2003 Journal for Juridical Science 28(2): 109-141

C Okpaluba

Institutional independence and the constitutionality of legislation establishing lower courts and tribunals: Part I*

Summary

The independence of the judiciary is the bedrock of the democratic system of government. Judicial independence is the gateway to the proper performance of the courts of their role of keeping all organs of state within the boundaries of their powers under the Constitution. The test for determining whether judicial independence is safeguarded is an objective one based on public confidence in the structure of the court and the impartiality of its judicial officers. The ascertainment of the independence of a tribunal depends on the mode of appointment of its judges, their financial security and whether their security of tenure is institutionally safeguarded from legislative or executive manipulation. This article lays down the constitutional basis for judicial independence; examines the test for ascertaining whether a court is independent and impartial; and links judicial independence with separation of powers. The discussion culminates in the analysis of the application of the principles of judicial independence to specific legislative schemes where the structure of the tribunal thereby established had been tested in the courts for unconstitutionality.

Institusionele onafhanklikheid en die grondwetlikheid van wetgewing vir die skepping van laer howe en tribunale: Deel I

Die onafhanklikheid van die regbank is die grondslag van 'n demokratiese regeringstelsel. 'n Onafhanklike regbank is die toegangspunt vir die behoorlike funksionering van die howe en 'n voorwaarde vir hulle rol om alle staatorgane binne die grense van hul verleende bevoegdhede ingevolge die grondwet te hou. Die toets om te bepaal of regterlike onafhanklikheid gewaarborg word is 'n objektiewe een gebasseer op openbare vertroue in die struktuur van die howe en die onpartydigheid van voorsittende beamptes. Die vasstelling van die onafhanklikheid van 'n tribunaal hang af van die wyse van aanstelling van regsprekende beamptes, hulle finansiële sekuriteit en of hul sekerheid van ampsbekleding institusioneel gewaarborg is teenoor wetgewende en uitvoerende manipulasie. Hierdie artikel bespreek die konstitusionele basis vir regtelike onafhanklikheid; dit ondersoek die toets om vas te stel of 'n hof onafhanklik en onpartydig is; en verbind regterlike onafhanklikheid met skeiding van magte. Die beginsels van regterlike onafhanklikheid word toegepas op spesifieke wetgewende programme waar die ongrondwetlikheid van die struktuur van die tribunaal wat daardeur totstand gebring is in die howe getoets is.

* An abridged version of this paper was presented at the International Conference on *Freedom, Justice & Equality: Three Pillars of Legal History* organized by the Southern African Society of Legal Historians held at the University of Stellenbosch, 15-17 January 2003. I am profoundly grateful to the Society for accommodating a non-legal historian like myself and for sharing with them the views herein expressed.

C Okpaluba, Professor of Jurisprudence & Director, School of Law, University of the North, Private Bag X1106 Sovenga 0727, South Africa.

1. Introduction

It is universally accepted that the independence of the judiciary is a *sine qua non* of a democratic state. Nor has it ever been in doubt that it is one of the fundamental values of a modern democratic Constitution. Indeed, the independence of the judiciary is the cornerstone of the revered concept of the rule of law,[1] the bedrock of the principle of separation of powers and a safety-valve for the role the courts play in the democratic system of government. In effect, the success or otherwise of modern constitutionalism depends so much on the ability of the judicial branch to discharge its functions without fear, favour or prejudice and without interference from the other departments of state.[2] The respect which the people of any country attach to the judicial branch often hinges on whether they perceive the courts to be independent of the executive, the legislature, the politician or, for that matter, any pressure group(s) and whether they are detached from these organs or persons or organizations as to be in a position to render justice according to law.[3]

Indeed, judicial independence operates "to insulate the courts from interference by parties to litigation and the public generally."[4] It is meaningless

1 See Okpaluba (2002 part I) 303:321.

2 In the course of the debates of the Virginia State Convention 1829-30, it was stated that: "[t]he judicial department comes home in its effects to everyman's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?' — cited in *O'Donoghue v US* 289 US 516: 532 (1933).

3 In his dissenting judgment in *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick* 2002 209 DLR (4th) 564:607-8 paragraph 117 Binnie J observed: "In *Valente v The Queen* 1985 2 SCR 673, 24 DLR (4th) 161, this Court made the fundamental point that the guarantee of judicial independence was for the benefit of the judged, not the judges. Its purpose was not only to ensure that justice is done in individual cases, but to ensure public confidence in the court system as a whole."

4 Per Lamer CJC, *Reference re: Provincial Court Act (PEI); R v Campbell; R v Ekmecic; R v Wickman; Manitoba Provincial Judges Association v Manitoba (Minister of Justice)* 1997 150 DLR (4th) 577 paragraph 130 (*The Provincial Court Judges Reference*). It has also been held in *Campbell v United Kingdom* 1984 7 EHRR 165:198-9 paragraph 78 that independence within article 6 of the European Convention for the Protection of Human Rights 1950 include independence from the parties to the proceedings. This formulation has been criticized as confusing independence, an aspect of separation of powers, with impartiality: Van Dijk & Van Hoof 1998:451. This criticism is justifiable in the light of the fact that the influence of a judge by party to litigation impeaches the court's impartiality and not independence in the strict sense of the word since, as it will be seen later in this paper, independence tends to tilt more towards institutional interference. But there could be a link between interference by a party and independence where the party concerned is the executive or the legislature. In such a situation, it will be difficult to separate independence and impartiality for the act of the government party will tantamount to an infringement of the doctrine of separation of powers in any event. It is thus not surprising that the European Court for Human Rights treats both concepts as closely linked and often considers them together — *Findlay v UK* 1997 24 EHRR 221:244-5 paragraph 73.

to talk about the right to a fair hearing in circumstances where a hearing has not been conducted by a court or tribunal in an atmosphere devoid of utter judicial independence on the part of the court and impartiality of the adjudicating officer. In any event, the right to a fair hearing in civil proceedings or criminal trials cannot be based other than upon the fundamental premise that the hearing be held or the trial be conducted by an "independent and impartial" court or tribunal.[5] Under the elegant constitutional model of South Africa ostensibly designed to combat the legacies of the past, to redress those ills and achieve racial harmony and those lofty ideals embedded in its preamble could only be attained if the foundational values of justice based on fairness and impartiality in the adjudicatory process and the independence of the adjudicating institutions are assured.

The perennial question concerns the meaning and implications of "independence and impartiality" when used in respect of courts. For instance, the Constitution of South Africa 1996 mandates the government through legislative and other measures to "assist and protect" the courts to ensure their "independence, impartiality, dignity, accessibility and effectiveness."[6] Or, as it is provided in the Constitution of Nigeria 1979, a court or tribunal shall be "established in such a manner as to ensure its independence and impartiality."[7] In the case of Namibia, the fundamental rights entrenched in their Constitution of 1990 could only be enforced by an "independent, impartial and competent Court or Tribunal[8] established by law."[9] Under the Canadian Charter of Rights & Freedoms 1982 those rights therein entrenched could simply be enforced by "an independent and impartial tribunal".[10] The question could be raised in a different way, viz.: when section 34 of the Constitution provides that everyone has the right to have any dispute resolved by the

5 Sections 33(3)(a), 34 & 165(2), Constitution of the Republic of South Africa 1996; article 12(1)(a), Constitution of the Republic of Namibia 1990; section 33(1), Constitution of the Federal Republic of Nigeria 1979.

6 Section 165(4), Constitution of South Africa 1996.

7 Section 33(1).

8 This discussion is not concerned with the meaning of a "competent court", a term commonly used in connection with the power to enforce the rights entrenched in the Bill of Rights. See for example section 38, Constitution of South Africa 1996; article 25 (1)(a) and (2), Constitution of Namibia 1990. In this context, a "competent court" refers to that court vested with the jurisdiction to enforce the entrenched rights. In the case of Namibia, it is the High Court and the Supreme Court — articles 79(2) and 80(2), Constitution of Namibia 1990). In the Constitution of South Africa 1996, such jurisdiction is vested in the High Courts (section 169); the Supreme Court of Appeal (sections 168(3), 172(2)) and the Constitutional Court (sections 167(3) & (4). It must be mentioned that in terms of section 172(2)(a) of the 1996 Constitution, any order of constitutional invalidity issued by any other court would not have the force of law unless and until it is confirmed by the Constitutional Court. As to what constitutes constitutional matter for the invocation of constitutional jurisdiction see *S v Boesak* 2001 1 SA 912 CC paragraph 15; *Phoebus Appollo Aviation CC v Minister of Safety & Security* 2003 2 SA 34 CC; *Bannatyne v Bannatyne (Commissioner for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 CC.

9 Article 12(1)(a), Constitution of Namibia 1990.

10 Section 11(d).

application of law by a court or, where appropriate, "another independent and impartial tribunal or forum", what does the latter phrase mean? When is a tribunal or forum "an ordinary court" for the purposes of compliance with the mandatory provisions of section 35(3)(c) of the Constitution?[11]

Without necessarily revisiting the whole gamut of the implications of independence of the judiciary,[12] an exercise already undertaken elsewhere,[13] the question for investigation in the present context is whether the constitutional principle of judicial independence applicable to the superior courts applies *mutatis mutandis* to the lower courts and, if so, to what extent it does or would apply to courts not within the higher echelon in the judicial hierarchy? The problem is: if, on the one hand, the Constitution provides in imperative and inclusive terms that "the courts are independent"[14] and, on the other, it seeks to differentiate between the higher courts from the lower courts in terms of status,[15] power and jurisdiction,[16] does it then follow that the principle of an independent judiciary applicable to these adjudicatory institutions be any different from those prescribed for the higher courts? In effect, should the apparent conflicting signals emanating from the Constitution be treated as immunizing existing legislation establishing Magistrates' Courts to the extent that the consistency of such legislation with the provisions of the Constitution be not subjected to scrutiny by the Courts charged with the responsibility to review governmental acts? Another way of looking at the problem is: granted the incontestable fact that inferior courts such as

11 This aspect of the problem has been dealt with in Okpaluba 1990:47-63.

12 Outlining the bare bones of the institutional and infra-structural aspects of judicial independence in his article: 1998 111: 112, the late Chief Justice Mahomed had stated that they pertain to "all the conditions affecting the appointment of judges, their tenure, service, salaries, ancillary benefits, pensions, dismissal, jurisdiction and status, which impact upon their actual independence or may reasonably be perceived to do so."

13 A discussion of the implications of judicial independence has been undertaken in Okpaluba 2002 (part II):436-461.

14 Section 165(2), Constitution of South Africa 1996.

15 At common law, the High Court as a superior court of record enjoys the inherent power to supervise the lower courts as to whether they perform their judicial functions according to law. Consequently, proceedings before the Judge of the High Court cannot be the subject of judicial review by another court — *Pretoria Portland Cement Co Ltd & Another v Competition Commission & Others* 2003 2 SA 385 SCA: 402B-C/D paragraph 35; 2 SA 381 TPD: 383G.

