Speculum Juris

University of Fort Hare
Together in Excellence

Editorial Board

Speculum Juris

ISSN 2523-2177 • Volume 38, Number 1 (2024)

Articles

Notes and Comments

Book Review

Speculum Juris

Vol 38 No 1 (2024)
Published 31 July 2024

ISSN 2523-2177

University of Fort Hare
Together in Excellence

Cite as: Ntlama-Makhanya "A South African Perspective on the Independence of the Judiciary in the Promotion of Human Rights for the Advancement of the 'Rule of Law' in Africa (Part Two)" 2024 (38) Spec Juris 18–31

A South African Perspective on the Independence of the Judiciary in the Promotion of Human Rights for the Advancement of the "Rule of Law" in Africa (Part Two)

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Abstract

This part lays the framework on the importance of the "rule of law" as a key principle of the independence of the judiciary in the protection of human rights which is discussed herein, in Part Two of this article. Its importance follows the fall of the system of apartheid governance in 1994 when South Africa attained its democratic system of governance. Since this period, the country has made significant progress in the development of the regulation of state authority that is influenced by human rights. Of particular importance was the adoption of the Constitution of the Republic of South Africa, 1996, (the Constitution) which laid the foundation of the new democracy. This development saw the emergence of the principle of the "rule of law" and "independence of the judiciary", as essential principles on the functioning of the new democratic order. This article acknowledges the significant strides attained, particularly the role played by the Constitutional Court that since its establishment, has ensured a generation of rights-inspired

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jurisprudence. The infusion of the rights-oriented principles has enabled the advancement of the independence of the judiciary from its constitutional adjudicative role. This was also a response to the prescripts of the community of nations that share the belief in human rights as common norms, standards, and values that had to be domesticated and enforced at the national level to advance the transformative vision of each country. The cross-transmission of these principles provides a framework without which the entire edifice of the new constitutional design will remain a pipedream for the fulfilment of human rights.

Therefore, the motivation for this article was the domestication of the universality of the principle of the "rule of law" as a core principle regulating the actions of state authority and its institutions in the Constitution. The article moves from a premise that the centrality of the "rule of law" is foundational to the independence of the judiciary, especially the newly established South African Constitutional Court that has since developed the jurisprudence that is influenced by human rights. The focus on the court is of further importance as it carries "no legal baggage" of South Africa's historical past that subjected the judiciary to the system of parliamentary supremacy and serves as a pacesetter for the rights-inspired jurisprudence.

The article starts with a brief historical overview, which offers an understanding of the "rule of law" within the community of nations, after which the legal framework from contemporary Constitutions that entrench these principles are outlined to ensure the implementation of human rights. The author argues that rights-jurisprudence has the potential to re-shape and influence an accountable system of governance in the generation of human rights. It draws a limited extent of lessons from comparative jurisdictions in the development and protection of the principle of the independence of the judiciary. With this argument, South Africa is the epitome of human rights, draws stimulus from Africa that the "rule of law" and independence of the judiciary offer a marker and determinant of the effectiveness of regulating state authority that is influenced by human rights.

Keywords: Rule of law; jurisprudence; human rights; independence of the judiciary; transformation; universality.

6 LOCATING THE FRAMEWORK FOR THE "INDEPENDENCE" OF THE JUDICIARY

This section is based on a premise that is founded on the uniqueness of the "rule of law" as discussed in Part One of this article. After the demise of apartheid, the establishment of the Constitutional Court in South Africa created a strong and specialist court that enforces the principles of the new constitutional dispensation. It serves as the guardian of democratic institutions, upholding the principles of constitutionalism and fundamental freedoms.[1] This is especially so in the South African context as it recovers from the atrocities of the past that continue to manifest themselves today, despite progress made since the advent of democracy in 1994.

Since its establishment, the Constitutional Court has played a central role in the democratisation of the country and the legitimisation of a legal system tainted by South Africa's past. It also laid the foundation for the supremacy of the Constitution itself, and reviewed and examined the validity of all the laws that were deemed in conflict.[2] Haynie contends that the Constitutional Court has distinct advantages because it represents a new structure without legal baggage, and separate from the old system, which interpreted and applied the statutory edifice of the

1 Harding "The Fundamentals of Constitutional Courts" 2017 *Constitution Brief* 1–8, https://www.idea.int/sites/default/files/publications/the-fundamentals-of-constitutional-courts.pdf (accessed 12-11-2022).

2 See s 2 of the Constitution of the Republic of South Africa, hereinafter referred to as the "Constitution".

apartheid system.[3] The court also reinforced the legitimacy of the judiciary itself and ensured the development of public confidence in the system.[4]

With the status and purpose accorded the Constitutional Court, Justice William Rehnquist (former chief justice of the Supreme Court of the United States of America) explained the role of a judge which he equated with a referee in a game of rugby, in that the judge is "obliged to call a foul against a member of the home team at a critical moment in the game: he will be soundly booed, but he is nonetheless obliged to call it as he saw it fit, not as the home crowd wants him to call it".[5]

