MODERN CHALLENGES TO THE INDEPENDENCE OF THE JUDICIARY

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When I received the invitation to speak on the theme topic "Modern Challenges to the Independence of the Judiciary" the first flitting thought that hit me was the opinion I once read attributed to a Mr. Justice Sydney L. Robins that –

> "…everything which can be said (on the topic of judicial independence) has already been said and repeated on so many occasions and in so many learned articles that any further observations are inevitably redundant."

However, on further reflection, I quickly discarded this thought as it was so much at variance with the beliefs I so closely hold as to the importance and centrality of the principles embodied in the 'Independence of the Judiciary'.

My learned colleagues I am truly humbled to appear before all of you and share a few thoughts on the theme of the conference – "Modern Challenges to the Independence of the Judiciary".

Cognisant of the fact that I am addressing 'The Already Initiated' I do not intend to bore you with the meaning and pivotal place of judicial independence in any democratic State – all I will state in that regard is that in the last three hundred or so years the doctrine of separation of powers has gained universal acceptance, to wit, the varying functions or powers of government are exercised by bodies or institutions we call the Legislature, Executive and Judiciary. That the trinity has separate, distinguishable, but coordinated roles is neither mysterious nor ambiguous. The administration of justice requires that the judiciary be given, by the Constitution, power to make binding and final decisions in disputed cases as to the facts and the law that apply to them, coupled with the power of enforcement. This power is peculiar to the judicial function and is not shared by the other two pillars of government.

In performing this function it is of paramount importance that the court arrives at its decisions in a regular as opposed to an arbitrary manner, that justice must be dispensed even-handedly, and that the general public must feel confident in the impartiality and integrity of the courts.

Bearing in mind the pivotal role which the judiciary plays in the governance of States and in lives of the individuals in them, it is not surprising that many efforts have been made domestically and internationally to formulate and enact rules that are designed to protect the judiciary and ensure that it performs its mandate under optimum conditions. From the older democracies to the younger ones such rules have become part of their Constitutional law.

The common objective of these rules is to secure the judiciary from undue influence and to make it as autonomous as possible within its own area – what is usually termed **the independence of the judiciary.**

At international level an important milestone was reached in 1985 when the United Nations General Assembly adopted the Basic Principles on the Independence of the Judiciary[1]. The world nations acknowledged that these ideals, of monumental proportions, enshrined in the Universal Declaration of Human Rights (1949), and the two 1966 covenants, namely the Economic, Social and Cultural Covenant as well as the Political and Civil Rights Covenant are all dependant on the simple notion of **"the right to a fair and public hearing and impartial tribunal established by law."** The General Assembly recognised further that **"Judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens".** Because of these grave responsibilities the General Assembly decided that all States must guarantee the independence of the judiciary in their domestic law and practice, following the adopted 20 basic principles. Because of their importance the first seven are reproduced here as follows –

Independence of the judiciary

1. **The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.**

[1] There have been several other International Conferences and conventions on the independence of the judiciary e.g. ...the Suva Statement of the Principles of Judicial Independence (2003); Bangalore Principles of Judicial Conduct (2002); UN Basic Principles on the Role of Lawyers (1990); Basic Principles on the Independence of the Judiciary (1985); International Bar Association's Minimum Standards of Judicial Independence (1982).

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. **The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.**

4. **There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.**

5. **Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.**

6. **The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of parties are respected.**

7. **It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.**

It must be noted that the above basic principles were not formulated as binding rules but as guides to Member States of the UN in the task of securing and promoting the respect for and recognition of the independence of the judiciary in their national legislation and practice

and to advertise the principles to members of the executives, legislatures and the general public.

Many nations, including the jurisdictions represented here had or have incorporated most of the rules in their constitutions or laws as advocated by the UN Basic Principles.

But the reality is that the question of the respect for the independence of the judiciary goes deeper than constitutional guarantees as to appointments, security of tenure, and salaries. It is a product of the actual relationship between the judiciary, the executive and the legislature. Put bluntly, independence is not achieved solely by the presence of a neat structural balance (as theorised by the doctrine of separation of powers) but in addition three factors are required, namely –

a) The attitude of the executive and the legislature to judicial independence and all it entails;
b) The commitment of judges themselves to guard and defend their independence, and
c) The readiness of the people to support the independence of judges as defenders of people's liberties.

