

SOUTHERN AFRICAN JUDGES' COMMISSION (SAJC)
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Financial Independence of the Courts
- A revisit of last year's discussion.

(LESOTHO)

1. The Paper¹ presented at **Maputo, Mozambique** by the Honourable Chief Justice **Gicheru** of Kenya is as challenging as it is invigorating. It is a shining beacon and guide towards the achievement of one of the main goals of our judiciaries i.e. meaningful judicial independence under the constitution.
2. Whilst judicial independence may stand guaranteed under the constitution, the financial and administrative aspects of the judiciary in some jurisdictions in reality continue to be controlled by the Executive. As the Learned Chief Justice succinctly puts it in his Paper:-

“The institutions that control the purse and the administrative support of the judiciary can also directly control the extent and efficiency in the execution of the role. It is simply a case of he who pays the piper calling the tune.

The necessary judicial independence of the judiciary cannot be achieved if the court finances are determined and dictated by the political organs of the Executive and the legislatures over whom the court should exercise judicial control.”

¹ “Financial and Administrative Autonomy of the Court” – 9th-13th August 2006.

3. The Paper also aptly captures the **UN Basic Principles of the Independence of the Judiciary** and the **Commonwealth (Latimer House) Principles** which boldly stress the state's duty to provide adequate resources to enable the judiciary to operate effectively and properly.
4. More importantly the Paper takes note of the cynicism and executive's fear of judiciary and "deliberate attempt" to (control or) cut the judiciary "to size" – and that what the judiciary regards as a minimum assistance the executive often takes as a maximum!
5. We should however take cognizance of reality. The survival of constitutionalism and along with it judicial independence and its appendages, ultimately depends upon the state of political climate and political maturity at any given time. Hostility to concepts such as constitutionalism, judicial independence and separation of powers is often fuelled by ulterior political motives antithetical to rule of law and good governance. This, of course, will vary from one country to another.
6. Our governments, through their Attorneys General must be continuously sensitized about the worthiness of constitutionalism and more importantly about the government's constitutional obligation to provide adequate resources, both human and material, to the judiciary and duty to refrain from unduly interfering with the functioning of the courts.

7. Matters of national policy or penal policy can and should be discussed and addressed through the head of the judiciary as and when the need arises. It is however not proper to “hobble” the functioning of the courts by depriving them necessary resources yet expecting them to perform up to certain standards. The Paper correctly points out

“The performance of the judiciary in its administrative matters depends directly upon financial autonomy of the court because efficient and efficient administration requires resources to support the remuneration of necessary staff and acquisition of equipment and facilities. In the interest of the independence of the judiciary, it is important that the administration of the judiciary be carried out by the judiciary itself or/ by a professional agency under the superintendence of the Judiciary.”

8. **LESOTHO POSITION**

As will later be noted, section 118 (3) of the Lesotho Constitution 1993 casts an obligation upon the Government to accord such assistance as the courts may require to enable them to discharge their functions under the Constitution to the law.

In practice, however, the judiciary has from year to year been under-budgeted and under-resourced and it lacks financial autonomy and to-date its finances and administration have been directly controlled by the Ministry of Justice. We thus suffer inadequate courtrooms, adequate staffing, equipment and other facilities and training is at its minimum.

9. In response to this, a **Judiciary Administration Bill 2004** was drafted to create “a Judicial Service” separate from the public service, thus ensuring a requisite autonomy of the judiciary in the administrative and financial matters. Despite some bureaucratic hurdles standing in the way towards the final enactment of this Bill, we today have full assurances that the Attorney General and his Parliamentary Counsel shall prioritize the presenting of this Bill before the 7th Parliament of Lesotho.
10. Section 118 of the Lesotho Constitution 1993 reads:-
- “Section 118. (1)*
- (2) The courts shall, in the performance of their functions under this Constitution or any law, be independent and free from interference and subject only to this Constitution and any other law.*
- (3) The Government shall accord such assistance as the courts may require to enable them to protect their independence, dignity and effectiveness, subject to this Constitution and any other law.”²*
(emphasis supplied)
11. These provisions are unique in themselves and require a special construction. Judicial independence of the courts is indeed a wide concept; included in it are institutional and individual independence of the judiciary, functional and administrative autonomy. Being one of three most important institutions under the Constitution and one whose independence is specially entrenched

² Indeed the United Nations 7th Congress on the Prevention of Crime and Treatment of Offenders (1985, Milan, Italy) declared that – “It is the duty of each Member State to provide adequate resources to enable the Judiciary to properly perform its functions.”

by the Constitution, the judiciary can properly discharge its functions in dispensing justice only if it enjoys administrative and financial autonomy. This autonomy can be implied from a proper reading of section 118 (3) i.e. “to enable the courts”. It is axiomatic that such “assistance” should not be remote-controlled by the Executive organs of Government.

12. The Judiciary should not be treated as if it is another administrative department in the Ministry of Justice for it is not. It is an institution under the Constitution which qualifies as an independent institution; whose accountability and responsibility should go hand in hand. Judicial independence without administrative and financial autonomy may turn out to be meaningless. Autonomy implies control of resources both human and material and without this autonomy there can be no accountability to speak about. The needs of the judiciary and its concerns can only be addressed if and only if the judiciary can itself assess and determine these needs and concerns. Delivery of justice depends on many factors such as numerical strengths of the judicial personnel, their competency and training; the judiciary must be assisted by an administrative staff with adequate equipment supervised by a diligent court administration.
13. Courts of law discharge their daily arduous judicial functions in chambers and courtrooms that should be adequately furnished with modern equipment and should be manned by efficient registrars, secretaries, judges’ clerks, recorders, interpreters and assessors

(where necessary). Deficiency or inadequacy in any of these essential administrative capacities leads to obvious delays in the administration of justice.

