

## JUDICIAL ACCOUNTABILITY

### PAPER DELIVERED AT CHIEF JUSTICES' CONFERENCE: KASANE, BOTSWANA, 7 AUGUST 2009.

1. I address you with a sense of humility because you are all, by definition, my seniors. I can claim only the advantage of age and of 27 years of judicial experience in the High Court and then the Supreme Court of Zimbabwe and for the last five years, in the Court of Appeal of Botswana.
2. I began my working life as a diplomat in what might now be called a “failed state” – the Federation of Rhodesia and Nyasaland. After ten years in that role I was more or less forced back into the law, for which I had qualified before I began to earn a living. I can still remember how impressed I was, at the age of 33, by the clarity of reasoning, the logical development of argument, and the careful research into authorities which characterized the submissions of my fellow members of the Bar. It was a far cry from the devious duplicity of diplomacy.
3. This leads me to my first observation. It is that people outside the law, whether they be politicians or members of the public

concerned about judicial accountability, do not always sufficiently appreciate the long training and discipline of the law which, ideally at any rate, moulds its practitioners into the virtues of the judicial approach. Indeed, it does more than that. It enables the judges to assess the quality of practitioners who appear before them in their legal skills, their moral character, their ethical approach and their general integrity. That is why, in my view, judges and law officers should play a major role in the selection of new judges. They should not be outnumbered in the Judicial Service Commission by politicians or political nominees. And their recommendations should be normally accepted by the President or whoever makes the appointment. In this context I refer in passing to the unfortunate practice of politicians with hidden agendas. They change the provision in the Constitution which reads “Appointments should be made on the advice of the Judicial Service Commission” and they make it read “Appointments shall be made after consultation with the Judicial Service Commission.” The former is a strong provision, the latter is toothless.

4. The 1998 European Charter on the Statute of Judges provides, *inter alia* that –

“In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of

office of a judge, the Statute envisages the intervention of an authority independent of the Executive or Legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”

5. I am reminded of the story of the British Lord Chancellor of long ago who is alleged to have said, in speaking of his power to appoint judges -

“I like my judges to be gentlemen. If they know a little law, so much the better.”

I know that by today’s standards that remark is both sexist and elitist. But it makes a good point and it makes it well. Nowadays we might say “I like my judges to be people of integrity. If they know a little law, so much the better.”

6. I would like to say a few words about power, because in a sense the concept of judicial accountability is one promoted by politicians in their constant struggle to free themselves from what they perceive as the shackles imposed upon them by the judiciary.

7. The desire for power is an amazing thing. It is an extraordinary aphrodisiac which perhaps explains the sexual excesses of some successful politicians. I see the lust for unbridled power as one of the major driving forces behind political insistence on judicial accountability. I should also make the point that primarily when one speaks about accountability one is speaking about money. “Money is the root of all evil” as the Andrews sisters used to sing many years ago. And judges really do not have much to do with money. It is Ministers, legislators and civil servants who are in a position to accept bribes, to award contracts to family members and otherwise to profit from their office. Judicial power is not power over money. It is essentially a power of restraint. Thus in a very real sense judicial accountability is a very different concept from the accountability of Ministers, legislators and Public servants. But, to be fair, this does not mean that judges should not be accountable.

8. The former Chief Justice of India, Justice Verma, was asked his opinion in 1996 on making the judiciary more accountable. He said –

“It’s long overdue. With the increase in judicial activism, there has been a corresponding increase in the need for judicial accountability. However judicial accountability is

not the same as the accountability of the Executive or the Legislature or any other public institution. This is because the independence and impartiality expected of the judicial organ is different from other agencies.”

9. When I talk about judicial power to ordinary citizens I use the old analogy of the motor car. I explain the three-way division of power between the Executive, the legislature and the judiciary like this –

“The Executive controls the steering wheel. It decides which way the country will go.

The Legislature controls the fuel supply. It votes the money to fund the policies which the Executive proposes.

The judiciary controls the brakes. It has the power to say no, when it believes that the Executive and/or the Legislature have over stepped their powers under the Constitution.”

