

Namibia's Perplexing Presidential Immunity



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1. Introduction

This paper examines the Namibian President's broad immunity from most civil and criminal proceedings by virtue of Article 31 of the Namibian Constitution. It looks at the notion of presidential immunity and the widely varying approaches to this issue in other countries, particularly in Africa. This comparison shows that the degree of immunity provided by the Namibian Constitution is particularly far-reaching, and out of step with the spirit and tenor of the Constitution as a whole.¹

Throughout the paper, a distinction is drawn between civil and criminal liability. Non-lawyers may need to know that civil liability refers to being held accountable for the harms caused by a wrongful act, usually by paying damages for the loss or injury suffered. Criminal liability refers to being put on trial by the State for a crime, and subjected to the penalties for that crime if convicted (usually in the form of a fine or imprisonment).

Note that this paper does *not* address the issue of prosecution of current or former heads of state for crimes in regional or international forums such as the International Criminal Court,² but focuses exclusively on presidential immunity at the national level.

Note also that the paper refers generally to "presidents" as the most common nomenclature in use in the region for heads of state, but this term is intended to encompass heads of state who are identified with other designations.

2. The notion of presidential immunity

The concept of presidential immunity generally began as "sovereign immunity". It refers to the degree to which the courts can hold a sovereign (or head of state) accountable, and it can refer to either the personal accountability of the individual who holds the office or to the accountability of the institution.

Historically, sovereigns, as personifications of the State, were granted absolute immunity.³ The common law maxim that "*the King can do no wrong*" was adopted in many Anglophone

¹ Funding for this paper was generously provided by the Hanns Seidel Foundation, which supports projects that strengthen civil society and civic involvement and promote the rule of law.

² For an interesting discussion of that issue, see *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) (on the failure of the South African government to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, holding that this was inconsistent with South Africa's obligations in terms of the Rome Statute as applied to South Africa by the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002; finding also that there was no form of immunity, including head-of-state immunity, that constituted a bar to South Africa's cooperation with the ICC by way of arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation had been made).

³ Albert Dicey, "*Introduction to the study of the Law of the Constitution*", London: Macmillan & Co Ltd, 1945, at 527.

countries.⁴ As one article comments, “[c]urbing the authority of absolute monarchs has been one of the principal aims of modern representative governments”.⁵ In modern times, most constitutions grant presidents some immunity, in an absolute or conditional form, to enable them to discharge their duties without constraint or distraction.

The nature and scope of presidential immunity varies from country to country. Constitutional provisions that grant immunity typically specify the limits of presidential liability during the time that the President holds office, and sometimes after the term of office ends. Immunity often applies to actions carried out in the course of exercising official duties, and infrequently to *anything* done by an individual whilst holding office as president. There are sometimes different rules for civil liability and criminal liability.

The concept of immunity for public officials in general can be grouped into the broad categories of *absolute immunity* and *qualified immunity*. *Absolute immunity* confers total immunity from criminal prosecution and civil proceedings, while *qualified immunity* (as the term is used in the United States) shields an individual from personal civil liability for reasonable good faith actions which lie within the scope of official duties – with the qualification being that this immunity does not apply in situations where the public official violated a statutory or constitutional right which was clearly established at the time.⁶

Our use of these terms is slightly different; in this discussion, we use the following terminology:

- *absolute immunity*, meaning immunity with no, or virtually no, exceptions;
- *qualified immunity*, meaning immunity for actions in good faith which lie within the scope of official duties;
- *conditional immunity*, meaning immunity that can be overcome if certain requirements are met, such as bringing a court action within a particular time frame or with authorisation from Parliament.

⁴ Guy I Seidman, “The Origins of Accountability: Everything I Know About the Sovereigns’ Immunity, I Learned from King Henry III”, 49 (2) *Saint Louis University Law Journal* 393 (Winter 2004/2005). “The maxim has actually stood for four different propositions at various points in English legal history. The first is that the King is literally above the law and cannot do wrong by definition; this understanding of the maxim reached its zenith in the 17th century under the banner of the ‘divine right of Kings’. A second meaning is that even if the King’s actions are not lawful by definition, there is no remedy for royal wrongdoing through ordinary legal channels; one might term this a ‘procedural’ or ‘remedial’ understanding of the maxim. A third meaning, which actually represents the true historical origin of the maxim, is that the King has no power or capacity to do wrong.... A fourth meaning is precisely the opposite of the first: it means that the King is eminently *capable* of doing wrong but cannot do so *lawfully*.” (At Introduction; unpaginated online version).

⁵ Ibid.

⁶ “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v Callahan* 555 US 223 (2009) at section II.A (unpaginated online version). For a short overview of qualified immunity, see the [Wex entry](#) on “Qualified immunity”. (Wex is a free legal dictionary and encyclopaedia featuring entries collaboratively created and edited by legal experts. It is hosted by the Legal Information Institute at Cornell Law School.) See also Kit Kinports, “The Supreme Court’s Quiet Expansion of Qualified Immunity”, 100 *Minnesota Law Review* 62 (2016); Colin Rolfs, “Qualified Immunity After *Pearson v. Callahan*”, 59 *UCLA Law Review* 468 (2011); and Theodore P Stein, “*Nixon v. Fitzgerald*: Presidential Immunity as a Constitutional Imperative”, 32 *Catholic University Law Review* 759 (1983).

However, as will be seen below, there are many more nuances in the differing approaches to presidential immunity around the world, which can be usefully grouped into a larger number of more finely-sliced categories.

3. Presidential immunity in Namibia

3.1 The immunity provision in the Namibian Constitution

The Namibian Constitution has an extensive provision on presidential immunity. In terms of Article 31, a President who is in office can be sued in *civil* proceedings for acts which are part of his or her official duties – and this happens from time to time in practice in Namibia. However, no *criminal* cases can be brought against a President during his or her tenure in office.

The President can be sued on civil or criminal grounds for personal actions which were *not* part of his or her official Presidential duties only *after* the end of the term of office – and even then *only if* Parliament has removed the President from office for serious misconduct by a two-thirds vote (ie impeachment) *and* passed a resolution saying that a court case against the President would be in the public interest. This is a high bar, meaning that the President's protection against civil and criminal lawsuits for *unofficial* actions is essentially absolute; any President facing impeachment who feared the possibility of being held civilly or criminally liable for personal wrongdoing could easily sidestep this eventuality by simply resigning before the impeachment process was finalised.

Article 28(2A)(f) accords the same immunity to a Vice-President acting as President.

NAMIBIAN CONSTITUTION

Article 31 – Immunity from Civil and Criminal Proceedings

(1) No person holding the office of President or performing the functions of President may be sued in any civil proceedings save where such proceedings concern an act done in his or her official capacity as President.

(2) No person holding the office of President shall be charged with any criminal offence or be amenable to the criminal jurisdiction of any Court in respect of any act allegedly performed, or any omission to perform any act, during his or her tenure of office as President.

(3) After a President has vacated that office:

- (a) no Court may entertain any action against him or her in any civil proceedings in respect of any act done in his or her official capacity as President;
- (b) a civil or criminal Court shall only have jurisdiction to entertain proceedings against him or her, in respect of acts of commission or omission alleged to have been perpetrated in his or her personal capacity whilst holding office as President, if Parliament by resolution has removed the President on the grounds specified in this Constitution and if a resolution is adopted by Parliament resolving that any such proceedings are justified in the public interest notwithstanding any damage such proceedings might cause to the dignity of the office of President.

To understand in more detail how the Namibian rules on presidential immunity would work in practice, let us consider some potential examples.

With respect to civil liability, consider an official act during the President's tenure in office such as the appointment of certain persons to certain positions, or some other Presidential action such as setting election dates by proclamation. Such actions can be, and have been, legally challenged during the President's tenure.⁷ However, it would in most instances be the State that is actually being sued in such cases, represented by the President as the Head of State, and not the President as an individual.⁸ Once the President leaves office, he or she can incur no personal liability for official actions taken whilst in office as President.

This possibility of civil action against a sitting President in respect of official actions, which is allowed under immunity provisions in many other African constitutions, was explained in a 2009 High Court case in Botswana:

Until relatively recently in the history of the Roman Dutch and the English Law, the doctrine that "the King is above the law" was interpreted to mean that no civil action could be instituted against the ruler, and, by extension, against the State. However, in modern times it has been recognized that this is wrong. Legislation has been passed to provide that the State may be sued and that the President may be sued in his official capacity.⁹

An example of an official action which might give rise to criminal liability is harder to pose – could a crime ever be considered to fall within the scope of official duties? For example, could an action which constituted torture or genocide ever be considered part of an official act, or would the illegality of such practices under domestic or international law remove them from the realm of "official acts"? International and national case law is inconsistent on the answer to this question in respect of torture, with views on this question depending in part on the context in which the question arises. However, as one example, the Canadian Supreme Court recently held that the very concept of torture refers to violence which is carried out by a person acting in an official capacity, and that the "heinous nature of torture" does not transform it into a private act undertaken outside the official capacity of state officials; the Court held that, on the contrary, "it is the state-sanctioned or official nature of torture that makes it such a despicable crime".¹⁰

⁷ See, for example, *Lameck and Another v President of the Republic of Namibia and Others* 2012 (1) NR 255 (HC) (questioning whether the same individual may simultaneously be Attorney-General and Minister of Justice); *Garoeb and Others v President of the Republic of Namibia and Others* 1992 NR 342 (HC) (questioning whether it is permissible for regional council elections and local authority elections to be held on the same dates).

⁸ See, for example, *Visagie v Government of the Republic of Namibia and Others* 2017 (2) NR 488 (HC) at paras 158-159 (Geier J dissenting); Charles Manga Fombad, "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects", 59 *Buffalo Law Review* 1007 (2011) at 1056: "Finally, another problem that needs to be urgently addressed is the tendency for many African presidents to abuse the absolute immunity which they enjoy from both criminal and civil proceedings, although in many Anglophone countries, such immunity does not apply to civil wrongs committed in the discharge of official duties, which are usually imputable to the state."

⁹ *Motswaledi v Botswana Democratic Party*, High Court of Botswana, High Court Case No. MAHLB-000486-09, 2 October 2009 at para 20.

¹⁰ *Kazemi Estate v Islamic Republic of Iran* [2014] 3 SCR 176 at para 95 (majority opinion *per* McLachlin CJ). The dissenting opinion (Abella J) points out that state practice "is evolving over whether torture can qualify as official state

Regardless of the position with respect to *civil* liability, Namibia's constitutional provisions on immunity would completely and permanently shield a sitting or former President from *criminal* accountability for torture in a Namibian court. It would not matter for this purpose whether torture was considered to be an official act or an act perpetrated in the President's personal capacity. Article 31(2) protects a sitting President (a "person holding the office of President") against criminal prosecution in respect of "any act allegedly performed, or any omission to perform any act, during his or her tenure of office as President" – a broad wording based on timing rather than function.

After a Namibian President is no longer in office, there would be only a narrow possibility for criminal accountability for torture. ***If the Namibian courts found that torture was part of an official act***, then the possibility of liability depends on the interpretation of Article 31(3)(b) – which is somewhat ambiguous and would turn on the understanding of the bolded words in the relevant part of that provision quoted here:

After a President has vacated that office...

(b) a civil or criminal Court shall **only** have jurisdiction to entertain proceedings against him or her, **in respect of acts of commission or omission alleged to have been perpetrated in his or her personal capacity whilst holding office as President**, if...

One possible reading is that *this provision limits liability only for personal actions and is silent on liability for official actions* – an unlikely interpretation given the comprehensive tenor of the provision as a whole. A more likely possible reading is that *a court has jurisdiction only over a former president's personal actions, subject to the limitations set forth in the provision, and no jurisdiction whatsoever over a former president's official actions after the term of office has ended*.

And, ***if the Namibian courts conversely found that torture committed by a former Namibian President had been carried out in that President's personal capacity***, then that President could face criminal (and civil) liability after leaving office *only* if Parliament authorised this after the President had been impeached (Article 31(3)).

Now consider unofficial actions more generally. Suppose that the individual who is holding the office of President does something egregious whilst in office, such as assaulting his wife or engaging in corrupt activities for personal profit. The President would be immune from both civil and criminal lawsuits for such unofficial actions whilst in office. However, even after leaving office, the President could face a civil lawsuit or criminal prosecution for unofficial actions **only** if Parliament authorized this after an impeachment.

A President who resigns, or fails to be re-elected for a second term, or leaves office at the expiry of the maximum term of office, can **never** be held accountable, civilly or criminally, for unofficial

conduct" and sees "no reason to include torture in the category of official state conduct attracting individual immunity" (at paras 173-174).

This issue has been considered in various forums in a variety of contexts. See, for example, United States: *Yousuf v Samantar* 699 F.3d 763 (4th Cir. 2012), cert denied 575 US 5 (US 9 March 2015) (No. 13-1361); UK: *Regina v Bartle, ex parte Pinochet* 38 I.L.M. 581, 593-95 (H.L. 1999); European Court of Human Rights: *Jones v United Kingdom*, Nos. 34356/06 and 40528/06, ECHR 2014.

actions such as assault, rape, fraud or corruption. And, as noted above, any president facing impeachment could insulate himself or herself from liability by the simple expedient of a quick resignation.

PRESIDENTIAL IMMUNITY IN NAMIBIA	
OFFICIAL ACTIONS	
Civil liability	No immunity
Criminal liability	Absolute immunity (in terms of the most likely interpretation of Art 31(3)(b))
UNOFFICIAL ACTIONS	
Civil liability	<i>Whilst in office:</i> Absolute immunity
	<i>After leaving office:</i> Virtually absolute immunity (liability <i>only if</i> removed from office by Parliament and lawsuit authorised by Parliament)
Criminal liability	<i>Whilst in office:</i> Absolute immunity
	<i>After leaving office:</i> Virtually absolute immunity (liability <i>only if</i> removed from office by Parliament and lawsuit authorised by Parliament)

Despite the broad constitutional provisions on presidential immunity, it should be noted the Namibian Constitution does include some other mechanisms for holding a President accountable.

Parliament can remove a president from office by a two-thirds vote on the grounds that he or she is guilty of a violation of the Constitution or a serious violation of some other Namibian laws. (This is essentially “**impeachment**”, although the Namibian Constitution does not use that term.) One can imagine that, in the unlikely event that Parliament took such a step, Parliament might at the same time consider a resolution in terms of Article 31 authorising a court case against the removed president after he or she left office in respect of the offending behaviour. However, impeachment is not a very practical mechanism for implementing accountability as it involves a “cumbersome political process” that can often be easily frustrated by the dominant party.¹¹

NAMIBIAN CONSTITUTION	
Article 29 – Term of Office	

(2) A President shall be removed from office if a two-thirds majority of all the members of the National Assembly, confirmed by a two-thirds majority of all the members of the National Council, adopts a resolution impeaching the President on the ground that he or she has been guilty of a violation of the Constitution or guilty of a serious violation of the laws of the land or otherwise guilty of such gross misconduct or ineptitude as to render him or her unfit to hold with dignity and honour the office of President.	

¹¹ Charles Manga Fombad, “Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects”, 59 *Buffalo Law Review* 1007 (2011) at 1057.

A more feasible mechanism of accountability lies in the National Assembly's less drastic power under Article 32 of the Namibian Constitution to vote by a two-thirds majority to “**review, reverse or correct**” any action taken by the President pursuant to the functions, powers and duties given to the President by the Constitution. In such a case, the President would remain in office, however, and would continue to enjoy complete criminal immunity and civil immunity for unofficial acts as well as criminal immunity for all official acts.

NAMIBIAN CONSTITUTION

Article 32 – Functions, Powers and Duties

(9) Subject to the provisions of this Constitution and save where this Constitution otherwise provides, any action taken by the President pursuant to any power vested in the President by the terms of this Article shall be capable of being reviewed, reversed or corrected on such terms as are deemed expedient and proper should there be a resolution proposed by at least one-third of all the members of the National Assembly and passed by a two-thirds majority of all the members of the National Assembly disapproving any such action and resolving to review, reverse or correct it.

(10) Notwithstanding the review, reversal or correction of any action in terms of Sub-Article (9) hereof, all actions performed pursuant to any such action during the period preceding such review, reversal or correction shall be deemed to be valid and effective in law, until and unless Parliament otherwise enacts.

The upshot is that, while there are some mechanisms which allow Parliament to check abuses of power by *sitting* Presidents, Namibian presidents *who have left office without being impeached* enjoy lifelong immunity from criminal responsibility for *anything* they did whilst in office, official or unofficial. In addition, a President who left office without being impeached holds lifelong immunity for civil liability for *unofficial* acts, and (once out of office) can no longer be held civilly liable on a personal basis for any *official* acts. Furthermore, the possibility of being civilly liable for official acts *before* leaving office would not entail personal liability on the part of the President, because any damages awarded in respect of official acts would be assessed against the “Office of the President” (ie, the State) and not against the President as an individual. If the acts in question fell outside the scope of official duties, then the immunity would kick in and the President could not be held liable.

3.2 The origin of the immunity provision

To understand the origin of Namibia's provision on presidential immunity, a brief explanation of the constitutional drafting process is required.¹² Namibia's first free and fair elections, held in

¹² The account is drawn primarily from Marinus Wiechers, “Namibia's Long Walk to Freedom: The Role of Constitution Making in the Making of an Independent Namibia” in Laurel E Miller, ed, *Framing the State in Times of Transition: Case Studies in Constitution Making*, Washington, DC: United States Institute of Peace, 2010 at 86-91. As indicated in the text, Wiechers was a member of the panel of three constitutional experts who assisted the Constituent Assembly. See also Hage Geingob, “Drafting of Namibia's Constitution” at 89-ff and Dirk Mudge, “The art of compromise: Constitution-making in Namibia” at 133-ff, both chapters in Anton Bösl, Nico Horn & André du Pisani, eds, *Constitutional democracy in Namibia: A critical analysis after two decades*, Windhoek: Konrad Adenauer Foundation, 2010.

November 1989, elected a Constituent Assembly which was tasked with drawing up a constitution for an independent Namibia. All of the political parties represented in the Constituent Assembly were invited to submit proposals for the new constitution. The proposals from SWAPO, the majority party and liberation movement, had particular significance. They were prepared by a SWAPO drafting committee and reportedly included provisions similar to those put forward by various other participating parties. Because the various parties “recognised elements of their own proposals in the SWAPO draft”, the Constituent Assembly unanimously agreed to adopt the SWAPO proposals as “a working document that would serve as the basis for the drafting of the constitution”.¹³ The document thus became a general Working Paper rather than a proposal identified solely with SWAPO.

The Constituent Assembly also appointed a panel of three constitutional experts, all of whom were South African lawyers: Advocate Arthur Chaskalson (now deceased), Professor Marinus Wiechers (now deceased) and Professor Gerhard Erasmus. These three lawyers were engaged to prepare a draft constitution based on the Working Paper to serve as a basis for discussion, and to answer legal questions. The Constituent Assembly appointed a twelve-person Constitutional Committee,¹⁴ chaired by Hon Hage Geingob (who became the first Prime Minister of independent Namibia and was elected as Namibia’s third president in 2014) and including representatives of all the political parties in the Constituent Assembly. The Committee met in closed sessions to discuss the draft with the three expert lawyers, and eventually adopted a final draft for consideration by the full Constituent Assembly. After a brief period of discussion and debate, the Constituent Assembly adopted the Namibian Constitution unanimously.

The Committee proceedings indicate that the draft provision on presidential immunity came from the Working Paper.¹⁵ There is only a brief discussion of presidential immunity in the Committee debates.¹⁶ There was no disagreement between political parties on this issue, but rather just explication of the precise effect of the provision by the experts.¹⁷ Committee members from two different parties emphasised that the Constitution should not put the President above the law. Professor Wiechers responded as follows:

¹³ Marinus Wiechers, “[Namibia’s Long Walk to Freedom: The Role of Constitution Making in the Making of an Independent Namibia](#)” in Laurel E Miller, ed, *Framing the State in Times of Transition: Case Studies in Constitution Making*, Washington, DC: United States Institute of Peace, 2010 at 88.

