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ADMINISTRATIVE INDEPENDENCE AS A GUARANTEE OF JUDICIAL INDEPENDENCE: EXPERIENCES FROM SOUTH AFRICA.

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It is a privilege to have been asked by the International Commission of Jurists to share with you my views on the topic 'Administrative independence as a guarantee of judicial independence: Experiences from South Africa.' The papers from the earlier sessions have dealt principally with judicial independence as a foundational principle of any democracy. And a key component of judicial independence, as you have heard, is individual independence – the requirement that judicial officers act independently and impartially when dealing with cases that come before them.

My topic relates to a separate and equally important element of judicial independence, namely, institutional independence – the requirement that the necessary structures and guarantees exist to protect courts and judicial officers from external interference by other branches of government. In this regard our Constitutional Court has emphasized that

> '…institutional judicial independence itself is a constitutional principle and norm that goes beyond and lies outside the Bill of Rights.'[1]

This means that judicial independence is not subject to limitation.

In essence the institutional independence of the judiciary concerns how resources are allocated to the judicial arm of government, by whom these resources are managed and who is accountable for their usage.

That these questions are of critical importance to the effective functioning of judiciaries in democratic societies was acknowledged at the 2003 meeting of Commonwealth Heads of Government though the 'Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government.' Concerning the resourcing of the judiciary the principles provide ideally that:

> 'Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence (of the judiciary)'

And that

[1] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at para 17.

> 'Interaction, if any, between the Executive and the Judiciary should not compromise judicial independence.'

These principles seek to insulate the judiciary from political control or interference but do not set out a model institutional design to achieve this purpose. Before considering a few models that have been adopted to deal with this issue, it is important to emphasize that the dominant model currently operating in most jurisdictions, including South Africa, is what can be described as the executive model.[2]

In this model the executive controls court administration and accounts to the legislature, usually through the Minister responsible for the justice portfolio. A chief justice has no defined relationship to the minister; whether the executive seeks the advice of the chief justice is purely a matter of executive discretion. The courts have no authority to develop or administer independently of government the court administration budget. The chief justice has no fiscal and operational responsibility that allows him or her to function independently of executive directives.

Although this model is justified on the grounds of ministerial responsibility and legislative supremacy it is also widely acknowledged to have several shortcomings. Courts are viewed as a branch of the Ministry, not an independent division of government. This causes numerous practical problems. For example court staff appointed by the executive is in an invidious position of having to report along a line of authority to the Director-General and Ministry while working under the day-to-day control and direction of judicial leaders. Disputes between the executive and judiciary over the job classification, recruitment and retention of court staff therefore becomes a source of considerable tension between the two arms of government.

By far the most often cited problem in most jurisdictions arising from the executive model is that judicial leaders have no say in the control of the allocation of resources to the courts. So, judges find themselves in the unedifying and compromising position of having to lobby politicians and executive officials for funds for improvements and simple repairs to court buildings, for essential material for libraries or for information technology.

Because of the imperfections of the executive model efforts have been made to improve the level of judicial input into decisions concerning court administration. These have largely involved improving mechanisms for communication between the executive and judiciary but have not sought to alter the relationship between them.

There are currently two separate systems for court administration and budgetary control in South Africa. In terms of an Act of Parliament, for the Constitutional Court, the Minister appoints staff, such as a registrar and assistant registrars on

[2] See generally 'Alternative Models of Court Administration'. Report by the Canadian Judicial Council (2006).

the request of and in consultation with the Chief Justice.[3]The Chief Justice on the other hand appoints research assistants in consultation with the Minister.[4] An Executive Secretary assists him to carry out his administrative duties. Section 15(2) of the Act sets how the court's budget is to be determined. It provides that the funding needs of the court are determined by the Chief Justice after consultation with the Minister.

In other words the Chief Justice is required to take the initiative in determining the court's needs and thereafter enter into discussions with the Minister regarding the appropriation of the funds. The Minister must then include the amount agreed in the budget that is tabled in Parliament, subject of course to the concurrence of the Finance Minister. However, it should be borne in mind that the Director-General of the Department of Justice, who is its accounting officer, is the official who is ultimately accountable for the expenditure of these funds. I will discuss later how maintaining this function as part of the Director-General's responsibility compromises the institutional independence of the judiciary. The model applied to the administration of the Constitutional Court is different from the executive model described earlier and may be described as the 'Constitutional Court Autonomous Model' where the court has autonomy to determine its own needs and is supported by its own staff. But the model does not apply to the rest of the judiciary;[5] hence my description of it as the 'autonomous model.'

The administration of the lower levels of the court system, which includes the Supreme Court of Appeal and Provincial High Courts, remains under the control of the Department of Justice – a system inherited from the pre-constitutional era and which functions firmly in the mould of the executive model.

The mechanism of formal communication between the Minister and leaders of the judiciary is a quarterly meeting between the Minister of Justice and the heads of courts including the Chief Justice. This meeting is preceded by a meeting of the heads of court, presided over by the Chief Justice where the judges decide on the issues they wish to raise with the Minister. Problems are addressed on an ad hoc basis. There is no structured or programmatic input relating to the budget for court administration or to strategic and long-term planning. The result is that most judges feel that these meetings achieve very little.

