

# JUDICIAL SERVICE COMMISSION



**PRESENTATION BY THE HONOURABLE MR JUSTICE**

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KAZAKHSTAN**

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**"OPPORTUNITIES AND CHALLENGES FACING  
THE WORLD`S COURTS"**

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## JUDICIAL INDEPENDENCE: MODERN CHALLENGES

*"All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary."*

*- Andrew Jackson*

An independent judicial system enjoying the confidence of the citizenry is central to preserving the rule of law. The rule of law, in turn, is the bedrock of our judicial system. The proper administration of justice is dependent upon the adherence to the value of judicial independence. This principle is essential in order to achieve a proper judicial process and to maintain the fundamental values which

underpin the justice system such as procedural fairness, efficiency and public confidence in the courts.<sup>1</sup>

The Judiciary, as an organ of the State, plays an instrumental role in the enforcement of the rule of law. Section 165(1)(c) of the Constitution of Zimbabwe, which speaks to principles guiding the Judiciary, provides that the role of the courts is paramount in safeguarding human rights and the rule of law. One of the fundamental objectives of the rule of law entails the limitation of Government powers through checks and balances. It is therefore of utmost importance that the independence of the Judiciary be guaranteed.

MAHOMED CJ in an address on the "*Role of the Judiciary in a Constitutional State*", published in 1998 (115) SALJ at 112, had this to say about the independence of the Judiciary:

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<sup>1</sup> Shimon Shetreet (2000) *The Challenge of Judicial Independence in the Twenty-First Century*, Asia Pacific Law Review, 8:2 at p 153.

"The exact boundaries of judicial powers have varied from time to time and from country to country, but the principle of an independent Judiciary goes to the very heart of sustainable democracy based on the rule of law. Subvert it and you subvert the very foundation of the civilization which it protects. What judicial independence means in principle is simply the right and the duty of the Judges to perform the function of judicial adjudication, on an application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any other person or institution."

This paper will mention several challenges to the independence of the Judiciary that are operative today and seem, to me at least, to be particularly troubling. The

challenges encountered in the implementation of the rule of law on the continent can be attributed to the "capture of the Judiciary" or rather executive influence on the workings of the Judiciary.

The procedures for the appointment of Judges is a cause for concern with regard to the independence of the Judiciary.

Most States have a system whereby the President makes these appointments, acting in accordance with the advice of independent judicial service institutions. Autocratic leaders are often in the habit of appointing to the Bench only those who are notoriously known to be loyal to their cause. JUSTICE

KING<sup>2</sup> in an article titled "*Current Challenges to the Federal Judiciary*"<sup>3</sup> captured the problem as follows:

"The independence of the Judiciary is also being undermined by the process by which federal appellate Judges are appointed, a process that involves both the executive and legislative branches. I understand that the judicial appointment process has always been political, but to varying degrees and with varying results on the process itself and on the choice of appointees. I am a fourth-generation Republican, appointed by a Democratic President who specifically said that he did not care what my politics were. But, admittedly, that was

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<sup>2</sup> Circuit Judge, United States Court of Appeals for the Fifth Circuit. Judge King was Chief Judge of the Fifth Circuit and a member of the Judicial Conference of the United States from 1999 to 2006. She was appointed by Chief Justice William H. Rehnquist to be a member of the Executive Committee of the Judicial Conference from 2000 to 2005 and to chair the Committee from 2002 to 2005. Judge King was appointed to the Fifth Circuit by President Carter in 1979.

<sup>3</sup> Carolyn Dineen King "Current Challenges to the Federal Judiciary" *Louisiana Law Review* Vol 66 (2006) at pp 666-667.

unusual. Recognising that the Republican administrations in the last twenty-five years may well not have been unique, it seems to me that they have featured an ever increasing demand by the President and his supporters for candidates for the intermediate appellate courts with strong conservative political views who can be relied upon to be rigorously faithful to those views. That is not to say that every federal appellate Judge appointed by those administrations fits that description because many do not. But it is to say that, increasingly, the common perception of what it takes to receive a judicial appointment is fidelity to strongly held political views ... What this selection process conveys to the public is the notion that the Judiciary is yet another political branch of government, a kind of stepchild of the other two branches. Judicial independence is central

to the separation of powers, and when the Judiciary is perceived as a stepchild of the political branches of government, the separation of the three branches of government is impaired. This alters the public's perception of the role of the Judge in a way that is damaging to the Judge's ability to say what the law is and his authority or credibility in so doing."

