



THE SUDD INSTITUTE

RESEARCH FOR A PEACEFUL, JUST AND PROSPEROUS SOUTH SUDAN

P. O. Box 34, Juba, South Sudan • Tel: +211 (0)956 305 780
Email: thesudd.institute@gmail.com • www.suddinstitute.org

POLICY BRIEF

July 05, 2016

The Importance of Judicial Independence to the Administration of Justice: The Case of South Sudan

Mark Atem Wek Deng

Summary

We live in an era where the need to ensure proper administration of justice has never been so imperative. However, the fulfilment of this desire, as an aspiration of every citizen, depends largely on the competence, independence, and integrity of judges as the custodians of the laws. This brief discusses the significance of judicial independence to the administration of justice, particularly in the context of South Sudan. While the brief acknowledges that maladministration is inherent in any system of governance world over, it highlights the particular, corrigible political practices that undermine both the independence of judges and the rule of law in South Sudan. Some of the practices highlighted include the removal of judges from office by the government without adhering to the governing laws, as well as other established processes.

In conclusion, the paper, based on these seemingly relentless practices of decreeing judges out of office, contrary to the governing law, draws an inference that judges in South Sudan are simply answerable to individual political leaders. This has serious implications for the proper administration of justice and the rule of law in the country. It is therefore incumbent upon the Transitional Government of National Unity to ensure judicial independence, because peace and order depend on the effective maintenance of a strong and independent judiciary as the third arm of the government.

I. Introduction

The recent move by President Kiir to demote a sitting judge¹ of the Supreme Court of South Sudan, without proper and transparent process being followed in arriving at this decision, has raised concerns as to the true nature and purview of

¹ **Justice Madol Arol Kachuol**, hereinafter referred to as '**Justice Madol**', was the deputy Chief Justice of the Supreme Court of South Sudan until recently when he was relieved from his position by President Kiir and replaced him with **John Gatwich Luol**, the former Chairman of the National Anti-Corruption Commission.

the President's constitutional power. It is, however, incontestable that the President has a constitutional power to remove a sitting judge of a federal² court upon the happening of such things as 'gross misconduct', or 'incapacity'³ to serve, but only when this action is 'recommended' by the National Judicial Service Commission.

Opinions may and can well differ on whether the demotion of Justice Madol was, in fact, a removal from office, or whether it was simply a disciplinary action taken against his Honour for any unprofessional or unethical act he may have committed in his judicial duties. Nothing in the decree issued by the President to relieve Justice Madol clarifies any of this to the public, and so it remains the subject of speculation, or at least it is for the purposes of this piece. However, in considering the constitutional security of tenure conferred upon judges once appointed to the bench, in tandem with the sanctity of their paramount duty to serve and to ensure efficient and proper administration of justice for all, there appears to be a reasonable ground to believe that this was a removal from office.

True it is that judges are not above the law and no one should believe they are, naïve as that belief maybe. They are custodians of justice, to the extent that they administer justice, interpret and apply the law to resolve controversies that come before them. Indispensable to the role of judges to effectively administer justice is judicial independence. That is, in simple terms, independence of judges from political interference in their judicial roles by the politicians, as well as independence from influence of any sort by private parties or members of the public.

Nothing, however, is set in stone for the judges, hence the reason Justice Madol has suffered casualty, whatever a consequence of the casualty was. A judge may be removed from office, provided that the constitutional grounds giving rise to the removal have been met and the processes of doing so are properly followed. This is to ensure that judges are held accountable for their actions, insofar as public accountability is concerned. However, transparency is required in the processes of relieving a judge, so as to eliminate any form of bias, real or perceived, on the side of the government. This is the tradition, or at least the accepted practice in the majority of constitutional democracies, save that South Sudan is not anywhere near a well-functioning constitutional democracy, and it would be unfair and offensive to the good conscience to believe that it is.

The reason why Justice Madol's removal seems to have put most South Sudanese people at unease is that the decision was not explained to the public, as there was no public address given about it, as some of us would have hoped. Hence, *we* do not know and may never know the circumstances or the particular grounds for which he was removed,

² The term 'federal' is used here arguably in the sense that South Sudan is a federation of 28 states with the national government and its compositions as the federal government. The Supreme Court of South Sudan is a component of the national government of South Sudan.

