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The 'Independence' of the Judiciary in Transformative Adjudication in Africa: A South African View?[1]

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This article is inspired by ***Prince Mbonisi Bekithemba Ka BhekiZulu v President of the Republic of South Africa [2024] All SA 662 (GP)*** *and* ***Electoral Commission of South Africa v Umkhonto Wesizwe Political Party 2024 (7) BCLR 869 (CC)*** *judgments, that emanated from the South African courts. The inspiration is grounded on the nature of the claims that were brought before the courts in that the* ***Prince Mbonisi*** *case challenged the decision of President Cyril Ramaphosa regarding the recognition of the successor to the status of Kingship following the death of the reigning King as exercised through the legal system of customary law. The second matter* ***(MKP)*** *related to former President Jacob Zuma and was at the heart of South Africa's democratic identity in the upholding of the electoral laws regarding the eligibility of potential candidates to Parliament after the National and Provincial Elections that were held on 29th May 2024. The centrality of the two-judgments touched on the core content of judicial independence regarding its aspirations on transformative adjudication. They raised a pertinent question whether the judiciary is 'self-policing' or has the 'ability to self-police' through the 'eagle eye' of the principle of 'judicial independence'. The author argues that transformative adjudication in contemporary Africa strives towards the production of transformative jurisprudence that emanates from the courts. The objective is to respond herein whether 'independence' infuses 'self or ability to police' towards adherence to the rule of law in Africa. As evidenced by the inspiration, the argument will be more biased to South Africa as it is acclaimed as a model of transformative adjudication in Africa.*

Keywords: *Judiciary; adjudication; independence; self-policing*; t*ransformation, integrity.*

Introduction

The year 2024 marks 76 years following the adoption of the Universal Declaration of Human Rights in 1948[2] which has since become integral in the democratisation and transformation of the adjudicative role of the courts. This period is of particular importance for the functioning of the judiciary not only in Africa but globally in that

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[2]Adoted on 10 December 1948 by United Nations General Assembly resolution 217 A (III). Hereinafter 'UDHR'.

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it is essential for stability and order in the regulation of state authority. The UDHR has been inspirational in the development of contemporary Constitutions that endorsed the independence of the judiciary that today became critical in transformative adjudication which would in turn give effect to the generation of public confidence in the judicial system.[3] Judicial independence is of paramount importance in the balance of power that is endorsed by the doctrine of separation of powers. The judiciaries of the world subscribe to the code of judicial conduct such as the Bangalore Principles of Judicial Conduct[4] that give substance to the requisites of the UDHR in the endorsement of the independence of the judiciary.[5] The Bangalore Principles are the evidence of the high level of support for judicial integrity.[6] The Bangalore Principles further affirm judicial independence as 'a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects'.[7] However, pertinent questions arise from the 'independence' whether the judiciary is '*policing itself*' and or '*able to police itself*'.

Contemporary Africa adopted Constitutions[8] which protect judicial independence and responded to the prescripts of the global community in ensuring an independent judiciary in its transformative adjudicative process.[9] Recently, the African Commission on Human and Peoples Rights adopted a Resolution on the Appointment of a Focal Point on Judicial Independence in Africa[10] which gives substance to Africa's transformative project on adjudication, particularly the substantive translation into reality of articles 7 and 26 of the African Charter on Human and Peoples Rights. The foundation to these instruments are an indication that African judiciaries should not be passive role players in leading the quest for a transformed jurisprudence that give an overall framework for the needed societal changes of the world. [11]

Africa, particularly South Africa, with its history that was plagued by draconian laws, the judiciary was the yardstick against which to enforce such laws, compromising the significance of the principle of independence and the broader democratisation through the lens of transformative adjudication.[12] Today, the country prides itself with a transformative Constitution, 1996[13] that is designed not only to uphold judicial independence but bring back and transform the jurisprudence from 'constitutional

[3]Hassan (2022).
[4]See David (2023). David, with reference to Francsico de Quevedo on the important of the judiciary in that *'where justice does not work, it is dangerous to be right'.*
[5]See also the influence of the UDHR on the adoption of the Prevention of Crime and Treatment of Offenders held at Milan from 26 August 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 regarding the basic principles on the independence of the judiciary.
[6]See Olowu (2013).
[7]See value 1 of the Bangalore Principles.
[8]See for example and not limited to the Constitution of the Republic of Namibia 1990 with amendments through 2010; Constitution of the United Republic of Tanzania 1977; Constitution of the Republic of Uganda 1995.
[9]Malila (2010).
[10]ACHPR/Res.570 (LXXCII) 2023.
[11]Chandra & Garg (2021).
[12]Gordon & Bruce (2006).
[13]The Constitution of the Republic of South Africa, 1996 (hereinafter the 'Constitution').

blankness' in giving effect to the prescripts of human rights laws. Following South Africa's recent national and provincial 2024 elections that were held on 29 May 2024, the courts have proved to be the centre of transformative adjudication through the lens of '*self-policing*' or '*showed ability to self-police*' without any undue influence on its independent role. In this regard, particularly the Electoral Court[14] has showed its ability to '*self-police*' in its adjudicative aspirations to ensure the advancement of the principles of judicial independence. The Electoral Court has remained steadfast in its adjudicative role in ensuring the interpretation of the electoral laws in a way that give content to the meaning and substance on '*self-policing*' for the advancement of the principle of 'independence'.

Of further importance in the context of this article is the nature of the matters that were brought before the courts where the role of the sitting President: President Ramaphosa was tested and reviewed to give substance to the system of customary law[15] that is progressively occupying its constitutional space considering South Africa's history where the system was never recognised and be developed alongside other legal systems applicable in the Republic. The second issue relates to former President Zuma[16] who had been convicted and sentenced to 15 month's imprisonment by the Constitutional Court for contempt of court regarding his failure to appear before the State Capture Commission.[17] The uniqueness of this matter was his inclusion in the list of candidates of his newly established political party (MKP) with a potential to be a member of Parliament if his party could have garnered enough votes and enable him to occupy the seat in the National Assembly. The inclusion was objected by the Independent Electoral Commission[18] in terms of section 47(1)(e) of the Constitution because of his conviction and sentencing. The decision of the IEC was challenged by the MKP at the Electoral Court which was granted against the IEC[19] which then took the matter to Constitutional Court for further determination on the eligibility of the former President to contest and be included in the list of the MKP. The Constitutional Court overturned the decision of the Electoral Court and found the provision of section 47(1)(e) disqualifying him to be an eligible member of the National Assembly and not even eligible to be included in the party list. Similarly, as is the case with the *Prince Mbonisi* case, the South African judiciary with no experience in transformative adjudication and during the infancy stages of the democracy, particularly in the area of customary law, incorporated the pluralistic character of the country by endorsing its diversity as evident in the preamble of the

[14]Established in terms of section 18 of the Electoral Commission Act 51 of 1996.