In Zimbabwe there is an independent process provided for under section 180 of the Constitution for the appointment of Judges. A perusal of sections 180 (2) and (3) of the Constitution reflects that the Heads of Courts, that is the Chief Justice, the Deputy Chief Justice and the Judge President of the High Court, are appointed by the President after consultation with the Judicial Service Commission. Subsection (3) goes further to place it beyond doubt that



the decision of the President as regards these appointments is final, regardless of there being an inconsistency with the recommendations of the Judicial Service Commission. The only caveat is that the President must inform the Senate as soon as is practicable.

The appointment of the other Judges is done by the President, after the Judicial Service Commission has conducted interviews and submitted a list to him or her of three qualified persons as nominees to the office. Hence the appointing authority is the President, despite there being an independent Commission charged with the constitutional mandate to promote and facilitate the independence of the Judiciary in terms of section 190(2) of the Constitution.

Solutions to counter the threat to judicial independence can be derived from the recommendations found in the Report of

the International Commission of Jurists on the proceedings of the "*African Conference on the Rule of Law*", Lagos, Nigeria, 1961. The following was stated in this regard:

"2. It is recognised that in different countries there are different ways of appointing, promoting and removing Judges by means of action taken by the executive and legislative powers. It is not recommended that these powers should be abrogated where they have been universally accepted over a long period as working well - provided that they conform to the principles expressed in Clauses II, III, IV and V of the Report of the Fourth Committee at New Delhi.

(3) In respect of any country in which the methods of appointing, promoting and removing Judges are not

yet fully settled, or do not ensure the independence of the Judiciary, it is recommended:

- (a) that these powers should not be put into the hands of the Executive or the Legislature, but should be entrusted exclusively to an independent organ such as the Judicial Service Commission of Nigeria or the Conseil superieurde la magistrature in the African French-speaking countries;
- (b) that in any country in which the independence of the Judiciary is not already fully secured in accordance with these principles, they should be implemented immediately in respect of all Judges, especially those having criminal jurisdiction." (emphasis added)

The mechanisms for judicial selection are one of the key elements of an independent Judiciary. Various international and regional guidelines have been formulated, whose objective is to recommend the basic elements that are constitutive of an independent Judiciary.<sup>4</sup> The general trend in common law and civil law countries, and probably a beacon of hope for the preservation of judicial independence, has been the use of judicial selection commissions or councils. The form and competences of these commissions have varied across jurisdictions. The use of a judicial selection commission is also common in Africa. Several African countries have in one form or another adopted the use of judicial selection commissions especially during the so called

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<sup>4</sup> Gift Manyatera and Charles Manga Fombad "An assessment of the Judicial Service Commission in Zimbabwe's new Constitution" *The Comparative and International Law Journal of Southern Africa* Vol. 47, No. 1 (MARCH 2014), p 90.

"third wave" of democratisation.<sup>5</sup> Judicial Service Commissions are increasingly becoming an important feature of most judicial appointment systems.<sup>6</sup>

The establishment of Judicial Service Commissions has been noted as a useful tool in ensuring that Executive influence is curtailed and judicial independence is preserved. The Beijing Statement of Principles of the Independence of the Judiciary in the Law Association for Asia and The Pacific makes the following pertinent observation:

"In some societies, the appointment of Judges, by, with the consent of, or after consultation with, a Judicial Service Commission has been seen as a means of ensuring that those chosen as Judges are appropriate

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<sup>5</sup> Fombad "A preliminary assessment of the prospects for judicial independence in post-1990 African Constitutions" 2007 SA Public Law 233-257.

