2004 Journal for Juridical Science 29(3): 149-172

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

Summary

The first part of this article dealt with the constitutional origins and principles of judicial independence. Those principles form the bases upon which the constitutionality of certain legislative schemes were tested. In that regard, we discussed case law where legislation establishing administrative agencies; the Court Martial; and the regional authority courts presided over by lay traditional chiefs, was challenged for unconstitutionality. The second part of this article examines the hotly-contested question of the constitutionality of the legislative framework under which Regional Magistrates Courts in South Africa were established against the backdrop of the constitutional guarantee of judicial independence. The case for discussion is *Van Rooyen & Others v State & Others (General Council of the Bar of South Africa Intervening)* where the Constitutional Court, unlike the trial judge, applied a purposive approach to the interpretation of the constitutional questions posed.

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

Die eerste gedeelte van hierdie artikel handel oor die grondwetlike oorsprong en beginsels van geregtelike onafhanklikheid. Hierdie beginsels vorm die grondslae waarteen die grondwetlikheid van sekere wetgewende prosesse getoets word. In hierdie verband is regspraak wat handel oor die grondwetlikheid van: wetgewing wat sekere administratiewe instansies daarstel, krygsverhore en streekshowe waarin leke tradisionele leiers voorsit, bespreek. Die tweede deel van hierdie artikel ondersoek die hoogs kontroversiële vraag met betrekking tot die grondwetlikheid van die wetgewende raamwerk waarbinne streeks-landroshowe in Suid-Afrika ingestel is (teen die agtergrond van 'n grondwetlike waarborg van geregtelike onafhanklikheid). Die saak onder bespreking is *Van Rooyen and Others v The State and Others (General Counsel of the Bar Intervening)*, waar die Konstitutionele Hof, in teenstelling met die verhoorregter, 'n doeldienende benadering by die interprestasie van die grondwetlike vrae aangewend het.

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6. Introduction

The first part of this article[1] dealt with the constitutional origins and principles of judicial independence. Those principles form the bases upon which the constitutionality of certain legislative schemes were tested. In that regard, we discussed the case law where legislation establishing administrative agencies; the Court Martial; and the regional authority courts presided over by lay traditional chiefs were challenged for unconstitutionality. Our preoccupation in the present context is to examine the hotly-contested question of the constitutionality of the legislative framework under which Regional Magistrates Courts in South Africa were established against the backdrop of the constitutional guarantee of judicial independence. The case for discussion is *Van Rooyen & Others v State & Others (General Council of the Bar of South Africa Intervening)*[2] where the Constitutional Court, unlike the trial judge, applied a purposive interpretive approach to the consideration of the constitutional questions posed. Consequently, it upheld the constitutional validity of the greater part of the legislation and its structural arrangements. Uppermost in the consideration of the Court was the point that judicial independence at the lower courts need not be applied with similar rigidity as at the higher echelon of the judicial hierarchy. In its application of this same broad-based assumption, the Constitutional Court adopted a three-dimensional approach in arriving at its conclusions. To begin with, it isolated and upheld as constitutionally valid, some provisions of the enactment that it considered passed the constitutionality test. Again, it applied the techniques of interpretation — reading down and severance — thereby saving those provisions of the law which could possibly be saved from invalidity. Finally, there were those provisions, albeit insignificant in quantity, which the Court found to be irremediably invalid and proceeded to declare them unconstitutional and of no effect.

7. The Regional Magistrates Courts' challenge

In *Van Rooyen & Others v State & Others (General Council of the Bar of South Africa Intervening)*,[3] three accused persons, a Regional Magistrate and an Association of Regional Magistrates of South Africa (ARMSA) who had obtained leave to intervene in the proceedings had, in a consolidated action, challenged the constitutionality of the provisions of the *Magistrates Act*,[4] the *Magistrates Courts Act*[5] and Regulations made in terms of the *Magistrates Act*.[6] The gist of the argument was that certain sections of the *Magistrates Act* 90 of 1993 and the

1 (2003) 28 (2) *Journal for Juridical Science* 109-141.

2 2001 (9) BCLR 915 (T); 2002 (5) SA 246; 2002 (2) SACR 222 (CC) (*Van Rooyen* challenge).

3 2001 (9) BCLR 915 (T); 2002 (5) SA 246; 2002 (2) SACR 222 (CC) (*Van Rooyen* challenge).

4 Act 90/1993.

5 Act 32/1944.

6 Regulations for Judicial Officers in the Lower Courts, 1993, Government Gazette 15524 GN R361 of 11 March 1994 (as amended) and the Complaints Procedure Regulations, Government Gazette 19309 GN R1240 of 1 October 1998.

Magistrates Courts Act 32 of 1944 and various regulations made under them were unconstitutional and invalid. The ground upon which declarations of invalidity were sought was that magistrates were regulated to such a degree by the Department of Justice, the Office of the Attorney General and the civil service generally, that a magistrates court failed to comply with the constitutional requirements of an institutionally independent and impartial court in that it lacked sufficient independence within the context of section 165(2) of the 1996 *Constitution of the Republic of South Africa*. It was further contended that these Acts were inconsistent with section 174(7) of the Constitution which mandates that appointments to judicial offices be made in terms of Act(s) of Parliament which must ensure that such appointments, promotions, transfers or dismissals of such officers take place without favour or prejudice; they were inconsistent with the separation of powers required by the Constitution; and that they were inconsistent with the Constitution in that they were an impermissible delegation of legislative powers by the National Assembly to the Minister of Justice.

7.1 The trial judgment

Southwood J had to grapple with the meaning of 'independent' as it pertains to courts and in the absence of any clear indication from the Constitution itself, the meaning of that term was implicit from the basic tenets of a democratic state founded on the concept of supremacy of the constitution and the rule of law. In any case, international human rights instruments[7] dealing with the subject indicate that independence of the judiciary requires that every judge be free to decide matters before him/her in accordance with the assessment of the facts and his understanding of the law without improper influences, inducements or pressures, direct or indirect, from any quarter or for any reason, and that the judiciary was to be independent of the executive and the legislature, and was to exercise jurisdiction, directly or by way of review, over all issues of a judicial nature. Judges, of essence, had individually to be free, these being standards and principles applicable to all persons exercising judicial functions. The fact that the Constitution had drawn a distinction between the superior courts and the lower courts does not impinge on this requirement in respect of lower courts, therefore, magistrates courts and magistrates had to enjoy the same measure of judicial independence as the higher courts and judges.[8]

The trial Judge held that the impugned statutes deprived the Magistrates Courts of institutional independence as required by the Constitution in that inherent in the method of appointment, promotion, discipline of magistrates and the manner of control by the executive of the day-to-day functioning of Magistrates Courts were manifest impediments to institutional independence. Like the Full Court of the Cape Provincial Division,[9] the trial judge had adopted

7 See e.g. Arts 1 & 2 "Draft Principles on the Independence of the Judiciary", Syracuse, Sicily, May 1981 in Strydom *et al* 1997:13.

8 2001 (9) BCLR 915 (T) at 942E.