The "booing" was evident in the case concerning former President Zuma on his sentencing to 15 months imprisonment by the Constitutional Court. The Court was "booed" by the "home crowd", including the former Public Protector, Advocate Mkhwebane[6] who has since been removed from her post.[7] The sentencing of the former Head of State, President Zuma, was unprecedented in South Africa as the Constitutional Court "took the bull by the horns" to protect the independence of the judiciary, which is founded on the fundamental rights of the citizenry. The "booing" translates to what Kibet and Fombad refers to as an "idolised former President with a common belief among his loyalist that he was constitutionally above the law and presided over the subversion of democracy, the rule of law and constitutional order".[8] This matter goes back to an application in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* (*State Capture*)[9] judgment. In this case, former President Zuma was summoned to appear before the Commission and file affidavits in respect of the allegations that were levelled against him by the witnesses that had earlier appeared before the Commission. There were several reasons that were provided for his non-appearance or non-filing of sworn statements, including his health status.[10] Former President Zuma left the hearings without permission and the Chairperson instructed that he must be criminally charged.[11]

There is a continued "booing" of the Constitutional Court as evidenced by the criticism levelled against it on the *Walus v Minister of Justice and Correctional Service* (*Walus*)[12] judgment. In that case, the Constitutional Court ordered the release of Mr Janus Walus on parole within 10 days of the judgment, after nearly 30 years of incarceration for his part in the murder of the former South African Communist Party General Secretary, Chris Hani in 1993, on the eve of

3 Haynie "Courts and Revolution: Independence of the Judiciary in the New Republic of South Africa" 1997 19 *The Justice System Journal* 167–179.

4 See also *S v Mamabolo* 2001 5 BCLR 449 (CC) as the Court endorsed the contention herein that the 'the judiciary cannot function without the support and public trust … and in the final analysis it is the people who must believe in the integrity of their judges. Without such trust, the judiciary cannot function properly the rule of law must die', paras 18–19.

5 Rehnuist "Act Well Your Part: Therein All Honor Lies" 1980 *Pepp Law Review* 229–230.

6 Letshwile-Jones "Zuma to Jail: Mkhwebane Prefers Minority Judgment which Disagrees with 15 Months Sentence" 30 June 2021, https://www.news24.com/news24/southafrica/news/zuma-to-jail-mkhwebane-prefers-minority-judgment-which-disagreed-with-15-months-sentence-20210630 (accessed 15-08-2022).

7 Merten "National Assembly Votes Busisiwe Mkhwebane Out of the Public Protector's Office for Incompetence and Misconduct" 11 September 2023, https://www.dailymaverick.co.za/article/2023-09-11-national-assembly-votes-mkhwebane-out-of-public-protector-office-for-incompetence-and-misconduct/ (accessed 15-09-2023).

8 See Kibet and Fombad "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa" 2017 *African Human Rights Law Journal* 340–366.

9 2021 ZACC 21.

10 *State Capture v Zuma* paras 40–46.

11 *Zuma* para 50.

12 (CCT221/21) [2022] ZACC 39.

South Africa's democratic elections in 1994. The Constitutional Court is viewed as:

> oblivious to South Africa's history; insensitive to the pain of Hani's Family; granting of the parole of Hani's killer is a reminder of the dark days of apartheid and a reversal of the democratic gains; Court failed to be on the side of the defenceless; compromised justice for the benefit of the privileged and the eligible parolee never showed any remorse.[13]

The Supreme Court of Appeal (SCA) as the second highest court in the land is also subject to "booing" for its declaration of the unlawfulness of the release of former President Zuma from jail on medical parole in the *National Commissioner of Correctional Services v Democratic Alliance* (*Democratic Alliance*)[14] judgment. This order is viewed as it:

> would not have an effect because the former President Zuma has finished his jail term, his sending him to jail would not have the rehabilitation effects for an old person like him and others want former President Zuma? in jail with immediate effect.[15]

Regarding the *Walus* judgment, the public's response was that Hani was a prominent and highly celebrated political figure at his untimely death, which was viewed as politically motivated and designed to halt South Africa's transition into a bloodless transition. Mr Walus is a white foreign national from Poland who was naturalised in 1987. However, his citizenship was revoked in 2017 and his part in the killing of Hani was linked to his opposition to South Africa's transition to democracy after years of apartheid rule.[16] In the *Democratic Alliance* judgment, the decision of the National Commissioner, Arthur Fraser who overruled the decision and recommended that former President Zuma should not be released from prison, was declared irrational. The reasoning of the Courts in these judgments signify their importance in grounding the "rule of law" as discussed in Part One of this article as a potent weapon for the affirmation of the independence of the judiciary. The importance of the "rule of law" is correctly captured in the *Walus* judgment that the "drafters of the Constitution and the Bill of Rights did not selectively confer fundamental rights only to those who fought for democracy but extended it to include those who also supported apartheid and opposed the attainment of democracy in South Africa".[17]

The above judgments saw the erosion of the principles of the independence of the judiciary. The public questioned the integrity of the judiciary on its adjudicative role in upholding the "rule of law". The Constitutional Court in the *State Capture* judgment expressed the view that "disobeying the processes that are issued under the lawful authority of the Republic is antithetical to our constitutional order and amounts to a direct breach of the 'rule of law', that is one of the values that underly the Constitution".[18] The Court went on to state that the "laws do not exempt anyone from its application irrespective of a person's privileged status such as the crafting of the laws in the shaping of South Africa's constitutional democracy".[19] Similarly, in the *Walus* judgment the Court held that "[South Africa is not an 'island unto itself'][20] but is

13 Mthembu "Parole for Hani's Killer: Judiciary Seems Oblivious to History" 23 November 2022, https://www.citizen.co.za/news/opinion/chris-hanis-killer-parole-judiciary-oblivious-history-november-2022/ (accessed 23-11-2022).