¹⁴ The Committee’s formal title was “Standing Committee on Standing Rules and Orders and Internal Arrangements (Constitutional Matters)”.

¹⁵ *Standing Committee on Standing Rules and Orders and Internal Arrangements (Constituent Committee)*, 18 January 1990 at 116.

¹⁶ We consulted two persons who were directly involved in the drafting and discussion of the Namibian Constitution, but neither could recall the reasoning behind the immunity provision. Personal communications by email and telephone, November-December 2018. This is not surprising since the issue received little attention at all during the debates. It must be remembered that the entire process of drafting and debating the constitution was compressed into a period of only two months. The Constituent Assembly met for the first time on 21 November 1989, and the Namibian Constitution was adopted on 22 January 1990. Marinus Wiechers, “[Namibia’s Long Walk to Freedom: The Role of Constitution Making in the Making of an Independent Namibia](#)” in Laurel E Miller, ed, *Framing the State in Times of Transition: Case Studies in Constitution Making*, Washington, DC: United States Institute of Peace, 2010 at 88, 90.

¹⁷ The following summary and quotes come from the *Standing Committee on Standing Rules and Orders and Internal Arrangements (Constituent Committee)*, 18 January 1990 at 113-117.

What this really says, in his official capacity he cannot be sued personally in civil proceedings. It doesn't mean to say that the state cannot be held liable for official acts, but not the president. It is an immunity for him as [a] person.

In response to a question on whether there was a contradiction between providing immunity against civil liability for official acts for a former president but not a sitting one, Professor Wiechers stated:

They are totally in conformity. (1) says that the office of the president or the president exercising official functions, can be sued and that is state liability, it is practice. If he is no longer president, just an ordinary human being, you will have to take his successor, and it also says while he is in official capacity you don't drag your head of state into suing [sic] him for R30 here or there, he is immune in that capacity, in his personal capacity, but not officially. You will always be able to take the president in his official capacity to court, as long as he is president.

The discussion then turned to lawsuits against presidents arising from their personal capacity. One Committee member asked if someone could sue a president for stealing a car, and another asked about a civil suit against a president for a divorce. Professor Wiechers replied: "[I]t is not that there is not a ground of action against him, that remains, but he cannot be taken to court." He assured the Committee members that this does not place the President above the law. Advocate Chaskalson then stated:

I think that what you do is that if you have a president who does something like steals your car, you ask for him to be impeached and parliament will remove him from office. The remedy is that if a person does something which is dishonourable, you remove the person from office and then the person ceases to have the presidential immunity which attaches whilst he holds office. Then the official capacity he no longer holds, somebody else holds the office of president and then will be sued in the official capacity for that. In other words, what it is saying is that parliament must deal, the president mustn't be dragged through the courts, if there are complaints about the president, start an impeachment procedure in parliament.

Professor Wiechers added that criminal liability would work in the same way, stating: "If there is criminal liability, the court of parliament will deal with it." (One could argue that the discussion failed to note the rarity of impeachment, the high bar which is required for this step or the possibility that a president who had committed serious misdeeds might resign before impeachment occurred to avoid criminal and civil liability.)

The issue of divorce was raised again, with one Committee member noting that this would clearly not be a matter that could be addressed by impeachment.¹⁸ Professor Wiechers stated, without explanation, that "that would be excluded". (We question the accuracy of this assurance, since Article 31(1) states that no one holding the office of President may be sued in "any civil proceedings" unless the suit concerns an act done in his or her official capacity as President – and divorce is undoubtedly a "civil proceeding". There would be no bar to suing a former president for divorce, however.) Adv Chaskalson suggested that the clause protecting sitting presidents from

¹⁸ As point of comparison, the divorce of Greek Prime Minister Andreas Papandreu whilst he was in office was mentioned – probably because this divorce took place in June 1989 and would have been recently in the news at the time of the Committee debates. See, for example, Associated Press, "[Athens Court Grants Papandreu a Divorce From Wife of 38 Years](#)", *LA Times*, 10 June 1989.

civil proceedings could be qualified with a phrase such as “save with the consent of the Speaker of the House of Assembly”, but at the same time he expressed concern that this might be “derogating from the office of the president” and so this suggestion was not taken up by the Committee.

One Committee member suggested that subarticle (3)(b) could perhaps be simplified or broken up into more sections to be easier to comprehend, but this suggestion was not taken forward. The debate then moved onto another topic.

There was no discussion of presidential immunity at all in debates of the full Constituent Assembly prior to the adoption of the Namibian Constitution.¹⁹

A diligent search also turned up little in the way of commentary on Article 31, although one academic writer has cited this provision as evidence that “although the Namibian president is an executive president with real power, and no mere figure-head, he or she does enjoy a privileged status in certain respects”.²⁰

3.3 Other official immunities in Namibia

In the absence of information about the reasons for the inclusion of such a sweeping presidential immunity in the Namibian Constitution, we must look at the degrees of immunity afforded to judges and other state officials in Namibia in order to contextualise our analysis.

(a) Judicial branch: Qualified judicial immunity

The question of judicial immunity in Namibia is not addressed by the Constitution, but is determined by the common law.

At common law, a judicial officer is not personally liable if damages are occasioned to another arising from decisions made in good faith and without malice in the performance of judicial functions. A judicial officer is however personally liable for his or her wrongful conduct whilst

¹⁹ The Constituent Assembly Debates report only: “ARTICLE 31 PUT AND AGREED TO”. *Constituent Assembly Debates*, Volume 1, 21 November 1989-31 January 1990 at 259 (31 January 1990).

²⁰ Gretchen Carpenter. “Chapter 5 – The President”, in Dawid van Wyk, Marinus Wiechers and Romaine Hill, eds, *Namibia Constitutional and International Law Issues*, Pretoria: VerLoren van Themaat Centre for Public Law Studies, University of South Africa, 1991 at 45.

Article 31 is summarised without comment in SK Amoo, *An Introduction to Namibian Law*, Windhoek: Macmillan Education Namibia Publishers (Pty) Ltd, 2008 at 315. It is mentioned only in passing in G Naldi, *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights*, Cape Town: Juta & Co, 1995 (at 16), and not at all in Joseph Diescho, *The Namibian Constitution in Perspective*, Windhoek: Gamsberg Macmillan, 1994.

Article 31 is summarised without specific comment in Oliver C Ruppel & Lotta N Ambunda, *The Justice Sector & the Rule of Law in Namibia: Framework, Selected Legal Aspects and Cases*, Windhoek: Namibia Institute for Democracy & Human Rights and Documentation Centre, undated at 52-53. This book’s general discussion of government immunities places them in the context of the State Liability Act 20 of 1957, but that South African statute was not ever made applicable to Namibia. The Crown Liabilities Act 1 of 1910, which was replaced in South Africa by the State Liability Act 20 of 1957, is still in force in Namibia. See *Minister of Defence v Mwandinghi* 1993 NR 63 (HC) and *Visagie v Government of the Republic of Namibia & Others* 2017 (2) NR 488 (HC) (discussed in the dissenting opinion *per* Geier J).

performing the judicial function if such conduct is proven to be *male fide* [in bad faith], malicious or fraudulent.²¹

The Supreme Court has elaborated on this rule, noting that *male fides*, malice and fraud give rise to personal liability because they “are vices that are unrelated to the judicial function”.²² The common-law position on judicial immunity in Namibia has been described as a “qualified personal immunity”.²³

In the case of *Visagie v Government of the Republic of Namibia and Others*, both the High Court and the Supreme Court of Namibia considered the related question of whether the *State* can be held liable for breaches of fundamental rights committed by judicial officers in the exercise of their judicial functions.²⁴ Although not directly concerned with the immunity of the individual judicial officer involved, this case does discuss the interplay between liability and separation of powers.

The issues considered by the High Court, assuming for the purposes of the stated case that the magistrate had behaved in bad faith in several fundamental ways in the course of a criminal trial,²⁵ were:

1. Can the State be held liable for the judicial acts of a magistrate on account of the fact that, while presiding over the case of the plaintiff, the magistrate was exercising the judicial power of the State of the Republic of Namibia?
2. Is the answer to this question affected by the constitutionally entrenched principles of the independence of the judiciary, the rule of law and the separation of powers doctrine?

²¹ *Visagie v Government of the Republic of Namibia and Others*, Case No. SA 34/2017, Supreme Court of Namibia, 3 December 2018 at para 5. See also *Gurirab v Government of the Republic of Namibia and Others* 2006 (2) NR 485 (SC) at para 24, and *Teek v President of the Republic of Namibia & Others* 2015 (1) NR 58 (SC).

²² *Visagie v Government of the Republic of Namibia and Others*, Case No. SA 34/2017, Supreme Court of Namibia, 3 December 2018 at para 79.

²³ See *Visagie v Government of the Republic of Namibia and Others* 2017 (2) NR 488 (HC) (Geier J, dissenting opinion) at paras 87, 89.

²⁴ *Visagie v Government of the Republic of Namibia and Others* 2017 (2) NR 488 (HC), confirmed on appeal: Case No. SA 34/2017, Supreme Court of Namibia, 3 December 2018 (unanimous opinion *per* Damaseb DCJ).

²⁵ The following facts were agreed for the purpose of adjudication solely on the question of law:

- 4.1 Plaintiff was arrested during March 1998 and three charges were levelled against the plaintiff: fraud, corruption (section 2 of Ordinance 2 of 1928) and contravention of section 56(e) of Act 7 of 1993 relating to the alleged falsification or fabrication of a passport;
- 4.2 Plaintiff appeared from time to time before the second defendant at the Magistrate’s Court at Windhoek from 1998 until 20 March 2003;
- 4.3 On 2 August 2000 the State closed its case;
- 4.4 In the course of acting as the presiding officer in the Magistrate’s Court, the second defendant -
 - (a) attempted to intervene to prevent the State from closing its case;
 - (b) did not inform the plaintiff, his legal representatives or the prosecutor that the State’s case had been closed on a previous occasion;
 - (c) was determined to get a conviction against the plaintiff;
 - (d) unduly interfered with the State’s case;
 - (e) denied the plaintiff a fair trial.
- 4.5 The said actions or omissions of the second defendant were actuated by mala fides and/or fraud, as well as malice and/or improper conduct and/or procedural error and/or the grossest carelessness.

Id at para 5.

3. On the assumption that the allegations pleaded by the plaintiff against the Magistrate *in casu* are established, would the first (the State) and/or third (the Magistrates Commission) and/or fourth (the Attorney-General) defendants be liable?²⁶

Two of the three judges who heard the case held that the individual magistrate, and only that magistrate, was civilly liable for damages suffered as a result of the bad faith exercise of the judicial function. Their reasoning was that the judiciary is “an independent organ of state insofar as it concerns the exercise of the judicial functions”,²⁷ and that the constitutional separation of powers draws “a sharp and dividing line between the judiciary and the other organs of state”.²⁸

The dissenting opinion asserted that the State cannot be held vicariously liable for the wrongful acts of judicial officers because a judge is not an employee of the State,²⁹ but found a separate theory of state liability on the basis that the State as an entity acts through its constitutional organs and so must be liable when any of those organs breaches its legal or constitutional duties.³⁰ In other words, the dissenting opinion concluded that, when a judicial officer has behaved in a manner which is not protected by the shield of judicial immunity, it is permissible and appropriate for a court to hold the State liable to provide appropriate relief to the aggrieved party for the violation of his constitutional rights.³¹ The dissenting judge further asserted that this approach would be “not only in accord with the principles of the independence of the judiciary, the rule of law and the separation of powers doctrine”, but also a means of embracing “the important democratic core value of accountability, which permeates through these principles”.³² The dissenting judge would have held both the judicial officer and the State liable for the wrong at issue, but not the Magistrate’s Commission or the Attorney-General.³³

Most importantly for the present discussion, the dissenting opinion found it “apposite to again call to mind that immunity is, in principle, inconsistent with the rule of law”,³⁴ quoting with approval a statement from a UK case that the concept of immunity “should not be given any wider application than is absolutely necessary in the interests of the administration of justice”.³⁵

²⁶ Id at para 6.

²⁷ Id at para 21.

²⁸ Id at para 24.

²⁹ Id at para 88 (Geier J, dissenting).

³⁰ Id at paras 90-99, drawing heavily on the reasoning of *An Blascaod Mor A Teoranta v Commissioners of Public Works in Ireland & Ors* (4) [2000] 3 IR 565.

³¹ Id at paras 111-127.

³² Id at para 139. The liability which the dissenting judge posited would have been against the “State” (which includes all three branches of government) and not the “Government” (which is synonymous with the executive branch); the dissent asserted that this distinction would have made the proposed state liability consistent with judicial independence. Id at paras 158-159. The Supreme Court agreed on appeal that “the State” is a conglomerate of “the three organs of State of which the President of the Republic is the public face”, but found that nothing turned on the citation of the “Government” as a defendant in the case before it. *Visagie v Government of the Republic of Namibia and Others*, Case No. SA 34/2017, Supreme Court of Namibia, 3 December 2018 at paras 108-109.

³³ *Visagie v Government of the Republic of Namibia and Others* 2017 (2) NR 488 (HC) at paras 166-187 (Geier J, dissenting).

³⁴ Id at para 140.

³⁵ Ibid, quoting Lord Cooke in *Darker and Others v Chief Constable of the West Midlands Police* [2001] 1 AC 435 (HL).

The key point for purposes of comparison with presidential immunity is that all three judges in this case agreed that an individual judicial officer had no protection from liability for official acts which were not carried out in good faith, regardless of their views on whether or not the State was *also* liable to the aggrieved party in such circumstances.

On appeal, the Supreme Court agreed with the majority opinion of the High Court, holding that there was no need to create a new and additional remedy for a wronged party by holding the State liable for *male fides* by a judicial officer, since the judicial officer can be held personally liable for actions which fall outside the scope of the qualified judicial immunity established by the common law. The Supreme Court was particularly concerned about *joint* liability involving the State and a judicial officer, which could lead to forms of cooperation in defending a claim that might undermine judicial independence.³⁶ In fact, most of the concerns cited in the Supreme Court judgment related to the problems which could arise from State liability *in combination with* the judicial officer's personal liability, and so do not concern the issue of immunity for judicial officers themselves.³⁷

It is particularly germane to this discussion that one consideration which the Supreme Court emphasised was that putting liability on the State for the *male fides* of a judicial officer would essentially be “indemnifying rogue judicial officers who pervert the cause of justice”.³⁸

It is also noteworthy that the Supreme Court was fortified in its view by the many potential remedies available to a person wronged by a judicial officer's misconduct – including, in addition to the personal liability of the judicial officer, the right of appeal, and the possibility of government legal aid to prosecute such an appeal, the provision for automatic review of certain decisions of magistrates' courts and the Supreme Court's extraordinary jurisdiction to review proceedings of lower tribunals in cases involving irregularities.³⁹ Thus, although not stated in so many words, the Court's reasoning emphasises the fact that there are many avenues to ensure accountability.

(b) Legislative branch: Limited immunity for Parliamentarians

Members of Parliament have immunity from civil and criminal proceedings in respect of statements made in Parliament, or matters brought before Parliament, in terms of the Powers, Privileges and Immunities of Parliament Act 17 of 1996.⁴⁰ This very limited protection is a common way of ensuring that Parliamentary debate is free and robust. The same statute also provides that no individual “shall be liable for damages or otherwise for anything done under the authority of Parliament.”⁴¹

³⁶ *Visagie v Government of the Republic of Namibia and Others*, Case No. SA 34/2017, Supreme Court of Namibia, 3 December 2018 at para 86. The Court observed that the State and the judicial officer would have “a common interest to resist the claim” and would likely develop joint legal strategy. The judicial officer would be assisted by the State's enormous resources in such a situation, which could create a public impression that the judicial officer will favour government in future cases out of a sense of gratitude.

³⁷ See *id* at paras 94-106.

³⁸ *Id* at para 87.

³⁹ *Id* at 116.

⁴⁰ Powers, Privileges and Immunities of Parliament Act 17 of 1996, s. 2 (which is misnumbered in the *Government Gazette*).

⁴¹ Powers, Privileges and Immunities of Parliament Act 17 of 1996, s. 5.

(c) Executive branch: Qualified immunity for state officials

A form of qualified immunity can be found in the indemnity provisions which are common in Namibian legislation, generally providing that state officials will not be personally liable for carrying out statutory duties in good faith.⁴² There are a few instances where such provisions exclude “liability” (as opposed to personal liability or state liability) for carrying out statutory duties in good faith.⁴³ This type of indemnity clause could warrant an entire research paper in its own right,⁴⁴ but the main point for purposes of this paper is that immunity from liability for state officials who carry out statutory duties is generally predicated on good faith. Unlike the President, state officials are not generally indemnified for wrongful acts.

(d) Comparison of official immunities in Namibia

Namibia’s broad and comprehensive presidential immunity is manifestly out of line with the other immunities which apply to the judicial, legislative and executive branches. The other immunities are narrowly drawn, and clearly aimed at ensuring that the good faith exercise of statutory and constitutional duties is not unduly constrained. These other immunities seem far more compatible with the constitutional imperative that all persons are equal before the law than the broad immunity afforded to the President.⁴⁵

Article 22 of the Namibian Constitution requires that any limitations on the fundamental rights and freedoms must be of general application and not “aimed at a particular individual”.⁴⁶ This does not apply to the right of equality before the law, which is not subject to limitation, and it does not apply to presidential immunity which is afforded by the Namibian Constitution itself rather than by a law enacted pursuant to the Constitution. However, Article 22 does underscore the fact that the Namibian Constitution affords strong weight to the idea that no individual should be singled out for special treatment in the eyes of the law. Against that background, the provision on presidential immunity strikes a discordant note.

⁴² See, for example, Namibian College of Open Learning Act 1 of 1997, s.22; Namibian Water Corporation Act 12 of 1997, s. 27; Communications Act 8 of 2009, s. 19; Employment Service Act 8 of 2011, s. 33; Disaster Risk Management Act 10 of 2012, s. 44.

⁴³ See, for example, Namibia Financial Institutions Supervisory Authority Act 3 of 2001, s. 31; Correctional Service Act 9 of 2012, s. 133; Prevention and Combating of Terrorist and Proliferation Activities Act 4 of 2014, s. 60; National Health Act 2 of 2015, s. 66.

⁴⁴ On the interpretation of such indemnities, see *Van Straten NO and Another v Namibia Financial Institutions Supervisory Authority and Another* 2016 (3) NR 747 (SC) (paras 95-98); *Simon’s Town Municipality v Dews and Another* 1993(1) SA 199 (A); *Knop v Johannesburg City Council* 1995 (2) SA 1 (A); *Carmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Minister of Justice and Constitutional Development v X* 2015 (1) SA 25 (SCA).

⁴⁵ *Namibian Constitution*, Article 10(1).

⁴⁶ Article 22 reads as follows:

Article 22 Limitation upon Fundamental Rights and Freedoms

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:

- (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
- (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

4. Presidential immunity in the African context

It is common for presidents in Africa to hold the positions of head of state (or chief of state⁴⁷), head of government and Commander-in-Chief of the Armed Forces. In Namibia, the President is the “Head of State and of the Government” and the “Commander-in-Chief of the Defence Force”.⁴⁸

African presidents often occupy central and even revered positions in their nations. They are also often regarded as symbols of the nation or national unity.⁴⁹ In some States in Africa, a president is regarded as the “Father of the Nation”.⁵⁰ In Namibia, for instance, Parliament enacted a statute which confers the status of “Founding Father of the Namibian Nation” on the first President of the Republic of Namibia, His Excellency Dr Sam Nujoma.⁵¹ Tanzania introduced a national public holiday, “Mwalimu Nyerere Day”, in 2002 to commemorate the death of that country’s Father of the Nation.⁵² By analogy, in most African societies, a father is traditionally a highly respected authority in the family, who often has the last say on decisions taken in the household. By the same token, a state president or king in an African nation may be viewed as having final authority which should not be challenged.⁵³

4.1 Forms of presidential immunity in African constitutions

In order to situate Namibia’s approach, we have tried to group African constitutional provisions on immunity in a way which facilitates analysis, moving roughly from the highest degree of immunity to the lowest.⁵⁴ The intent is not to be comprehensive, but rather to provide a sense of the variety of approaches to this issue in Africa. It should be noted that the categories which we have used to make sense of the variety of approaches are not clear-cut; the immunities of the various countries discussed could be organised in respect of criteria different from the ones we have chosen.⁵⁵

⁴⁷ The term Chief of State is common in Francophone Africa.

