INDEPENDENT AND EFFECTIVE ADJUDICATION IN THE LOWER COURTS OF SOUTH AFRICA

Thesis Presented for the Degree of

Doctor of Philosophy

In the Department of Public Law

University of Cape Town

By

Pawranavilla Rawheath

RWHPAW001

Under the Supervision of Professors Hugh Corder and Pierre de Vos

Date: 15 August 2022

DECLARATION

I, Pawranavilla Rawheath, do hereby declare that this PhD thesis titled, INDEPENDENT and EFFECTIVE ADJUDICATION in the LOWER COURTS of SOUTH AFRICA, is my own independent work, save for that which is properly acknowledged. It is being submitted for the degree of Doctor of Philosophy at the University of Cape Town. It has not been submitted before for any degree or examination in any other University.

Signed: Signed by candidate

15 August 2022

DEDICATION

For:

Nelvia

My Child *of the Moonbeam*: You mean all things Bright and Beautiful about the Universe!

In Memory of:

Roark and all manner of Trails in our Wondrous Journey.

And

Oothamee, ***Ammah***, my mother of boundless Love and Fortitude; an Eternal, Peerless Fountain of Empowerment.

And

Soobiah Subramony, Pappa: my father, ultimate hero of the girl child…for the culture of joy in music, art, and sport but especially for Being There in Every Way.

∞∞∞∞

ACKNOWLEDGEMENTS

Thank You!

Professor Hugh Corder: My Supervisor

The Quintessence, of Guru in this Millennium.!

I'm still blown away by how you got a thought, a mere idea, to grow to the scale of a dissertation in the law. Also incredibly fascinating, for me is how the eminent jurist and scholar that you are, can still be so meticulous in the more mundane aspects of academic writing: **not** your archetypical, wise but distracted professor!

And Thank You!

Professor Pierre de Vos: My Supervisor

This thesis took shape through your challenging of the many significant constitutional concepts it explores and importantly for grounding my thinking in why the Constitution matters so much to people. I appreciate your constant, quiet encouragement in keeping the connection of the concept and principle to the realities of a living and vibrant Constitution.

To both my supervisors, thank you for helping me to make this contribution towards building stronger local court communities.

I am deeply grateful to the Court Communities of Verulam, Durban, and Chatsworth for the inspiration over the decades to write this thesis. These are such resilient societies, constantly braving the tremendous challenges involved in resolving everyday conflicts with the help of the local courts.

And finally, I am truly grateful to you my closest family, Roy, Virez and Nelvia for seeing me through the seasons of this journey which included living through and mercifully surviving Covid – 19.

Hope Frees!

Contents

EXPLANATORY NOTE

Statements and assertions in the text that appear to be unreferenced may largely be attributable to the writer herself and reflects her knowledge and experience acquired whilst serving as a magistrate and regional magistrate in South Africa for thirty-five years.

LIST OF ABBREVIATIONS

CONSTITUTION	THE CONSTITUTION OF SOUTH AFRICA 1996
COMMISSION	THE MAGISTRATES COMMISSION
ICJ	INTERNATIONAL COMMISSION OF JURISTS
JSC	JUDICIAL SERVICE COMMISSION
MA	MAGISTRATES ACT 90 OF 1993
MCA	MAGISTRATES COURTS ACT 32 OF 1944
MCs	MAGISTRATES' COURTS (SOUTH AFRICA)
SCA	SUPERIOR COURTS ACT 10 OF 2013

INDEPENDENT AND EFFECTIVE ADJUDICATION IN THE LOWER COURTS OF SOUTH AFRICA

ABSTRACT

Most dispute resolution in South Africa takes place in the lower courts, mainly the Magistrates' Courts (MCs), and they therefore constitute the foundation upon which the country's administration of justice rests. Indeed, since the establishment of a constitutional democracy in South Africa and the declaration of MCs as independent, the lower courts constitute the largest component of the judiciary and the institution where most people seek the protection of the rule of law.

Although the critical importance of the work of MCs in communities is common knowledge, very little attention has been given to the subject of lower court dispute resolution in the jurisprudence and the scholarly literature. Under the circumstances, the discourse about judicial independence and courts' effectiveness is situated in a judicial system in which MCs do not feature. Several related explanations may be given for the absence of lower courts from these debates, not least of which is the pre – constitutional historical location of MCs within the executive of a state where an illegitimate Parliament was sovereign. Yet, given the rather obvious ***present*** *importance of the lower courts in the judicial system, there is a need to draw them to the centre of the debate.*

This shift is especially important considering the enormous challenges which confront lower courts to effectively adjudicate disputes in high volumes and varied in nature and complexity. When the work of MCs is raised in discussions about the judiciary, commentary is invariably negative in tone especially with reference to the poor quality of judicial decisions and the inefficiency that plagues the judicial system at lower court level. Criticisms of this kind are not unjustifiable but serve little purpose unless they lead to the identification of the root causes, the ways to resolve them and importantly, appropriate remedial action by the responsible institutions.

The transformational vision of the Constitution calls for all state organs to support the courts to adjudicate the vast and varied disputes, claims and charges impartially, independently and effectively. However, the veritable invisibility of the issues and challenges that confront MCs in the prevailing discourse may have enabled the responsible entities to neglect it. As a consequence, MCs have continued to function as they did in the pre – constitutional era: still mainly under the governance and management of the executive and in a position of inferiority. As the notion of impartiality and the characterisation of all courts as independent are central to dispute resolution, the issues arising from the debates constitute the core subject matter this thesis traverses. This thesis posits the view that the prolonged, degraded status of lower courts may continue to weaken the public confidence in these courts and may imperil the legitimacy of the judiciary as a whole in the long term.

CHAPTER ONE

1.1 Introduction

The authority to review legislative and executive conduct[1] that the Constitution vests in the superior courts significantly expands the functions of the judiciary from its historically conventional role as the institution that decides disputes between litigants. The Constitution envisages a new important role for the superior courts in vesting in them powers of judicial review of legislation and constitutional interpretation. However, the primary function or core business of the judiciary remains dispute resolution in the trial courts, especially in the lower courts which comprise the largest part of the judiciary. Magistrates' Courts (MCs), lower courts in the judicial hierarchy, comprised of District and Regional courts, hear an estimated ninety five percent[2] of all disputes, claims and charges that enter the judicial system for resolution.

Hence, the most significant value of the lower courts to the judicial system is in the fact that all manner of disputes, in large numbers, are dealt with speedily and inexpensively at the point of entry. Van Dijkhorst the first chairperson of the Magistrates' Commission (Commission) commented on the value of MCs as follows: 'In my view, the magistrates' courts are the most important cog in our judicial machine. Their administration and their grievances call for our immediate attention.'[3] The unique characteristics of speed, volume, and low cost in decision - making attributed to the lower courts establish them as indispensable foundational members of the judicial system.

The distinguishing feature of lower courts internationally is their readiness to afford many court users the entry point from which to access the help and protection of the law. Ultimately, most laws created by law makers and shaped by the superior courts are applied in the lower courts where the main body of the citizenry experiences them. In this sense, the lower courts represent the coalface of justice in the democratic state.

---

1 Constitution of the Republic of South Africa, 1996 - s 172.
2 Olivier M *The Magistracy* in Hoexter C and Olivier M (eds) *The Judiciary in South Africa* (2014) 319 – 354 at 319.
3 Van Dijkhorst K *The future of the magistracy* (2000) First Term *Advocate* 39 – 42 at 42.

The importance of lower courts is given constitutional recognition in that the MCs are vested with judicial authority and judicial independence in the same clauses[4] of the Constitution as all the courts within the system. This recognition is arguably one of the most significant and momentous transformative developments for MCs. For the first time, MCs are invested with judicial authority separate from the executive government, signalling a substantive re – configuration of their role and functions.

Implicit in the principles of judicial independence is the democratic consensus that the judiciary as the third arm of the state must function in accordance with the philosophy of constitutionalism and the doctrine of the separation of powers.[5] With the specific inclusion of MCs in the Constitution as an independent judicial authority, lower courts have been brought under the scope and ambit of the principles of constitutionalism. This means that the implications of the regime change of the relationships between the elected organs and the judiciary apply to all levels of the judicial system as a unit, representative of a co – equal third arm of government.

The placement of the lower courts, formally, within the nation's judicial mainstream symbolises a decisive severance of the historic ties of the MCs with the executive arm of government.[6] In addition this incorporation into the judiciary unambiguously proclaims the association of the lower courts with the value of independence that normally characterises a judiciary.

Judicial independence at lower court level affirms the judiciary's essential purpose in the constitutional state: the maintenance of the rule of law through the right of access to courts and fair adjudication of disputes for all court users. This constitutional endorsement both empowers the lower courts and seizes them with the responsibilities implicated with judicial independence, thus ensuring that the primary beneficiaries of judicial independence and impartiality of the courts are not the courts or judicial officers themselves but the communities they serve. The substantive value of judicial independence therefore, irrespective of where in the hierarchy it operates, is a means to this end rather than the end. As Chief Justice Chaskalson points out, 'judicial independence is a requirement demanded by the Constitution, not in the personal interests of the judiciary, but in the public interest, for without that protection judges may not be,

4 Constitution - s165 (a) - (c).
5 See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa (Certification)* 1996 4 SA 744 para 106 – 113.
6 Olivier op cit note 2 at 349.

or be seen by the public to be, able to perform their duties without fear or favour. This is necessary in the best of times and crucial at times of stress.'[7] Courts must apply the law impartially and independently not only to ensure the integrity of their judgments but because of the value of institutional independence in ensuring the effective functioning of the courts in resolving the disputes.