16 Although the Constitution recognizes the Magistrates' Court and other courts in its section 170, it does not expressly confer upon them jurisdiction, rather it vests such power on Parliament. On the other hand, it clearly denies any court lower in status than a High Court the jurisdiction to enquire into or rule on the constitutionality of any legislation or any conduct of the President. It must however be pointed out that magistrates' courts are not without constitutional responsibilities by virtue of the fact that they exercise criminal jurisdiction which necessitates the application of the constitutional right to a fair trial within the context of section 35 of the Constitution. In this regard, Saras Jagwanth 2001: 203-214 has shown that there are at least six distinct ways in which magistrates are expected to discharge constitutional responsibilities in the conduct of criminal proceedings.

Magistrates Courts play very important role in the administration of public justice, could it not be reasonably assumed that such courts be established by a law that safeguards their independence and impartiality? The focus here is on the specific issues raised in the recent Constitutional Court case of *Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa Intervening)* [17] which impelled the Chief Justice of South Africa to state that: "[j]udicial independence can be achieved in a variety of ways; the 'most rigorous and elaborate conditions of judicial independence'[18] need not be applied to all courts, and it is permissible for the essential conditions for independence to bear some relationship to the variety of courts that exist within the judicial system." In effect, in spite of the differentiations made by the constitutional system between the superior courts and the lower courts in terms of modes of appointment and jurisdiction,[19] such lower courts are nonetheless "entitled to the protection for necessary judicial independence, even if not in the same form as the higher courts."[20]

That the independence of the judiciary is the first requirement of justice in its practical application[21] has been stated and reiterated in other jurisdictions of the common law world is not in doubt. However, while issues concerning judicial independence and impartiality have been contested in Commonwealth Courts of late, it is the Canadian case law that provides more ammunition for comparative purposes not only because cases emanating from the Supreme Court of that country has had such a significant impact in the development of the South African constitutional jurisprudence in general but, in particular, the Canadian experience on the issue of judicial independence is, on all accounts, quite interesting, contemporary, enriching and persuasive not only in South African Courts but also they have been cited, adopted and approved as authoritative in, among others, in the Australian and the United Kingdom judgments discussed in this paper.[22] Canadian Courts have in the last two decades[23] sought to redefine the meaning and scope of the operation of judicial independence. In the process, "the proper constitutional relationship between the executive and the provincial court judges … has come under strain"[24] in circumstances where judges, the dispensers of justice, have themselves appeared in "the well of the courtroom

17 Per Chaskalson CJ, 2002 5 SA 246; 9 BCLR 810 CC 270I/J-271A paragraph 27 (*Van Rooyen* challenge).

18 Citing per Ackermann J in *De Lange v Smuts* 1998 3 SA 785 CC paragraph 170.

19 These differentiations are no doubt implicit in the Constitution and have been captured by Chaskalson CJ in *Van Rooyen*, 2002 5 SA 246: 271 paragraph 28.

20 Ibid.

21 Hahlo & Kahn 1968:38.

22 Reference is being made to the following Canadian cases: *R v Valente* 1985 24 DLR (4th) 161 SCC; *The Queen in Right of Canada v Beauegard* 1986 30 DLR (4th) 481 SCC; *R v Genereux* 1992 1 SCR 259 SCC; *The Provincial Court Judges Reference*.

23 In addition to the *Newfoundland* case and those discussed hereunder see also: *Re British Columbia Legislative Assembly Resolution on Judicial Compensation* 1998 160 DLR (4th) 477 BCCA.

24 Per Lamer CJ in *The Provincial Court Judges Reference*:592 paragraph 7.

to seek what they claim as justice for themselves."[25] Judges themselves have challenged what they perceive as the legislative and executive interference with their constitutionally guaranteed independence through the legislative measures of economic, structural and administrative nature concerning their salaries and conditions of service.

The first part of this paper attempts to put the subject of judicial independence in its constitutional perspective showing its close relationship with the doctrine of separation of powers. It discusses the senses in which judicial independence are employed by the Courts, the tests they resort to in order to ascertain whether the legislation of which its constitutionality is impugned has satisfied these vital requirements of fair adjudication. Thereafter, the balance of this part is devoted to the application of institutional independence drawing illustrations from those cases where legislation has been challenged for contravening the doctrine of judicial independence in that the legislature has purported to establish lower courts and vested in them powers not constitutionally designed for such courts or for vesting in the executive some remote-control mechanisms over the judicial body. The second part of this paper focuses on the issues of unconstitutionality arising from the Regional Magistrates Courts' Act challenge where the statutory role of the Magistrates Commission, the financial security, security of tenure and matters of discipline regulated by the Magistrates Act, Magistrates Courts Act and Regulations were extensively canvassed in light of the 1996 Constitution of the Republic of South Africa.[26] There is a further examination of the critical issues affecting the modes of appointment of lower court judges directly or indirectly arising from the *Van Rooyen* challenge.

2. Constitutional origins of judicial independence

The principle that in the conduct of judicial proceedings, a judge must not only be seen to be impartial, but must manifestly be independent of the executive and the legislature is one of the most cherished legacies of the common law adversarial jurisprudence. The historical underpinning of the universal requirement of independence and impartiality of courts which in the last century has been extended to other decision-makers manifesting itself in the jurisprudential requirement of procedural fairness in all adjudicatory and decision-making processes has its roots in the *Magna Carta* of 1215 where the English declared unequivocally that "right and justice shall not be sold".[27] This principle found its way into the Act of Settlement 1700 (UK)[28] where provisions for the better securing in England of judicial independence were reinforced. It was this principle that was evidently seen to be behind the confrontation in 1607 between Coke CJ and King James about the

25 Per Green JA in *Newfoundland Provincial Court Judges v Newfoundland* 2000 191 DLR (4th) 225: 235 paragraph 3.

26 The *Van Rooyen* challenge.

27 Holdsworth 1938 vol. 1 6th ed.:57-8.

28 Re-enacted by the *Judicature Acts* 1873-76 and later by the *Supreme Court Act* 1981 (section 11).

supremacy of law.[29] Again, it was applied when Bacon was stripped of office and punished for taking bribes from litigants.[30] Judicial independence and impartiality is fundamental to the jurisprudence of the old Commonwealth as it was equally exported to all other parts of the new Commonwealth.[31]

2.1 Canada

In Canada, the independence of the judiciary is protected by the Preamble to the *Constitution Act* 1867 and section 11(d) of the Canadian Charter of Rights and Freedoms, 1982. Dickson CJC spoke of the core principle central to the independence of the judiciary as the "complete liberty" of individual judges to hear and determine cases before them independent of, and free from external interference or influence of government, pressure group, individuals or even other judges.[32] Like in the Australian situation,[33]

29 Holdsworth 1937 vol 5 2nd ed.:430.

30 See also the summary provided by Gleeson CJ, McHugh, Gummow & Hayne JJ of the Australian High Court in *Ebner & Another v Official Trustee in Bankruptcy & Another* 2000 205 CLR 337: 345 paragraph 3.

31 These precepts were exported to the Colonies — *Terrell v Secretary of State for the Colonies* 1953 2 QB 483: 492-3 per Lord Goddard CJ.

32 *The Queen in Right of Canada v Beauegard* 1986 30 DLR (4th) 481 SCC:491.

33 In Australia, the High Court has always guarded the independence of the judicial arm jealously. It is to them a vital link in the principle of separation of powers. For instance, Brennan J speaking on the import of sections 71 and 72 of the Australian Constitution, said in *Harris v Caladin* 1990-1991 172 CLR 84:108-9 that: "The primary and manifest purpose of those provisions is to guarantee impartiality and independence in the hearing and determination of legal controversies and that purpose would be frustrated if court officers, lacking in the protection which those provisions are intended to secure, were empowered to hear and determine legal controversies." Sections 71 and 72 provide for the appointment, remuneration and tenure of Justices of the High Court and Justices of other federal courts. In other words, these sections apply to courts exercising federal jurisdiction. For example, if either the Parliament or Ch. III judges constituting the respective federal courts or a federal court were authorized to delegate the jurisdiction vested in that court to a person who was not a Ch. III judge, as was in issue in this case where, in terms of section 37A(1) of the *Family Court Act* 1975 (Cth), family court judges were empowered to delegate parts or all of their powers to the registrars, the constitutional provisions governing appointment, remuneration, and tenure of Ch. III judges could be circumvented. The High Court has used sections 71 and 72 in a catena of cases to prevent Parliament either to vest what is strictly judicial power upon Commonwealth authorities without creating those authorities as a federal court consisting of Judges appointed under section 72 or to compel the High Court to exercise jurisdiction beyond the limits of sections 75 and 76 of the Constitution — per Evatt J in *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignam* 1931 46 CLR 73:116. Where such attempts have been made, they have been held to be contrary to the separation of powers and in breach of the judicial power of the Australian Commonwealth — *Waterside Workers Federation of Australia v JW Alexander Ltd* 1918 25 CLR 434; *R v Kirby; Ex parte Boilermakers Society of Australia* 1956 94 CLR 254. Thus in *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* 1992 176 CLR 1:27,

the Canadians consider three factors as essential to the independence of the judiciary. Such conditions were identified in *R v Valente* [34] as first, security of tenure whereby an incumbent judge does not get removed from office except for cause.[35] Second, there should be a basic degree of financial security[36]

Brennan, Deane & Dawson JJ spoke of the well settled principle of separation of powers in Australia that "the grants of legislative power contained in section 51 of the Constitution, which are expressly 'subject to' the provisions of the Constitution as a whole, do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth. Nor do these grants of legislative power extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exhaustively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power."

34 1985 24 DLR (4th) 161 SCC.

35 Cf in *Anya v Attorney General, Borno State of Nigeria & Another* 1984 5 NCLR 225 FCA where the Federal Court of Appeal held that it was improper and contrary to the principle of separation of powers for a State House of Assembly to seek the removal of a judge by resolution instead of the elaborate procedure laid down in section 256 of the 1979 Constitution of Nigeria which would have involved all the arms of government. It was further held that the allegations against the judge must be proved in a court of law and that it was not for a State House of Assembly to attempt to exercise judicial functions by investigating and making a finding of guilt in respect of the powers conferred on them by section 256 notwithstanding section 120 of the Constitution.