⁴⁸ *Namibian Constitution*, Article 27(1).

⁴⁹ For example, the *Constitution of Swaziland, 2005* says that the King “is a symbol of unity and the eternity of the Swazi nation” (Article 4(2)).

⁵⁰ See, for example, H Kwasi Prempeh, “Africa’s ‘constitutionalism revival’: False start or new dawn?”, 5 (3) *International Journal of Constitutional Law* 469 (2007), at Part 1 (online version is unpaginated).

⁵¹ *Conferment of Status of Founding Father of the Namibian Nation Act 16 of 2005*.

⁵² “Tanzania coins Mwalimu Nyerere Day”, *PanaPress*, 10 October 2002.

⁵³ See, for example, Chacha Bhoke Murungu, “Immunity of state officials and prosecution of international crimes in Africa”, PhD thesis, University of Pretoria, 2012 at “Chapter 5: Immunity and prosecution of state officials for international crimes in selected African jurisdictions”; Anita Powell, “Young Continent, Old Leaders: The Aging Face of African Governance”, *Voice of America*, 30 December 2016, quoting African politics scholar David Kiwuwa, who teaches international studies at Princeton University, as saying that some of Africa’s aging leaders “still attract reverence and unbridled loyalty from their supporters. Equally, being seen as ‘fathers of the nation,’ who led independence or liberation struggles, makes them irreproachable, irrespective of their shortcomings, extending their tenure.”

⁵⁴ The discussion here is indebted to that in Charles Manga Fombad & Enyinna Nwauche, “Africa’s Imperial Presidents: Immunity, Impunity and Accountability”, 5 (2) *African Journal of Legal Studies* 91 (2011) at 11-ff (online version), but we have not categorised the various immunities in the same way.

⁵⁵ For instance, our categories emphasise the distinctions between immunity for current and former presidents, rather than being organised around distinctions between civil and criminal liability.

Immunity provisions in many African countries have been revised in recent years, along with other democratic and liberal constitutional reforms, against the backdrop of the continent's "constitutionalism revival".⁵⁶ This means that some academic articles on presidential immunity in Africa are now out of date.

There are some States with constitutions which are silent on the issue of presidential immunity,⁵⁷ but this does not necessarily mean that there is no immunity. In South Africa, for instance, the rules on official immunity are to be found in the common law.

(a) Absolute lifelong immunity

One category of immunity grants the head of state "absolute immunity" from both civil and criminal proceedings. For instance, in **eSwatini** (formerly **Swaziland**),⁵⁸ the King is given absolute immunity from both criminal prosecutions and civil proceedings in respect of official and unofficial actions, and even from the obligation of giving testimony in a court proceeding.⁵⁹ Although this provision technically appears to provide immunity to the King only whilst he is in office, it essentially constitutes absolute life immunity, since (as with many monarchies) there is no term limit and therefore a term of office may last until the death of the monarch.

The constitutional immunity granted to the King apparently does not insulate the "King's Office" from lawsuits. In 2011, the High Court of Swaziland decided the *Maseko* case, in which cattle allegedly stolen from the King were confiscated by the police pursuant to the authority of a letter from the King's Office. The Court held that this letter could not constitute a lawful basis for the confiscation of the cattle, since there was no court order or other legal authority to support the action. It noted that "the King's Office, like all other institutions in this Kingdom, is governed by the rule of law and cannot do or authorize others to act in contravention of the law, whether the Constitution, legislation or the common law":⁶⁰

This office is particularly prone to close scrutiny in respect of its actions and utterances for the reason that it works very closely with and can be considered as His Majesty's hands, feet and in some cases, his mouth-piece. Any illegal actions it takes or irresponsible utterances it makes may

⁵⁶ See generally, H. Kwasi Prempeh, "Africa's 'constitutionalism revival: False start or new dawn?', 5(3) *International Journal of Constitutional Law* 469 (July 2007).

⁵⁷ Examples include the *Constitution of South Africa, 1996* (rev 2012), and the *Constitution of Mali, 1992*.

⁵⁸ According to the *United Nations*, the name of the country was changed from the Kingdom of Swaziland (former short form: Swaziland) to the Kingdom of Eswatini (short form: Eswatini) with effect from 19 April 2018. The word as it is used in Swaziland appears as eSwatini. A court case challenging the name change on the grounds that the King did not follow constitutional procedures in making the name change is pending. The Constitution continues to refer to "Swaziland". Lynsey Chutel, "eSwatini—or is it Swaziland?—is finding out how hard it is to rebrand a country", *Quartz Africa*, 10 July 2018; Nimrod Mabuza, "Swaziland's name change challenged in court", *Mail & Guardian*, 28 August 2018; Simon Allison, "Swaziland's name change debate is more about defining the exact limits of the king's authority", *Daily Maverick*, 4 September 2018.

⁵⁹ *Constitution of Swaziland, 2005*, Section 11. The office of "King" and "iNgwenyama" are held by the same person, but the positions have distinct (albeit overlapping) functions. The "King" is the head of the executive arm of government. The "iNgwenyama" is the customary office which entails customary functions. See Angelo Dube & Sibusiso Nhlabatsi, "The King can do no wrong: The impact of *The Law Society of Swaziland v Simelane NO & Others* on constitutionalism", 16 (1) *African Journal of Human Rights Law* (online version) (2016).

⁶⁰ *Maseko v Commissioner of Police & Another* (1778/09) [2011] SZHC 66 (17 January 2011); quotation from para 40.

be imputed to and have adverse consequences for the institution of the Monarchy, which should at all times be above reproach and not associated with any illegal, dishonourable or opprobrious act. It should be a model and epitome of sagacious, judicious, lawful and exemplary behaviour.⁶¹

In response to this ruling, the Chief Justice charged the High Court judge in question with insulting the King, leading to a disciplinary proceeding that resulted in the judge's dismissal.⁶² The High Court ruling was reversed on appeal, with the Supreme Court characterizing the issue as a conflict between Roman-Dutch common law and Swazi law and custom, and holding that the High Court had lacked jurisdiction over the dispute in question because it involved the King's property and was therefore a matter of Swazi law and custom.⁶³

The Chief Justice also issued a Practice Directive that essentially prohibited the country's courts from considering legal claims against the King or the "King's Office". This Practice Directive prohibited the acceptance by any court of "summonses or applications for civil claims against His Majesty the King and *Ingwenyama*, either directly or indirectly"⁶⁴ – which (according to the International Commission of Jurists) also effectively removed access to the courts for cases against corporations in which the King owned shares or had an interest as well as those against the King in his executive or personal capacity.⁶⁵

This led to a boycott of all the courts in Swaziland by the nation's lawyers.⁶⁶ The Law Society of Swaziland also filed a complaint against Swaziland with the African Commission on Human and Peoples' Rights, alleging that the Practice Directive –

- Amounts to an ouster of the courts' jurisdiction in all cases involving the King, his office or his interests;
- Removes effective protection of the law in Swaziland where the cause of action involves the King, his interests or his office being a statutory body;
- Violates a wide range of rights, specifically the right to access to justice and effective remedies inherent in all human rights enjoyed by Swazi citizens;
- Violates the independence and impartiality of the Judiciary;
- Violates the principle of equality before the law; and,
- Places the Chief Justice in this unusual position of being at the forefront of the ouster of the jurisdiction of the courts and an assault on judicial independence.⁶⁷

⁶¹ Id at para 41.

⁶² The basis for the charge of insult was the statement that it was "incomprehensible that His Majesty could conceivably speak with a forked tongue, saying one thing to his people [that they must avoid taking the law into their own hands] and then authorising his officers to do the opposite." *Commissioner of Police and Another v Maseko* (3/11) [2011] SZSC 15 (31 May 2011) at para 42; the Supreme Court, after quoting the High Court judgement, remarked: "To say that I was horrified by the use of this language is probably an understatement" (*per* Ramodebedi CJ).

⁶³ *Commissioner of Police and Another v Maseko* (3/11) [2011] SZSC 15 (31 May 2011).

⁶⁴ Practice Directive No.4/2011, 16 June 2011.

⁶⁵ International Commission of Jurists, "Justice Locked Out: Swaziland's Rule of Law Crisis International Fact-finding Mission Report", 2016 at 10, 33, 40.

⁶⁶ Angelo Dube & Sibusiso Nhlabatsi, "The King can do no wrong: The impact of *The Law Society of Swaziland v Simelane NO & Others* on constitutionalism", 16 (1) *African Journal of Human Rights Law* (online version) (2016).

⁶⁷ Communication 406/2011, as described in International Commission of Jurists, "Justice Locked Out: Swaziland's Rule of Law Crisis International Fact-finding Mission Report", 2016 at 33. According to this report, the case was still pending as of 2016. No record of it could be located on the website of the African Commission on Human and Peoples' Rights (as of November 2018). It may have become moot since the Practice Directive was withdrawn.

The 2011 Practice Directive was withdrawn in 2017.⁶⁸ However, a 2014 High Court case held in the meantime that the constitutional immunity afforded to the King applies to him in his executive capacity:

Then in terms of Section 11(a) the use of the same word “*shall*” signifies that it is generally imperative or mandatory that His Majesty the King not be subjected to any suit or legal process, in any cause in respect of all things done by him in the execution of his Monarchical duties ... Under no circumstances therefore should any litigant, attempt, directly or indirectly, to challenge the authority of His Majesty the King in any cause in respect of all things done or omitted to be done by him! Once the King has spoken it is the end of the matter. It is final. And as a Swazi Nation that is where our old adage of “*Umlomo longacali manga*” [“*the Mouth that tells no lies*”] comes from.⁶⁹

Thus, the current position apparently remains much the same as under the Practice Directive.⁷⁰ As the International Commission of Jurists commented, the consequence is that the Executive is effectively placed above the law.⁷¹

ESWATINI (SWAZILAND)

Protection of King and iNgwenyama in respect of legal proceedings

11. The King and iNgwenyama shall be immune from –

- (a) suit or legal process in any cause in respect of all things done or omitted to be done by him; and***
- (b) being summoned to appear as a witness in any civil or criminal proceeding.***

(b) Lifelong immunity except where cases are authorised by Parliament

Some constitutions provide *civil and/or criminal* immunity for the life of the President, but allow this immunity to be lifted by Parliament. For example, in **The Gambia**, the President has complete immunity from civil or criminal proceedings whilst in office, as well as lifelong immunity from civil proceedings for *official acts*, and from criminal prosecution for *any acts* during his time in office – unless the National Assembly resolves by a two-thirds vote that some criminal prosecution of this nature is “justified in the public interest”. There is an exception for constitutional actions brought against the President in his official capacity.⁷²

⁶⁸ Practice Directive No.1/2017, 3 July 2017.

⁶⁹ *Law Society of Swaziland v Simelane and Others* (527/2014) [2014] SZHC 179 (01 August 2014) at para 2 (in a case challenging the constitutionality of the King’s appointment of a particular judge).

⁷⁰ See Angelo Dube & Sibusiso Nhlabatsi, “**The King can do no wrong: The impact of *The Law Society of Swaziland v Simelane NO & Others* on constitutionalism**” 16 (1) *African Journal of Human Rights Law* (online version) (2016). Practice Directive No.1/2017, 3 July 2017, which withdrew the 2011 Practice Directive, states at para 3:

Sections 7 and 11 of the Constitution do provide the necessary immunity for the King and Ingwenyama as well as Indlovukazi in respect of legal proceedings.

⁷¹ International Commission of Jurists, “**Justice Locked Out: Swaziland’s Rule of Law Crisis International Fact-finding Mission Report**”, 2016 at 33. This report describes how the crisis affecting the country’s courts worsened in the wake of the events described in the text: “Recent events in the Kingdom of Swaziland involved the arrest of two judges of the High Court, a Registrar of the High Court and the Minister of Justice, and an attempt to arrest the then Chief Justice Michael Ramodibedi on various charges related to corruption and the obstruction of justice. These have served to underline once again the fragile and degraded state of the Judiciary, judicial independence, separation of powers and adherence to the rule of law and the capacity for the Judiciary to administer justice fairly and effectively in the Kingdom of Swaziland.” (At 6-7.) Even though the Chief Justice had consistently sided with the Executive, the King removed him from office in June 2015 and he subsequently left Swaziland. (At 8, 13-17.)

⁷² Constitution of The Gambia, 1996 (rev 2004), Article 69.

The sweeping immunity afforded to former presidents in The Gambia has not prevented a group of citizens from launching a civil lawsuit in the High Court of Gambia against former President Yahya Jammeh regarding a fraudulent HIV/AIDS treatment program that he ran from 2007 to 2016, whilst he was in office. Plaintiffs are seeking civil damages for harm suffered as well as a declaration from the High Court that their human rights were violated.⁷³ We could not discover what theory is being put forward to overcome the constitutional provision on immunity in this case, but the argument is likely to be that the actions which are the subject of the civil lawsuit were not done in the former President's official capacity and so are not covered by the constitutional immunity clauses.⁷⁴

THE GAMBIA

Article 69. Immunity from Civil Criminal Proceedings

- 1. Except as provided in subsection (2), no civil or criminal proceedings shall be instituted or continued against any person while holding or performing the functions of office of President in respect of anything done or omitted to be done by him or her whether in an official or a private capacity.*
- 2. Nothing in subsection (1) applies to an action for a declaration under section 5 (enforcement of the Constitution), and any proceedings under that section against the President or a person performing the functions of that office shall be brought against him or her by his or her official title or style, and he or she shall appear, and be represented by, the Attorney General.*
- 3. After a President has vacated the office or [of] President -*
 - a. no court may entertain any action against him or her in any civil proceedings in respect of any act done in his or her official capacity as President;*
 - b. a criminal court shall only have jurisdiction to entertain proceedings against him or her in respect of acts or omissions alleged to have been perpetrated by him or her while holding office as President if the National Assembly has resolved on a motion supported by not less than two-thirds of all the members that such proceedings are justified in the public interest.*

A similar example, limited to lifelong *criminal* immunity, can be found in **Zambia**, where Article 98(4) of the Constitution protects a sitting president from any form of criminal prosecution whilst in office. However, a former president may be prosecuted if immunity for the specific offence in question is removed by a two-thirds vote of the National Assembly, after it considers the recommendation of a select committee convened for this purpose. The request to remove criminal immunity for the alleged offence must be submitted to the National Assembly by the current President, and the former President whose immunity is being considered may appear before the select committee to make representations.⁷⁵

The National Assembly of Zambia did in fact pass a resolution removing the immunity of former President Chiluba, acting in terms of a previous version of this constitutional provision. Although the case resulted in a full acquittal,⁷⁶ it shows that it is possible in practice to utilise this procedure to prosecute a former president. The version of the constitutional provision which applied at that

⁷³ Press Release, "Legal Action filed against Gambian Ex-Dictator by PLWHA – May 2018", IHRDA and Aids-free World, 31 May 2018.

⁷⁴ As noted above, Article 69(3)(a) gives former presidents immunity against *civil* liability *only* in respect of acts done in a president's "official capacity". See Niklas Hultin, "The five big questions facing the New Gambia's new government", *African Arguments*, 30 January 2017.

⁷⁵ *Constitution of Zambia 1991 (rev. 2016)*, Article 98. The removal of immunity for a particular offence for which there is *prima facie* evidence does not appear to affect immunity for other criminal offences; each separate offence must be considered for removal of immunity. See Article 98(8).

⁷⁶ *The People v Chiluba* Case number SSP/124/2004, In the Subordinate Court of the First Class for the Lusaka District Holden at Lusaka, 1-289, 17 August 2009.

stage required that lifting the immunity “would not be contrary to the interests of the State”,⁷⁷ but the revised provision in force in 2018 sets no criteria for lifting immunity for a particular offence other than the presentation of *prima facie* evidence (presumably to avoid baseless allegations). The National Assembly’s resolution removing Chiluba’s shield of immunity was challenged in court, but it was upheld upon judicial review by the Supreme Court of Zambia.⁷⁸ The issues aired in that challenge appear to have informed the amendments to the procedure which are now in force.

Presidential immunity was again removed by Parliament in March 2013, in respect of former President Rupiah Banda after he lost elections to President Michael Sata. He was acquitted on one set of criminal charges for abuse of authority of office in 2015, before his immunity was restored in 2016 by a High Court decision which stopped another criminal prosecution against him for offences of corrupt practices and concealing gratification. Banda argued that the offences did not form part of the allegations tabled before the National Assembly prior to its removal of his immunity from prosecution, thus rendering the decision of Parliament improper, and his immunity was restored following an agreement between his lawyers and the State.⁷⁹

Civil immunity in Zambia applies only during the President’s term of office,⁸⁰ and it is reciprocal in the sense that a sitting President is forbidden from instituting civil proceedings against anyone in his or her personal capacity. Prescription periods do not run in respect of civil claims during the President’s tenure.⁸¹

In 2011, the High Court of Zambia considered the issue of whether presidential immunity should extend to protect an incumbent president from answering questions on his qualification to stand for re-election. The Court held that “aspiring for election or re-election is a personal issue not falling within the discharge of official functions of the presidency”, and as a result determined that the immunity provided for in the Constitution would not apply.⁸²

⁷⁷ Previously, the *Constitution of Zambia (as amended in 1996)* contained the following provision on presidential immunity:

Article 43. [Protection of President in respect of legal proceedings]

- (1) No civil proceedings shall be instituted or continued against the person holding the office of President or performing the functions of that office in respect of which relief is claimed against him in respect of anything done or omitted to be done in his private capacity.
- (2) A person holding the office of President or performing the functions of that office shall not be charged with any criminal offence or be amenable to the criminal jurisdiction of any court in respect of any act done or omitted to be done during his tenure of that office or, as the case may be, during his performance of the functions of that office.
- (3) A person who has held, but no longer holds, the office of President shall not be charged with a criminal offence or be amenable to the criminal jurisdiction of any court, in respect of any act done or omitted to be done by him in his personal capacity while he held office of President, unless the National Assembly has, by resolution, determined that such proceedings would not be contrary to the interests of the State.
- (4) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the term of any person in the office of President shall not be taken into account in calculating any period of time prescribed by that law which determines whether any such proceedings as are mentioned in clause (1) and (3) may be brought against that person.

⁷⁸ *Chiluba v Attorney-General (Appeal Number 125 of 2002)* [2003] ZMSC 3 (18 February 2003).

⁷⁹ “Kambwili says Government has position on RB immunity, but Mukanga says immunity was automatically restored”, *Lusaka Times*, 8 July 2015; “Former President Rupiah Banda Comments on his Immunity Restoration”, *Lusaka Times*, 21 March 2016.

⁸⁰ The wording of Article 43(1) and the comprehensive approach taken by Article 43 in its entirety indicates that civil proceedings against a sitting President are allowed in respect of acts in his official capacity. However, it is not clear if this would operate only to hold the State liable for the President’s actions.

⁸¹ *Constitution of Zambia 1991 (rev. 2016)*, Article 98.

⁸² *Kabimba N.O. v Attorney General and Others* 2011/HP/744 [2011] ZMHC 83 (8 August 2011).