Instead of extending or adapting the model adopted for the Constitutional Court to the lower levels of the judiciary consistent with the Commonwealth Principles and the trend in other jurisdictions of granting greater institutional independence to the judiciary, the South African government proposed entrenching the executive model and depriving courts of any responsibility regarding administration and budgeting through the Constitution Fourteenth Amendment Bill of 2005, which sought to alter s 165 of the Constitution – the provision guaranteeing the independence of the judiciary. Its effect was to

[3] Section 14(1) of the Constitutional Court Complementary Act 1995
[4] Section 14 (2)(a) of the Constitutional Court Complementary Act 1995.
[5] Cf Report on Alternative Models of Court Administration (above at n 2)

confine the Chief Justice and the judiciary's responsibility to dealing with 'judicial functions' while making the Minister of Justice solely responsible for the 'administration and budget of the courts.' The Superior Courts Bill of 2003 mirrored the proposal but made it obligatory for the Minister to consult the Chief Justice on the funds required for the administration and functioning of the courts. To assist the Chief Justice to administer the 'judicial function' the Minister would appoint an executive secretary after consultation with the Minister.

The overall thrust of the proposal was to curtail rather than extend the responsibility of the judiciary over the administration of the courts. This development was surprising. Not only did it go against the spirit of the Commonwealth Principles – and the model that had been adopted for the Constitutional Court – but it was also at odds with judicial decisions of the Constitutional Court that made it clear that 'administrative decisions …bear directly and immediately on the exercise of the judicial function.'[6] Moreover the Constitutional Court has also made clear with reference to other independent bodies such as the Electoral Commission, that their 'financial independence' is an essential element of its institutional independence.[7] Despite this the government's proposals were aimed at removing any control of the judiciary over its finances.

The rationale advanced by the government for seeking to place the administration of justice under the control of the Department of Justice was the need to transform the judiciary and improve its efficiency and effectiveness. It also bizarrely argued that placing the administration of justice under the control of the judiciary would be a breach of the doctrine of the separation of powers, as any administrative task properly falls within the domain of the executive. The critics of the proposal saw it for what it was – an attempt to place the judiciary under firmer executive control.

So it was not unexpected that that these Bills would generate significant opposition outside government. Indeed, they elicited a storm of protest from judges, the legal profession, civil society and from bodies such as the International Bar Association. And faced with this opposition the executive quietly withdrew the Bills in November 2006.

Among the arguments the government then advanced for introducing the Bills was that they accorded with best practice from the Commonwealth.
It is therefore worth briefly examining how some Commonwealth countries deal with administration of the courts. I do this against the background of the Commonwealth Principles.

In Australia there are separate court systems at the state and federal level. At the federal level, a Chief-Executive Officer and a Principal Registrar oversee the

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[6] *De Lange v Smuts No and Others* 1998 (3) 785 (CC) at para 70 and *Van Rooyen v The State* (supra) at para 29.
[7] *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) at para 98.

administration of the High Court. They are nominated by the court and appointed by the Governor-General.[8] With respect to budgetary arrangements, the Finance Minister directs Parliament as to what funds are to be appropriated for the court. Similar arrangements exist for the Federal Court of Australia.[9] The model operates much the same way as South Africa's 'Constitutional Court Autonomous Model.'

At a state level a variety of systems exist, varying from control of the executive to the judiciary. South Australia has an interesting model where a State Courts Administration Council acts as the administrative body independent of control of the executive. The Council consists of the Chief Justice of the Supreme Court, Chief Judge of the District Court and the Chief Magistrate of the Magistrates Court.[10] And it provides all the administrative facilities and services to the participating courts and their staff to carry out their judicial and administrative functions. The courts remain responsible for their own internal administration. The fact that the Council acts independently of executive control is an important safeguard against executive intrusion into judicial arm of government.

In Canada too, the executive model applied to the administration of the courts. Currently various agencies administer the courts. A Registrar, who answers directly to the Chief Justice, is responsible for the administration of the Supreme Court.[11] This model too is similar to that of South Africa's Constitutional Court.

In July 2003 the Court Administration Service Act 2002 was enacted. Its purpose was to 'enhance judicial independence' and to ensure the proper administration of the courts 'by placing administrative services at arm's length from the Government' and to 'enhance accountability for the use of public money in support of court administration while safeguarding the independence of the judiciary.' A Chief Administrator ensures the efficient administration of all court services, including court facilities, libraries, corporate services and staffing for all federal courts.[12] At a provincial level, administration services are usually provided by the executive. The Courts of Justice Act 1990 creates an Ontario Advisory Council, composed of the Chief Justice and other senior judges. The Council's mandate is to advise the Attorney-General on any matter regarding the administration of the courts.[13] It functions in a manner similar to South Africa's head's of courts meeting with the Minister.