10. It is a useful analogy though it is not a perfect one. The important thing is, that it stresses the fact that by and large the judiciary’s power is a negative one. It should not be seen as a threat to the

Executive but simply as a cautionary presence. The judges are the guardians of the Constitution. I mean no disrespect to politicians when I say that the judiciary can say to them exactly what it can say to criminals -

“Stay within the law and you have nothing to fear from us.”

I will come later to the question of judicial activism.

11. There are, I think, three levels on which one has to consider judicial accountability -
  1. The personal conduct level.
  2. The personal decision-making level.
  3. The conduct of the judiciary as a whole, usually expressed through its highest court in relation to judicial review of administrative action or to judicial questioning of the constitutionality of legislative or executive action; or to the protection of human rights or to the protection of minorities.

#### ACCOUNTABILITY FOR PERSONAL CONDUCT

12. This is the simplest level of accountability. It should not occur too often when judges are selected properly by people who know them, that they turn out to be drunkards, fraudsters or high-profile

misbehavers. But if they do, there must be machinery by which they can be disciplined. There are two conflicting principles involved. The one is that judges must not be seen to be above the law like diplomats with their parking tickets. The other is that the judiciary as a whole should not be brought into disrepute, by the misbehaviour of one of its members. Even more so, of course, when the alleged misbehaviour turns out to be a spurious charge specifically designed to bring the judiciary into disrepute.

13. Most countries, I suspect, have constitutional provisions to cover this kind of situation. Normally the matter is reported to the Chief Justice, who institutes an enquiry, and makes a decision whether to reprimand, or report to the President with a recommendation for dismissal, or hand the matter over to the police. It is desirable also to have a provision that the police may not arrest a judge without the prior consent of the Chief Justice. This kind of accountability does not usually cause problems. And, according to Professor Tarr of Rutgers University in a paper presented in 2007, behavioral accountability seldom raises concerns about judicial independence. Even in South Africa, where the “transformation” of the judiciary is a major talking point, President Zuma in a speech to the Second Judicial Conference last month said –

“The transformation of the judiciary should be advanced and undertaken without interfering with the principle of judicial independence.”

And later –

“Transformation means the promotion of a culture of judicial accountability.”

#### DECISIONAL ACCOUNTABILITY

14. To what extent are, or should judges be accountable for their decisions? And what does decisional accountability mean?
  
15. Judges cannot be forced to resign because of making a decision which is perceived to be wrong. This is a fundamental aspect of judicial independence. There is a general and necessary conflict, or at least tension, between the two principles of judicial independence and judicial accountability. But it is broadly accepted that judges must make their decisions without fear or favour. It necessarily follows that they cannot be disciplined for making a particular decision.



16. But there is a whole built in system to ensure that judges are held accountable for their decisions. We start with their oath of office, and their requirement to act within the law. They sit in open court. They are required to give detailed reasons for their decisions, which are then open to public discussion and criticism. Nowadays the old fashioned protection of “contempt of court” proceedings is frowned upon by the courts. We must face these public criticisms. It is part of our public decisional accountability.
17. And finally, there is the system of appeals and reviews which is designed in an appropriate judicial way to hold individual judges accountable for their decisions.
18. By and large, at the level of individual decision-making the tension between independence and accountability is resolved by this internal machinery. “Decisional independence does not extend to a judicial freedom to decide cases whimsically or arbitrarily, on the basis of personal preferences or antipathies. Rather, it means freedom for judges to render impartial judgments based on law” (Tarr, *op cit.*). Or as Judge Roger Warren put it in his Justice Robert H. Jackson lecture at the National Judicial college of the USA in July 2005 –

“Sometimes we forget that judicial independence is not an end in itself but merely a means to an end. With respect to judicial decision-making the object of judicial independence is to ensure judicial fairness – that judicial decisions are based solely on evidence and law and not influenced by any improper consideration. With respect to judicial decision-making, judicial independence is the freedom to be fair.”

