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Call for input of the Special Rapporteur on the independence of judges and lawyers for the next thematic report on safeguarding the independence of judicial systems – South Africa

1. Judges

Have Judges Played an Active Role in Safeguarding Democracy and Upholding Fundamental Democratic Rights in South Africa?

The judiciary in South Africa has played a dynamic and crucial role in safeguarding democracy and upholding fundamental democratic rights. Through landmark decisions, judges have interpreted and applied the Constitution, ensuring that the rule of law prevails. Notable cases include the Certification of the [Constitution itself in 1996](#), where the Constitutional Court legitimised the Constitution's supremacy, laying the foundation for democratic governance.

The judiciary system in South Africa acts as an accountability check on the powers of the legislative and executive branches. This role is particularly crucial in upholding the principles of the Constitution and ensuring that democratic values prevail. Although separation of powers is integral, the judiciary's independence allows it to arbitrate disputes, interpret laws, and hold both legislative and executive actions accountable.

In numerous instances, the judiciary has demonstrated its commitment to maintaining the delicate balance of power in line with democratic principles. Examples include cases where the judiciary settled disputes within the legislative sphere. In the case of [Doctors for Life International v. Speaker of the National Assembly in 2006](#), the Constitutional Court ruled on the constitutionality of the Prevention of Mother-to-Child Transmission of HIV program, emphasizing the importance of legislative actions being consistent with constitutional and democratic principles (ensuring adequate public participation before a bill is passed). This case showcased the judiciary's role in scrutinizing legislation to ensure it aligns with democratic values.

Are Judges Facing Obstacles, Risks, or Challenges?

Despite their pivotal role, judges in South Africa face substantial obstacles and risks. A notable challenge is political interference, with attempts to compromise judicial independence, especially in high-profile cases. For instance, the controversy surrounding the [State Capture Inquiry](#) has seen judges facing indirect pressures from political actors. Additionally, judges do sometimes encounter threats and intimidation, particularly when delivering decisions that challenge powerful interests. An example of this is the [2017 break-in at the office of Chief Justice Mogoeng Mogoeng](#).

Despite commendable strides in transforming the judiciary in South Africa, persistent gender biases and the absence of explicit sexual harassment policies have created concerns regarding the working environment for women within the legal sector. The lack of clear policies on sexual harassment leaves female judges, and support staff vulnerable to workplace misconduct, inhibiting their ability to work in a safe and supportive atmosphere.

A significant development occurred in 2023 when authorities announced their commitment to enhancing workplace conditions by [introducing sexual harassment policies for women in the](#)

[courts](#). This acknowledgement is a step towards recognizing and rectifying systemic issues faced by female professionals within the judiciary. The Special Rapporteur is encouraged to monitor the progress of these policy enhancements, ensuring their robustness, inclusivity, and effective enforcement.

Specific Role Played by the Judiciary in Democratic Elections:

The courts play a vital role in ensuring the fairness and integrity of the democratic process during elections. It serves as the ultimate arbiter in resolving election-related disputes, contributing to the transparency and legitimacy of the electoral system. For instance, in the case of [Independent Electoral Commission v Langeberg Municipality in 2001](#), the judiciary addressed disputes regarding the demarcation of electoral boundaries, emphasizing the importance of ensuring that electoral frameworks align with constitutional principles. Such interventions underscore the judiciary's commitment to upholding the democratic ideals embedded in the South African constitution.

The judiciary actively adjudicates cases related to political party participation, voter registration, and alleged irregularities during elections. In [Economic Freedom Fighters v Independent Electoral Commission in 2016](#), the Constitutional Court ruled on the constitutionality of a provision requiring political parties to pay a deposit to participate in elections. This exemplifies the judiciary's dedication to safeguarding the political rights of citizens and ensuring that electoral processes adhere to constitutional standards.

However, the challenge arises in maintaining a delicate balance between [judicial intervention and the principle of separation of powers](#). The judiciary must navigate the fine line between ensuring electoral fairness and avoiding undue interference in the domain of the executive and legislative branches. Striking this balance becomes particularly crucial in cases where the judiciary is called upon to adjudicate matters that involve the internal workings of political parties or parliamentary procedures, testing the limits of its role in the separation of powers doctrine.

These challenges underscore the complexity of the judiciary's role during elections, emphasizing the need for careful consideration of the separation of powers doctrine to ensure a democratic system where each branch functions independently yet harmoniously.

Policies or Institutional Arrangements Limiting the Role of Judges:

While there may not be explicit policies limiting the role of judges, there have been instances of political rhetoric challenging judicial decisions. [Political leaders criticizing the judiciary](#), especially when decisions are unfavourable, may indirectly undermine the judiciary's authority. Vigilance is necessary to ensure that such rhetoric does not translate into legislative or executive actions that compromise judicial independence.

Approaches Taken to Protect Judges:

South Africa has implemented various measures to protect judges. Security protocols, both within and outside courtrooms, have been enhanced. The South African Police Force's dedicated [Directorate for Priority Crime Investigation \(Hawks\)](#) investigates threats against judges. However, there is room for improvement in addressing gender-based and racial threats against judges through awareness campaigns and targeted security measures.