36 Roberts J of the Newfoundland Supreme Court held in *Re Judges of the Provincial Court of Newfoundland et al: Newfoundland Association of Provincial Court Judges v Newfoundland* 1998 160 DLR (4th) 337 that the *Public Sector Restraint Act* 1991, the *Public Sector Restraint Act* 1992 and the government's reductions of contributions to the judges' pensions were unconstitutional to the extent that they affected the financial security of the Provincial Court judges without recourse to an independent commission. The government's delegation to officials of the Treasury Board and then outside consultants of the reclassification of the judges' salary on a civil service pay scale was *ultra vires* the procedure established in section 28 of the *Provincial Court Act* 1991, and also violated judicial independence. On the other hand, changes in discretionary sick and paid leave benefits did not violate judicial independence because they did not infringe the essential feature of financial security. The Court made an order of mandamus to issue requiring the government to perform its duty under section 28 of the *Provincial Court Act* 1991 and to implement the report of the judges' salary review commission submitted to the legislature and which had deferred consideration of the same in violation of the financial security guaranteed to judges under section 11(d) of the Charter. To the same effect was sections 28.2(3) and (4) of the amended *Provincial Court Act* 1991 which created the possibility of the provincial government delaying the consideration of the report by proroguing the legislative assembly. The Court of Appeal of Newfoundland in *Newfoundland Association of Provincial Court Judges v Newfoundland* 2000 191 DLR 225 found it unnecessary to consider the constitutionality of the *Public Sector Restraint Act* 1991, but held that the trial judge was correct in concluding that in 1992 the legislature did not comply with the requirement in section 28 of the *Provincial Court Act* 1991 to consider and approve the report. Even if the resolution to defer the report were construed as a positive, substantive decision, it was neither reasonable nor in accord with constitutional principles to say that section 28 permitted the indefinite postponement of a decision to accept or vary

from "arbitrary interference by the Executive in a manner that could affect judicial independence." The third is the "institutional independence with respect to matters that relate directly to the exercise of the tribunal's judicial function ... judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function."[37]

The Court further explained that judicial independence has both an institutional and individual dimension.[38] According to Gonthier J, the individual dimension relates especially to "the person of the judge and involves his or her independence from any other entity." On the other hand, the institutional dimension relates to the court to which the judge belongs and "involves its independence from the executive and legislative branches of the government". The Judge went on to state that the "rules relating to these dimensions result from somewhat different imperatives. Individual independence relates to the purely adjudicative functions of judges — the independence of a court is necessary for a given dispute to be decided in a manner that is just and equitable — whereas institutional independence relates more to the status of the judiciary as an institution that is the guardian of the Constitution and thereby reflects a profound commitment to the constitutional theory of separation of powers. Nevertheless, in each of these dimensions, independence is designed to prevent any undue interference in the judicial decision-making process, which must be based solely on the requirements of law and justice."[39]

the report. A decision having been made, the report was required by section 28(7) to be implemented forthwith. It achieved the force of law on June 1, 1992. The Court held that judges were not immune from the impact of economic measures deemed necessary by a government to properly discharge its responsibilities relative to fiscal economic matters. However, the unique position of the judiciary, special rules applied as to how that could be accomplished. Since the government had chosen a mechanism for determining judicial salaries and benefits that promoted constitutional values, it is bound to comply with the legislative and constitutional standards it had established. The rule of law demanded no less.

37 1985 24 DLR (4th) 161: 180, 184, 187 and 190 respectively. See also *R v Lippe* 1991 2 SCR 114: 132; *R v Genereux* 1992 1 SCR 259: 285-6; 88 DLR (4th) 110; *Ruffo v Conseil de la magistrature* 1995 130 DLR (4th) 1 par 40; *Provincial Court Judges Reference*, note 4 paragraph 115; *Re Therrein* 2001 200 DLR (4th)1: 40 paragraph 64.

38 See also the *Provincial Court Judges Reference*: paragraph 118.

39 *Mackin & Rice v New Brunswick*: 585-6 paragraph 39. The Supreme Court was unanimous in its decision on the broad principles of judicial independence as restated by Gonthier J, namely that: (a) judicial independence was protected by the Preamble to the 1867 Constitution Act as well as section 11(d) of the Charter; (b) the independence of a particular court had both an individual and institutional dimension; and (c) within each of these dimensions, there were three characteristics required to ensure judicial independence — security of tenure, financial security and administrative independence. On the application of these principles to the question at hand, the Court was however split. The majority could not link the Amendment with security of tenure since there was no removal from office as judges who were sitting as supernumeraries retained their security as judges of the Provincial Court following the passage of Bill 7. Again, the possibility that a judge could sit on a supernumerary basis was not such an integral part of the office that its elimination would tantamount to removal from

2.2 South Africa

The Constitutional Court of South Africa took the opportunity of the *Van Rooyen* challenge to lay down basic rules regarding judicial independence and the application of the principles so enunciated to the facts of the case before it. It was held that the constitutional protection of the core values of judicial independence accorded to all courts by the Constitution means that all courts are entitled to and have the basic protection that is required. Section 165(2) of the Constitution pointedly states that the courts are independent. Implicit in this is the recognition that the courts and their structure ought to be independent. This does not mean that particular provisions of legislation governing the structure and functioning of the courts would be immune from constitutional scrutiny. Nor does it mean that lower courts are entitled to have their independence protected in the same way as the higher Courts. The Constitution and the existing legislation kept in force by the Constitution treat higher Courts differently from lower courts.

These differentiations are no doubt implicit in the Constitution and have been articulated by Chaskalson CJ in *Van Rooyen* in these words:

> The jurisdiction of the magistrates' courts is less extensive than that of the higher Courts. Unlike higher Courts they have no inherent power, their jurisdiction is determined by legislation and they have less extensive constitutional jurisdiction.[40] The Constitution also distinguishes between the way Judges are to be appointed and the way magistrates are to be appointed. Judges are appointed on the advice of the Judicial Service Commission;[41] their salaries, allowances and benefits may not be reduced;[42] and the circumstances in which

office. Furthermore, the possibility that a supernumerary judge might be forced to retire because of inability to return to full-time work should not be classified as a removal from office. Rather, this indicated an inability to perform the duties of a Provincial Court Judge. Binnie J (Le Bel J, concurring) dissented, holding that supernumerary status as defined in the legislation before Bill 7 did not constitute an economic benefit protected by the doctrine of judicial independence. The expectation of the supernumerary judges that they would only work 40 percent of the time for 100 percent of the pay of a full-time judge was neither spelled out in the legislation nor put in an otherwise legally enforceable form. The potential advantage of supernumerary status lay either in the discretion of the Chief Judge who was responsible for assigning work to supernumerary judges or in the discretion of the provincial government in its overall budgetary allocation for the Provincial Court and its willingness to appoint new judges. Bill 7's repeal of a potential benefit voluntarily conferred by the legislature could not and did not undermine the institutional independence of provincial judges where the determination of whether there was any benefit in practice was wholly discretionary.

40 Section 170, 1996 Constitution provides that "Magistrates' Courts and all other courts" may exercise jurisdiction in matters determined by an Act of Parliament except that "a court of a status lower than a High Court may not enquire into or rule on the constitutionality of legislation or any conduct of the President."

41 Section 174(6), 1996 Constitution.

42 Section 176(3). On this see the discussion in part two of this paper of the Canadian Judges litigation challenging legislative and executive measures purporting to interfere with judicial salaries and other conditions of service of Judges especially in the *Provincial Court Judges Reference*.

> they may be removed from office are prescribed.[43] In the case of magistrates, there are no comparable provisions in the Constitution itself, nor is there any requirement that an independent commission be appointed to mediate actions taken in regard to such matters.[44]

Whilst particular provisions of existing legislation dealing with magistrates' courts could be examined for inconsistency with the Constitution, the mere fact that they are different from the provisions of the Constitution that protect the independence of Judges is not in itself a reason for holding them to be unconstitutional. In deciding whether a particular court lacked the institutional protection that it requires to enable it operate independently and impartially, it was relevant to have regard to the core protection given to all courts by the Constitution, to the particular functions that such court performs and to its place in the judicial hierarchy. It should be borne in mind that lower courts are entitled to protection by the higher Courts should any threat be made to their independence. Accordingly, the greater the protection given to the higher Courts, the greater was the protection that all courts had.[45]

One of the main goals of institutional judicial independence postulated by section 165(2) of the Constitution is to safeguard the right of the accused

---

43 In terms of section 177(1), a judge may be removed from office only if: (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and (b) the National Assembly calls for the judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members. It is after such a resolution has been passed that the President would remove the judge. By virtue of subsection (3): "The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1)." In view of the fact that the removal of a Judge in a democratic State is a serious matter, these provisions are not to be literally applied or interpreted for, as it will be seen later in this paper ['security of tenure' in part two], strict observance of the rules of natural justice at all stages must be adhered to. Incapacity and misconduct would, in ordinary employment terms, lead to a justifiable and fair dismissal. Gross misconduct is nowhere defined in the Constitution nor in leading law dictionaries. For instance, *Black's Law Dictionary* 1990:999 defines "Misconduct in office" as: "any unlawful behaviour by a public officer in relation to the duties of his office, willful in character. The Term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act." And it has been held that a cumulative case of judicial perversity by a judicial officer tending to lower the dignity of his office such as to constitute an embarrassment to the public could constitute misconduct. See *Anyah v Attorney General, Borno State & Another* 1984 5 NCLR 225 FCA. In the case of a Judge, incapacity and misconduct must be "gross" to justify removal. It means in effect that the incapacity or misconduct contemplated must be so outrageous otherwise, the term 'gross' may border on the superfluous. It is doubtful whether the standard of conduct expected of a Judge need be higher than that of the ordinary public officer, but it is clear that the misconduct must be proved not imagined. Again, the body that must make the finding of guilt must be the body charged with the constitutional responsibility and no one else.

44 2002 5 SA 246 CC: 271 par 28.

45 *Van Rooyen & Others v The State & Others* 2002 5 SA 246 CC: 269E-70D/E paragraphs 22 & 23.

to a fair trial by an independent and impartial court although the institutional independence as a constitutional principle and norm is quite beyond and lay outside the Bill of Rights. It is thus improper to attempt to drag the application of this principle within the reach of the limitation clause inherent in section 36 of the Constitution of which it is not subject.[46] The possibility that the power can be abused does not go to the issue of the constitutionality of that power. In any event, the exercise of constitutional power conferred on any functionary is subject to judicial control.[47]

3. Relation with the doctrine of separation of powers

In most instances where the unconstitutionality of legislation had been challenged on the ground of breach of the doctrine of separation of powers, they are more often than not based on the interference by the legislature of the principle of judicial independence.[49] Invariably, a discussion of the constitutionality

46 Ibid: 273F-H paragraph 35.

47 Ibid: 274F paragraph 37.

48 Emphasizing the independence of the judiciary as an essential attribute of the doctrine of separation of powers and linking it to the well-established by-product of that doctrine to the effect that a judge is not an employee of the State or the Executive, the Supreme Court of India, per Sawant J stated in *All India Judges' Association & Others v Union of India & Others* 1994 4 LRC 115: 121*b/c-d* that: "The judicial service is not service in the sense of 'employment'. The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the state. They are holders of public offices in the same way as the members of the council of ministers and the members of legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the state, what is intended to be conveyed is that the three essential functions of the state are entrusted to the three organs of the state and each one of them in turn represents the authority of the state." See also *Union of India v Pratibha Bonnerjea* 1996 AIR SC 690: 696; *Hannah v Government of the Republic of Namibia* 2000 4 SA 940 NmLC.