#### A BRIEF ASIDE

19. Before I go on to what is perhaps the more important part of my paper, a little light relief might be welcome. There is a story about two young magistrates, long ago, in a remote part of the Bechuanaland Protectorate, as it then was. They went out one weekend for a spot of illegal hunting and were caught by the police. They decided to deal with this as discreetly as possible. So they went into court on a Saturday morning, with no one else around. Jones sat on the Bench. Smith was in the dock. He pleaded guilty and was fined £5. Jones then announced that the court would adjourn briefly and reconvene reconstituted.

20. They came back, now with Smith on the Bench and Jones in the dock. He pleaded guilty. His friend and colleague looked very stern.

“Mr. Jones”, he said, “I am compelled to regard this matter in a very serious light. The crime of poaching is becoming ever more prevalent in this jurisdiction. Indeed this is the second case we have heard in this court this very morning. A deterrent sentence is called for. You are fined £50.”

History does not relate what happened next.

#### THE ACCOUNTABILITY OF THE JUDICIARY AS A WHOLE

21. This is sometimes known as the Judiciary’s Institutional Accountability. It is a somewhat shadowy concept because it is essentially an accountability to the public at large. Dato Param Cumaraswamy, former UN Special Rapporteur on the independence of judges and lawyers said in October 2003 –

“Judicial accountability is today a catchphrase in many countries. Judges can no longer oppose calls for greater accountability on the grounds that it will impinge on their independence. Judicial independence and judicial accountability must be sufficiently balanced so as to

strengthen judicial integrity for effective judicial impartiality. The establishment of a formal judicial complaint mechanism is therefore not inconsistent with judicial independence under international and regional standards.”

He went on to refer to the attempt by the South African judges to draft legislation to provide for a judicial complaint commission. I understand this proposal is still held up by disagreement between the executive and the judiciary.

22. The judiciary needs to be held in respect by the general public and indeed by the Legislature and the Executive if it is to function adequately. And that respect cannot be demanded. It must be earned. This means at the simplest level that judges must conduct themselves with dignity, they must treat those appearing before them with courtesy, they must organize their court roll with efficiency and they must deliver judgment reasonably expeditiously.
23. Perhaps they should go even further than that, in order to try to explain to the people at large why the judicial institution and judicial independence are important. The duty to explain is a major part of the duty to account.

24. Associate Justice Stephen Breyer of the US Supreme Court, at a conference on Judicial Independence in September 2006 put it this way –

“The judiciary is, in at least some measure, dependent on the public’s fundamental acceptance of its legitimacy. And when a large segment of the population believes that judges are not deciding cases according to the Rule of Law, much is at stake. As Chief Justice Marshall warned “The people have made the Constitution, and they can unmake it.” And the society around us can undermine the judicial independence that is the rock upon which the judicial institution rests.”

25. In similar vein the Institute of Democracy in South Africa (IDASA) said in March 2007 –

“The Independence of the Judiciary must not only be constitutionally protected, it must also capture and maintain the confidence of the public it seeks to protect. Loss of confidence in the judicial system due to perceptions of a lack of independence and impartiality is extremely damaging to the effective working of the justice system.”

26. Professor Le Sueur in an article entitled “Developing Mechanisms for Judicial Accountability in the UK” says -

“The accountability revolution has led to an expansion in the concept of accountability and the application of accountability practices to an ever wider range of public authorities. In a mature democracy, those who exercise significant public power ought to hold themselves open to account, and judicial power should not be excluded from this imperative.”

27. It is interesting that in each of the three jurisdictions to which I have referred, the authors go on to set out the points I have already dealt with under accountability for personal conduct and decisional accountability. Institutional accountability is, in the final analysis, the duty to explain to the public how the judicial system is essential to the preservation of the Rule of Law; the duty to demonstrate to the public that the system works efficiently and in a “consumer friendly” way; and the duty to satisfy the public that there is a disciplinary mechanism in place to deal with errant judges.

28. The judiciary, as one of the three co-equal branches of government, is not strictly accountable to either of the other two

and indeed must resist any pressure to become so. Nonetheless there may often be calls from these other two branches for the judiciary to be called to account, usually by reason of its alleged frustration of or interference with government policy decisions. It is in this context that accusations are made of “judicial activism.”