A critical issue that this thesis seeks to underline is that the foundational element upon which the right of access to courts rests is the guarantee that the court adjudicating any dispute is independent and impartial. This implies that the right of access to a court is denied to a litigant when the adjudicator is not independent or is not reasonably seen to be independent.[8]

In essence, this thesis makes the argument that section 165 of the Constitution in so far as it provides that MCs are independent, has not yet been realised and that MCs continue to occupy an inferior position in the hierarchy of courts, in fact and in law, owing in large part to the lack of substantive judicial independence which in turn impacts on the effectiveness of MCs. The various factors that enable the circumstances that are not in alignment with the constitutional imperatives are outlined in the following sections.

1.2 Relevance of History

Because the concept of judicial independence and impartiality is the core aspect of *all* dispute resolution, its importance to lower court function is not exceptional. The very fact that this subject has been identified as the central theme for this thesis suggests that the judicial independence of lower courts in South Africa may not be described as ordinary. For the most part, the peculiarity of the circumstances of lower courts' function and status that motivates this study, arises out of the extraordinary and complicated history of MCs. Although the repressive, undemocratic, and illegitimate pre-constitutional history of South Africa is well known and

7 Chaskalson A 'The Rule of Law: The importance of independent courts and legal professions' accessed from P de Vos, *Constitutionally Speaking* blog available at: http://constitutionallyspeaking.co.za/arthur-chaskalson-on-independence-of-legal-profession. Last accessed on 26 November 2019.

8 The right of access to courts and the relationship of this right to the concept of judicial independence is dealt with comprehensively in Chapter Six of this thesis.

documented, the literature includes the different approaches the superior-court judges of the time adopted to the rule of law and judicial independence.[9]

This thesis focuses on the issues that expose the complicated nature of independent judicial functioning at lower court level in the context of the predominantly executive character of MCs in the pre – constitutional era. As an institution associated with the executive government of an undemocratic state, the magistracy was bound to experience challenges in assimilating with an independent judiciary newly established under the Constitution. The difficulty in the transitioning may have been compounded by the fact that, structurally at least, MCs had their genesis within the English judicial system of a lay magistracy that constituted the largest part of the judiciary in a monarchy with a sovereign parliament.[10]

These circumstances presented a rather unique set of challenges that the constitutional state had to engage with in the process of transforming the lower courts to function as substantively independent. Altogether, the relocation of MCs from executive governance to the judicial sector has implications beyond the formality and symbolism associated with institutional independence, notionally a paradigm shift is implied and is arguably inevitable. The various phases of the pre-constitutional history of MCs have all contributed to the character and status of the lower courts at present. These influences continue to impact not only on how the lower courts function in relation to the legislature and executive but also on the structure of the entire judiciary. Therefore, the historical background is studied in some detail in Chapter Two.

1.3 Transformational Issues

No institution that has been rejected as illegitimate may be seamlessly absorbed, incorporated and accepted into a newly established fully democratic society and state without substantial transformation. Chief Justice Pius Langa emphasises this point when he states: 'the judiciary needs to meet the challenge posed by the demands of a transforming landscape. It must adjust

9 Corder H 'Judicial Authority in a Changing South Africa' *Legal studies* (2004) 24 253 – 274 at 258. See also - Corder H *Judges at Work: The Roles and Attitudes of the South African Appellate Judiciary 1910 – 1950* (1984) and Forsyth C *The Judiciary Under Apartheid* in Hoexter C and Olivier M (eds) in *The Judiciary in South Africa* (2014) 26 – 67.

10 See - Halo HR & Kahn E *The Union of South Africa: The Development of its Laws and Constitution* (1960) for the historical background of Magistrates' Courts in South Africa. See also - Devenish G 'South Africa from pre – colonial time to democracy: a constitutional and jurisprudential odyssey' (2005) 3 *TSAR* 547.

to new imperatives, not least of which is the need for more effective delivery of justice, equally available to every person… in a manner that is infused with the values of the new constitutional order.'[11] It is submitted therefore that the transformation of the magistracy would have been a required condition of their acceptance in the new constitutional dispensation. Without that, its status as independent within the judiciary would hardly be meaningful. Hence the necessity for transformative change cannot be over emphasised to establish consistency between the formal and substantive conditions of the judicial independence of lower courts.

The fact that the state is governed under a constitution that was negotiated and adopted by broad consensus rather than through the evolution of democratic values over time, makes it particularly important that fundamental concepts such as judicial independence be as carefully defined as possible from inception. The most obvious and important reason for this is the need for the courts to be enabled to give effect to the fundamental rights enshrined in the Constitution, and the avoidance of prejudice that may be consequent upon misdirection in the application of rights. To establish a set of principles that guide the application of the concept of judicial independence without inordinate delay, a newly established democratic state may seek direction from international and foreign law.[12] In Chapter Three, this thesis engages in a detailed study of the concept of judicial independence as it is applied in international law and certain relevant foreign jurisdictions so that they may be used to gauge domestic transformative progress.

It is submitted that, for any meaningful judicial transformation of MCs to be initiated, the first and primary starting point would have to be an analysis of the concept of judicial independence and a determination of the different dimensions it comprises, and further how each dimension is secured, protected and guaranteed. A clear determination of the principles that distinguish individual judicial independence from collective or institutional judicial independence may enable the establishment of the most effective mechanisms to protect each dimension of judicial independence. To establish appropriate mechanisms for the protection of independence, an enquiry into the nature of the potential threats to impartial dispute resolution is required. These considerations reflect the many and varied complexities of the concept of judicial independence that find application in most if not all dispute resolution.

11 Langa P 'The Vision of the Constitution' (2003) 120 *SALJ* 670 – 679 at 671.

12 Constitution - s39 (1).

1.4 Judicial Independence and the Status of Magistrates' Courts

It is suggested that a closer examination of the principles of judicial independence and impartiality may be of value not only for better performance of the courts but also for the benefit of court users whose perceptions of courts' independence are as important as the fact that they are independent.[13] Because the substantive statutory jurisdiction of the lower courts is extensive, their decisions impact on social interactions constantly. Communities' perceptions of the impartiality of the courts, especially as the state is the most prolific litigant, are important, for these perceptions ultimately shape the public confidence in the judiciary as an independent organ of government.

An important theme of this thesis is that there is a lack of engagement with the application of judicial independence at lower court level. As a result, the full extent and scope of its application may not be assumed to be understood for the court users and court communities to claim that it is adequately provided. This thesis argues that the foundational law for the protection of lower courts' judicial independence, the Magistrates Act[14] (MA), is inadequate to ensure their independence and society's perceptions thereof.

The foregoing paragraphs present a profile of MCs and their status in terms of judicial independence when the Constitution was adopted. What has changed about the functioning of MCs since the constitution first if they are independent? The relevant considerations are that the Magistrates Courts Act[15] (MCA) that created the present MCs, albeit modified and adapted several times over the years, has been retained as the primary law governing MCs through the decades, and remains as such administered by the executive. The MA seems to be a supplementary enactment to operate as a parallel law to the MCA, especially aimed at creating the Commission, a regulatory authority for magistrates. The MA that provided for certain conditions of independence of magistrates was enacted a few years before the final Constitution was adopted while the Constitution itself omits to provide for these essential conditions for MCs. An examination of the present profile and status of MCs more than twenty-five years since the birth of the democratic era shows little evidence of substantial transformative change. Thus, the

13 See - Mahomed I 'The Role of the Judiciary in a Constitutional State' (1998) 115 *SALJ* 111 – 114 at 112.

14 Act 90 of 1993.

15 Act 32 of 1944.

MA not only fails to ensure judicial independence of MCs, it seems to have contributed to the stagnation of their development. The location of a judicial institution within the executive organ of the state is the anomalous situation that the Constitution seems to address by moving lower courts into the judiciary but this event, as significant as it is, has not substantively altered the character or the functioning of these courts. In this regard Olivier makes the following observation:

> '… *the magistracy remains connected to the executive in some unsatisfactory ways…This impacts on the independence of magistrates and the magistrates' courts and by extension their legitimacy. Concerns relating to independence pose a material threat to the legitimacy of the magistracy, and this link with the executive reinforces the impression that magistrates are still to some degree civil servants'.*[16]

There is an abundance of jurisprudence on a variety of aspects and perspectives of judicial independence but not nearly enough that is pertinent to the particular issues that this thesis aims to probe. The main aspects of judicial independence that come under the purview of this thesis, relate to the nature and effectiveness of the legal institutions and mechanisms established to protect the individual and collective judicial independence of lower courts in South Africa. Under the rubric of the legal status of the judicial independence of lower courts the following sub – topics are examined: (a)The Magistrates Act, 90 of 1993; (b) a comparison of the protection of judicial independence of higher courts and lower courts; and (c) the Constitutional Court's findings in *Van Rooyen and others v The State and Others* (*Van Rooye*n)[17]rejecting the challenge that the MA and MCA were substantially unconstitutional owing to certain provisions being inconsistent with the principles of judicial independence.

1.4.1 The Magistrates Act

The last pre-democratic legislature enacted the MA and created the Commission, which was arguably instrumental in altering the course and pace of transformation of the lower courts. It is argued throughout the thesis that the Commission is less than the ideal mechanism for the purpose of ensuring the judicial independence of lower courts as it lacks the capacity and the

16 Olivier op cit note 2 at 353.

17 *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC).

power to adequately advance the judicial independence of the lower courts that the Constitution guarantees. The concept of judicial independence, as evident in the examination of the topic in Chapter Three, is multi – dimensional and complex because the threats that may compromise the impartiality of judicial officers are varied in nature and the degree of harmfulness. Therefore, the foundational legislation that has been established to protect courts from any interference with judicial functions needs to embody and evidence all the general principles that inform the protection of their judicial independence. The treatment of the subject in the MA, it is argued, does not.