ZAMBIA

Article 98. Protection of President from Legal Proceedings

- 1. A person shall not institute or continue civil proceedings against the President or a person performing executive functions, as provided in Article 109, in respect of anything done or omitted to be done by the President or that person in their private capacity during the tenure of office as President.*
- 2. The President shall not, in the President's private capacity during the tenure of office as President, institute or continue civil proceedings against a person.*
- 3. For purposes of clauses (1) and (2), where a law limits the time within which proceedings may be brought against a person, the term of office shall not be taken into account in calculating the period of time.*
- 4. Subject to clause (9), the President or a person performing executive functions, as provided in Article 109, is immune from criminal proceedings which immunity continues after that person ceases to hold or perform the functions of that office.*
- 5. Where there is prima facie evidence that a person who held the office of President or who performed executive functions committed an offence whilst in office or during the period that person performed executive functions, the President shall submit a report, outlining the grounds relating to the offence allegedly committed, to the National Assembly, requesting the National Assembly to remove the immunity from criminal proceedings of that person.*
- 6. Where the National Assembly receives a report, submitted in accordance with clause (5), the National Assembly shall constitute a select committee to scrutinise the grounds submitted and determine whether or not there is a prima facie case, based on the grounds submitted, that warrants the removal of the immunity from criminal proceedings, and recommend its decision to the National Assembly.*
- 7. The person who held the office of President or who performed executive functions has the right to appear, be represented and be heard before the select committee constituted under clause (6).*
- 8. Where the select committee, constituted under clause (6), recommends the removal of immunity from criminal proceedings from the person who held the office of President or who performed executive functions, the National Assembly may remove the immunity in respect of the alleged offence, by a resolution supported by a vote of not less than two-thirds of the Members of Parliament.*
- 9. Where immunity is removed, in accordance with clause (8), the person who held the office of President or who performed executive functions, shall be charged with the offence for which the immunity from criminal proceedings was removed.*
- 10. Where a court acquits the person who held the office of President or who performed executive functions, of an offence for which that person's immunity from criminal proceedings was removed, the immunity of that person shall, for all purposes, be deemed not to have been removed, without further proceedings.*
- 11. The process for the removal of immunity, provided for under this Article, shall not apply to an impeachable offence under Article 108.*

A similar approach is to provide lifelong immunity except in cases of impeachment, which generally requires a Parliamentary vote. For example, **Liberia** provides immunity for sitting presidents from “any suits, actions or proceedings”, and lifelong immunity from arrest, detention, actions or proceedings, judicial or otherwise, in respect of “any act done by him” pursuant to the Constitution or any other law whilst being President. Criminal immunity is lost only if a President is impeached, which requires grounds of “treason, bribery and other felonies, violation of the Constitution or gross misconduct” as well as a two-thirds vote of the Senate.⁸³

⁸³ Constitution of Liberia, 1986, Article 61 (immunity), Article 62 (grounds for impeachment) and Article 43 (procedure for impeachment).

The constitutional provisions on immunity were interpreted by the Supreme Court in a 2007 case involving an attempted prosecution of the former Chairman of the Transitional Government of Liberia, Charles Bryant, for the theft of over US\$1 million in state funds. The Court held that the constitutional provision on immunity (Article 61) provides protection against suits against “even a former President” unless that President is impeached, which would then make it possible for the impeached President to be sued for the offence which led to the impeachment.⁸⁴

LIBERIA

Article 61

The President shall be immune from any suits, actions or proceedings, judicial or otherwise, and from arrest, detention or other actions on account of any act done by him while President of Liberia pursuant to any provision of this Constitution or any other laws of the Republic. The President shall not, however, be immune from prosecution upon removal from office for the commission of any criminal act done while President.

Similarly, **Tunisia** gives its presidents total immunity during office, and permanent immunity in respect of *official acts* except for criminal prosecution following on impeachment.⁸⁵ In **Burundi**, the President is not criminally liable for any *acts committed in the exercise of his functions*, except on a charge of high treason, which constitutes grounds for impeachment. “High treason” encompasses “an act contrary to the superior interests of the nation which gravely compromises national unity, social peace, social justice, the development of the country, or gravely infringes on human rights, territorial integrity, national independence and national sovereignty”.⁸⁶ This approach

⁸⁴ *Bryant v RL et al* [2007] LRSC 10 (11 May 2007) (unpaginated online version) (opinion of the court *per* Ja’neh J):

We also affirm and confirm the Supreme Court’s decision in the C.D.B. King Case rendered 75 years ago to the extent that no sitting President of Liberia shall be arrested, detained or prosecuted pursuant to any provision of law in the Courts of Liberia. We also hold that in order to confer jurisdiction on the Court over the President, he must first be held in impeachment proceedings and removed by the Legislature. Thereafter, he may be further tried at law for the indictable offence.

This Court will therefore interpret Article 61 of the Constitution to mean that the President is immune from suits, actions or proceedings judicial or otherwise and from arrest, detention or other actions on account of acts done by him/her while in office. In other words, the President shall lose his/her immunity and become amenable to Court process if he/she is removed from office by impeachment for the commission of crime while in office, and in that case he/she may be tried at law for the same offence for which he/she has been impeached.

The Court went on to hold that the immunity provision did not apply to the charges against Bryant because of the peculiar legal situation which applied to the Transitional Government. See also *Williams v Tah et al* [2011] LRSC 12 (21 January 2011).

⁸⁵ *Constitution of Tunisia, 2014*, Articles 87-88:

Art 87:

The President of the Republic enjoys judicial immunity during his/her term in office. All statutes of limitations and other deadlines are suspended, and judicial procedures can only be recommenced after the end of his/her term.

The President of the Republic cannot be prosecuted for acts that were carried out in the context of performing his/her functions.

Art 88:

The Assembly of the Representatives of the People may, through the initiative of a majority of its members, present a motion to bring to an end the President of the Republic’s term for a grave violation of the Constitution. Such a motion must be approved by two-thirds of the members. In such an event, the matter is referred to the Constitutional Court for a decision by a majority of two-thirds of its members. In the event of condemnation, the Constitutional Court orders removal of the President of the Republic from office, without excluding eventual criminal prosecution when necessary. Where the President has been removed from office under these circumstances, he/she is not entitled to run in any subsequent elections.

⁸⁶ *Constitution of Burundi, 2005*, Article 117, which reads in relevant part as follows:

The President of the Republic is only criminally responsible for the acts accomplished in the exercise of his or her functions in cases of high treason.

is frequently found in Francophone Africa, with similar provisions in Côte d'Ivoire,⁸⁷ Djibouti,⁸⁸ Guinea,⁸⁹ Niger,⁹⁰ Senegal⁹¹ and possibly other Francophone countries – with most of these provisions appearing to provide lifelong immunity from both civil and criminal liability for *official acts* except in the case of high treason, while remaining silent on liability for acts carried out in a personal capacity.⁹²

Tanzania, which is discussed below because of its unusual approach to *civil* proceedings, could have been placed in this category with reference to criminal proceedings, as it provides absolute immunity to sitting Presidents against criminal liability, and lifelong immunity from criminal or civil proceedings related to official acts except in the case of impeachment.⁹³

Namibia belongs in the most restrictive end of this category since Namibian presidents enjoy absolute immunity against criminal liability whilst they hold office, and civil and criminal immunity after leaving office, for both official and unofficial acts committed during their tenure, except in cases of impeachment where there is *also* an additional parliamentary authorisation.

(c) Immunity only for official acts

Some African States offer immunity only for actions which took place in the course of exercising official functions, with some exceptions. For example, Uganda provides lifelong criminal and civil immunity for official acts. The President is protected against *all* court proceedings whilst in office, and prescription periods do not run during that time – with the narrow exception of utilising the constitutional procedure provided to challenge the validity of a presidential election. However, after leaving office, the President is subject to civil or criminal proceedings “in respect of

⁸⁷ Constitution of Côte d'Ivoire, 2016, Article 157:

The President of the Republic is not held responsible for acts performed in the exercise of his official duties and appears before the High Court of Justice only in case of high treason.

⁸⁸ Constitution of Djibouti 1992 (rev. 2010), Article 84, which reads in relevant part as follows:

The President of the Republic is not responsible for the acts accomplished in the exercise of his functions except in the case of high treason.

⁸⁹ Constitution of Guinea, 2010, Article 118:

The High Court of Justice is competent to judge the acts accomplished in the exercise of or on the occasion of their functions by:

1. The President of the Republic in the case of high treason;
2. The Prime Minister and the other members of the Government for crimes and misdemeanours.

⁹⁰ Constitution of Niger, 2010 (rev. 2017), Article 142, which reads in relevant part as follows:

The President of the Republic is not responsible for the acts accomplished in the exercise of his functions except in the case of high treason.

⁹¹ Constitution of Senegal, 2001 (rev. 2016), Article 101, which reads in relevant part as follows:

The President of the Republic is only responsible for the acts accomplished in the exercise of his functions in the case of high treason.

⁹² Article 117 of the Constitution of Burundi, 2005 provides that a president is *only criminally responsible* in cases of high treason. It is silent on civil liability, seemingly leaving this possibility open. This contrasts with the language contained in the Constitutions of Cote d'Ivoire, Djibouti, Niger, Senegal, and Tunisia which otherwise contain very similar provisions but provide that a president is *not responsible* for acts performed in the exercise of official duties, other than high treason; the broader wording in these constitutions may give presidents immunity from civil suit in circumstances which do not constitute high treason – although this is not entirely clear and we have not researched this issue.

⁹³ Constitution of Tanzania, 1977 (rev. 2005), Article 46.

anything done or omitted to be done in his or her personal capacity before or during the term of office”.⁹⁴

Uganda’s constitutional provisions seem broadly-worded, but case law has carved out space for challenging the constitutionality of a sitting President’s actions. In the 2005 *Tumukunde* case, the Constitutional Court elaborated on the meaning of the constitutional immunity provisions. This case involved a challenge to a presidential order directing a member of the Uganda Peoples Defence Forces to resign from his position as Army Representative in the Parliament of Uganda. The petitioner argued that the immunity provisions should not bar a suit which is not against the person of the President, and which involves an issue implicating fundamental human rights and freedoms.

The Constitutional Court first confirmed the President’s immunity against lawsuits:

The President [has] total immunity against court proceedings both criminal and civil arising out of his/her acts or omissions done or omitted to be done either before or during his/her term in office as President. Any person who wishes to challenge those acts or omissions of the President in court, has to wait until the President has ceased to be one. The only exception to this is for a challenge of the election of a President of a person who happens to be the incumbent President at the time of the challenge. This may appear a hard position but that is what the Constitution says.⁹⁵

The Court noted two main justifications for such immunity. Firstly, the President “occupies a unique office with powers and responsibilities so vast and so important that public interest demands that he devotes his undivided time and attention to his public duties”.⁹⁶ Secondly, the Court cited concerns about the separation of powers: “Unless the President is immune from legal proceedings whilst holding office, there exists a threat of judicial interference with the executive branch through orders, and other court decisions which would violate the separation of power principle.”⁹⁷

However, the Court also clarified that the President’s immunity from being brought before a court of law does *not* prevent a court from entertaining a complaint regarding the constitutionality of the President’s actions:⁹⁸

Any act or omission by any person or authority which contravenes the Constitution or is in any way inconsistent with it is justiciable under the laws of Uganda. There is no exception whatsoever. The President of Uganda, no matter in what capacity, is not excepted.... If this Court were to interpret article 98 to exempt the actions of the President from challenge in court, then there would be no need for the Constitutional Court because the President does virtually everything. Fortunately, such an interpretation is not justifiable and is not called for.⁹⁹

⁹⁴ Constitution of Uganda, 1995 (rev. 2017), Article 98(4)-(5).

⁹⁵ *Tumukunde v Attorney General & Anor* (Constitutional Petition No. 6 of 2005) [2005] UGCC 1 (26 August 2005) (unpaginated online version) (majority judgment *per* Kikonyogo DCJ, joined by Kitumba JA).

⁹⁶ *Id.*, Issue No. 1 (majority judgment).

⁹⁷ *Ibid.*

⁹⁸ The Court cited Article 137 of the Constitution of Uganda, which in sub-article (3)(b) confers jurisdiction on the Constitutional Court to consider a complaint that any act or omission by any person or authority is inconsistent with or in contravention of a provision of the Constitution (majority judgment).

⁹⁹ *Id.*, Issue No. 1 (majority judgment).

The Court concluded that constitutional challenges to the President's acts can be brought by suing the Attorney General since it is not possible to bring any action against the President personally.¹⁰⁰

UGANDA

Article 98. President of Uganda

1. There shall be a President of Uganda who shall be the Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples' Defence Forces and the Fountain of Honour.

2. The President shall take precedence over all persons in Uganda, and in descending order, the Vice-President, the Speaker and the Chief Justice, shall take precedence over all other persons in Uganda.

3. Before assuming the duties of the office of President, a person elected President shall take and subscribe the oath of allegiance and the presidential oath specified in the Fourth Schedule to this Constitution.

4. While holding office, the President shall not be liable to proceedings in any court.

5. Civil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office of that person; and any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was President.

Article 104. Challenging presidential election

8. For the purposes of this article, clause (4) of article 98 of this Constitution shall not apply.

The Francophone countries discussed in the previous section could also be placed here, as most of those surveyed appear to limit immunity to official acts only, with exceptions for impeachable offences or for liability following on impeachment.

(d) Immunity only for sitting presidents

Another category of immunity grants presidents absolute immunity from both civil and criminal proceedings *whilst in office*, often with the exception of civil liability in respect of official actions – but provides no immunity at all after presidents leave office. These provisions

¹⁰⁰ Ibid. On this point, two of the other three justices were in agreement; for instance, the separate judgment of Mpagi-Bahigeine JA stated:

As the Fountain of Honour, the person of the President while still in office is protected against court proceedings by article 98(4). In all these various capacities under article 119 the Attorney General, who is the Principal Legal Adviser of the Government, represents and defends the Government including the President's official actions and or omissions, in court. That is why this petition is filed against the Attorney General and not the President. Regarding anything done by the President in his personal capacity, criminal or civil proceedings may be taken against the President after he leaves office – article 98(5).

Only one justice (Kavuma JA) would have decided this issue somewhat differently – but still with an emphasis on constitutional accountability:

The Presidential immunity provided for in article 98(4) is to be restrictively interpreted to exclusively apply to the person of the President where he/she personally exercises the powers and duties of the office of President. Where the President assigns any of his executive powers to ministers or other officers, [...], that immunity does not extend to such other ministers or officers. Where such ministers or officers act or omit to act in such a manner as to attract legal challenge or liability to Government, the Attorney General is sued in his representative capacity [...].

The combined effect of all this, is to leave a very narrow scope of executive acts or omissions that cannot be readily challenged or of which the Government cannot be immediately held liable, on account of presidential immunity.

Article 98 itself does not impose permanent absolute immunity from judicial review to the person of the President. It only postpones such liability and subjection to legal challenge until such a time the person holding the office of President ceases to so hold the same. The President is, therefore, constantly reminded that when he ceases to hold that office, he may be called upon to answer for his acts or omissions while holding the office. This keeps the President on his toes.

can be equated with absolute immunity for sitting presidents, since naming a sitting president in a civil lawsuit relating to official acts is generally a means of holding the State liable.

For example, the Constitution of **Botswana** has a simple form of absolute immunity for sitting Presidents, with (as in Namibia) an exception for civil proceedings relating to official duties. However (unlike Namibia), there is no civil or criminal immunity for former presidents, and the Constitution provides that any applicable prescription period will not run whilst a president is in office.¹⁰¹ There is no civil immunity for the official acts of presidents whilst they are in office, and the High Court has pointed out that “[l]egislation has been passed to provide that the State may be sued and that the President may be sued in his official capacity”.¹⁰²

BOTSWANA

41. Protection of President in Respect of Legal Proceedings

1. Whilst any person holds or performs the functions of the office of President no criminal proceedings shall be instituted or continued against him or her in respect of anything done or omitted to be done by him or her either in his or her official capacity or in his or her private capacity and no civil proceedings shall be instituted or continued in respect of which relief is claimed against him or her in respect of anything done or omitted to be done in his or her private capacity.

2. Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the term of any person in the office of President shall not be taken into account in calculating any period of time prescribed by that law which determines whether any such proceedings as are mentioned in subsection (1) of this section may be brought against that person.

In **Lesotho**, the Constitution provides for absolute immunity of the King whilst in office, with an exception for civil proceedings relating to official duties (again, as in Namibia).¹⁰³ There is no provision for civil or criminal immunity for someone who no longer holds the office of King (unlike Namibia’s treatment of former presidents), and the running of any applicable prescription period is suspended whilst the King is in office (as in several other African countries). Interestingly, there is some provision for reciprocity in the Lesotho approach; the King may not take private civil action against anyone else whilst in office; this right is automatically assigned to the Attorney-General, who acts on behalf of the King.¹⁰⁴

¹⁰¹ Constitution of Botswana, 1966 (rev. 2005), Article 41. The meaning of this provision is explicated in *Motswaledi v Botswana Democratic Party* High Court of Botswana, High Court Case No. MAHLB-000486-09, 2 October 2009, where the Court held that the phrase “in his or her private capacity” means “in any capacity other than his or her official capacity as Head of State” (at para 23).

¹⁰² *Motswaledi v Botswana Democratic Party* High Court of Botswana, High Court Case No. MAHLB-000486-09, 2 October 2009 at para 20, referring to “Chapter 10:01 of the Laws of Botswana, State Proceedings (Civil Actions by or against Government or Public Officers) Act”. See also the discussion of immunity in *Medical Rescue International Botswana Ltd v The Attorney-General And Others* 2006 (1) BLR 516 (CA).

¹⁰³ The absence of immunity for civil proceedings in respect of official acts seems clear from the contrasting wording of the parallel phrases in Article 41(1) and (2). The issue was also discussed in *Makenete v Lekhanya and Others* (CIV/APN/74/90) (CIV/APN/74/90) [1990] LSHC 1 (06 November 1990) at paras 22, 46-ff.

¹⁰⁴ Constitution of Lesotho, 1993 (rev 2011), Article 50(1).

LESOTHO

50. Protection of the King and of Certain Persons in Respect of Legal Proceedings

1. Whilst any person holds the office of King, he shall be entitled to immunity from suit and legal process in any civil cause in respect of all things done or omitted to be done by him in his private capacity and to immunity from criminal proceedings in respect of all things done or omitted to be done by him either in his official capacity or in his private capacity.

2. Whilst any person exercises the functions of the office of King as Regent or by virtue of a designation under section 45(3) of this Constitution, no criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official capacity or in his private capacity, and no civil proceedings shall be instituted or continued in respect of which relief is claimed against him in respect of anything done or omitted to be done by him in his private capacity.

3. Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period during which that person has held the office of King or exercised the functions of the office of King shall not be taken into account in calculating the period of time prescribed by that law which determines whether any such proceedings as are mentioned in subsection (1) or (2), as the case may be, of this section may be brought against that person.

4. Where a debt or obligation is owing to any person as a result of anything done or omitted to be done by the King, Regent or by a person designated to exercise the functions of the office of King during the absence or illness of the holder of that office or of the Regent, in his private capacity, the person to whom the debt or obligation is owing may lodge an application in writing to the Minister responsible for finance who, in his absolute discretion, may, after consultation with the Attorney-General, defray the debt or make provision to satisfy the obligation out of the Civil List.

5. Any civil right of action that the King, or any person exercising the functions of the office of the King as Regent or by virtue of a designation under section 45(3) of this Constitution, would have in his private capacity, shall vest in the Attorney-General who may institute appropriate proceedings, and any proceedings therefrom shall be paid to the King or, as the case may be, to the person exercising the functions of the office of the King.

