

THE MEANING OF INSTITUTIONAL INDEPENDENCE IN  
*VAN ROOYEN v THE STATE*

JANE FRANCO

*Lecturer in Commercial Law, Law Faculty, University of Cape Town*

CATHY POWELL

*Lecturer in Public Law, Law Faculty, University of Cape Town*

In *Van Rooyen & Others v The State & Others (General Council of the Bar Intervening)* 2002 (5) SA 246 (CC) (hereinafter referred to as *Van Rooyen (CC)*), the Constitutional Court found that magistrates' courts are sufficiently independent largely because the High Courts are able to protect the lower courts from executive interference through the mechanism of judicial review. Apart from providing an overview of the case as a whole, this note analyses the Constitutional Court's reliance on judicial review in detail, suggesting that the central role accorded to judicial review betrays an inadequate theoretical conception of institutional independence.

Before the Magistrates Commission was established in 1993, magistrates' conditions of service were regulated under the Public Service Act 54 of 1957 (repealed) and the Public Service Act 111 of 1984 (repealed), and not by an independent body. As a result, magistrates lacked independence from the executive branch of government and the public perception could only have been that they were an extension of the government of the day. In the light of the chequered history of the magistrates' courts, their independence was

viewed with scepticism and surrounded by debate even after magistrates were officially removed from the public service and the Magistrates Commission was established. Even under the new system, magistrates' courts still enjoy significantly less independence than High Courts. It was therefore inevitable that the constitutionality of lower courts would be challenged on the basis that their relationship with the executive infringed the doctrine of separation of powers.

The challenge came in 2001. In three criminal cases, the validity of the proceedings in the magistrate's court was challenged on the basis that the court lacked the institutional independence required by the Constitution (*Van Rooyen & Others v The State & Others* 2001 (4) SA 396 (T), hereinafter referred to as *Van Rooyen* (TPD)). The men accused in these cases sought further ancillary relief regarding the constitutional validity of certain provisions of the Magistrates Act 90 of 1993, the regulations made under it, and the Magistrates' Courts Act 32 of 1944 (see *Van Rooyen* (TPD) at 414).

When the case came before the Transvaal Provincial Division, Southwood J found that certain provisions of the impugned legislation were unconstitutional as they infringed the independence of the magistrates' courts. In a unanimous judgment, the Constitutional Court overturned the TPD decision almost entirely, holding that the magistrates' courts had sufficient independence to comply with the doctrine of separation of powers (*Van Rooyen* (CC)).

## THE CONCEPT OF JUDICIAL INDEPENDENCE

The argument accepted by the TPD was that both the regulatory body governing the magistracy — the Magistrates Commission — and the magistrates' courts themselves lacked independence. In rejecting this contention, the Constitutional Court had first to establish how independence should be evaluated.

Quoting the Canadian case of *R v Généreux* (1992) 88 DLR (4th) 110 (SCC), Chaskalson CJ noted that the test for determining whether criteria for independence are met is whether, 'from the objective standpoint of a reasonable and informed person, [the court or tribunal will] be perceived as enjoying the essential conditions of independence' (*Van Rooyen* (CC) para 32). This test is objective (para 34) and stresses the importance of the public perception of independence, which is as relevant to the enquiry as factual independence (para 32).

The particular criteria for the test for independence were taken from another Canadian case, that of *Válente v The Queen* (1986) 24 DLR (4th) 161 (SCC). This case attributed an internal, or subjective, as well as an external, or objective, facet to independence. This conception requires that the judicial officers themselves be impartial in their state of mind and also that there be 'a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees' (*Válente* (supra) 170, referred to in *Van Rooyen* (CC) at note 22).

Our discussion relates entirely to the second aspect, that is, the external, objective facet of independence. *Valente* (supra) identified three specific elements which together guarantee external independence, namely, security of tenure, financial security and the independence of the institution to which the judicial officers belong (*Valente* (supra) at 176–90; *Van Rooyen* (CC) para 29).

The court in *Valente* (supra) saw security of tenure and financial security together as safeguards of the *individual* judge's freedom from outside influence, whereas institutional independence protects the judges as a *collectivity*. Distinguishing broadly between individual and collective independence, the *Valente* court emphasized (at 171) that the latter aspect was indispensable:

'The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.'

Collective, institutional independence in *Valente* (supra) relates to the control which judges have over the job they do. The court described it as the facet of independence concerned with 'matters of administration bearing directly on the exercise of [the court's] judicial function' (at 187). However, it then distinguished further between the *adjudicative* and purely *administrative* judicial functions, according decisive importance only to the adjudicative aspect. This aspect, according to *Valente* (supra), involves the 'assignment of judges, sittings of the court and court lists — as well as related matters of allocation of court-rooms and direction of the administrative staff engaged in carrying out these functions' (at 188).

The purely administrative aspect of the judicial function, on the other hand, was seen in terms of various financial and discretionary benefits enjoyed by the judges, the control exercised by the executive over these benefits and the recruitment and control over support staff within the court (at 188–90). Outlined in this manner, the administrative aspect was seen as peripheral to institutional independence (*ibid*).