Some past threats to the independence of the judiciary

A few cases where the struggle for judicial independence has played out in several African states since the early days of freedom from European colonialism illustrate the interplay of the factors stated above.

In early 1960 Ghana had its test case arising from an attempted assassination of President Kwame Nkrumah. The Chief Justice tried and acquitted three men who were accused of treason and convicted two others. The Executive refused **"to take any cognizance"** of the verdict and kept all men under preventive detention. Parliament then passed a law empowering the President to override the court. Nkrumah proceeded to quash the court's decision and dismissed the Chief Justice.[2]

In Zambia, High Court Judge Evans released two Portuguese soldiers who had been imprisoned by a magistrate for crossing into Zambia unarmed and in full view of a Zambian immigration officer. The judge said **"there was nothing sinister"** in what the soldiers did.[3] The review judgement infuriated the executive which refused to release the men. President Kaunda addressed a press conference at which he denounced the judge for disregarding Zambia's security and being politically motivated. He called on the Chief Justice for an explanation. After meeting with other judges, Skinner CJ stoutly defended Judge Evans and admonished the President not to interfere with judicial independence.

The Chief Justice's response sparked a demonstration at the High Court. The C.J and Judge Evans had to barricade themselves in their chambers. Some of the demonstrator's banners read, **"Away with imperialistic judge."** "[redacted]" etc

[2] "Treason Trial and Dismissal of the Chief Justice" 11 Africa Digest 1964 p. 116
[3] The People v. Silva and Freitas: 1969 ZSJLZ

...President Kaunda eventually stopped the demonstrators but announced his intention to Zambianise members of the judiciary. Chief Justice Skinner left Zambia in a huff and announced his resignation from abroad.

Recently, a judicial clash with the executive flared up in Swaziland. The government there evicted families from their homes destroying property in the process. The Court of Appeal ordered that the families be allowed to return to their homes but the Prime Minister publicly refused to comply. The Court of Appeal Judges, all of them white South African expatriates, resigned in protest in 2002.

On 4 March, 2007, Ugandan judges announced a one week strike action in protest at the executive's habitual trashing of the orders of the court which it did not like. In the latest case, the court granted bail to six suspects accused of being members of the People's Redemption Army rebel movement. The men were promptly rearrested at the court premises in the presence of a judge. A fracas involving the police, the accused and some judicial officers ensued. Judges demanded an apology and prosecution of the police officers who caused the incident. The Judges were supported by the country's Law Society whose members declared a strike in sympathy.

My own country, Zimbabwe, had its first taste of executive interference with the rule of law and the independence of the judiciary in the early days of the Rhodesia Unilateral Declaration of Independence. In one case, council for the rebel regime blatantly

threatened that "**certain dire consequences might overtake the court**" if it decided against the regime[4]. The courts were intimidated into refusing to grant appeals to the Privy Council and finally into capitulating and accepting the rebel government as legally valid, **de facto and de jure**. Two judges, John Fieldsend and Dendy Young, resigned as a **"matter of judicial conscience"** while Chief Justice Beadle and the majority decided to **"accept the situation in Rhodesia as it is today".**[5]

Appointments to the bench assumed a particular pattern thereafter. During that period only white lawyers sympathetic to the racist policies of the government of the day were appointed to the bench. These are the judges who made the bench at the time of Zimbabwe's independence. After independence a new trend to appointments to the bench emerged. The new appointments to the bench consisted of mainly black lawyers and liberal white lawyers who had hitherto been marginalised. This trend continued until the land reform programme.

The land reform programme involved the compulsory acquisition of land from the minority white land owners and its distribution to the majority black indigenous people. As a consequence of the land reform programme two schools of thought emerged within the existing judiciary. One school of thought held the view that the constitution of Zimbabwe could not be amended to provide for compulsory acquisition of land for redistribution. This view was

[4] Central African Examiner (Pvt) Ltd v. Howman & Ors 1966 (2) SRLR
[5] Madzimbamuto v. Lardner-Burke 1968 (2) SA 284

predicated on the doctrine of essential features or core values of a constitution. This doctrine was established by the Supreme Court of India in the case of *Kesavananda v. Kerala* [1973] Supp. SCR 1, in which it was held that certain provisions of the constitution of India constitute essential features or core values or basic elements of that constitution, and that they are unchangeable by the exercise of amending power conferred on the Legislature under Article 368 of that country's constitution.