49 Although the Constitutional Court rejected the appellant's contention in *Geuking v President, Republic of South Africa & Others* 2003 3 SA 34 paragraphs 44-50, which was linked to breaches of the rights to access to court (section 34) and fair public hearing (section 35(3)) hence in violation of the principle of judicial independence and the doctrine of separation of powers. It was argued that by obliging the magistrate to commit the person concerned in an extradition proceeding without being able to determine the dispute (if one arose) as to whether the conduct alleged constituted criminal conduct in the foreign country, section 10(2) of the *Extradition Act* 67 of 1962 was in breach of these constitutional fundamentals. It was held that an extradition proceeding did not determine the innocence or guilt of the person concerned, hence the party facing extradition was not an accused person for the purposes of the protection under section 35(3). Rather, it was a proceeding aimed at determining whether or not there was reason to remove a person to a foreign State in order to be put on trial there. The hearing before the Magistrate was a step in those proceedings and was focused on the question whether the person concerned was extradictable. The ultimate decision to extradite was a political one to be made by the Minister. Thus, the test for fairness associated with section 35 of the Constitution was inapplicable to the proceedings before the Magistrate under section 10(2) of the Act. It was further held the duty of the Magistrate in the circumstances was to

of legislation on separation of powers ground is to a large extent a discussion of the various regards by which the legislature had sought dexterously or inadvertently to impede the independence of the judiciary. For instance, breaches of the doctrines of separation of powers and the independence of the judiciary have been contested in circumstances where the legislature had sought to:

- regulate the conduct of judicial proceedings;[50] or
- usurp judicial authority by pronouncing a person guilty of an offence without due process or formal trial before a court of law;[51] or
- place bureaucratic and procedural hurdles on the way of the citizen's right of access to the courts;[52] or
- delegate judicial power to the executive branch;[53] or
- establish a court or tribunal not being part of the regular judicial hierarchy and vesting in it judicial power otherwise reserved for the superior courts.[54]

---

determine whether the conduct alleged by the foreign country constituted criminal conduct in South Africa. If, on the other hand, the certificate from the appropriate authority in the foreign State to the effect that the conduct in question warrants prosecution in that State, something which the South African lawyers and judicial officers may not be qualified to decide, that would be sufficient to determine the matter for the purposes of extradition. As to the claim by the appellant that the conclusive nature of the certificate under section 10(2) constituted an invasion of judicial independence and accordingly inconsistent with section 165 of the Constitution, the Court held that the certificate was conclusive in respect of foreign law. The subsection in no way detracted from the independence of the judiciary nor violated the separation of powers, there being no judicial trial or hearing to ascertain innocence or guilt, since "extradition proceedings are sui generis and the Act in essence regulates the exercise of foreign State's power" — per Goldstone J: 38 paragraph 50.

50 *Unongo v Aku* 1983 2 SCNLR 332: 359; *Kadiya v Lar* 1983 2 SCNLR 368: 372 SCN.

51 *Polyukhovich v Commonwealth* 1991 172 CLR 501 HCA: 540; *Uwaifo v Attorney General of Bendel State* 1983 4 NCLR 1 SCN: 36; *Liyanage v The Queen* 1967 AC 259: 289, 291 respectively; *Buckley v Attorney General of Eire* 1950 IR 67.

52 *Moise v Transitional Local Council of Greater Germiston* 2001 8 BCLR 765 CC par 16; *Mohlomi v Minister of Defence* 1997 1 SA 124 CC; *Bakare v Attorney General of the Federation* 1990 5 NWLR (152) 516 SCN.

53 *Waterside Workers Federation of Australia v JW Alenxander Ltd* 1918 25 CLR 434: 442; *Attorney General of Australia v The Queen, Ex parte Boilermakers Society of Australia* 1957 AC 288; *Brandy v Human Rights & Equal Opportunity Commission* 1994 183 CLR 245; *De Lange v Smuts* 1998 3 SA 785 CC.

54 The judgment of Froneman J in *Special Investigating Unit v Ngcinwana & Another* 2001 4 SA 774 ECD abundantly illustrates this ground for attacking legislative erosion of judicial independence by purporting to vest judicial authority in a body which by its composition, competence and procedures does not fit into the judicial hierarchy. Among the anomalies and the many oddities afflicting the legislative creature called the Special Investigating Unit, is that it was "a hybrid mix of all, with characteristics of a criminal, civil and adjudicative nature" which "may not only investigate corruption and maladministration in ways reminiscent of a criminal investigation (sections 4(a), 5 and 6 of the Special

And, in recent times, legislation placing conditions upon which a court could grant bail[55] and the statutory imposition of minimum sentences upon the finding of guilt in certain offences[56] have been challenged as unconstitutional. The Constitutional Court had thrown out both challenges and held that section 51 of the *Criminal Procedure Act* 1977 in no way impinged on the constitutional principle of separation of powers. Indeed, it held in *Dlamini* that what the legislature did was to provide a check list of the potential factors for and against the granting of bail, and in so doing, provided guidelines as to what factors that controlled the granting of bail while leaving to the judge the decision of the extent to which any of the factors for or against bail would weigh in determining the issue. The legislature was thereby not interfering with the exercise of judicial authority since it had acted in proper exercise of its functions including the power and responsibility to afford the judiciary guidance where it felt it was necessary to so provide.[57] The rejection of the constitutionality argument in *Dodo* was based on the reasoning that sentencing *per se* was not the exclusive domain of the judiciary as both the legislature and the executive have a role to play on the question of what sanction should be imposed against what offences. All three organs complement each other in the discharge of this vital governmental function hence there was no merit in the contention that section 51 deprived the High Court of its being "an ordinary court" within the context of section 35(3)(c) of the Constitution.[58]

That the doctrines of separation of powers and the independence of the judiciary are inter-dependent[59] was extensively deliberated upon by the

Investigating Units and Special Tribunals Act 74/1996), but may also institute civil proceedings in a special manner (sections 4(b), 4(c) and 5(5) of the Act). In certain instances it may even adjudicate, albeit only temporarily, in own cause (sections 5(8) of the Act). The last anomaly … relates to the adjudicative instrument established by the Act, the Special Tribunal." Given this setting, the Judge held that the Special Tribunal was not a court of law with judicial authority in terms of the Constitution. This is informed by the fact that: (a) it was not established as a court in terms of sections 165 and 166 of the Constitution notwithstanding that it was vested with judicial authority (sections 2(1)(b) of the Act); (b) its presiding members appointed to the Tribunal (section 7 of the Act) were not judicial officers in terms of section 174 of the Constitution. Accordingly, no leave to appeal should be required against an order of a tribunal which is not a court of law, such right of appeal not emanating from a High Court order or judgment was therefore unrestricted and not subject to leave.

55 *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 7 BCLR 771 CC.

56 *S v Dodo* 2001 5 BCLR 423 CC.

57 1999 7 BCLR 771 CC par 43 per Didcott J.

58 2001 5 BCLR 423 CC par 43.

59 In *Bernstein & Others v Bester & Others NNO* 1996 2 SA 751 CC paragraph 105 while speaking on the provisions of the 1993 Constitution the court made the following pertinent observation: "When section 22 is read with section 96(2), which provides that '(t)he judiciary shall be independent, impartial and subject only to this Constitution and the law', the purpose of section 22 seems to be clear. It is to emphasize and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the Judiciary from the other arms of the State. Section 22 achieves this by

Constitutional Court in *South African Association of Personal Injury Lawyers v Hendrik Willem Heath & Others*.[60] The Court was dealing with the constitutionality of a law that established a Special Investigating Unit (SIU) vested with the power to investigate the criminal conduct, serious maladministration and a host of other forms of improprieties by government departments and public officials. The challenge was based on the fact that the head of the Investigating Unit was a Judge of the High Court who, in terms of the Act, was clearly under the control of the President who formulated what the Unit had to investigate. The Judge, as head of the unit, must report to the President from time to time. These statutory provisions raised the question of the apparent interference by the legislation of the independence of the judicial head of the unit and the consequent breach of the doctrine of separation of powers.

In reversing the trial Judge and holding that both principles were provided for in the Constitution of South Africa and that they were both infringed by the impugned Act, the Court held that:

- The functions of the SIU were far removed from 'he central mission of the judiciary'. The nature of the investigations which were determined by the President, the inextricable link between the Unit as an investigator and litigant, the indefinite nature of the appointment which precluded the head of the unit from performing his judicial functions were all factors that rendered the appointment of the judge incompatible with the judicial office and contrary to the separation of powers required by the Constitution.
- Under the Constitution, the judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the bill of rights. It is thus important that the judiciary be independent and should be seen to be so. It is inimical to the principle of the independence of the judiciary for judges to be appointed for indefinite terms to executive posts or to perform other executive functions not appropriate to the 'central mission of the judiciary'. The contrary would undermine the separation of powers and the independence of the judiciary, crucial for the proper discharge of functions assigned to the judiciary by the Constitution and fundamental to the constitutional order.
- Section 3(1) of the contentious *Special Investigating Units and Special Tribunals Act* 74 of 1996 and the Proclamation appointing Judge Heath to what was clearly an executive trouble-shooting post were therefore unconstitutional and invalid.[61] By assigning to a member of the Judiciary functions close to the 'heartland' of executive power, the legislature clearly intruded into the judicial domain.[62]

---

ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional State, the 'regstaatidee'…."

60 2001 1 SA 883 CC esp. paragraphs 45 & 46.

61 Ibid: 898E-F paragraph 24.

62 One of the questions before the Federal Court of Australia in *North Australian Aboriginal Legal Aid Service Inc v Bradley & Another* 2002 192 ALR 701:724-729

The Court's decision was premised on the doctrine of separation of powers as it intersects with the principle of judicial independence. And the rationale behind that conclusion could be read through the following paragraphs of the Court's judgment. Chaskalson P (as he then was) stated that:

> The separation of the Judiciary from the other branches of government is an important aspect of separation of powers required by the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws made, but have no law-making power other than that vested in them by the legislatures. Although Parliament has a wide power to delegate legislative authority to the Executive, there are limits to that power. Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.

The Court went on:

> The separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined. The Constitution recognizes this and imposes a positive obligation on the State to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour of prejudice. No organ of State or other person may interfere with the functioning of the courts and all organs of State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.[63]

The argument in *Mhlekwa v Head of the Western Tembuland Regional Authority & Another*; *Feni v Head of the Western Tembuland Regional Authority & Another* [64] was that the fusion of functions of regional authority courts whereby the chiefs, as presiding judicial officers, also performed other

paragraphs 102-133 was whether the principle that courts exercising federal jurisdiction cannot be invested with functions or powers which are incompatible with their exercise of the judicial power of the Commonwealth otherwise known as the principle in *Kable v Director of Public Prosecutions* 1996 189 CLR 51, would apply to courts established by the Legislative Assembly of the Northern Territory. It was held, per Black CJ & Hely J, upholding the primary Judge, Weinberg J [2002 192 ALR 625], that the *Kable* principle flowing by implication from Ch III of the Constitution was inapplicable to territory courts. See further: *Spratt v Hermes* (1965) 114 CLR 226; *Capital TV & Appliances Pty Ltd v Falconer* 1970 125 CLR 591; *Re Governor, Goulburn Correctional Centre: Ex parte Eastman* 1999 200 CLR 322.

63 *SAAPIL v Heath* 2001: 898F-899D paragraphs 24-26.