14. Most of the modern constitutions in Africa guarantee judicial independence in glowing terms. Much ink has flowed and much debate has centered over the nature and scope of the concept of judicial independence. Whilst it may mean absence of undue external control, it should also mean functional self-containment. This only means that judicial independence devoid of financial and administrative sufficiency and autonomy is meaningless inanity, sheer, rhetoric. A judiciary can surely enjoy its institutional independence under the constitution if the requisite legal infrastructure is created to facilitate thereby a separate judicial service (separate from the public service) with provisions for an independent Judicial Service Commission which appoints and controls not only judicial officers but other court officials.
15. Efficacy of the judiciary is also closely linked to the degree of financial or relative autonomy which the judiciary should enjoy under the law. Whilst the Minister of Justice may in terms of the constitution rightfully remain as a “*responsible Minister*” an independent judiciary should adequately manage its financial and administrative affairs without any ministerial control or intervention – because of the hallowed principle of separation of powers which in Lesotho has been affirmed in several renowned

cases – such as of **Swissborough**³, **Joale**⁴ and **Lesotho Law Society vs Prime Minister of Lesotho**.⁵

16. Financial autonomy is not inimical or antithetical to meaningful communications between the judiciary and the Justice Ministry. The “*umbilical cord*” should continue to exist in the constitutional set-up.
17. It must always be recognised as a constitutional reality that the judiciary does not live in an ivory tower. The Judiciary is accountable under the Constitution in the performance of its functions – functions which it can effectively discharge if it possesses necessary tools of trade (books, courtrooms and trained (competent) staff.
18. Even though the recent trends in all subregion indicate executive resolve to exert control over the administrative aspects of the judiciary, such control must be restricted to the minimum and only to the essential services or practical aspects and not to be extended to a “*merger*” of judicial administration into the public service.
19. Though the principle of separation of powers may today seemingly be disregarded in some African states, this practice must be discouraged for the very sake of the survival of democracy, rule of law and good governance. Any gradual or systemic abrogation of

³ 1991-96 LLR 1481

⁴ Const./3/05

⁵ 1985-90 LLR 500

this hallowed principle may herald the demise of our emerging democracies with catastrophic consequences.

20. Since the public funds are at stake, any financial/administrative autonomy must come along with competent financial and administrative management and supervision. These public funds must be managed and disbursed with full sense of responsibility and accountability by a competent cadre of staff.
21. In Lesotho, the **Administration of the Judiciary Bill 2004** was therefore a logical step in the right direction toward achievement of a separate judicial service function in full possession of attributes relating to financial/administrative autonomy. The Attorney-General has been beseeched by the Chief Justice to expedite the enactment of this Bill.
22. The judicial needs and concerns of the judiciary should be timeously assessed, estimated and addressed by the judiciary itself (books, infrastructural facilities, training recruitment, promotion etc), otherwise underfunding or underestimation is likely to occur and recur.

The judiciary will always be unable to discharge its functions efficiently if (a) it lacks adequate judicial personnel, courtrooms, basic utilities like books, court equipment, trained essential staff. And what is best for the judiciary, should always be determined by the judiciary itself.

23. The need for financial and administrative autonomy is therefore a *sine qua non* to judicial independence. Section 118 (3) of the Lesotho Constitution indeed casts a duty (obligation) on the Government to provide such assistance as the “*courts may require*” to guarantee their effectiveness and dignity.
24. In this scenario, the Government must provide and ensure financial capacity and administrative effectiveness of the courts because, on their own courts cannot generate their own finances.
25. The oft-repeated criticism leveled at the judiciary usually consists of accusations of ineffectiveness, delay, incompetence etc mostly perceived and rarely factual as all these are often “*resource – related*”. The judiciary stands to be held accountable at all times but it is unfair that it should be blamed without correspondingly entrusted with sufficient financial and administrative autonomy to support its day-to-day operations and activities. A “*remote–control*” administration from the Ministerial headquarters obviously breeds bureaucratic delays and redtape in the responsiveness to the pressing needs of the judiciary.
26. The proposed parliamentary reforms in Lesotho shall indeed bring into existence a **Justice Portfolio Committee** at which judicial needs and concerns can be discussed and addressed at national/parliamentary level. This committee and along with it the Auditor-General and the Parliamentary Accounts Committee will

act as constitutional watchdogs and the people's last bastions over all justice and judicial affairs.

27. In this regard the Chief Justice should, as the head of the judiciary, exercise control over all financial and administrative affairs of the judiciary at all levels and should be assisted by adequate and efficient financial controllers and administrators. This arrangement can help level play-fields for the judiciary to fulfil its constitutional role and function without undue or unwitting control or influence from the Executive or Legislative branches of Government.

In conclusion, we should note that whilst governments come and go, the judiciary is there to stay. The role of the Attorney General is very crucial. Unlearned in the principles or tenets of constitutionalism, most members of the Executive, their administrative officials, and indeed members of Parliament all need to be sensitized about these important principles if only for the sake of the survival of our budding democracies; and that an undue control over the judiciary is antithetical to the constitution and would tend to weaken the judiciary in the performance of its functions under the constitution.

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