<sup>6</sup> See Volcansek "Exporting the Missouri Plan: judicial appointment commissions" (2009) 774 Missouri Law Review 785-786.

for the purpose. Where a Judicial Service Commission is adopted, it should include representatives of the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained."<sup>7</sup>

While Judicial Service Commissions play a vital role in ensuring the retention of independence by the Judiciary, it should be noted that it is not immune to external or executive pressures. The composition of the Judicial Service Commission also has an impact on the appointment of independent Judges. Where the majority of members of the Judicial Service Commission are people appointed directly or indirectly by the President, there is a challenge of the potentiality of such members being influenced by the

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<sup>7</sup> Article 15 of *The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, 1995.

Executive. The learned authors Manyatera G and Fombad CM in the article titled "*An Assessment of the Judicial Service Commission in Zimbabwe's New Constitution*"<sup>8</sup> remarked as follows in this regard:

"... the composition of the Commission including the selection of its members is a critical determinant of its independence from political players. A commission dominated by political appointees is less likely to make independent judgments on the merits or otherwise of prospective judicial candidates than one with few political appointees. Commissions staffed by political appointees tend to dance according to the whims of the Executive. Generally, the composition of selection commissions includes executive, legislative, legal

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<sup>8</sup> See note 6 above at p 97.

profession and other stakeholder representation.”

(emphasis added)

Another factor that interferes with the independence of the Judiciary is the fact that the courts in most States do not have an independent budget and largely rely on the allocations from the Treasury or State coffers. An independent Judiciary is one that receives enough funding to run the courts in order to protect the rights of citizens. It is only a Judiciary that is truly independent which decides matters impartially without fear, favour or prejudice; and is impervious and immune to extraneous influences. It is only a truly independent Judiciary which can withstand the pressure exerted by the demands of the principle of the rule of law.



Where the Judiciary does not have an independent source of income its independence is dependent on the other organs of State from which it obtains its money. JUSTICE KING in the article "*Current Challenges to the Federal Judiciary*" *supra* at page 662 captured the problem well. She remarked:

"The Constitution mandates that the powers of the federal government be separated among three independent branches: executive, legislative and judicial. But the Judiciary is financed, like all other parts of the federal government, through appropriations bills passed by Congress and signed by the President. You have heard that the Judiciary does not have the power of the purse. Indeed, it does not; it is dependent for its financial livelihood on Congress and the President. So our independence must always be

understood as qualified by our dependence on the other branches for our money.” (emphasis added)

The Judiciary should not have to rely on the Executive or Legislature for its livelihood. There is therefore a critical need to ensure financial independence, without which there can be no absolute judicial independence.

## **COSTS OF THE JUDICIARY AS A STATE INVESTMENT IN SUSTAINABLE DEVELOPMENT**

We do not inherit the earth from our ancestors;  
we borrow it from our children.

*- Native American Proverb*

Sustainable development refers to maintaining a delicate balance between the human need to improve lifestyles and preserving natural resources and ecosystems, on which future generations depend. In short, it is development which meets the present needs without compromising the ability of

future generations to meet their needs. It aims at striking a balance between human needs and environmental protection.

Sustainable development is the well-being of mankind. It integrates three activities; that is, a) economic growth, b) social development, and c) environmental protection.

The World Commission on Environment and Development ("WCED") in its Report prominently known as the "Brundtland Report", popularly known as "Our Common Future", defines sustainable development as signifying:

*"... development that meets the needs of the present without compromising the ability of the future generations to meet their own needs."*

This is widely accepted as an apt definition of Sustainable Development by the majority of the States. From 5 June to 16 June 1972, under the auspices of the United Nations,

representatives of 113 nations gathered and conferred at Stockholm, Sweden. They considered the obligations for shared perspective and for common principles to induce and enlighten the inhabitants of the world in the safeguarding and enrichment of the human environment. The Stockholm Conference is marked as a stepping stone to Sustainable Development in the International Concerns. Principle 1 of the Report of the United Nations Conference on the Human Environment, Stockholm states that:

"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations."