[15]*Prince Mbonisi Bekithemba Ka BhekiZulu v President of the Republic of South Africa* [2024] All SA 662 (GP), hereinafter '*Prince Mbonisi'*.

[16]*Electoral Commission of South Africa v Umkhonto Wesizwe Political Party* 2024 (7) BCLR 869 (CC) hereinafter '*MKP*'.

[17]See *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption in the Public Sector including Organs of State v Zuma* 2021 (9) BCLR 992 (CC).

[18]Hereinafter referred as 'IEC' established in terms of section 3 of the Electoral Commission Act 51 of 1996 which reads as follows:

(1) There is an Electoral Commission for the Republic, which is independent and subject only to the Constitution and, the law.

(2) The Commission shall be impartial arid shall exercise its powers and perform its functions without fear, favour or prejudice.

[19]*Umkhonto Wesizwe Party v Independent Electoral Commission* [2024] ZAEC 5.

Constitution, 1996. The incorporation became of substance which is traceable to the Constitutional Court in *S v Makwanyane*[20] when the Court indirectly incorporated the principle of *ubuntu* in its judicial reasoning.

It is drawn from the two cases: *Prince Mbonisi* and *MKP* judgments that courts provided a foresight on the determination of the question raised herein about the judicial 'ability to 'self-police' through the principle of 'independence' framework. The independence of the judiciary and its ability to 'self-police', as to be argued herein, is indicative of the resilience of the judiciary as demonstrated by the Kenyan High Court[21] during the chaotic status of the country when the opposition party refused to accept the presidential election results which were then declared invalid by the court.[22] However, the basic question which lingers over judicial 'independence' is whether 'self-policing' or 'ability to self-police' is an indirect contribution to a transformed adjudicative process? In addition, to what extent does 'self-policing' or 'ability to self-police' advances the principles of judicial independence towards the production of a transformed jurisprudence?

Against this background, this article is inspired by the *Prince Mbonisi*[23] judgment. In this matter, the sitting President of the Republic of South Africa: President Cyril Ramaphosa was found to have violated the prescripts of customary law in the appointment of the successor to the status of Kingship. The second motivation relates to the *MKP*[24] judgment. This matter involved former President Jacob Zuma who, before South Africa's 2024 National and Provincial Elections that were held on 29 May 2024 challenged the decision of the IEC regarding the removal of his name from the list of his newly established political party as a potential member of the National Assembly if his party could have garnered enough votes. This motivation is limited to the electoral matters and not on other matters relating to him that are still pending before the courts of law against the former President.

In essence, the two judgments are a stimulant to the argument herein. A sitting President was found to have acted beyond the scope of his authority and the former President wishing to recontest elections for the National Assembly and found ineligible to hold such office. It is this motivation that enable the article to move from a premise that '*self-policing*' or '*ability to show self-policing*' is a model that is designed and should be interpreted as a measure that advances the principle of judicial independence in transformative adjudication aspirations. The substance of the argument herein relates to the jurisprudence itself and not the scope of authority that exists between the judiciary and the other branches of the state through the application of the doctrine of separation of powers. Therefore, the argument is important for comparative lessons from African judiciaries' response on 'self-policing' in the upholding of the principle of independence for the policing framework.

[20]See Mokgoro, J. in *S v Makwanyane* 1996 (10) 1253 BCLR (CC) paras. 307-308.
[21]Presidential Election Petition No 1 of 2017. See also Mutuma (2021).
[22]See *Odinga v Independent Electoral and Boundaries Commission* [2017] KESC 42 (KLR).
[23][2024] 1 All SA 662 (GP).
[24]2024 (7) BCLR 869 (CC) (*MKP*).

Viewing Transformative Adjudication through Case Law

Brief Facts

(1) Prince Mbonisi Bekithemba Ka BhekiZulu v President of the Republic of South Africa

The matter entailed an application for the review of the President's decision to recognise King Misuzulu as King of the Zulu nation. It did not entail who should be the King of the Zulu nation, thus, it was based on the review for the procedures for his identification that were allegedly, not in accordance with the Zulu customs and practices. In essence, the application was not a determinant of the eligible heir to the status of Kingship/His Majesty but the process towards the rationality of the identification.[25] The second issue was whether the recognition by the President was lawful in terms of the Traditional Leadership and Khoi-San Act 3 of 2019.[26] The first contention was answered in the affirmative by Madondo AJP at the Pietermaritzburg High Court that King Misizulu is the rightful heir to the throne and needed not be considered in this case as the court was not to sit as one of appeal. The second review application was whether the recognition of the King was in accordance with the Leadership Act.[27]

The substance of the relief sought was for the review and setting aside of the meeting of the Royal Family on 14 May 2021 that was not lawfully constituted and not in accordance with section 8(1)(a) of the Leadership Act read with section 17(3) of the KwaZulu Natal Traditional Leadership and Governance Act 5 of 2005 including the decision of the said meeting.[28] In addition, for the setting aside of the decision of the President to recognise King Misuzulu in publication of Government Notice 1895 in Government Gazette no 46067 of 17 March 2020 in terms of section 8(3)(a) and (b) as unlawful and unconstitutional.[29]

It is not intended to provide an exhaustive factual matrix of this dispute but following the death of King Goodwill Zwelithini KaBhekuZulu on 12 March 2021, at the age of 72 years the question of who would become His successor became the substance of conflict between the Royal Family members.[30] King Zwelithini was the longest serving reigning King of the AmaZulu nation and after His passing, the traditional Prime Minister: Prince Mangosuthu Buthelezi, who has also since passed on, wrote to the KwaZulu-Natal Premier advising her of the nomination of her Majesty Queen Shiyiwe Mantfombi Dlamini Zulu: the Great Wife as successor following the reading of the King's will which was read on 24 March 2021. Queen Mantfombi did not survive the throne as she also passed on immediately after taking the reigns on 29 April 2021.[31] As noted, this article does not intend to provide a lengthy background on the facts of this case. Thus, of essence and direct relevance

