africa, a case in point since 2010 involves the president of Cape High Court-John Hlope.[10]

More so, it is worth mentioning that in liberal South Africa as it is the case elsewhere, particularly in democratic societies, court proceedings, by law, are open to the public including the media. In other words, judicial system is transparent because the media is often allowed to report on the proceedings and outcomes of the court. The media is further permitted to report on issues concerning the judiciary as a whole in as much as judges from time to time are invited to media interviews or briefings. Then it suffices to say that the South African judiciary accounts directly to the law, especially the country's national constitution. The same holds for the judiciary in Kenya as Article 160 of the Constitution of Kenya states that "In the exercise of judicial authority, the judiciary...shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."

Apart from these traditional methods of judicial accountability, there are also other established legal checks and balances that operate through legal procedures to ensure judicial accountability and they only impact on the legal due process. We indicated that the Supreme Court of Appeal in South Africa exists to review the decisions of the first instance courts brought through appeals and this also happens elsewhere. The Australian Supreme Court, for example, overturned a law that legalised gay marriages (CNN News Channel, 2013, December 12th).

Traditional methods of judicial accountability cited above have however been criticised by Contini and Mohr (2007: 32) as not purely representing true accountability in the strict sense. Contini and Mohr argue that when

errors in the application of the law by judges occur, they do not normally lead to consequences for poor judgements. We agree with these scholars that there are established judicial arrangements that represent accountability such as disciplinary committees or commissions which apply more effective judicial procedures in assessing the performance of judges, according to the existing local and international ethical and procedural standards. It is conspicuous that the South African judicial system has established legal forums (i.e. the Judicial Services Commission) to enforce "explanatory" accountability by judges or the institution itself. Similarly in Nigeria, for example, these forums include the Federal Judicial Services Commission and the National Judicial Council which play an important role on the appointment and removal of judges, while the Revenue Mobilization Allocation and Fiscal Commission determines the remuneration, salaries and allowance of judges (Aderibigbe, 2012).

Contini and Mohr (ibid) are right to point out that other oversight institutions such as the legislatures, within the principle of checks and balances, are available to evaluate the performance of the judiciary in order to ensure judicial accountability and apply sanctions especially in the area of financial responsibility. As Chief Justice Mogoeng noted, South African judiciary does not determine its own budget but its budget is regulated and determined by the executive branch of government through the Ministry of Justice and Constitutional Development. Lack of its own budget by the South African judiciary is well articulated by Chief Justice Mogoeng as thus, "But you cannot have a judiciary that always has to go cap in hand to the executive for it to buy books or other things they might need to facilitate proper delivery of justice for all. We would like to get to the point where we have our own budget and are able to account on that budget to Parliament ourselves" (Mogoeng cited in Mabuza, 2013: 2).

This quotation simply illustrates that although the South African judiciary is perceived as independent, it does not have what Chief Justice Mogoeng refers to as "absolute independence" from the executive and legislative branches of government. This is contrary to other judicial systems in other African states like Ghana and Kenya in the sense that they determine and control their own budget and account on it to the legislatures. To reiterate, the Kenyan's Constitution secures the financial autonomy of the judiciary by creating the Judicial Fund so that funds can be transferred into the fund once appropriated by the legislature (Rawal, 2013).

In nutshell, the post-apartheid judiciary in South Africa has been found to be somewhat more independent and accountable because of the promotion of meritocratic recruitment culture that promotes excellence within the legal profession, despite not having its own budget. Many scholars agree that merit-based appointment in the legal profession helps to ensure that candidates appointed as jurists always have the necessary qualifications and experience in their area of specialisation acquired through a lengthy training certified by possession of University or College degree and passing of public examination (e.g. Judicial Board Exam). Regarding judicial accountability, it has been discussed that the South African judicial system is accountable but in a different manner. A similar observation is made by Gutto (2001: 188) that the judiciary in South Africa's nascent democracy is becoming more transparent and accountable. However, the difference in accounting stems from the need by the Constitution and also international treaties to ensure that judges are impartial and independent from societal pressures including the executive, the legislature and or the media while exercising their judicial functions. Empirical studies concur that the need is also reflected in the national constitutions of many liberal democracies and international principles and standards on independence of the judiciary. Therefore, we do not see how these forms of judicial accountability appear to come into tension with the democratic principles of independence, honesty and impartiality in the judicial systems, as other scholars suggest. The procedures that ensure conformity to the law reflect the duty of the judges to upholding, protecting and promoting the spirits, values and purport of the national Constitutions as well as the authority of the state. As noted by Gutto (2005: 185), the oath and affirmation made by judicial officers commit them to uphold and protect the Constitution in its entirety.