Ghana's Constitution appears to go further than most countries to protect the institutional autonomy of the judiciary.
Article 127 guarantees the independence of the judiciary both in its judicial and administrative functions, including financial administration. An independent Judicial Council, comprising a majority of non-government members ensures the efficient administration of justice. The Chief Justice's responsibility includes the

[8] Part lll, High Court of Australia Act 1979.
[9] Federal Court of Australia Act 1976.
[10] See for example s 13A of the Supreme Court of Queensland Act 1991.
[11] Section 15, Supreme Court Act 1985.
[12] Section 7(2), Courts Administration Service Act 2002.
[13] Section 76, Courts of Justice Act 1990.

administration of the judiciary. For this purpose the Chief Justice makes staff appointments without the need for executive approval.[14]

It is quite clear from the three models I have just described that the South African Government's proposals mentioned earlier did not accord with the models that were adopted in other jurisdictions to disentangle themselves from the weaknesses inherent in the executive model. The South African Government has now published a new Superior Courts Bill 2010, which it intends to introduce in Parliament soon. The Bill covers a wide range of subjects.

Here I am only concerned with the proposals in Chapter 3 of the Bill in so far as they concern the administration and funding arrangements for the Superior Courts, that is the Constitutional Court, Supreme Court of Appeal and provincial High Courts.

For the Constitutional Court, the 2010 Bill establishes the Office of the Chief Justice comprising an Executive Director and a staff establishment determined by the Chief Justice after consultation with the Minister of Justice. The post level of the Executive Director is however, to be determined by the Minister after consultation with the Minister of Finance. The Chief Justice intends the post to be equivalent to that of a Director-General, but in its present form the Bill does not require the executive to take account of the Chief Justice's views regarding the post level of the senior official in the Office of the Chief Justice.

The Executive Director may appoint the other personnel to this office, and also to the other superior courts, but only after consulting the Director-General of the Department of Justice.[15] The appointment of staff to all the superior courts must be done with the concurrence of the judicial head of the court concerned.[16]

Regarding the financing of the administration of the Superior Courts the Minister of Justice is required to 'address requests for funds' from the Chief Justice, who must consult other heads of court regarding their funding needs. Once the request reaches the Minister the process follows the normal budgetary process.[17] However, the 2010 Bill explicitly makes the Director-General of the Department responsible to account for the expenditure of funds on account of the administration of the Superior Courts in terms of the Public Finance Management Act 1 of 1999 just as here in Lesotho the Principal Secretary is accountable for the judiciary's budget.

The 2010 Bill is undoubtedly an improvement on the status quo where, for Superior Courts other than the Constitutional Court, the Department is responsible for all aspects of administration and for the Constitutional Court the Minister is responsible for its staffing requirements – albeit in consultation with the Chief Justice. In my view there ought to be no reason for the Minister to be

[14] Article 158 (1) of the Constitution.
[15] Section 12, Superior Courts Bill 2010.
[16] Sections 12(1)(b) and 16 (1)(a) of the Superior Courts Bill 2010.
[17] Sections 15(1) and 15 (2) of the Superior Courts Bill 2010.

concerned with the judiciary's budgetary and staffing requirements. This ought to be dealt with directly by Parliament.

The crucial shortcoming in the 2010 Bill is that the Director-General remains accountable for the expenditure of the funds – an indication that the executive is not yet willing to let go of a key component of the executive model. If the 2010 Bill is adopted in this form it is likely to cause friction between the Director-General and the Executive Director.

This is because the 2010 Bill makes the Director-General accountable for the expenditure of the funds for the Superior Courts without responsibility for supervision of the administration while at the same time making the Executive Director responsible for the supervision of the administration without having to be accountable in terms of the Public Finance Management Act.

A practical solution would be to confer the accounting responsibility for the administration of the Superior Courts on the Executive Director in the same way as the Public Finance Management Act does with respect to chief executive officers of the independent constitutional institutions.[18] This would not only deal with the problem of conflicting lines of authority between the two senior officials but would, in my view, better give effect to the requirement for the courts to be institutionally independent of the executive. It would make the Executive Director directly accountable to Parliament for the expenditure of funds.
I am informed that there is currently before the Lesotho Parliament a Bill that seeks to make the Registrar of the High Court and of the Appeal Court the accounting officer for the judiciary. I applaud this development.

To conclude, the 2010 Bill travels a long way down the path towards institutional independence for the judiciary and away from the executive model. But it still does not accept the full implication of what institutional autonomy for the judiciary entails.

I can only hope that when Parliament does consider the 2010 Bill it takes a step further down the path than the executive was prepared to take – by making the Executive Director, instead of the Director-General, the accounting officer for the judiciary and by stating explicitly that the post of the Executive Director shall be at the level of a Director-General. And it should remove the Minister's role in the budgetary and staffing requirements of the judiciary.

Bibliography

1. 'Alternative Models of Court Administration'. Report by the Canadian Judicial Council (2006).
2. 'Beyond Polokwane: Safeguarding South Africa's Judicial Independence'. Report by the International Bar Association (July 2008).

[18] See s 36 (2)(b) of the Public Finance Management Act 1 of 1999.