29. I have referred earlier to Prof. Tarr. He says –

“The charges are familiar. Conservative critics insist that judicial activism is rampant, with liberal judges “legislating from the Bench” on social policy issues such as abortion and gay rights, ignoring long-standing community sentiment on the pledge of allegiance and school prayer, and ‘making law rather than enforcing it,’ in overturning convictions in criminal cases.

For these critics, the solution is obvious. Out-of-control judges must be held accountable for their over-reaching, so that self-government and the rule of law can be restored and “judicial dictatorship” ended.

Indeed, some might wish to go further. As the chief of staff of Oklahoma Senator Tom Coburn declared – “I don’t want to impeach judges. I want to impale them.””

In England, in August 2005, Michael Howard, a former leader of the Conservative Party, launched a strong attack on the Law Lords for what he called their “aggressive judicial activism.” The reason for his attack was their decision that the indefinite detention without trial of foreign terror suspects contravened the Human Rights Act. He claimed that what he called political intervention by judges “would put our security at risk.” He blamed the government for bringing the judiciary further into the political arena.

30. Why do these situations arise, in which Ministers and Legislators and sometimes also the Press seem to be screaming for the blood of judges? I think the answer lies in the fact that judicial power is on the increase. As Professor Hugh Corder, Dean of Law at the University of Cape Town said in a speech in November 2008 –

“A constitutional system which gives the final word on the lawfulness of governmental conduct to the courts will inevitably thrust the judges into the political spotlight.”

Judicial power is increasing primarily in four areas -

1. Judicial Review of Administrative Action;
2. Judicial Overview of the Constitutionality of Legislation;



3. Judicial Protection of Human Rights;
4. Judicial Protection of Minorities.

All of these four functions lead the courts into areas of government where Ministers and Legislators would prefer that they did not pry. Hence the accusations of judicial activism.

### JUDICIAL REVIEW

31. This is not a paper on Judicial Review, but it will be clear to you all that this power gives the courts an authority to intervene in the activities of the other two branches of government. We have developed principles like “fairness” and “legitimate expectation” to justify our probing, and they don’t always like it. That however, is not to say that it is wrong. It does mean that we must be cautious and prudent when exercising that power, more particularly when it leads us to tell the government not just what not to do, but what they must do. We must be wary. We must be conscious of the danger of judicial activism in alienating the good will of the public and the executive.

## PROTECTION OF THE CONSTITUTION

32. There is nothing more provoking to the legislature than the striking down by the courts of a legislative enactment on the grounds of unconstitutionality. It is not something we should do without profound thought. We must always be aware of the danger that, if pushed too far, the Executive can introduce a Constitutional Amendment to nullify our action. But fundamentally it is our duty rather than merely our power to do so, and we cannot shirk our responsibilities.

## PROTECTION OF HUMAN RIGHTS

33. Since 1948 the concept of Human Rights, and the concept of the duty of the Courts to protect these rights, if necessary against the power of the state, has expanded enormously. Most countries have a Bill of Rights entrenched in their Constitution. There is usually considerable scope for interpretation, and thus scope for judicial activism, in enforcing these rights. Over and above this, we introduce norms and conventions from International Conventions and Agreements, and concepts from other jurisdictions, giving the impression that we are subjecting our state authorities to external precepts. I remember once telling a

meeting of American judges in Washington that there was a danger that the concept of Human Rights had been hi-jacked by the Radical left. I do not however think this is a significant problem for Africa. Here again, we lay ourselves open to accusations of judicial activism and of interfering with the functions of the other two branches of government. Our defence has to be that that is the very role which has been made for us. As the “braking mechanism” we play that role. You cannot apply the brakes without affecting the movement of the vehicle.

#### PROTECTION OF MINORITIES

34. Democracies are not good at protecting minorities. Somebody once described democracy as -

“A very bad system of government, which we use because we have not been able to find a better one.”