All States in the modern world are based on the rule of law and they have a constitutional obligation to promote and protect the abovementioned fundamental rights. The Judiciary, as an organ of State, plays a central role in the realisation of sustainable development and hence funds must be provided to it to enable it to properly discharge its functions. The role of the Judiciary in promoting sustainable development was aptly stated by Gupta S in *"The Role of Judiciary in Promoting Sustainable Development: Need of Specialised Environment Court in India"* Journal of Sustainable Development Vol 4, No 2; April 2011 at page 249 as follows:

"Sustainable development is increasingly promulgated in international and national legal contexts, but there is a long way to go in terms of implementation. The role of

the judiciary is thus of the greatest importance. The judiciary, at a national level, is faced with the task of explicating the law of sustainable development, case by case. Incrementally a body of environmental jurisprudence is emerging. In performing this task, national judiciaries will be assisted by the exchange of judicial decisions, information and experience between jurisdictions. In this way, national judiciaries may benefit from each other's knowledge, experience and expertise." (emphasis added)

It is in the interests of the State and that of the people for the State to invest in the Judiciary. It would not be hyperbolic to say that efficient courts are the backbone of the modern, hyper-specialised and environmentally sensitive economies. A sound Judiciary is key to enforcing laws and

creating trust in the economy, allowing economic exchange between complete strangers by deterring fraud and increasing the incentives for fair play. One cannot have an underfunded Judiciary and expect it to play its role.

Economic growth is a fundamental element of sustainable growth as depicted in the widely accepted definitions of the concept. A well-functioning judicial system also underpins economic development. A 2017 report by the Joint Research Centre of the European Commission titled "*The Judicial System and Economic Development Across EU Member States*" at page 5 identifies correlations between improvement of court efficiency and the growth rate of the economy and between businesses' perception of judicial independence and the growth in productivity.<sup>9</sup> Whatever the

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<sup>9</sup> "*The Judicial System and Economic Development Across EU Member States*", JRC, available at: <http://publications.jrc.ec.europa.eu/repository/bitstream/JRC104594/jrc1045>

model of the national justice system or the legal tradition in which it is anchored, independence, quality and efficiency are the essential parameters of an effective justice system and need to be ensured.

It is from this background that it is evident that costs of the Judiciary should be seen as an investment in the quest to attain sustainable development. Despite the central role played by the Judiciary in the implementation of the law and the promotion of sustainable development, it should be noted that the priorities of the Judiciary are perceived as being lower than those of the other arms of Government. In turn the Judiciary does not receive as much funding as it should, which poses a pronounced threat to its efficiency and independence. If the State does not invest in the Judiciary,



the lack of funding creates fertile ground for outside sources to step in, with the resultant effect being the negation of the Judiciary's independence. The Judiciary needs to be dependent upon its own resources. In Zimbabwe, we have sought to resolve the problem by ensuring that part of the money charged for court services is retained by the Judiciary.

### **MODELS OF COURT INTERACTION WITH OTHER ARMS OF GOVERNMENT TO SECURE JUDICIAL ADMINISTRATION RESOURCE REQUIREMENTS: EFFECTIVE PRESENTATION OF THE JUDICIARY'S FINANCIAL AND BUDGET REQUIREMENTS**

In many jurisdictions, the determination of annual budgets for the justice sector is a frustrating and contentious process. The requirements of the executive branch of Government, especially for fiscal restraint and accountability in financial management, are often perceived as infringing on

the principles of the judicial branch - fairness and independence in the administration of justice. The problem is not simply insufficient funds, but a mutual perception that neither branch properly understands, or respects, the other's mandate and goals.<sup>10</sup>

Generally, the principle of separation of powers requires that each branch of Government performs its functions independently of the others. The relationship between the Legislature, the Executive and the Judiciary was summarised by LORD MUSTILL in *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 in the following terms:

"It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive

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<sup>10</sup> Webber D "Good Budgeting, Better Justice: Modern Budgeting Practices for the Judicial Sector", Law & Development Working Paper Series No. 3

and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks fit. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed."

