



Republic of Zambia

JUDICIARY

**THE ACCOUNTABILITY OF THE JUDICIARY –
ACCOUNTABLE TO WHOM?
IS THERE SUCH A MECHANISM?**

A PAPER PRESENTED

BY

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INTRODUCTION

I feel greatly honoured to have been invited to present a paper on this very important subject. I consider that justice will not be done to this topic without again, briefly alluding to the concept of the independence of the judiciary. I posit that accountability of the judiciary and independence of the judiciary are closely interlinked. Indeed, it is said that accountability is the reverse side of the coin of judicial independence.

THE CONCEPT OF JUDICIAL INDEPENDENCE

Judicial independence is a concept, which has been entrenched in most constitutions of the SADC Member States and in written Constitutions of many other countries. However, while we affirm our faith and belief in Judicial independence, we have to appreciate that the independence is not an end in itself. It exists to protect the public. **Chief Justice Fraser of Alberta, Canada**, once said: *"We have Judicial independence for a reason - to protect the constitutional rights of our citizens."* Indeed, independence of the judiciary has been well-recognized and widely documented in international instruments, statutes and court decisions. Similarly, various meanings and definitions of this concept have been espoused.¹

The Constitution of Zambia makes specific provision for the Judicature, the independence, the impartiality and the autonomy of the Judiciary.²

The concept of judicial independence has also been enunciated in many court decisions. For example, in an English case of *Sirros V Moore and Others*³, *Lord Denning* said:

"Ever since 1613, if not before, it had been accepted in our law that no action is maintainable against a Judge for anything said or done by him in the exercise of the jurisdiction which belongs to him. The words which he speaks are protected by absolute privilege. The orders which he gives and the sentences which he imposes, cannot be made subject of civil proceedings against him. No matter that the Judge was under some gross error or ignorance or was activated by envy, hatred and malice and all uncharitableness, he is not liable to an action... of course, if the Judge accepted bribes or been in the elastic degree corrupt, or has perverted the course of justice, he can be punishable in the criminal courts. That apart, however, a Judge is not liable to an action for damages. The reason is not because the Judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear."

We do not, on the other hand, have such specific provisions in the constitution or in the law on Judicial Accountability or whether the Judiciary must be accountable and if so to whom the accountability should be. My short research on the subject of Judicial Accountability revealed that the absence of specific provisions on Judicial Accountability is a common phenomenon in most constitutions.

DEFINING THE CONCEPT OF ACCOUNTABILITY

It should be noted, from the outset that there can be no such thing as absolute independence of the judiciary. In practice, I cannot think of any judicature that claims independence in absolute terms. Judges are constrained by, and follow existing laws, procedures and practices. They do not act as they please; otherwise one good, namely, justice would be sacrificed on the altar of another, namely, independence. Judges are therefore not free to act perversely or for ulterior motives. Inevitably, they find themselves under controls of either a judicial or an administrative nature. For instance, the Constitution of Zambia states that ***'the Judges .. shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a Code of Conduct..'*** The Constitution also states that 'the judicature shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament.'⁴ Quite clearly, these restrictions establish the hypothesis that there cannot be an independent judiciary in absolute terms in any country. In my view, it is in this context that the accountability of the judiciary should be understood.

Accountability of the judiciary may be to the law, to the Executive, the Legislature, or to the public at large. Judicial criticisms by the Executive, Legislature, the public and the press are a recognition that the independence of judicial officers is not absolute but is subject to certain limitations. It is for this reason that throughout history, Judges have been criticized and attacked, sometimes savagely and severely, by Members of Parliament, government officials, the press and the public for decisions they have made in particular cases. It is submitted that the justification for such criticism seems to be anchored in the fact that as

long as courts continue to serve as the stage for contentious battles over emotionally charged issues of politics, asylum, immigration, corruption, crime and high profile cases, Judges must expect to be criticized and attacked for decisions they make.

In the modern environment, the concept of accountability, permeates public life. In a democracy, based on the rule of law, it is now the expectation of every citizen that all aspects of government ought to be highly accountable. It is probably also a fair conjecture that the same citizen would characterize the judicial branch of Government as being in need of greater accountability. Yet, the reality seems to be that the judicial branch of government has historically and in actuality been probably one of the most accountable areas of government.