9 *Freedom of Expression Institute & Others v President, Ordinary Court Martial & Others* 1999 (2) SA 471 (C): 483F where the question was whether a court martial enjoyed the essential conditions of independence.

the objective test established by the Chief Justice of Canada in *R v Genereux*[10] which addresses the question 'whether an informed and reasonable person would perceive the tribunal as independent' or 'whether the tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence.'[11] The trial judge held that the provisions impugned failed that test since the *Magistrates Courts Acts* had laid down the relationship between the executive branch and the Magistrates Courts in a manner which rendered their provisions inconsistent with the Constitution. The Court was further influenced by both the jurisprudence of the European Court of Human Rights[12] and Le Dain J's statement in the Canadian case of *Valente v The Queen*:[13]

> 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 and acceptance 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.

7.2 The Constitutional Court's three-dimensional approach[14]

In a marathon judgment that materially and substantially differed from that of the trial Court, the Constitutional Court applied the principles of judicial independence to the impugned Magistrates Courts legislation. It found that certain provisions of the impugned legislation fell short of what was required by the Constitution to ensure the independence of the magistrates courts and magistrates at an institutional level. Yet, notwithstanding those shortfalls, it concluded that the legislation viewed as a whole was consistent with the core values of judicial independence.[15] In order to deal with, and to understand the various ramifications of the intricate and exhaustive nature of this judgment, an attempt has been made to analyze it in three distinctive and manageable

10 1992 88 DLR (4th) 110 at 130.

11 2001 (4) SA 396 (T) at 433D-G. This same objective test of appearances or perceptions applies *mutatis mutandis* when the Court seeks to establish whether it might reasonably be suspected by fair-minded persons that the learned judge might not have resolved the matter before him in a fair and unprejudiced manner — *Fingleton v Christian Ivanoff (Pty) Ltd* (1976) 14 SASR 530: 533; *Committee for Justice & Liberty et al v National Energy Board* (1976) 68 DLR (3d) 716: 735; or whether there are grounds for recusal of a judge or judges, or whether a reasonable, objective and informed person would reasonably apprehend that the judge had not approached the adjudication with a mind open to persuasion by evidence — *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC) at paragraph 48.

12 *Findlay v United Kingdom* 1997 EHRR 221 at paragraph 73.

13 1986 24 DLR (4th) 161 at 172.

14 *Van Rooyen & Others v State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246; 2002 (8) BCLR 810, 2002 (2) SACR 222 (CC).

15 336C paragraph 269.

ways. The first step is to identify those provisions of the Acts and regulations found by the Court to have scaled the constitutionality test. The second is to isolate those provisions that would ordinarily have been inconsistent with the constitutional objectives of judicial independence but were redeemable through the techniques of construction and severance. The third and final approach is the discussion of those provisions held to be irretrievably bad for failing the constitutionality test and thus struck down by the Court for that reason.

7.2.1 Constitutionally valid provisions

7.2.1.1 Magistrates Commission

One of the arguments against the constitutionality of the *Magistrates Act* 1993 was the structure and composition of the Magistrates Commission established by virtue of section 2 of that Act. It was held that the fact that the Executive had a strong influence in the appointment of the members of the Commission did not detract from the institutional independence vested in the judicial branch by the Constitution. The Court took cognizance of the fact that the chairperson of the Commission was a Judge, while two of its members were chief magistrates. These judicial officers were required to discharge their duties impartially and in consonance with the judicial office. Membership of the Commission also includes practicing advocates and attorneys and even members of the governing party as well as the opposition political parties. This high profile membership was one reason that prompted the Court to reject the argument that the influence of the legislature and the executive in the Magistrates Commission and the magistracy undermined the institutional independence and impartiality of magistrates courts. The other reason was that the contention ignored the constitutional norm set by the Judicial Service Commission.[16] Furthermore, it overlooked the powerful constitutional and judicial safeguards that were in place and that prevented the executive and the legislature from taking 'control' of the magistracy. The Magistrates Commission was not and could not reasonably be perceived to be an executive structure and thus not independent.[17]

The Court would not accept that section 6 of the *Magistrates Act* and the Complaints Procedure Regulations were constitutionally invalid because they gave the executive the exclusive power to create a mechanism for dealing with improper conduct of magistrates. Section 180(c) of the Constitution made provision for a complaints system to be determined by national legislation. National legislation was defined in section 239 of the Constitution as including 'subordinate legislation made in terms of an Act of Parliament.' Similarly, the regulations passed by the Minister were subject to constitutional control. So, the validity of such a regulation would be judged not because it was made by the Minister but as to whether its provisions were inconsistent with the Constitution or any other law. The declaration by the trial Judge that section

16 See to the same effect the *International Bar Association's Code of Minimum Standards of Judicial Independence*, New Delhi, 1982 paragraph 3a cited in Kirby 2000:546.

17 284F-I paragraphs 73 & 74 read with 274A-F paragraph 36.

6A of the *Magistrates Act* was inconsistent with the independence of the courts was set aside.[18]

The mere fact that the executive and the legislature made or participated in the Magistrates Commission did not conflict with the doctrine of separation of powers or for that matter of judicial independence as required by the Constitution. Again, the fact that the Minister was not constitutionally bound by the recommendations of the Magistrates Commission was not constitutionally objectionable. The appointment of a Magistrates Commission, presided over by a Judge, and drawn from diverse sections of the legal community to advise the executive in relation to the appointment of magistrates was a check on the exercise of executive power, and not a flaw in the appointment process. Accordingly, the provisions of section 10 of the *Magistrates Act* and section 9(1) of the *Magistrates Courts Act* were not inconsistent with the Constitution.[19] It means therefore that insofar as the appointment of a magistrate follows the procedure laid down in the enabling Act or the statutory instruments made thereof, such an appointment may not be successfully challenged for unconstitutionality.[20]

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18 291E-G/H paragraphs 100 & 101.

19 293B-BC and 294D-F/G paragraphs 109 and 110 respectively.

20 If the question in the *Van Rooyen* challenge arose in the nature of an abstract review, a real live issue of the constitutionality of a fixed term or temporary appointment was raised in the subsequent *Van Rooyen* litigation. One of the grounds for review in *Van Rooyen v De Kock NO & Others* 2003 (2) SA 317 (TPD) was that the magistrate who presided over the trial of the appellant was not properly appointed as a judicial officer as required by section 174(7) of the Constitution. The respondent was appointed in terms of section 9(4) of the *Magistrates Courts Act* 32 of 1944 under a written contract subject to the provisions of the *Public Service Act* 54 of 1957 and regulations made under it. The appointment could be terminated at any time. It was contended that the respondent was merely a consultant in terms of the *Public Service Act*; he was a civil servant not a judicial officer. The appellant based his argument of improper appointment on the alternative ground that section 9(4) of the Act was declared unconstitutional by the Constitutional Court in the *Van Rooyen* challenge. It was held that the appointment was improper and inconsistent with the provisions of sections 165(2) and 174(7) of the Constitution. The criminal proceedings in which the appellant was charged, convicted and sentenced were declared to have no legal force or effect. There was no doubt that the proceedings were conducted impartially and without bias. Yet, the defect in the respondent's appointment which was at the pleasure of the State was something patently inimical to the core constitutional values of judicial independence and impartiality. '[W]hat is really at the heart of the problem', according to Bosielo J, 'is the confidence which courts, operating in an open, democratic and constitutional state, must engender and inspire in the public. Public confidence in the Judiciary is crucial for the credibility and legitimacy of the entire Judiciary. In my view, it is imperative that in every modern democratic society, particularly ours which is still relatively young and nascent, that the Judiciary as a whole must not only claim or purport to be, but must manifestly be seen to be truly independent. I venture to say that the attributes of judicial independence and impartiality lie at the very heart of the due process of the law. They represent the true essence of a proper judicial process. It follows logically that all attempts must therefore be made to avoid any perception or indication of dependence by the Judiciary on the Executive'.