This section of the judgment is puzzling. It does not comply with *Valente's* own definitions of its three core concepts. The case appears to slot control over administrative personnel into both the adjudicative and administrative aspect of institutional independence. To our mind, the distinction between 'support staff' and 'administrative personnel' is at best nebulous and at worst non-existent. However, *Valente* (supra) categorizes as *adjudicative* the direction of the administrative staff engaged in carrying out the court's functions and as *administrative* the control over support staff within the court (at 188).

Furthermore, the case sees discretionary benefits as an issue under the peripheral, 'purely administrative' aspect of *institutional* independence. But discretionary benefits affect the individual, not the institution. *Valente* (supra) appears to be ignoring its own main distinction between the independence of the *individual* and the independence of the *institution*.

What may have contributed to the confusing categorization is that the particular benefits in *Valente* (supra) were being handled in such a way as to

seem to put judges on a par with civil servants (at 189). Such a comparison creates the impression that one institution has been subsumed under another. When the umbrella institution is under the direct control of the executive, there is clearly a threat to the doctrine of separation of powers. Nonetheless, *Valente* (supra) conflated the executive's control over an individual judge with the judiciary's control over its functions and thereby ignored its own distinction between individual and institutional independence.

This failing is to some extent explained by Lamer CJC in a later case, *Reference re: Public Sector Pay Reduction Act (PEI), s 10; Attorney General of Canada et al, Interveners; Reference re: Independence of Judges of Provincial Court, Prince Edward Island, Provincial Court Act and Public Sector Pay Reduction Act; Attorney General of Canada et al, Interveners* (1997) 150 DLR (4th) 577. In this case, Lamer CJC found the theoretical framework underlying the distinction inadequate. Noting that *Valente* (supra) distinguished between individual and institutional (collective) independence without clearly defining the latter (*Reference re: Public Sector Pay Reduction Act* (supra) para 123), Lamer CJC suggested that security of tenure, financial security and what he termed administrative independence may each protect *both* individual and institutional independence. Individual and institutional independence, in Lamer CJC's view, were *dimensions* of an independence protected by its 'core characteristics' of security of tenure, financial security and administrative independence (*Reference re: Public Sector Pay Reduction Act* (supra) para 118). Lamer CJC stated (para 119) that these three characteristics

'come together to constitute judicial independence. By contrast, the dimensions of judicial independence indicate which entity — the individual judge or the court or tribunal to which he or she belongs — is protected by a particular core characteristic'.

As *Valente* (supra) did not have a vision of institutional independence (*Reference re: Public Sector Pay Reduction Act* (supra) para 123), Lamer CJC suggested one himself. As in *Valente* (supra), Lamer CJC linked institutional independence to the doctrine of separation of powers (*Reference re: Public Sector Pay Reduction Act* (supra) para 125). His discussion is limited to the context of financial independence, but is applicable in a wider context. Within the context of financial independence, Lamer CJC held that the doctrine of separation of powers requires that the courts both be and appear to be free from political interference through economic manipulation, and that they not become involved in the 'politics of remuneration' (para 131). The only means to achieve this, in his opinion, was by interposing an independent body between the judiciary and other branches of government (paras 133 and 166). Although Lamer CJC did not insist that the body's views be binding on the executive, he did require that the body itself be independent, effective and objective (paras 170–5). Its members themselves must have security of tenure (para 171) and the body should not be controlled by any of the branches of government (para 172).

When the Constitutional Court in *Van Rooyen* (CC) dealt with institutional independence, it relied on *Valente* (supra). The case of *Reference re: Public Sector Pay Reduction Act* (supra) is mentioned only in the context of

remuneration, and its delineation of institutional independence is ignored (*Van Rooyen* (CC) paras 141–3). The Constitutional Court limited institutional independence specifically to adjudicative aspects, but did not list exactly what these were. As in *Valente* (supra), the relevant aspects were instead defined generally as administrative decisions bearing ‘directly and immediately on the existence of the judicial function’ and as ‘matters that relate directly to the exercise of the judicial function’ (*Van Rooyen* (CC) para 29). A second formulation used by the Constitutional Court is that institutional independence is the independence between the courts and other arms of government (paras 18–19). Chaskalson CJ held that institutional independence requires sufficient structures to ‘protect courts and judicial officers from external interference’ (para 19) but saw appeal and review procedures by *other* courts (para 24) as well as the Constitution itself as a mechanism of institutional independence (para 18). Yet another formulation saw institutional independence as independence in the appointment, promotion and discipline of magistrates and the control over day-to-day functioning of the courts (para 30).

In our view, the Constitutional Court’s piebald treatment of institutional independence, and the contradictions which emerge within the judgment, demonstrate Lamer CJ’s contention that the core aspects of security of tenure, financial security and administrative independence may each bear on both individual and institutional independence. The problem with *Van Rooyen* (CC), however, is that it does not acknowledge this. Instead of producing a clearly delineated concept of institutional independence, it relies on *Valente*’s amalgam of factors. As a result, institutional independence, both too wide and too narrow a concept, provides no clear principles by which independence can be evaluated.

We submit that a coherent definition of institutional independence is essential, and we believe that *Van Rooyen* (CC) demonstrates the dangers of bypassing this dimension.