The concept of judicial accountability can broadly be said to refer to the notion that Judges or those who sit in Judgment over others need to account for their judicious and injudicious conduct. The emerging right to democratic governance has come with a call for accountability of all public institutions. The legislature is composed of members who represent an electorate. They are accountable to this electorate. The executive branch also has, at the end of the day, to account to those who put them in office.

In most jurisdictions, Judges are appointed through a system over which the public has no control to enjoy security of tenure. They cannot be removed from office unless on the ground of proven misconduct, but again, after a laborious procedure which is not easily invoked. In their day to day functions, Judges wield tremendous power. They review both legislature and executive branch decisions. It is again, a concept of democratic governance to guarantee judicial independence, which broadly

requires that the judiciary must, in the performance of its function, be free from any interference, be it political or otherwise. This principle of non interference permeates to all men and women who sit on the bench.

It would appear from the foregoing that the judiciary is a sacrosanct and inviolable sanctuary of its occupants. Drunk with so much power and independence, there is an attraction to develop the 'arrogance of office,' which is a feeling of being untouchable. The issue as to whether Judges should be accountable, and if so to whom, thus becomes very critical. It goes without saying that Judges being human do make mistakes, some of which could be unintentional but with devastating effects on individuals.

Judicial accountability, therefore, even in the absence of specific provisions in a constitution, is now accepted as the reverse side of Judicial independence and not an interference or a limitation. As long as Judges are charged with the responsibility of protecting the human rights and freedoms of the citizenry, they are stewards who should therefore account to the public for their judicial performance. This, therefore, means that the public should be allowed the freedom to make adverse comment on judicial performance which they perceive as errant from the norm.

The founding fathers and the framers of most constitutions seem to have taken special precautions to isolate the Judiciary from the executive and the legislative influence. They did not wish Judges to be subject to the executive dominance. They must also have been afraid that there might be times when the executive and the legislature might respond to political and social convulsions and act hastily and oppressively. But as repositories of public power, all the three branches of government hold that power in trust for the people and for the accomplishment of their

assigned tasks. Thus, the judges must account to some authority outside themselves on how they use that power.

BUT ACCOUNTABLE TO WHOM?

In a democracy, the Legislature is accountable to the people through regular and periodic elections. The executive is accountable to the legislature and ultimately to the electorate. And, in both cases, the courts in the exercise of their powers of constitutional and judicial review may invalidate laws passed by the legislature and over turn decisions made by the executive which are not in accord with the constitution or with the law.

On the other hand, Judges are neither subject to periodic elections nor subject to censure. They serve till they reach retiring age or their contractual term. They may be removed only for a cause. No other authority hovers over their shoulders to see whether they are performing their functions properly. Consequently, this has led to a perception that Judges, particularly those who serve in the superior courts, are irresponsible and undemocratic, especially when they invalidate laws passed by representative legislatures or overturn decisions of popularly elected governments.

Judges, as public servants, are accountable to the people as to how they exercise their powers, albeit not in the same way as other branches of government. However, the concept of accountability is said to be a facet of the concept of democracy. This means that any individual, authority or institution that exercises the power of governance of any kind, exercises it for and on behalf of the governed and, therefore, should be accountable to them for its exercise. In a democratic polity, it is inconceivable, theoretically speaking, that any person, be he an individual or an

authority, exercises power without being answerable for the exercise. It is this yardstick, which is sought to be applied to the judiciary as well. The question, therefore, is not: "Accountable To Whom? But how far does the Judiciary measure up to this standard of accountability"?

Thomas Jefferson once said: "*Man is not to be trusted for life, if secured against all liability to account*" The question that should not be overlooked when we deliberate on judicial accountability is this: **who Judges the Judges?**

Writing in the 2nd century A.D poet **Juvenal** coined the phrase: "**Quis custodiet ipsos custodes**" ("who will guard the guards?")

Although the poet did not have the Judges in mind when he raised this issue, the expression has come to signify concerns about the functioning of the judiciary and hence the question: "**who Judges the Judges?**"

We live in an era of greater public demands for judicial accountability. The call for Judicial Accountability has gained momentum in many parts of the world. The Judiciary is therefore no longer considered a sacrosanct and inviolable sanctuary of its occupants.