Conditions of service of magistrates was one area where the applicants made heavy weather of the unconstitutionality of the legislative scheme. To begin with, the Court did not find any inconsistency with the procedure laid down in section 16(1) of the *Magistrates Act* to which the provisions of section 174(7) of the Constitution apply.[21] Furthermore, the power to compile a code of conduct was vested in the Magistrates Commission and its exercise of this power was subject to certain restraints. The recommendations of the Commission go to the Minister who was obligated to table the same to Parliament who would or would not approve the recommendations. The further restraint is the role the courts would play in the event of the Minister or the Commission or both of them performing their functions irregularly. These checks on the functionaries would obviously take care of any slip in the spheres of executive or legislative interference with judicial independence. Viewed from the objective standpoint, the Minister's power over conditions of service of magistrates was of limited quality and did not entitle him to impair the independence guaranteed by the Constitution.[22] There was thus no basis for holding that section 16(1)(e) was inconsistent with the Constitution. Similarly, the trial Judge's consequential finding that regulation 54A and Schedule E of the code of conduct were unconstitutional was unsustainable.[23] Similar faith of constitutionality pertains to section 16(1) and 16(1)(j) insofar as the framework for the conditions of service prescribed by the Minister conforms to the constitutional requirements of judicial independence. In the final analysis, the provisions of sections 11 and 16(1) seen alone or in the context of the Act as a whole, did not impinge on the independence of magistrates.[24]

7.2.1.2 Financial security

On the vital issue of the financial security of the magistrates, the Court held that although magistrates did not enjoy the same protection as Judges regarding the reduction of their salaries, the Minister was obliged to consult the Commission and the Minister of Finance before determining the salaries of magistrates. In spite of the processes involved in the salary issue, it is Parliament that is empowered to reduce salaries and unless such reduction is justified in the case of magistrates, any action to that effect runs the risk of being set aside on the ground of its inconsistency with judicial independence.[25] Taking into consideration

[323C-F paragraph 12.2.] See also *Starrs & Another v Procurator Fiscal* 2000 (1) LRC 718 HC and *Millar & Others v Dickson & Others* 2002 (1) LRC 457 PC; Schofield D 1999:73, 75.

21 In terms of this subsection it is provided that 'other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.'

22 298I/J-299E paragraphs 127 & 128.

23 300A paragraph 131.

24 300C-G paragraphs 132-135.

25 A similar situation applies in Canada, except that the legislature is constitutionally obliged to submit any proposed changes to judicial salaries to an independent commission. Thus in the consolidated four appeals: *Reference re: Public Sector*

the various safeguards designed to protect magistrates from possible abuse and undue pressure in the determination of their salaries, section 12 of the *Magistrates*

Pay Reduction Act (PEI), s 10; 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 SCC (Provincial Court Judges Reference), the Supreme Court in a majority judgment, held that as a general principle, Government may reduce the salaries of provincial court judges either as part of an overall economic measure or as a measure directed solely at the judges, but they were constitutionally obliged to submit any proposed changes to an independent, objective and effective body that would de-politicize the process. Although the commission had the power to make non-binding recommendations to the government, if the latter departs from such recommendations, it must justify its decision according to the standard of simple rationality. An across-the- board reduction for all persons paid from public funds including judges would be *prima facie* rational to the government's fiscal concerns, but the failure of the provincial governments in all the three provinces to submit the proposed salary changes to such an independent body violated section 11(d) of the Charter and was not justified under section 1 of the Charter. With specific reference to the two appeals from Prince Edward Island, it was held that the power of the provincial executive to grant discretionary benefits such as leaves of absences and sabbaticals under sections 12(2) and 13 of the *Provincial Court Act* 1988 did not violate judicial independence. Similarly, the fact that Provincial Court judges do not administer their own budget, or that the Executive Council can make regulations under section 17 of the Act respecting the powers of the Chief Judge and other rules of court, does not violate judicial independence, because section 4(1) of the Act vests with the Chief Judge of that court powers essential to its administrative independence, such as the assignment of judges and the sitting of courts. The designation of a place of residence, under section 4 of the Act, at the time of a judge's appointment also does not violate the administrative independence of Provincial Court judges or the fact that the courts' offices, while separate, were in the same building as Crown attorneys. The allegations of unconstitutionality arising from three separate and unrelated criminal proceedings in Alberta against three accused persons dealt with a 5 percent reduction in the salaries of the Provincial Court judges brought about by the Payment of Provincial Judges Amendment Regulation and section 17(1) of the *Provincial Court Judges Act* 1981. The 5 percent reduction was accomplished by a 3.1 percent direct salary reduction, and by 5 unpaid days' leave of absence. The respondents equally attacked the constitutionality of the power of the Attorney General to designate the court's sitting days and judges' place of residence. The Supreme Court faulted the Alberta law in two particular regards. First, it was held that section 17(1) of the impugned Act of 1981 violated section 11(d) of the Charter because it did not guarantee that Provincial Court judges should receive salaries. Secondly, the power vested in the Attorney General by section 13 of the Act to designate a judge's residence after appointment and sitting days violated the administrative independence of the judges. The crux of the challenge by the Manitoba Provincial Court Judges Association was that the salary reductions not only violated their judicial independence as protected by section 11(d) but it also was unconstitutional for effectively suspending the operation of the Judicial Compensation Committee, a body created by the *Provincial Court Act* 1987, whose task it was to issue reports on judges' salaries to the provincial legislature. The Association contended that the government interfered with judicial independence by ordering the withdrawal of court staff and personnel on unpaid days of leave, which in effect shut down the Provincial Court on those days. Furthermore, it was alleged that by exerting improper pressure on the Association in the course of salary discussions to desist from launching the constitutional challenge, the

Act was not inconsistent with judicial independence as it is evolving in South Africa's constitutional jurisprudence.[26]

7.2.1.3 Security of tenure[27]

A critical issue related to the security of tenure of judicial officers centres on their removal or impeachment. Generally, judges cannot be removed from office except on grounds of 'misconduct,[28] continued ill-health or incapacity' subject, of course, to the observance of the constitutional or statutory due process

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government infringed on the judges' independence. The Court of Appeal having rejected all the constitutional challenges, the Supreme Court held that a *mandamus* should be issued requiring the provincial government to implement the report of the standing committee as required under section 11.1 of the *Provincial Court Act* 1987. It was a violation of judicial independence for the provincial government to attempt to negotiate salaries with the judges' association. It was similarly an infringement of administrative independence of the judges to require that courts close on certain days in accordance with section 4 of the *Public Sector Reduced Work Week and Compensation Management Act* 1993. The Provincial Court should be exempted from that requirement.