## THE FINDINGS OF THE CONSTITUTIONAL COURT

*Van Rooyen* (CC) runs to over 150 pages, pronouncing on two Acts, 15 regulations and 39 sections in all. It considers the Magistrates Commission, the appointment of magistrates, their salaries, their conditions of service, public complaints against magistrates, complaints by magistrates, removal of magistrates and the assignment of administrative duties to them. We believe that a comprehensive overview is essential for a proper analysis of the case, but the detail and the sheer volume of the judgment threaten to obfuscate an examination of the underlying reasoning. We have therefore tabulated the main findings. They are presented at the end of this note in the form of two tables and brief descriptions of the Court’s decision on the main points, accompanied by short comments where these relate to an individual finding. In the rest of the note, we analyse and critique the reasoning underlying the judgment as a whole. We will not, however, be dealing with s 9(3)–(5) of the

Magistrates' Courts Act regarding acting and temporary magistrates or s 12(2) of the Magistrates' Courts Act regarding additional/assistant magistrates.

*The Magistrates Commission*

Section 109 of the Constitution of the Republic of South Africa Act 200 of 1993 ('the interim Constitution') required a Magistrates Commission to be established to ensure that 'the appointment, promotion, transfer or dismissal of or disciplinary steps against magistrates take place without favour or prejudice' (see also *Van Rooyen* (CC) para 53 and Kees van Dijkhorst 'The future of the magistracy' 2000 *Advocate* 39).

The Magistrates Act 90 of 1993 came into operation on 11 March 1994. It was meant to take magistrates out of the realm of the public service and to establish an independent judiciary with its own governing body, the Magistrates Commission. Section 4 of the Magistrates Act sets out the objects of the Commission. For our purposes the most important object of the Commission is to guard the independence of the Magistracy (s 4(a), (b) and (h) of the Magistrates Act). In doing so, the Commission must ensure that there is no preferential treatment or prejudice in the appointment, promotion, transfer, discharge of, or disciplinary procedures against, magistrates (s 4(a)) and make recommendations on these procedures (s 4(a), (b), (f) and (g)). It must also compile a code of conduct for magistrates, advise the Minister of Justice and make recommendations regarding conditions of service of magistrates, their administration (s 4(d) and (e)) and any other matters that may affect the independence of the magistracy (s 4(h) and (i)).

Table 1 illustrates the composition of both the Magistrates Commission (hereinafter the MC) and the Judicial Service Commission (hereinafter the JSC). Under s 3 of the Magistrates Act, the MC consists of 27 members, namely, one judge, the Minister of Justice, six magistrates, four practising lawyers, two people involved with the education and training of lawyers and magistrates, eight politicians and five other persons. The judge, half the magistrates, the practising lawyers and the law teacher are chosen by the President after consultation with the professional group to which the appointed person belongs. The politicians are chosen by the National Assembly and the National Council of Provinces. The appointees in the former group must include two opposition members, while the persons designated by the NCOP require the support of six of the nine provinces. (As seven of South Africa's provinces are governed exclusively by the ANC, the choice of commissioners from the NCOP is currently in the hands of the majority party in Parliament.) The President, in consultation with Cabinet, has the sole say in choosing the five remaining commissioners.

In our analysis of the possible influences on the magistracy, we must bear in mind that South Africa's constitutional system provides for a partially fused executive and legislature. (Under s 91 of the Constitution of the Republic of South Africa, Act 108 of 1996, all but two members of Cabinet must be selected from the National Assembly.) As a result, the executive constitutes the

leadership of the majority party in Parliament and has the power to determine the legislature's choice of Commissioners. We will refer to this entity composed of the executive and the majority party in Parliament as the 'ruling party' or 'government'. From Table 1 and the description given above, it should be clear that this unit appoints or designates 21 of the 27 members of the Commission. It must be noted that even the Commissioners appointed from opposition parties in Parliament are chosen by the majority party.

Due largely to its composition, the TPD found that the Magistrates Commission lacked the necessary independence to carry out its objects. In terminology criticized by the Constitutional Court (*Van Rooyen* (CC) para 46), Southwood J described the Commission as the 'personal fiefdom of the Minister of Justice' (*Van Rooyen* (TPD) at 455).

Southwood J was concerned that the members of the Commission would defer to the Minister. He stated that the Commissioners were 'unlikely to express views or make recommendations or take a final decision which does not find favour with the Minister' (*Van Rooyen* (TPD) at 455). The Constitutional Court overturned this finding (*Van Rooyen* (CC) paras 57–74). In particular, Chaskalson CJ held that the MC followed the 'constitutional template provided by the Constitution, in the form of the Judicial Service Commission' (*Van Rooyen* (CC) para 58) and was therefore sanctioned by the Constitution itself. He further rejected Southwood J's view that the Commissioners would defer to the Minister of Justice, holding that there is no reason to believe that the Commissioners 'will not discharge ... their ... duties with integrity, or that viewed objectively there is any reason to fear that they will not do so' (para 72).