14 (33/2022) [2022] ZASCA 159.

15 Mabaso "KZN ANC: 'Zuma will remain a free man'" 21 November 2022, https://ewn.co.za/2022/11/21/kzn-anc-jacob-zuma-will-remain-a-free-man (accessed 23-11-2022).

16 Gibson and Boonzaaier, "Walus Could Receive a Hero's Welcome from Right-wing Groups if Sent Back to Poland" 27 November 2022 (accessed 28-11-2022).

17 *Walus* para 96.

18 *Zuma* para 87.

19 *Ibid.*

20 The idiom is used from the extract and summary in the *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1248 (CC) paras 37–44.

committed in building a united and democratic country within the family of the community of nations as envisaged in the preamble of the Constitution 1996".[21]

Viewed through the lens of the "rule of law" and the "independence of the judiciary", these judgments have serious political outcomes since the courts upheld the democratic principles in the application of the law without fear, favour or succumbing to political pressure. The criticism levelled against the courts by highly placed individuals and organisations have serious and negative consequences for the independence of the judiciary, which is framed within the context of the "rule of law". The singling out of Chief Justice Zondo in the *Walus* matter, threats for demonstration against the *Walus* judgment and President Cyril Ramaphosa, being disappointed with the judgment, without having read the judgment at the time he responded to it, carry a greater risk for the erosion of the public confidence in the judiciary.[22] President Ramaphosa is a "constitutional being" and is obliged to be at the fore-front to ensure the protection of the judiciary and not to be driven by his other responsibility as a political head of the governing party. Even if President Ramaphosa is wearing the "latter hat", he still has a mandate for ensuring the stability of governance. Without a further review of the latter role, it is for the judiciary to eliminate any form of "booing" that translates to public opinion in the context of these cases. Public opinion in judicial reasoning was long settled in the *Makwanyane* judgment, where it was pointed out that the "public does not necessarily have an opinion in adjudication of cases and even though such opinion might be of value is not a final determinant on the reasoning of the Court".[23] This statement meant the recovery of the "sharpened" judicial teeth that were made "blunt" by South Africa's past regime.[24] Sitting as an apex court,[25] the Constitutional Court represented a remarkable moment in the history of the promotion and the affirmation of the independence of the judiciary in ensuring the advancement of a constitutional jurisprudence that is grounded in human rights.[26] The "sharpened teeth" of the judiciary ensure that judges act, apply and interpret the law independently of the executive and the legislative branches of the State to ensure adherence to the law and hold the other two branches accountable. This is the fitting of the judiciary within the new constitutional framework of the doctrine of separation of powers, as discussed in Part One.

There is no doubt that courts, across the world, are accorded the authority of constitutional adjudication. This authority is expressly recognised in the UDHR that proclaims that: "everyone is entitled in full equality and to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".[27] In addition, the ICCPR specifically guarantees everyone's entitlement to "a fair and public hearing by a competent, independent, and impartial tribunal in the determination ... of any charge against him".[28] Further, the ACHPR guarantees that "[s]tate parties shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms

21 *Walus* para 96.

22 See Mtshali "Guidelines Will Benefit Almost 5000 Lifers" 27 November 2022, *Sunday Tribune* (pressreader.com) (accessed 28-11-2022).

23 See *Makwanyane* paras 88–89.

24 See *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 3 BCLR 241 (CC) paras 33–38.

25 See s 166 of the Constitution.

26 Colasurdo and Martin "South Africa's Constitutional Jurisprudence and the Path to Democracy: An Annotated Interview with Dikgang Moseneke, Acting Chief Justice of the Constitutional Court of South Africa" 2014 Fordham *International Law Journal* 279–304.

27 See art 10 of the UDHR adopted on 10 December 1948.

28 See art 14(1) of the ICCPR.

guaranteed by the present Charter".[29] Similarly, the Universal Declaration on the Independence of Justice adopted at the First World Conference in Montreal (Montreal Declaration)[30] provides that "judges and [C]ourts shall be free in the performance of their duties to ensure that the rule of law is observed, and shall not admit influence from any government or any other authority external to their statutes and the interests of international justice".[31]

The significance of the independence of the judiciary in the domestic sphere in South Africa became clear with the entrenchment of section 165 of the Constitution 1996, which provides that:

> (1) the judicial authority of the Republic is vested in the [C]ourts.
>
> (2) the [C]ourts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
>
> (3) no person or organ of state may interfere with the functioning of the [C]ourts. organs of state, through legislative and other measures, must assist and protect the [C]ourts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
>
> (4) an order or decision issued by a court binds all persons to whom and organs of state to which it applies.
>
> (5) the Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all [C]ourts.