Constructive relationships between the three arms of government, that is the Executive, the Legislature and the Judiciary, are essential to the effective maintenance of the Constitution and the rule of law.<sup>11</sup> The interaction of these arms of Government is a fundamental aspect of any Constitution founded on democracy and the rule of law. Unless there is an independent Judiciary, able to interpret

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<sup>11</sup> House of Lords Select Committee on the Constitution (2007): *Relations between the Executive, the Judiciary and Parliament*, 6<sup>th</sup> report of session 2006-7, Authority of the House of Lords, London: The Stationery Office Limited

and apply laws in a manner based on legal rules and principles rather than on political intentions or calculations, the concept of law itself is brought into question.<sup>12</sup> In recent years, the character of these relationships has changed significantly, both because of changes in governance and because of wider societal change.

The prime constitutional principle of central importance in governing the relationships between the Judiciary, the Executive and the Legislature is that of the independence of the Judiciary. This does not and should not mean that the Judiciary has to be isolated from the other branches of the State. Nor does it mean that the Judiciary - individually and collectively - needs to be insulated from scrutiny, general

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<sup>12</sup> Bradley A, "The New Constitutional Relationship Between the Judiciary, Government and Parliament" at para 2

accountability for its role or properly made public criticisms of conduct inside or outside the courtroom.<sup>13</sup>

One of the Judiciary's most serious ongoing concerns relates to the funding and administrative support of the courts. Therefore, the need for a properly funded court system cannot be overemphasised. It needs no telling that the resource requirements of the Judiciary may only be met through a budget mechanism.

LORD JUSTICE THOMAS set out the reassurances sought by the Judiciary in relation to the funding of the courts as follows:

“There must be a fixed mechanism to set the budget and operating plan with provision for capital expenditure; and, in the event of a dispute between the judicial and executive branches of government as to the resources

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<sup>13</sup> See note 12 above.

necessary, the arbiter must be the legislature which of course ultimately votes the budget in accordance with their view as to priorities of overall expenditure. It is also necessary to ensure that if adjustments are proposed to the budget during the year (for example by taking money from the agreed budget to remedy shortfalls elsewhere in the Ministry), there is a similar open and transparent mechanism which must be followed before a change is made."<sup>14</sup>

Whilst greater judicial involvement in setting the courts' budget might seem desirable, attention must be drawn to a caveat set out by Professor Terence Daintith. He warned that he would expect "judges always to be saying that they wanted more money for the Courts Service than the

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<sup>14</sup> *Ibid* at p 29 para 75

department or the Treasury were prepared *ab initio* to give", resulting in "a situation where there was at least an odour of disagreement floating around". He felt that there could be "a quite difficult constitutional situation, year by year, in relation to the fixing of this budget" and suggested that if the Judges "can stay out of it somehow ... that would be perhaps the best way through, but my understanding is that they do not really want to stay out of it."<sup>15</sup> The above sentiments accurately capture the dilemma or controversy that pertains to the funding of the Judiciary's functions or activities.

In Zimbabwe, the Judicial Service Commission is a constitutional body specially constituted in terms of Part 3 of the Constitution. It has a mandate to, *inter alia*, conduct

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<sup>15</sup> See note 12 above at p 30 para 82

the affairs of the Judiciary and ensure the proper administration of justice. In pursuing this particular endeavour, various objectives have to be met, for instance the procurement of court equipment, stationery and the overall modernisation of the technology in the court system.

In a speech which I delivered during the occasion of the official opening of the 2019 Zimbabwe legal year, under the theme "Consolidating the Rule of Law", I indicated that the Judicial Service Commission was aiming at implementing an Integrated Electronic Case Management System, initially in the Commercial Division of the High Court to make it a modern and paperless system. It cannot be gainsaid that the administration of justice must keep pace with technological advancements and its attainment in this modern age very much depends on them. I also indicated that budgetary



bottlenecks were a possible hurdle in the implementation of the case management system in all the courts in Zimbabwe.