The Constitution of **Kenya** protects sitting Presidents from virtually *all* criminal prosecutions, and from civil proceedings related to their official functions, with prescription periods being suspended during a president's tenure. The only exception to this general rule is where a treaty to which Kenya is party prohibits such immunity in respect of a crime committed by a president.¹⁰⁵ There is no criminal or civil immunity for former presidents.

The scope of the presidential immunity afforded by the Constitution has been considered by the High Court on several occasions, with the rulings indicating that "a sitting President cannot ever be made a party to any legal proceeding in court", but that "the immunity in Article 143 of the Constitution only lasts for the time the President is in office".¹⁰⁶ In 2012, Kenya's Court of Appeal, ruling in respect of a claim against former President Daniel Arap Moi, affirmed that the constitutional immunity from civil liability "is limited to the tenure of the holder of the post of the President".¹⁰⁷ In 2014, it was again affirmed that "the immunity in Article 143 of the Constitution only lasts for the time the President is in office".¹⁰⁸ In 2015, the High Court accordingly confirmed

¹⁰⁵ Constitution of Kenya, 2010, Article 143.

¹⁰⁶ *Julius Nyarotho v Attorney General & 3 others* [2013] eKLR, as quoted in *Zulfikar Ali Hassanally & another v Westco Kenya Limited & 3 other[s]* [2015] eKLR (per Onyancha J); the 2015 case quotes several other High Court cases on immunity which were decided under the repealed Constitution of Kenya.

¹⁰⁷ *Otieno Mak'onyango v Attorney General & Another* [2012] eKLR at para 74 (per Rawal J).

¹⁰⁸ *Julius Nyarotho v Attorney General & 3 others* [2013] eKLR at para 12 (per Gikonyo J).

that a case involving unofficial acts by former President Mwai Kibaki, which had been discontinued when he was elected as President, could be revived after he left office.¹⁰⁹

It has also been held on several occasions that the immunity afforded to sitting presidents does not shield them from judicial review. In a case decided by the High Court in 2010 under the previous Constitution, which also had an immunity clause, it was explained that presidential immunity “was intended to prevent politically motivated harassing litigants and frivolous litigation against a sitting President. It was not meant to give the President an absolute immunity for all kinds of transgressions and violations.”¹¹⁰ The Court noted that “judicial review proceedings are neither civil nor criminal proceedings’ and therefore held that the presidential immunity afforded by the Constitution does not apply to judicial review. This case held that “a party affected by the decision of a sitting president can rightly and legitimately seek the intervention of the High Court for redress or remedy by way of judicial review or by way of constitutional declaration”.¹¹¹

This stance was reiterated in 2013,¹¹² and the High Court in 2017 once again confirmed that the presidential immunity which applies to sitting presidents does *not* prevent a court from testing a president’s actions against the Constitution and quashing any action which is not within his constitutional mandate.¹¹³

KENYA

143. Protection from Legal Proceedings

1. Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.

2. Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.

3. Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.

4. The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.

¹⁰⁹ *Zulfikar Ali Hassanally & another v Westco Kenya Limited & 3 other[s]* [2015] eKLR (*per* Onyancha J).

¹¹⁰ *Republic v Chief Justice of Kenya & 6 others Ex-parte Moijo Mataiya Ole Keiwua* [2010] eKLR, dealing with section 14 of the repealed Constitution. Section 14 of the previous Constitution of Kenya read as follows:

- (1) No criminal proceedings whatsoever shall be instituted or continued against the President while he holds office, or against any person while he is exercising the functions of the office of President.
- (2) No civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the office of President.
- (3) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, a period of time during which a person holds or exercises the functions of the office of President shall not be taken into account in calculating any period of time prescribed by that law which determines whether any such proceedings as are mentioned in subsection (1) or (2) may be brought against that person.

¹¹¹ *Ibid* (unpaginated online version).

¹¹² *Julius Nyarotho v Attorney General & 3 others* [2013] eKLR at para 21 (*per* Gikonyo J):

I am not persuaded by the argument that because a sitting President enjoys immunity from legal proceedings under article 143 of the Constitution, no proceedings in the nature of public remedy should commence to put right a clear violation of the law in the exercise of a public power by the President. The public power herein is derived by the President from the Constitution and statute law as delegated by the people. Judicial review being a public law remedy is available in the Constitution to ensure due process has been followed, and it will not suffer ineffective because the impugned exercise of public power was committed by the President.

¹¹³ *George Bala v Attorney General* [2017] eKLR at para 86.

Nigeria's constitutional immunity clause forbids any civil or criminal proceeding against a president who is in office, as well as prohibiting arrest or imprisonment during the term of office. Presidents are also protected against being compelled to testify while they are in office. A few exceptions to these rules are provided, including civil proceedings against presidents in relation to acts done in their official capacity, and any case where the President is only a nominal party to the proceedings. The same rules on immunity apply to the Vice-President, Governor and Deputy-Governor as well.¹¹⁴ The constitutional immunity ends when these officials leave office.

Against this background, the 2002 *Fawehinmi* case¹¹⁵ considered the question of whether a criminal complaint against one of the officials stipulated in the Constitution (including the President) can be *investigated* while the official is still in office. The Supreme Court concluded that investigations can proceed, since an investigation is not equivalent to a proceeding. It found no mechanism by which immunity is provided to a sitting president against being investigated in respect of a crime (or a civil action). Such investigations face limits, however, in that investigators cannot detain, question or take statements from presidents who are still in office.

Additional case law in Nigeria has taken the immunity clause further and restricted the right of sitting presidents to prosecute an appeal. This means that the immunity clause in Nigeria is reciprocal, as in some other African countries; presidents cannot continue an action that began before their presidency, just as no one in the public can continue or initiate a proceeding against them.¹¹⁶ To avoid prejudice, the Constitution states that limitation periods will not take into account terms in office.¹¹⁷ Case law has also held that there is no possibility of waiver of the immunity clause by any official to whom it applies.¹¹⁸

NIGERIA

Section 308

1. Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section -

- a. no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;*
- b. a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and*
- c. no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:*

Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

¹¹⁴ Constitution of Nigeria 1999 (rev. 2011), Section 308.

¹¹⁵ *Fawehinmi v Inspector General of Police* [2002] FWLR (Pt. 108) 1355, as discussed in Charles Manga Fombad & ES Nwauche, "Africa's imperial presidents: Immunity, Impunity and Accountability", 2011 at 12 and Sesan Fabamise, "Constitutional Immunity Clause and The Fight Against Corruption in Nigeria", *The Journal of Sustainable Development Law and Policy*, Volume 8, No. 2, 2017, pages 155-185, at 176/177.

¹¹⁶ *Tinubu v IMB Securities Plc* (2001) 16 NWLR (Pt 740) 670, as discussed in Sesan Fabamise, "Constitutional Immunity Clause and The Fight Against Corruption in Nigeria" at 174.

¹¹⁷ Constitution of Nigeria 1999 (rev. 2011), section 308(1).

¹¹⁸ *Industrial Commercial Service Ltd v Balton B V* (2003) 8 NWLR (Pt 822) 223, as discussed in Sesan Fabamise, "Constitutional Immunity Clause and The Fight Against Corruption in Nigeria" at 174.

2. The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.

3. This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to “period of office” is a reference to the period during which the person holding such office is required to perform the functions of the office.

Another country where immunity is restricted to sitting presidents is **Sierra Leone**, where a sitting President has absolute immunity from civil or criminal proceedings “in respect of anything done or omitted to be done by him either in his official or private capacity”¹¹⁹ – with no mention of any immunity for former presidents.

Even constitutional provisions such as these, which limit immunity to the period of office, have been criticised for being overbroad, on the grounds that they could enable a president “to get away with serious crimes committed whilst in office and even crimes committed in order to prolong his stay in power and to escape prosecution.”¹²⁰

(e) Immunity only for former presidents

In direct contraposition to the category above (“Immunity only for sitting Presidents”), **some African countries provide certain immunities only for presidents who have left office**. For example, **Congo** provides immunity only for former presidents. Its Constitution provides that a President may be criminally prosecuted for “acts qualified as crimes or misdemeanours or for grave failure in his duties committed on the occasion of the exercise of his function” *only whilst in office, and not after leaving office*. A conviction on such an offence would constitute a breach of duty or high treason,¹²¹ and might be grounds for impeachment (which requires a grave failure in duties which is manifestly incompatible with the exercise of the President’s high function, as well as a vote by a three-quarters majority in Parliament).¹²² **Rwanda** provides that a former President “cannot be prosecuted for treason or serious and deliberate violation of the Constitution when no legal proceedings in respect of that offence were brought against him or her whilst in office”.¹²³

(f) Conditional immunity

Various countries provide different kinds of conditional immunity, such as immunity which applies only to certain kinds of cases or where specific conditions are met – with the specifics varying from country to country. For example, in **Angola**, the President enjoys immunity from

¹¹⁹ Constitution of Sierra Leone 1991 (reinst. 1996, rev. 2013), Article 48(4):

While any person holds or performs the functions of the office of President, no civil or criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official or private capacity.

¹²⁰ Charles Manga Fombad & Enyinna Nwauche, “Africa’s Imperial Presidents: Immunity, Impunity and Accountability”, 5 (2) *African Journal of Legal Studies* 91 (2011) at 11 (online version).

¹²¹ Constitution of Congo, 2015, Article 96.

¹²² Id, Article 95.

¹²³ Constitution of Rwanda, 2003 (rev. 2015), Article 114.

criminal prosecution for any acts performed as part of his official functions, *with the exception of* “subordination, treason and the crimes defined in this Constitution as imprescriptible and ineligible for amnesty”¹²⁴ – which include genocide and crimes against humanity.¹²⁵ For unofficial acts, the President may be criminally prosecuted only after a period of five years since leaving office has passed. There appears to be no immunity from civil liability for official acts, although this is not entirely clear.¹²⁶ The Constitution is completely silent on a president’s civil liability for unofficial acts.

ANGOLA

Article 127. (Criminal Liability)

- 1. The President of the Republic shall not be liable for actions practised in the exercise of his functions, except in the event of subordination, treason and the crimes defined in this Constitution as imprescriptible and ineligible for amnesty.*
- 2. Conviction shall lead to removal from office and disqualification from standing for another term of office.*
- 3. For crimes not committed during the exercise of his office, the President of the Republic shall answer before the Supreme Court five years after his term of office has ended.*

In **Tanzania**, civil proceedings can be brought against a sitting president for an act or omission committed in a private capacity before or after the president assumed office, *provided only that 30 days’ notice is given*. There is absolute protection of sitting presidents against *criminal* proceedings, and lifelong immunity from civil or criminal proceedings related to anything done “in his capacity as President” for any president who was not impeached.¹²⁷

TANZANIA

Article 46. Immunity from Criminal and Civil Proceedings

- 1. During the President’s tenure of office in accordance with this Constitution it shall be prohibited to institute or continue in court any criminal proceedings whatsoever against him.*
- 2. During the President’s tenure of office in accordance with this Constitution, no civil proceedings against him shall be instituted in court in respect of anything done or not done, or purporting to have been done or not done, by him in his personal capacity as an ordinary citizen whether before or after he assumed the office of President, unless at least thirty days before the proceedings are instituted in court, notice of claim in writing has been delivered to him or sent to him pursuant to the procedure prescribed by an Act of Parliament, stating the nature of such proceedings, the cause of action, the name, residential address of the claimant and the relief which he claims.*

¹²⁴ Constitution of Angola, 2010, Article 127(1).

¹²⁵ Id, Article 61.

¹²⁶ This assumption is based on the title of Article 127 (“Criminal liability”), even though the text of the provision does not refer to civil or criminal liability, but more generally to “actions practised in the exercise” of the President’s functions. See Constitution of Angola, 2010, Article 75:

Article 75. (Liability of the State and Other Public Corporate Bodies)

- 1.** The state and other public corporate bodies shall be jointly and civilly liable for any actions and omissions committed by their organs, their respective officeholders, agents and staff in the exercise of their legislative, judicial and administrative duties or as a result of the said duties which result in the violation of rights, freedoms and guarantees or in losses to those entitled to them or third parties.
- 2.** The individuals responsible for these acts or omissions shall be held liable for them, in criminal and disciplinary terms, under the terms of the law.

It is not clear how Article 75 fits together with Article 127 (quoted in the text). Note also that Article 105(1) states that the President, the National Assembly and the courts are “sovereign bodies”.

¹²⁷ Constitution of Tanzania, 1977 (rev. 2005), Article 46.

3. Except where he ceases to hold the office of President pursuant to the provisions of Article 46A(10) [concerning impeachment] it shall be prohibited to institute in court criminal or civil proceedings whatsoever against a person who was holding the office of President after he ceases to hold such office for anything he did in his capacity as President while he held the office of President in accordance with this Constitution.

Ghana has an unusual form of conditional immunity, which essentially provides a prescription period for personal presidential liability. Sitting presidents have absolute civil and criminal immunity, but former presidents can be held civilly or criminally liable for anything done in their personal capacity – *as long as proceedings are instituted within three years of the date on which the President left office.*¹²⁸

GHANA

Article 57. The President of Ghana

4. Without prejudice to the provisions of article 2 of this Constitution, and subject to the operation of the prerogative writs, the President shall not, while in office, be liable to proceedings in any court for the performance of his functions, or for any act done or omitted to be done, or purported to be done, or purported to have been done or purporting to be done in the performance of his functions, under this Constitution or any other law.

5. The President shall not, while in office as President, be personally liable to any civil or criminal proceedings in court.

6. Civil or criminal proceedings may be instituted against a person within three years after his ceasing to be President, in respect of anything done or omitted to be done by him in his personal capacity before or during his term of office notwithstanding any period of limitation except where the proceedings had been legally barred before he assumed the office of President.

The approach taken by **Kenya** (discussed above), which generally protects only sitting Presidents, could also be described as an example of conditional immunity since it does *not* apply to a crime by a president in instances where a treaty to which Kenya is party prohibits such immunity.¹²⁹

(g) Virtually no immunity

There are a few African countries which offer virtually no immunity, even to a sitting President. In **Mozambique**, the Constitution is silent on civil claims against a sitting President, which suggests that there is likely no civil immunity – since criminal liability is discussed in detail. Criminal acts committed *outside official duties* can be prosecuted at the end of the President's term of office, and crimes committed *in the performance of official functions* can be tried by the Supreme Court whilst the President is sitting. Moreover, the Assembly can pass a resolution by a two-thirds majority which requests the Attorney General to institute criminal proceedings against a sitting President, and a conviction will result in discharge from office as well as a prohibition on *ever* standing for public office again.¹³⁰

¹²⁸ Constitution of Ghana, 1992 (rev. 1996), Article 57(4)-(6).

¹²⁹ Constitution of Kenya, 2010, Article 143.

¹³⁰ Constitution of Mozambique, 2004 (rev. 2007), Article 153.

MOZAMBIQUE

Article 153. Criminal Responsibility

1. For crimes committed in the performance of his functions, the President of the Republic shall be tried before the Supreme Court.
2. For crimes committed outside the performance of his functions, the President of the Republic shall be tried before the ordinary courts, at the end of his term of office.
3. It shall be incumbent upon the Assembly of the Republic to request that the Attorney General of the Republic institute criminal proceedings against the President of the Republic, upon the recommendation of at least one third and carried by a majority of two thirds of the deputies of the Assembly of the Republic.
4. The President of the Republic shall be suspended from his duties as of the date on which definitive indictment or its equivalent has been passed, and his conviction shall result in his discharge from office.
5. The Supreme Court, sitting in plenary session, shall deliver its judgement within a maximum period of sixty days.
6. In the event of a conviction, the President of the Republic shall not be able to stand as a candidate for that office again, nor may he hold any position in a sovereign public office or a local authority.

Another example is **South Africa**. The Constitution of South Africa is silent on the issue of presidential immunity from civil or criminal suits,¹³¹ and the rules on immunity in South African common law do not provide for presidential immunity.¹³² Presidential immunity was not even proposed during the debates around South Africa's interim or final constitutions,¹³³ and the Constitutional Court has made it clear that the powers of South African presidents are derived from the Constitution and are subject to judicial review for consistency with the Constitution.¹³⁴

In 1999, then-President Nelson Mandela gave evidence in person in the Transvaal High Court in *South African Rugby Football Union & Others v President of the Republic of South Africa & Others*.¹³⁵ The case involved the question of whether the President had exercised his power to establish a commission improperly. The acceptability of the decision to order the President to give evidence was considered by the Constitutional Court, which held that a president is a competent and compellable witness, but should be compelled to testify only in exceptional circumstances:

We are of the view that there are two aspects of the public interest which might conflict in cases where a decision must be made as to whether the President ought to be ordered to give evidence. On the one hand, there is the public interest in ensuring that the dignity and status of the President is preserved and protected, that the efficiency of the executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed. Careful consideration must therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of state and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that courts are not impeded in the administration of justice.¹³⁶

¹³¹ *Constitution of South Africa, 1996 (rev. 2012)*. See also Stu Woolman, Theunis Roux & Michael Bishop, *Constitutional Law of South Africa, 2nd Edition*, Cape Town; Juta & Co Ltd, 2009, at 25-26.

¹³² This legal position was confirmed in the 1994 *Gqozo* case in which the Court ruled that the principle that "the King can do no wrong" does not form part of the common law of South Africa. *S v Gqozo and Another* 1994 (2) 756 (CK).

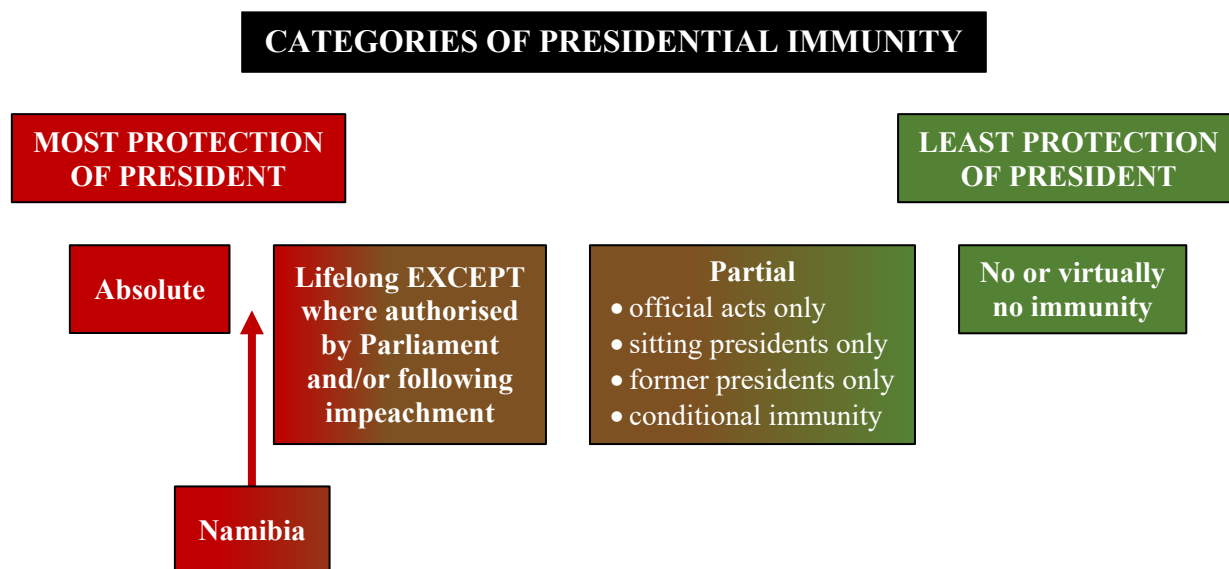
¹³³ Two constitutional scholars in South Africa confirmed this to be the case, in personal communications.

¹³⁴ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

¹³⁵ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

¹³⁶ *Id* at para 243.

The absence of immunity can be seen at work in the investigation and prosecution of former South African President Jacob Zuma during his presidency for alleged crimes which took place before his term of office (discussed in the following section).