We would like to assume that, given the offices they occupy, the commissioners will discharge their duties with integrity. But we would also like to assume that this would be true of all persons in public office and, in particular, of all judicial officers. Yet *Valente* (supra) and *Van Rooyen* (CC) itself make clear that all judicial officers require protection against undue influence from other branches of government. What is striking in the Constitutional Court's approach is that the personal integrity of the commissioners forms a particular safeguard for the Magistrates Commission; a safeguard evidently deemed to be insufficient in the case of the JSC.

We submit that the JSC is supported by considerable additional mechanisms. If we examine Chaskalson CJ's statement that the two commissions follow the same template, we see that the template relates largely to the categories from which the commissioners are chosen. The Constitutional Court accords very little importance to the designating authority. Under s 178 of the Constitution, 12 of the 23 permanent members of the JSC are appointed by or constituted of the majority party in the legislature or the executive branch of government. (Following Southwood J's method in *Van Rooyen* (TPD) at 452–5), we are excluding from the 'ruling party' total the members of the opposition parties appointed by the National Assembly.) The executive and the majority party in Parliament therefore enjoy a majority in

both commissions, but in the JSC it is a majority of one person. In the Magistrates Commission it is a majority of over 80 per cent.

Furthermore, the Court presumed that each commission fulfils an identical role in protecting the independence of the judicial body it governs. It did so on the basis that both commissions deal with appointment and impeachment (*Van Rooyen* (CC) paras 57, 59 and 60). The Court disregarded the fact that the MC plays a more direct role in ensuring the independence of magistrates than the JSC does in respect of the judiciary. For example, it participates in determining matters such as remuneration (ss 11, 12 and 16 of Magistrates Act) whereas judges are governed by s 2 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989, read with ss 176(3) and 178 of the Constitution. The MC further determines transfers, promotion and disciplinary procedures whereas the JSC does not (compare ss 176(2) and 178 of the Constitution with ss 7, 11, 12, 13 and 16 of the Magistrates Act). In disregarding the more important role played by the MC, the Court may also have failed adequately to acknowledge that the chequered history of the magistracy in this country opened it up to the kinds of inappropriate influence by the other branches of government to which the judiciary was not exposed. It was for this very reason that the Commission was established (see generally M Olivier 'Is the South African magistracy legitimate?' (2001) 118 *SALJ* 166; Van Dijkhorst op cit 43; Lazarus Kgalema & Paul Gready 'Transformation of the magistracy: balancing independence and accountability in the new democratic order' report prepared for the Centre for the Study of Violence and Reconciliation (2001); *Van Rooyen* (TPD) at 443).

Members of the MC may be removed from office by the body or person that appointed or designated them after consultation with the Commission, if there are 'sound reasons for doing so' (s 3(2) of the Magistrates Act). On the face of it, this procedure reflects the procedure for the removal of members of the JSC. However, the designating authority in the case of almost half the members of the JSC is the group from which the commissioner was chosen. In the case of the MC, on the other hand, 21 of the 27 members may be recalled at the instance of the ruling party.

### *Independence of the Magistracy*

Table 2 provides a tabulation of those aspects of executive control over the magistracy approved by the Constitutional Court, thereby overturning the TPD on most of its findings. The aspects of executive control which the Constitutional Court found inconsistent with the requirements of judicial independence are listed below the table.

#### a. *Security of tenure*

The Constitutional Court considered both the grounds and procedure for the removal of magistrates from office. It approved the grounds for removal, namely, ill health, incapacity and misconduct (s 13(aA)(i)–(iii) of the Magistrates Act). Chaskalson CJ commented that the grounds for removal are 'not

materially different from the grounds on which judges may be removed in countries such as Australia, Canada, New Zealand and the United Kingdom' (*Van Rooyen* (CC) para 162). The procedure for removal is that the Commission may provisionally suspend a magistrate pending an investigation, which suspension, if confirmed by the Minister, must be tabled, with reasons, in Parliament. Parliament must then make a resolution on whether or not to remove the magistrate (s 13(2), (3) and (4) of the Magistrates Act and *Van Rooyen* (CC) paras 166–7). The Court approved the provisional suspension on the basis that, 'since the Constitution makes provision for a judge to be suspended on the advice of the Judicial Service Commission . . . there can be no constitutional objection to a similar power being vested in the Magistrates Commission' (para 170). It also approved the procedure for final impeachment, holding that that '[i]mpeachment on the basis of an independent investigation subject to confirmation by Parliament is generally recognised as a high degree of protection against executive power, consistent with judicial independence' (para 183).

An additional procedure for removal provided by s 13(4) Magistrates Act was, however, struck down by the Court. This section provided that the Minister had to remove a magistrate if Parliament passed a resolution recommending this removal. The Court saw this mechanism as providing an additional ground for removal over and above the grounds of misconduct, ill health or incapacity; one which furthermore did not require a preliminary investigation by the Magistrates Commission. The Court held that this procedure infringed judicial independence (*Van Rooyen* (CC) para 186).