The Judicial Service Commission's budget is approved and allocated by the Treasury. It is within these financial boundaries that the Judicial Service Commission must undertake its activities. The day to day activities of the court system depend on this budget and it would not be exaggerating to mention that the very administration of justice itself is dependent on this budget.

How, and how much, justice systems and courts gain from the State budget, and in which way they are accountable for what they spend, is of paramount importance for judicial independence and the well-functioning of courts.<sup>16</sup> Judicial independence is a central pillar of any constitutional system.

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<sup>16</sup> Viapiana F (2018) *Pressure on Judges: How the Budgeting System Can Impact on Judge's Autonomy* Italian Research Institute on Judicial Systems - National Research Council of Italy (IRSIG-CNR), 40126 Bologna, Italy at p 1

It is fundamental in any democracy that individual Judges and the Judiciary as a whole are independent of all external pressures and improper influence from the other branches of government, including funding bodies. The minimum conditions for judicial independence include financial security.<sup>17</sup>

An adequate budget, based upon objective and transparent criteria, makes the Judiciary less vulnerable to undue influence. It can ensure the integrity and competence of the Judges through proper allocation of resources towards judicial salaries and costs of training.<sup>18</sup> This notwithstanding, it is common cause that State resources are limited and the

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<sup>17</sup> European Network of Council for the Judiciary (ENCJ). 2016. *Funding the Judiciary*. Available online at [https://www.encj.eu/images/stories/pdf/workinggroups/encj\\_2015\\_2016\\_report\\_funding\\_judiciary\\_adopted\\_ga.pdf](https://www.encj.eu/images/stories/pdf/workinggroups/encj_2015_2016_report_funding_judiciary_adopted_ga.pdf) (last accessed 3/9/2019)

<sup>18</sup> *Ibid*

prioritisation of their allocation creates competition among the different public departments.

The separation of powers principle implies that the three powers of the State must be separated and independent from each other. Each power must check and limit the other two powers and all three powers should have the same weight (the check and balance principle). In this model, Judges should be independent of external and internal pressures. Nevertheless, the budget can be a source of pressure and can influence judicial independence. First, despite the separation of powers principle, judicial funding is in the hands of the other two powers, which have some extra leverage and can potentially reduce the judicial budget if some disagreements between the branches arise. Secondly, if Judges' salaries are not adequate, they can be vulnerable to

undue influences. A proper amount of budget allocated to judicial training can also improve the integrity and the competence of the Judges.

If, on the one hand, the dependence from Executive driven funding mechanisms can affect judicial independence, an excessive financial independence could be used by some Judges to shield themselves against legitimate reform efforts and reasonable expectation regarding performance.<sup>19</sup>

The most probable solution regarding this problem is that a funding mechanism based upon transparent criteria is necessary to maintain the independence of the Judiciary, as long as the Judiciary is closely involved in setting these criteria. In this sense, there are checks and balances to ensure that the Judiciary gets adequate funding whilst at the

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<sup>19</sup> The World Bank (2011) "*Improving the Performance of Justice Institutions*" Washington, DC: The World Bank

same time maintaining high performance standards. One of the recommendations by the European Network of Councils for the Judiciary (ENCJ) in its ENCJ Report - *Funding of the Judiciary 2015-2016* - adopted by the General Assembly on 3 June 2016 was that:

"Budgets will always be subject to Parliamentary scrutiny as they involve the expenditure of public resources. However, the creation of the budget should be systemically and practically free from inappropriate political interference. Courts should not be financed on the basis of discretionary decisions of official bodies but on the basis of objective and transparent criteria."

Ideally, the Judicial Service Commission should have control of its own finances and activities independently of both the Legislative and Executive branches of Government. It must

also have adequate financial and administrative resources properly to carry out its functions and also the power and capacity to negotiate and organise its own budget effectively.