64 2001 1 SA 574 TkD.

tasks that fell within the exercise of executive power impeded judicial independence as it interfered with the constitutional principle of separation of powers. The Court rejected this submission and held that the fact that the fusion of judicial and administrative tasks of a chief or head of a regional authority as provided for in the *Transkei Regional Authority Court Act* 1982, did not of necessity denote an absence of judicial independence neither would it ordinarily disqualify such a person from being appointed a judicial officer. Van Zyl J was not in doubt as to whether besides judicial work, magistrates, attended to a whole list of administrative tasks that fall within the exercise of executive power. However, he held that there is no general or entrenched separation of powers as the Constitution had made no provision to the effect that each branch of government exercises only 'its own function'. Again, section 165(2) of the Constitution does not "constitute a prohibition against the appointment of chiefs or the head of a traditional authority as a judicial officer simply by reason of the fact that they also perform other functions. That was acknowledged by the Constitutional Court in *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* [65] … where the Court observed that 'judicial officers may, from time to time, carry out administrative tasks'. What is essential to the independence of a Judiciary is that it should enforce the law impartially and that it should function independently of the Legislature and the Executive."[66]

4. Test for determining judicial independence

The meaning and relationship between independence and impartiality[67] both of which are separate but distinct values or requirements was further explained in *Valente* where the question was whether, in the light of the control exercised by the Executive, a judge of the Ontario Provincial Court (Criminal Division) was an independent tribunal.

Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case.[68] The word 'impartial' ...

65 2000 1 SA 1: 67A-C; 1999 10 BCLR 1059: 1119 paragraph 141 CC.

66 2000 2 SACR 596 TkD: 638h/i-639a-c/d. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 1996 4 SA 744 CC: 814 paragraph 123.

67 See Okpaluba (2002 part I) 303:328-330.

68 The requirement of rigid impartiality on the part of professional judges and those others who may be called upon to sit in judgment over others requires them to, at all times, exercise a detached attitude towards the facts before them. But that judges should be neutral in cases before them since they act as umpires in such proceedings imposes upon them, among other things, the duty not to descend into the arena of conflict — *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 2 SA 565 A: 570E; *Moch v Nedtravel (Pty) Ltd t/a American Express Travel service* 1996 3 SA 1 A: 14E. A judge would be said to descend into the arena where he/she asks too many questions or literally takes over the proceedings — *Jones v National Coal Board* 1957 2 QB 55; *Okoduwa & Others v The State* 1988 2 NWLR 333; *Onuoha v The State* 1989 2 SCNJ 225; or makes disparaging remarks: *Moreau-Berube v New Brunswick*

connotes absence of bias, actual or perceived.[69] The word 'independence' in section 11(d)[of the Charter] reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions,

---

2001 194 DLR (4th) 664 NBCA; *Benedict v Ontario* 2001 193 DLR 329; *Mitsui & Co v Jones Power Co* 2001 202 DLR (4th) 499 NSCA — thus raising the issue of "absolute neutrality". See the Australian Law Reform Commission Report No 69 Part II paragraphs 330-3; Douglas & Jones 1999:635-7; Aranson & Dyer 1996:587-97. In restating the requirement of impartiality in the judicial process in *South African Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 21 ILJ 1583 CC, Cameron AJ (now JA) adverted to the problem of attaining "absolute neutrality", which is "something of a chimera in the judicial context" because judges are human. "They are unavoidably the product of their own life experiences, and the perspectives thus derived inevitably and distinctively informs each judge's performance of his or her judicial duties." However, "absolute neutrality" must be contrasted with "colourless neutrality" [See also *R v S* (RD) 1997 118 CCC (3d) 353 SCC paragraphs 35-84; *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* (2) 1999 4 SA 147; (7) BCLR 725 paragraphs 74-5] — which is the opposite of judicial impartiality. Otherwise, impartiality "is that quality of open-minded readiness to persuasion — without unfitting adherence to either party, or the judge's own predictions, preconceptions and personal views — that is the keystone of a civilized system of adjudication. Impartiality requires in short 'a mind open to persuasion by the evidence and submissions of counsel' — *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* (2): 753 paragraph 48; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding" — 2000 21 ILJ 1583: 1588 paragraph 13. The rule against bias is one of the essential components of the common law rules of natural justice and thus a ground of judicial review in administrative law — Section 6(2)(a)(iii), *Promotion of Administrative Justice Act* 3 of 2000. Certainly, it is an integral part of the duty to act fairly within the contemplation of article 18 — the administrative justice clause — of the Namibian Constitution. It was held in *Hindjou v The Government of the Republic Of Namibia (Receiver of Revenue) & Another* 1997 NR 112 SC that the appellant's claim that the procedure adopted for assessing tax liability and collection of taxes under section 83(1) of the *Income Tax Act* 24 of 1981 was not a determination within the contemplation of article 12(1)(a) of the Constitution and had nothing to do with the right to a fair trial before an independent, impartial and independent and competent court or tribunal. Thus the opportunity to be tried by an impartial and independent court within the meaning of article 78 of the Constitution did not arise.

69 The jurisprudence that has developed out of the principle of impartiality is such that actual bias on the part of the judge is not necessary since the appearance of bias or a reasonable apprehension of it, is enough. Hence, "where the impartiality of a judge is in question the appearance of the matter is just as important as the reality" — *R v Bow Street Stipendiary Magistrates Court, In Re Pinochet [No2]* 1999 1 All ER 577: 592h per Lord Nolan. The long accepted axiom is that "justice must not only be done but must manifestly and undoubtedly be seen to be done" — Lord Hewart CJ, *R v Sussex JJ ex parte McCarthy* 1924 1 KB 256: 259. The requirement of impartiality as a fundamental prerequisite of any fair and just legal system; an absolute requirement in every judicial proceeding, is based on the confidence which the litigant and the general public must of essence repose in the judicial system and "nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the

but a status or relationship to others, particularly the Executive branch of government that rests on objective conditions or guarantees.[70]

So, the legal aphorism that justice must be administered without fear, favour or prejudice, rests on the delicate balance between the two pillars; on the one hand, the independence of the judiciary as an institution from the other arms of government, and on the other, the requirement of impartiality of the judge in the adjudicatory process.[71] As the European Court for Human Rights put it in *Findlay v UK*,[72] "… in order to establish whether a tribunal can be considered as 'independent', regard must be had *inter alia* to the

---

general public, than actual bias or the appearance of bias in the officials who have the power to adjudicate on disputes" — *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* (2) 1999 4 SA 147; 1999 7 BCLR 725 CC paragraph 35; *S v Roberts* 1999 4 SA 915 SCA; *Moch v Medtravel (Pty) Ltd t/a American Express Travel Service* 1996 3 SA 673 A; *R v Gough* 1993 2 All ER 724. What is absolute is the requirement for it is not humanly possible to attain "absolute impartiality" given the fact that judges are, after all, human — *Sager v Smith* 2001 3 SA 915 SCA paragraph 16. Nor would the inference of bias on the part of the members of a tribunal be easily drawn, for instance, the failure by an administrative tribunal to observe the rules of natural justice could stem not from a reasonable apprehension of bias but from the agency's lack of understanding of administrative law or its members' inexperience — *Commissioner, Competition Commission v General Council of the Bar of South Africa & Others* 2002 6 SA 606 SCA: 618 paragraph 16.

70 1985 24 DLR (4th) 161: 169-170.

71 The border line between judicial independence per se and impartiality of a court is sometimes blurred by the use of such terms as "objective impartiality". For instance, The question of independence or 'objective impartiality' of temporary sheriffs, legal practitioners appointed for a term of one year to supplement the work of permanent sheriffs in the sheriff court in Scotland was raised in *Starrs v Procurator Fiscal* 2000 1 LRC 718. It was held that the objective impartiality of these practicing attorneys and advocates who doubled as temporary judges was not necessarily seen to be compromised by the combination of their part-time judicial activities with their continuing legal practice as advocates or solicitors. The only guarantees that a temporary sheriff would avoid would be conflicts of interest arising from that combination were his oath and, in the case of a solicitor, the rule that he would not be allocated to a court in which her or his firm practiced. The avoidance of conflicts of interest depended on the judicial oath and the integrity of individual sheriff. Generally, judicial oath on itself and the unenforceable traditions were inadequate safeguards. Although what the position would be in civil matters was one of doubt but in the present case, a criminal matter, it was difficult to see how legitimate doubts as to the objective impartiality, or independence from procurator fiscal, of a temporary sheriff could arise from the temporary sheriff being in private practice [ibid at 775*a-e*]. In spite of the differences between the statutory scheme deliberated upon by the Supreme Court of Canada in *R v Lippe* 1991 64 CCC (3d) 513, where the question was whether the part-time municipal court judges who maintained their law practices thereby lacked judicial independence, the Scottish Court adopted the reasoning of Lamer CJC and Proulx JA and upheld the view that there was no basis for holding that by being in private legal practice temporary sheriffs arrangement would have compromised institutional independence notwithstanding the absence of a regulatory framework as in the Canadian case.

72 1997 24 EHRR 221: 244-5 paragraph 73.

matter of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect." Independence, therefore, is the necessary precondition to impartiality. It is a *sine qua non* for attaining the objective of impartiality.[73] Both concepts are essential to a proper discharge of judicial functions.[74]

In order to establish whether a court is structured in such a manner as to ensure its independence structurally or whether a trial would be conducted or was conducted in an atmosphere that will reinforce the impartiality of the judge, the test enunciated and adopted by the High Court of Australia,[75] the

73 Per Vertes J in *Reference re: Territorial Court Act (NWT), section 6(2)* 1997 152 DLR (4th) 132: 146. A defect in a law establishing jury service was held in *Rojas v Berilaque* 2002 4 LRC 464 to be capable of rendering a court, in the event of a jury trial not an impartial court. Schofield CJ held that a law that restricted the female gender from participating in the jury service with equal opportunity as their male counterparts and which would expose a female complainant to an all-male trial in a domestic violence claim was unconstitutional in the light of public perception of the lack of impartiality of the jury system thus offending the applicant's right to an independent and impartial court in accordance with section 8(8) of the Constitution of Gibraltar 1969.

74 *Union of India v Pratibha Bonnerjea* 1996 AIR SC 690: 696. In Australia, the requirement that a judge disqualifies his/herself on occasions is based on the concept that courts must act impartially and must be seen to act impartially, this being a precept of the common law as well as a requirement of Ch III of the Constitution — an attribute of judicial power. Thus, "impartiality and the appearance of impartiality are so fundamental to the judicial process that they are defining features of judicial power" and further, "Ch III of the Constitution operates to guarantee impartiality and the appearance of impartiality throughout the Australian Court system." That notwithstanding, the Australian High Court had rejected the automatic disqualification of a judge on the ground of substantial financial interest in a public company where the company concerned was not a party to the litigation or has interest in its outcome, it admitted in *Ebner v Official Trustee in Bankruptcy* 2000 205 CLR 337, that "bias" whether actual or apprehended may not be adequate to cover all cases of absence of independence. The majority of the Court held that a failure to disclose such interests or associations would be relevant where it might throw an evidential light on the ultimate question of reasonable apprehension of bias since: "… the fundamental principle to which effect is given by disqualification of a judge is the necessity for an independent and impartial tribunal. Concepts of independence and impartiality overlap, but they are not co-extensive. In order to maintain both the reality and the appearance of independence, as well as impartiality, there must be a prohibition upon a judge sitting in a case to which he or she is a party, and that would include a case where one of the parties on the record is a nominee or alter ego of the judge." [Ibid at 358 par 60 per Gleeson CJ, McHugh, Gummow & Hayne JJ].