The retirement of magistrates is dealt with in s 13(1) of the Magistrates Act, which provides that the age of retirement is 65, but that the Minister may, after consultation with the Commission, allow a magistrate to continue to hold office for a further period which the Minister shall determine, if the magistrate's mental and physical health would enable him or her to continue working (see s 13(1)(a) of the Magistrates Act). Chaskalson CJ found there was sufficient security of tenure in such processes because the extension period is fixed at the outset and not vulnerable to the will of the executive (para 151). He also overturned the TPD's finding that the procedure by which magistrates are chosen for extended tenure rendered magistrates vulnerable to the executive. Under the Act, the Minister decides who shall remain in office 'after consultation with' the Commission (s 13(1) of the Magistrates Act). Having conceded (para 103) that such a procedure did not bind the Minister to follow the Commission's recommendation, Chaskalson CJ nonetheless decided that a judicial officer would not attempt to find favour with the executive in order to maintain his or her post after retirement (para 155).

#### b. *Conditions of service*

This issue does not fit comfortably into any of the three *Valente* (supra) categories, and the Court found itself rather awkwardly dealing with it under institutional independence.

The Magistrates Act provides that the Minister may make regulations concerning the conditions of service of magistrates after the Commission has made a recommendation (ss 11 and 16(1) of the Magistrates Act). Van Rooyen and his fellow applicants objected to this provision, maintaining that the Minister's power to make regulations was an unconstitutional delegation and a measure which placed the executive in control of the magistracy (*Van Rooyen* (CC) para 112). This argument was rejected by the Court, which held that s 174(7) of the Constitution did not preclude delegation; it merely required that an Act of Parliament *ensure* that matters relating to appointment, promotion, transfer, dismissal, leave and disciplinary procedures take place without favour or prejudice (para 121). The Magistrates Commission, it held, was the mechanism by which this fair process was to be ensured (para 124). The Court held the phrase 'after the Commission has made a recommendation' to mean that the regulations can be made *only* on recommendation of the Commission (para 133), and held further that the Minister may neither act without a recommendation nor depart from the terms of the recommendation (paras 127–8). The Court also identified parliamentary and judicial review as possible safeguards against abuse by the Minister (para 127).

Section 16(1) of the Act provides: 'The Minister may, after the Commission has made a recommendation, make regulations. . . .' In its discussion of this section, the Court did not concede that the word 'may' allows the Minister not to act on recommendations at all — a significant power if the Minister wishes to block attempts at reform by the Commission.

In terms of s 13(5)(a) of the Magistrates Act, a magistrate may vacate office prior to retirement while retaining pension benefits, but only with the consent of the Minister. The Court held that this did not affect the institutional independence of the magistracy (*Van Rooyen* (CC) paras 153–9). It conceded that the Minister's exclusive power to consent directly affects the magistrate financially, but relied again on the character of judicial officers to prevent this power from leading to undue influence. In the Court's view, judicial officers were persons of integrity who would not be influenced by the motive of gaining favour with the executive to secure benefits (para 155).

Promotion of magistrates is dealt with under the regulations promulgated in terms of s 16(1) of the Magistrates Act (reg 16(1)(a) of the Regulations for Judicial Officers in the Lower Courts GN R361 in GG 15524 of 11 March 1994). A magistrate with more than five years' experience may be promoted by the Minister on the recommendation of the Commission. This was found to be constitutional as the Minister does not have unfettered discretion. In its discussion, the Court conceded that the Minister may manipulate the process by failing to act on a recommendation, but justified this power on the basis that an omission would be subject to judicial review (para 213).

Complaints or grievances made by magistrates are also dealt with in the regulations promulgated in terms of s 16(1) (see regs 31–3 of the Regulations for Judicial Officers in the Lower Courts). If a magistrate is dissatisfied with an 'official act or omission', he or she will have recourse to the head of office or, if

there is no head of office, the Commission itself, which body must investigate the complaint. If the magistrate is not satisfied with the head's handling of the matter, he or she may approach the Commission directly. In such a case, the Commission may itself investigate the matter or designate a 'magistrate or person' to do so (see reg 31(1)). The Commission must notify the magistrate of its findings and take any steps it deems fit (reg 32(1)). If still dissatisfied, the magistrate may request the Commission to refer his or her complaint to the Minister (reg 32(2)). The Minister must then decide whether to continue with the investigation and inform the magistrate of his or her decision (reg 33). The High Court rejected these provisions on the basis that the complaint will itself usually be against the persons empowered to carry out official acts — that is, the Minister, the Department or the Commission. There was, in the High Court's view, no independent body to oversee such grievances (*Van Rooyen* (TPD) at 476). Overturning this ruling, the Constitutional Court held that the Commission would be a suitably independent body if the complaint is against the department, and that the right of further redress to the Minister provides an additional remedy rather than encroaching upon independence. Furthermore, if the magistrate's complaint relates to decisions taken by the Commission or the Minister, and those decisions were taken properly, the Court opined that the magistrate has no legitimate grievance and so need not resort to the complaints procedures at all (*Van Rooyen* (CC) para 238).

This is an extraordinary paragraph. In the Court's view, there will be a legitimate grievance, and therefore grounds for judicial review, only if a decision was not 'properly' taken. This suggests that there can be no *substantive* element to a complaint, as the Court envisages only *procedural* irregularities. Magistrates whom we asked for examples of complaints that they might lodge did suggest some procedural irregularities, such as favouritism, but included substantive problems such as sexual harassment and interference by the head of office in a magistrate's running of cases.