26 2002 (5) SA 246 (CC): 304G-305D-E paragraphs 147-9.

27 One of the conclusions arrived at by the Supreme Court in *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick* 2002 209 DLR (4th) 564 was that by abolishing the system of supernumerary judges and replacing it with a panel of retired judges sitting at the request of the Chief Judge or Associate Chief Judge for pay on a *per diem* basis instead of a salary and fringe benefits equivalent to those of judges sitting full-time, was related to the protection of financial security rather than security of tenure. The system of supernumerary judges constituted an undeniable economic benefit for all judges of the Provincial Court. At the very least, the system provided a right to the potential benefit of a reduced workload, the extent of which was established by the Chief Judge, that is, by an independent judicial authority. Its abolition constituted a change in the conditions of the office of Provincial Court judge and so affected the institutional dimension of the financial security. There was no distinction in principle between a straight salary cut and the elimination of economic benefit. By failing to refer the question of the elimination of the office of supernumerary judges to an independent, effective and objective body, the government of New Brunswick breached a fundamental constitutional duty. The lack of a 'godfather' clause in favour of the judges of the Provincial Court appointed before Bill 7 came into force and the supernumerary judges in office at that time aggravated this violation.

28 It was emphasized in *Re Therrien* 2001 200 DLR (4th) 1 paragraphs 108-110 that the function of the judge was unique. Apart from the traditional role of settling disputes and adjudicating rights between parties, judges were also responsible for preserving the balance of constitutional powers between the two levels of government and for defending individual rights and freedoms. Judges also played a fundamental role in the eyes of the external observer of the justice system. To the public, judges not only swore an oath to serve the ideals on which the rule of law was built, but were asked to embody them. 'Accordingly,' stated Gonthier J, 'the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning.' This was a case where, in application for the post of provincial court judge, the applicant failed to disclose that he had been

including the observance of the rules of natural justice.[29] So, the provisions of the impugned Act concerning the grounds for removal, suspension and the procedure

convicted twice for criminal offences and had served a year in prison and that he was granted pardon subsequently. The question was whether his non-disclosure was such misconduct that would have betrayed the confidence reposed in him as a judicial officer and to warrant his removal from the office of judge. The Court of Appeal, in accordance with the statutory procedure in such matters found that his conduct had undermined public confidence in his ability to perform the duties of his office. The Supreme Court dismissed the appeal and refused to interfere with that finding.

29 The Court of Appeal of Guyana found the procedure followed in removing the judge in *Barnwell v Attorney General* 1994 (3) LRC 30 defective. The Chancellor of the Judiciary of the Republic had invited the judge to an interview after receiving a complaint from a Chief Magistrate about the attempt by the judge to influence the outcome of the case before the Chief Magistrate. Without giving the judge the details of the allegations or letting him see a copy of the petition against him, the Chancellor, acting also in his capacity as the chairman of the Judicial Service Commission, demanded the resignation of the Judge failing which he would face an inquiry leading to his removal in accordance with article 197 of the Constitution of Guyana 1980. The Commission subsequently met and considered the allegations along with the Chancellor's recollections of the interview with the Judge but did not hear the Judge. The Commission represented to the President that removal of the judge from office be investigated. Although the judge wrote an explanation to the Commission, the latter did not recall its representation to the President who, pursuant to article 197(5), suspended the judge pending investigation by a tribunal as to the judge's removal. The Court was unanimous in holding that there was a breach of the principles of fairness and natural justice in that the Commission made representations to the President without having given the judge a hearing. According to Bishop CJ, given that the Constitution did not exclude the rules of natural justice and gave judges a protected status, on general principles of fairness it was not proper that a judge suffered loss of status, reputation, position, prestige, power and property (which exoneration would not necessarily undo) without a hearing before the Commission's representation to or suspension by the President. Fairness had not been extended by observing the rules of natural justice or acting under a duty to be fair since the judge had no prior intimation of the agenda for his meeting with the Chancellor and had no ample opportunity to respond in that meeting (at 66-68, 78, 79 & 82). In his judgment, Kennard JA held that the rules of natural justice and fairness applied to a representation by the Commission to the President as to the removal of a judge since the Commission was a body having legal authority to determine a question affecting the judge's rights and there was no contrary intention in the Constitution. Natural justice also applied to suspension of a judge from office since it was a drastic measure with a devastating effect causing prejudice that might never be assuaged (at 95, 97-8, 99 & 103). Per Churaman JA: given the constitutional importance of removal of a judge from office, the Commission had a duty to act reasonably in deciding whether to make a representation to the President which included hearing the judge first. Further, a decision-maker deciding a question affecting the rights of an office-holder (particularly given the constitutional office of judge and the fact that the Commission's decision not to make a representation would be an end to the matter), had a duty to hear the office-holder before a decision in the absence of clear statutory words to the contrary. Moreover, there was a right to be heard as to suspension since the consequences could be untold financially, emotionally and socially and no legislation denied such a right (at 128-9, 130-31, 134 & 136).

for impeachment are stated in terms[30] not unfamiliar for removal of Judges both under the Constitution[31] and in other jurisdictions.[32] In other words, removal

30 Section 13(2), (3) & (4), *Magistrates Act* 1993.

31 In *Rees & Others v Crane* 1994 (2) WLR 476, the Privy Council had to decide whether a judge suspended from performing the functions of his office was fairly treated in that he was not heard before the suspension and before the Judicial Service Commission approached the President to set in motion the process for his removal for incapacity. In terms of section 137(1) of the *Constitution of the Republic of Trinidad & Tobago* 1976 (the equivalent of section 177(1) of the Constitution of South Africa), it is provided that a judge could only be removed from office for inability to perform the functions of his/her office arising from infirmity of the mind or body or any other cause, or for misbehaviour. The question before their lordships concerned whether, in deciding to make a representation to the President under section 137(3) requesting him to set up an investigation into the allegations against the judge (the first stage in the three-stage constitutional process under section 137), the commission was under a duty to accord the judge concerned a hearing. Their lordships were not unmindful of the fact that in preliminary investigations or initiating proceedings, the person concerned generally had no right to be heard, especially where, as in this case, the judge would be heard at a later stage. The Privy Council reiterated the well-established principle that there was no hard and fast rule as to whether or not to accord a hearing at this preliminary stage, but held that taking into account the seriousness of the allegations against the judge; the suspicions both for the present and the future by a decision to suspend him which a subsequent revocation of the suspension would not necessarily dissipate; and having regard to all the circumstances of the case, the commission had not treated the judge fairly in failing to inform him of the allegations made against him or to give him a chance to reply to them in such a way as was appropriate. In other words, before the Judicial Service Commission decided whether a complaint had *prima facie* sufficient basis in fact and was serious enough to warrant making a representation to the President, it had a duty to act fairly. Having failed to do so in this case, the commission acted in breach of the principles of natural justice and had contravened the judge's right to protection of the law afforded by section 4(b) of the *Constitution of Trinidad & Tobago*.