4.2 African presidents on trial

It has been suggested that, in practice, it is likely to be rare for African judges to hold presidents liable – especially where sensitive political issues are involved.¹³⁷

Several African presidents have been criminally prosecuted by the courts of their own countries *after* the expiry of their terms of office.

- In **Equatorial Guinea**, the country's first President Francisco Macías Nguema was overthrown by a military coup on 3 August 1979, after being in office for nearly 11 years. Shortly thereafter, a Special Military Tribunal was established, and Nguema and several of his collaborators were tried and convicted for crimes committed whilst in office, including genocide, mass murder, and systematic human rights violations. On 29 September 1979, Nguema was sentenced to death. There was no appellate court, so the decision of the Special Military Tribunal was final. Nguema was executed the same day.¹³⁸
- In **Mali**, former President Moussa Traoré was tried and convicted of mass murder for crimes committed whilst he was in office. In 1993, the High Court sentenced Traoré after ruling that he had ordered security forces to open fire on pro-democracy demonstrators on 22 March 1991, four days before he was overthrown. At least 106 people were killed.¹³⁹

¹³⁷ See Charles Manga Fombad & Enyinna Nwauche, "Africa's Imperial Presidents: Immunity, Impunity and Accountability", 5 (2) *African Journal of Legal Studies* 91 (2011) at 13 (online version).

¹³⁸ "Francisco Macías Nguema", *Trial International*, 1 April 2017.

¹³⁹ "Death Sentence", *Independent*, 13 February 1993.

However, Traoré's sentence was later commuted to life imprisonment, and he was subsequently pardoned in 2002 for humanitarian reasons.¹⁴⁰

- In **Zambia**, former President Frederick Chiluba faced corruption charges for allegedly stealing more than \$43 million of state funds.¹⁴¹ However, under the Zambian Constitution, presidents enjoy immunity from prosecution for life, unless Parliament decides to remove this immunity.¹⁴² Accordingly, before criminal proceedings were brought against Chiluba, the National Assembly voted unanimously to remove his immunity from criminal prosecution for acts done in his private capacity whilst occupying the office of the President – a decision which was upheld by the Supreme Court in February 2003.¹⁴³ However, six years later, the Supreme Court ultimately acquitted Chiluba of all criminal charges.¹⁴⁴ He died two years later.¹⁴⁵
- Another former president was subsequently prosecuted in **Zambia**. Ex-President Rupiah Banda was prosecuted for abuse of authority of office in connection with involving a US\$2.5 million oil deal between Zambia and Nigeria, after the Zambian Parliament voted to remove his immunity. He was acquitted of these charges in June 2015, and his immunity was then restored by a High Court decision, thus preventing a further prosecution on different criminal charges.¹⁴⁶
- In **Rwanda**, former President Pasteur Bizimungu was tried in the country's domestic courts for actions which took place after his tenure in office. Bizimungu was the President of Rwanda from 19 July 1994 to 23 March 2000. Over one year later, in May 2001, he founded a new political party – the Party for Democratic Renewal (PDR-Ubuyanja) – which was quickly banned by the government on the grounds that it was a radical Hutu party. Bizimungu was subsequently arrested. His trial began on 31 March 2004, almost two years after his arrest, and four years after he left office as President. Along with Charles Ntakirutinka and six co-accused, he was charged with plotting to overthrow the government, inciting rebellion through false rumours and creating a criminal association. He was also separately accused of embezzling public funds, illegal possession of a firearm and forgery. On 7 June 2004, a trial court in Rwanda convicted Bizimungu and several of his co-accused of spreading rumours to incite rebellion, creating a criminal association and embezzling state funds. Bizimungu was

¹⁴⁰ “Mali pardons former dictator”, *News* 24, 30 May 2002.

¹⁴¹ Basildon Peta, “Ex-Zambia president on trial for stealing £25m from country”, *Independent*, 10 December 2003.

¹⁴² Charles Manga Fombad & Enyinna Nwauche, “Africa’s Imperial Presidents: Immunity, Impunity and Accountability”, 5 (2) *African Journal of Legal Studies* 91 (2011) at 12 (online version); Scott D Taylor, “Divergent Politico-Legal Responses to Past Presidential Corruption in Zambia and Kenya: Catching the ‘Big Fish’, or Letting Him off the Hook?” 27 (2) *Third World Quarterly* 281 (2006).

¹⁴³ *Chiluba v Attorney-General (Appeal Number 125 of 2002)* [2003] ZMSC 3 (18 February 2003).

¹⁴⁴ *The People v Chiluba*, Case number SSP/124/2004, In the Subordinate Court of the First Class for the Lusaka District Holden at Lusaka, 1-289, 17 August 2009. See, for example, “Zambian ex-president Frederick Chiluba cleared of corruption”, *The Guardian*, 17 August 2009. Sebastian Berger, “Zambia’s ex-president Frederick Chiluba cleared of theft”, *The Telegraph*, 17 August 2009.

¹⁴⁵ For more detail see Paul Lewis, “Shifting Legitimacy: The Trials of Frederick Chiluba” in Ellen L Lutz & Caitlin Reiger, eds, *Prosecuting Heads of State*, Cambridge: Cambridge University Press, 2009.

¹⁴⁶ “Kambwili says Government has position on RB immunity, but Mukanga says immunity was automatically restored”, *Lusaka Times*, 8 July 2015; “Former President Rupiah Banda Comments on his Immunity Restoration”, *Lusaka Times*, 21 March 2016.

sentenced to five years on each count. He and the others appealed the trial court's decision. The High Court declined to hear the appeal, but the Supreme Court finally heard the appeal in late 2005. On 17 February 2006, the Court overturned the convictions of six co-accused but upheld the convictions of Bizimungu and Ntakirutinka on charges of forming a criminal association and inciting a rebellion. Additionally, the Court reversed the previous acquittal of Bizimungu and Ntakirutinka on charges of plotting against the government, sentencing them each to 10 years imprisonment to be served concurrently with their existing sentences. Unexpectedly, on 6 April 2007 (one day prior to the 13th genocide commemoration ceremony), Bizimungu was officially pardoned by President Kagame. One academic, Lars Waldor, is of the view that "Bizimungu's trial represents a throwback to an earlier generation of political show trials designed to destroy or disgrace political opponents".¹⁴⁷

- In **Malawi**, former President Bakili Muluzi's criminal trial on corruption charges, which began after he left office, continues to drag on, at a reported cost of \$12 million. As of 9 April 2018, the trial had been ongoing for some 12 years and the High Court had still not set dates for a full hearing.¹⁴⁸

At least three former African Presidents have been tried by the courts of their country *in absentia* – which has the potential to raise serious due process concerns.

- In the **Central African Republic**, former President and Emperor Jean-Bédél Bokassa was tried *in absentia* on a series of charges including embezzlement, murder and cannibalism which took place during his nearly 14-year reign.¹⁴⁹ He was convicted and sentenced to death in December 1980. This marked the first time an African leader was ever tried in a domestic court for human rights abuses.¹⁵⁰ Interestingly, a law in the Central African Republic requires that a person convicted *in absentia* must be tried again upon capture.¹⁵¹ On 22 October 1986, Bokassa voluntarily left exile in France and returned to Bangui, where he was immediately arrested and later tried on similar charges.¹⁵² On 13 June 1987, the Bangui Criminal Court convicted Bokassa for a second time and sentenced him to death for murdering at least 20 people during his rule. He was also found guilty of ordering the arrest of more than 100 schoolchildren in 1979. The allegations of cannibalism were not proved.¹⁵³ The entire trial was broadcast on radio and television.¹⁵⁴ His sentence was later

¹⁴⁷ Lars Waldor, "A Justice 'Trickle-Down': Rwanda's First Postgenocide President on Trial" in Ellen L Lutz & Caitlin Reiger, eds, *Prosecuting Heads of State*, Cambridge: Cambridge University Press, 2009 at 186-190, quoted text at 192.

¹⁴⁸ Owen Khamula, "Court yet to set date for Bakili Muluzi case", *NYASA Times*, 9 April 2018. Muluzi left office on 24 May 2004. He was arrested for the first time on 27 July 2006 (with the charges being dropped the same day); arrested again on 25 May 2008, and again on 26 February 2009.

¹⁴⁹ "Bokassa doomed by Bangui Court", *The New York Times*, 13 June 1987.

¹⁵⁰ Jonathan C.R. and al, "Bokassa's bloody past relived in steamy African courtroom", *The Washington Post*, 25 January 1987.

¹⁵¹ "Bokassa Will Go on Trial Soon", *Los Angeles Times*, 1 November 1986.

¹⁵² *Ibid.*

¹⁵³ "Bokassa doomed by Bangui Court" *The New York Times*, 13 June 1987.

¹⁵⁴ Jonathan C.R. and al, "Bokassa's bloody past relived in steamy African courtroom", *The Washington Post*, 25 January 1987.

commuted to life in prison, although he was released in 1993 by President André Kolingba and pardoned in 2010, after his death.¹⁵⁵

- In **Ethiopia**, several years after former President Mengistu Haile Mariam fled the country and was granted asylum in Zimbabwe, he was found guilty of genocide *in absentia* in 2006. The trial took approximately 12 years.¹⁵⁶ During the trial, the defence argued that the former President could not be tried by a domestic court on the grounds of presidential immunity. However, the Court rejected this defence, reasoning that the Penal Code provided for the equal treatment of all persons under the law and that the Ethiopian courts were fulfilling their obligation to prosecute and punish perpetrators of genocide pursuant to the 1948 Genocide Convention, which Ethiopia ratified in 1958 and incorporated into their Penal Code.¹⁵⁷ The Ethiopian Constitution does not provide for presidential immunity.¹⁵⁸
- In **Chad**, former President Hissène Habré was found guilty and sentenced to death *in absentia* at a mass trial for crimes against state security in connection with the 2008 Battle of N'Djamena.¹⁵⁹ (In a separate action, Habré was tried, convicted and sentenced to life imprisonment by the Extraordinary African Chambers in Senegal on 30 May 2016 for crimes against humanity, war crimes, and torture committed during his tenure as President of Chad.¹⁶⁰ The Senegal judgment is notable because it marked the first time a national court relied on the principle of universal jurisdiction to convict a former head of state for human rights abuses.¹⁶¹)

At least one former President has been subjected to a civil lawsuit in a domestic court.

- In **The Gambia**, three survivors launched a civil lawsuit in the High Court of Gambia on 31 May 2018 against former President Yahya Jammeh regarding a fraudulent HIV/AIDS treatment program that he ran from 2007 to 2016, whilst he was in office.¹⁶² As of late

¹⁵⁵ David Smith, "'Cannibal' dictator Bokassa given posthumous pardon", *The Guardian*, 3 December 2010.

¹⁵⁶ See also Tsegaye Tadesse, "Ethiopia's Mengistu found guilty of genocide", *Reuters*, 20 January 2007. Mengistu was the leader of Ethiopia 1977 to 1991, initially as the chairperson of the military junta that governed Ethiopia from 1977 to 1987, and then as the President of the People's Democratic Republic of Ethiopia from 1987 to 1991. He was found guilty and sentenced to life imprisonment in 2006.

¹⁵⁷ *Special Prosecutor v Col Haile-Mariam and 173 Others, Preliminary Objections*, Criminal File No.1/87, Decision of Meskerem 29, 1988 EC (GC); reported in Oxford Reports on International Law – ILDC 555 (ET 1995), 9 October 1995, as found in Dr Chacha Bhoke Murungu, "Prosecution of African State Officials – National and International Perspectives", *Bonner Rechts Journal*, February 2012 at 173.

¹⁵⁸ *Constitution of Ethiopia, 1994*, Article 63(2) states that "No member of the House of the Federation may be arrested or prosecuted without the permission of the House except in the case of flagrante delicto", but does not provide for presidential immunity.

¹⁵⁹ *Hissene Habre, Trial International*, 10 January 2018. Note that this was not in connection with crimes committed whilst in office, as he only ruled from 1982 until he was deposed in 1990 and thereafter fled to Senegal.

¹⁶⁰ *Ibid.* See "Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal". *Human Rights Watch*, 3 May 2016 for a brief discussion on due process concerns and why Habré was not prosecuted in Chad for crimes against humanity, torture and war crime.

¹⁶¹ "One dictator down", *The Economist*, 4 June 2016. Universal jurisdiction allows a court to hear a case regardless of where the crime took place.

¹⁶² Spencer Feingold, "Former Gambian leader sued over fraudulent AIDS cure", *CNN*, 31 May 2018. This is the first time that Jammeh is being sued in Gambia's domestic courts. Celeste Hicks, "Seeking justice in The Gambia: Why Jammeh's days are numbered", *African Arguments*, 21 June 2018.

2018, Jammeh was in exile in Equatorial Guinea, where he fled after losing the presidential elections in January 2017. Another group of activists have begun a campaign to extradite Jammeh and bring him to justice in The Gambia for crimes relating to killings, disappearances, torture, and sexual violence committed during his 22-year rule.¹⁶³

We could find only one instance where a sitting president in Africa has ever been criminally prosecuted, or subjected to a civil lawsuit, in a domestic court. This example comes from **South Africa**, an unusual case as one of the few African countries that allows for the prosecution of sitting presidents.¹⁶⁴

- Former South African President Jacob Zuma, who left office on 14 February 2018. spent much of his presidency embroiled in court proceedings on corruption charges stemming from a multi-billion dollar arms deal he was involved with in the 1990s, *prior to* his tenure as President (or Vice President).¹⁶⁵ At the time of writing (late 2018), the former President faces a total of 16 criminal charges, including 12 counts of fraud, two counts of corruption, one count of racketeering and one count of money laundering.¹⁶⁶
- Whilst Zuma was President, he also faced court action in respect of lavish renovations to his personal property (“Nkandla”), using state funds under the ruse that the luxurious modifications were all in aid of enhancing his security.¹⁶⁷ In 2014, in the wake of a finding by South Africa’s Public Protector that Zuma had unduly benefitted from the work at Nkandla, an opposition party laid a criminal charge of corruption against the President; however, no prosecution proceeded.¹⁶⁸ In March 2016, South Africa’s Constitutional Court ruled that Zuma (who was still in office at the time) had violated his oath of office and the Constitution by failing to comply with the Public Prosecutor’s recommendation to repay some of the government money he spent to upgrade Nkandla.¹⁶⁹ However, this case was

¹⁶³ “Gambia: Campaign to bring former President Yahya Jammeh to Justice”, *Trial International*, 23 October 2017.

¹⁶⁴ Miren Gutiérrez, “The Prosecution of Presidents” *Global Policy Forum*, 1 August 2003.

¹⁶⁵ These criminal charges concerned alleged actions which took place approximately 10 years prior to the date when he assumed the Presidency. Zuma was named as South Africa’s Deputy President on 14 June 1999. He was first implicated in the arms deal during the criminal trial of his financial advisor, who was found guilty of corruption and fraud in connection with the same deal on 2 June 2005. Zuma was dismissed from his post as Deputy President on 14 June 2005, and criminally charged in respect of the arms deal in December 2007. However, the case was dropped in April 2009, shortly before Zuma became President on May 9. However, the charges were reinstated in April 2016, as Zuma’s political influence waned. An opposition party also brought a court case demanding that the President face charges. Zuma resigned from the Presidency on 14 February 2018, having been essentially forced out by his own party. See Jeanette Chabalala, “Timeline: Jacob Zuma gets his day in court”, *News24*, 6 April 2018; “Timeline of the arms deal”, *Corruption Watch*, 17 January 2014.

¹⁶⁶ Jeanette Chabalala, “Timeline: Jacob Zuma gets his day in court”, *News24*, 6 April 2018.

¹⁶⁷ Mfuneko Toyana and James Macharia, “South Africa’s Zuma repays some state money in home improvement scandal”, *Reuters*, 12 September 2016.

¹⁶⁸ Rex van Schalkwyk, “No privilege for presidents and everyone is equal before the law — even No 1”, *Business Live*, 25 October 2016.

¹⁶⁹ See, for example, Genevieve Quintal, Naledi Mailula & Jenni Evans, “Zuma violated oath of office and Constitution – Trengove” *News24*, 2 September 2016; “Jacob Zuma: The dates that explain why S Africa president quit”, *BBC News*, 16 March 2018; Andrew Harding, “The trials of Jacob Zuma”, *BBC News*, 15 December 2017. But also see “ConCourt did not say Zuma breached oath: Presidency”, *IOL*, 5 April 2016, reporting the Presidency’s views that the technical finding of the Constitutional Court was actually that: “The failure by the President to comply with the

not a civil or criminal action against the President, but rather a question regarding the implementation of the Public Protector’s findings in terms of her constitutional authority. The Constitutional Court also has explicit and exclusive jurisdiction in terms of the South African Constitution to “decide that Parliament or the President has failed to fulfil a constitutional obligation”.¹⁷⁰ In September, Zuma finally took out a home loan from a private bank to repay R7.8 million, which was the amount the Treasury determined to be the “reasonable cost” he should bear.¹⁷¹

- Zuma also faced criminal charges of rape between his tenure as Vice President and his term of office as President. He served as Deputy President of South Africa from 14 June 1999 to 14 June 2005. In December 2005, he was charged with rape. He was tried and acquitted during a period when he was not in office, and he held no political office at the time of the incident which gave rise to the charges.¹⁷²

South Africa’s decision not to provide immunity for sitting or former Presidents or Deputy Presidents has been praised as a positive example of how States can demonstrate that they are serious about accountability; as one commentator observed, “a former President on trial will be a strong reminder that political power is not supreme, that it cannot guarantee uncensored immunity and privilege. A trial will send the message that unbridled power comes with high risks and huge costs.”¹⁷³

5. Examples of Presidential immunity outside Africa

Outside Africa, many democracies make provision for holding even serving presidents accountable for their actions, demonstrating that immunity is not a prerequisite for a functional presidency.

5.1 United States

In the United States, presidential immunity is based on two key Supreme Court cases, rather than on any constitutional provisions, and can be summed up as follows:

remedial action taken against him, by the Public Protector in her report of 19 March 2014, is inconsistent with section 83(b) of the Constitution read with sections 181(3) and 182(1)(c) of the Constitution and is invalid.”

¹⁷⁰ *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC), referring to s167(4)(e) of the South African Constitution.

¹⁷¹ Mfuneko Toyana and James Macharia, “South Africa’s Zuma repays some state money in home improvement scandal”, *Reuters*, 12 September 2016. Ironically, if Zuma is ultimately convicted on the corruption charges in connection with the above-mentioned arms deal, the State could theoretically seize his Nkandla home on the grounds that it was built with the “proceeds of crime”. Ranjeni Munusamy, “Zuma’s conviction could lead to seizure of Nkandla”, *Times Live*, 8 April 2018.

¹⁷² See Jeanette Chabalala, “Timeline: Jacob Zuma gets his day in court”, *News24*, 6 April 2018; Andrew Harding, “The trials of Jacob Zuma”, *BBC News*, 15 December 2017.

¹⁷³ “Why Zuma’s trial matters for South Africa’s constitutional democracy”, *The Conversation*, 4 April 2018.

- A President is entitled to absolute immunity from civil liability for official acts.
- A President has no immunity from civil litigation arising from unofficial acts, and there is no constitutional requirement that such litigation be deferred until after the President's term of office ends.
- Neither sitting nor former presidents appear to have any immunity from criminal prosecution, although this has not been directly considered by the Supreme Court as yet.