Even in the case of procedural irregularities, however, the Court's interpretation leaves us wondering quite what the complaints procedure is for. If the decision was *not* properly taken, then Southwood J's view needs careful consideration. Because complaints would by nature be against the persons who exercise power over the complainant, and the Minister and MC exercise power over the magistracy, there is still a strong likelihood that the complaint will be against the very people empowered to hear it. In that case, judicial review becomes the magistrate's only avenue for redress. On the other hand, if the decision in question *was* properly taken, then the entire complaints procedure, according to the Constitutional Court, should not be used in the first place.

Complaints against magistrates made by the public are dealt with in s 6A of the Magistrates Act, which directs the Minister to create procedures for lodging complaints and a structure to deal with such complaints. The Complaints Procedure Regulations establish complaints committees which

can investigate complaints themselves or refer them to the Commission (Complaints Procedure Regulations GN R1240 in GG 19309 of 1 October 1998). The High Court held that s 6 infringed judicial independence because it gives the Minister exclusive power to make the regulations (*Van Rooyen* (TPD) at 456). The High Court finding was overturned by the Constitutional Court. Chaskalson CJ pointed out that the Constitution specifically provides for legislation to be enacted dealing with complaints against magistrates and that regulations are included within the definition of legislation (*Van Rooyen* (CC) para 100). This reasoning passes lightly over the Minister's sole powers to pass such legislation, although the Constitutional Court once again expressly relied on judicial review to check executive interference (para 100).

*c. Appointment*

Once again, the issue of appointment sits uncomfortably with the *Valente* (supra) tabulation. The Constitutional Court did not make clear how it categorizes the matter. Magistrates are appointed by the Minister after consultation with the Commission (*Van Rooyen* (CC) para 100). As this means that the Minister is not bound by the Commission's recommendation (para 103), the Commission becomes merely a consultative body in this process of appointment, which is then left in the hands of the executive. The Court held, however, that the executive's role in the appointment of these judicial officers is not incompatible with the separation of powers doctrine (paras 104–10). It noted (paras 107–9) that this method of appointment had been approved in the *First Certification Judgment (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))* and paralleled the process of appointment of high court judges in jurisdictions such as Australia, the United States, Canada and Germany.

*d. Financial security*

Section 12(1)(a) of the Magistrates Act allows the Minister to determine salaries in consultation with the Commission. The phrase 'in consultation with' prevents the Minister from acting without the concurrence of the Commission (see *Van Rooyen* (TPD) at 453 and *Van Rooyen* (CC) para 103). The Constitutional Court held that this restriction on his powers ensures that magistrates have adequate financial security (*Van Rooyen* (CC) paras 147–8). However, the Act does allow for further intervention in magistrates' salaries, in that s 12(6) allows magistrates' salaries to be reduced by Act of Parliament. Judges' salaries, on the other hand, are immune from reduction (s 176(3) of the Constitution). Chaskalson CJ commented (para 148) that there 'are significant guarantees against the power to set salaries being used as a means of exerting pressure on magistrates', but did not specify what they are. The only mechanism identified by the Court was that of review by the higher judiciary.

## THE BASES OF THE JUDGMENT: DIFFERENTIATION AND JUDICIAL REVIEW

The Constitutional Court was prepared to accept a lower standard of independence in the magistracy than it requires of the High Courts. Rejecting the applicants' contention that 'all courts should be treated in the same way' (*Van Rooyen* (CC) para 21), Chaskalson CJ held that

'“the most rigorous and elaborate conditions of judicial independence” 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' (para 27, citing *Valente* (supra)).

The Constitutional Court justified this view with reference to the Constitution itself, which provides for a hierarchy of courts (paras 21–8, referring to ss 166, 170, and 174 of the Constitution), with different jurisdictions and administrative procedures (para 28). The Court noted, in particular, that the Constitution provides for matters relating to the administration of judges itself while leaving such matters in respect of magistrates to be decided by Act of Parliament (s 174(7) of the Constitution and *Van Rooyen* (CC) para 28). In addition, higher courts deal with matters such as administrative review and constitutional issues, which were seen to be the 'most sensitive areas of tension between the Legislature, the Executive and the Judiciary' (para 25). On this basis, the Court held (*ibid*) that '[m]easures considered appropriate and necessary to protect the institutional independence of [high] courts ... are not necessarily essential to protect the independence of courts that do not perform such functions'. What the Court did not consider, however, is that magistrates, in hearing criminal cases, deal with the police, and therefore the executive, all the time. In each criminal case, the state is a party. This suggests that protection from the influence of the executive arm of government is particularly important for the magistracy.

Central to the Constitutional Court's argument was the view that the increased level of institutional independence at a higher level was justified because the High Courts are in themselves an infrastructure ensuring and guarding the independence of the judiciary in the lower courts through the mechanism of judicial review (*Van Rooyen* (CC) paras 21–4). In the Court's own reasoning, then, judicial review is the remedy by which the lowered standard of independence is justified.