The other school of thought was that the doctrine of essential features of the constitution did not apply to the Zimbabwean constitution because it was worded differently. In particular section 52 of the Zimbabwean constitution does not place any section of the constitution beyond amendment by the Legislature.

As can be expected the view of the government coincided with those of the latter school. It was also clear that divisions on the above issue tended to follow racial lines.

Another consequence of this development was a clear pattern of indigenisation of the judiciary.

Whether indigenisation of the judiciary undermines judicial independence or not is something that is likely to generate debate without consensus among jurists.

The commonality in the examples cited is that past threats to judicial independence manifested themselves in an undisguised and confrontational manner.

Modern challenges to the independence of the judiciary

Some modern challenges may be blatant, but too often they are likely to take a more subtle form than their precursors. In modern times individuals wielding political power do not telephone judges, by night, about pending decisions nor do they send letters of instructions. Yet, the pressures, if more subtle, are non-the-less insidious.

These normally take the form of cries, in the name of lack of judicial accountability, leading to suggestions of amending the Constitution, with the intention of introducing some mechanism of parliamentary review of judicial decisions.

- Such was witnessed when Justice Robert H. Bork, a respected American judge, at one point suggested amending the US Constitution to authorise Congress, by a majority vote of each House, to overrule any Federal or State court decision ~~resolving~~ involving a Constitutional question.

- At the beginning of the 2000's Canada, experienced sporadic talk of introducing Parliamentary review of judicial decisions and calls for appointment procedures that would permit legislators to choose judges on the basis of political ideology.

- In Israel there were recent discussions of removing the power of constitutional review from its respected Supreme Court by the creation of a new Constitutional Court more amenable to Parliamentary control.

Further examples of modern threats to judicial independence may take the form of calculated and well publicised criticisms of judicial decisions by powerful interest groups. I will be the first to state that criticism of judicial decisions is appropriate and salutary, if the intentions are *bona fides*. But where the criticism becomes *mala fides* taking the form of personal attacks on judges, suspicion abounds that such criticism is designed to unconsciously affect a judge's independence no matter how courageous s/he may be.

The above is not exhaustive as the detractors of independence of the judiciary are always scheming of new and innovative ways of subverting the very essence of what this independence stands for. What I have highlighted, however, sufficiently demonstrates the moving away from employing blatant and direct threats to using more indirect and subtle methods of encroaching on the independence of the judiciary.

Before I conclude I am constrained to mention one threat which has survived the test of time – traversing both the past and modern.

This is none other than the control of the judicial budget by the executive, in most cases through a Ministry of Justice by whatever name it's called in our different jurisdictions. I am here not referring to the salary, pensions and other benefits of office for judges as these are normally protected by Constitutional provisions which expressly state that they may be no diminution in the remuneration of judges during their judicial service.

What I am referring to is the provision of adequate operational budgets which are wholly and fully controlled by the judiciary itself – For he who pays the piper controls the tune. I shall say no more!

Conclusion

I conclude by making an observation that the doctrine of separation of powers is very laudable but comes with a heavy price – namely that it advocates for drawing away from human basic instincts of self-preservation and survival of the fittest. As long as these human attributes continue to exist, threats to judicial independence will regrettably always be there.

This then places a special obligation to defend judicial independence on us judges – not because of self-interest, but because we are aware of the history and purpose of judicial independence and the myriad of ways by which it can be attacked by powerful interests, public and private.

As judges it is well to acknowledge that in recent times, we have witnessed attacks by governments and politicians who should know better, spurred on by a media avid for entertainment and conflict as well as powerful sectors in our societies unused to being thwarted, becoming much more sophisticated and more vocal than in earlier times in their endeavours to attack the independence of the judiciary.

I THANK YOU.