75 In *Ebner v Official Trustee in Bankruptcy* 2000 205 CLR 337, the majority of the Australian High Court held that the apprehension of bias principle was to be applied to all cases in which it was suggested that, by reason of interest, conduct, association, extraneous information or some other circumstances, a judge might

Supreme Court of Canada,[76] the European Court of Human Rights[77] and the Constitutional Court of South Africa[78] is the common law objective test.[79] In the often-quoted speech of De Lain J in *Valente*, it was stated that:

---

not bring an impartial mind to the resolution of the question he/she was required to decide. In laying down the test of reasonable observer in *Livesey v New South Wales Bar Association* 1983 151 CLR 288: 299, the High Court had stated: "What is in issue in the present case is the appearance and not the actuality of bias by reason of prejudgment. The reasonable observer is to be presumed to approach the matter on the basis that ordinarily a judge will so act as to ensure both the appearance and the substance of fairness and impartiality. But the reasonable observer is not presumed to reject the possibility of prejudgment or bias; nor is the reasonable observer presumed to have any personal knowledge of the character or ability of the members of the relevant court." The Court was dealing with a submission on behalf of the association to the effect that a reasonable observer would be aware of the ability of any judge of the Court of Appeal to put from his mind evidence heard and findings made in a previous case and to decide the case at bar impartially and fairly on the evidence led in that particular case. Between *Livesey* and *Ebner*, the reasonable apprehension of bias test was applied in: *Re JRL*; *Ex parte CJL* 1986 161 CLR 342; *Vakauta v Kelly* 1989 167 CLR 568; *Grassby v The Queen* 1989 168 CLR 1; *Webb v The Queen* 1994 181 CLR 41; *Johnson v Johnson* 2000 201 CLR 488.

76 Per Howland CJ (Ontario) in *R v Valente (No 2)* 1983 2 CCC (3d) 417: 430-440; per Granpre J *Committee for Justice & Liberty v National Energy Board* 1978 1 SCR 369: 394; per Le Dain J in *Valente v The Queen* 1985 2 SCR 673: 706; per Lamer CJ, *The Provincial Court Judges Reference*: 630 paragraph 113. For instance, Gonthier J held in the *Supernumerary Judges* case 2002 209 DLR (4th) 564: 591 paragraph 59 that "reductions in the salaries of judges must not result in lowering these below the minimum required by the office of judge. Public trust in the independence of the judiciary would be weakened if salaries paid to judges were so low that they led people to think that judges were vulnerable to political or other pressures through financial manipulation."

77 *Findlay v United Kingdom* 1997 24 EHRR 221 paragraph 73.

78 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others (2)* 1999 4 SA 147; 1999 7 BCLR 725 CC paragraph 35; *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 21 *ILJ* 1583 CC. This objective test translates into a two-fold requirement of reasonableness — the reasonable apprehension of a reasonable person — and, in practical terms, it means that mere apprehension or strongly and honestly felt anxiety is not enough. See also *Sager v Smith* 2001 3 SA 915 SCA paragraphs 14 & 16.

79 Apart from *R v Bow Street Stipendiary Magistrates Court, In Re Pinochet [No2]* 1999 1 All ER 577 where the House of Lords restated the reasonable apprehension of bias test, the Court of Appeal has recently spoken in a somewhat different tone in *Locabail (UK) Ltd v Bayfield Properties Ltd* 2000 QB 451: 475 of the "most effective protection of the right [to a fair hearing before an impartial tribunal] is in practice afforded by a rule which provides for the disqualification of a judge, and setting aside of a decision, if on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias." Cf that famous passage from the judgment of Lucas J in *Rose v Johannesburg Local Road Transportation Board* 1947 4 SA 272 W: 287 to the effect that: "The right of everyone to equal justice before the law … requires that every party … should be entitled to what must appear to be a fair, impartial and unbiased consideration of his case…. A reasonable man …would be entitled to think that the facts … justified the applicant in thinking that he would be in danger of not getting justice from the Board."

> Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.[80]

The test referred to in *Valente* was originally enunciated in *Committee for Justice & Liberty et al v National Energy Board* [81] as follows:

> The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons,[82] applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal … that test is 'what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly'?

Persuaded by Canadian case law, the Constitutional Court of South Africa, applied and formulated the reasonable apprehension test while dealing with an application that its members recuse themselves from the *SARFU(2)* case on the ground of previous political and other flimsy-type associations of the judges with the President, the appellant, including allegations of lack of impartiality arising from the fact that the judges were themselves appointed by the President.[83] The relevant speech of Chaskalson P which has been adopted in testing the impartiality of the adjudicator in recusal applications and other allegations of apprehension of bias is to the effect that: "the question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submission of counsel."[84]

---

80 1986 24 DLR (4th) 161: 172. See also per Ackermann J in *De Lange v Smut NO & Others* 1998 3 SA 785 CC: 814F.

81 1978 68 DLR (3d) 716: 735. See also *R v S (RD)* 1997 157 DLR (4th) 193 paragraphs 11, 31 & 111; *Baker v Canada (Minister of Citizenship & Immigration)* 1999 174 DLR (4th) 193 paragraphs 46-47; *Halfway River First Nation v British Columbia (Ministry of Forests)* 2000 178 DLR 666 BCCA: 696 paragraph 67; *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)* 1992 89 DLR (4th) 289.

82 The expression used by the Ontario Court of Appeal in *Reference Re Justices of the Peace Act: In Re Currie & Niagara Escarpment Commission* 1985 14 DLR (4th) 651: 666 was "informed, reasonable and fair-minded observer".

83 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others (2)* 1999 4 SA 147; 1999 7 BCLR 725 CC. See also per Pickering J in *Wildlife Society of SA & Others v Minister of Environment* 1996 3 SA 1095 Tk: 1104B.

84 Ibid paragraph 48. See further per Cameron AJ in *SACCAWU v Irvin & Johnson Ltd* 2000 3 SA 705 CC: 713F-715G paragraphs 11-17; *Sager v Smith* 2001 3 SA 1004 SCA. This approach signaled the disappearance of the earlier tests, such

In the *Van Rooyen* challenge, the Constitutional Court applied the test it had earlier approved in *SARFU (2)*. It was held that in deciding whether a court was to be perceived to be independent and capable of functioning impartially, the appropriate test was that of the perception of a reasonable person, a perception based on a balanced view of all the material information, an objective test properly contextualised. Put simply, it is the question as to how things appeared to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical and suspicious person.[85] According to Chaskalson CJ: "[b]earing in mind the diversity of our society this cautionary injunction is of particular importance in assessing institutional independence. The well-informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts."[86] Thus, "a properly contextualised objective test is the test to be applied in the present case".[87] It is important to note that it was this same test that the trial Judge applied in the court below and yet both Courts came to completely opposing conclusions on the issue of the constitutionality of the legislative scheme.[89]

as: "real and substantial likelihood" — *S v Bam* 1972 4 SA 41 A; "real likelihood of bias" — *Barnard v Jockey Club of South Africa* 1984 2 SA 35 W; "suspicion of bias" — *Monnig & Others v Council of Review & Others* 1989 4 SA 866 C; "reasonable suspicion of bias" as was favoured by Howie JA in *S v Roberts* 1999 4 SA 915 SCA: 924E-925A-H paragraphs 32-35 especially paragraphs 36 & 37; *BTR Industries South Africa (Pty) Ltd & Others v Metal & Allied Workers' Union & Another* 1992 3 SA 673 A.

85 See the American case of *US v Jordan* 49 F 3d 152: 156 5th Cir 1995; *Re Mason* 916 F 2d 384: 386 7th Circuit 1990.

86 2002 5 SA 246 CC: 273B-C paragraph 34.

87 Ibid: 273E/F paragraph 35.

88 2001 4 SA 396 T: 433E-G.

89 See also *Van Rooyen v De Kock* 2003 2 SA 317 TPD; 323 paragraph 12.3 where, in considering whether the appointment of a magistrate who had tried and convicted the appellant for housebreaking was properly appointed as a judicial officer, Bosielo J for the Transvaal Provincial Division, held that the appointment fell foul of section 165(2) and (3) of the Constitution for it "manifestly" did not "engender any individual or public confidence in the administration of justice" as "objective, right-thinking and reasonable members of society would perceive first respondent to be a public servant who may be influenced advertently or inadvertently, perceptibly or imperceptibly, by some extraneous factors to pass judgment intended to please his master for the sole purpose of safeguarding his position."

5. Application of the principle of judicial independence to specific legislative schemes

There is no doubt that issues concerning appointment, conditions of service, promotions, removal from office or impeachment to a substantial extent go to the individual independence of a judge, they relate to the appointee personally but because they are also of institutional import — these are matters regulated or ought to be regulated by legislation and statutory instrument(s)[90] — they are treated, and rightly so, under institutional independence. That apart, there is a problem of categorization in the analysis of the case law in the sense that in most of the cases, issues of security of tenure arise with the same intensity as financial security and administrative independence of judges are questioned. In the present context, it is intended to discuss the issues from the point of view of the legislative schemes that have been challenged, as against the nature of the complaints, hence the analysis begins with the consideration of the constitutionality of the law vesting administrative agencies with judicial authority, the constitutional validity of the establishment of regional authority courts and the court martial and vesting in them criminal jurisdiction. The next is the examination of the comprehensive challenge of the Regional Magistrate Courts' structure in the *Van Rooyen* case and the discussion of the techniques of interpretation adopted by the Constitutional Court in evaluating the various issues of constitutionality raised thereby.

5.1 Administrative agency vested with judicial authority

Apart from the *Van Rooyen* challenge where the structural independence of regional magistrates courts were contested, the Courts in South Africa have had occasion to deliberate upon the constitutional principle of judicial independence on several planes since the coming of constitutional democracy. The question has arisen as to whether the statute vesting what is, in pith and substance, judicial authority in administrative agencies have safeguarded their independence in such a manner that the public officers concerned would have been placed in a position to dispense justice without favour or prejudice. So, too, have been questions as to the constitutionality of the structure of the court martial whose membership were laymen and the regional authority courts presided over by traditional chiefs both "courts" having been vested with criminal jurisdiction. The crux of the matter is whether the institution in question could appropriately be described as an "ordinary court" as envisaged by section 35(3)(c) or, at least qualifies as

90 As Sawant J put it in *All India Judges' Association & Others v Union of India & Others* 1994 4 LRC 115: 121: "Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. It is trite that those who are in want cannot be free. Self-reliance is the foundation of independence. The society has a stake in ensuring the independence of the judiciary and no price is too heavy to secure it. To keep the judges in want of essential accoutrements and thus to impede them in the proper discharge of their duties, is to impair and whittle away justice itself."

"another independent and impartial tribunal or forum" within the context of section 34 of the 1996 Constitution and, if so, whether it is independent within the meaning of that expression in section 165.