### **THE PRESIDENT OF THE COURT: EFFECTIVE EXECUTION OF HIS OR HER POWERS. DUALISM OF JUDICIAL INDEPENDENCE AND EFFECTIVENESS**

The Chief Justice is the highest judicial officer in the land and he is the presiding Judge in the Constitutional Court and the Supreme Court of Zimbabwe. In addition to this judicial role, the Chief Justice represents the Judiciary nationally and internationally, which entails various coordinating and administrative responsibilities. He or she is also required to perform a multiplicity of constitutional and statutory duties and functions.

While the independence of the Judiciary is key in a constitutional democracy, it must be remembered that complete separation of the three arms of the Government is impossible and thus the Judiciary and its constituents, just like any other public entities, must be beholden to the principles of accountability and effectiveness that govern the other arms of Government. Judicial independence is for the protection and benefit of the public. It is to ensure that the Judiciary, with the Chief Justice at its apex, is able to carry out its role as the guardian of the Constitution without fear or favour, and to inspire the confidence of the public that it is able to and will do so.

As the head of the Judiciary and the presiding Judge in the Constitutional Court, one of the main duties that befalls the Chief Justice, aside from presiding over ordinary open court

hearings, is the hearing of chamber applications for various relief. Litigants usually approach the Constitutional Court in Chambers seeking leave to appeal against a decision of a subordinate court, leave for direct access to approach the Constitutional Court directly, and any other appropriate applications in terms of the Rules of the Constitutional Court.

Of late there has been an influx of cases that have been filed in the Constitutional Court, especially by self-actors, who erroneously believe that every dispute must be resolved by constitutional means. While every person has a constitutional right to access to justice, there is an overriding need for the Constitutional Court to regulate its process and protect it from abuse. By constitutional definition, the Constitutional Court is a specialist court imbued only with the narrow jurisdiction to determine constitutional matters to the



exclusion of all other matters. It is on this basis that the Chief Justice, sitting in Chambers, must balance the right of access to justice against the abuse of court process by litigants.

Capacity building in the Judiciary, which is in line with the best practices in comparable democracies, is also one of the objectives overseen by the Chief Justice. One of the ways to achieve this objective is the adoption of the Electronic Case Management System, as earlier mentioned. The effective management of cases is central to excellent court performance. Electronic filing and electronic record keeping will facilitate the efficient management of cases and their speedy finalisation and ensure that the disappearance of records of proceedings, which often results in grave injustice to the affected parties and sometimes even the general

public, becomes something of the past.<sup>20</sup> The efficacy of this system must be assessed in order to address performance challenges and, more importantly, to enhance efficiency because there is always room for improvement.

As the head Judge in both the Supreme Court and the Constitutional Court, it is the role of the Chief Justice to identify the training needs of the Judges of the superior courts. High quality training must be available throughout a Judge's professional career. Proper training promotes high quality and prompt judicial decisions, which themselves strengthen predictability and legal certainty. The funding of these training programmes ought to be provided by the State.

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<sup>20</sup> See lecture by Mogoeng CJ titled "*The Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa*" delivered at the 2013 Annual Human Rights Lecture of the Stellenbosch Law Faculty, University of Stellenbosch available at <https://www.politicsweb.co.za/documents/the-office-of-the-chief-justice-and-its-implicatio> (accessed 31/8/19)

While the Judiciary in Zimbabwe is one of the few to be envied in Africa, it is not without its critics. As I mentioned during the official opening of the 2019 Zimbabwe legal year, Judges are not immune to criticism. Their decisions must be scrutinised, commented on and even criticised. Our system encourages that the scrutiny, comments or criticism must remain professional, impersonal and constructive. If that is observed, it develops the jurisprudence of the country because the criticism ceases to be mere criticism and becomes a contestation of ideas between and amongst intellectuals.

Constructive criticism implies knowledge and understanding of the law prescribing the standard against which the legality of the conduct in dispute is to be measured. It involves setting out the requirements of the law and pointing out the

errors committed by the court in its findings of the facts in issue or in its interpretation or application of the law to the facts of the conduct.