2. Prosecutors

Active Role in Safeguarding Democracy:

South African prosecutors have actively contributed to safeguarding democracy by addressing high-profile cases that threaten the rule of law. For instance, the [National Prosecuting Authority \(NPA\)](#) has played a crucial role in prosecuting cases related to state capture, corruption, and other offenses involving public officials. The prosecution of [former President Jacob Zuma in the arms deal corruption case](#) and the ongoing investigation into [state capture](#) exemplify the NPA's commitment to upholding democratic values.

Risks, Obstacles, and Challenges:

Prosecutors face risks and challenges, including significant faults within the National Prosecuting Authority. The NPA has been marred by controversies, including allegations of corruption and inefficiency in prosecuting cases. The removal of [former National Director of Public Prosecutions Mxolisi Nxasana](#) and the subsequent appointment of Shaun Abrahams raised concerns about the politicization of the NPA, impacting its ability to act impartially.

The NPA's handling of high-profile corruption cases, such as the [Gupta family's alleged involvement in state capture](#), has been criticized for inefficiency and delays. These challenges have led to public skepticism and calls for reforms to address systemic issues affecting the NPA's effectiveness.

Moreover, prosecutors, especially those from minority racial backgrounds or specific genders, may encounter biases and discriminatory treatment. The case of [former Deputy Director of Public Prosecutions Nomgcobo Jiba](#), whose removal faced legal challenges and accusations of bias, underscores the challenges faced by prosecutors in navigating complex and politically sensitive cases.

Role in Democratic Elections:

The NPA has been active in prosecuting cases related to [electoral fraud](#), including instances of vote rigging, double voting, or other fraudulent activities during elections. These cases aim to uphold the fairness and credibility of the electoral process. It has been involved in cases related to the investigation of political party funding, ensuring transparency and compliance with electoral laws. Cases may arise if there are allegations of illegal or undisclosed contributions that violate campaign finance regulations.

Prosecutors also handle cases involving voter intimidation or violence at polling stations. Ensuring that citizens can freely exercise their right to vote without fear of coercion or violence is crucial for maintaining the democratic process. The NPA prosecutes cases related to the spreading of false information or engaging in disinformation campaigns that aim to manipulate public opinion or disrupt the electoral process. The NPA is also responsible for [prosecuting individuals or entities found in violation of electoral laws](#). This may include cases related to the illegal removal or defacement of campaign materials, the unlawful distribution of election-related materials, or any other offences outlined in electoral legislation.

Policies or Institutional Arrangements Limiting the Role of Prosecutors:

Historically, the National Prosecuting Authority (NPA) has faced allegations of political interference in its operations. [The appointment and removal of National Directors of Public Prosecutions](#) have been subject to political influence, raising concerns about the independence of the NPA. Political pressures on prosecutors can compromise their ability to act impartially, especially in cases involving prominent political figures.

[Insufficient resources allocated \(due to corruption and mismanagement of funds\) to the NPA](#) can limit its ability to effectively carry out its prosecutorial duties. This includes limitations on staffing, technology, and training. Resource constraints may hinder prosecutors from adequately investigating and prosecuting complex cases, impacting the overall functioning of the justice system.

South Africa has faced challenges with lengthy and delayed legal proceedings, often due to backlogs in the courts. Prolonged legal processes can strain the resources of prosecutors and contribute to public perceptions of inefficiency within the justice system. [Delays may also affect the timely resolution of cases, potentially impacting the deterrence effect of legal actions.](#)

[Public perception of the prosecutorial system and trust](#) in its independence have been influenced by controversies, political pressures, and high-profile cases. Perceived biases, whether based on political affiliations, racial identity, or other factors, can erode public confidence in the fairness and impartiality of the prosecutorial process.

Approaches to Protect Prosecutors:

Prosecutors in South Africa have, unfortunately, been subjected to violence and threats in the course of their duties. The nature of their work, especially when handling high-profile cases involving powerful individuals or criminal organizations, exposes them to various risks. While I do not have real-time data, there have been historical instances where prosecutors faced threats and violence.

One notable incident occurred in 2013 when the National Prosecuting Authority (NPA) advocate, [Glynnis Breytenbach, reported receiving threats and intimidation](#) during her involvement in prosecuting cases related to corruption and fraud. The threats were believed to be linked to her work on cases that implicated influential individuals.

Additionally, threats against prosecutors are often more pronounced when they are dealing with organized crime, political corruption, or cases that involve powerful figures. The complexities of these cases can result in a challenging and sometimes dangerous environment for prosecutors.

The safety and security of prosecutors are critical considerations, and authorities in South Africa have taken some steps to address these concerns. Measures include providing security details for prosecutors handling sensitive cases, implementing protocols for reporting threats, and establishing specialized units to investigate and respond to such incidents.

