PERSONAL INDEPENDENCE AND IMMUNITY OF JUDGES IN BOTSWANA

Hon Justice Dr. OBK Dingake[1]

> *"… No judge or magistrate in Botswana should do that which his conscience tells him is wrong and against the Constitution or laws and usages of Botswana, to gain a nod of approval from any official or politician or the applause of thousands or the daily praise of the press or the news media or avoid that which his conscience tells him is right and in conformity with the Constitution, though it should draw upon him a whole artillery of libels, all that falsehood and malice can invent, and the credulity of a section of the populace can swallow."*
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> (Quotation attributed to Hayfron-Benjamin CJ (former Chief Justice of Botswana) from **" The Judicial Institution in Southern Africa", by Linda Van De Vijver, 2006, (Siber Ink), p29)**

Introduction

This paper deals primarily with the personal independence of a judicial officers and immunity attached to the exercise of judicial functions in Botswana. The paper argues that both the independence of a judicial officer and the immunity attached to the exercise of judicial functions is meant to afford the public protection and not the judicial officer *perse.*

Before delving into the subject matter of enquiry it is appropriate to appreciate the various international legal instruments that deal broadly with the matter of judicial independence.

International legal instruments

The concept of the independence of the judiciary is adequately reflected in several international instruments and/or declarations. The Universal Declaration of Human Rights of 1948; the International Covenant on Civil and Political Rights of 1966, all declare that everyone in the determination of his civil, political rights and obligations and of any criminal charge preferred against him or her is entitled to a fair hearing by an independent and impartial tribunal established by law.

In 1985, the UN General Assembly adopted a statement on the "Basic Principles of the Independence of the Judiciary"[2]. The UN General Assembly acknowledged that governments and other institutions must respect and observe the independence of the

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[2] See General Assembly Resolution 40/146,1985

judiciary[3]. As a consequence of the adoption of the above principles, the members of the General Assembly are each, expected to guarantee the independence of the judiciary in their constitutions and laws.

In 2003 the Commonwealth, developed the Commonwealth Latimer House Principles on separation of powers among the three branches of Government, the Executive, the Legislature and the Judiciary.[4] The Latimer House Principles, state that: "An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice".[5]

It becomes clear, having regard to the above instruments that an independent judiciary is the key to upholding the rule of law in a free-society. This independence may take different forms in different jurisdictions, but the principles that underpin it are the same in all democratic countries who subscribe to the rule of law.

Having dealt briefly with the international legal instruments and or declarations, I turn now to consider the conceptual framework on the independence of the judiciary. This section lays a basis for a discussion of the matter of personal independence and judicial immunity.

The concept of the Independence of the Judiciary

The concept of the independence of the judiciary is not a complicated idea. It refers to the ability of a judge or judicial officer to decide a matter free from improper influences. Improper influences might come from sources external to the judiciary, such as another branch of government, or from powerful interest groups within society, or from "public opinion" and or the media. It may also come from colleagues, friends and relatives of a judicial officer.

Any self respecting liberal democracy predicated on the rule of law needs legal and institutional measures to ensure that judges individually are, and the judiciary collectively is, independent from external forces. Judicial independence also means that judges must be afforded independence from their judicial colleagues, so that only a judge presiding over a case, who has heard the evidence and the arguments, must take a decision on the basis of the application of the law to the facts of the case. The above is often referred as personal independence.