MANIFESTATION OF JUDICIAL ACCOUNTABILITY

Judicial accountability is manifested in several ways. In most countries, the business of all courts is, except in extraordinary circumstances, conducted in public⁵. In terms of practice and procedure, Judges resolve disputes under the obligation to publish full reasons for their decisions⁶. Thus, the public hearing and the reasoning underlining judicial decisions are forms of accountability. Another form of judicial accountability is

that each decision, other than those of the ultimate court of appeal is subject to being appealed. The criticisms of the appeal courts may be published without limitation. Academic lawyers are free to criticize judicial reasoning. The Media attend hearings.

Despite these structural guarantees of exposure of the business of the courts to the scrutiny of legal examination and the glare of public scrutiny, it is still considered that the Judicial branch needs to become more accountable. Thus, it is contended that the absence of "a constitutional referee" to review their wrongs, imposes on Judges an awesome responsibility to exercise self-accountability⁷. One commentator once said, *"If you have Judges with high character, knowledge, and commitment to the rule of law, that in itself is a measure of accountability."*⁸

THE NEED FOR ACCOUNTABILITY

The need for Judicial accountability without eroding judicial independence has now been recognized in most democracies. It is found in both international instruments and national statutes. At the international level, I find the **2002 Bangalore Principles of Judicial Conduct** instructive. The first principle is that 'impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.' The second principle is that 'integrity is essential to the discharge of the judicial office.' The fourth principle is that 'ensuring equality of treatment to all before the courts is essential to the due performance of judicial office.' And the fifth principle is that 'competence and diligence are prerequisites to the due performance of judicial office'.

Many reasons have been given for the growing need for courts' greater accountability and responsiveness to the public. Some of the reasons are the sheer growth in the size and complexity of the Judiciary in the modern welfare and citizens are asserting their rights by taking more and more cases to court. More citizens are insisting on Judges being more accountable for their actions and statements. Most Judges are appointed, so the public has no direct control over them. Some Judges, particularly in the lower court are of poorer quality and no prior training; and most Judges have continuous tenure during "good behaviours", which sometimes leads to what is called "the arrogance of office." The procedure for removal of Judges is too difficult, and cases of their removal are rare in both the Commonwealth countries and the United States; and often there are no provisions for disciplining Judges, while, there is no way to remedy cases of minor misbehaviour, and there are no provisions for remedying unintentional mistakes made by Judges or officials of the Courts.⁹

ENSURING ACCOUNTABILITY

(i) Judicial Code of Conduct

Most jurisdictions have adopted codes of conduct, which establish standards for the ethical conduct of Judges. This is in a bid to regulate the conduct of Judges; provide a mechanism and a forum for those who may have complaints against Judges; and to some extent curb the independence of those who may be tempted to go overboard. The rationale for such codes was best described by **Laurance M. Hyde, Jr.** when he said:

'This vital independence must be balanced by concepts and duties which will assure our citizens that Judges will

impartially interpret and apply the law of the land. Judges must be, and just as important must appear to be, above reproach. Much of this will always be up to the consciences of those individuals who are called to the bench, and no code of ethics can substitute for the personal qualities which are the makings of good judges. However, just as there must be laws, not merely the sense of justice of good and wise people serving as Judges, so there must be not only Judges of good conscience, but rules of ethical judicial conduct which are mandatory, and sanctions for the violation of those rules.¹⁰

Mr. Hyde quotes an interesting utterance by John Marshall at the Virginia Constitutional Conference in 1829-30, when he said:

'I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt or a dependant judiciary.'

Judicial Codes of conduct have, in certain circles, been resisted because of the fear that they impair judicial independence. Indeed, in our own jurisdiction in Zambia, it had to take the framers of the Constitution to insert a clause in the Constitution providing for a code of conduct that the Judiciary took it upon itself to suggest the contents of the code. This was after years of resistance.

(ii) The Latimer House Guidelines

The Latimer House Guidelines provide that:

"A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring accountability of Judges."

They also state that legitimate public criticism of judicial performance is a means of ensuring accountability. And that the Criminal Law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.

Codes of Conduct and constitutions contain various do's and don'ts relating to judicial officers. The purpose is to regulate conduct and performance of judicial officers. In other words, these constitute sufficient mechanisms for making the judiciary accountable, notwithstanding its independence.