Conclusion

Independence and accountability of the judiciary are important for enforcing the rule of law and for the consolidation of democracy not only in South Africa but in Africa. The analysis has indicated that the judiciary in Africa, with specific reference to South Africa, exercises its judicial functions honestly, independently and impartially without fear or favour from other branches of government in order to ensure the rule of law and protection of national democratic constitutions. The African judiciary has resisted any attempts by the politicians through the legislature and the executive to regulate its operations or to undermine the provisions of the Constitution, specifically in South Africa. The democratic Constitutions of these nations have created mechanisms to sustain the judiciary's complete autonomy and

also put in place processes and procedures that enhance judicial independence and impartiality. South African judges are accountable directly to the law, specifically the Constitution. This has in turn helped South Africa to serve as model of democracy for many developing nations around the world. Elsewhere in Africa, this accountability is clearly spelt out in Article 160 of the Constitution of Kenya (2010) that the judiciary shall be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority. Yet the study suggests that more still needs to be done to transform the judiciary in Africa, particularly in South Africa, as the Chief Justice of the South African Constitutional Court - Mogoeng indicated that ninety percent of court appearances continue to be conducted by white attorneys and judges as compared to other races in the country. More so, the South African judiciary needs to be allowed to determine and control its budget in order to reclaim an "absolute independence" from the executive much as the sub-national legislatures in South Africa are beginning to reclaim their financial independence from the executive through a separate piece of legislation. Lastly, we suggest that a comparative analysis of judicial independence and accountability of African and Western countries is necessary to deepen our understanding of democratic sustainability and consolidation within the governance framework of both Presidentialism and Westminster traditions.

Notes

1. See Nijzink *et al* (2006). "Parliaments and the Enhancement of Democracy on the African Continent: An Analysis of Institutional Capacity and Public Perceptions". *The Journal of Legislative Studies*, 12(3-4): p.311-335, and Johnson, J.K. (Jr). 2011. *Parliamentary Independence in Uganda and Kenya 1962-2008*. Proquest: Umi Dissertation Publishing.

2. For further details, see the Constitution of the Federal Republic of Nigeria (1999), the Constitution of United Republic of Tanzania (1977) and the Constitution of Kenya (2010).

3. Further international standards are contained in an International Commission of Jurists' guide on international principles on the independence and accountability of judges, lawyers and prosecutors

of 2004, http://www.icj.org/news.php3?id_article=3649&lang=en (accessed 15 December 2013).

4. This was a public lecture made to the Helen Suzman Foundation, http://hsf.org.za/siteworkspace/hsf-justice-lecture.pdf (accessed 8 December 2013).

5. Literalism means that judges' role in statutory interpretation is given effect to the true intention of the legislation, not to promote and protect the purport of the constitution.

6. Section 104(1)(b) of the South African Constitution provides that "in exercising its legislative power, a provincial legislature may (b) initiate or prepare legislation, except money Bills."

7. These other provincial legislatures were the Eastern Cape, Free State, Gauteng, Mpumalanga and North West.

8. For further details, read South African Attorneys Act (No. 53 of 1979 and the Admission of Advocates Act (No. 74 of 1964).

9. See, Russell et al (2001) (eds). *Judicial Independence in the Age of Democracy*.

10. The case against the Cape High Court Judge- Hlope was still not yet closed by the time this paper was written.

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