Administrative independence as a guarantee of judicial independence: experiences from South Africa*

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It is widely accepted that judicial independence is a foundational principle in any democracy. It is also acknowledged that an essential component of judicial independence is individual independence – the requirement that judicial officers act independently and impartially when dealing with cases that come before them.

A separate and equally important element of judicial independence is institutional independence – the requirement that the necessary structures and guarantees exist to protect courts and judicial officers from external interference by other branches of government. So, the institutional independence of the judiciary concerns how resources are allocated to the judicial arm of government, by whom these resources are managed and who is accountable for their usage.

The principle of the institutional independence of the judiciary is underpinned by two interrelated principles. First, adequate resources should be provided for the judicial system to operate effectively without any undue constraints. And second, interaction, if any, between the Executive and the Judiciary should not compromise judicial independence.

These principles seek to insulate the judiciary from political control or interference, and require that the judiciary be both administratively and financially independent of the executive.

The Superior Court Bill, 2010, which Parliament is soon to consider, adopts a model that allocates the responsibility for 'the administration of judicial functions' to the Chief Justice, but retains the current system where the Director-General of the Department of Justice is accountable for the financial administration of the judiciary. The Bill's failure to transfer the responsibility for financial administration from the executive to the judiciary is, I submit, inconsistent with the idea that the judiciary must be institutionally independent of the executive, and will raise the justified concern that the executive remains intent on exercising control over the judiciary.

In the pre-constitutional era in South Africa, as in other Commonwealth countries, the idea of judicial independence was confined to judges making decisions impartially. The executive was, however, responsible for the administration of the judiciary. This model of judicial administration is known as the 'executive model' because the executive controls court administration and accounts to the legislature, usually through the Minister responsible for the justice portfolio.

A chief justice has no defined relationship to the minister; whether the executive seeks the advice of the chief justice is purely a matter of executive discretion. The courts have no authority to develop or administer the court administration budget independently of government. The chief justice has no fiscal and operational responsibility that allows him or her to function independently of executive directives.

The executive model is justified on the grounds of ministerial responsibility and legislative supremacy, but is widely acknowledged to have several shortcomings. Courts are viewed as a branch of the Ministry, not an independent division of government. This causes numerous practical problems. Court staff, for example, is in an invidious position of having to report along a line of authority to the Director-General and Ministry while working under the day-to-day control and direction of judicial leaders. Disputes between the executive and judiciary over the job classification, recruitment and retention of court staff therefore become a source of considerable tension between the two arms of government.

By far the most often cited problem in most jurisdictions arising from the executive model is that judicial leaders have no say in the control of the allocation of resources to the courts. So, judges find themselves in the unedifying position of having to lobby politicians and executive officials for funds for improvements and simple repairs to court buildings, for essential material for libraries or for information technology.

Because of the imperfections of the executive model, and its inconsistency with the requirement for the judiciary to be institutionally independent, efforts have been made to improve the level of judicial input into decisions concerning court administration by increasingly shifting more authority to the judiciary.

Several countries, notably Australia and Canada, have established independent agencies to administer the affairs of the judiciary at arms length from the executive. Ghana's Constitution appears to go further by guaranteeing the independence of the judiciary both in its judicial and administrative functions, including financial administration. An independent Judicial Council, comprising a majority of non-government members, ensures the efficient administration of justice.

There are currently two separate systems for court administration and budgetary control in South Africa. For the Constitutional Court, the Minister appoints staff, but does so in consultation with the Chief Justice, who is assisted by an Executive Secretary to carry out his administrative duties. The financial needs of the court are determined by the Chief Justice after consultation with the Minister of Justice, who must then include the amount agreed in the budget that is tabled in Parliament, subject to the concurrence of the Finance Minister. The Director-General of the Department of Justice is accountable for the expenditure of these funds.

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This model of administration for the Constitutional Court differs from the executive model described earlier and may be described as the 'Constitutional Court Autonomous Model' where the court has autonomy to determine its own needs and is supported by its own staff – but the model does not extend to the rest of the judiciary, including the Supreme Court of Appeal and Provincial High Courts, which are administered by the Department of Justice according to the executive model.

In 2005, through the Constitution Fourteenth Amendment Bill, the executive sought to entrench the executive model by constitutionally depriving the courts, including the Constitutional Court, of any responsibility regarding administration and budgeting. The rationale advanced for seeking to place the administration of justice under the control of the Department of Justice was the need to transform the judiciary and improve its efficiency and effectiveness. The executive also bizarrely argued that placing the administration of justice under the control of the judiciary would be a breach of the doctrine of the separation of powers. Critics of the proposal saw it for what it was – an attempt to place the judiciary under firmer government control.

So, it was not unexpected that that this proposal would generate significant opposition outside government. Indeed, it elicited a storm of protest from judges, the legal profession, civil society and bodies such as the International Bar Association. And, faced with this opposition, the executive quietly withdrew it in November 2006.

The current Bill (2010) confirms the status quo by making the Chief Justice responsible for the staffing of the judiciary. However, the senior civil servant in the office of the Chief Justice – the Executive Director – is appointed after consultation with the Minister of Justice.

The Executive Director may appoint the other personnel to this office, and also to the other superior courts, but only after consulting the Director-General of the Department of Justice. The appointment of staff to all other superior courts must be done with the concurrence of the judicial head of the court concerned. In this respect the Bill is an improvement on the status quo, which gives this responsibility to the Department.

Regarding the financing of the administration of the superior courts the Minister of Justice is required to 'address requests for funds' from the Chief Justice, who must consult other heads of court regarding their funding needs. Once the request reaches the Minister it follows the normal budgetary process. However, the Bill explicitly makes the Director-General of the Department responsible to account for the expenditure of these funds.

This is a crucial shortcoming and indicates that the executive is not yet willing to let go of a key component of the executive model – control of the judiciary's budget. Furthermore, if the Bill is adopted in this form it is likely to cause friction between the Director-General and the Executive Director and compromise the smooth administration of the judiciary. This is because the Bill makes the Director-General accountable for the expenditure of budget for the superior courts without giving him responsibility for supervision of the administration while at the same time making the Executive Director responsible for the supervision of the administration but not for the budget.

There is no reason why the Department or Ministry of Justice should have any responsibility for the judiciary's budgetary and staffing requirements. This ought to be the responsibility of the Chief Justice and the Executive Director, who should be directly accountable to Parliament for the judiciary's budget just as other constitutionally independent institutions are. It bears mentioning that a Bill providing for exactly this model of judicial administration – where the 'Principal Secretary' of the judiciary is the accounting officer of the judiciary – is currently before the Lesotho Parliament.

By increasing the judiciary's responsibility over its own administration the Bill is undoubtedly an improvement on the status quo. But, for the reasons I have mentioned, it regrettably falls short of granting full institutional independence to the judiciary.