³ *The Transitional Constitution of South Sudan 2011*, hereinafter referred to as 'The Transitional constitution' Article 135 (2).

including whether the constitutional processes for the removal of a judge were followed. So, inasmuch as this decision remains unexplained and wanting, it is in the interest of the public to ask these two simple questions: (1) what did Justice Madol do so egregious that prompted a swift intervention from the President to remove him from office?; and (2) did the National Judicial Service Commission recommend his removal and what precisely was the recommendation? This is a matter of importance and the public deserves answers to these questions, if transparency and public confidence are to be maintained when dealing with our judicial officers.

This piece briefly discusses the importance of judicial independence to the proper administration of justice in the context of President Kiir's recent decision to divest a judge of his role in a manner that appears to be at odd with the acceptable practices for the removal of judges from office. It argues that when the independence of judges is compromised or politically interfered with, justice is equally compromised; and when justice is compromised, the society pays an '*awful price*'. While the country implements the Agreement on the Resolution of Conflict in South Sudan (ARCISS), ensuring judicial independence must be a priority of the Transitional Government of National Unity. An effective judicial system can play a significant role in addressing the issues of transitional justice, hence contributing to the healing process and bringing lasting peace and political stability to the country.

II. Importance of Judicial Independence

There are many facets to judicial independence that maybe worthy of presentation herein, but owing to the limited scope of this brief, our discussion mainly focuses on the importance of judicial independence and how it may be ensured and maintained in South Sudan.

There are two chief reasons that make judicial independence to be of public importance. First, judicial independence ensures the protection of the rule of law against lawless political power seekers. A free society, it is said, is one that is governed by the rule of law.⁴ The rule of law, however vague or ineffective it may be perceived by ideological opponents, or individuals, operates on the simple basis that every citizen is subject to the law and that all persons, regardless of their positions in a society, powerful or weak, rich or poor, are equal before the law.⁵ It, in a nutshell, applies to the ruled and the rulers alike.

However, the concept should be understood as relative, because its application depends largely on the circumstances of individuals in a society. It is empirical that people are not equally placed in any society, and regardless of how economically advanced and well-off a

⁴ Sir Gerrard Brennan Ac, 'Judicial Independence' (Paper presented at the Australian Judicial Conference, University House, Australian National University, (2 November 1996), available at: <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_ajc.htm> (last accessed 13 April 2016).

⁵ A. V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915) 198-199.

society maybe, individual circumstances will not always be the same. As such, it would be of no equality at all to treat unequally placed persons equally. For example, it would be of no equality to legally require children to have the same level of criminal responsibility as adults, for the obvious reason that children do not possess comparable level of diligence and competence as adults. For this reason, it is understandable that the rule of law, as an exception, ‘requires rational and non-arbitrary basis for differential treatment of people’⁶ who are unequally placed in a society. Judicial independence ensures that judges administer and enforce this principle in order to realize its potential benefits for individuals and society at large.

The second reason that judicial independence is of such profound importance is that it ensures that judges are free to determine controversies that come before them through rational and objective evaluation of facts and applying known law/s to the facts in order to arrive at a balanced legal decision. The crux of this aspect of judicial independence is that it shields judges from external pressures, be these pressures from the government or private parties, which may have significant bearing on a judge’s mind when determining a particular legal matter. It is apparent that a judge who faces a potential threat or retaliation from a powerful litigant may not sacrifice his/her life and decide a case in a fair and impartial manner.

How Independent Are Judges in South Sudan?

Under the Transitional Constitution of South Sudan, judiciary is set as an independent institution from the government, and ‘all organs and institutions of government’, in undertaking and executing their duties, are required to respect and implement ‘judgments and orders of the courts’.⁷ Despite this explicit promulgation of the law, however, what happens in practice has not always been consistent with what the law other says otherwise. Judges have not always been free from political threats to decide cases in an impartial manner. We have provided a couple of examples below as testaments to this assertion.