The independence of the judiciary relates to the system of the appointment of judges in terms of General Comment 32 of the United Nations Human Rights Committee, which provides that the autonomy involves the procedure and qualifications for: the appointment of judges; guarantees relating to the security of tenure; conditions governing promotions, transfer, suspension and cessation of their functions; and the degree to which the two other branches of the state do or do not interfere in the judicial making function of the judges.[32] The establishment of the Judicial Service Commission (JSC) which is comprised of 23 members in terms of section 178 of the Constitution of South Africa is intended to enhance the independence of the judiciary. The membership of the JSC includes: the Chief Justice; President of the Supreme Court of Appeal; One Judge President designated by Judge Presidents; the Cabinet member responsible for the administration of justice (or a designated alternate); two practising advocates; two practising attorneys; one professor of law; six members of the National Assembly; four permanent delegates of the National Council of Provinces; four persons designated by the President and Judge President of the Division; and Premier of the Province concerned when considering a matter relating to a specific Division of the High Court of South Africa.[33]

The independence of the judiciary is necessary for ensuring the development of free and stable societies, the effective implementation of the "rule of law", the realisation of human rights, and the advancement of the new constitutional democracy. The guarantees in sections 165 and 178 entail two crucial factors that affirm the principle of the "independence" of the judiciary. First, the independence of an institution that is free from executive and/or legislature control

29 See art 26 of the ACHPR.

30 Montreal (Quebec, Canada) on 10 June 1983.

31 Montreal Declaration 1.03.

32 See Article 14 of the General Comment 32 para 19 "Right to Equality Before Courts and Tribunals and to a Fair Trial" https://www.refworld.org/docid/478b2b2f2.html (accessed 29-03-2022).

33 See s 178(1)(a)–(k) of the Constitution.

or interference and only subject to the law in the execution of its duties. Secondly, the judges themselves must be able to decide a dispute before them according to the law, uninfluenced by any other factor or branch of the State. For this reason, the independence of the judiciary entails the independence of each and every individual judge. This means that judges cannot be put under pressure by other judges when making their judgments. The two former judges of South Africa's Constitutional Court, Justice Nkabinde and Justice Jafta, offer a good example. The two judges were allegedly approached by former Judge President Hlophe of the Western Cape High Court Division on the adjudication of a matter of "privilege" that was to be decided by them involving former President Zuma. The two judges pointed out that the approach by Hlophe JP never had an impact on them in the adjudication of the matter. Also, their own decision not to be part of the other Constitutional Court judges in lodging a complaint against Hlophe JP in this matter was indicative of the personal independence of the judges.[34]

The institutional and personal independence capture certain traits that are ascribed to the independence of the judiciary, such as being the guardian of the "rule of law" and the linchpin of checks and balances through which the separation of powers assures compliance with established legal norms and standards.[35] These qualities were expanded by Kibet and Fombad as they contend that judges are the key drivers of South Africa's transformative project in the advancement of the rights language. In this regard, they have proved that they (i) are custodians of the socio-political transformation project; (ii)are the midwives of the transformation since they are mandated to legally interpret and apply the law; (iii)need to always exercise restraint because they are not law makers; (iv)need to be more assertive; (v)"co-ordinate' and "co-equal" arms of government with the mandate to interfere with the decisions of the political arms, which offend or exceed the limits of the Constitution and the law; (vi)need to liberate themselves from being subordinate to the other arms in the scheme of government; (vii)to be aware of the prominence that they enjoy and society's expectations of the Courts. (viii)are of necessity justify their decisions not only by reference to precedence and other legal authority, but by reference to certain overarching principles and values; and (ix) have the power to assess any measure restricting rights to determine whether it meets constitutional standards that are vested in the judiciary.[36]

The qualities entail that the hierarchical structure of the judiciary or any difference in rank or superiority does not entail interference in the decision-making process of any individual judge to resolve of matters presided by an individual judge[37] It is the broad conception of "independence" that enable the judiciary to perform its function without any distinction.

7 INVOKING THE PRINCIPLE OF "INDEPENDENCE" IN COMPARATIVE JUDICIARIES

The courts in Africa have invoked their "independence" to protect the fundamental rights of the citizenry. The principle of "independence" serves as the cornerstone and a guide of the new constitutional democratic system that embraces the achievement of freedom and justice. In the *United Democratic Movement v President of the Republic of South Africa* (*United Democratic Movement*)[38] the court held that "these values have an important place in our Constitution as they inform its interpretation and other laws and set positive standards with which all law

34 Judges Matters "Judges Jafta and Nkabinde Call for a Rescission in Hlophe decision" 9 June 2016, https://www.judgesmatter.co.za/opinions/jafta_nkabinde_call_for_rescission/ (accessed 15-07-2022).

35 Mutua "Judiciary Under Siege: The Rule of Law and Judicial Subservience in Kenya" 2001 *Human Rights Quarterly* 96–118.

36 See Kibet and Fombad 2017 *AHRJL*.

37 See s 3 of the Declaration on the Independence of Justices.

38 2002 11 BCLR 1179 (CC).

must comply in order to be valid".[39] The court in *United Democratic Movement* went on to acknowledge that these values are not easily amended by the legislature as they are protected by section 74 of the Constitution, which requires a special majority for it to be passed.[40] As expressed by Mogoeng-Mogoeng CJ in *Economic Freedom Fighters v Speaker of the National Assembly (EFF2016)*[41] that the "rule of law … must be observed scrupulously; hence it stands as a sharp sword that is ready to chop off stiffened necks".[42]

The Courts have demonstrated their "independence" and integrity. For example, the President of Tunisia, Kais Saied, dismissed more than fifty 50 judges that he accused of corruption; protection of terrorists; adultery; and participation in "alcohol-fuelled parties".[43] The Court in this matter revoked the "Presidential Decree 2022-35". This 2022-35 Decree entitled President Saied to dissolve the Supreme Judicial Council and gave him authority to fire judges at will based on reports by unspecified bodies that they were a threat to the country's public security or supreme interests.[44]

The dismissal of judges was an "affront" to the principle of judicial independence as envisaged in the Constitution of Tunisia, that provides that "Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law with the proviso that it must not be amended".[45] This includes the declaration for the emphasis on the doctrine of separation of powers and … independence of the judiciary.[46] President Saied negated both his status as head of the national executive and national legislature to ensure the protection of the integrity of the judiciary. The resultant consequence of his actions and with the judiciary succumbing to his pressure would have been the death of the independence of the judiciary with its subsequent impact on the fulfilment of human rights.