1.4.2 The Constitutional Protection of the Judicial Independence of Superior Courts

The concept of judicial independence is difficult to define precisely because it is multi – faceted and wide in its scope, but the universal purpose served by judicial independence in democracies across jurisdictions is substantially the same. Essentially, judicial independence enables judicial officers to adjudicate disputes between litigants impartially, without fear of reprisal or in anticipation of personal benefit. Therefore, the foundational law that protects judicial independence of the lower courts ought to ensure that judicial officers in the lower courts are able to adjudicate impartially and are reasonably perceived to do so. It is submitted that such a foundational law requires that the clauses related to the appointment, promotion, transfer, discharge, and disciplinary action of judicial officers should be entrenched. These matters concerning the independence of judges and other protections, such as terms of office and mechanisms for removal from office, are embodied in the Constitution. However, the Constitution provides that these protections of lower court judicial officers' independence be secured by ordinary legislation and not in the Constitution itself. As Olivier observes, 'both tenure and financial security are constitutionally protected as far as judges are concerned but have only legislative protection where magistrates are concerned. This is far from ideal.'[18]

It is noteworthy that the subject of judicial independence in international law is not differentiated in its applicability between the higher and lower courts, although this assessment is made on the basis that judicial independence appears rarely in legal literature, discussed in terms of

18 Olivier op cit note 2 at 350.

differences in application according to the hierarchical level of the courts. Proceeding from the premise that the essential principles of the concept of judicial independence and its meaning generally remain the same applied at any level of the judicial hierarchy, an inconsistency is discernible where an inferior or diluted level of independence is found to be acceptable for lower courts.[19] The fact that the judicial independence of the superior courts is protected in the Constitution itself and that those protections are substantially stronger, is evidence that lower court judicial independence is not valued equally. It will be argued that there is no legal justification for this serious disparity and variance in the nature of the relationship of the different levels of courts and the executive: a core aspect of the separation of powers doctrine. The inadequate support for the independence of the lower courts, it is submitted, impacts on their effective functioning.

1.4.3 The Constitutional Court's Findings in Van Rooyen v The State (Van Rooyen)

The core issue of this thesis requires that the CC's findings in *Van Rooyen* be engaged with in some considerable detail. In this case the CC found that the institutional judicial independence of MCs is unimpaired by the fact that the protective mechanism for lower court judicial independence is in certain respects weaker than those for higher courts.[20] In so finding the CC primarily depended on the Canadian case of *Valente v The Queen*[21] (*Valente*).

As the approach of the CC in its reasoning on this issue has significant implications and gives cause for concern about the legitimacy of the MCs in the future, apparently being relegated to a status of dependence in perpetuity, the decision constitutes a pivotal aspect of this thesis.

Both *Van Rooyen* and *Valente* are dealt with in greater detail in subsequent chapters. Suffice it to note at this juncture that although *Van Rooyen* confirms that MCs are judicially independent institutions to the extent of the issues resolved by the CC, the issue of what constitutes institutional independence of lower courts was not engaged with adequately or expounded clearly in this case. As Franco and Powell point out, 'Instead of producing a clearly delineated concept of institutional independence it [*Van Rooyen*] relies on *Valente's* amalgam of factors.

19 Mack K and Anleu S R 'The Security of Tenure of Australian Magistrates' (2006) 30 *Melbourne University Law Review* 371 – 398 at 371.

20 See Van Rooyen case op cit note 17 at para 21.

21 *Valente v The Queen* (1985) 2 SCR 673.

As a result, institutional independence; both too wide and narrow a concept, provides no clear principles by which independence can be evaluated'.[22] The CC's treatment of the meaning of administrative judicial function does not adequately determine which aspects of judicial functions are purely adjudicative, which are purely administrative and which areas overlap. This is a strongly contested area of the judicial independence debate and accordingly the site of much tension between the judiciary and the executive. The impact of this omission on the day – to day functioning of the lower courts is examined in Chapters Five and Six.

1.4.4 Judicial Independence and the Effective Functioning of Lower Courts

Proceeding from the premise that judicial independence is valued for its crucial role in ensuring that courts are effective, the mechanisms established by the state to ensure judicial independence are essentially directed at the quality of judgments and the efficiency with they are delivered. This implicates firstly, the courts' primary resource, its judicial officers, and secondly all the resources that are required for the effective judicial administration of the courts, both human and material.

1.4.4.1 Quality of Judgments

As all legal disputes are ultimately resolved by decisions of the courts, their judgments are essentially what the judiciary provides as the end-product of the process of evaluating the merits and demerits of evidence and legal arguments. Court users presume that the judgments of the courts will be correct and impartial, therefore the judicial officers appointed by the state should be presumed to be properly qualified, competent, and independent.

It is submitted that the capacity and the composition of the Commission cannot inspire confidence in the informed court user that only the best qualified and most competent persons are appointed as judicial officers and therefore there is no basis on which it may be presumed that judgments will be mostly correct. In addition, the integrity and impartiality of judicial officers cannot be presumed because the Minister of Justice may appoint persons who are not recommended by the Commission[23] even in cases where the qualification and competence of the recommended candidates are beyond question.

---

22 Franco J and Powell C 'The Meaning of Institutional Independence in *Van Rooyen v the* State' (2003) 3 *SALJ* 562 – 575 at 566.

23 Magistrates Act. Section 10.

This thesis examines the limitations of the Commission to ensure the judicial independence of the judicial officers and that of the courts they preside over, particularly because of the over-representation in its composition of non – lawyer members. In addition, it will be argued that the Commission lacks the capacity and power to ensure that only the most appropriately qualified candidates are appointed to judicial office.

The quality of judgments and hence the appointment of the most competent persons as judicial officers is so critically important to effective dispute resolution in the lower courts that the institution and the process seized with this responsibility should not remain untransformed.

1.4.4.2 Judicial Independence, Court Efficiency and Resources

Former Chief Justice Ngcobo expressed his firm view on the issue of administrative judicial independence and the efficient functioning of the courts as follows:

> *'The nature and scope of the constitutional authority of the executive to administer courts must be determined in the light of the independence of the judiciary proclaimed by section 165(2). And judicial independence is implicit in the rule of law that is foundational to our Constitution and in the constitutional principle of the separation of powers demanded by our Constitution. The requirement of the independence of the judiciary is buttressed by the provisions of section 165(3) and (4)'.*[24]

Lower courts are at present wholly dependent on the executive for all resources which are managed at court level by the executive's administrative personnel and therefore not easily and readily accessible by courts. The generally high level of dependence of the lower-court judiciary on elected branches to function effectively is inimical to the Constitution's guarantee of their judicial independence, as it stands in conflict with the doctrine of separation of powers and constantly impacts on the court users' accessibility of the courts that must depend on the executive bureaucracy to be given resources for everyday operations. This situation of the MCs stands in stark contrast with that of the higher courts and disadvantages the former institutionally on two levels: firstly, because of the non – recognition of the MCs as institutionally independent entities within the judiciary, in accordance with the doctrine of the separation of powers; secondly

24 Ngcobo S 'Delivery of Justice: Agenda for Change' (2003) 120 *SALJ* 688 – 705 at 695.

and again, unlike the Superior Courts, have no legislative authority to access resources for court operations.[25]

Efficiency in the context of the judicial function means the effective resolution of disputes within a reasonable time. The amount of time the courts generally take to resolve disputes is an important gauge of the effectiveness of the courts. The efficient resolution of disputes through the judicial system is one of the most challenging and complex problems that modern democracies grapple with.

This study analyses delays in three broad categories: criminal courts, civil courts, and infrastructural delays, showing how a particular resource deficiency impacts on a fundamental fair trial right. The various causes of delay and their sources are identified, analysed, and categorised to clearly illustrate how and to what extent each type of delay affects court functioning.

Delays in lower courts are often attributable to some form of resource constraint. In the main there are two categories of resources required for efficient judicial functioning: human resources, as in court personnel, and infrastructural resources, such as court rooms and court equipment. All judicial and court administration personnel perform functions that support the initiation of judicial proceedings or the operations of the court in the hearings. This component of judicial administration which was historically executive - controlled continues to function under the administrative Department of Justice.

1.4.5 Proposed Recommendations for Reform

After a critical evaluation of the main findings of the study into the history and the institutional legal framework that governs the lower courts presently, the indications are that the judicial transformation that was required to achieve substantive independence has not materialised. Old-order laws, particularly the MCA and the MA that remain the primary laws governing lower courts in every aspect of judicial function, inhibit the attainment of stronger protection of judicial independence of lower courts. The thesis argues that these laws are so deeply flawed that their retention cannot be justified. The recommendation for holistic transformation involves a

25 Administrative judicial independence of MCs is not provided for in the Constitution and as the Superior Courts Act makes no provision for the judicial administration of MCs, the executive retains full control of the allocation of judicial resources for lower court functioning.

restructuring of the courts and integration of the superior and lower courts with a single and central administration of justice headed by the Chief Justice. An integrated judiciary implies that the Constitution would provide for the protection of the judicial independence of the lower courts and judicial officers of lower courts by the same standards as that of superior courts and judges.

The reform proposed envisages a paradigm shift in the thinking of the value of lower courts to the judiciary, the administration of justice and society. This implies that the institutional relationship of the lower courts with superior courts as well as that between the lower courts and the non – judicial organs, needs to be re – framed and re – defined so that the independent functioning of lower courts may no longer be impeded. The effect would be the significant advancement of the right of access to the courts for all court users.

1.4.6 The Thesis Summary

This thesis focuses on the significance of the judicial functions of MCs, the importance of their work especially with the constantly increasing criminal and civil jurisdiction, and the complexity of the nature of the disputes. These conditions and circumstances present enormous challenges in fulfilling the responsibility to the users of the courts to ensure that disputes are resolved correctly, efficiently, and effectively. As the notion of impartiality and the characterisation of courts as independent is central to all dispute resolution, the insight in these aspects is its core component.