As our discussion of the individual findings in *Van Rooyen* (CC) has shown, judicial review plays a central role in the judgment. It is the only protection against external influence and abuses of power in a wide number of instances brought before the Court. Judicial review would be needed to remedy an inappropriate consultative process in the appointment of commissioners (para 69), the promotion of magistrates (para 213) and any improper decisions regarding magistrates' conditions of service and complaints they may have (para 238). Judicial review is the only remedy if the Minister abuses his power to make regulations on complaints by the public (para 100). The Court also relied implicitly on judicial review in two other main areas: first, it rendered the procedure for the recall of commissioners reviewable through removal of

the phrase ‘if in his, her or its opinion’ from s 3(2) of the Magistrates Act (there is no other safeguard of independence in this case); second, it does not give weight to the fact that the Minister may choose not to act at all (when, for example, the Commission makes recommendations regarding conditions of service or promotion of magistrates). If the Minister were to refuse to act, it is clear that the only remedy for the magistrates would be judicial review. Finally, whenever the Court points out that a decision will be invalid if it infringes the doctrine of separation of powers, it is relying on the mechanism of judicial review to render that ‘invalid’ decision inoperative (see, for example, *Van Rooyen* (CC) paras 87, 100, 128 and 234).

The Court’s reliance on judicial review is problematic. To the extent that it is used to oppose the applicants’ argument, it often begs the question before the Court. The whole challenge to the legislation was based on the fact that the Constitution requires the magistracy to be independent. The Court, however, treated this constitutional requirement as a *defence* against the challenge, in effect seeing the constitutional requirement of independence as constitutive of that very independence. In the light of the magistracy’s history, such an approach was inappropriate. When the interim Constitution came into effect, it was clear that the magistracy was *not* an independent body. The constitutional requirement of independence — the protection on paper — needed to be given practical effect in order to change the situation on the ground.

Furthermore, judicial review is not a protective mechanism unique to the magistracy. In relying on judicial review, the Court relies on a feature available to all South Africans in order to claim that the magistracy is sufficiently protected as an *institution*. A similar kind of thinking seems to be behind the confident assertion that the magistracy is protected by the personal integrity of commissioners (para 72) and magistrates (para 155).

Finally, when the Court relies on judicial review, it is relying on a person or a body to bring cases of interference and abuse of power to the High Court. In this way, the High Court serves to *remedy* infringements of independence. It does not *prevent* them. And the body which was established to prevent abuses of power — the Magistrates Commission — is itself heavily dependent on the High Court to carry out this important function.

## CONCLUSION

In the Constitutional Court’s own view, the most important protection accorded to the magistracy emanates from the High Courts and not from within the magistracy itself. In our view, this leads to the anomalous result that the magistracy, as an *institution*, has little or no protection from political interference, and is yet considered to have *institutional* independence. The judgment in *Van Rooyen* (CC) accepts an institution as independent from another institution with which it overlaps, and which has considerable influence on its day-to-day running, provided a third body can be called upon to remedy undue influence and the abuse of power.

We would argue that independence requires more than the absence of interference or even protection from interference; it requires that the day-to-day running and the overall control of the magistracy be located in an institution which is sufficiently separate from any other branch of government. The executive and legislature should have little or no chance to exert improper influence on the judiciary, so that the remedies for such abuses become largely unnecessary. A stringent application of the doctrine of separation of powers would prevent abuse and interference by other branches of government. With its reliance on judicial review, we submit that the Court is to some extent presenting a cure for a problem which would not arise in a truly independent institution in the first place.

Both *Valente* (supra) and *Van Rooyen* (CC) found that varying levels of independence are acceptable for different bodies within the judicial system. Our objection is not to the differentiation as such, but to the lack of a test, or at least a guideline, to establish at which point 'different' becomes 'insufficient'. In this respect, the most important difference between the higher judiciary and the magistracy is found in the level of overlap which each body has with the executive. We would argue that this differentiation is permissible provided each body within the judiciary has only as much overlap with another branch of government as effective government requires.

In line with academic writing on the subject, Chaskalson CJ noted that the requirement of an independent judiciary is based on the doctrine of separation of powers (*Van Rooyen* (CC) paras 17 and 34, citing L Tribe *American Constitutional Law* Vol 1 3 ed (2000) 127). However, the Constitutional Court does not relate its vision of independence, and particularly that of the independence of the magistracy as an *institution*, to the theoretical framework of the doctrine of separation of powers. In our submission, the doctrine of separation of powers is best reflected in a conception of judicial independence which seeks to avoid overlap between the branches of government, or at least limit it to a minimum. In this vein, it has been argued that '[c]ollective independence will require that executive control over matters of judicial administration must be limited to those areas where the system of government deems it indispensable' (S Shetreet 'Israel' in S Shetreet (ed) *Judicial Independence: The Contemporary Debate* (1985) 174). This means that the Court would have to ask what effective government requires when it addresses a question of judicial independence. However, the problem of overlap between branches of government was addressed only fleetingly in *Van Rooyen* (CC). The Court noted an overlap, in that magistrates' courts carry out administrative functions, which create a closer relationship between the magistrates' courts and the executive than the relationship between the High Courts and the executive. On the basis that the overlap had not been challenged by the applicants, however, the Court did not enquire whether it was acceptable (paras 233–4).