Additional Issues:

In South Africa, the private prosecuting option allows private individuals or organizations to initiate criminal proceedings. This alternative has gained attention in cases where there are concerns about the NPA's ability to act independently. For example, the [private prosecution led by AfriForum in the case against Duduzane Zuma](#), son of former President Jacob Zuma, for culpable homicide reflects the public's desire for accountability and the willingness to explore alternative avenues when confidence in public prosecutions wavers.

3. Lawyers

Active Role in Safeguarding Democracy:

South African public interest lawyers continue to champion democracy and human rights through their involvement in landmark cases. [The Lawyers for Human Rights \(LHR\)](#), for instance, has been instrumental in advocating for marginalized communities. In the "[Grootkraal Community Case](#)," the

LHR represented a rural community facing forced eviction, successfully challenging the government's actions and securing the community's right to fair administrative action.

Risks, Obstacles, and Challenges:

Public interest lawyers often face risks due to their advocacy on contentious issues. Adv. Tembeka Ngcukaitobi, renowned for his work in constitutional and human rights cases, faced challenges while representing the State on the State Capture against former president Jacob Zuma. [Ngcukaitobi received threats and criticism](#) for challenging powerful interests, highlighting the difficulties faced by lawyers in the public sphere.

Gender biases within the legal profession impact women lawyers actively involved in public interest litigation. Advocate Thuli Madonsela, during her tenure as the Public Protector, [faced gendered attacks](#) as well as [assassination threats](#) while investigating allegations of state capture. These challenges underscore the intersectional obstacles women lawyers encounter when engaged in public roles.

Role of Legal Associations in Democratic Elections:

While the primary focus of bar associations is on professional standards, they indirectly contribute to democratic elections. [The Law Society of South Africa](#) ensures ethical conduct, fostering an environment where lawyers can play a role in safeguarding the democratic process. [The South African Bar associations](#) may intervene if legal challenges arise during elections, contributing to the fairness and integrity of the electoral system.

Approaches to Protect Lawyers:

Legal professional bodies, bar associations, and civil society organisations actively advocate for the protection of lawyers, providing support and legal assistance. While these mechanisms exist, challenges persist, and the effectiveness of protection measures depends on the commitment of governments and the broader legal community to uphold the rights and safety of lawyers, particularly in regions where the rule of law may face challenges.

4. Community Justice Workers

Active Role in Safeguarding Democracy:

Community justice workers, spanning social workers, civil society organizations, police, metro police, private security, informal safety groups like community safety organisations and activism organisations such as Abahlali Basemjondolo, have played a crucial and active role in safeguarding democracy and upholding fundamental democratic rights in South Africa. Organisations like [Abahlali Basemjondolo\(Shack Dweller's Movement\)](#) in South Africa, actively contribute to democracy by challenging systemic injustices and advocating for the rights of marginalized communities. Abahlali Basemjondolo, with its focus on land and housing rights, not only resists unjust evictions but also forces government accountability through legal action. This legal activism is a crucial dimension of their contribution to democracy, ensuring governmental actions align with constitutional principles.

Similarly, informal community safety initiatives like community safety organisations, which have been [foundational to South Africa's transition into democracy](#), embodying a people-centred justice approach, play an essential role in maintaining communal safety despite lacking formal organizational structures. Alongside recognized NGOs, these entities collectively reinforce the

importance of community justice workers in fostering transparency, accountability, and justice within the democratic framework.

Obstacles, Risks, and Challenges:

Social workers advocating for marginalized communities grapple with resource constraints, hindering their ability to address deep-seated social inequalities effectively. NGOs face funding limitations, [community policing organisations](#) are exposed to physical risks during patrols, and activists from [Abahlali Basemjondolo have been tragically assassinated, in numbers](#), for their advocacy work, highlighting the severe threats faced by those championing justice and human rights.

Moreover, risks extend to law enforcement, including police and [private security](#), who navigate complex challenges in their commitment to community safety. In the context of South Africa, a country often labelled as one of the [most crime-ridden and violent](#) in the world, the risks to all involved are heightened. Law enforcement entities and private security personnel operate in an environment where crime rates and violence pose significant challenges, making their roles even more perilous.

Addressing these challenges requires comprehensive strategies that prioritise the safety of all stakeholders involved, allowing them to carry out their essential roles in a secure and supportive democratic framework.

Policies or Institutional Arrangements Limiting Their Role:

The landscape for community justice workers is often marred by policies or institutional arrangements that limit their roles. Funding restrictions on social programs and legal aid initiatives can impede the impact of civil society organizations. Community policing efforts may face limitations due to bureaucratic hurdles or insufficient support from law enforcement structures. Informal safety groups may operate within legal grey areas, facing challenges in obtaining official recognition. Policies restricting freedom of association can hinder the work of activist organizations.

Approaches to Protect Community Justice Workers:

Community justice workers in South Africa are protected through a combination of legal frameworks, including the country's constitution that guarantees fundamental human rights, and sector-specific legislation. Collaboration with law enforcement, local community engagement, and local government support amplify their safety measures.