In 2013, a judge of the South Sudan’s Court of Appeal, Justice John Clement Kuc,⁸ resigned from office, citing a number of reasons for his resignation, including political interference in his judicial role by the government.⁹ However, the manner in which Justice John had experienced political interference in his judicial role has not been communicated in any lucid terms and remains the subject of further speculation. While political interference seems to be the main reason in Justice John’s resignation, the host of other reasons he cited are certainly concerning, as they do not reflect well on the integrity

⁶ Suri Ratnapala, ‘Securing Constitutional Government: The Perpetual Challenge’ (2003) 8 (1) *The Independent Review*, at 9.

⁷ The Transitional Constitution, Article 123 (2) and (7).

⁸ Justice John Clement Kuc, hereinafter referred to as ‘Justice John’.

⁹ Misuk Moses Mule, Judge Says His Resignation from Court Driven by Honesty (14 March 2013) Gurtong, available at: <<http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/10063/Judge-Says-His-Resignation-From-Court-Driven-By-Honesty.aspx#sthash.gYFTPj87.dpuf>> (Last accessed 13 April 2016).

of the judiciary itself as a national institution of justice. He cited ‘bad administration, corruption, nepotism and favouritism’¹⁰ within the judiciary as some other factors that impelled his resignation.

In particular, his Honour questioned the manner in which the 78 legal assistants, which included the daughter of the Chief Justice, Chan Reech Madut, were selected from the applicant pool of nearly 600 young lawyers in 2013.¹¹ His Honour pointed out that the 78 legal assistants were handpicked without being awarded marks in the interview.¹² In concluding his statement, his Honour expressed what appears to be a personal frustration with the head of the judiciary, the Chief Justice, in the following words:

As a judge, I am supposed to be a mirror that reflects the people. I am supposed to be there to help the people... and if I become vulnerable because of the politics of certain person who is sitting on me, then I must step aside.¹³

These assertions may be treated as mere personal frustrations, insofar as their veracity remains unconfirmed, but there is certainly no question that they cast a doubt on the integrity of the judiciary. It is, however, an undeniable reality that any institution of governance, be it a justice institution or political institution, grapples with the issues of maladministration in attempting to meet their responsibilities, and the judiciary of South Sudan is no exception in this respect. If, however, the maladministration is getting to the point where judges who enjoy the constitutional security of tenure in office are resigning, then it is certainly something that the government should investigate and take necessary measures to restore and maintain the integrity of the judiciary. It erodes public trust and confidence in the judiciary when the judiciary is seen as failing to meet its responsibility to ensure fairness within itself and for the members of the public who seek its services and the blessing of the law.

However, the practice of removing judges from office without adhering to the governing law and relevant processes appears to be a new normal in South Sudan. For example, in 2015, Justice Ajonye Perpetua, who was both a judge in the judiciary and a legal advisor in the Office of the President of South Sudan, was relieved from her legal advisory role and subsequently removed from the judiciary as judge.¹⁴

The circumstances that led to Justice Ajonye’s removal from the judiciary were not explained to the public, just like every other contentious political decision taken by the government. Given the varying nature of both roles, it is hard to imagine what Justice Ajonye did so wrong that prompted a sweeping response from the government to

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ajo Noel Julious K, *Mythos of Judicial Independence in South Sudan* (2015) Sudan Tribune, available at: <<http://www.sudantribune.com/spip.php?article55523>> (Last accessed 25 April 2016).

concurrently relieve her from both roles. While we do not know the terms of the employment entered into by Justice Ajonye and the Office of the President, we do know that Justice Ajonye did not have the constitutional security of tenure in this particular role and, to that effect it would not be wholly unfounded an assumption to suggest that the government may had reserved the right to vary, repudiate, or terminate the employment contract with Justice Ajonye. However, this all depends on the nature and the terms of employment contract in question. With respect to Justice Ajonye's removal from the judiciary, however, there are explicitly defined constitutional grounds for which a judge may be removed from office, none of which were cited in her removal. It is a redundancy to the law and to the established system for the government to circumvent the standing, substantive law in order to take an action, which is not permitted by the law.