It is argued that the inadequacy of the judicial independence of lower courts hinders transformation and perpetuates the discriminatory divisions between the superior and lower courts. Upon a detailed evaluation of the findings of the research undertaken, the thesis proposes recommendations that involve legislative reform aimed at integrating the courts so that all court users may have equal access to courts that resolve disputes impartially, independently, and effectively.

1.4.6.1 Arrangement of Thesis by Chapter

Chapter One has introduced the topic and set out the background for the study explaining its value in increasing the knowledge about the functioning of lower courts. The introductory chapter shows why an in-depth analysis of the history of MCs is significant to the main theme. It offers an insight into and broadly defines the main theme of the thesis which is to evaluate critically the

formal guarantee of judicial independence of MCs from the perspective of their value to the judiciary as the primary provider of access to courts for effective resolution of disputes.

Chapter Two explores the historical association of the MCs with the executive and its influence on the present status of the lower courts in the judicial hierarchy because of that history.

Chapter Three is a study of the concept of judicial independence and the nature and scope of its application from an international and foreign law perspective. The study examines the multi-layered attributes and complex meanings of judicial independence to assess its level of impact in the judicial functioning of the lower courts. In particular, the administrative judicial independence aspect of institutional independence of the courts is explored in illustrating the challenges confronted by lower courts internationally to access resources that are exclusively appropriated, controlled and managed by the executive.

Chapter 4 deals with the institutional protection of judicial independence and assesses the standards adopted by other jurisdictions to ensure that judges and judiciaries can function impartially without fear of dismissals. The essential conditions of judicial independence, security of tenure, remuneration and appointments of judges are examined. In addition, this chapter discusses the development of administrative judicial independence and advancement towards greater self – governance for judiciaries.

Chapter Five assesses judicial independence at the level of lower courts since the constitutional guarantee of judicial independence of MCs and the progress of transformation from the executive branch to an independent judicial authority. The legislative framework provided by the MA and MCA as well as the CC's findings in *Van Rooyen* are examined in this chapter. The thesis explains its view that the MA and the MCA represent non – transformational old-order notions that constitute impediments to the development of substantive institutional independence of lower courts.

Chapter Six examines the right of access to courts and its relevance to the independence of judicial functioning in South African lower courts. This part of the study focuses on the impact of inadequate judicial independence from the elected branches especially from executive government on the quality and efficiency of judicial service to most court users. Issues of access to adequate resources and the right to trials without undue delay are discussed in this chapter.

Chapter Seven evaluates the findings of the study and proposes recommendations that aim to advance judicial independence at lower court level which promote the right of access to courts, the law, and justice. These recommendations include proposals for constitutional and legislative reform that enables the restructuring and integration of the higher and lower levels of the courts to standardise the protection of judicial independence throughout the judiciary.

Chapter Eight concludes with a summary of the findings and the outlook for a reformed and restructured judiciary that accords with the constitutional vision.

1.5 Conclusion

MCs have been uniquely and severely affected by the country's undemocratic history in terms of their status in the judiciary and the concomitant lack of *de facto* judicial independence. This thesis endeavours to bring to the centre of the discourse, the challenges of lower court users to exercise the right of access to courts, owing to the weaker protection of the judicial independence of MCs. The proposals for reform include the re – configuration of the judiciary with the aim of ensuring that the judiciary at the lower levels of the hierarchy provides access to independent and impartial courts as it must for higher courts.

CHAPTER TWO

The Relevance of the History of Magistrates' Courts to the Contemporary Judicial Independence Debates

2.1 Introduction

Although South Africa became a constitutional democracy over 25 years ago and the judiciary functions vastly differently, from a political perspective, from the way it did under parliamentary sovereignty, the history of the judiciary and that of Magistrates' courts (MCs) in South Africa is very relevant to how the judicial system is structured and functions at present. This opening statement presents something of a paradox. The advent of the constitutional democracy in 1994 represented an overwhelming rejection of the government founded on the Westminster model of legislative supremacy. Yet, except for the promise of transformation that the Constitution envisages, with the establishment of the Constitutional Court and the Judicial Service Commission the judiciary of the previous era was retained almost entirely intact. In this respect Cora Hoexter remarks:

> *'The interim Constitution perpetuated the pre-1994 structure of a Supreme Court with an Appellate Division established for the entire country. Indeed, there was an almost seamless transition as far as the courts were concerned. The existing courts simply continued to function though with some changes of name and existing judicial officers continued to hold office subject to their taking a new oath'.*[26]

As for MCs, this thesis contends that, although the Constitution formally guaranteed their judicial independence, MCs substantively function as they did in the pre-constitutional era: the history is not only relevant to their current status but is largely the same in terms of their relationship to the political organs of government and to the superior courts.

In this chapter, the historical background of MCs in South Africa is examined to advance the view that although MCs are independent under the Constitution, this present status is obscured

26 Hoexter C *The Structure of the Courts in Hoexter* C and Olivier M (eds) *The Judiciary in South Africa* (2014)1-25 at 11.

by their history. The thesis argues that while the MCs remain structurally in the same position as they did under a parliamentary sovereignty, attached to the executive, people's right of access to courts is impaired.

The various phases of MC history are sketched broadly to show the extent of each era of influence and the impact of that influence on the present circumstances of lower courts. Each phase of the history is linked to one or more themes of the thesis that are explored in the chapters dealing with the concept of judicial independence and its current application in the functioning of MCs.

The history of magistrates in South Africa can be traced back several centuries but that which is relevant and significant to this study occurs in three distinct epochs: the pre- union (1652 to 1910), pre-constitutional (1910 to 1994); and the constitutional (1994 to date) periods. Each of these periods is identified and characterised by the nature of the government during that phase. Governments in the first two phases influenced the functioning of MCs in different ways and to varying degrees, and in the third and current phase, the influence strongly continues. The common thread discernible through all the phases is the integral presence of the executive government in the judicial functions of lower courts. The impact of this history on the development and value of MCs to resolve disputes effectively under the Constitution is discussed in this chapter.

2.2 Magistrates' Courts in the Pre-Union Phase

The history of MCs in South Africa is remarkable, by its absence, in the literature on the judiciary, as the significant body of writing on the subject seems to summarily gloss over the lower courts, as they focus on the more important shapers of the law, the superior courts. It is inevitable therefore that the development of the lower courts as contributors to a strong judiciary would be overshadowed by the jurisprudential prominence of the superior courts. It is accordingly inevitable too, and indeed necessary, for any discussion about the MCs in South Africa to constantly draw parallels with developments in the higher courts.

Generally, from the earliest times there was a clear divergence that was maintained in the paths between the lower and higher courts with no common level of interaction. The incongruence, that widened over time becomes irreconcilable when viewed against the reality that most of the dispute resolution occurs in the MCs applying the same laws of the land as the higher courts.

The issue is on what constitutes the legal basis upon which the hierarchal judicial system legitimates the substantially lower status of the largest part of the judiciary under the Constitution. The insights that one may gain from this historical survey will help better understand how and why the apparently deep division between the higher and lower courts developed but none that evidences a sound legal or rational basis for the preservation of that great divide in the constitutional era.

2.2.1 Roman- Dutch Law in South Africa

The significant historical events that determined the nature of government policies were also foundational to the character of the judicial system in general and to the judicial function of lower courts. The influence of its colonial history is firmly embedded in the body of South African law and thus in the administration of justice as it applies at present. Before the union of 1910 the laws applicable to the various regions of South Africa reflected those of the original colonial governments. The influence of Roman Dutch law on South African law is attributable to the era of Holland's government in the Cape from 1652 when the Dutch parliament established a permanent settlement to provide a supply station for the Dutch East India Company (VOC) trade vessels en route to the Company's headquarters in Batavia. The Dutch parliaments had by the 17th century delegated legislative, executive, and judicial authority in foreign territories to the Commander (later the Governor- in- council) of the VOC. There was no separation of powers as the first court of justice at the Cape was presided over by the Commander who was not a trained judge.[27]

The earliest local government that performed legislative, executive, and judicial functions in the rural districts of the Cape were established through institutions known as landdrosten and heemraden.[28] By 1685, the Raad van Justitie took responsibility for judicial functions of the colonial government while the Raad van Politie retained legislative and executive functions at the Cape. However, the landdrosten and heemraden continued functioning as courts under the executive authority of the time. The divergence of the development of the South African judiciary began around this time when courts of landdrosten and heemraden in the districts performed

27 Sachs A *Justice in South Africa* (1973) at 17.

28 Devenish G 'South Africa from Pre- Colonial Time to Democracy: A constitutional and Jurisprudential Odyssey' *(*2005) 3 *TSAR* 547 – 571 at 551.

both judicial and administrative functions while the Raad van Justitie[29] functioned as a judicial entity separate from the political organs.

