

Judicial administrative autonomy and accountability essential to its independence

By Werner Horn MP - DA Shadow Deputy Minister of Justice and Constitutional Development

Justice Rezine Mzikamanda, Judge President of the High Court of Malawi in 2007 in an article entitled *“The place of the independence of the judiciary and the rule of law in democratic sub-Saharan Africa”* identified certain essential elements of judicial independence.

Of these the following elements are present in South Africa in a more or less uncontroversial manner.

The constitutional guarantee of judicial independence; a transparent and fair nomination process sufficiently insulated from political interference aimed at ensuring impartiality and integrity; security of tenure and remuneration; impunity from prosecution for judgements.

However, two of these elements have not been resolved yet.

Firstly, administrative and budget autonomy. This is an important aspect of independence of the Judiciary. Neither the doctrine of separation of powers nor any system of checks and balances allow for one branch of government to control the other.

The establishment of the Office of the Chief Justice as a separate government department was, at the time, seen as a step in the direction of ensuring administrative and budget autonomy for the Judiciary.

During the Fifth Parliament, however, this issue was not, as it should have been, settled.

For all intents and purpose, we had a stand-off between the Executive and the Judiciary on this issue.

Minister, if one thinks about how your predecessor dealt with this issue the following words come to mind: Obstruction, obfuscation, avoidance and retardation.

Every year during these debates the finalisation of this matter was put on the back burner by announcing further consultations, colloquiums, Cabinet committees and pending Cabinet decisions, none of which were ever heard of after the budget debates.

Minister, please don't be that kind of a Minister. Bring this matter to finalisation.

As in the past we re-confirm our stance that to enhance the independence of a Judiciary we are in support of a judicially lead court administrative model in which the Judiciary is not dependent on either of the Executive or the Legislature for the budgetary appropriation that is to be entrusted to it.

The other matter not resolved yet in South Africa and which Justice Mzikamanda identified as essential to judicial independence is that of judicial accountability.

A judicially lead court administration model does not mean that the Judiciary is not to account for the manner in which it administers its budget and the manner in which it self-regulates in respect of all matters other than the content of its decisions.

Chairperson, this legislature has been found wanting – and rightfully so - by our Courts in the last few years of not properly performing our duties of oversight and holding to account the Executive.

The source of our oversight duties and functions is of course to be found in the constitutional duty we have of overseeing the manner in which public money is spent, to whoever it has been entrusted to perform a public function or duty.

A system with which all branches of government are either equally happy or unhappy with, will have to be developed to ensure that the Judiciary not only account for the money it receives from the public purse, but also for the operational standards one can reasonably expect of an optimally functional Judiciary.

It must also follow that while the tenure and remuneration of individual members of the Judiciary is an inalienable right in South Africa, as with all other rights, it brings with it a responsibility.

In this case the responsibility of the Judiciary having to deal with the thorny issue of administering discipline in the case of allegations of judicial misconduct in not only a fair manner, but also in a speedy and final manner.

Judge President Mzikamanda in the article I referenced earlier states that the public confidence in the Judiciary is yet another important element of the independence of the Judiciary.

The time has come for us, as the elected representatives of the people to say that the inability to deal effectively and with finality with those disciplinary matters that have been lingering for years now is becoming a self-created threat to judicial independence.

The uncertainty around the failure to deal with the decade old complaints against Judge President Hlope and to bring to finalisation the matter against Judge Motala (after his disciplinary hearing was concluded in January 2018 already) creates the very real possibility that public confidence and trust in the judiciary could be broken down.

This is very dangerous because the authority of the Courts are not only based on the constitutional guarantee of its independence. It is based on public acceptance and respect for judicial decisions. Acceptance depends on public confidence in the judges, as well as confidence on the part of the public that the judiciary is earmarked by integrity and impartiality and that it displays moral authority.

Chair, we know that the Chief Justice is in agreement with us. Last year in November at the Judicial Accountability session convened by him, he stated and I quote:

“Lack of confidence in the judiciary has the potential to erode the moral authority of the Judiciary. We do not control the army, the police or the public purse. Our orders as the court are obeyed because of the moral authority we enjoy. If we lose public confidence we are finished.”

Therefore, the only thing that remains on this issue is for form to follow function.