[25]*Prince Mbonisi* para 2.
[26]Hereinafter 'Leadership and Khoisan Act, *Ibid.*
[27]*Ibid.*.
[28]*Prince Mbonisi* para 8.
[29]*Prince Mbonisi* para 9.
[30]*Prince Mbonisi* para 10.
[31]*Prince Mbonisi* paras 10-11.

is the President's exercise of his constitutional powers in the appointment and recognition of the successor to the throne not only of the King in this dispute but others that were not before the court.[32]

In this matter, considering the President's decision to recognise King Misuzulu as King of AmaZulu on 16 March 2022, the court considered the chronology of events that ensued towards His recognition. The court highlighted the substance of the report of the Mediation Panel that was appointed by the Minister of Cooperative Governance and Traditional Affairs and to provide an insight and recommendations on the resolve of the dispute. It was this report that the President noted the high divisions in the Royal Family in that the Royal Family meeting of the 14th May 2021 was highly contested regarding the way in which the late former Traditional Prime Minister: Buthelezi conducted the said meeting.[33] The President alleged not to have received the document due to an error in His email (Panels' recommendations) but acknowledged the complaint letter that was written to Him by Princess Thembi about the said meeting.[34] In that letter, Princess Thembi made allegations that the 14th May 2021 meeting was called under false pretences with no indications of its intended purpose of identifying the successor to the throne. The President conceded of His foresight on the highly divided Royal Family on the letters written to Him and the requests He made to the Minister and Premier for their assistance on this matter including the recommendations made by the Mediation Panel.[35]

The Court acknowledged the letter written to the President from the applicant's attorneys that it intended to appeal Madondo AJP decision that confirmed King Misuzulu as the legitimate heir to the throne, which is also not the subject of contention in this article as was the case with the Court.[36] Of substance in this application was the letter written by the former Traditional Prime Minister on 12 March 2022 advising the President that the heir would come from the Great House: Queen Mantfombi and the necessary arrangements had to be made for the nomination of King Misuzulu which was done according to customary law and its customs.[37] On receipt of this letter, the President waited for four days and thereafter received another letter from the Minister advising of the support for the recognition of King Misuzulu which was based on the judgment of Madondo AJP.[38] Thus, the President relying heavily on the letter of 12th March 2022 from the Traditional Prime Minister, He took the decision to recognise King Misuzulu on 16 March 2022 despite being aware of the intention to appeal Madondo AJP judgment.[39] The Court did acknowledge the 15-day period within which to lodge the application to appeal was still not prescribed and the President did take it into account but instead, went ahead and recognised the disputed recognition. Thus, the appeal application was delivered timeously on the 18th March 2022 before its expiry on 24 March 2022.[40]

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[32]*Prince Mbonisi* para 37.
[33]*Prince Mbonisi* para 38.
[34]*Prince Mbonisi* para 39.
[35]*Prince Mbonisi* paras 40-42.
[36]*Prince Mbonisi Mbonisi* para 42.
[37]*Prince Mbonisi* para 43.
[38]*Prince Mbonisi* para 45.
[39]*Prince Mbonisi* para 45.
[40]*Prince Mbonisi* para 45.

In this case, the Court made an emphasis as contended by the parties on the importance of section 8(4) and 5 of the Leadership and Khoisan Act regarding the process to be followed on an allegation of having flouted the due process of identification as prescribed by customary law and its customs. This was also linked to section 59 regarding the dispute itself on the process to be followed on its resolution. The Court drew a sharp distinction on the substance of the two provisions (8 and 59) regarding the procedures to be followed. The Court put an emphasis on section 8 which provides for the process regarding leadership and governance in traditional communities. On the other hand, section 59 deals with the general provisions, particularly with the existence of a dispute and not a mere allegation.[41] The Court gave substance to section 8 and rejected the appointment of the Mediation Panel as not the one anticipated by the Leadership and Khoisan Act.[42] Of course, mediation could have been ideal, but not the appropriate one as it might not have had a binding precedent in that it would have relegated the core content of the law into a 'brotherhood' or 'sisterhood' approach instead of the centrality of the law in resolving the impasse between the Royal Family members. The Court considered the text and purpose of the statute which should not be driven by 'anxiety' in reaching an amicable solution.[43]

The Court stressed the mandatory provision of the statute and found the President to have erred in law on the assessment of what he considered as evidence because it is the investigative committee that is intended by the statute to conduct such an evaluation.[44] Therefore, the Court held that the recognition of King Misuzulu was reviewable in terms of section 6)(2)(d) of the Promotion of Administrative Justice Act 3of 2000 (PAJA) for failing to comply with the requirements of section 8(4) and (5) of the Leadership and Khoisan Act. The Court went further and ordered for the establishment of the Investigative Committee as prescribed by the Leadership and Khoisan Act and not the one contemplated by section 8(1)(c)(ii)(aa) of PAJA.[45]

(2)Electoral Commission of South Africa v Umkhonto Wesizwe Political Party

This matter was an appeal against the Electoral Court decision in *Umkhonto Wesizwe Political Party v Electoral Commission of South Africa*[46] that entailed the interpretation of section 47(1)(e) of the Constitution 1996. The core content of the appeal was whether former President Zuma was eligible to be included in the MKP list and stand for election for the National Assembly considering his conviction for contempt of court and his 15 months sentencing by the Constitutional Court. This matter has a long history which complicates the subject of the dispute as it is interlinked with other matters which are not the subject of the argument in this article. For ease of reference, the former President was sentenced to 15 months imprisonment after having failed to obey the Constitutional Court order to appear before the State

[41]*Prince Mbonisi* para 50.
[42]*Prince Mbonisi* para 52.
[43]*Prince Mbonisi* paras 52-55.
[44]*Prince Mbonisi* para 60.
[45]*Prince Mbonisi* paras 62-64.
[46]*Umkhonto Wesizwe Political Party v Electoral Commission of South Africa* [2024] ZAEC 5.

Capture Commission.[47] It is not the intention to delve into these matters herein but the subject of contention was his qualification to stand for membership to the National Assembly if his party could have gathered enough votes for representation in the National Assembly as it finally proved to have such numbers after the presentation of the outcome of the election results.