It is noteworthy that Roman Dutch law as originally influenced by celebrated European natural law jurists Hugo de Groot and Johannes Voet did not take hold in the legal development of the Cape although the opportunity for that to happen did present itself when the earliest settlers interacted with the indigenous societies of the region. By all accounts only a less orderly and more arbitrary version of the Roman Dutch law was practised by the untrained judicial functionaries at the time.[30] The VOC policy for the administration of the colonies which was based on the teachings of Roman Dutch jurists, required that the practices of indigenous populations be respected. According to Sachs, Voet wrote that aboriginal communities were not to be denied liberty and further that they be governed according to the same laws and measure of justice by which they themselves were governed.[31] However, the practice of governorship by the Dutch in the Cape was very different to the theories of Roman Dutch jurists, as Devenish observes:

> *'In practise (sic) the arrival of the Dutch settlers was to establish a brutal policy of hegemony and inequality in the relationship between whites and people of colour that was to endure for nearly 350 years and bequeathed unfortunate and very grave consequences for colonised people. This resulted in a tragedy of inordinate proportions for all people of colour. The constitutional and political dispensation, the law and jurisprudence was influenced by this relationship of inequality. What was to emerge from this period in different manifestations was the jurisprudence of politics of inequality'.*[32]

Sachs states that the kind of Dutch law that was applied in the Cape during this early period was not consistent with the natural law espoused by Roman Dutch jurists, describing them as 'confused' and administered 'arbitrarily by untrained judges.' This, in Devenish's view, explains why the Dutch courts in South Africa made no contribution to Roman – Dutch law.[33]

One significant vestige of this legacy which remained throughout judicial history was the institution of the landdrosten that survived for a century albeit modified under the influence of English law. The Afrikaans name for Magistrates' Court "Landdros Hof" is still in contemporary

29 Ibid.
30 Ibid.
31 Sachs op cit note 27 at 29 cites Voet 1. 5..3.
32 Devenish op cit note 28.
33 Ibid at 551.

use throughout the country. The legacy of this early history of the landdrosten and heemraden is manifest in the strong bond with the executive, the inequality of the judicial administration for the poor and indigenous communities that were governed under colonial governments, and the fact that disputes were resolved by untrained judges. The maintenance of this decrepit history by successive governments which solely made the law, executed it and enforced it, suggests that the notion of judicial independence in MCs was not an important consideration in the pre – constitutional period.

2.2.2 British Imperial Influence

The administration of justice in South Africa was most enduringly influenced by the British after their second occupation of the Cape in 1806. The introduction of the Charter of Justice for the Cape Colony in 1827 entrenched the English legal and judicial system in South Africa and embedded the dual hierarchical court structure in the South African judicial system. A large body of literature on the history of the South African judicial system discusses the impact of English law upon it. These remarks of Chanock capture emphatically, how, and why the laws pertaining to the judicial administration of South Africa are essentially English:

> *'My basic starting point is to work with the idea that the South African legal system is fundamentally and characteristically British. The state created in 1910 was a British state created by Britain for British imperialistic purposes. Its constitution was a classic 'Westminster model'; parliament totally supreme; no Bill of Rights; courts subordinate to the legislature;(t) The personnel of the state were predominantly British for the first twenty years or more. The magistracy, police, legal profession and bureaucracy were dominated by former imperial civil servants or English speaking South Africans. (Even the most learned of the Roman – Dutch jurists with Afrikaner names who were to be found on the Supreme Court bench had been trained like a large part of the South African Bar, in Britain…Large and dominating parts of the legal system were British…The codes of criminal procedure and laws of evidence and most of the major statutes were borrowed from English and Imperial models, and British precedents continued to exercise immense influence over the courts in the building of the common law'.*[34]

The incorporation of English law and the English model of the administration of justice on such a massive scale implied that simultaneously, the institutions of Magistrates' Courts or Justices

34 Chanock M 'Writing South African Legal History: A Prospectus' (1989) 30 *The Journal of African History* 265 – 288 at 269.

of the Peace, which were already well established, lower judicial bodies in England[35], were assimilated into the South African judicial system. The introduction of the Charter of Justice[36] was particularly significant in the history of MCs because it saw the replacement of the Heemraden and Landdrosten with the institution of the *Resident Magistrate*[37] of England.

It is remarkable that these Dutch governmental institutions were apparently seamlessly substituted by England's lower court system and carried into the South African judicial system from this era substantively unchanged for some 200 years. Even more remarkable and perhaps paradoxical is the fact that while South Africa retains the magistracy in the Constitution, its executive bent notwithstanding, England, without a written constitution, has developed a magistracy that even in the present-day commands more respect because of its independence from the executive government.[38] Underlying this disconnect is a complex set of circumstances the analysis of which is substantially beyond the scope of this study. In the next chapter this thesis interrogates some of the theories on the forces at work that may have led to this anomalous position of MCs. Arguably the institution of the MCs in South Africa remains, still frozen, in a counter evolutionary and anachronistic state.

2.3 The Pre-Constitutional Phase

2.3.1 The impact of the Westminster System on MCs

English rule in South Africa during the period 1806 to 1931 imparted its Westminster system of government and judicial administration that continued until 1994 when South Africa became a constitutional democracy.[39] The Magistrates Courts Act (MCA) of 1944, that replaced the Magistrates Courts Act of 1917, was the primary statute and central pillar of the structure of the lower courts after the establishment of the Union of South Africa. Although several amendments to this legislation were enacted over the decades, the framework of the law has remained and

35 See generally - Milton F *The English Magistracy* (1967) London. Also, Moir E *The Justice of the Peac*e (1969) Harmondsworth.

36 Devenish op cit note 28 at 555.

37 Ibid.

38 Fitzpatrick B *et al* 'New Courts Management and Professionalization of Summary Justice in England and Wales' *Criminal Law Forum* (2000) 11 1 – 22. See also - 'Courts and Tribunals Judiciary' accessed from www.judiciary.uk on 28 November 2018.

39 Hahlo HR & Khan E *The Union of South Africa: The Development of its Laws and Constitution* (1960).

continues to be the primary source of legal governance for the MCs. The extensive powers of the Minister of Justice to create and abolish courts and to exercise formal control over the appointment of magistrates of all lower courts are indicative of executive dominance over the judiciary.

From the formation of the Union of South Africa, the judicial administration system of superior and inferior courts, in a dual hierarchal arrangement was retained. This paved the way for the entrenchment of the absolute separation of the MCs from the superior courts. In the process, the essential character of the English lay magistracy changed in accordance with the policy position of the South African government and the purpose these courts were to serve under the government of the day. The nature and extent of these changes have a bearing on certain aspects of judicial transformation; therefore, a brief examination of the subject is necessary.

The English institution of the voluntary lay magistracy or Justice of the Peace was established and developed over several centuries as citizen - based fora for dispute resolution by peers. By all accounts, lay magistrates in England enjoyed the support of the overwhelming majority of court users. Importantly lay magistrates in England are not associated with executive government but rather with the active citizenry. In a research report to the Lord Chancellor and British Home Office, Morgan and Russell make this statement.

> *'Not only is the justice of the peace ancient and in an important tradition of voluntary public service, it is also a direct manifestation of government policy which encourages active citizens in an active community. In no other jurisdiction does the criminal court system depend so heavily on such voluntary unpaid effort'.*[40]

In a similar vein, Fitzpatrick, Seago, Walker and Wall remark that;

> *'They comprise local and lay people. (These reflected cherished attributes of the jury)…Thus there are fundamental principles of democracy and the protection of individual rights which call for representative (and therefore predominantly lay) and local involvement at all levels of justice'.*[41]

40 Morgan R and Russell N made this remark in the introduction to a report commissioned by the Lord Chancellor and British Home Office titled 'The Judiciary in the Magistrates Courts' (University of Bristol) (2000) at xiii.

41 Seago P *et al* 'The Role and Appointment of Stipendiary Magistrates' (1995) *Criminal Law Forum* 1 – 22 at 10.

More recently, Stipendiary Magistrates who have been renamed District Judges (Magistrates Courts) in recognition of their professional status are the closest equivalent to the South African District Magistrate.[42]

There are several differences between England's magistracy and the South African version. These are not only differences in how the institutions are structured and constituted but in the democratic culture of their development under diverse circumstances. In this instance there is the additional complication of two different colonial systems (Dutch and British) merging and imposing on the majority population a judiciary which they had no part in establishing. This imposition of foreign laws by a small minority on the indigenous majority directly conflicts with democratic principles and renders governments established in this way manifestly illegitimate. As Corder points out,

> *'The administration of justice in South Africa has never enjoyed legitimacy among the majority of our population. From the earliest days the court system has rightly been seen as a means of enforcing the statutes of a regime which represented a very small proportion of those who lived under its sway. And even the much vaunted common law, whether it be of English or Roman Dutch origin represented a value system which was generated in the eighteenth to nineteenth century mercantilism hardly appropriate and minimally relevant to South Africa's indigenous inhabitants'.*[43]

The following observation in the Truth and Reconciliation Commission Report explains the problems associated with the importing of a system of government, as Westminster was, from a very different place, time, and people:

> *'Parliamentary sovereignty and the rule of law work hand in hand and are premised on a political system that is fundamentally representative of all the people subject to that Parliament. This situation never applied in South Africa; not only was representative (and responsible) government conferred effectively only on white inhabitants of the Union in 1910(at maximum less than 20% of the population), but South African legal life was never characterised by that unwritten sense of 'fair play' which is so much part of the native Westminster tradition'.*[44]

42 See - 'Courts and Tribunals Judiciary' accessed from www.judiciary.uk on 28 November 2018.
43 Corder H 'Establishing Legitimacy for the Administration of Justice in South Africa' (1995) 2 *Stellenbosch Law Review* 202 – 216 at 202.

44 Truth and Reconciliation Report on Institutional Hearing 1998 Volume 4 Chapter 4 Paragraph 41.

The lack of compatibility between the institutions seems not to have been a concern as successive governments during this period annexed MCs, where magistrates applied and enforced repressive laws. This mixing of the separate functions of the state provided the conditions for the flagrant violation of the basic principles of institutional judicial independence and in fact represent a rejection of the very notion of judicial independence and the idea of a constitutionally democratic state.

2.3.2 The Impact of Apartheid on MCs

2.3.2.1 Adjudication without judicial independence

For an objective evaluation of the argument to be made on this subject it is important that due consideration be given to the context in which the entire judiciary functioned during this period. Such a contextualization should enable an assessment of how the higher courts dealt with the pressure brought to bear by the regime of that time, on their judicial independence. Firstly, an analysis of the impact of the Pro-Apartheid parliament and executive government on the shaping of the hierarchy of the judiciary, reveals the potential dangers of undervaluing the judicial independence of lower courts. It helps to shed light on an important issue underlying the problem question in this thesis; should the judicial independence of higher courts be protected differently and more strongly than that of lower courts?