32 In Canada since *Valente*, the Courts have maintained that although it may be desirable, it is not reasonable to apply the most elaborate and rigorous conditions of judicial independence as constitutional requirements since section 11(d) of the Charter may have to be applied to a variety of tribunals. Rather, the essential conditions of independence should respect this diversity and be construed flexibly. Thus in *Re Therrien* 2001 200 DLR (4th) 1: 41-43 paragraphs 67-70, Gonthier J for the Supreme Court held that it was not necessary for the purposes of section 11(d) of the Charter that the procedure to remove a provincial court judge who hears criminal cases include an address of the legislature even though in the present circumstance the statutory procedure (section 95, *Courts of Justice Act* RSQ) resembles the constitutional procedure embodied in section 99 of the 1867 Act, such standards must not be imposed as constitutional requirements.

must be on 'proved misbehaviour[33] or incapacity'.[34] Magistrates are, in this regard, on similar keel with the other non-judicial Commissions, such as the Human Rights Commission, the Gender Equality Commission and the Electoral Commission.[35] There was therefore nothing in the provisions relating to the powers, conditions and procedure for removal of magistrates that would render them unconstitutional for failing to conform to the constitutional protection given to judicial officers. Indeed, the Court held:

> Since the Constitution makes provision for a Judge to be suspended on the advice of the Judicial Service Commission pending its investigation, there can be no constitutional objection to a similar power being vested in the Magistrates Commission, pending an investigation by it into whether or not a particular magistrate is fit to remain in office. The fact that such a suspension takes place before the impeachment enquiry is held, is not necessarily open to objection. The nature of the allegation against the magistrate may, in itself, be so serious as to make it inappropriate for the person concerned to continue to sit as a magistrate while the allegation is being investigated. The Commission would have to have reliable evidence before it to warrant such action and it would have to conduct its affairs in a manner consistent with natural justice. If in the particular circumstances of the case its decision cannot be justified or if it has failed to comply with the requirements of natural justice, its decision would be liable to be set aside on review by the higher Courts. That constitutes adequate protection against any possible abuse of power. It follows that s 13(3)(a) is not inconsistent with judicial independence and that the appeal relating to this section must be upheld.[36]

The Court also upheld section 13(3)(b) of the *Magistrates Act*. Insofar as it provided that a suspended magistrate shall receive no salary or a different salary, it was not inconsistent with an investigation into the 'fitness' of a magistrate to hold office. The decision to investigate had to be taken by the Commission and that would be competent only when the allegations, if established, were sufficiently serious to warrant removal from office. Such allegations were likely to be made only rarely. If they were, and if good reason existed for suspension, a withholding of salary during suspension was not necessarily disproportionate. That was so, even if the holding of salary could take place from time to time during a provisional suspension. There was no

33 In *Re Therrien* 2001 200 DLR (4th) 1, it was held that before making a recommendation that a judge be removed, the question to be asked was whether the conduct for which he or she was blamed was so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his or her office. On the facts before the Court, it was held that the committee of inquiry and the Court of Appeal found that the judge's conduct was so manifestly and profoundly destructive of public confidence in him that removal was appropriate. The Court of Appeal's finding should only be reviewed if it was clearly in error or seriously unfair.

34 Section 72(ii), Constitution of Australia 1900; section 99(1), Constitution Act 1982: Canada; section 23, Constitution Act 1986: New Zealand.

35 Section 194(1)(a), 1996 Constitution.

36 310G-311A-B paragraphs 170-2.

reason why a magistrate who was not fit to hold office, and was removed from office for that reason, should be paid for the period during which he or she was under suspension prior to removal. If, however, the magistrate was not removed from office the salary withheld had to be paid.[37]

Apart from removal from office, a magistrate could vacate office or be discharged on retirement at the normal retiring age or with the permission of the Minister at an earlier date. He or she could be discharged on the ground of continued ill-health or incapacity. The High Court held that the extension of the tenure of a magistrate after due retirement age or for permission to retire early was inconsistent with the Constitution because it enabled the executive to allow a magistrate to continue in office after reaching retirement age. That the Minister would consult the Commission was said not to have provided a safeguard against possible executive abuse and this could lead to a perception that 'the prospect of continuing in office would induce the magistrate to tailor his judgments with that object in mind: i.e. to win the favour of the Executive.'[38] The Constitutional Court held otherwise. It was of the view that by an objective assessment, these provisions did not impair judicial independence. Rather, the requirement of the Minister's consent was to the benefit of the magistrate and the picture painted of the ministerial influence over the judgments of the magistrate could not be sustained. Again, subsections 13(1) and (5)(a) insofar as they related to the power to retire early, were not inconsistent with the Constitution. Similarly, regulation 30 which dealt with the procedure to be followed by a magistrate seeking early retirement on the grounds of ill-health, was not inconsistent with the Constitution.[39] Regulations 27-29 regulated the procedure to be followed in respect of an investigation into alleged incapacity or ill-health of a magistrate that prevented the magistrate concerned from carrying out his or her duties efficiently. These procedures were held to be consistent with fairness insofar as it accords with the principles of natural justice.[40]

7.2.2 Invalidity saved through techniques of interpretation

The Constitutional Court has since established the principle that a declaration of unconstitutionality of legislation would not readily be made where the well-known techniques of interpretation and construction could be used to spare the otherwise invalid law from unconstitutionality. Briefly stated, the approaches are: first, where through a broad and generous construction, the impugned law is capable of two meanings, one tilting towards invalidity while the other interpretation leans towards constitutionality, it is the latter meaning that should be preferred.[41] Secondly, the Court may apply the technique of severance either

37 311D-H paragraphs 175-6.
38 2001 (4) SA 396 (T): 464C.
39 2002 (5) SA 246: 306F-307C-F paragraphs 155, 157-9.
40 318-9 paragraph 204.
41 This technique of construction is known as 'reading down'. See Okpaluba 2000 (part II):439, 454.

by actually deleting those words that render the law unconstitutional (*actual* severance) or by declaring the inconsistent part or text unconstitutional to the extent of its inconsistency without tampering with the text of the statute (*notional* severance).[42] The Court may add (read in)[43] words omitted from the provisions without which the law remains unconstitutional.[44] These approaches must precede a declaration of complete invalidity, and only if none of the techniques are applicable, should such a declaration be made. Adverting to these techniques as the correct approach to constitutional adjudication of the constitutional challenge relevant to legislation,[45] the Court was able to save from inconsistency several provisions of the Acts and Regulations from conflicting with judicial independence.

7.2.2.1 Severance

First, the Court found that the provisions of section 3(2) of the *Magistrates Act* which empowered the 'appointing or designating authority … after consultation with the Commission' to recall a member 'if in his, her or its opinion there are sound reasons for doing so' did not establish an objective standard and was therefore unconstitutional. In order to remove the subjective element in the power to recall, the words 'in his, her or its opinion' were deleted from the subsection.[46] Secondly, insofar as section 13(3)(b) left the issue of payment of salary to the recommendation instead of providing in clear terms that the Minister be bound by such recommendation, it was improper. Hence the words: 'the Minister on the recommendation of' was deleted from the subsection.[47]

Thirdly, there was a constitutional flaw in the investigation process of the charges of misconduct against a magistrate. Although the procedure did not on the face of it appear to be objectionable,[48] the provision in regulation 26(6)

42 For the application of this constitutional relief see the following recent cases: *First National Bank of SA Ltd t/a Wesbank v SARS & Another* 2002 (4) SA 768 (CC) at 816 paragraph 114; *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC) at 315-317 paragraphs 53-60; *Attorney General v Goodman* 2001 (3) LRC 371 (PC).