In early 2019 the Judiciary, particularly the Magistrates Court, drew criticism from the public after allegations were made that there were extra-curial influences on their decisions. In a statement by the Judicial Service Commission responding to these allegations, it was made clear that there was no doubt that the conduct impugned by the allegations constituted an affront to the absolute right to a fair trial because judicial officers are constitutionally mandated to preside over a fair trial and they do so by maintaining their independence and impartiality. However, it was made clear to the public that any grievances against a judicial decision had to be addressed in terms of the law. Once a decision has been

made, only a court of competent jurisdiction can interfere with it and this is done in terms of appeal or review procedures as laid down by law.

Another problem bedeviling the Judiciary in Zimbabwe is that of corruption. Corruption has been very insidious in the judiciary systems of African countries, invariably culminating in the compromise of various legal and institutional mechanisms designed to curb it. The Chief Justice of Ghana, MR JUSTICE KINGSLEY ACQUAH, acknowledged the problem of judicial corruption and since his appointment in June 2003 concentrated on reforming the judicial system.<sup>21</sup> Speaking at the Fourth Chief Justices' Forum in Accra in November 2005, he accepted that corruption is a national problem and

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<sup>21</sup> Transparency International "Global Corruption Report 2007" Cambridge University Press at p 208

urged that criticism of Judges should be seen as a means of correcting their mistakes and keeping corruption in check.<sup>22</sup>

In order to curb corruption, there is need to conscientise the Judiciary about the effect of corruption and this can be done through instilling in the Judges strong moral convictions. The importance of performance-enhancing judicial education programmes and a self-governance system commensurate with judicial independence cannot be overemphasised. As the adage goes, justice must not only be done but must also be seen to be done.

It is important to the survival of constitutional democracy that the Judiciary should function as a well-oiled machine that is responsive and accountable to the needs of the people.

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<sup>22</sup> Chief Justice Kingsley Acquah, *4th Chief Justices' Forum (CJF) in Accra*, 22 November 2005, quoted in *Ghana Review (Ghana)*, 23 November 2005. Available at <https://ghanareview.com/review/index.php?classall&date2005-11-23&id12472>

As such, where a judgment is reserved by the court, the law requires that it be delivered within 90 days and where exceptional circumstances exist within no more than 180 days.

Justice delayed is justice denied. As Francis Bacon, the Lord Chancellor of England, remarked in 1617, fresh justice is the sweetest.<sup>23</sup> The delay in delivering reserved judgments harms litigants in several ways: the delays cause psychological and economic harm to the litigants and negatively impacts their ability to effectively pursue the remedy of an appeal against that decision. Delayed reserved judgments also harm the citizenry as a whole, as they undermine the efficient functioning of the legal system and

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<sup>23</sup> See <http://www.duhaime.org/LegalResources/CivilLitigation/LawArticle-1270/Delay-in-Reasons-for-Judgment-Justice-Delayed-is-Justice-Denied.aspx> (last accessed 3/9/2019)

pose significant threats to the country's social, economic and legal stability.<sup>24</sup>

High workload, corruption and postponements are some of the causes of delayed judgments. It is therefore fundamental that justice be swiftly delivered. The use of the internet for research purposes and the publication of judgments on official websites are examples of the use of Information Technology in judgment writing.

It is the function of the Chief Justice to ensure a well-functioning civil and criminal justice system which protects the rights of all citizens against infringement by others. A delicate balance ought to be struck between the independence of the Judiciary and its effective functioning.

While the Judiciary is dependent on the Executive for

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<sup>24</sup> Crichton S, "Justice Delayed is Justice Denied: Jamaica's Duty to Deliver Timely Reserved Judgments and Written Reasons for Judgment" 44 Syracuse J International Law and Commerce 1(2016) at p 5



funding, its functions ought not to be beholden to these budgetary restraints and judicial officers must act outside such intricacies. As earlier mentioned, judicial independence also includes financial independence. An independent Judiciary is an effective Judiciary and it is the role of the Chief Justice to ensure both the independence and effectiveness of the justice delivery system.

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