However, after having served three months of his sentence which he started on 8 July 2021, the former President was released by the National Commissioner of Correctional Services on account of medical reasons.[48] Such release was declared unlawful and set aside in an appeal which was dismissed by the Supreme Court of Appeal[49] and Mr Zuma had to go back to prison on 11 August 2023.[50] On the same date, the President issued Proclamation Notice 133 of 2023, acting in terms of section 84(2)(j) of the Constitution 1996 and granted remission to more than 9000 prisoners which included Mr Zuma.[51]

It was the release of former President Zuma through the process of remission that was central relating to his eligibility for the National Assembly. The basic question that emanated from this matter was whether the release entailed the review of the original sentence imposed by the court to the three months that was served by former President Zuma. This question became the basis of the interpretation of section 47(1)(e) of the Constitution which disqualifies anyone not only him, but everyone sentenced to 12 months imprisonment without an option of a fine and after the expiry of the five-year period of the sentence.

This article does not intend to focus on other issues raised by this matter but the interpretation of section 47(1)(e) of the Constitution. The Court established two elements that are drawn from this provision in that it entails a substantive disqualification on anyone convicted of an offence and sentenced to more than 12 months imprisonment without an option of a fine from being eligible to be a member of the National Assembly.[52] Secondly, it contains a time frame at which the disqualification become operational with reference against which conviction or sentence has been determined or the appeal has expired.[53]

The Court unearthed the purpose of the disqualification in that it is designed to maintain the integrity of South Africa' democratisation and to ensure that members of the National Assembly are not the serious violators of the law.[54] The maintenance is endorsed within the framework of the rule of law against the backdrop of foundational values as envisaged in section 1[55] and the direct right to political participation as

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[47]See *Secretary of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* 2021 (9) BCLR 992 (CC).
[48]*MKP* para 4.
[49]See *National Commissioner of Correctional Services v Democratic Alliance* 2023 (2) SA 530 (SCA).
[50]*MKP* para 4.
[51]*MKP* para 5.
[52]*MKP* para 32.
[53]*MKP* para 32.
[54]*MKP* para 38.
[55]The section reads as follows:
1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

envisaged in section 19[56] of the Constitution. It also traced back the purpose of the disqualification to section 47(1) that sets out the minimum criteria to be satisfied by the potential candidate to the National Assembly.[57]

The Court linked the purpose of the disqualification to section 30 of the Electoral Act 73 of 1998 which deals with objections on the candidature of any person.[58] In this instance, Mr Zuma's name was objected to be included in the list of his MKP list due to his conviction and sentencing which was upheld by the Electoral Commission. It was the decision of the Electoral Commission that was taken to the Electoral Court for a review wherein the latter Court found the interpretation of section 47(1)(e) not applicable in his stance in that the Constitutional Court as the final court of appeal, the contempt judgment was not appealable.[59] Secondly, the effect of remission meant the reduction of the original sentence of 15 months to 3 months which he served.[60]

The Electoral Court was heavily criticised by the Constitution Court for the misinterpretation of section 47(1)(e) by 'subverting the very purpose to be achieved by the said section which meant that a person convicted and sentenced by the Constitutional Court as a court of first and final instance is permanently immunised from the section 47(1)(e) disqualification'.[61] The Court went further to state that the Electoral Court decision meant that 'disqualification will never take place because the conviction and sentence are not to be appealed and the Electoral Court committed fallacy by interpreting the said section as an independent enacting clause, the functioning which is to alter the principal substantive meaning of the clause'.[62] The

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(a)Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b)Non-racialism and non-sexism.
(c)Supremacy of the constitution and the rule of law.
(d)*Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness*, (author's emphasis).

[56]The section provides that:
1. Every citizen is free to make political choices, which includes the right:
(a)to form a political party;
(b)to participate in the activities of, or recruit members for, a political party; and
(c)to campaign for a political party or cause.
2. Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
3. Every adult citizen has the right:
(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
(b) to stand for public office and, if elected, to hold office.

[57]*MKP* para 40.

[58]The section provides that:
1.Any person, including the chief electoral officer, may object to the nomination of a: candidate on he following grounds:
(a)The-candidate is not qualified to stand in the election;
(b)[…]·

[59]*Umkhonto Wesizwe Political Party v Electoral Commission of South Africa* [2024] ZAEC paras 49-51.

[60]*MKP*, ibid.

[61]*MKP*, at para 60.

[62]*MKP* para 60

Court went on to state and used a strong language of 'being compromised by the Electoral Court in that if the same sentence could have been imposed by the Magistrate Court, the disqualification could have stood against Mr Zuma'.[63] The Court further stated that 'on a proper construction of section 47(1)(e) provides that a person who is finally convicted and sentenced to more than 12 months imprisonment is not eligible to contest elections or hold office as a member of the National Assembly'.[64]

In addition, carving out an exception for persons like Mr Zuma on the basis that they did not have the right to appeal their conviction, and sentence subverts the purpose sought to be achieved by section 47(1)(e) and threatens to undermine our democracy. It threatens the integrity of the National Assembly – a body that ought to comprise of individuals who can be trusted to promote and advance the rule of law and constitutional values – and it undermines the confidence that the public holds in the National Assembly. Further, it would threaten the legitimacy of this Court's findings as the apex court.[65]

Without exhausting the facts of this case, the Court as it indicated earlier, held that the purpose of section 47(1)(e) is the maintenance of South Africa's democratic character which is grounded on the universal model of the rule of law.

It is drawn from the facts of the two cases are central to transformative adjudication in that the *Prince Mbonisi* case divided the AmaZulu nation, particularly the Royal Family that is a glue that keeps the traditional community joined together in the regulation of traditional authority. The *MKP* case was highly contentious in that it raised serious political questions relating to South Africa's constitutional and democratic identity on the extent to which the judiciary deal with highly placed individuals who do not have just an influence but a social and political status in the carriage of their duties? Therefore, the uniqueness of the two cases narrows the focus in this article to determine the influence of the principle of judicial independence regarding its 'self-policing' or 'ability to self-regulate' in its aspirations for transformative adjudication. It is in this regard that a review of the meaning of transformative adjudication is discussed as a foundation to the question posed herein on the 'ability to self-police' within the framework of judicial independence.