The Malawian case of *Gwanda v The State* (*Gwanda*)[47] is another clear demonstration of the independence of the judiciary. The Court in *Gwanda* found the state to have acted contrary to the prescripts of the Malawian Constitution 1994. In this case, the applicant was arrested and charged for being a rogue and vagabond under section 184(1)(c) of the Malawian Penal Code. The bone of contention was the constitutionality of section 184(1)(c) of the Code. It was contended that section 184(1)(c) of the Code violated the applicant's constitutional rights to dignity; to be free from inhuman and degrading treatment; freedom and security of the person; and to be free from discrimination and equal protection and benefit of the law under sections 19 and 20 of the Constitution.[48] After tracing the historic adoption of the Penal Code from Malawi's colonial masters, the court in *Gwanda* reasoned that the law was designed for the sole purpose of curtailing mobility.[49] The court in *Gwanda* pointed out that the applicant was arrested with no evidence to prove the illegality of the intended action, even though the police were made aware

39 *UDM* para 19.

40 *UDM* para 19.

41 2016 5 BCLR 618 (CC), hereinafter referred as "*EFF2016*".

42 See Madala J in *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 9 BCLR 865 (CC) para 80 quoted in *EFF2016* para 1.

43 Hammoudi "Tunisian Court Revokes President's Decision to Dismiss Judges" 10 August 2022, https://www.aa.com.tr/en/world/tunisian-court-revokes-presidents-decision-to-dismiss-judges/2658130 (accessed 12-08-2022).

44 Amnesty International "Tunisia: Arbitrary Dismissal a Blow to Judicial Independence" 10 June 2022, https://www.amnesty.org/en/latest/news/2022/06/tunisia-arbitrary-dismissals-a-blow-to-judicial-independence/ (accessed 12-08-2002).

45 See art 2 of the Tunisia's Constitution of 2014.

46 See preamble and art 102 of the Tunisia's Constitution of 2014.

47 Criminal Case No 444 of 2015.

48 *Gwanda* 3.

49 *Gwanda* 6

of his movements to and from his place of trade where he was selling plastic bags and bottles.[50] The court in *Gwanda* held that the applicant's constitutional rights were violated with no basis in law and further declared section 184(1)(c) unconstitutional and invalid.[51]

The *Gwanda* case is an indication of the broader conception of judicial independence and shows that the remnants of the colonial past do not feature in Africa's new dispensation. The case of *Gwanda* ensures the extension of protection to everyone without distinction. As a result, the "weak, poor and the vulnerable including those that might appear not to need the accorded special protection".[52] The judgment in *Gwanda* shows the "sharpened teeth" of the judiciary in using its independence and the values embraced by the international community to protect the rights of wrongfully accused persons. If it were not for the "independence" that requires adherence with its prescripts, the courts would not have been able to protect their integrity and extend protection to the most vulnerable who might be harassed by the state based on a suspicion of having committed a crime, as evidenced in *Gwanda* case.

The Kenyan Supreme Court was not outsmarted by former President Uhuru Kenyatta's plan to amend the Constitution that could have given him wide powers to introduce electoral reforms. The court struck down the proposed electoral reforms and established that under the 2010 Constitution of the Republic of Kenya, the President does not have the authority to initiate changes that could only be undertaken under the provisions of sections 256 and 257.[53] When the presidential elections were declared invalid, the judges were stigmatised and referred to as "those people" in the courts;[54] "crooks" (*wakora in Swahili*) that have gone against the will of the people and "committed a coup"[55] because they are paid by foreigners and other fools.[56] Despite the foul name-calling of the judiciary, the striking down of the electoral reforms are indicative of the triumph of the independence of the judiciary in advancing the "rule of law".

During his visit to South Africa, the President of Sudan, who had two warrants of arrest issued by the International Court of Justice (ICJ) was not arrested by the South African government. The latter was not spared the judiciary's legal wrath, especially in view of the Gauteng High Court's order to effect such arrest. The *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*,[57] that was appealed and dismissed by the SCA in *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre*.[58] The dismissal demonstrated the centrality of upholding the independence of the judiciary within the framework of the "rule of law". Also, the judiciary itself has important societal goals and values in the maintenance of constitutional law principles and the advancement of public confidence

50 *Gwanda* 8.

51 *Gwanda* 11–12.

52 See *Makwanyane* para 230.

53 *HE Uhuru Muigai Kenyatta v David Ndii* Civil Appeal No E2194 of 2021.

54 Igunza "Kenya's BBI Blocked in Blow to President Uhuru Kenyatta" 31 March 2022, https://www.bbc.com/news/world-africa-60941860 (accessed 21-08-2022).