Secondly, the enforcement of apartheid laws by MCs had the effect of entrenching the division of the judiciary into a superior and inferior class; the foundational basis for which is the status of independence of the former and the lack thereof of the latter. The superior – inferior imputation of status according to the capability or incapability of a court to function independently, requires some interrogation as the perception of inferiority of MCs that persists, may have been incubated during this time when the judiciary was seen as independent and the magistracy not. In this respect it is noteworthy that some judges (in the earlier years after the attainment of democracy) seem to express resistance to the idea of merging the higher and lower courts into a single judicial system.[45] The justifiability of this negative attitude towards the functioning of MCs, in the

45 See - Thring WG 'Comment on the White Paper on the Judicial System: Chapter on the Judiciary produced by the Policy Unit, Department of Justice.' (1999) 116 *SALJ* 858 – 864 at 861. Also see - Cameron E 'A Single Judiciary? Some Comments.' (2000) 17 *SALJ* 141 – 151 at 150.

context of transformation of the judicial system needs to be objectively assessed. Thus, a brief reflection on how the higher courts responded to the enforcement of apartheid laws, is valuable.

On the first point, regarding the functioning of MCs in the pre – democratic era, Olivier observes:

> *'[T]he pre - 1994 status of magistrates as public servants violated the separation-of-powers doctrine. Judicial independence was not constitutionally or legislatively protected or guaranteed, and magistrates lacked both institutional and, in some respects, personal independence from the executive'.*[46]

The stigma of distrust of magistrates' executive – mindedness that was bred during the pre – democratic era and which endured long after the institution of MCs was brought to South Africa by the English, deepened under the apartheid government. MCs being extended arms of the executive during the pre-constitutional era; they were effectively instruments used to promote and support apartheid laws. By implication all lower court criminal trials and inquests in which police were suspected of committing crimes were inherently prejudiced in favour of the state. When the Nationalists came into power from 1948, the enforcement of apartheid laws became increasingly severe, resulting in human rights violations against arrested persons and detainees. As MCs during this period were used by the state to conduct inquests into the death of detainees, the perception was inevitable that findings would favour the state and it seemed that police were most often found not culpable nor liable for these deaths. Under the circumstances the impartiality of magistrates was questionable.

As Forsyth observes:

> *'It was in the magistrates' courts that the law of apartheid was primarily enforced. It was here that the 'pass laws' were applied in an attempt to exclude black people from being permanently resident in urban areas. It was here that the innumerable other offensive rules and regulations were given effect. Here was the cutting edge of the legal engine of apartheid'.*[47]

He describes the execution of apartheid laws as follows:

> *"An army of civil servants and policemen (and soldiers) implemented these laws; and crucially, the courts enforced them. So the courts were an important part of the apartheid project. Many*

46 Olivier op cit note 2 at 349.

47 Forsyth op cit note 9 at 31.

litigants inevitably left the courts without justice and with their dignity impaired. It is undeniable that the courts were often the engines of injustice".[48]

In his note on reforming judicial decision - making in the democratic South Africa, Huebner[49] quotes Lubowski who observes about the lower courts in the apartheid years as follows:

"The problem is more acute at lower court level which lacks the independence and institutional pride enjoyed by the Supreme Court bench…the magistrate comes from the state prosecutor's office and the only other legally trained officer is the prosecutor himself. Is it far – fetched to say that 90% of the people going to prison in South Africa and Namibia are being sent there by two prosecutors?"[50]

These impressions of MCs of that time reflect that the government of the day was incognisant of the value and need for judicial independence and impartiality of the lower courts that served not only to enforce apartheid laws but as courts for general dispute resolution. This implies that the lack of independence of the MCs of the time was unremarkable which demonstrates that the essence of the right of access to impartial judicial officers and independent courts was of little concern.

As argued in Chapter Six of this thesis, there can be no judicial dispute resolution without independent courts as judicial independence is implicit in the notion of access to courts. From this perspective MCs functions were more akin to tribunals which decide disputes without necessarily being independent. Under these conditions, the idea of the protection of judicial independence of MCs would have been inconceivable for the government of the day. Without the protection of judicial independence, magistrates were not at liberty to prevent human rights abuses by law enforcement agencies without fear of dismissal or other reprisals and this enabled them to repress civil liberties through the application of harsh, undemocratic laws. The total absence of judicial independence in the magistracy thwarted any notion of legitimacy for the lower courts being developed in the pre – constitutional era.

---

48 Ibid at 26.

49 Huebner M S 'Who Decides? Restructuring Criminal Justice for a Democratic South Africa' *Yale Law Journal* (1993) 102 961 – 990 at 969.

50 Lubowski A 'Democracy and the Judiciary' in Proceedings of the National Conference on Democracy and the Judiciary 1988, organized and presented by the Institute for a Democratic Alternative for South Africa 16 (1988).

This history brings into focus the danger of the state's failure to protect the judicial independence of lower courts, at least, as well as that of higher courts and as the following paragraphs demonstrate, the better protection of the independence of higher courts is not enough to ensure that the fundamental rights of lower court users are not violated.

2.3.2.2 The Impact of Apartheid on the Judicial Independence of Higher Courts

The role of South Africa's pre-constitutional judiciary in positively affirming and perpetuating apartheid's racial oppression is well documented, highlighting issues of interpretation of the concept of judicial independence that confronted judges. Huebner observes that not only did the judges in the apartheid era demonstrate bias against Blacks, but they also were executive – minded and deferential in their decision- making in enforcing oppressive laws. Cowling supports this view in his remarks that:

> *"Judges are increasingly coming to be seen as willing and obedient servants of a repressive legislature rather than impartial and objective arbiters and dispensers of justice, stepping in to protect the individual from legislative and executive excesses. Critics of the judiciary argue that even when presented with a choice judges have almost without exception taken the most pro – executive stance"*[51]

Most of the literature relates to the application of these repressive laws by the higher courts for the reason that judges' decisional independence empowered them to interpret laws with a measure of moral integrity instead of with positivism to suit the lawmakers.[52] Corder describes the superior court judiciary as having an 'overwhelmingly negative record in the treatment of individual rights' when they came up against state power but his reference to MCs as 'the mockery that was the administration of justice' confirms the general perception that the whole judicial system was totally lacking in credibility and legitimacy.[53] The fact that such a repressive regime was affirmed and sometimes even approved by judges of the time is an indictment of the impartiality and independence of the judiciary or the lack thereof, that ultimately compromised its legitimacy.

---

51 Cowling MG 'Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premise' *SAJHR* (1987) 3 177 at 181.
52 Huebner op cit note 49.
53 Corder H 'Judicial Authority in a Changing South Africa' *Legal studies* (2004) 24 253 – 274 at 258.

The division between the higher courts and MCs widened during this time as it was generally accepted that judges were independent and magistrates not. The historic dichotomy of superiority and inferiority of the level of the courts was, to some extent, attributable to the issue of greater and lesser judicial independence and continues to have a negative impact on the present, lower status of MCs and constitutes a source of tension in the ranks of the lower judiciary. This is an important theme of this thesis and is therefore dealt with in greater detail in later chapters but is touched upon in this chapter because the historical perspective of this hierarchal division helps to provide a backdrop to the circumstances that shape the structure of the judiciary under the Constitution.

South Africa's pre–democratic history has tainted judges and magistrates alike as participants in an illegitimate judicial system. In the apartheid era, executive – minded and positivist judges were able to cause as much if not more harm than magistrates, as they could and did wield their greater power (such as jurisdiction to impose sentences of capital punishment and life imprisonment that magistrates did not have). In this respect Gready and Kgalema make the following observation about judges in the apartheid era:

> *'Judges did not regard themselves as public servants and enjoyed more of the trappings of independence (such as security of tenure). These two levels of judicial actor were therefore positioned differently in relation to the state, with judges in a better position to be more if far from sufficiently, independent – minded'.*[54]

The question is: what is the principle upon which the legitimacy of MCs must be founded in the constitutional era, when the reality and perception persists, that these courts are still substantially under executive control and inferior in status and function to higher courts?

2.4 Conclusion

The summary of the historical background of MCs shows how the colonial legacy of the country influenced and shaped the present status, structure and functioning of the lower courts. MCs with their centuries-long history continue to operate strongly influenced by the British colonial judicial system. In the pre-constitutional phase, under the apartheid government, MCs were

54 Gready P and Kgalema L 'Magistrates under Apartheid: A Case Study of the Politicisation of Justice and Complicity in Human Rights Abuses' (2003) 19 *SAJHR* 141 – 188 at 145.

constituted as part of the executive, within a scheme of parliamentary sovereignty. When the Constitution was adopted, MCs were invested with judicial authority and judicial independence. However, this significant change in formal status did not translate into greater independence or autonomy in judicial administration for the lower courts.

The study of the concept of judicial independence, focusing on international and foreign law, in the next chapter, aims at showing how significantly the history and evolution of the concept influences the contemporary application of the doctrine of separation of powers in modern democratic states. A detailed examination of the application of the concept may aid in identifying the aspects that advance the primary role of dispute resolution in lower courts while enhancing the judiciary's role as an independent arm of the government.

The historical development of the principles of judicial independence remains especially relevant in explaining the many inconsistencies inherent in the application of the concept within and across jurisdictions and different models of governance. The developmental changes that presented challenges for well - established common - law jurisdictions also impacted on the operation of the concept in developing democracies globally. The present hierarchical organisation of the South African judicial system reflects the general historical development of judicial independence as a concept and in particular the influence of the country's uniquely undemocratic, apartheid history on the application of its principles on the status of MCs.