The US Supreme Court considered presidential immunity for the first time in the seminal case of *Nixon v Fitzgerald*,¹⁷⁴ which concerned a civil lawsuit arising from the wrongful dismissal by the President of a member of the US Air Force who had previously testified before a congressional committee. While President Nixon had taken responsibility for this action, the issue before the Court was whether a President was immune from civil suit. After considering its previous rulings on immunity for various government officials, the Court concluded (by a narrow 5-4 majority) that a President "is entitled to absolute immunity from damages liability predicated on his official acts".¹⁷⁵ Generally, the Court observed that subjecting official acts to civil liability "would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government".¹⁷⁶ Other arguments cited in support of this holding included the following:

- The President occupies "a unique position in the constitutional scheme" and is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity".¹⁷⁷
- The President is responsible for the conduct of foreign affairs, and courts should not review actions in this realm and possibly "nullify actions of the Executive taken on information properly held secret".¹⁷⁸
- Management of the Executive Branch is a task which requires unrestricted power to remove subordinates if necessary.¹⁷⁹
- "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government."¹⁸⁰
- A President must concern himself with matters likely to "arouse the most intense feelings", and it is in precisely such cases "that there exists the greatest public interest in providing an official with "the maximum ability to deal fearlessly and impartially" with the duties of his office."¹⁸¹
- The prominence and visibility of the President's office, and the widespread impact of his actions, would make him be an easily identifiable target for lawsuits for civil damages.¹⁸²

¹⁷⁴ *Nixon v Fitzgerald* 457 US 731 (1982) (opinion of the Court per Powell J).

¹⁷⁵ *Id* at 732.

¹⁷⁶ *Id* at 745, quoting *Spalding v Vilas* 161 US 483 (1896).

¹⁷⁷ *Ibid*.

¹⁷⁸ *Id* at 750.

¹⁷⁹ *Ibid*.

¹⁸⁰ *Id* at 751.

¹⁸¹ *Id* at 752, quoting *Pierson v Ray* 386 US 547 (1967) and *Ferri v Ackerman* 444 US 193 (1979).

¹⁸² *Id* at 752-753.

- While the separation of powers doctrine does not entirely prevent the judicial branch from exercising jurisdiction over the President, the exercise of such jurisdiction “must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch”.¹⁸³ A concurring opinion elaborated on this issue: “The essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches.”¹⁸⁴ The concurring opinion further noted that, while *judicial review* of legislative actions is in some instances necessary to maintain proper checks and balances, the judiciary should be “hesitant to probe into the elements of Presidential decisionmaking, just as other branches should be hesitant to probe into judicial decisionmaking. Such judicial intervention is not to be tolerated absent imperative constitutional necessity.”¹⁸⁵

The Court was at pains to emphasise that presidential immunity for civil suits in respect of official acts would not remove Presidential accountability:

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President’s traditional concern for his historical stature. The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President ‘above the law’. For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.”¹⁸⁶

The dissent in the *Nixon* case argued that presidential immunity, like absolute judicial and prosecutorial immunity, should attach to particular functions and not to particular offices.¹⁸⁷ The dissenting opinion further argued that the majority holding would create an absurd result whereby a President could, without following the required statutory procedures, order wiretapping or housebreaking for the purpose of installing a listening device, while remaining absolutely immune from a lawsuit for the damage which might result, regardless of whether his actions violated statute law or the Constitution and regardless of his purpose.¹⁸⁸

¹⁸³ Id at 753-754.

¹⁸⁴ Id at 760-761 (Burger CJ, concurring opinion).

¹⁸⁵ Ibid.

¹⁸⁶ Id at 757-758 (footnotes omitted). Although the *Nixon* case is often cited for the proposition that the President has “absolute immunity” from civil liability, it has been pointed out that the Court’s holding explicitly extends only up to the “outer perimeter” of the President’s official responsibilities. Congress could (and had) expressly subjected the President to suit in certain circumstances, and that there may be instances where immunity is overruled by the need for judicial action to maintain the proper balance between the different branches of government. Steve Vladeck & Benjamin Wittes, “[Can a President’s Absolute Immunity be Trumped?](#)”, *LawFare* blog, 9 May 2017.

¹⁸⁷ Id at 764 (dissenting opinion *per* White J): “Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong.”

¹⁸⁸ Id at 765-766.

The dissent also argued that presidential immunity from civil liability for damages was illogical given that the constitutionality and legality of the President's actions clearly remained subject to judicial review; moreover, there is no presidential immunity to criminal prosecution in the United States, nor is the President immune to being subpoenaed or insulated from lawsuits seeking declaratory or injunctive relief. Thus, if these forms of accountability do not violate the doctrine of separation of powers, then neither do civil lawsuits for damages, according to the *Nixon* dissent.¹⁸⁹

The dissenting opinion asserted that the courts' enforcement of the rule of law with respect to the President, particularly their role in ensuring that the President does not go beyond the bounds of his constitutional authority, is not a violation of the separation of powers but an illustration of this doctrine's purpose.¹⁹⁰ Answering the specific arguments of the majority opinion, the dissent reasoned as follows:

- The unique office of the President in the constitutional structure does not on its own justify absolute immunity from civil liability.
- There is no factual evidence to support the concern that the President's stature and visibility make him particularly vulnerable to suits for civil damages, and there is no reason to believe that this could not be addressed through tools such as the power to dismiss frivolous suits.
- In response to the assertion that potential liability could distract the President from his public duties, awareness of legal accountability should be viewed as a virtue and not a detriment.¹⁹¹

In short, the dissent asserted that the guiding principle should be "the right of every individual to claim the protection of the laws, whenever he receives an injury".¹⁹²

The Supreme Court considered presidential immunity again in the case of *Clinton v Jones*, which concerned a civil lawsuit arising from alleged sexual harassment of an employee which took place before the president in question assumed office. Here, the Court held unanimously that a sitting president has no immunity from civil litigation arising from unofficial actions, and that there is no constitutional requirement that such litigation be deferred until after the President's term of office ends.¹⁹³

The Court did point to the possibility that special caution may be required if the materials or testimony in question involve confidential matters relating to a president's official activities.¹⁹⁴

¹⁸⁹ Id at 780-782.

¹⁹⁰ Id at 794.

¹⁹¹ Id at 795-797.

¹⁹² Id at 783, quoting *Marbury v Madison* 1 Cranch 137 (1803).

¹⁹³ *Clinton v Jones* 520 US 681 (1997) (opinion of the Court per Stevens J; Breyer J wrote a concurring opinion). "The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power." (At 701.)

This case is commonly understood to be predicated on the fact that the conduct took place before the President took office, but the court's opinion focuses on the fact that the alleged conduct did not fall within the President's official duties. Steve Vladeck & Benjamin Wittes, "Can a President's Absolute Immunity be Trumped?", *LawFare* blog, 9 May 2017; "The Limits of Presidential Immunity", *The New York Times*, 28 May 1997.

¹⁹⁴ *Clinton v Jones* 520 US 681 (1997) at 704.

The Court also noted that the testimony of a president could be scheduled in a way which would accommodate his busy schedule, and that there might be no necessity for the President to attend a civil trial in person, though he might elect to do so.¹⁹⁵ Thus, immunity was not required to ensure that a president was not unduly burdened or distracted from the responsibilities of his office.¹⁹⁶

PRESIDENTIAL IMMUNITY IN THE UNITED STATES	
OFFICIAL ACTIONS	
Civil liability	Virtually absolute immunity (without affecting judicial review or tests of constitutionality)
Criminal liability	No immunity (although not yet directly considered)
UNOFFICIAL ACTIONS	
Civil liability	<i>Whilst in office</i> : No immunity
	<i>After leaving office</i> : No immunity
Criminal liability	<i>Whilst in office</i> : No immunity (although not yet directly considered)
	<i>After leaving office</i> : No immunity

5.2 Canada

Canada, like many other commonwealth countries (including **Australia** and **New Zealand**), follows the **UK model of parliamentary immunity**.

In **Canada**, the Prime Minister, who is a member of Parliament, enjoys the same privileges afforded to other Members of Parliament, without any additional protection. Section 18 of the *Constitution Act*, 1867 grants Parliament the authority to enact parliamentary privileges and immunities,¹⁹⁷ which are defined by the *Parliament of Canada Act*.¹⁹⁸ Members of the Senate and the House of Commons enjoy the following privileges:

- freedom of speech;
- freedom from arrest in civil actions;
- exemption from jury duty; and
- exemption from attendance as a witness.¹⁹⁹

The Prime Minister of Canada, as a Member of Parliament, enjoys all of these parliamentary privileges and immunities.²⁰⁰ The justification is that the “House has the pre-eminent claim to the attendance and service of its Members, free from restraint or intimidation particularly by means

¹⁹⁵ Id at 691-692.

¹⁹⁶ Breyer J’s concurring opinion (at 710-ff), while agreeing that there was no constitutional right to a postponement of such a civil case until a president leaves office, gave more weight to the possibility that a president might be able to motivate the need for such a postponement in a specific case, to prevent interference with the ability to perform official duties.

¹⁹⁷ *Constitution of Canada*, 1867, Article 18.

¹⁹⁸ *Parliament of Canada Act*, Article 4.

¹⁹⁹ Parliament of Canada, “*Privileges and Immunities – Parliamentary Privilege: a Definition*”, *House of Commons Procedure and Practice*, Third Edition, 2017.

²⁰⁰ Ibid.

of legal arrest in civil process”.²⁰¹ However, this particular immunity has lost most of its importance in the contemporary context, as imprisonment for debt has been long abolished (with only a few exceptions).²⁰² Moreover, this privilege does not apply to actions which may affect Members of Parliament as private individuals, and are not directly related to the performance of their functions (for example, a Member of Parliament can still be summoned to court for tax evasion or a traffic violation).²⁰³

In Canada, there is no legal obstacle to prosecuting a sitting or former Prime Minister for a crime. Freedom from arrest is limited to civil cases and does not allow for any Member of Parliament, including the Prime Minister, to evade criminal or even quasi-criminal law.²⁰⁴ This conforms with the guiding principle set out by the British House of Commons in 1641: “Privilege of Parliament is granted in regard of the service of the Commonwealth and is not to be used to the danger of the Commonwealth.”²⁰⁵ Accordingly, the Prime Minister of Canada remains subject to criminal law, except in respect of words spoken or acts done in the context of a parliamentary proceeding.²⁰⁶ Any sitting or former Member of Parliament, including the Prime Minister, can be charged with a criminal offence, and in such a scenario would be required to abide by the due process of law.²⁰⁷ However, police and courts must comply with special procedures upon the arrest or imprisonment of a Member of Parliament. Notably, the police or court must notify the Speaker of the House if a Member of Parliament is remanded in custody, detained for a significant amount of time or sent to prison following a conviction.²⁰⁸

PARLIAMENTARY IMMUNITY IN CANADA	
OFFICIAL ACTIONS	
Civil liability	No immunity (Only freedom from arrest in civil actions)
Criminal liability	No immunity
UNOFFICIAL ACTIONS	
Civil liability	<i>Whilst in office</i> : No immunity
	<i>After leaving office</i> : No immunity
Criminal liability	<i>Whilst in office</i> : No immunity
	<i>After leaving office</i> : No immunity

²⁰¹ Ibid.

²⁰² Joint Committee on Parliamentary Privilege (UK), *Parliamentary Privilege – First Report – Volume 1*, 9 April 1999 at para 327 as found in Senate, “A Matter of Privilege: a discussion paper on Canadian Parliamentary Privilege in the 21st century”, *Subcommittee on Parliamentary Privilege of the Standing Committee on Rules, Procedures, and the Rights of Parliament*, January 2015, page 70.

²⁰³ Parliament of Canada, “*Privilege and the Criminal Code – Member’s privileges and the criminal law*”, *House of Commons Procedure and Practice*, Third Edition, 2017.

²⁰⁴ Ibid.

²⁰⁵ United Kingdom, House of Commons, Select Committee on Parliamentary Privilege, 1966-67, Report at 1, as reported in Parliament of Canada, “*Privilege and the Criminal Code – Member’s privileges and the criminal law*”, *House of Commons Procedure and Practice*, Third Edition, 2017.

²⁰⁶ Parliament of Canada, “*Privilege and the Criminal Code – Member’s privileges and the criminal law*”, *House of Commons Procedure and Practice*, Third Edition, 2017.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

5.3 Israel

Israel is a parliamentary republic, and the President is the Head of State. However, unlike the situation in most other parliamentary republics, the President's role is mostly ceremonial and apolitical. The real power is vested in the Prime Minister, because the *Basic Law: The Government* bestows executive power on the government – of which the Prime Minister is the leader.²⁰⁹ Interestingly, Israel does not have a formal constitution. Instead, the country has enacted “Basic Laws” in a piecemeal manner over the years, and the Supreme Court of Israel has held that these have a constitutional nature.²¹⁰

Presidential immunity: The *Basic Law: President of the State* contains a provision on presidential immunity from criminal proceedings which states:

13. Immunity with regard to discharge of functions

- a. The President of the State shall not be amenable to any court or tribunal, and shall be immune from any legal act, in respect of anything connected with his functions or powers.
- b. The President of the State shall not, in giving evidence, have to disclose anything which came to his knowledge in the discharge of his functions as President of the State.
- c. The immunity of the President of the State under this section shall continue after he has ceased to be President of the State.²¹¹

14. Immunity from criminal proceedings

The President of the State shall not be criminally prosecuted. The period during which, by virtue of this section, the President of the State cannot be prosecuted for an offence shall not be counted in calculating the period of prescription of that offence.²¹²

In a landmark case, former President Moshe Katsav was prosecuted and convicted on sexual offences which took place during his time in office, as well as a rape which pre-dated his tenure as President.²¹³ Allegations first surfaced in 2006 and by September that year, the police determined they had enough evidence for an indictment. However, Katsav, by virtue of presidential immunity, could not be prosecuted until his term ended in August 2007. An effort to impeach him failed,²¹⁴ but he resigned with effect from 1 July 2007 in the wake of a plea bargain.²¹⁵ Interestingly, he later withdrew the plea bargain on the belief that prosecution did not have enough evidence to convict him. But he was wrong. In March 2009 he was formally indicted, and in December 2010 he was convicted for rape and other sexual offences as well as obstruction of justice.²¹⁶

²⁰⁹ *Basic Law: The Government* (2001).

²¹⁰ *United Mizrahi Bank Ltd v Migdal Cooperative Village* CA 6821/93, 49 (4) Piske Din (P.D.) 221 (1995) [English translation].

²¹¹ *Basic Law: The President of the State* (1964), Art 13.

²¹² *Id.*, Art 14.

²¹³ “Israel ex-President Moshe Katsav found guilty of rape”, *BBC News*, 30 December 2010.

²¹⁴ “President Katsav escapes impeachment over likely rape charges”, *Haaretz*, 7 March 2007.

²¹⁵ “Israel ex-President Katsav begins jail term for rape”, *BBC News*, 7 December 2011.

²¹⁶ “Former President Moshe Katsav Guilty of Rape and Sexual Assault”, *Haaretz*, 30 December 2010.

Parliamentary immunity for the Prime Minister: In contrast to presidential immunity, the Prime Minister's immunity is not specifically enumerated in a Basic Law. However, the *Basic Law: The Knesset* states that "The members of the Knesset shall have immunity; particulars shall be prescribed by Law".²¹⁷ Accordingly, the Prime Minister of Israel, by virtue of being a Member of the Knesset, enjoys parliamentary immunity.²¹⁸ However, criminal immunity for members of the Knesset is not automatic but requires a vote in the Knesset in order for any member to be able to invoke this immunity.²¹⁹

As of November 2018, efforts to make parliamentary immunity automatic, and to shield sitting Prime Ministers from criminal investigations, have failed.²²⁰ While no Prime Minister, past or present, has ever been criminally prosecuted whilst in office, criminal investigations have been opened and police have recommended indictments of at least two sitting Prime Ministers.

- In May 2008, while **Ehud Olmert** was still Prime Minister, the police launched a criminal investigation into whether he had received money illegally whilst in office. In September 2008, police recommended that criminal charges be brought against Olmert.²²¹ He resigned shortly thereafter, before being indicted on charges of fraud and breach of trust in connection with two different scandals.²²² The trial began in September 2009; he was convicted in 2012 and convicted again in a retrial that concluded on 30 March 2015.²²³
- In 2018, the Israeli police launched five criminal investigations into **Prime Minister Benjamin Netanyahu**. Case 1000 relates to charges of bribery, fraud and breach of trust in connection with receiving gifts valued at more than US\$280 000. Case 2000 involves bribery, fraud and breach of trust over an alleged arrangement with a newspaper. Case 3000 involves kickbacks relating to the suspicious purchase of submarines that cost over a billion US dollars. Case 4000 relates to an order to a media outlet to provide positive coverage of him and his wife. Case 1270 involves alleged bribery of a senior judge.²²⁴ In February 2018, the police recommended that Netanyahu be indicted in two corruption cases on suspicion of fraud, breach of trust, and accepting bribes.²²⁵ However, he has not yet been indicted.

²¹⁷ *Basic Law: The Knesset* (1958), Article 17.

²¹⁸ The Knesset is the parliament of Israel.

²¹⁹ *Knesset Members Immunity, Rights and Duties Law* (1951), Article 13(a).

²²⁰ Gil Hoffman, "Netanyahu Halts Controversial Immunity Bill in Knesset", *The Jerusalem Post*, 23 October 2018.

²²¹ "Ehud Olmert Fast Facts", *CNN*, 3 October 2018.

²²² These have been dubbed the "Talansky affair" and the "Rishon Tours affair".

²²³ "Ehud Olmert Fast Facts", *CNN*, 3 October 2018.

²²⁴ Rory Jones, "Why Israeli Police Are Investigating Benjamin Netanyahu", *Wall Street Journal*, 2 March 2018.

²²⁵ Loveday Morris, "Israeli police recommend indictment of Netanyahu on corruption charges", *The Washington Post*, 13 February 2018.

6. Analysis

How can one make sense of this bewildering array of approaches? The outlines of immunity are important in both practical and symbolic terms.

6.1 Key arguments *for* presidential immunity

Immunity during office – with exceptions for impeachable offences (and citing a president as the head of state in civil actions relating to official acts) – is often justified as being necessary to avoid distraction and disruption, particularly in light of a president’s enormous responsibilities, which require undivided time and attention for the sake of protecting the interests of the public. As the High Court of Botswana put it:

The obvious purpose of the provision [on immunity] is to ensure that the President, while carrying out his important functions, is not impeded or embarrassed by having to deal with law-suits and civil claims.²²⁶

The Philippine Supreme Court, in 2006, set out the reasoning for giving presidents immunity whilst in office as follows:

Settled is the doctrine that the President, during his tenure of office or actual incumbency, may not be sued in *any* civil or criminal case, and there is no need to provide for it in the Constitution or law. It will degrade the dignity of the high office of the President, the Head of State, if he can be dragged into court litigations while serving as such. Furthermore, it is important that he be freed from any form of harassment, hindrance or distraction to enable him to fully attend to the performance of his official duties and functions. Unlike the legislative and judicial branch, only one constitutes the executive branch and anything which impairs his usefulness in the discharge of the many great and important duties imposed upon him by the Constitution necessarily impairs the operation of the Government. However, this does not mean that the President is not accountable to anyone. Like any other official, he remains accountable to the people but he may be removed from office only in the mode provided by law and that is by impeachment.²²⁷

Another argument is that immunity enables a president to exercise official discretion without the constraints which might result from fear of criminal prosecution or civil liability. It is argued that such fears could potentially inhibit the decisive, vigorous and effective administration of government policies.

Yet another argument is that presidential immunity serves to protect the dignity of the Office of the President and not just the individual holding that office. In fact, the Namibian Constitution’s provisions on presidential immunity specifically refer to concerns that court cases against a president, even after he or she has left office, might cause damage to “the dignity of the office of President”²²⁸ – a view which seems to suggest an unwarranted conflation of the office in the abstract with individual holders of that office.

²²⁶ *Motswaledi v Botswana Democratic Party* High Court of Botswana, High Court Case No. MAHLB-000486-09, 2 October 2009 at para 29.

²²⁷ *David v Macapagal* Philippine Supreme Court, G.R. NO. 171396: 3 May 2006, Section A (footnotes omitted).

²²⁸ Namibian Constitution, Article 31(3)(b).