An institution which is separate from the other branches of government would be independent in itself. But it would also require some mechanism,

unique to itself, by which it could protect itself from outside interference. We therefore support Lamer CJC's view that, where the judiciary is concerned, the best such mechanism would be an independent regulatory body. The magistracy already has a body expressly set up to guard its independence but the Magistrates Commission cannot fulfil this function unless it itself enjoys independence and has the power to make and carry out independent decisions. In our discussion of the MC and the system within which it works, we have argued that neither condition is met.

There are 532 magistrates' offices in South Africa and 1 758 magistrates (*Van Rooyen* (CC) para 223). Quite possibly, the JSC does not provide the right template for the type of governance required over a body as enormous as the Magistracy. (According to figures prepared by the Department of Justice for a Judges' Symposium in July 2003, there are only 214 judges in South Africa.) However, effective management of the magistracy does not necessarily require control by the executive. To the extent that some overlap and control by the executive may be needed for the effective running of the system, that level of overlap and control should be established by a careful enquiry. We submit that the issue of the independence of the magistracy still needs close scrutiny, and that the Constitutional Court's treatment of the subject, while voluminous, does not provide a clear theoretical framework by which independence, and particularly *institutional* independence, can be evaluated.

The *Van Rooyen* (CC) judgment would seem to close debate on most aspects of the magistracy. However, a close analysis of the judgment raises important questions and suggests that the issue of its independence has not been resolved. We submit that the issue should not be shelved just yet. Between 90 and 95 per cent of cases are heard in the lower courts (*Olivier* op cit). As magistrates' courts are the only forum in which the majority of the population will encounter the justice system, the independence of the magistracy is crucial to the administration of justice as a whole. As South African judges have noted ('Address by the Chief Justice I Mohammed to the Second Annual General Conference of the Judicial Officers' Association of South Africa in Pretoria on 26 June 1998' (1998) 1 *Judicial Officer* 47–8 and *Van Dijkhorst* op cit 42), it is in the magistrates' courts that admiration can be earned for the entire judicial system, and it is there that respect will be lost.

**Table 1:**  
**Composition of the Magistrates Commission  
 and the Judicial Service Commission**

Category from which Commissioner is chosen	Members of MC designated by ruling party	Members of JSC designated by ruling party	Members of MC designated by others	Members of JSC designated by others
Judge	0	0	1	3
Minister/nominee	1	1	0	0
Regional magistrates	1	—	1	—
Chief magistrates	1	—	1	—
Other magistrates	1	—	1	—
Advocates	2	0	0	2
Attorneys	2	0	0	2
Law Teachers	1	0	0	1
Head: Justice College	1	—	0	—
NA	2(4)*	3(6)*	2(0)*	3(0)*
NCOP	4	4	0	0
Other	5	4	0	0
<b>Total</b>	<b>21 (23)*</b>	<b>12 (15)*</b>	<b>6 (4)*</b>	<b>11 (8)*</b>

\* The figures in brackets reflect the fact that half of the commissioners from the National Assembly, while being opposition MPs, are nonetheless *chosen* by the National Assembly as a whole, and therefore by the ruling (majority) party. However, the TPD's analysis treated the opposition MPs as commissioners designated by a body other than the ruling party; an approach which we are adopting here with respect to both commissions.

**Table 2:**  
**Minister's powers over magistrates  
 approved by the Constitutional Court**

	Minister's level of discretion	Safeguards of independence identified by the Court
Appointment (paras 102–10)	Minister acts 'after consultation with' MC	Method found in other jurisdictions; judicial review
Extension of tenure (paras 150–9)	Minister acts 'after consultation with' MC	Personal integrity of magistrates
Approval of early retirement (paras 155–9)	Minister has sole discretion	Personal integrity of magistrates; judicial review
Procedure and grounds for removal (paras 161–77)	MC suspends magistrate; decision confirmed by Parliament	MC; parliamentary review
Promotion (paras 212–16)	Minister acts 'on recommendation of' MC (but may fail to act)	MC; Judicial review

	<b>Minister's level of discretion</b>	<b>Safeguards of independence identified by the Court</b>
Setting of salaries (paras 136–49)	Minister acts 'in consultation with' MC	MC for setting of salaries; constitutional review for reduction of salaries by Parliament
Transfers of magistrates without their consent (paras 221–5)	Minister takes decision; MC decides appeals	MC; judicial review
General conditions of service (paras 111–35)	Minister acts 'after the MC has made a recommendation'	MC; parliamentary review; judicial review
Complaints by magistrates (paras 235–9)	Minister and/or MC hears complaint	Judicial review
Creation of procedure for complaints by public (paras 96–101)	Minister has sole discretion to draw up regulations	Judicial review
Assigning of administrative powers (paras 228–34)	Minister acts 'after consultation with' MC	Judicial review

Note: The main areas in respect of which the Constitutional Court did *not* accept the Minister's discretionary powers over magistrates were: disciplinary procedures (paras 179–86 and 199); the assigning of judicial powers (paras 229–30); and the referral to Parliament of an MC recommendation to remove a magistrate (paras 166–86).