CHAPTER THREE

Judicial Independence: The History and Development of the Concept and its Basic Principles

3.1 Introduction

The concept of judicial independence developed as societies began to challenge the tyrannical abuse of power by monarchs who wielded supreme control over all state functions including that of the judges of the realm who were dismissed or threatened with dismissal if they made decisions unfavourable to these heads of state. These sustained challenges culminated in the founding of the philosophical doctrine of the separation of powers which currently informs the understanding of judicial independence.

Although judicial independence was conceptualised several centuries ago, there is yet no single judicial independence theory that may be constantly and uniformly applied across or even within jurisdictions, when confronting problems of interpretation. As philosophers and jurists engaged in the discourse about excesses of power concentrated in autocratic rulers, societies, through their governments, enacted laws to ensure that judges were protected against reprisals for judgments against rulers and powerful entities. These laws, that embody the values represented by independent adjudication, are what constitute the essential conditions of judicial independence which is discussed in the next chapter.

In this chapter attention is directed to the meaning of judicial independence and the value of preserving, protecting and advancing the principles of the concept from the various perspectives of jurists and political scientists in the field. Judicial independence is a vast and complex subject to which many scholars have dedicated their work.[55] The large body of scholarship internationally discussing the various themes and issues of judicial independence mostly refer to judges and judiciaries in generic context without drawing distinctions regarding their specific position in the structural hierarchy of courts.

The application of judicial independence to all judges broadly, affirms the common understanding that all adjudication is presumed to be impartial and independent irrespective of the status of the court or who the parties to dispute may be. As however, the international

55 See Annexed Bibliography at 258.

debates on various aspects of the subject tend to focus on issues that come before the higher courts, the application of the concept at lower court level and its significance for lower court users is rarely addressed.

Regarding the application of judicial independence to lower courts Shetreet argues that:

> *'Scholars should pay heed to the issue of judicial independence not only as it applies to the high level judiciary, which is the level most relevant to the rule of law and human rights, but also to lower court judges, tribunal judges, and administrative judges, and other judicial officers. This is critical, for the issue of judicial independence is equally important to the citizen whose matter is adjudicated before one of these levels as it is to the person whose case is heard before a supreme court. It seems that the development of the culture of judicial independence is moving in this direction'.* [56]

However, as governments in the common-law jurisdictions divided judiciaries into superior and inferior courts according to jurisdictional capacity, adjudication of disputes in the higher courts was done by a class of judicial officers called judges. Most adjudication takes place in the lower courts of certain countries by judicial officers called magistrates. Therefore, the generic reference to judges in scholarly literature includes judicial officers in lower courts even though they may not be referred to as judges in these jurisdictions: South Africa is one such jurisdiction. Thus, unless otherwise indicated, the reference to judges in the authorities cited in this chapter and the next one, means that judicial officers, titled 'magistrate' are being referred to.

It is worthy of note that the jurisprudence on the rule of law generally also seems to manifest a flat generic quality and is not sufficiently nuanced to reflect the substantive values that are of particular significance to adjudication of disputes in lower courts, and to the aspirations of lower court users. It is submitted that a certain level of knowledge deficit exists here to which this chapter attempts to draw attention, while analysing the most significant and relevant jurisprudence as reflected in the history of the subject in foreign and international law. The

56 Shetreet S 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges' (2009) 10(1) *CJILaw* 275 - 332 at 332.

discussion about the principles of judicial independence is aimed at providing a foundation for the reforms proposed in the final chapters.

Because the subject of judicial independence has generated a vast body of scholarly literature and jurisprudence and there is little in the field of judicial function that is irrelevant, it is necessary to state that the examination of the subject material in this chapter is limited to the broad framework of principles comprising certain inter – related aspects of judicial independence of relevance to lower court functioning. Section 3.2 discusses the definitional principles of judicial independence incorporating the concepts of impartiality and the doctrine of the separation of powers. Section 3.3 consists of an examination of the instrumental values of judicial independence as reflected in human rights discourse. Section 3.4 provides a summary of the basic principles of judicial independence informing contemporary jurisprudence especially in developing constitutional democracies.

3.2 The Definitional Principles of Judicial Independence

Judicial independence, as a concept, defies simple definition as it lends itself to varying interpretations according to the circumstances and context of a given jurisdiction in which its application is considered. The fact that the term independence itself is relational, implies constraints to absoluteness and scope: independence from what or who and how much? Regarding the wide range of approaches to defining judicial independence Sir Ninian Stephen observes… 'Like most concepts that mankind debates judicial independence conveys different shades of meanings to different minds'.[57]

According to Burbank;

> *'Many people simply assume that there is agreement about what judicial independence is… Many others are quite clear what they mean by judicial independence but their definitions are so obviously the product of the academy (or self-interest) that they are ill – suited for the practical business of government. Still others capitalize on the multiplicity of possible meanings with the same result'.*[58]

57 Ninian S *Sir Owen Dixon: A Celebration* Melbourne University Press (1986) at 6.

58 Burbank S B 'What Do We Mean by "Judicial Independence"?' (2003) 64 *Ohio State Law Journal* 1-10 at 1.

Tiede's observation aptly encapsulates the constantly shifting dynamic of the concept: 'Part of the problem with attempting to define judicial independence is that the use of the term is amoebic, changing shape to fit the context in which it is used. The question is who or what the judiciary is to be "independent" from'.[59]

The notion of pliability of the definition of judicial independence suggested by these writings is irrefutable as is evidenced in the discourse. Politicians, political scientists, and academics tend to define judicial independence in the light most favourable to the interest or hypothesis they advance. This adaptability to interpretation of the concept seems to give cause for it to be perceived as complex. The adaptability factor in turn may be attributable to the several significant values the concept represents: values of fairness and equality, the value of separation of powers of government institutions and the rule of law.

The nature of the relevant interests seems to have determined a framework for the definition of the concept as it developed and seems to have also driven the judicial independence debates that may further inform it in the future. An important issue related to the definition of judicial independence is the invisibility of lower courts and lower court users in the engagements that framed the discourse that defined the concept up to now. Thus, the meaning of judicial independence is fraught with controversy as is evident in the challenge before the Constitutional Court(CC) in the case of *Van Rooyen.*[60]

This case is analysed in much greater detail in Chapter Five but suffice it to state at this juncture that although it may be difficult to define this concept precisely, the task in every relevant case is unavoidable. It is submitted that one of the reasons that the outcome in *Van Rooyen* continues to present problems for the transformation of lower courts is owing to the lack of thorough analyses and clear definition of the concept. Hence, the definitional aspect of judicial independence is given substantial attention in this chapter.

The constant similarity in most attempts to define judicial independence, is that the concepts of impartiality and separation of powers are the primary points of reference. Both these concepts are inextricably linked to judicial independence, albeit in completely different contexts and therefore are essential for the correct application of the principles under different circumstances.

---

59 Tiede L B 'Judicial Independence: Often Cited, Rarely Understood' (2006) 15 *Journal of Contemporary Legal Issues* 129.

60 *Van Rooyen and Others v The State* op cit note 17.

3.2.1. Judicial Independence and Impartiality

Judicial independence and judicial impartiality are closely linked aspects of judicial functioning, but they are distinct concepts. Making this distinction brings a clearer perspective to complex attributes of judicial independence and its individual and institutional dimensions. Impartiality refers to the unbiased, unprejudiced state of mind that the judge brings to the case at hand without any subjective, personal interest in or concern about the outcome. Ideally an impartial judge applies the law unaffected by personal predilection, ideology or experience thus bringing to the case at hand an open and independent mind. Justice Harms explains the intrinsic value and significance of impartial adjudication in the following statement:

> *'Without an independent mind, approach and attitude (on the part of the judge) judicial independence is worthless. Structures and constitutions cannot create this state of mind. They can only provide its framework and support it'.*[61]

In similar vein, Colvin explains the operation of the different concepts involved in adjudication.

> "*A tribunal may be independent in status but not impartial in its functioning. Moreover even though a tribunal may lack independence it may still achieve impartiality if improper influence is resisted or is not exercised and if improper preference is avoided".*[62]

It is the judge's responsibility to remain steadfastly impartial in judicial conduct (towards litigants and in interpreting the applicable laws) In this respect the *Bangalore Principles of Judicial Conduct*[63] (*Bangalore Principles*) provides an internationally accepted instructive guideline for judges on ethical judicial standards. The *Bangalore Principles* state that judges shall perform their official duties 'without favour, bias or prejudice' and conduct themselves generally in a manner that enhances the public confidence in the impartiality of judges and the judiciary.[64] Gordon and Bruce write about the meaning of impartiality according to the *Bangalore Principles* as follows: 'Essentially when accepting a seat on the bench a judge must put aside his or her

---

61 Harms L made this statement during closing remarks at the International Judicial Conference held in Warsaw Poland on 3 October 1998. Cited by Gordon A and Bruce D 'Transformation and the Independence of the Judiciary in South Africa' *CSVR Centre for Study of Violence and reconciliation* (2007) October. Available online at www.csvr.org.za. Last Accessed on 15 April 2018.

62 Colvin E 'The Executive and the Independence of the Judiciary' (1986) 51 *Saskatchwan Law Review* 229 – 246 at 231.

63 *Bangalore Principles of Judicial Conduct* 2002.