55 BBC News 'David Maraga: the brave judge that made Kenyan history' 2 September 2017, https://www.bbc.com/news/world-africa-41123949 (accessed 13-08-2022). See also Dickens 'Kenya Presidential Elections Cancelled by Supreme Court' 1 September 2017, https://www.bbc.com/news/world-africa-41123329 (accessed 21-08-2022).

56 Wamai "Kenya's Supreme Court Ruling and What it Means for the Country" 7 September 2017, https://theconversation.com/kenyas-supreme-court-ruling-and-what-it-means-for-the-country-83549 (accessed 22-08-2022).

57 2015 5 SA.

58 (867/15) [2016] ZASCA 17 (15 March 2016).

and trust in the adjudication process.[59]

In another case that involved the extension of the term of office of the former Chief Justice Mogoeng Mogoeng in *Justice Alliance v President of the Republic of South Africa* (*Justice Alliance*),[60] judges of the Constitutional Court could not be influenced by their own relationship with their former colleague and Chief Justice Ngcobo and the role of President Zuma in the appointment process. In this case, the conduct of President Zuma to extend the term of office of the former Chief Justice Ngcobo was found contrary to the prescripts of section 8 of the Judges Remuneration and Conditions of Employment Act 47 of 2001 and section 176(a) of the Constitution was found to be invalid and unconstitutional. The Constitutional Court judges prevented the former Chief Justice Ngcobo from "tiptoeing" back to the office through the backdoor. The upholding of the independence of the judiciary principle in *Justice Alliance* ensured the fulfilment of its "constitutional role which is indispensable for the discharge of judicial function in a constitutional democracy".[61]

In the case of *Helen Suzman Foundation v Judicial Services Commission*[62] the JSC's diverse membership was tested when the court ordered that the post-interview deliberations of eligible candidates should be made accessible to ensure transparency in the judicial appointment processes. During this judgment it was argued that the objectivity of the JSC members had been undermined.[63] The independence of the judiciary is further linked to the implementation of court orders that could be lessons for other judiciaries. This position was affirmed by Pillay AJ in *Municipal Manager O.R. Tambo District Municipality v Ndabeni*[64] when the Judge held:

> this Court in *State Capture* reaffirmed that irrespective of their validity, under section 165(5) of the Constitution, court orders are binding until set aside. … They are not void or nothingness but exist in fact with possible legal consequences. If Judges had the authority to make the decisions at the time that they made them, then those orders would be enforceable. Court orders are effective only when their enforcement is assured. Once court orders are disobeyed without consequence, and enforcement is compromised, the impotence of the [C]ourts and the judicial authority must surely follow. Effective enforcement to protect the Constitution earns trust and respect for the [C]ourts. This reciprocity between the [C]ourts and the public is needed to encourage compliance, and progressively, common constitutional purpose.[65]

The "slow progress" or lack of progress in the implementation of court orders is traceable from the *Government of the Republic of South Africa v Grootboom* (*Grootboom*)[66] judgment. This case dealt with the socio-economic right of access to adequate housing as envisaged in section 26 of the Constitution. It was *Grootboom* that highlighted the intersection of civil and political rights and socio-economic rights. Further, the court in *Grootboom* held that the foundational values are denied to those without food or shelter and the realisation of these rights is key to the advancement of race and the achievement of gender equality.[67] If the state is in contempt of court judgments by not implementing them promptly, the public confidence in the courts and

59 Lamer "The Rule of Law and Judicial Independence: Protecting the Core Values in Times of Change" 1996 *UNBLJ* 1–16.

60 2011 10 BCLR 1017 (CC).

61 *De Lange v Smuts* 1998 7 BCLR 779 para 36.

62 2018 7 BCLR 763 (CC).

63 See Ntlama "The Implications of the Decision in *Helen Suzman Foundation v Judicial Service Commission* 2018 7 BCLR 763 (CC) 8 on the Functioning of the South African Judicial Service Commission" 2020 *Law Democracy and Development* 248–270.

64 [2022] ZACC 3.

65 *Ndabeni* paras 24–26, (all footnotes omitted).

66 2000 11 BCLR 1169.

67 See *Grootboom* paras 23–26.

the evolution of human rights have a greater potential of waning. The courts are required to give just and equitable remedies[68] and if those are left hanging in the balance, the affirmation of the independence of the judiciary within the framework of the doctrine of separation powers is negated. It cannot be overemphasised that the independence of the judiciary is vital and constitutes the cornerstone of South Africa's constitutional democracy and promotes other values such as the "rule of law' that are entrenched in the Constitution.[69]

8 THE "SHARPENED TEETH" OF THE JUDICIARY IN TRANSFORMING THE JURISPRUDENCE OF HUMAN RIGHTS

After 30 years of democracy, it is still imperative to track the progress made in the evolution of the jurisprudence that has since developed to give content to human rights as envisaged by the Constitutional Court in the Constitution. This is essential considering that there were no "home-ground" constitutional lessons to be learned on steering the "democratic yacht", but to develop them alongside the conception of "learning" by doing.