[3] Article 1

[4] Drawn up by the Law Ministers and endorsed by Commonwealth Heads of Government Meeting Abuja, Nigeria, 2003 and published by the Commonwealth Secretariat in April 2004

[5] Ibid, Clause IV

In the case of **Valente v The Queen**[6], the court defined judicial independence as follows:

> *"…judicial independence involves both individual and institutional relationship: the individual independence of a judge, as reflected in such matters as security of tenure and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationship to the executive and legislative branches of government."*

The court concluded that:

> *"…judicial independence is a status or relationship resting on objective conditions or guarantees as well as a state of mind or attitude in the actual exercise of judicial functions…"*

The notion of judicial independence clearly suggests that a judge must not be influenced by any outside sources. In order to avoid such a perception, judges must have no real or apparent contact with any person and or litigant that may reasonably call into question his/her impartiality. If a court or an individual judge is subject to, or even appears to be subject to, inappropriate or improper influence from any person whatsoever, not just the executive or the legislature, then he/she cannot be said to be independent and impartial. As Hogg, correctly puts it, "it is inherent in the concept of adjudication, at least as it is understood in the western world, that the judge must not be an ally or supporter of one of the contending parties".[7]

It follows therefore that judicial independence is much about perception as reality. It follows therefore that a judge who has an interest in a matter must recuse himself/or herself from the case.

Personal Independence

Personal independence of a judicial officer is one of the elements of judicial independence. The concept of personal independence postulates that in the decision making process, judges shall be independent from any influences or pressures from their friends, relatives and colleagues at the bench. This means that any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his or her judgment freely.

Courts in liberal democracies founded on the rule of law, depend on public confidence for their credibility. Citizens will not be willing to submit to the decisions of the judiciary if they perceived that judges are subject to influences and or pressures by their friends, relatives and colleagues.

Judicial Immunity

[6] **1985 2 SCR 673 at 687 & 689**

[7] Peter Hogg, the Constitutional law of Canada 3rd ed, (Toronto: Carswell, 1992) p 168

Another important factor that helps to guarantee independence and impartiality of the courts is the immunity afforded to judicial officers. Judicial officers are not liable to be sued for the legitimate exercise of their powers. It should be obvious that if judges were to be sued for delivering a judgment which was not in accordance with the law, but which the judge believed to be in accordance with the law, the judicial function would be impossible to exercise. However, a judge may be sued if it can be proven that his or her judgment was actuated by malice.

Judicial immunity may be traced to the early 16th century. In an old English case of *Floyd v Barker*[8], Lord Coke explained that the significance of judicial immunity lies in ensuring that judicial officers decide disputes before them freely and without fear of adverse consequences that may arise.

In the case of *Sirrors v Moore*[9], Lord Denning likewise expressed the significance of judicial immunity by stating:

> *"Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'if I do this, shall I be liable in damages?'*[10]

Perhaps the clearest articulation of the rationale of judicial immunity was in the case of *McC v Mullan*,[11] where it was stated that:

> "*The principle underlying this rule is clear. If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction."*

In the South African case of **Penrice v Dickinson** the court held that no liability attaches to a judicial officer who gives a bad judgment as a result of a lack of legal skill or knowledge, as long as the decision was arrived at in good faith. Even a failure to take reasonable care would not render the judicial officer liable for damages.[12]

The South African Appellant Division also considered a claim for costs against a judicial officer in **Regional Magistrate Du Preez v Walker.**[13] The court held that a cost order

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[8] (*1607) 77 ER 1305,*

[9] *(1975) 1 QB 118*

[10] *Ibid, p 136*

[11] *(1984) 3 ALL ER 908 (HL)*

[12] Penrice v Dickinson, 1945 AD 6 at 18.

[13] 1976(4) SA 849

against a judicial officer arising from the performance of judicial functions solely because he has acted incorrectly is incompetent. Judicial officers would be unduly hampered in the exercise of their functions if it were otherwise. The court held that an exception to this rule would exist in circumstances where the judicial officer is shown to have been actuated by malice in his or her decision. It also appears to be settled that where the evidence does not support a finding of malice and or bad faith (there is therefore no question of awarding costs against the judicial officer personally), it would also not be appropriate to award costs against the State either.[14]

While many people may agree or disagree with the sentence and the judge's reasons for imposing the sentence, it must be remembered that a judge has the authority and the power to be wrong as well as right. Disenchanted litigants or other citizens should not be able to influence a judge about judicial decision through the threat of disciplinary sanction.[15]

In 1978, the Supreme Court of the United States of America in the case of *Stump v Sparkman*[16], held that the doctrine of judicial immunity forbade a suit being brought against a judge who had authorized sterilization of a slightly retarded 15 year old girl under the guise of appendectomy. Apparently the judge had approved the operation without a hearing when the mother alleged that the girl was promiscuous. After her marriage two years later, the girl discovered she was sterile.