43 *Du Toit & Anor v Minister for Welfare & Population Development (Gay & Lesbian Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC): 213-4 paragraphs 38-44; *National Director of Public Prosecutions & Another v Mohammed NO & Others* 2002 (4) SA 843 (CC) pars 26-29; *Satchwell v President of the Republic of South Africa & Another* 2002 (9) BCLR 986 (CC) paragraphs 27-36.

44 See generally, Okpaluba 2001:462, 464; Okpaluba, 2000 (Part I):50.

45 288E-289B paragraphs 87 & 88.

46 289H-290D paragraphs 93-95.

47 311H-J paragraph 177.

48 The trial Judge had struck down the whole of Regulation 26 as constitutionally invalid. Thus when the validity of Regulation 26(20) came up specifically for review in *Moldenhauer v Du Plessis & Others* 2002 (5) SA 781 (TPD), Motata J declined to pronounce on its validity, as it were, once more. From the text, it is clear that the Constitutional Court did not pronounce specifically on the constitutionality of this Regulation. But its approach to Regulation 26 shows that the provisions of Regulation 26(20) are not patently unconstitutional. The decision of Motala J is therefore not to be read as confirming the unconstitutionality of the sub-regulation,

which could enable a non-judicial officer to preside over the investigation of allegations of misconduct against a magistrate which could lead to his/her removal from office, was inconsistent with judicial independence and therefore unconstitutional. However, once the words: 'or person' where they appeared for the first time immediately before the words 'hereinafter called the presiding officer' were deleted, regulation 26(6) would regain its consistency. Fourthly, the interposition of the Minister into the process of removing a magistrate on

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but rather as the application of a provision not intrinsically invalid but such that could be invalidated in the process of its application to a specific fact-situation. Regulation 26(20) provides that: 'The investigation shall take place *in camera* unless the presiding officers order otherwise.' The applicant, the chief magistrate for the district of Pretoria, had contended that the disciplinary hearings against him should not be held *in camera* but in public since the administrative charges against him had commanded a considerable amount of press coverage. It was the applicant's case that public hearing of the inquiry would enable him to clear his name and to set the records straight. Counsel for the applicant contended that the investigation was not merely a fact-finding mission but the future and career of the applicant and therefore his rights might be adversely affected as contemplated by section 33 of the Constitution. Although it was conceded that the applicant was not an accused person in terms of section 35 for the purposes of invoking the right to a fair trial, and that the rights in section 34 could not be transported into disciplinary proceedings, it was nonetheless contended that the principles enshrined in the Constitution were applicable. Extolling the public essence of judicial proceedings as adumbrated by Kriegler J in *S v Mamabolo (ETV & Others Intervening)* 2001 (3) SA 409 (CC) paragraphs 18, 30 & 31, Motala J held that in view of the public interest evoked by the 'chaotic' situation in the Pretoria magistracy, the public must be eager to see it resolved in the open in a reasoned and rational manner. The underpinning reasoning of the trial judge comes from this passage in his judgment (at 795B-E): 'The Judiciary and the magistracy in my view can only prosecute their functions where there exists respect, honesty, self-discipline and to some extent restraint when colleagues deal with each other. When a debate is thrown into the public eye and not discussed (*sic*) amongst themselves, it exhibits a high degree of indiscipline. It is a well-known convention of our courts that judicial officers speak in court and as such only in court. They are not there to defend their liberty or even go to the extent of debating their decisions or misunderstandings in public. The impression I gathered from the pleadings before me as well as the newspaper cuttings attached to the pleadings only illustrate the 'chaotic' situation which exists in the magistrate's office in Pretoria.' This case is clearly distinguishable from that situation where a student disciplinary proceeding was held to be properly conducted *in camera* to which the judicial-type proceedings contemplated in sections 34 & 35 of the Constitution may not in the circumstances be applicable, for an enquiry into alleged transgressions on campus should not be subject to public information — *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others* 2000 (4) SA 621 (CPD) at 639F/G-J paragraphs 59 & 60. In the final analysis, the question whether a particular proceeding is such that needs to be kept private or be brought to the public glare would depend on whether the administration of justice would be rendered impracticable or materially hampered by the presence of the public — *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd & Another* 1984 (4) SA 149 (T) at 158G-I. See also the discussion in part one of this article: 2003 28(2) *Journal for Juridical Science* 109, 136 in relation to the constitutionality of the *in camera* proceedings of a Court Martial.

grounds of misconduct, ill-health or incapacity brought the Minister within the reach of interference with the process, whereas the confirmation of the resolution of the Commission was a sure and transparent safeguard of the process. The appropriate remedy for the inconsistencies in regulations 27(1) & (2), 29(1), (2), (3) and (4) was to delete the words 'the Minister or' wherever they appeared. Similarly, regulations 28(4) and (5) which contemplated that the Minister may withhold from Parliament a recommendation by the Commission (which vested on the Minister the final decision in regard to removal on the grounds of misconduct, ill-health) were deleted.[49]

Fifthly, certain provisions relating to section 14 and regulations 16 and 17 on promotions for magistrates were invalid. However, these could be remedied, in the case of regulation 16, by deleting the words: 'provided further that a magistrate who performs certain duties in terms of section 14 of the Act conferred upon him by the Minister in a specific case after consultation with the Commission may be promoted to a higher post without absorption into such higher post', and in regulation 17(1), the words: 'except in the cases falling under section 14, in which case the date of entry shall be determined by the Minister.'[50] Finally, it was not consistent with institutional judicial independence that the Minister should assign judicial powers to magistrates in addition to those ordinarily vested in them by the law. Accordingly, the words: 'or, in any specific case, by the Minister after consultation with the Commission' had to be deleted from section 14 of the Act.[51]

7.2.2.2 Reading down

While the Court did not find the remedial option of reading inappropriate in any of the circumstances in its detailed consideration of unconstitutionality of this rather complicated legislative scheme, it had adopted the interpretative technique of reading down in at least three instances. For example, if the word 'may' in section 13(3)(aA) of the Act was read as conferring on the Minister the power coupled with the duty to confirm the recommendation of the Commission in respect of the suspension of a magistrate, the result would be to deny the Minister the discretion inherent in the wording of the subsection. On the other hand, a construction which would make it obligatory for the Minister to refer the Commission's recommendation to Parliament would bring the process nearer the process for the removal of a Judge and accordingly would render the procedure constitutional.[52] Again, if regulation 25 which had defined the circumstances in which accusations of magisterial misconduct could be made, had simply provided that an accusation of misconduct should be the subject of a preliminary investigation in order to determine whether or not there were grounds for bringing a charge of misconduct against a magistrate, there could have been no objection to it. In defining circumstances in which an accusation could be

49 319H-320C paragraphs 209 & 210.