The question before the Constitutional Court in *De Lange v Lane NO* [91] where an administrative agency was vested with judicial authority was the constitutionality of section 66(3) of the *Insolvency Act* 24 of 1936 which had empowered a presiding officer to imprison an uncooperative witness in an enquiry convened under section 65 of the Act. It was held that the power to imprison such a witness unjustifiably infringed the procedural aspects of section 12(1) of the Constitution because a presiding officer other than a magistrate was empowered to deprive a person of his freedom. In effect, officers in the public service who were answerable to higher officials in the executive branch do not enjoy the independence of the judiciary and therefore could not, without danger to liberty, commit to prison witnesses who refuse to cooperate in a creditors' meeting held under section 65 of the Insolvency Act. Ackermann J held that:

> Section 35(3)(c) of the 1996 Constitution unambiguously limits the adjudication of criminal offences to an 'ordinary court'. This must be kept in mind in construing the phrase 'when appropriate', which qualifies the permissibility in section 34 of the Constitution of allowing the resolution of a dispute in a hearing before 'another independent and impartial tribunal'. These provisions and their interrelationship are not fortuitous, but rather, I am convinced, a deliberate constitutional reaction to the recent history in this country regarding detentions and deprivations of physical liberty and are aimed at affording the individual greater constitutional protection. Although committal to prison under section 66(3) is not incarceration following upon a criminal conviction, it is, from the perspective of the persons deprived of their freedom, analogous. Accordingly, when considering whether it is 'appropriate' under section 34 for 'another independent and impartial tribunal'[93] to commit a person to prison under section 66(3), it strengthens the conclusion that this would only be appropriate where

---

91 1998 3 SA 785 CC.

92 As to the argument of lack of independence of the Independent Electoral Commission established in terms of the *Electoral Commission Act* 51/1996 in the discharge of its functions under the *Electoral Act* 73/1998, see *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 3 SA 191 CC: 232-3 paragraph 106. On the independence of institutions other than the judicial organ established by the Constitution, see Ackermann 1999:91, 93.

93 It would appear from this provision that legislation could create an administrative body or agency and clothe it with authority to decide disputes insofar as it safeguards its independence and impartiality. The question which arose in *Financial Services Board & Another v Pepkor Pension Fund & Another* 1998 11 BCLR 1425 C was whether having rejected the applicant's application for the amendment of its pension fund rules, a member of the respondent Board could be part of the hearing by an appeal Board constituted by section 26(1) of the *Financial Services Board Act* 97/1990. It was contended that the Appeal Board composed in accordance with section 26(1) of the Act would not appear to be structurally independent of the first applicant, the Registrar and CEO of the

> such tribunal is constituted, or presided over, by a judicial officer of the court structure established by the 1996 Constitution and in which section 165(1) has vested the judicial authority of the Republic.[94]

Contemporary constitutional jurisprudence is replete with cases where the Courts in the Commonwealth including the Privy Council have struck down legislation purporting to establish courts or tribunals not within the regular court hierarchy and vesting in them such powers that were reserved for the superior courts. Such legislative schemes have been struck down as violating the principles of separation of powers and judicial independence.

Board, since by virtue of the subsection, one of the members of the Appeal Board will come from the Board and would have connection with the first applicant. Conradie J declared that the presence of a member of the Board did not taint the structure or composition of the Appeal Board, which was, for all intents and purposes, an independent tribunal envisaged by section 34 of the Constitution hence section 26(1) of the Financial Services Board was not constitutionally objectionable. Admitting that the degrees of independence of tribunals do vary for it is not every tribunal that is independent as a court of law is expected to be and applying the test that the overall objective of guaranteeing judicial independence was to ensure a reasonable perception of impartiality in this enquiry involving apprehension of bias on an institutional level, the trial judge posed the question whether: "a substantial number of reasonable and informed users of the Appeal Board would think that there was a risk of partial decisions being made because of the member's connection with the Board and the Board's relationship with the Registrar. In assessing the reaction of the reasonable and informed user of the Appeal Board, I bear in mind that the composition of the Board is quite clearly designed to draw together in one tribunal the expertise of a lawyer, an accountant and auditor and someone with knowledge of the practical application of several esoteric acts dealing with complex financial matters…. The philosophy behind the composition of the Appeal Board does not differ from that underlying the composition of other expert tribunals. There is nothing offensive about appointing to the Appeal Board someone who is sensitive to the broad policy concerns of the Board." (at 1431-32).

94 1998 3 SA 785 CC: 815 paragraph 74. Once it is established that the institution or agency in question is neither a court nor a tribunal within either section 34 or section 35, such institution or agency would not be expected to be bound by the rules of evidence and procedure applicable in a court of law. The agency may adopt its own procedure, obtain evidence in a manner it deems fit including admitting hearsay evidence. However, such institution or agency is bound, at all times it has to decide anything concerning the rights of others, by the duty to act fairly, to observe the common law rules of natural justice, to comply with the requirements of procedural fairness contemplated by section 33 of the Constitution in conjunction with section 3 of the *Promotion of Administrative Justice Act* 3/2000. See for example *Bongoza v Minister of Correctional Services & Others* 2003 6 SA 330 (Tk HC) paragraphs 20-25; *De Beer NO v North-Central Local Council & South-Central Local Council & Others (Umhlatuzana Civic Association Intervening)* 2002 1 SA 429 CC paragraphs 11-12; *Chairman, Board on Tariffs & Trade & Others v Brenco Inc & Others* 2001 4 SA 511 SCA; *Du Preez & Another v Truth & Reconciliation Commission* 1997 3 SA 204 A: 233C-F. Cf a situation where the tribunal is a tribunal of record such as that established in terms of section 26(1)(c) of the *Competition Act* 89/1998 and see per Schutz JA in *Simelane & Others NNO v Seven-Eleven Corporation SA (Pty) Ltd & Another* 2003 3 SA 64 SCA: 72 paragraph 13.

The Courts have held that it is impermissible to merge judicial and executive powers in one body.[95] Similarly, where the method of appointment of the purported judicial officers would not have complied with the constitutional procedure nor their tenure be secured through recognized processes of removal of judges, the legislation would be declared unconstitutional. Speaking in the Jamaican Gun Court challenge, Lord Diplock formulating the critical questions to be posed in such situations said: "What is the nature of the jurisdiction to be exercised by the judges who are to compose the court to which the new label is attached? Does the method of their appointment and the security of tenure conform to the requirement of the Constitution applicable to judges who at the time the Constitution came into force, exercised jurisdiction of that nature?[96] Again, speaking in an earlier case from Canada, Lord Simonds said: "If the appellant board is a court analogous to a superior and other courts mentioned in section 96 of the *British North America Act*, its members must not only be appointed by the Governor-General but must be chosen from the Bar of Saskatchewan."[97] At the same time, the fact that a tribunal established is basically administrative in nature does not *per se* render it unconstitutional because it is vested with some judicial power designed for the implementation of the administrative policy. What is crucial to this enquiry is the nature of the jurisdiction so vested.[98]

5.2 Court martial[99]

The constitutionality of the structural arrangement of a court martial whereby the convening authority had the power to order that proceedings of a court martial convened to hear and determine charges against soldiers be held in camera was one of the issues raised in *Freedom of Expression Institute & Others v President, Ordinary Court Martial & Others*.[100] The provisions of the *Military Discipline Code* being the First Schedule to the *Defence Act* 44/1957 were also challenged in that they prohibited the prosecutor from withdrawing charges or accepting a plea of guilty without the consent of the convening authority; provided that neither the prosecutor nor members of the ordinary court martial need be legally trained. Although

---

95 *R v Kirby, Ex parte Boilermakers' ,Society of Australia* 1956 94 CLR 254.

96 *Hinds & Others v The Queen* 1976 1 All ER 353 PC: 361.

97 *Saskatchewan Labour Relations Board v John East Iron Works Ltd* 1949 AC 134.

98 *Toronto Corporation v York Corporation* 1938 AC 415; *United Engineering Workers Union v Devanayagan* 1967 2 All ER 367.

99 It is important to note that the issue in *Minister of Defence v Potsane & Another; Legal Soldier (Pty) Ltd & Others v Minister of Defence & Others* 2001 11 BCLR 1137 CC was whether the provisions of the *Military Discipline Supplementary Measures Act* 16/1999 which confer authority on military prosecutors to institute and conduct prosecutions in military courts was not unconstitutional in the light of the provisions of section 179 of the Constitution which vest the power to prosecute in the National Director of Public Prosecutions. Again, the question in *Commander of Lesotho Defence Force & Others v Rantuba & Others* 2001 7 BCLR 742 Les.CA was whether an arrested person awaiting trial before a military court has a right to seek legal advice.

100 1999 2 SA 471 CPD.

the Court pointed out that there are degrees of independence of courts and tribunals such that it is not every tribunal that can be as completely independent as a court of law is expected to be since the independence of courts of law and of administrative bodies cannot be measured by the same standard,[101] it nonetheless held aspects of the Military Code to be in violation of the constitutional right to a fair trial by an independent court or tribunal.

First, it was held that to the extent that the proceedings of an ordinary court martial be held in camera, thereby inviting arbitrary interference by an executive official with the due process of the ordinary court martial, it was unconstitutional in that not only did it violate the right to a fair trial, which included the right to a public trial before an ordinary court, protected by section 35(3)(c) as well as section 34 of the Constitution which also guaranteed everyone the right to have any dispute decided in a fair public hearing before a court, or where appropriate, another independent and impartial forum or tribunal. In the words of Hlophe ADJP (now JP),[102] "[n]o democratic society will tolerate a system whereby the executive is given the power to interfere with the judicial process in any court, thereby tainting its independence. It is untenable to entrust power in the convening authority to make such an order. No reason is advanced in any of the affidavits filed on behalf of the respondents as to why these powers are necessary to ensure that justice is properly administered. The present case is a perfect example of why the provisions of the said section do not accord with the norms of a civilized society."[103]

101 Ibid at 483 par 24. See also *R v Valente* 1985 24 DLR (4th) 161: 175-6; *R v Genereux* 1992 88 DLR (4th) 110: 130; *Financial Services Board & Another v Pepkor Pension Fund & Another* 1999 1 SA 167 C: 174F-G.

102 Ibid: 477I-J-478A.

103 In Lesotho, a court martial is expressly vested with judicial power under section 118(1)(c) of the Constitution and by virtue of subsection (2), it, like all the other courts listed in subsection (1), is obliged to perform its functions independently and free from interference and subject only to the Constitution or any other law. However, in *Sekoati & Others v President of the Court Martial & Others* 2001 7 BCLR 750 Les.CA, the appellants who were charged with mutiny, contested not only the constitution of the Court Martial but they also argued that certain of the provisions of the Lesotho *Defence Force Act* 1996 and the *Defence Force (Court Martial) (Procedure) Rules* were inconsistent with section 118(2) of the Constitution in that the scheme of the Act resulted in the concentration of certain powers enjoyed by the convening authority in the hands of one office which formed part of the executive branch of government. This, it was argued, was inconsistent with the principle of judicial independence as is the power of the confirming authority. It was submitted that the members of a court martial fell within the command structure of the accused such that the convening officer and their own superior officers might be called upon to give evidence. The Full Court of the Court of Appeal held that the generally accepted core of the principle of judicial independence is the complete liberty of individual judges to hear and decide cases that come before them without interference from any outsider — *The Queen in the Right of Canada v Beauregard* 1986 30 DLR (4th) 481: 491; *Law Society of Lesotho v Prime Minister & Another* 1986 LRC Const 481: 493-4

Secondly, to the extent that neither the Act nor the Code required that members of the ordinary court martial be legally qualified and thereby permitted lay members of an ordinary court martial to convict and imprison people for up to two years, they were unconstitutional in that they violated section 174(1) of the Constitution, which required that a judicial officer be an "appropriately qualified woman or man who is fit and proper person", and section 12(1)(b) read with section 35(3), which guaranteed the right not to be detained without a public trial before an ordinary court.[104] The Court was of the view that "committing a person to prison is the ultimate deprivation of liberty. Therefore, to the extent that the provisions under review permit lay members of the ordinary court martial to convict and imprison people for up to two years, they are undoubtedly unconstitutional."[105]