(iii) Other Means

Even without a code of conduct, other mechanisms may be put in place to spell out the means and grounds on which those Judges wanting would be answerable for their actions. This could be in the law itself. In these days, when many people are enlightened, calls for judicial accountability are not only emanating from the public at large, but even from the members of the bench themselves. There is a growing realization that like all other arms of government, the Judiciary must serve the public diligently and honorably. It owes a duty to the public to provide a reliable and effective dispute resolution mechanism which is not only substantively fair but appears to be fair. This is more so that the constitutional guarantee of independence does not only enhance the proper and fearless discharge of the judicial function, but can also be a shield for a bad and / or corrupt Judge.

IS JUDICIAL ACCOUNTABILITY ACHIEVABLE?

I believe it is. First, we need to put our house in order administratively by accounting for the resources entrusted to us to run the judicial system. This is the easy part. Secondly, the judiciary should look at the quality of its product. Is it timely? In this vein, we need to address the delays in the administration of justice. Case flow management; delays in delivery of judgments; and accessibility of courts to the public need to be looked into. Thirdly and most importantly, what is the caliber of the adjudicators? Are they perceived to be corrupt? Do they suffer from 'arrogance of office'? Is there a body or institution to which an aggrieved party can complain? Is proven misconduct punishable? It cannot be denied that there may be a time when the judicial function falters in integrity and even in fairness, thus undermining the confidence of the people. It is in this third category that most of the discussion on judicial accountability must be directed.

CONCLUSION

I am of the view that in order to minimize complaints against adjudicators, selection of those to be appointed to the bench is critical. Appointing people with known undesirable traits leads to a breed of Judges who tend to be drunk with judicial power and soon develop 'arrogance of office' syndrome. The integrity of the Judiciary will be a pipe dream if the men and women who sit on the bench themselves lack integrity. The Judiciary can also play its part by having in place, programmes of continuing education tailored to instill a sense of accountability in its officers. Topics to build up on the core values of the institution must be frequently put on the agenda. The Judiciary should not be too sensitive to criticism. When one of our own falters, we should not unnecessarily shield them. As a public institution, we are accountable to the public.

References

1. See the 1985 UN Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of offenders held at Milan from 26 August to 6 September, 1985 and endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December, 1985. See also The 2002 Bangalore Principles of Judicial Conduct.
2. Article 91(1) (2) and (3) of the Constitution of Zambia reads:
 - (1) ***The Judicature of the Republic shall consist of:***
 - (a) ***the Supreme Court of Zambia;***
 - (b) ***the High Court for Zambia;***
 - (c) ***the Industrial Relations Court;***
 - (d) ***the Subordinate Courts;***
 - (e) ***the Local Courts; and***
 - (f) ***such lower Courts as may be prescribed by an act of Parliament.***
 - (2) ***The Judges, members, magistrates and justices, as the case may be, of the courts mentioned in clause (1) shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament.***
 - (3) ***The Judicature shall be autonomous and shall be administered in accordance with the provisions of an act of Parliament.***
3. (1975) QB 118.
4. Article 91(3)
5. Scott V Scott (1913) AC 417: Also cited by the Hon. Mr. Justice R.D. Nicholson, a Judge of the Supreme Court of Australia in a Paper Judicial Independence and Accountability: Can they co-exist?
6. Public Service Board of New South Wales V. Osmond (1986) 159CLR
7. See P.N. Bhagwati, "Judicial Independence V Judicial Accountability: A debate," 7CIJL Yearbook 85 1999, as cited by

Professor D.D.N. Nsereko (University of Botswana) in a Paper presented at the SADC Chief Justices Conference on Human Rights from 5-7 July, 2004, Kasane.

8. Jerome J. Shestack, "A Comment," 7CJIL Yearbook 91 (1999) – ibid.
9. Justice Sir Moti Fikaram, "Judicial Independence Vis-avis Judicial Accountability." A Paper presented at the World Jurist Association Delhi Seminar on the Judiciary in Asia, 14-17 February, 1999.
10. In his introduction to the book, "Modern Judicial Ethics" by Dilweg, Fretz, Muphy, Rodgers and Wicher. 1992
11. Latimer House Guidelines for the Commonwealth, 19th June, 1998.