Courts `in Transformative Adjudication: A Model for 'Self-policing' on the Independence of the Judiciary in Africa?[66]

The transformative aspirations were envisioned long before the attainment of a democratic post-apartheid South Africa. Baxter[67] citing and with reference *In re Willem Kok and Nathaniel Balie*[68] judgment that involved a Griqua Chief and his son. They were suspected by the government of instigating rebellion and had been unlawfully detained in 1879 where the transformative aspirations of the judiciary

[63]*MKP* paras 61-62.
[64]*MKP* para 63.
[65]*MKP* para 64.
[66]Self-policing as idiom drawn from Conditt Jr (2001).
[67]Baxter (1985).
[68](1879) 9 Buch 45.

were envisaged. In this matter, Sir John Henry de Villiers, the Chief Justice at the time rejected the government's interference in the functioning of the courts and held:

> *"it is said the country is in such an unsettled state, and the applicants are reputed to be of such a dangerous character, that the Court ought not to exercise a power which under ordinary circumstances might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country. If a different argument were to prevail, it might so happen that injustice towards individual [Blacks] ha[ve] disturbed and unsettled a whole tribe, and the Court would be prevented from removing the very cause which produced the disturbance*".[69] (author's emphasis)

It is this judgment, not even during the apartheid system of governance, dating back to the colonial system of state authority that the courts indicated the potential to advance a quest to 'self-police'. It was the courts that set the tone to indicate the need not to be interfered in their adjudicative role. It was this indication that continues to be grounded on the independence of the courts. It was this independence that enables the determination of an '*eagle view*' on the production of a transformed jurisprudence through the principle of 'independence' that is meant to enhance individual liberties and not to deprive them. Overall, it is this indication, that today, judicial independence is envisaged in contemporary Constitutions in Africa that set a framework for transformative aspirations in adjudication.

The framework for transformative aspirations in adjudication require the production of judgments that will enable the determination of the response to the question posed in this article. It is designed as a response to the question on what constitute transformative adjudication in the context of judicial 'self-policing'. How such context contributes to the advancement of the principle of judicial independence? The questions are prompted by the extent to which the courts may 'self-police' with reference to the evolution of the meaning and substance of transformative adjudication.[70]

The debates are of importance in South Africa's 30 years of democracy that appears to be a model and great influence on the advancement of the principles of 'independence' on African judiciaries.[71] The foundation of transformative adjudication is grounded in Africa's history of constitution-making as drawn from Ndulo[72]. Ndulo identifies the three-stage process of constitution-making in Africa that informed the basis for transformative adjudication. Ndulo points out that these stages entail (i) the first phase took place at independence in the 1960s and was typically led by the colonial power [and] was part of the decolonisation process; (ii) second phase from independence to 1989 [wherein] during this period, constitution amendments to the independence constitutions designed to concentrate power on the presidency. He further argues that this was the period of authoritarian governments in Africa which culminated into one party state systems of governance; (iii) the third stage which runs from 1989 to today is associated with the worldwide wave of democratisation

[69]Baxter (1985).
[70]Aziz (2023).
[71]Fombad (2017).
[72]Ndulo (2019).

[and] is centred on rebuilding the political community as well as structures that had been distorted by political manipulation and violence during the era of authoritarian rule. As he opines, this was the phase which was also marked by promoting the rights of citizens in the affairs of their own countries and the accountability of governments.[73]

The stages are of particular significance for African judiciaries, especially the South African judiciary of cleansing itself of the apartheid legacy on adjudication in post-apartheid South Africa.[74] The judiciary itself, as a structure of government within the context of its institutional independence, had to infuse the values of the broad principles of transformation to be inclusive of South Africa's pluralistic character in terms of race and gender in its judicial echelons.[75] It is this broad process that enables the determination of the progress made that the focus is not only on the numbers or the biological differences of appointed judges from the diverse communities but the quality of the produced judgments that responds to the question herein on 'self-policing' in advancing judicial independence.

The aspirations of the three-stage process are also traced from the lessons learnt from the UDHR which was foundational to amongst others the adoption of the Basic Principles on the Independence of the Judiciary as indicated above. The substance of independence is captured herein and reads as follows:

> 1. 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.
> […]
>
> 6 The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
> […].

The UDHR influence transmitted to the African continent on the quest for the independence of the judiciary with the African Charter on Human and Peoples Rights requiring:

> State parties to the present charter to guarantee the independence of the judiciary and allow the establishment of national institutions entrusted with the promotion and protection of the rights and freedoms by the present charter.[76]

These principles serve as the pinnacle of state's responsibility towards, ensuring, first, the state's role in protecting the independence of the judiciary. Secondly, for the courts to ensure the fairness in the application of the law. Thirdly, the protection

[73]Ndulo (2019).
[74]Sapa (1997).
[75]See section 174(2) of the Constitution.
[76]See article 26 of the African Charter on Human and Peoples Rights.

of individual rights in the adjudication of their rights by the courts. Of further importance, not to compromise the principle of judicial independence in the adjudication of the matters before them which entails the incorporation of 'self-policing' in transformative adjudication towards the production of transformative jurisprudence.

The importance of the judiciary cannot be overemphasised as a branch of the state and stands at the epitome of justifying each judgment delivered with concise and substantive reasoning regarding each matter. It is the justification that serve the richness of the jurisprudence in building a culture of justification and accountability, particularly in the context of developing a transformed jurisprudence that is designed to effect societal changes through the lens of the law. Quenot gives substance to this specific role on transformative adjudication in that:

South African courts are therefore important institutions where deliberation and accountability for the fundamental normative commitments of South Africa's constitutional order are fostered. But on the other hand,

> *"a culture of justification also insists on a particular mode of adjudication, of legal reasoning, by the courts* […] . *Transformative constitutionalism requires the exercise of judicial power to be justified as much as any other form of public power.* These two implications of a culture of justification for adjudication are indeed linked. […] the *role of courts as sites of justification of public conduct in terms of the Constitution's normative framework will be undermined if adjudication itself does not reflect a culture of justification,*[77] *(*authors emphasis*).*

Drawing from Quenot it is evident that judiciaries must move away from the literal interpretation of the text and show willingness to purposefully align it with the vision propounded by the Constitution.[78] As similarly articulated by De Villiers[79] who contends that:

> "*the judiciary can be an essential agent in the transformative process of a country. This is because the judiciary can breathe life into the dry text of a constitution. The judiciary can make a rainbow of the black print. The judiciary can let the silent words of the constitution speak out by resolving disputes based on findings of fact, the application of relevant law, and the exercise of discretion. It can fill in gaps in policies. Handing down a judgement is not a computer-generated exercise. This is because the judiciary is responsible, based on the facts and submissions before it, to declare the law of the land for which it is responsible. The judiciary cannot write a constitution, but it can enliven it. The life-giving ability of the judiciary applies to long established, young and emerging democracies."*[80]

It is drawn from the tone set by De Villiers that the judiciary carries a specific responsibility as an agent of change in giving substance by taking a lead role in '*self-policing*' its transformative aspirations for the promotion of judicial independence. That starts at first by the individual judge exercising the individual independence in

[77]Quinot (2010) at 112.
[78]See Hoexter (2017).
[79]De Villiers (2023).
[80]De Villiers (2023).

the adjudication of the matter before him or her. The second relates to the overall institutional integrity of the judiciary wherein the higher court will exercise the review or appellate role over the decision of the *court a quo*. The interdependence of the two factors is the framework upon which '*self-policing*' is assessed. Broadly, the factors encapsulate the principle of 'independence' that requires the courts to exercise their judicial discretion in a fair and impartial manner. It is this point of departure that serve as a foundation to transformative aspirations in giving substance to 'self-policing' in that judicial officers are to take responsibility in adhering to the prescripts of the new dawn of democracy. This is important for a flourishing adjudication which is grounded on an impartial decision-making process that gives substance to the broader concept of *'justice not to be done but must be seen to be done*'. The concept subjects the judiciary to the 'policing test' which is a main goal for 'independence' in the advancement of personal and institutional independence of the judiciary.[81]

According to De Villiers, 'the transformative role and ability of a court goes deeper and is more multilayered than the age of the constitution under which the courts function. The contention attests positively to the recently established South African Constitutional Court that has since its establishment served as a model of transformative adjudication and invalidated laws and conducts that were not in accordance with the spirit and purport of the Bill of Rights.[82] As De Villiers further argues, the transformative role of the judiciary 'may arise from a democratisation process; an end to civil war; eradication of socio-economic inequality; recognition of ethno-minority and indigenous rights; accommodation of societal plurality; ensuring equal treatment of all individuals; laying the contours of federal-state intergovernmental relations; upholding constitutional values such as the separation of powers or acknowledging the importance of environmental issues'.[83]

South Africa, that just attained the 30 years of democratic existence after being thwarted by many years of insubordination, 'self-policing' is the process that may be viewed as a measure that is designed as the basis to internalise transformative adjudication within its overall adjudicative aspirations. The adjudication is grounded on transformative constitutionalism as De Villiers further expresses that '*the true test … is whether the courts address the issues that are relevant to a particular society and whether those judgements give rise to practical changes within the society*',[84] (author's emphasis). The judiciary is central in giving meaning to the transformative vision of the Constitution and other related laws. It is the Constitution that seeks to establish a 'just society in healing the divisions of the past'.[85] It is in this regard that Sachs J in *S v Makwanyane*[86] also expressed the need for transformative adjudication

[81]Chandra & Garg (2021).
[82]See for example, the *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC). In this case and in the early stages of the democracy, the Court incorporated the various legal systems as of equal status in the regulation of state authority and affirmed the rights of South Africa's diverse groups.
[83]Ibid.
[84]See De Villiers (2023).
[85]See preamble.
[86]1995 (6) BCLR 665.

wherein traditions, beliefs and values of all sectors of South African society when developing our jurisprudence are to be considered and held:

> "in broad terms, the function given to this court by the Constitution is to articulate the fundamental sense of justice and right shared by the whole nation as expressed in the text of the Constitution. The Constitution was the first public document of legal force in South African history to emerge from an inclusive process in which the overwhelming majority were represented. Reference in the Constitution to the role of public international law [sections 35(1) and 231] underlines our common adherence to internationally accepted principles. Whatever the status of earlier legislation and jurisprudence may be, the *Constitution speaks for the whole of society and not just one".*[87] (author's emphasis*).*

In the 30 years of democracy, lessons learnt for a transformative adjudication design is meant to conceptualise the content and meaning to '*self-policing*' in advancing judicial independence. '*Self-policing*' is today driven by the process and building on the strengths and lessons in advancing South Africa's democratic identity in giving effect by first being the holder of the aspirations of the new dawn of democracy. The judiciary, as a resource of reconstruction and tool for transforming the jurisprudence that emanate from it that is influenced by the values that upholds the Constitution. Through '*self-policing*', the judiciary is better placed to protect its own independence by dismantling any barriers that may compromise the quality of producing socio-political oriented jurisprudence that addresses the people's human living conditions. '*Self-policing*' considers transparency and accountability amongst other principles in adjudication towards the advancement of judicial independence. However, does it mean 'independence' without transformative ideals in its processes? To what extent does the judiciary have to thread carefully in the exercise of its judicial authority? What amount of 'self-policing' will contribute to 'independence' in transformative adjudicative aspirations?

A South African Perspective on the Significance of '*Self-policing*' in Transformative Adjudication

The two cases that are the subject of the argument herein are foundational to the pertinent question raised about the process which endorses judicial independence in the exercise of its judicial authority. Of particular interest is the fitting of 'self-policing' in advancing the principle of judicial independence. The interest is directly linked to the nature of the dispute where the courts infused 'independence' on their self-policing exercise in adjudication.