50 321G-I, 321H-322B paragraphs 218 & 219.

51 324C-D paragraph 230.

52 312-313 paragraphs 181 & 182.

brought, regulation 25 drew attention to conduct which may give rise to a charge. Whether that conduct in fact justified the charge would depend upon all the circumstances, including the nature of the offence, or the respects in which the regulations had been breached or the Code of Conduct had been contravened. Regulation 25 was capable of being so construed and applied consistently with judicial independence.[53]

The third provision subjected to this saving technique was regulation 55 which provided that:

> any act, measure, arrangement or direction which is applicable to an officer in the department, shall *mutatis mutandis* apply to any person who has been appointed in a temporary or acting capacity or as assistant-magistrate as a judicial officer in terms of section 9 of the Magistrates Courts Act.

The Chief Justice held that it was reasonably possible to construe the words '*mutatis mutandis*' as limiting the application of the regulation to any "act, measure, arrangement or direction" which might appropriately be applied to judicial officers. Thus construed, the regulation was not inconsistent with judicial independence. The appeal against the High Court's finding to the contrary was therefore upheld.[54]

7.2.3 Irremediably invalid provisions

By virtue of sections 9(3), (4) and (5) of the *Magistrates' Courts Act*, it was provided that:

> (3) Whenever by reason of absence or incapacity a magistrate, additional magistrate or assistant magistrate is unable to carry out the functions of his or her office or whenever such office becomes vacant, the Minister, or an officer in the Department of Justice or a magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate authorized thereto in writing by the Minister, may appoint any other competent person to act in the place of the absent or incapacitated magistrate, additional magistrate or assistant magistrate, as the case may be, during such absence or incapacity or to act in the vacant office until the vacancy is filled: Provided that no person shall be appointed as an acting magistrate of a regional division unless he or she has satisfied all the requirements for the degree referred to in ss (1)(b) or has passed an examination referred to in that subsection: Provided further that when any such vacancy has remained unfilled for a continuous period exceeding three months the fact shall be reported to the Magistrates Commission.
>
> (4) The Minister or an officer in the Department of Justice or a magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate authorized thereto in writing by the Minister, may appoint temporarily any competent person

53 315C-F paragraph 192.
54 326G-I paragraph 241.

> to act either generally or in a particular matter as magistrate of a regional division in addition to any magistrate or acting magistrate of that division or as additional or assistant magistrate for any district or sub-district in addition to the magistrate or any other additional or assistant magistrate.
>
> (5) The Minister may, with the concurrence of the Minister of Finance, determine the remuneration and allowances and the method of calculation of such remuneration and allowances payable to a person appointed under ss (3) or (4), if such person is not an officer of the public service.

The question for the determination of the Court was whether these provisions were inconsistent with the Constitution. Acting appointments on the South African bench are not uncommon, for section 175(1) empowers the President to appoint an acting Judge in the event of a vacancy in the Constitutional Court on the recommendation of the "Cabinet member responsible for the administration of Justice acting with the concurrence of the Chief Justice." It is the duty of the Cabinet member responsible for the administration of Justice to make acting appointments to other Courts in terms of section 175(2). If this is allowed in respect of the higher bench, then, in what regard would the above quoted provisions have violated the principle of judicial independence of magistrates thereby appointed? The trial Judge held that the provisions of section 9 empowered the executive to select and appoint acting and temporary magistrates, to limit their tenure for reasons unrelated to capacity, competence or behaviour and to determine the cases to be heard. In effect, these provisions would create the perception on the part of the reasonable objective and informed person that acting and temporary magistrates are not independent.[55]

The Constitutional Court held that the appointment in section 9(3) was for a "determinate period" hence there was security of tenure during the period of appointment and the appointee did not hold office at the discretion of the Minister.[56] On the other hand, section 9(4) which enabled "a competent person" to act "generally or in a particular matter" was held to be inconsistent with judicial independence since these provisions would permit the appointment of a non-judicial officer with no security of tenure to hear "a particular matter". An appointment to hold office at the discretion of "the State" was clearly inconsistent with security of tenure that is an essential element of judicial

55 2001 (4) SA 396: 459E-F.

56 2002 (5) SA 246: 328F-G paragraph 245. It was held (paragraph 249) that there were practical reasons in the evolving process of judicial independence that necessitated the appointments contemplated in section 9(5). Where the acting appointments are made within the ranks of serving public officials, such appointees continue to receive the salary ordinarily payable to them as such members of the public service. But where the persons appointed as temporary magistrates are from outside the service, their salary, like those of other magistrates, will be fixed at the point of entry. According to the Court, the subsection "empowers the Minister to fix a salary in consultation with the Minister of Finance. The salary has to be paid out of public revenue and this is a practical arrangement. Since the salary has to be fixed before the acting appointment is made, and the acting appointment is only for a limited period, the procedure does not impinge on judicial independence." The Court therefore upheld the appeal against the declaration of invalidity made by the trial judge concerning this subsection.

independence. The Court reasoned that to appoint a 'competent person' as a temporary magistrate to act generally in a particular court may not be objectionable, but to appoint a person who is not a magistrate and who did not enjoy a security of tenure to hear a particular case would be inconsistent with judicial independence. The defects in the provisions of section 9(4) were not amenable to constructive remedial solutions through severance or reading in. They were accordingly declared to be constitutionally irremediable.[57] Section 12(2)(b) was also in contravention of judicial independence since it was wholly inconsistent to vest in the Minister or any other person the authority to prohibit any magistrate from exercising or performing the functions vested in him or her by law.

7.2.3.1 Impeachment & appropriate sanction

While some of the provisions relating to the impeachment of magistrates were valid or severable or salvaged by way of construction, the role of the Minister in this regard and the powers vested in him to impose sanctions were in instances found to be invalid. It was held in respect of section 13(4) that the fact that it provided that the Minister shall remove a magistrate from office if Parliament passed a resolution recommending such removal was intended to make clear that the Minister had to act on a resolution of Parliament; it added nothing to section 13(3). And if it would involve removing a magistrate without a preliminary investigation by the Commission that would be inconsistent with judicial independence.[58] A parliamentary resolution was required as a safeguard and not as a means of avoiding the consequences of an independent investigation called for by section 13(3). The finding of unconstitutionality by the High Court in this regard was confirmed.

The power to impose appropriate sanction on a finding of misconduct was a major source of unconstitutionality of the legislative scheme. The Court flawed these provisions as they appeared in regulation 26(17) in three respects. To begin with, the vesting of such a power on the Minister was not in accord with judicial independence and would have been in conflict with the only meaningful construction that could be given to section 13(3)(aA) as indicated above. The imposition of sanctions where appropriate should be the responsibility of the Commission not the Minister. Since the inconsistency in the provisions of regulation 26(17) were not remediable by way of reading in or severance, it had to be declared unconstitutional.[59] The second aspect of the inconsistency of the regulations dealing with sanctions was that of imposing a fine or a transfer to other headquarters. Regulation 26(7) did not state to whom the fine should be paid. And if it were to be paid to the Department of Justice, a ground of inconsistency would have occurred. Clearly,

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57 Paragraph 248.