The "sharpened teeth" on the evolution of the rights-oriented jurisprudence were evident in the *First Certification Judgment*. The judgment certified the legitimacy of the Constitution 1996 as a founding document that was grounded in the "rule of law". The court in the *First Certification Judgment* adopted a holistic approach[70] to give effect to the "creation of a new [constitutional] order that is based on a sovereign and democratic state in which all citizens are able to enjoy and exercise their fundamental rights and freedoms".[71] It is the *First Certification Judgment* that set the tone and provided a pathway for the evolution of the rights-language within the framework of the independence of the judiciary in South Africa. The *First Certification Judgment* is of direct relevance for the argument because democracy had not even attained "infancy status".

The *First Certification Judgment* created an opportunity for the constitutional recognition of South Africa's pluralistic character, as evidenced in the preamble and many other provisions of the Constitution.[72] The *First Certification Judgment* certified the legitimate status of the institutional structure that regulates the system of customary law, drawn from various provisions of the Constitution.[73] The *Judgment* signified the needed change in consolidating South Africa's democratic identity that constitutes diverse groups in the Republic. The certification of the Constitution saw the endorsement of the equal status of South Africa's legal systems and paved the way for drawing lessons from the different systems as sources of interpretation and application of the Constitution. The importance of these sources was given meaning in the case of *Makwanyane* when Sachs J stressed that the "lack of references to African sources as part of the general law of the country" and contended that the "time has come for the Court not to continue to ignore the legal institutions and values of the large section of the population that suffered most of the violations of their fundamental rights in the previous system of governance".[74]

Without hesitation, the Court in *Makwanyane* reflected on the interpretation of the *ubuntu* principle and drew lessons from a source that is derived from the living conception of the system of customary law. The Court in *Makwanyane* held that "our new Constitution, unlike its dictatorial predecessor, is value-based. Among other things, it guarantees the protection of basic

68 See s 172(1)(b) of the Constitution.

69 *Justice Alliance* para 40.

70 This entails an all-inclusive approach of the advancement of the rights language without limiting it to technical rigidity.

71 See *the First Certification Judgment* paras 27, 34–46.

72 See the *First Certification Judgment* paras 189–202.

73 See ss 15; 30; 31; 39; 211; 212 and but not limited to 235.

74 *Makwanyane* para 371.

human rights, including the right to life and human dignity, two basic values supported by the spirit of *ubuntu* and protected in sections 9 and 10 respectively".[75] This lesson is evidence of an integrated approach in the evolution of the principles of the new constitutional dispensation and brought back customary law from the "legal cold" to redress the impact of the past on the development of its own principles. The integrated approach was also considered as a version of the living status of customary law itself that views *ubuntu* as a foundational value in the regulation of human conduct although it is not included as such in the Constitution 1996.

The Court in *Alexkor Ltd v Richtersveld Community*[76] also signified the diverse sources for the advancement of South Africa's pluralistic character as it held that "indigenous law must be viewed through its own lens as it has become the integral part of South Africa's law and the Courts are obliged to apply it as envisaged in section 211(3) of the Constitution because of its originality and distinctiveness within the legal system".[77]

The finding of the constitutional status of customary law principle in judicial reasoning was advanced in *Gumede (born Shange) v President of the Republic of South Africa* (*Gumede*)[78] when the court invalidated customary law principles that entrenched inequality between men and women to ensure alignment with the values in the Constitution. The court in *Gumede* infused principles of equality and human dignity in the interpretation of racial and gender discrimination that was entrenched in the Recognition of Customary Marriages Act 120 of 1998 and the KwaZulu Natal Code of Law. The traditional communities were also given the right to develop their customs and practices in alignment with the Constitution in *Shilubana v Nwamitwa*.[79] In this case, the development of the right to equality was extended to be inclusive of women to succeed to chieftaincy to promote the right to gender equality. Despite reservations about[80] this development, the role extended to communities to change and transform their systems in line with the Constitution is of importance. This position is not limited to gender equality, but to the broader conception of the authority that is vested in the institution of traditional leadership.

The *First Certification Judgment* heralded an opportunity for the protection of the rights of vulnerable groups by rejecting the arguments that were raised against the inclusion of socio-economic rights in the Constitution. In the *First Certification Judgment*, it was argued that these rights were not universality accepted and will interfere with the doctrine of separation of powers and were therefore not justiciable.[81] In the *First Certification Judgment* the court established the interrelationship between socio-economic rights and civil and political rights. It reasoned that someone without a roof over his or her head cannot claim the full protection of his or her right to human dignity, equality and being free from all forms of discrimination.[82] Disappointingly, following the *First Certification Judgment* the court immediately hesitated and viewed these rights as an ideal to be achieved, like Madala J contended in *Soobramoney v Minister of Health* (*Soobramoney*)[83] judgment. As he pointed out that "[these rights] amount to a promise … and indication of what a democratic society aims to salvage lost dignity; freedom and equality as they are values which the Constitution seeks to provide, nurture and protect for

75 *Makwanyane* para 313.

76 2003 12 BCLR 1301 (CC).

77 *Alexkor* paras 50–51.

78 2009 3 BCLR 243 (CC).

79 2008 9 BCLR 914 (CC).

80 See Ntlama "The Changing Identity on Succession in the Institution of Traditional Leadership: *Mphephu v Mphephu-Ramabulana* (948/17 [2019] ZASCA 58" 2020 *PELJ* 1–25.

81 The *First Certification Judgment* paras 76–78.

82 *Ibid*.