The *Prince Mbonisi* judgment touch on the constitutional space that has been attained by the system of customary law in the new dispensation.[88] The substance of the motivation is the procedural disregard of the customary law processes in the nomination of the successor to the late King Zwelithini. The President was found to be at the helm of disregarding the system and its processes and his awareness of the

[87]S. *v Makwanyane*, para 362.
[88]See section 211 of the Constitution.

divisions in the Royal Family could have been the basis upon which to determine carefully the extent to which his recognition of King Misuzulu as successor to the throne would impact not only the Royal Family but the Zulu nation at large. In this case, the President is required to 'uphold, defend and respect the Constitution as the supreme law of the Republic and to strive towards the attainment of unity of the nation'.[89] The President's conduct was not a misdirection, but a complete disrespect of the processes involved in the identification of a successor to the status of Kingship. Whilst he also acknowledged and became aware of the high divisions in the Royal Family, he exacerbated those divisions by not 'fighting' for the customary law process that is still progressively rediscovering itself as a constitutional legal system as is the case with other applicable systems in the Republic. The President's conduct was evident in *Chief Avhatendi Ratshibvumo Rambuda v Tshibvumo Royal Family*[90] judgment where the Premier of the Limpopo Province as a member of the provincial executive was also found to have flouted customary principles which became the centre of the dispute as the Court found that the Premier:

> did not exercise his discretion under section 12(2) of the Limpopo Traditional Leadership Act in a lawful manner. The Premier simply recognised Mr Rambuda based on misinformation in the form of a memorandum received from the MEC which incorrectly interpreted a notice of withdrawal of the application by the respondents. He did not apply his mind to the matter but acted on the strength of the erroneous facts in the memorandum which rendered his decision reviewable. In terms of the court order dated 24 March 2016, the Premier was mandated to carefully consider the respondents' representations before making any decision. As aptly recognised by the High Court, an examination of the respondents' representations would have alerted the Premier to the existence of a dispute regarding the rightful successor.[91]

There is a link in these cases in that the President and the Premier hold executive powers and authority to protect the different legal systems in South Africa. The Courts in these cases are commended herein in that the President and Premier are not ordinary persons but constitutional beings,[92] who are 'required to, if there is a war, to come out and fight and protect his country'.[93] This is the approach in this case as he was required to adopt a fine comb in his recognition of 'King Misuzulu' and protect the integrity and status of customary law as a legal system that is observed by black South Africans. The misinterpretation from the President of the applicable laws in the regulation and resolve of customary law disputes is a cause of concern. The compromise of applicable legislation (Leadership Act) by the highest office of the land reduced the protection accorded to the system and structures of customary law to 'mere cousins' of the new dispensation. The aspirations of this country are vested

[89]See section 83 of the Constitution.
[90](CCT 255/22) [2024] ZACC 15. Hereinafter *Rambuda*.
[91]*Rambuda* para 55.
[92]See section 83 on the status and functions of the President and section 125 on the status of the Premier as envisaged in the Constitution 1996.
[93]*Economic Freedom Fighters v President of the Republic of South Africa* 2016 (5) BCLR 618 (CC) hereinafter '*EFF'* para 20.

in the President which were endorsed in the *EFF* judgement as the Constitutional Court held:

> "the nation pins its hopes on *him* to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis".[94] (author's emphasis).

It is against this background that the judiciary had to undertake a 'nail-biting' exercise in protecting its independence through the lens of 'self-policing' in the production of a transformed jurisprudence relating to the exercise of executive authority. It is this context that the confidence in the judiciary is strengthened by ensuring not just a pure equal protection, but the full benefit of the law as envisaged in section 9(1) of the Constitution.[95] It is also acknowledged that the constitutional authority as exercised by the courts relating to the constitutional identity of the office held by the President was the thorny subject in this matter. The President had to be reminded of the due process that needed to be followed in the recognition of successors which is also not of benefit to the case at hand but to other Kingships and Chieftaincies on succession of the potential candidates to the throne. The President, as Head of State and Executive is required by section 165(4) of the Constitution not to subject the courts to unnecessary pressure but to protect their independence and in this case, he is central in testing the substance of that principle being undermined by Him.

The Court 'pulled its head under the sand' and gave meaning on its independence through its reasoning that is the basis of 'self-policing' relating to the quality of judgment it produced. Particularly in the context of the doctrine of separation of powers under which the branches operate as the judiciary, although at face value is viewed as the weakest link of the other branches, it amasses wide powers in declaring any conduct that is inconsistent with the law to be invalid.[96] It is in situation of this nature that 'self-policing' as a measure of 'independence' becomes of value in producing a constitutionalised transformative jurisprudence in giving effect to the quality of transformed adjudicative aspirations.

In the *MKP* judgement with the after-effects still felt in South Africa after the National Elections with former President Zuma being left out of the slate for eligibility as a member of the National Assembly, the Electoral Court and the Constitutional Court are also commended for stamping their judicial independence in the interpretation of electoral laws to give substance to the overarching question on 'self-policing'. It is expressed herein that that although the Electoral Court was unanimous in its decision regarding the eligibility of former President Zuma, it proffered different reasons and came up with three judgments that became critical on the question raised in this case, that of 'self-policing' and 'independence' in transformative adjudication. The Electoral Court Judges, based on their oath of office, gave effect to section 165 of the

[94]*EFF* para 20.
[95]The said section provides that "Everyone is equal before the law and has the right to equal protection and benefit of the law".
[96]See section 2 of the Constitution 1996.

Constitution[97] to apply the law without fear or favour in ensuring the integrity of the courts in judicial reasoning.

The foundations of independence which are also framed on individual and institutional independence became a source of what I would refer to as the 'internalised process' of 'self-policing' in the adjudication of the *MKP* judgment. The Constitutional Court established that the Electoral Court misplaced the constitutional identity of the National Assembly and the quality of potential candidates that will represent the electorate in Parliament. The distinct and striking features of the National Assembly were also laid in the *EFF v President* judgment as the Constitutional Court held:

(i) National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people.
(ii) It is the voice of all South Africans, especially the poor, the voiceless and the least remembered.
(iii) It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people.
(iv) It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed.
(v) The willingness and obligation to do so is reinforced by each member's equally irreversible public declaration of allegiance to the Republic, obedience, respect and vindication of the Constitution and all law of the Republic, to the best of her abilities.
(vi) In sum, Parliament is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa.[98]

It is drawn from these principles that the National Assembly is the House of the highest order wherein in the South African context, has been rescued from its own negative accorded status of the supremacy of parliament of the past. Today, the National Assembly requires representatives that will give substance to the democratic ideals of transformation that are transmitted by the courts in the interpretation of the law. The Constitutional Court in *MKP* exercised its 'self-policing' responsibility in protecting not just the status of 'independence' but the quality of jurisprudence that enhances the South Africa's vision of a democratised system of governance. The

[97]The said section reads as follows:
(1) The judicial authority of the Republic is vested in the courts.
(2) The courts 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 courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
(6) 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 courts.
[98]*EFF* para 22.

distinct feature in the *MKP* judgment is the appeal process itself which is fundamental to transformative adjudication and is linked to the broader framework of section 34 of the Constitution which provides for access to justice. Access to justice through the lens of the appeal process presents an opportunity, as in this case, to give meaning and substance to the foundations of transformative adjudication. The oversight role that is played through the appeal process reinforces the self-policing principle on the quality of produced jurisprudence.

