

THE RELATIONSHIP BETWEEN JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY: THE PACKAGE OF DRAFT LAWS ON THE JUDICIARY

In dealing with this topic, it is important to understand what is meant by judicial independence and judicial accountability. A quick visit into the internet will show that a lot has already been written, nationally and internationally, on the two issues. My paper does not attempt to digest all those learned thesis and writings. I am merely making a presentation which is very much tailor-made to our national debate on the two issues; a debate no doubt generated by the Draft Bills we all know of.

What do we, as South Africans, understand by "Judicial independence"? Simply put, it means the freedom to decide a matter without external influence. The source of such independence is the Constitution itself. Section 165(2) thereof reads:

"The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

In practice though, the concept is not that easy to apply or realize. Central to this problem is whether there is any such thing as complete independence. In

other words, isn't independence a relative concept? Can the Judiciary operate in total isolation from, and independence of, other authorities of the state? If not, would the judges' independence not be compromised? Yet somebody must pay the judges their salaries; somebody has to make sure they get motor vehicles etc. Yet, occasions may arise when the Executive may be so much in control of the infrastructure on which judges are dependent for the execution of their judicial functions that the latter's independence is imperiled; that is, when the judges are, as it were, at the mercy of the Executive. The purest form of judicial independence would, in my view, be when the Judiciary is in charge of its own budget (assuming of course there are other factors such as an acceptable appointment mechanism and security of tenure). Some of the provisions in one of the Draft Bills has caused other people to fear that the Judiciary would be made over-dependent on the Executive. The debates and discussions are still going on. Views do differ, and time will tell where we stand, or who is right. What is generally accepted, is that judicial independence can be whittled away through a subtle process. Indeed, in a country such as ours, there can never be a blatant undermining of judicial independence; the courts would simply strike down any such measure as being unconstitutional. Moreover, a government which lays claim to democracy, would hardly resort to such a measure. But the consequences of blatant interference and a subtle one, even the one in good

faith, are the same. It is important that judicial independence be institutionalised.

While it is the duty of other arms of state authority to protect the independence of the Judiciary, judges need to understand that the final responsibility lies with them. It is they who should eventually decide whether any measures, such as an Act of Parliament, undermine their independence and, if they do, to strike them down. Therefore, it would be an ultimate act of betrayal of the principle of judicial independence for any judge to countenance any measure or Act of Parliament which undermines judicial independence. We owe this duty to ordinary people, whose lack of understanding and emotions are sometimes whipped up and exploited by populist politicians for ulterior motive. In fact the protection of judicial independence is for the benefit of everybody, including politicians themselves. After all, the wheel of life never stops turning.

But Judicial independence should never be used as shelter against incompetence and under-performance, nor should it be used as a shield against legitimate criticism. This brings me to the next aspect of my presentation, namely, accountability.

Here again we must be clear as to what is meant. Maybe we should explain what judicial accountability does not mean. Here are a few examples of what

judicial accountability does not mean; bringing a judge to Parliament to account for a judgment which some members of Parliament do not like; attempting to give a judgment which seeks to please populist views. A good judge would never feel so obliged.

Some people like padding the view that judges are not accountable. Nothing is further from the truth. For every decision a judge takes or the order made, a judge is under a legal duty to explain themselves not only to the parties in the matter, but to the world at large. Full and clear reasons must be given. If none are given, any party would be entitled to ask for, and be given, same. In doing so, a judge must express himself/herself clearly so as to be understood. That is accountability. Moreover, judgment, if reserved, must be given within a reasonable time. People are entitled to read the judgment and critic it. That is holding a judge accountable. As far as accountability in respect of non-judicial functions is concerned, a complaint may be laid against the judge with the Judicial Service Commission. At this stage though, a complete and satisfactory mechanism to deal with non-impeachable conduct is yet to be finalised. As far as the execution of their daily duties is concerned, judges are of course under the supervision of their head of court: they are accountable to the latter in respect of matters or duties allocated to them.

There is no conflict between judicial independence and judicial accountability, provided the two concepts are properly understood. A judge speaks through his/her judgment, and being accountable can never, as we have seen, mean that a judge should justify himself/herself to anybody, any institution or group of people beyond that point. An attempt to cause a judge to do so would undermine the independence of the judiciary. A good example to seek to make a judge explain himself/herself beyond and outside of his judgment; was the attempt a few years ago by some members of Parliament to summons a judge to appear before Parliament to explain himself.

In my view, judicial accountability and judicial independence are complementary. A judge who is not independent, who simply produces judgments dictated to by others, would not be able to explain himself/herself. By holding judges accountable in the manner described, we inculcate, nurture and strengthen in them, a sense of independence, the ability to be original and a sense of confidence. The quality of a judgment is a deep reflection of an individual's intellectual excellence and insight into the issues involved, especially points of law, and the courage to resolve them with conviction. Yes, another court might find that you are wrong; but that is another matter.

The final product that comes out of the combination of judicial independence and judicial accountability is quality justice.

How does the so-called Package of Draft Laws impact on judicial independence and judicial accountability?

There was reason to believe that some of the Draft Bills severely undermined judicial independence. A number of us were asked to make presentations at a colloquium which was held earlier this year to discuss the Draft Bills concerned. It was a Bill on the amendment of the Constitution, a Bill on judicial training (restructuring of Justice College); a Bill on the complaint mechanism, and a Bill to amend the Judicial Service Commission Act on aspects relative to the resolution of complaints against judges. Also in the package was a Bill on the Superior Courts. Meetings have been held to resolve differences of opinion. For now, discussions are continuing only in respect of the latter Draft Bill, the rest have been temporarily shelved. We sincerely hope that the differences will be sorted out. It would therefore be inappropriate for me to go into these matters right now, though of course, this conference is at large to do so. The impact which some of the Draft Bills will make, depend on the construction which one places on some of the proposed sections of the Bills.

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