In another case of *Dykes v Hosemann*[17] the Court held that a judge who had issued an " emergency" order, granting custody of a child to its father (a fellow judge), without notice to the mother or a proper hearing was immune from legal suit at the instance of the mother.

The principle that judges can be wrong as long as their decisions are arrived at in good faith is meant to ensure that there should be no threat of personal liability for decisions which are later found to have been incorrect.

Personal Independence of a judicial officer in Botswana

The Constitution of Botswana has carefully delineated, and distributed, the powers of the State among the three organs (with a certain amount of overlap), namely the Parliament, the Executive and the Judiciary, in accordance with doctrine of the separation of powers.

The Constitution of Botswana guarantees rights to the individuals and the courts are obliged to enforce such rights; the courts further have the constitutional prerogative to

[14] Regional Magistrate Du Preez at 855-6.

[15] Petition of Lauer 788 F.2d 135 (8th Circuit, 1985)

[16] 435 U.S. 349 (1978)

[17] 776 f.2d 942(11th Cir.1985)

singularly define the scope and extent of the power for the other organs according to the law, to which all the organs of the State, and the citizenry, are subservient. Section 3 to 18 of the Constitution deals and confers fundamental human rights and freedoms.

Section 10 of the Constitution provides that any person who is charged with a criminal offence must be afforded a hearing, within a reasonable time, by an independent and impartial court. Sections 10 (1) and 10 (9) are quite similar, though with notable differences; the first deals with criminal cases and the second with civil cases. Section 10 is material to this discussion and deserves being quoted:

> "(10)(1): *If any person is charged with a criminal offence, then, unless the charge is withdrawn,* ***the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court*** *established or recognized by law.*
>
> (10)(9): *Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established or recognized by law and* ***shall be independent and impartial****; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority,* ***the case shall be given a fair hearing within a reasonable time***."

Sections 10 (1) and 10 (9) prescribes, *interalia,* the following conditions:

(a) Independence
(b) Impartiality
(c) Fairness

Although the Constitution does not single out personal independence as an important element of an " **independent and impartial court"** there can be no doubt that if the term " **independent"** is construed broadly and generously in accordance with the well known canons of constitutional construction it would invariably cover the element of personal independence.

Personal independence is secured, interalia, by security of tenure; decent salary to secure financial independence; irreducible benefits; transparent and objective appointment procedures.

Judges in Botswana may be appointed or permanent or on contract basis. Citizens are invariably appointed on permanent and pensionable terms. They are essentially irremovable and the retirement age for both the judges of the High Court and the Court of Appeal is set at 70 years. Judges may only be removed for gross misconduct and on grounds of certified insanity in accordance with the constitutional stipulations.

Judges salaries are higher than those of top civil servants save for the Permanent Secretary to the President who is pegged at the same level as the Chief Justice. It would seem probable that if all the judges benefits are taken into account judges may well be earning more than even the Permanent Secretary to the President. Judges salaries are

may not be reduced. This however does not apply to their allowances that are constitutionally not protected.