83 1997 12 BCLR 1696.

a future South Africa".[84] Madala J in *Soobramoney* went on to hold that it is the "language of the Constitution itself that acknowledges that it cannot resolve societal problems overnight as they depend on the financial muscle of the state".[85]

However, the *Grootboom* judgment reclaimed the constitutional status of socio-economic rights when a group of squatters needed housing[86] in an emergency. In *Grootboom* the court found the Policy of the Department of Housing (now Human Settlement) to be invalid by not catering for people in these circumstances.[87] Without this inclusion, today's vision of the United Nations 2030 Agenda for Sustainable Development[88] with the subsequent goal of eliminating poverty as its first primary goals would have been laid on "shaky ground". The non-inclusion would have a greater effect on changing the lives of the most vulnerable people who are faced by hunger and without a mechanism with which to hold governments accountable.

It was also in *Makwanyane,* as in *Grootboom,* where the inter-relationship that exists within the rights framework that could not be interpreted in isolation of each other was highlighted. When the Constitutional Court in *Makwanyane* interpreted the right to life *vis-à-vis* the right to human dignity it also considered the impact of South Africa's history on the enjoyment of human rights. O'Regan J held that:

> … the right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity. … The new constitution rejects th[e] past and affirms the equal worth of all South Africans. Thus, recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution.[89]

It is not the aim of this article to exhaust the rights-oriented case law, but it is clear from the jurisprudence of the courts that it has been on a transformative path, as it carries the ultimate authority to declare any law or conduct that is inconsistent with the Constitution invalid. This is in contrast to the past when the judiciary was subject to the whims of parliamentary supremacy. The court reviewed legislation and presided over matters that have serious political outcomes, as evidenced by the *State Capture-Zuma* and *Walus* cases discussed above. The unprecedented arrest of former President Zuma and the order for the release of Mr Walus on parole (which is still sending shockwaves through the country) attest to the "sharpened teeth" of the judicial function in the adjudication of matters that have serious political outcomes. It attests to the upholding of its judicial, as opposed to the political function that is within the domain of the other branches of the state. It is only in this context that the independence of the judiciary, with the reinforcement of the legal profession itself can be upheld in the enforcement of the rights-oriented laws, as the former cannot solely achieve the establishment of a "just society". It is the profession that conducts initial research that should be couched in human rights in the presentation of arguments on their cases in court. The establishment of the legal question, applicable law in the resolve of the facts presented before the court are the basis for the advancement of the principles of the new constitutional dispensation.

An integrated approach that complements the independence of the judiciary in the evolution of human rights has the potential to enrich and flourish in South Africa's constitutional democracy. The integrated approach enhances the analysis of the law and its application to ensure compliance with adopted rules and international human rights law in building an integrated legal system

84 *Soobramoney* para 42.

85 *Ibid* 43.

86 See s 26 of the Constitution.

87 See *Grootboom* paras 93–96.

88 Adopted on 25 September 2015.

89 *Makwanyane* paras 327–329. See also *Republic v Mbushuu* 1994 TLR 146.

for a global community.[90] An independent and impartial judiciary is likely to bridge the gap on the inter-relationship that exists between the various sources of law in the promotion of human rights in South Africa. Without an independent judiciary, the highly lauded Constitution could have been a distant dream in the translation of formal rights into substantive reality. The Constitution has strengthened the promotion of human rights and bridged the gap that existed in the legal realm that had an impact on the way these rights are to be realised. The judgments delivered by the Constitutional Court contribute to South Africa's transformative vision that put limits on abuse of state power, ensures the enjoyment of human rights and rejects not only past laws but practices that enforced domination, brutalised people and diminished the respect for human life.[91] The Constitutional Court judgments represent a critical break from the past and denounced an arbitrary system that undermined the human rights from being a democratic, universal, egalitarian, and caring future that is expressly articulated in the Constitutions of the countries of the world.[92] The Constitutional Court has been fundamental in driving the much-needed change and contributed to the elimination of the barriers that limited the right of equal access to rights and grounded its independence through the lens of human rights.

9 CONCLUSION

This article places strong emphasis on the relationship that exists between the "rule of law" as discussed in Part One and independence of the judiciary as explained in Part Two. These principles ensure the establishment of a framework for the advancement of political stability, and good governance in promoting the principles of the new constitutional dispensation. The article draws lessons from comparative Constitutions in contemporary jurisdictions to determine the response of South Africa's Constitutional Court in the development of a rights-oriented jurisprudence. The infusion of the independence of the judiciary in contemporary Constitutions in the promotion of human rights laid the foundation for the examination of the judicial response of South Africa's Constitutional Court in the promotion of rights-based jurisprudence.

In this article the author highly commends the South African Constitution 1996 as a progressive and transformative document that laid the framework for the development of a "constitutionalised" system of human rights. Notwithstanding the ambivalent approach both in the Constitution 1996 and the Constitutional Court, particularly the advancement of the pluralistic character of the country, greater gains have been achieved since the dawn of democracy. The independence of the judiciary has promoted the advancement of human rights as a significant contributor of the principles of the "rule of law", as argued in Part One of this article. It is for the inter-relationship that exists that the "rule of law" and independence of the judiciary must transcend from abstract theory and permeate the entire legal, social political order, and establish a culture of respect for the law and democratic institutions of governance.

90 United Nations Secretary-General "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies" 23 August 2004 6 UN Doc S/2004/616.

91 *Makwanyane* paras 390–391.

92 See Mahomed CJ in *Makwanyane* para 262.