As mentioned at the outset, another worrying development that occurred in sequence was the recent removal of the deputy Chief Justice of the Supreme Court of South Sudan, Justice Madol, from the bench, by President Kiir through a presidential decree. And, again, the circumstances that led to Justice Madol's removal were not explained to the public. However, it has been alleged that his removal had to do with his disagreement with his boss, the Chief Justice¹⁵ of the Supreme Court of South Sudan, over a case brought by the opposition's legal team¹⁶, challenging the constitutionality of President Kiir's Establishment Order that recently created 18 more states in the country. The Establishment Order has been set as an *unalterable* presidential decree, apparently preempting any possibility of being legally challenged by lawyers or rejected by the National legislative Assembly. It is, however, unclear how exactly the disagreement occurred between Justice Madol and the Chief Justice, but reports¹⁷ suggest that the Chief Justice was asked to recuse himself from hearing the case against the Establishment Order due to a suspected conflict of interest. The Chief Justice was reported to have defied the call, but the rationale for his defiance remains unknown and unascertainable for our purpose.

The suspected conflict of interest arose from the perceived close relationship between the Chief Justice and President Kiir. It is believed that the Chief Justice is a loyal friend of President Kiir and, for that reason alone, the Chief Justice could not guarantee or be truly expected to exercise his judicial impartiality in hearing the case. Following the issuance of the Establishment Order, the Chief Justice was reported as having personally written and published a congratulatory letter to President Kiir for creating 28 states. This was the compounding factor for the conflict of interest the Chief Justice was suspected of in this case. However, whether or not the Chief Justice had a conflict of interest in the case, it remains a matter of opinion and of further investigation.

¹⁵ Chief Justice Chan Reech Madut.

¹⁶ Sudan People's Liberation Movement- In Opposition (SPLM-IO)' legal team, challenging the constitutionality of the creation of 28 states in South Sudan.

¹⁷ Radio Tamazuj, *Ousted South Sudan supreme court justice says 'no problem' with dismissal* (12 March 2016) Radio Tamazuji, available at: <<https://radiotamazuj.org/en/article/ousted-south-sudan-supreme-court-justice-says-no-problem-dismissal>> (Last accessed 13 April 2016)

Opinions may also be divided on whether it was appropriate and acceptable for the Chief Justice, a highly influential judicial leader upon whom entrusted the administration of justice of the nation, to openly express his support for a highly contentious and divisive political decision. True, it is that everyone is entitled to their own opinion on any political issue and on any issue really, and the Chief Justice, to the extent that he is an individual and a citizen of South Sudan as a nation, should be of no exception to this prevailing liberal philosophy. However, what concerns most people about the Chief Justice expressing his opinion on a political issue, such as this, is his position as a judge and President of the Supreme Court of the nation. The principle of the separation of powers under which exists the idea of judicial independence does not and should not be understood or construed to apply to the executive and the legislature only. It, too, applies to judges to exercise discipline and restraint not to get themselves consciously entangled in sensitive political matters- matters that lie exclusively in the executive's realm and require an open political debate and potentially, a plebiscite to test their viability and popularity with the public.

So, on balance, the Chief Justice's decision to get himself involved in a political matter, unconscious of his position as a judge and his role as the custodian of the constitution, was an unnecessary interference in the political affairs of the nation. Such act, by virtue of the prevailing practices, was totally inappropriate and unacceptable and should never have been entertained by the government. A judicially prudent and role-conscious judge would never have found it pleasurable and acceptable to do so.

Constitutionality of the Establishment Order

The creation of the 28 states was met with mixed emotions. Some on the one hand believe that creating more administrative units in South Sudan is good for both political and economic developments and consistent with Dr. Garang's¹⁸ old cliché of taking towns to people and bringing the government to a level closer to the people. Whether there is merit in this side of the debate is a matter of opinion for experts and political analysts. Others on the other hand, including the rebels,¹⁹ strictly deem the creation of the 28 states as unconstitutional and a desperate attempt by a desperate government to further polarize an already ethnically fragmented country. This argument seems to have merit on the account of the constitutional legality of the creation of 28 states, as well as the manner in which the new states were formed, which appeared to have been based on ethnic boundaries.