Judges in Botswana are appointed by the President. In appointing judges the President is requires to do so in accordance with the recommendations of the Judicial Service Commission. The Judicial Service Commission is chaired by the Chief Justice and its members are drawn from a broad spectrum of the society such as the Law Society, the Attorney Generals Chambers and a representative of the public, who is appointed by the President, among others. In practice vacancies in the judiciary are advertised in newspapers and shortlisted candidates attend interviews which are held in camera. Having regard to the above it could be safely said that although there is room for improvement Botswana constitutional provisions relating to security of tenure, salaries and conditions of service and appointment process broadly meets international standards. There is still some controversy surrounding the meaning of section 96 of the constitution that provides that judges of the High Court shall be appointed by the President in accordance with the advice of the Judicial Service Commission. It has been contended by some that the use of the phrase " in accordance" obliges the President to stick to the recommendations of the Judicial Service Commission and that he or she is precluded from rejecting the names submitted to him.

Judicial officers in Botswana are independent from the influences of friends, relatives and colleagues in determining disputes before them. There has never been any credible suggestion or a complaint that a judicial officer was influenced or pressurized to decide a matter in a particular way by a colleague or any other person.

Judicial immunity in Botswana

The Constitution of Botswana does not provide for the immunity of judges. Instead the immunity is provided by section 25 of the High Court Act. Section 25 of the High Court Act provides that:

" No judge shall be liable to be sued in any court for any act done or ordered to be done by him in the discharge of his judicial duty whether or not done within the limits of his jurisdiction, nor shall any order of costs be made against him, provided that he at the time in good faith believed himself to have the jurisdiction to do or order the act complained of"

On close scrutiny it seems clear that the section limits immunity to judicial acts and does not cover administrative acts. In the case of *Ngope v O'Brien-Quinn* the former Chief Justice was successfully sued by a court Clerk for defamation. The defamatory statement was made by the Chief Justice whilst discharging his functions. Some authorities have expressed concern that the failure to cover administrative functions may constrain judicial officers to perform their judicial functions.

The High Court has also had occasion to deal with the matter of judicial immunity in the case of *Justice P.H. Tebutt and Others v Water Engineering (Proprietary) Ltd and*

Another[18]. The facts of the case were briefly that the respondents sued the judges of the Court of Appeal for damages, for wasted time and for expenditure in a case over which the judges had presided. The judges defended the suit on the basis that they enjoyed judicial immunity from civil suits for damages arising out of proceedings over which they presided.

The court held that, in terms of the common law, all judges of the superior courts are protected by absolute immunity against claims for damages arising from the exercise of their functions as judges.

It would appear from the above, therefore, that judicial errors, whether with respect to jurisdiction, procedure, ascertaining and or applying the law or evaluating evidence, should not attract liability. That being said, in the case of such errors being committed by the lower court, there are recognized procedures whereby those who are aggrieved by such errors may appeal to the Court of Appeal.

Other errors of a fundamental nature that can be proved to be prejudicial, such as delays, may be dealt with by suing the state, if that is considered necessary. This point remains a moot one. It should also be recalled that delays in trials may not necessarily be due to the fault of judges. Delays may occur due to a host of other factors, such as inadequate resources or systems failure.

Conclusion

This paper has sought to demonstrate that the independence of the judiciary is an indispensable feature of any liberal democracy. It has also shown that judicial officers in Botswana are independent of their colleagues. No suggestion has ever been made that such interference takes place. The courts have also upheld the immunity of judges, which is in keeping with the constitution and International Law.

Judicial officers wield enormous power. In the course of endeavoring to deliver justice to all, judicial officers may ruin lives if their appreciation of the law is inadequate or lacking. Armed with the constitutional power to pass judgment on every aspect of human life, a judicial officer can occasion immense harm, if his or her appreciation of the law is inadequate which is often a feature of unmeritorious appointments. The harm inflicted may be far reaching and enduring.

The paper also makes the point that both the independence of the judiciary and judicial immunity should not be regarded as a shield from public scrutiny, but rather as a devise intended to protect the public. It is in the wider interest of the public that no one

[18] *(2004)1 BLR 241*

must give or attempt to give the judge orders or instructions of any kind in order to ensure that judicial officers attend all matters before them without fear or favour.