Thirdly, there were no requirements laid down that the prosecutor appointed by the convening authority be a fit and proper person or be legally qualified in terms of the rules made under the Act; coupled with the fact that the prosecutor could not withdraw charges without the permission of the convening authority, it follows that not only could someone ill-equipped to perform the prosecutor's function be appointed, but that such prosecutor could not exercise an independent judgment and discretion. Again, the requirement that the sentence of the court martial could not be enforced or executed until it was confirmed invited arbitrariness by encouraging executive interference with the judicial process. Thus, by so providing, section 96 of the Code violated section 34 of the Constitution's prescription of independence and impartiality as essential requirements of access to justice.[106]

Les.CA. The Court pointed out that "the conditions of independence are, however, susceptible to flexible application in order to suit the needs of different tribunals. The question in every case is whether an informed and reasonable person would perceive the tribunal as independent — *Regina v Genereaux* 1992 88 DLR (4th) 110 SCC. The critical question posed by the court was whether in the light of the provisions of the Act and the Rules impugned, a court martial constituted under the Act and the Rules had the necessary independence and lack of interference required for compliance with section 118(2). Answering that question in the positive, the Court held that on a proper construction of section 118(2), read in the context of the Constitution as a whole and in particular having regard to section 24(3), a court martial, in order to comply with section 118, cannot be completely lacking in independence, nor can it be completely subject to outside interference. At the same time, having regard to the peculiar requirements of military discipline, although a court martial cannot operate under cover of absolute lack of independence, it is not required to have the same degree of independence nor to enjoy the same degree of freedom from interference as may be required in the case of the ordinary court. The qualitative independence of such a court has to be adjudged in the light of what is structurally fair and reasonable for a military court as opposed to a civilian court.

104 1999 2 SA 471 CPD: 479H-80A-D.

105 Ibid: 480F/G par 18. Cf *Mhlekwa & Another v Head of the Western Tembuland Regional Authority & Another* 2001 1 SA 574 TkD: 617 A-C.

106 Ibid: 480G/H-481A/B, 482C/D paragraphs 19 and 23 respectively.

Finally, given its constitution, an ordinary court martial did not conform to the concept of "ordinary court" as envisaged by section 35(3)(c) of the Constitution. It was simply a military court *sui generis* which could be presided over by laymen entrusted with powers to deprive convicted accused persons of their personal liberties. This was a manifest violation of the right accorded to accused persons by section 35. Neither did the court martial comply with sections 165, 174, 176 and 177 of the Constitution, all provisions seeking to promote the independence of judicial officers.[107] The Court rejected the submission that court martial was universally known all over the world and should therefore not be tampered with on the ground that the objective of maintaining military discipline would not be served by granting power to convict and incarcerate to a tribunal so lacking in the essentials of judicial independence. It follows that the ordinary courts, enjoying the constitutional safeguards of judicial independence and equipped to protect fundamental human rights, were statutorily competent to try offences under the Act and the Code and, in such a manner, military discipline would be achieved without any restriction on constitutionally guaranteed fundamental rights.[108]

5.3 The Regional Authority Court

The dilemma inherent in the dual existence of the African customary law with the western system of law manifests itself in the constitutional challenge encountered here. The problem centers on how to reconcile the technically formal common law adversary approach to adjudication to the informal inquisitorial method of settling disputes prevalent in the traditional African cultural legal system. The question therefore is whether the laws establishing traditional courts presided over by chiefs, paramount or otherwise, who may not be learned in law, could survive the onslaught of unconstitutionality given the prescriptions of judicial independence based on western values? The approach of Madlanga J in *Bangindawo & Others v Head of the Nyanda Regional Authority & Another*; *Hlantlalala v Head of the Western Tembuland Regional Authority & Others* [109] is that:

> Surely, the views and outlook of believers in and adherents of African customary law to the question of independence and impartiality of the judiciary would not be the same as those of non-believers and non-adherents. That being so there seems, in my view, to be no reason whatsoever for the imposition of the western conception of the notions of judicial impartiality and independence in the African customary law setting. Any such imposition is very much akin to the abhorrent subjection of matters African to 'public policy'. As our recent legal history discloses, such was the public policy of those then in power and it did not necessarily accord with the public policy of the rest of the South African people who were not in power. The believers in and adherents of African customary law believe in the impartiality of the

107 Ibid: 481C-I paragraph 21.
108 Ibid: 485C/D-F paragraph 29.
109 1998 3 SA 262 Tk.

> chief or king when he exercises his judicial functions. The imposition of anything contrary to this outlook would strike at the very heart of the African customary legal system, especially the judicial facet thereof. This would be completely at variance with the provisions of sections 31, 33(3) and 181(1) of the Constitution.[110]

While the trial judge upheld the argument of the unconstitutionality of the provisions of section 7(1) of the impugned *Transkei Regional Authority Courts Act* 13/1982 which prohibited legal representation in civil matters in regional courts violated sections 22 and 25(3) of the interim Constitution as no justifiable limitation had been proffered, the judge held that the lack of legal training of presiding officers of these courts was compensated for the advantages which they had, such as their knowledge of customary law. Litigants appearing before the regional authority courts were known to the judges as much as the language of the court was spoken by those who appear before it thus eliminating the danger of a likely miscarriage of justice occasioned by inaccurate interpretation. "The environment", said the judge "is more conducive to the important perception that justice should be seen to be done."[111]

The reasoning of Mandlanga J was not followed by a subsequent Court of the Transkei Division in *Mhlekwa v Head of the Western Tembuland Regional Authority & Another; Feni v Head of the Western Tembuland Regional Authority & Another*.[112] Van Zyl J held that "the Regional Authority Courts Act and its rules reveal a remarkable departure from traditional courts, either in terms of customary law or statute." Among other things, it enjoys a wider jurisdiction and has the power to try serious offences both at common law and statutory law and may impose imprisonment as a penalty. Rather, the Regional Authority Courts Act has created a court that is essentially equivalent in status to a magistrates' court. They have concurrent jurisdiction with magistrates' courts. The Act therefore, must be seen "as an attempt on the part of the Legislature to assimilate the traditional court procedure to the procedure observed by Western-type courts."[113] The court advanced two further reasons why it would not apply the approach of Mandlanga J. First, it was based on the fallacy that litigants in the regional courts were not placed, like those in traditional courts, in a position of equality. Secondly, while it is important that a tribunal be perceived as independent and impartial, "the perception of judicial independence must be a perception of whether a judicial officer enjoys the essential objective conditions and guarantees of judicial independence, and not a perception of how it will in fact act regardless of whether he enjoys such conditions and guarantees."[114]

The arguments in *Mhlekwa* were in many respects similar to those in Bangindawo. It was contended that certain provisions of the *Transkei Regional Authority Courts Act* 13 of 1982 did not ensure that the presiding

110 Ibid: 273B-E.
111 Ibid: 279F.
112 2000 2 SACR 596; 2001 1 SA 574 TkD.
113 2000 2 SACR 596: 652*d-j*.
114 Ibid: 653*a-e*.

officers of these traditional authority courts thereby established were suitably qualified or that their appointments took place without favour or prejudice contrary to section 174(1) and (7) of the 1996 Constitution. Further, that the establishment of these courts were in conflict with section 165(2) of the 1996 Constitution in respect of the independence and impartiality of courts. It was contended by the applicants that the fusion of executive and judicial functions in one person and the fact that the powers of such judicial officers in their capacity as traditional leaders were regulated by the State. In other words, the argument was that by their structure, regional authority courts lacked independence by reason of its institutional or administrative relationship with the executive and the legislative branches of government. In effect: "The enquiry is … limited to the question whether the appointment of presiding officers in such courts reflects the constitutional value of judicial independence. This aspect of independence involves not only the state of mind or attitude of a judicial officer in the actual exercise of his judicial functions but involves a determination of his status or relationship to others such as the executive branch of government and which mostly rests on the objective conditions or guarantees."[115]

The need to secure the independence of the regional authority courts is much a prerequisite for fair trial as it is the requirement of impartiality on the part of the judicial officer. Again, criminal proceedings before these courts were judicial in nature. These courts exercised jurisdiction in common law and statutory offences and those brought before them on criminal charges were entitled to the procedural rights which must conform to the standards and values set down in section 35(1) and (3) of the Constitution. To the extent that the regional court structure failed to include any measures or guarantees to ensure judicial independence, it failed the test of an ordinary court properly equipped to administer criminal justice within the standards anticipated by section 35(3) of the Constitution. These defects emanated from two particular sources:

- The appointment of presiding officers did not meet the values of judicial independence enshrined in section 265(2) of the Constitution and the qualities envisaged in section 35(1) and (3) for, where proceedings were criminal in nature and might result upon conviction to imprisonment thereby depriving the accused person of his liberty, it was imperative that such tribunal be presided over by a judicial officer who met the requirements of the provisions in chap. 8 of the Constitution.[116]
- For expressly providing that an accused person would not be represented by a legal representative and that a legal representative would not be present in that capacity in any proceedings before the courts, section 7(1) of the *Regional Authority Courts Act* was inconsistent with the entrenched right to a fair trial. The *Regional Authority Courts Act* was subject to its consistency with the provisions of the Constitution and a person charged with an offence before a regional authority court was

115 2000 2 SACR 596: 637*b-d* per Van Zyl J.
116 Ibid: 638a.

an accused person in criminal proceedings as envisaged by section 35(3) of the Constitution. Since section 35(3) did not limit the right to an accused person appearing in a particular court, the only requirement was that the person had to be an accused. Accordingly, the protection afforded an accused was extended to every accused and was not limited to only certain categories or classes of accused persons.[117]

On the question whether section 2(2) of the *Regional Authority Courts Act* satisfied the requirements of judicial independence, it was held that the Constitution did not prohibit traditional leaders or laymen from being appointed presiding officers in courts of law.[118] Again, the requirement that judicial officers must be "appropriately qualified" did not necessarily prevent the appointment of judicial officers without educational or other professional requirements since such appointments could be made in such a manner as to provide or guarantee the essence of security afforded by the essential conditions of judicial independence although "this need not be done by any particular legislative or constitutional formula".[119] However, the *Regional Authority Courts Act* in its present form did not include such measures as were laid down in section 174 of the Constitution or any other guarantees to ensure judicial independence.[120] The necessary implication of this was that the regional courts could not be said to be "an ordinary court" within the qualities of independence as envisaged in section 35(3) of the Constitution in that the appointment of presiding officers in such courts did not reflect the constitutional value of judicial independence in section 165(2) of the Constitution.[121]

(To be continued)

117 Ibid: 642f/g-642a-d.
118 Cf in *Re Justices of the Peace Act* 1985 14 DLR (4th) 657 Ont. CA.
119 2000 2 SACR 596: 640a citing per Ackermann J in *De Lange v Smuts NO & Others* 1998 3 SA 785 CC: 815A paragraph 72.
120 2000 2 SACR 596: 638*g-h/i*.
121 Ibid.