Some supporters of presidential immunity assert that such immunity accords with the separation of powers, by ensuring that the actions of current and former Presidents should not be questioned by any court.²²⁹ Proponents of this view contend that “the legislative, judiciary, and executive branches of a government are independent and should remain independent of each other at all times”, which means that “the actions of current and former presidents cannot be questioned by any court”.²³⁰ This ignores the fact that the very purpose of the separation of powers is to provide for checks and balances.

Even if some of these arguments are accepted, most can only validly be viewed as applying to immunity *during* a President’s term of office.

6.2 Key arguments *against* presidential immunity

It has been argued that presidential immunity conflicts with the doctrine of separation of powers, which requires distribution of powers amongst the legislative, judicial, executive and judicial branches of government.²³¹ The counterargument is that Presidential immunity removes one aspect of the checks and balances which should exist between each of the separate branches of government, to prevent the abuse of power by a president as the head of the executive branch:

Those who believe in and support the doctrine of the separation of powers have argued that the powers of the legislative, judicial, and executive branches of a government constitutionally are separated but must remain coordinated and distributed equally amongst the three branches of government. Anything short of this shall woefully amount to the abuse of power by a president. Advocates of limited presidential power and restricted privilege further argue that while the Constitution distributes and diffuses powers amongst the legislative, judicial and executive branches of a nation’s government in order to better secure liberty and justice, it also commands coordination and interdependence amongst the three separate but equal branches of government for the purpose of equal justice and better governance. The doctrine of separation of powers conflicts with the granting of absolute and unrestricted power to a president. Allowing a president to have absolute power could conflict with the provision of equal justice and human rights in any developed and developing society. It could be a troubling and terrifying environment if unrestricted and unchecked powers were to be granted to a former or current president. Therefore, there must always be checks and balances on the powers of a president.... [I]t is the power and province of the courts to say what the law is. Therefore, the legislative, judicial and executive branches of a government must always act as checks and balances of a former or current president’s acts. Anything short of this is equal to asking a nation, Western or African, to place its president above the rule of law, equal justice, and the respect for human rights.²³²

²²⁹ See, for example, *Tumukunde v Attorney General & Anor* (Constitutional Petition No. 6 of 2005) [2005] UGCC 1 (26 August 2005) (unpaginated online version): “Clearly each of the three arms of the Government namely; the Executive, the Legislature and the Judiciary is independent. There is need for each arm to respect the duties of the others. Unless the President is immune from legal proceedings while holding office, there exists a threat of judicial interference with the executive branch through orders, and other court decisions which would violate the separation of power principle.”

²³⁰ Arguments for presidential immunity in an unspecified paper delivered by Fredrick Jayweh on 25 March 2008, as quoted in *Republic v Chief Justice of Kenya & 6 others, Ex-parte Moiwo Mataiya Ole Keiwua* [2010] eKLR.

²³¹ See, for example, M Evans, “*International Law*”, Fourth Edition, Oxford: Oxford University Press, 2010.

²³² Arguments for presidential immunity in an unspecified paper delivered by Fredrick Jayweh on 25 March 2008, as quoted in *Republic v Chief Justice of Kenya & 6 others, Ex-parte Moiwo Mataiya Ole Keiwua* [2010] eKLR.

On the issue of dignity, the Constitutional Court of South Africa has stated that, while courts “are obliged to ensure that the status, dignity and efficiency of the office of the President is protected”, this cannot be allowed to impede the administration of justice.²³³

It is also asserted that the rule of law requires that a president and all government officials must be subjected to the same laws that apply to others in the country. For example, the following argument was made in Zambia:

Presidential immunity from prosecution [serves] no meaningful purpose and must be removed from our Constitution. Any law that places an individual, regardless of the national importance of his or her job, above the law is no good law. We say no one is above the law but, in truth, the presidential immunity places the individual who occupies the presidency literally above the law. No law should place any individual above the law. Presidential immunity places a president above the law. No one should have immunity to face the law.²³⁴

In Italy, it has been said that:

No one man can be above all others and above the government. To suggest otherwise is a violation of the principle that all citizens are to be treated equally under the eye and arm of the law.²³⁵

It is particularly hard to see any good justification for protecting former presidents from liability for wrongful official or unofficial acts after they leave office. It has been argued that such liability is an important restraint on the abuse of power:

The prospect of a president returning to private life after the expiration of the maximum constitutional term, with its attendant loss of presidential immunity, should help discipline the use of power during a president’s term in office, especially where alternation of power between rival political parties and, for that matter, post-regime accountability, is a strong possibility.²³⁶

It is also particularly hard to understand the rationale for giving former presidents any immunity at all for actions unrelated to their official duties – such as personal acts of violence or corruption – or for misconduct in the exercise of official functions. Such immunity “can lead individuals to take advantage of entrusted power for personal gain”.²³⁷ In Namibia (as in many other countries), immunity from liability in respect of the judiciary and state officials is generally applied only to official acts carried out in good faith, and not to bad faith or fraudulent actions. It is hard to see why presidents should not be held to the same standard.

²³³ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para 242.

²³⁴ Lewis Mwape, Executive Director of the Zambia Council for Social Development, calling for the removal of presidential immunity from the Zambian Constitution, as quoted in “[Remove presidential immunity from the Constitution](#)”, *The Zambian Observer*, 10 February 2018.

²³⁵ Italian Constitutional Court, in ruling that Prime Minister Berlusconi was subject to prosecution like any ordinary citizen, as quoted in *Helen Suzman Foundation v President of the Republic of South Africa* Case No: 87643/16, High Court of South Africa, Gauteng Division. Pretoria at para 94.

²³⁶ See, for example, H Kwasi Prempeh, “Africa’s ‘constitutionalism revival’: False start or new dawn?”, 5 (3) *International Journal of Constitutional Law* 469 (2007) at Part 2.4 (unpaginated online version). One counter-argument might be that an individual who feared civil or criminal liability after leaving office might be more motivated to press for the removal of term limits.

²³⁷ “[When Immunity Becomes a Licence to Break the Law](#)”, Transparency International, 29 April 2013; Miren Gutiérrez, “[The Prosecution of Presidents](#)”, *Mail & Guardian*, 1 August 2003.

Fombad, who has written extensively on presidential immunity in Africa, supports constitutional provisions which give presidents general civil and criminal immunity, but suggests the following significant exceptions:

- (i) Civil proceedings for acts or omissions committed by the president in his official capacity, because responsibility for this is usually imputed to the state.
- (ii) Crimes or wrongs committed before the president assumed office. To reduce the risk of corrupt leadership, the presidential office should be reserved for those who have a clean record and not those who want to use the office to escape liability for their past misdeeds.
- (iii) Any private act that amounts to abuse of the official position for private ends as well as any act that violates the spirit of the constitution.²³⁸

6.3 Namibia's presidential immunity in context

(a) Comparison with other African approaches

In order to better understand how Namibia's presidential immunity compares with other approaches in Africa, we have constructed a comparative table.

This table focuses on countries where we could source sufficient information to be relatively sure of the position, and it omits repetition in respect of several Francophone countries which follow very similar approaches.

In fact, if one discounts the immunity accorded to the King of eSwatini (Swaziland), who is not entirely analogous to a president, Namibia represents the end of the spectrum of the African countries examined with the most far-reaching presidential immunity, while South Africa represents the opposite end of the spectrum with the least presidential immunity – a surprising point of comparison given the many legal and historical points of connection between the two countries. Both Rwanda and Mozambique provide very little immunity for their presidents.

There are few exceptions to Namibia's virtually blanket immunity for former presidents, in contrast to many other countries that have broad immunities but provide for parliamentary authorisation of civil and/or criminal charges. Elsewhere, such parliamentary authorisation is not necessarily linked to the higher bar of impeachment, which typically requires both a serious criminal violation and super-majority of Parliamentary votes.

Of the countries examined in this report, only Congo, The Gambia and Zambia (like Namibia) provide for lifelong immunity from criminal prosecution for *unofficial* acts committed by a president whilst in office – with The Gambia and Zambia both making it easier to overcome this immunity than Namibia.

This type of immunity is significant because it is the hardest to justify on any theory. Once a person no longer holds office as president, the arguments for immunity based on the separation of powers

²³⁸ Charles Manga Fombad, "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects", 59 *Buffalo Law Review* 1007 (2011) at 1057.

and possible distraction of a president from his or her duties fall away. Some might argue that prosecuting a former president has the potential to damage the dignity of the office, but allowing a president to commit crimes in office without ever being held accountable is certainly even more damaging to the dignity of the position.

LEGAL LIABILITY OF CURRENT AND FORMER PRESIDENTS

This chart shows when a current or former President (or other Head of State) can or cannot be held legally liable for

(a) OFFICIAL ACTS (acts carried out as part of the functions of office) and

(b) UNOFFICIAL ACTS (acts carried out in a personal capacity, such as corruption, fraud, and crimes of violence).

X = absolute or almost absolute immunity

✓ = no, or virtually no, immunity

* = liability only on behalf of the office

(naming the President in his or her capacity as Head of State where the liability will actually accrue to the State)

? = the country's constitution is silent regarding a particular type of immunity and there is no case law to give guidance

Country	Current Presidents				Former Presidents			
	OFFICIAL		UNOFFICIAL		OFFICIAL		UNOFFICIAL	
	Civil	Criminal	Civil	Criminal	Civil	Criminal	Civil	Criminal
Namibia	*	X	X	X	X	X	X only if impeached & with Parliament authority	X only if impeached & with Parliament authority
Angola	?	X liability only for treason, genocide, etc	?	X	✓	X liability only for treason, genocide, etc	✓	✓ only 5 years after leaving office
Botswana	*	X	X	X	✓	✓	✓	✓
Burundi	*/✓	X liability only for treason	✓	✓	✓	X liability only for treason	✓	✓
Congo	?	✓ liability for breach of duty or treason	✓	✓	✓	X	✓	X
Gambia	X	X	X	X	X	X prosecution only with Parliament authority	✓	X prosecution only with Parliament authority
Ghana	X	X	X	X	?	?	✓ within 3 years of leaving office	✓ within 3 years of leaving office
Kenya Immunities do not apply if prohibited by treaty	X but court can test constitutionality	X	X	X	X	X	✓	✓

Country	Current Presidents				Former Presidents			
	OFFICIAL		UNOFFICIAL		OFFICIAL		UNOFFICIAL	
	Civil	Criminal	Civil	Criminal	Civil	Criminal	Civil	Criminal
Liberia	X	X	X	X	X	X liability only if impeached	✓	✓
Lesotho	*	X	X	X	✓	✓	✓	✓
Mozambique	?	✓	?	X lawsuits allowed if deferred until after end of term of office	✓	✓	✓	✓
Nigeria	*/✓	X	X	X	✓	✓	✓	✓
Rwanda	*/✓	✓	✓	✓	✓	✓ but liable for treason etc only if action initiated whilst in office	✓	✓
South Africa	*/✓	✓	✓	✓	✓	✓	✓	✓
Tanzania	X	X	✓ with 30 days' notice	X	X	X	✓	✓
Sierra Leone	X	X	X	X	✓	✓	✓	✓
Swaziland	X	X	X	X	-	-	-	-
Uganda	X	X	X	X	X	X	✓	✓
Zambia	*/✓	X	X	X	✓	X prosecution only with Parliament authority	✓	X prosecution only with Parliament authority

(b) Comparison with regional positions

Namibia's approach seems out of step with that of the African Union, which included a "rejection of impunity" in the guiding principles of the Constitutive Act of the African Union, 2000.²³⁹ This principle is buttressed by another which expressly provides for intervention by the AU, pursuant to a decision of the AU Assembly, in respect of grave circumstances in the form of war crimes, genocide and crimes against humanity.²⁴⁰ One analyst has suggested that the principles contained in the Constitutive Act are intended to correct past institutional and normative inadequacies.²⁴¹

In 2017, a joint statement by the Heads of State of the African Union (AU) and the European Union (EU) reaffirmed this rejection of impunity, and reiterated a "commitment to fighting it at the national, regional and international levels".²⁴²

²³⁹ *Constitutive Act of the African Union*, Article 4(o). This treaty replaced the Charter of the Organization of African Unity.

²⁴⁰ *Id.*, Article 4(h).

²⁴¹ A Jeng, *Peacebuilding in the African Union: Law, Philosophy and Practice*, Cambridge: Cambridge University Press, 2012 at 182, as cited in Olufemi Amao, *African Union Law: The emergence of a sui generis legal order*, Oxford: Routledge, 2018 at 90.

²⁴² *Final Declaration of the African Union - European Union Summit 2017*, AU-EU/Decl.1(V), para 55. Only Egypt reserved its position on this document.

Moreover, in 2016, the African Commission on Human and Peoples' Rights passed a resolution citing the Constitutive Act's "condemnation and rejection of impunity" and recalling "the obligation of African countries to combat impunity for all human rights violations in accordance with international and regional instruments and national legislative frameworks, to hold perpetrators of these crimes accountable". This Resolution also called for parties to the *African Charter on Human and Peoples' Rights* to take "the necessary legislative and other measures to put an end to impunity and ensure that all the perpetrators of serious human rights violations are prosecuted".²⁴³

On the other hand, immunity for sitting heads of states is proposed in respect of the future African Court of Justice and Human and Peoples' Rights. The *Protocol on the Statute of the African Court of Justice and Human Rights, 2008* is intended to accomplish a merger of the African Court of Human and Peoples' Rights and the proposed Court of Justice of the African Union,²⁴⁴ by establishing an African Court of Justice and Human and Peoples' Rights. The 2008 Protocol which would create this court is not yet in force, and has not yet been signed or ratified by Namibia.²⁴⁵ The *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014*,²⁴⁶ if adopted, would amend the 2008 Protocol to provide as follows:

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.²⁴⁷

However, there is no protection against liability for officials who have left office, and other proposed amendments also make it clear that heads of state and other public officials will be held "individually responsible" for any crimes committed whilst in office, and that "the official position of any accused person "will not relieve such person of criminal responsibility nor mitigate punishment".²⁴⁸

The proposed immunity for sitting presidents has been criticised for violating the principle of equality before the law, and for being unjust to the victims of crimes committed by national leaders. It has also been argued that blanket immunity for the commission of atrocity crimes could fuel violence and destabilize states as well as regions. It has been asserted that criminal prosecutions should be depoliticized, so as to be based solely on evidence of culpability rather than on the

²⁴³ "344: Resolution on the fight against impunity in Africa – ACHPR/Res. 344(LVIII) 2016", African Commission on Human and Peoples' Rights, 20 April 2016.

²⁴⁴ This Court would have been created by the *Protocol on the Court of Justice of the African Union, 2003*, which never came into force.

²⁴⁵ *Protocol on the Statute of the African Court of Justice and Human Rights, 2008*, [Status List](#) as it stood at 8 February 2018, African Union website. The Protocol and the Statute annexed to it shall enter into force thirty days after the deposit of instruments of ratification by 15 Member States. As of February 2018, there were 31 signatories but only six ratifications.

²⁴⁶ *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014*, [Status List](#) as it stood at 8 February 2018, African Union website. The Protocol and the Statute annexed to it shall enter into force thirty days after the deposit of instruments of ratification by 15 Member States. As of February 2018, there were 11 signatures and no ratifications.

²⁴⁷ *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014*, Article 46Abis. See generally Garth Abraham, "Africa's Evolving Continental Court Structures: At the Crossroads?", South African Institute of International Affairs, Occasional Paper 209, January 2015.

²⁴⁸ *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014*, Article 46B.

position of the alleged perpetrator. It has also been observed that immunity for sitting presidents might motivate those who have committed serious crimes against humanity to cling to power at all costs, to avoid prosecution.²⁴⁹

(c) Comparison with international positions

At the international level, there is a trend against head of state immunity, with such immunity being expressly excluded in treaties such as the *Convention on the Prevention and Punishment of the Crime of Genocide* and the *Rome Statute of the International Criminal Court*.²⁵⁰

In addition, the *International Covenant on Civil and Political Rights* requires States Parties to ensure that any person whose rights or freedoms are violated has “an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”.²⁵¹

In fact, it has been suggested by some that the proposed creation of the new African Court of Justice and Human Rights was prompted by concerns about avoiding international accountability.²⁵²

7. Recommendations

Namibia’s broad presidential immunity is out of sync with the constitutional values of equality before the law and the general progressive spirit of the Namibian Constitution. The current provision on immunity violates the principles of accountability and the idea that everyone is subject to the law. It also seems inconsistent with the stated African Union commitment to ending impunity, and with regional and international trends. Few of Namibia’s African neighbours have such far-reaching immunities – including many countries with less well-entrenched democratic traditions than Namibia.

Therefore, we suggest that Article 31 of the Namibian Constitution should be amended next time constitutional amendments are considered. One option would to **repeal Article 31 in its entirety**,

²⁴⁹ Letter from the New York City Bar to H.E. Dr. Nkosazana Dlamini Zuma Chairperson of the African Union Commission, 2 February 2015; Betty Waitherero, “AU seeks to entrench the impunity of Heads of State”, *Daily Nation* [Kenya], 13 June 2014, quoting a letter sent to the African Union in May 2014 by 19 civil society organizations: “The irrelevance of official capacity is at the core of making accountability for the gravest crimes meaningful. The alternative would carve out a sphere of impunity for high-level perpetrators, and create an incentive for such perpetrators to hold on to power indefinitely. Such impunity is further inconsistent with the needs of victims and ensuring justice for the gravest crimes.”

²⁵⁰ *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, Article 27; *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, Article 4.

²⁵¹ *International Covenant on Civil and Political Rights*, Article 2(3).

²⁵² Garth Abraham, “Africa’s Evolving Continental Court Structures: At the Crossroads?”, South African Institute of International Affairs, Occasional Paper 209, January 2015 at 13: “It would appear that ensuring immunity for heads of state and senior state officials is the primary reason for the establishment of the Expanded Court. The dominant view among Africa’s leaders – as reflected in the position of the AU – is that heads of state and senior state officials must be accorded absolute immunity. Indeed, while African States themselves have failed seriously to embrace the exercise of universal jurisdiction against high-ranking officials – whether in or out of office – charged with the commission of international crimes, it was the use of universal jurisdiction against senior Rwandese officials a decade ago that sparked the initial call for an African court with jurisdiction over international crimes.”

thus putting Namibia in the same position as South Africa with the President being subject to the rule of law during and after his or her tenure in office, just like anyone else.

If this option is too drastic to find political acceptance, then we suggest the following:

CIVIL LIABILITY

1. Continue to allow a **sitting President** to be sued in **civil actions** in his or her capacity as **Head of State**, as the situation now stands.
2. Provide **qualified civil immunity for former Presidents** in respect of any **official acts carried out in good faith** – along the lines of the qualified civil immunity enjoyed by many other public officials and by judicial officers in Namibia.
3. Provide **no civil immunity for official acts carried out in bad faith or for unofficial acts**, but **defer civil lawsuits in such instances until after a president's term of office ends** – and suspend prescription periods accordingly. Reciprocally, prohibit sitting presidents from bringing civil suits against anyone else whilst they are in office, again with prescription periods accordingly suspended.

CRIMINAL LIABILITY

4. Give sitting Presidents **immunity from criminal prosecution**, to avoid distraction and possible compromise of the President's ability to give full attention to the duties of office.
5. Allow **criminal prosecution for any crime committed whilst in office**, in an official or unofficial capacity, **after the President's term of office comes to an end** – to reinforce the idea that no one, not even the President, can operate outside the boundaries of the law.

Such an approach would continue to show due deference to the dignity of the Office of the President, without continuing a situation where, short of impeachment, “the President can do no wrong”. Presidents should be treated with dignity – but the Namibian Constitution respects the right of *everyone* to be treated with dignity. It would be more consistent with the constitutional commitments to dignity for everyone and equality before the law to amend Article 31 of the Namibian Constitution to remove the extreme forms of presidential immunity, in favour of more emphasis on the accountability of the persons who hold Namibia's highest executive office.

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