¹⁸ Dr. John Garang de Mabior was a South Sudanese revolutionary leader, who led a guerrilla movement against the political oppression of South Sudanese by the tyrannical Islamic regime in Khartoum. He was tragically killed in an air crash in 2005, shortly after signing a historic peace agreement that ended a 21 year- old civil war in Sudan and heralded a new era for the South Sudanese.

¹⁹ Sudan People's Liberation Movement- In Opposition (SPLM- IO), a rebel movement led by Dr. Riek Machar Teny.

Until the South Sudan National Legislative Assembly passed a law to validate and to constitutionalize the creation of 28 states, The Transitional Constitution of South Sudan did not anticipate such thing as the creation of more states for the country. The Transitional Constitution, as perused, does not appear to have a provision that gives the president power to unilaterally create more states, and it is this lack of constitutional power and the very fact that the new states were created by the government without having consulted the general public that seem to have outraged most people. An acceptable way, and indeed the traditional way as far as democracy is concerned, in which something of this national importance can be and could have been brought about is through popular choices of the people, which certainly requires time and resources and proper processes to be followed in order to arrive at the final verdict. So, on the question of legality, the Establishment Order, however necessary, or popular it may be with the public, was, in all respects, unconstitutional and an inexcusable breach of the constitution. Given the controversial nature of the decision, the Chief Justice should have refrained from expressing his political opinion and instead provided impartial judicial platform for the South Sudanese who are opposed to it.

What is the Correlation between the Removal of Justice Madol and His Disagreement with the Chief Justice?

As discussed elsewhere in this brief, it is a normal practice that a judge may be removed from the bench in accordance with the governing principles. This is a settled area of law in all liberal democracies and South Sudan, however politically unstable or weak its institutions maybe, should be of no exception. The reason why the removal of Justice Madol seems to be of a general concern to the public, just like the removal of Justice Ajonye, is that it does not appear to have been done in accordance with the constitution. As mentioned earlier, there are defined constitutional grounds for a removal of a judge, but not a single one of these grounds was referenced in the decree.

However, as highlighted elsewhere in this paper, independent sources²⁰ have hinted that Justice Madol's removal had to do with his disagreement with the Chief Justice of the Supreme Court, but how can it be so? Disagreement for judges, whether it arose out of the context of trying to resolve a particular legal matter, or from other circumstances, is a normal thing and the government should not have to intervene, unless it is so serious that it effectively undermines the efficient and proper administration of justice. The nature of the disagreement and how serious it was remain unclear. However, in all these known facts, nothing correlates the removal of Justice Madol with his disagreement with the Chief Justice. So, to the extent that these factual scenarios remain uncorrelated, one may

²⁰ Radio Tamazuj, *Ousted South Sudan supreme court justice says 'no problem' with dismissal* (12 March 2016) Radio Tamazuj, available at: <<https://radiotamazuj.org/en/article/ousted-south-sudan-supreme-court-justice-says-no-problem-dismissal>> (last accessed 13 April 2016).

be justified to allege that there may be an undisclosed issue by the government that might have necessitated the removal of Justice Madol. In his recent interview with Radio Tamazuj, Justice Madol said, when questioned about his removal, that ‘the criteria of appointing’...judges ‘should not only be based on loyalty to you or your party but integrity’.²¹

We are not entirely sure of the exact premise of this statement; only Justice Madol knows what he meant by it. If, however, Justice Madol is indeed saying that the government appoints only those judges who are loyal to the government and to the party, then that is something that should be of grave concern for every citizen of South Sudan. It is unhealthy for the proper administration of justice to appoint judges on the basis of partisan politics or institutional loyalty, but not on the basis of their competence and integrity. The appointment of judges on the basis of partisan politics means that judges would not be independent and intrepid enough to administer justice on an impartial basis, and would thus not be able to protect and enforce the rule of law on both the ruled and rulers. As mentioned at the outset, the erosion of or the tampering with judicial independence compromises justice and when justice is compromised there is an awful price to be paid by the society.