58 On the proper procedure for removal from office see *Rees & Others v Crane* 1994 (2) AC 173 (PC); *Barnwell v Attorney General of Guyana* 1994 (3) LRC 30 Guyana CA.

59 317H-I paragraph 199.

> judicial officers are not accountable to the government. They are accountable to the Constitution and the law and to the courts as independent institutions. If the misconduct attracts criminal sanctions the magistrate concerned will be liable to the penalties prescribed by the criminal law for such misconduct. But the penalty must be imposed by a criminal court in an ordinary prosecution and not as a sanction for a breach of the code of conduct. The payment of a fine to an organ of State for misconduct that does not constitute a criminal offence is not a sanction compatible with judicial independence.[60]

On transfer as a sanction, the Chief Justice held:

> A compulsory transfer designed to serve as a penalty is also not a sanction compatible with judicial independence. There may be reasons for transferring a magistrate to another district for operational reasons and not as a penalty where the circumstances of particular complaints found to be justifiable make it desirable that this be done. But if this is not the case, a compulsory transfer is not rationally related to the misconduct. A sanction not rationally related to the misconduct is not consistent with judicial independence.[61]

8. Conclusion

The backbone for the court's exercise of its judicial power and, consequently, of its jurisdiction to review governmental powers, is the constitutional requirement that the judiciary, as an institution of government, must be independent of the other organs of government and that in discharging his or her duties, a judge must be impartial.[62] The independence of the judicial department is therefore "a cornerstone of constitutional government";[63] it is an indispensable attribute of the rule of law as it is an integral part of the doctrine of separation of powers[64] for, even where it is convenient in a constitutional arrangement for legislative and executive functions to commingle, the independence of the judicial branch must be preserved. The independence of the judiciary is not only neatly tied to the supremacy of the Constitution; it is also an essential ingredient of the modern concept of constitutionalism. Complete independence of the courts of justice is thus a *sine qua non* of a democratic dispensation. The independence of the judiciary is one of the pillars upon which the democratic principles of South Africa are founded. It is the prop upon which judicial review of legislation, of executive conduct and administrative action flourishes. It is the

60 Per Chaskalson CJ: 318B-C/D paragraph 200.

61 318D-E paragraph 201.

62 On this see *SARFU & Others v President of the Republic of South Africa & Others* (2) 1999 7 BCLR 725 (CC); *R v Bow Street Metropolitan Stipendiary Magistrate & Others, ex parte Pinochet Ugarte (No 2)* 1999 1 All ER 577 HL; *S v Roberts* 1999 4 SA 915 SCA; *SACCAWU & Others v Irvin & Johnson Ltd Seafoods Division Fish Processing* 2000 21 ILJ 1583 (CC). See generally: Williams 2000:45.

63 Per Binnie J in the Supernumerary Judges case 2002 209 DLR (4th) 564: 607 paragraph 116.

64 Mathews 1986:7-8; Carpenter 1987:90-2.

foundation for the protection of the constitutional guarantee of civil and political liberties and the socio-economic rights generously entrenched in the Constitution for the protection of the individual and the society. Take away the independence of the judiciary, and the Constitution would crumble and the democratic fabric will degenerate into anarchy. Once this "fundamental pillar of our constitutional democracy"[65] is threatened, then with it will the rule of law and the constitutional democracy because the independence of the judiciary is "absolutely sacrosanct and is without any qualification whatsoever."[66] It is therefore imperative for the sustenance of democratic ideals, the maintenance of the rule of law and the attainment of the constitutional objectives of freedom, equality and justice that the independence of the judicial arm must be assured by the political state at all times.

It is clear from this study that in line with the principle of judicial independence is the understanding that the degrees of its application vary from court to court, the higher the court in the judicial hierarchy, the more stringent the requirements of its institutional independence and impartiality of the individual judges. The fact that a superior court has inherent powers of judicial review over the lower court gives the judicial officers of the lower court further security. The modes of appointment and the nature of the jurisdiction of the lower courts also contribute towards the relaxation of the form of independence required of those courts. It is clear that where the jurisdiction is of a criminal nature and the sanction which the court or tribunal is empowered to impose approximate to a deprivation of personal liberty, the higher court will take a more stringent approach in evaluating the lower court's structural independent arrangements. This is perhaps the dividing line between the decision of the Constitutional Court in *De Lange* and the Cape Provincial Division in *Freedom of Expression Institute* on the one hand, and that of the Cape of Good Hope High Court in *Financial Services Board*, on the other. The latter case dealt purely with administrative jurisdiction and a tribunal established to determine cases of such a nature is spared the rigid implementation of the strict rules obtainable in courts of law so as to enable it to operate in an atmosphere less formal than the ordinary court.

If the test of the exercise of criminal jurisdiction and imposition of penal sanctions is adopted across the board, that is, if it were to apply *mutatis mutandis* to all lower courts and tribunals, then the regional authority court of the Tembuland quality would on that account definitely fail the test. But when it is recalled that traditional authority courts serve a particularly different purpose; they are meant to preserve the vestiges of an indigenous judicial system in operation before the European colonial adventurers set foot on the African soil. The jurisdiction of the customary court is not prescribed by the Constitution although the same Constitution clearly states that traditional authority courts "must apply customary law subject to the Constitution and

65 This statement attributed to the Minister of Justice of Namibia was quoted in *S v Heita & Another* 1992 NR 403: 412.
66 1992 NR 403: 411.

any legislation that specifically deals with customary law".[67] Qualifications for membership of indigenous courts have never been predicated on the acquisition of law degrees from Universities or for that matter, exposition to Western-type education and yet, as shown in the *Tembuland* case, the procedure followed in the regional authority courts in accordance with that legislative scheme, resembles that obtainable in the ordinary court. The existence of legal pluralism does not contemplate the total purging of the basic tenets of the customary legal order. Rather, it is designed to keep those values as much as it is possible for the mutual co-existence of the customary as well as the Western legal system.

The Constitutional Court decision in *Van Rooyen* on the independence of Magistrates' Courts in South Africa shows clearer than any court has ever done that these courts, like other lower courts in the judicial hierarchy, cannot assume the same mantle of judicial independence in all its ramifications as the higher courts. Magistrates' Courts are generally known in common law jurisprudence as courts of summary jurisdiction. This means that they are courts of limited jurisdiction as opposed to the High Court which in many Commonwealth countries, is a court of unlimited jurisdiction. By definition, Magistrates' Courts do not assume jurisdiction in constitutional and other matters involving complicated legal issues. In most instances, their decisions are subject to appeal to the higher courts, and in any event, aggrieved litigants can always take on the proceedings before Magistrates' Courts, their orders and decisions on review to the higher court. In spite of the foregoing, it is submitted that what served to rescue the many parts of the Magistrates Courts legislation from outright declaration of unconstitutionality for the most part is the Constitutional Court's well established attitude towards unconstitutionality of legislation whereby it leans on the side of that interpretation or technique that will save the legislation of Parliament from invalidity. That is precisely the approach it adopted in the *Van Rooyen* challenge.

67 Section 211(3), 1996 Constitution.

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