The African judiciaries also do not appear to engage in transformative adjudication but are seen to fulfil the advancement of 'self-policing' through the lens of the principle of 'independence'. The Zambian Constitutional Court was put in a pedestal to determine the eligibility of former President Edgar Lungu to stand for the year 2026 presidential elections. In *Michelo Chizombe v Edgar Chagwa Lungu*[99] the Court decided that it will take a full trial court to determine former President Lungu's eligibility to stand for the forthcoming elections to be held in the year 2026 in Zambia. In this matter, Chizomba sought to challenge former President Lungu's participation as 'the Patriotic Party presidential candidate in the elections that were held on 12 August 2021 and his eligibility to participate in future presidential elections on the ground that he has served two terms'.[100] It was contended that former President Lungu held office under the 1991 Constitution and secondly under the Zambian Constitution as amended by Act 2 of 2016.[101] The foundation of this petition was that 'former President Edgar Lungu was ineligible to seek a presidential election for a third term'.[102] On the other hand, former President Lungu asserted that the issues raised by the petitioner were already ventilated by the courts and the petition was nothing more than an abuse of the court process.[103] Thus, the Constitutional Court reasoned that this matter raised a point of law which is highly contested and is more suited for its merits to be determined at a full trial.[104]

The Ecowas Court of Justice in Abuja *Obianuju Catherine Udeh v Federal Republic of Nigeria*[105] also entered the fray on self-policing for judicial independence and found the Republic of Nigeria to have violated many of the fundamental rights which are included the African Charter on Human and Peoples Rights.[106] In this matter, the applicant held, as they alleged, participated in a peaceful protest with other persons at the Lekki Toll Gate in Nigeria on 20 and 21 October 2020 which was directed at the Special Anti-Robbery Squad, a unit of the Nigerian Police Force as a result of their harassment and brutality which is contrary to their mandate.[107] The respondents averred that the applicants were a group of *hoodlums* (unlawful protesters).[108] The Court considered the issue of jurisdiction and admissibility in the determination of jurisdiction in this matter. to determine its adjudication. The Court

[99]2023/CCZ/0021) [2024] ZMCC 14 (9 July 2024). Hereinafter '*Chizomba'*.
[100]*Chizomba* para 2.1.
[101]*Chizombe.*
[102]*Chizombe,* para 2.2.
[103]*Chizomba* para 3.
[104]See *Chizomba,* paras 7.5-7.6.
[105]ECW/CCJ/JUD/29/24. Hereinafter *Nigeria.*
[106]*Nigeria* para 1.
[107]*Nigeria* paras 23-24.
[108]*Nigeria* para 39.

relied on General Principle 5(a) of the United Nations Basic Principles of the Use of Force and Fire-Arms by Law Enforcement which requires the use of minimal force in dispersing the crowd and found the rights of protesters to have been violated.[109]

It is not intended to exhaust the case law, but it is evident that the judiciaries in Africa continue to be under immense pressure from members of the public who, in the context of the *MKP* judgment was also politically motivated as the country was in an election mode that was heavily contested. The face of former President Zuma as a forerunner for the MKP campaign became the subject of contention and viewed as being vilified by the governing party at the time through the courts that became a centre of attention regarding the handling of this matter by the judiciary. In this case, the Courts were not swayed by public and political influence in the adjudication of the matters but affirmed the 'independence' by adhering to the principles of upholding the 'rule of law' as a foundational value in transformative adjudication. Similarly, former President Lungu of Zambia, his desire for re-election for a third term is reflective of Africa being mirrored by high profile people that use their influence and social standing to influence public opinion regarding the role of the courts. The judiciary is unique, and its reasoning does not depend on public opinion as the latter is not a final determinant on the quality of reasoning to be proffered by the courts in the production of 'just remedies'.

In *Prince Mbonisi* and *MKP* judgments, including the *Lungu* and *Nigeria* judgments, the principle of 'independence' remained core and the judiciary did not succumb to the litigants holding highest office or with much influence in the country. It is in this instance that the courts are commended for upholding independence, in turn, showing an 'ability to police' themselves without squandering to the highest bidder at the expense of ensuring the advancement of transformative adjudication that gives substance and meaning to the law for South Africa's democratisation process.

The 30 years of transformative adjudication were long given effect during the infancy stage of South Africa's constitutional identity when the Constitutional Court in the *Certification of the Constitution of the Republic of South Africa*[110] judgment showed an ability to '*self-police*' when it declared the legitimacy of the Constitution as in compliance with the 34 Principles that were adopted and served as a framework upon which to test adherence to the post-1994 vision in transforming the various facets of human lives in all systems of governance in the Republic. These judgments are an affirmation of judicial accountability towards the attainment of transformative jurisprudence through the lens of 'self-policing'. The judiciary crafted South Africa's transformative identity which is grounded in the Constitution. It also addressed the issues relating to transformation of the customary law processes, electoral laws for and general rights framework which are of great relevance for South Africa and the African continent.

It is deduced from the discussion of the cases herein that transformative adjudication has the potential to contribute to good governance through the lens of 'self-policing' without which the principle of judicial independence will wade into thin air. South Africans, as evidenced by the *MKP* judgment, contributed to the tensions that had been brewing and public debates about the judiciary being labelled

[109] *Nigeria* para 137.
[110] *1996 (10) 1253 BCLR (CC).*

as 'untransformed' and used by the political elite to fight political battles.[111] It is in situations of this nature that the judiciary is commended for showing its 'self-policing' ability in contributing to a transformed adjudication process that is not influenced by public opinion or the status of the office or influence the person holds.

Conclusion

Transformative adjudication has been a thorny subject since the attainment of democracy in post-apartheid South Africa. The quality of jurisprudence produced contributes to the ideals of the new dispensation by effecting the needed societal changes. The cases discussed herein are indicative of the progress made so far which is commended and saw the infusion of 'self-policing' in advancing the principle of judicial independence. It is also acknowledged that transforming the jurisprudence is progressive in nature and requires an independent judiciary that will first internalise its transformative processes. The cases herein are indicative of judicial accountability in 'self-policing' without undermining the main goal of transformation.

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