One of the weaknesses of democracy is that it gives expression, inevitably, to the will of the majority, and may tend to trample on, or overlook, the rights of minority groups. We are the ones who must protect these minorities. It sometimes happens therefore, that we must go against the will of the majority. James Madison, in 1788, set out the problem in this way –

“Wherever the real power in a government is, there is the danger of oppression. In our Government the real power is in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.”

#### FINANCIAL ACCOUNTABILITY TO THE LEGISLATURE

35. Sometimes a problem can arise over the budget of the judiciary, which of course has to be approved by the Treasury and incorporated in the Estimates of Expenditure. We cannot usually complain if we do not get everything we want. By the same token, we can legitimately complain if Government seeks to control our activities by putting a strangle-hold on our finances. There has to be a degree of give and take between judicial independence and judicial financial accountability. Different countries will find different ways of solving the problem if it should arise.

## CONCLUSION

36. (i) Judicial accountability on a personal conduct or individual decision-making level is usually achieved through the internal mechanisms of the judiciary.
- (ii) The judiciary's Institutional Accountability lies primarily to the general public. The judiciary needs the support of the public and that support must be earned. The best way of earning that support is by making sure the public understands our decisions. The best way to account to the public is to explain to the public.
- (iii) Judicial activism creates a certain demand for accountability, particularly from the Executive and the Legislators, which we cannot shrug off by reliance on judicial independence.
- (iv) Particularly where we are entrusted with a creative as opposed to a purely protective role we must accept a greater degree of accountability. This will arise usually in four sets of circumstances –
- (a) Judicial Review of Administrative Action;
  - (b) Protection of the Constitution;
  - (c) Human Rights cases;

(d) Protection of Minority Rights.

37. The guidelines are simple enough. The application of the guidelines will vary from country to country and from situation to situation. All of us need to make a judgment, when the time comes, remembering that judicial independence is not an end in itself, it is a means to a greater end - the dispensing of justice without fear or favour.

JUDICIAL REFORM

38. A brief word about judicial reform. I think it will be apparent from my analysis that it is not easy to put mechanisms in place to deal with what I have called Institutional Accountability. Nor do I think it is generally necessary to improve Conduct Accountability. In the area of Decisional Accountability there is always room for improvement. Case management as it has been introduced in Botswana appears to be a success, and for those who have not introduced it, it is worth studying. But above all there is a need for improvement in the speed with which matters are disposed of, both in the relevant court and in transmission between courts. It is quite common for us in the Court of Appeal in Botswana to deal with matters which are four or five years old. So reform in the

speed of transmission of cases on appeal would be my number one priority.

39. Perhaps equally important is to reduce the number of times an accused person comes before the court for mention, as we say in Botswana, or for remand as we used to say in Zimbabwe. If funding is to become available I would suggest these two areas should be systematically researched so that positive measures of judicial reform can be introduced to address these problems.

40. Dato Param Cumaraswami, whom I have cited earlier, remarked in a paper presented in October 2003 that

“The Asia-Pacific made history in 1995 when Chief Justices in the region gathered in Beijing for the Sixth Conference of Chief Justices of Asia and the Pacific. There they adopted the Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia region, commonly known now as the “Beijing Principles” ... Such a document emerging from the hands of the eminent Chief Justices could carry greater weight than an intergovernmental document.”

Do we have such a document for the SADCC region?

41. Finally a note of optimism. We tend to think that other countries are more advanced than we are, with the United States at the pinnacle. We forget how fragile is the judicial power, and how long it has taken for it to become fairly solidly established. Two cases illustrate this development.
  
42. In 1832 the Cherokee Indians won a landmark case upholding their land rights against the invasion of white settlers. President Andrew Jackson sent federal troops in to ensure that the decision was not enforced. In 1955, in *Brown v Board of Education*, the US Supreme Court ordered an end to segregated education and the “separate but equal” doctrine. In the face of considerable public opposition, and in spite of his own personal misgivings, President Eisen-Lower sent in Federal troops to ensure that the ruling was enforced.
  
43. Judicial independence has to be continually fought for – and won anew each day. It is grounded in public respect for the courts and for the judicial function. Like respect, it cannot be demanded. It must be earned. The price we must pay is judicial accountability.