Possible Inference to be drawn from the Three Case- examples

From the nature of the three case-examples regarding the removal of judges discussed in this paper, we can simply infer that judges are answerable to an individual in South Sudan, not to the law. This has serious implications for human rights, the rule of law and democracy in the country, obviously because judges do not have an effective constitutional power to safeguard these ideals by ensuring that the government acts within the limits of its powers, as sets by the constitution. Only a politically independent judiciary can ensure that the government upholds and advances these ideals for the good of the society. There is a general consensus among political philosophers, (and this is quite empirical too) that all governments, irrespective of whatever form in which they exist, are, by nature, tyrannical. This is a correct observation, given the torturous political history of governments, as we know it. The judiciary, as the least dangerous branch of the government, was therefore developed to guard the government against its tyrannical nature and to protect the rule of law, among other things.

In well-functioning constitutional democracies, Australia being as an obvious example, the conformity of all laws and executive actions is judged by independent courts and without judicial independence, judges cannot effectively supervise the exercise of governmental powers and keep them in check. In the words of a most revered French

²¹ Radio Tamazuj, *South Sudan's ousted deputy chief justice calls for reforms in judicial system* (5 April 2016) Radio Tamazuj, available at: <<https://radiotamazuj.org/en/article/south-sudans-ousted-deputy-chief-justice-calls-reforms-judicial-system>> (Last accessed 13 April 2016).

political philosopher, Baron Montesquieu, the effect of [judicial independence] as it exists under the principle of the separation of powers is that ‘it guards the government against its own lawlessness, prevents any deviation from the rule of law by allowing the legislative and executive powers to be checked by the judicial arm that will interpret the laws and apply them equally to everyone’.²²

Judicial independence is, indeed, at the heart of good governance and it is something that the Government of South Sudan cannot afford to disregard if it has to make full transition to democracy. As has been said, ‘judiciary is the lynchpin of a democratic [government] and the rule of law’.²³ Such claim, together with authoritative statements quoted above, make a strong case for the effective maintenance of judicial independence by the institutions of government for the good of the society. The simple way in which judicial independence is secured and maintained is to entrench its terms in the constitution, so as to make it hard for the unprincipled political power seekers to alter these terms in the constitution, except through *legitimate* means for the amendment of the constitution for a *legitimate purpose*. This is the practice in all liberal democracies—a tradition from which South Sudan can certainly learn.

The judiciary, as the third branch of the government, is declared as an independent institution under the Transitional Constitution and what only seems to be lacking on the side of the government, as far as recent developments in the country are concerned, is the conviction and commitment to uphold and implement the constitution in accordance with its terms. As Professor Ratnapala has shrewdly observed, a constitution ‘has no life of its own, and... its words have no magical quality. It gains meaning from the way it is understood, construed, observed and enforced by officials who form the government’.²⁴

Conclusion

This piece has emphasized the importance of judicial independence and the practical need for it to be ensured and maintained in South Sudan. This brief has discussed the three cases involving the removal of judges contrary to the governing law and relevant processes. It argues that when the independence of judges is compromised, as reflected in these three case-examples, justice is undermined altogether. This results in the erosion of the rule of law, producing a lawless society, all of which culminates in instability.

About Sudd Institute

²² Tina Hunter Schulz, ‘Rule of Law, Separation of Powers and Judicial Decision-Making in Australia’ (2005) 11 (1) *National Legal Eagle* at 1-4.

²³ Chan Sek Keong, ‘Securing and Maintaining the Independence of the Court in Judicial Proceedings’ (2010) 22 *Singapore Academy of Law Journal*, at 230.

²⁴ Suri Ratnapala, above n 6, at 15.

The Sudd Institute is an independent research organization that conducts and facilitates policy relevant research and training to inform public policy and practice, to create opportunities for discussion and debate, and to improve analytical capacity in South Sudan. The Sudd Institute's intention is to significantly improve the quality, impact, and accountability of local, national, and international policy- and decision-making in South Sudan in order to promote a more peaceful, just and prosperous society.

Author's Biography

Mark Atem Wek Deng is an Australian admitted South Sudanese lawyer. His research interest is in political philosophy and the advancement of the rule of law and constitutionalism. He is presently undertaking advanced studies in migration law at Griffith University, Australia.