64 Ibid 'Value 2.

personal biases and should refrain from any activity that directly affects or gives the appearance of affecting his or her ability to decide cases impartially.'[65]

The impartiality of the judge is presumed in the right of access to courts and fair dispute resolution; the notion of any adjudication implies application of the law without any interest in the final outcomes regardless of what issues must be resolved, or who the parties may be. The integrity of the judge in the individual case is the essential element of impartiality.[66]

Judicial independence compared with judicial impartiality, is a more complex concept because judicial functions embody an external institutional element associated with the relationship of the judiciary to the other organs of government. The principle that underlies judicial independence requires that the conditions under which judges perform their functions must be free of interference or influence, actual or perceived from the other organs of government or powerful entities. Judicial independence represents an instrumental value that enables all court users to exercise and enforce all other rights under the Constitution. Judicial independence, as opposed to impartiality is not related to the subjective state of mind or attitude of the judge to the case at hand, it abides in the external, objective conditions that have been established to separate the functions of the judiciary from other organs so that judges function independently and are seen to do so.

3.2.2 The doctrine of separation of powers

The historical development of the concept of judicial independence is closely connected with the doctrine of separation of powers and the notion of constitutionalism.

3.2.2.1 Historical Development of Judicial Independence

The divergent meanings of the concept of judicial independence may be better appreciated when considered against the historical backdrop of the doctrine of separation of powers which is characterised by the distinct division of the legislative, executive, and judicial functions of the state from each other and the non – interference in the spheres of authority of each other. The development of the principles of separation of powers as applied by democratic states at present

65 Gordon Amy and Bruce D 'Transformation and the Independence of the Judiciary in South Africa' *CSVR Centre for Study of Violence and reconciliation* (2007) October. Available online at www.csvr.org.za. Last Accessed on 15 April 2018.

66 Ferejohn J 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 *Southern California Law Review* 353.

is the product of the struggles of societies over the past few centuries in response to the abuse of these powers that were at the time vested absolutely in the monarchies and oligarchies. The course of development of judicial independence in common law jurisdictions was largely determined by the political history of the monarchy of England, where those struggles were aimed at curbing the concentration of power in the reigning monarch.

As judges were an integral part of the royal administration there would have been no clear distinction between judicial and administrative duties. The king had control over the judiciary, including the power of dismissal from office, suspension, and transfer from one judicial office to another.[67]

The fight for an independent judiciary continued during the reign of successive monarchs until the Glorious Revolution of 1688, followed by the celebrated Act of Settlement of 1701 which is seen as a beginning of the separation of the executive and the legislature from the judiciary. The Canadian Federal Court in *Beauregard v The Queen*[68] (*Beauregard*) reflected on the Act of Settlement as a significant development in the concept of judicial independence as it in effect liberated England's judges from serving at the King's pleasure, assuring them security of tenure and remuneration upon good conduct and curtailed parliamentary powers against judges. On the issue of legislative control of the judiciary Shetreet observes that:

> *'Parliament's own efforts to control the judiciary were in the main motivated by political considerations. Judicial activities were labelled 'illegal,' 'contrary to fundamental laws' or 'corrupt,' but in effect the judges were proceeded against by Parliament to protect the political interests at stake and to curb royal powers. Judges could be impeached or called before Parliament to explain their actions as if their only duty was to serve Parliament'.*[69]

Thus, although the Act of Settlement and the Judicature Act of 1925 provided the statutory basis for the security of tenure and remuneration of appeal court judges, the overlapping of the functions between the elected branches and the judiciary did not disappear. On the contrary, the Westminster parliamentary system of government continues to function as a loosely separated division of the three main functions of the constitutional state. As Stevens points out:

---

67 Shetreet op cit note 56 at 299.

68 *Beauregard* 1981 130 DLR (Federal Court Canada) 433.

69 Shetreet op cit note 56 at 299.

'In England the concept of judicial independence, an integral part of the separation of powers, is an inchoate one. In modern Britain the concept of the separation of powers is cloudy and the notion of the independence of the judiciary remains primarily a term of constitutional rhetoric… although practically the English have developed surprisingly effective informal systems for the separation of powers… it should never be forgotten that the system of responsible government is based on a co-mingling of the executive with the legislature'.[70]

Modern constitutions with clearer divisions of power and functions are more akin to the constitutional design of United States of America that represented a significant breakaway from the kind of structure of England's Parliamentary sovereignty in the common law tradition. As Buenger observes about the early American struggle for judicial independence:

'Thus, while clearly revolutionary at the time, the creation of a truly separate judiciary was the product of evolutionary thinking, informed by the philosophy of the Enlightenment and by hard-fought struggles over the structure of the new government'.[71]

The power of kings to appoint, pay and dismiss judges was an effective way that the substantive judicial independence of judges could be controlled in past centuries. The struggles against the abuse of this authority paved the way for the establishment of mechanisms to ensure security of tenure of judges. However, these measures did not end the king's inappropriate use of the judiciary to promote executive, undemocratic practices. The early doctrine of separation of powers was conceived with the aim of preventing both the monarch and the legislature from interfering in judicial functioning.

3.2.2.2 Judicial Independence and the Theory of the Separation of Powers

The theoretical foundation underlying the separation of powers doctrine is attributed to John Locke who advanced the concept of natural freedoms of people that were never transferred to the state when subject to its rule. According to Locke state power was limited and distributed according to its legislative and executive functions but he referred to the judiciary as a general 'attribution of the state'.[72]

---

70 Stevens R 'A Loss of Innocence? Judicial Independence and the Separation of Powers' (1999) 19 *Oxford Journal of Legal Studies* 365 – 402 at 367.

71 Buenger M 'Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times' (2003) 92 *Kentucky Law Journal* 979 – 1050 at 988.

72 Locke J *Two Treatises of Government* Peter Laslet (ed) 118.

Best renowned for propounding the modern theory of separation of powers and the idea of an independent judiciary is the French jurist Montesquieu. Montesquieu further developed the principles of separation of powers propounded initially by Locke and clearly identified the judicial function, observing that:

> *'There is no liberty if the power to judge is not separated from the legislative and executive powers. Were the judicial power joined to the legislative, the life and liberty of citizens would be subject to arbitrary power. For the judge would then be the legislator. Were the judicial power joined to the executive, the judge would acquire enough strength to become an oppressor'.*[73]

According to the theory of complete separateness of the three organs, the liberty of individual citizens could only be secured where each of the three organs performed only the specific function each was established for, without interference or influence over the functions or authority of the others. Montesquieu's philosophy of separation of powers which, by all accounts, was inclined towards absolute divisions between the three arms of government had limited impact on the shape of political power in England which even presently reflects a high level of flexibility in the organisation and functioning of the branches.

The development of the principles of judicial independence in England was a process largely determined by convention, animated by the general acceptance of the necessity for impartial adjudication. The lack of clear definition of power separation and consequently the lack of clear meaning of judicial independence in England influenced the application of these concepts in most common law jurisdictions including South Africa. The question is whether the continued influence of certain aspects of the common law pertaining to the concept of judicial independence holds substantial value for the judiciary in a modern constitutional democracy.

Montesquieu's separation of powers perspective could not be sustained without adaptation to the less rigid approach that seems to be required for effective and holistic functioning of governments in common law jurisdictions. However, the main idea of separateness and non – interference, inspired by Montesquieu and particularly by Sir William Blackstone, remains the essence of modern constitutionalism. Blackstone in his *Commentaries* expressed the view that

73 Montesquieu 'The Spirit of Laws' BK XI Chapter 6 M. Richtel, *The Political Theory of Montesquieu* 245.

the monarch should not be entitled to remove judges at pleasure and proposed that judicial administration should be separated from the legislature and the executive.[74]

Indeed, the shaping of modern constitutions in the American tradition follows Blackstone's philosophy of the separation of powers and judicial independence, as Alexander Hamilton, the renowned American jurist observes:

> *'For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers... the complete independence of the courts of justice is peculiarly essential in a limited constitution'.*[75]

The American Federal Constitution highly prizes the rather stricter and clearer divisions of governmental functions attributable to Blackstone rather than the more fluid nature of its application in English law: its original source. It is noteworthy that the American approach to the concepts of separation of powers and judicial independence diverged significantly from its root source as the Founding Fathers replaced parliamentary supremacy with the adoption of its Constitution. This divergence represented in the American Constitution with the added influence of international human rights movements informs the structure of many constitutions in developing democracies historically linked to English common law.

The distinct divisions of functions between the branches and the areas of authority also heralded the strengthening of the concept of institutional judicial independence which hitherto was not easily determinable in English common law. The aspect of institutional judicial independence that was a concern for the elected branches related to the power of judicial review of legislation that the higher courts were given. However, the institution of mechanisms for 'checking and balancing' the powers of the organs of government ensures that they remained appropriately accountable. Ultimately, the value of an independent judiciary redounds to the benefit of individual users of courts and society at large.

Thus, whilst the doctrine of separation of powers affords the judiciary decisional independence and freedom from interference in the actual decision-making function, in principle, the courts do

---

74 Sloan H and Hadley E (eds) *Commentaries on the Laws of England* (1869) 322.

75 Alexander Hamilton *The Federalist No. 78* in George W. Carey & James McClellan (eds) *The Federalist* (1990) 402.

not have law making authority and the lower courts generally have no jurisdiction to invalidate laws. In view of the limited jurisdictional authority of lower courts, the notion of judicial independence is less about judicial power and concerns about judicial overreach but much more about the freedom of individual judges to resolve disputes between parties impartially and judiciaries to function effectively without interference from the other branches of government.

3.2.2.3 The impact of Common Law on the Interpretation of Judicial Independence

The Constitutional Court in *De Lange v Smith NO (De Lange)*[76] cites the Canadian Supreme Court case in *Beauregard*[77] to explain what judicial independence means. Dickson CJC in *Beauregard* defines judicial independence as follows:

> *'Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider…be it government, pressure group, individual or even another judge: should interfere in fact or attempt to interfere with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence'.*[78]

This definition has been derived from a foreign jurisdiction that essentially is modelled on its common law Westminster tradition of parliamentary sovereignty. Judicial independence in common law jurisdictions including Canada and other formerly British colonies developed over time through custom and tradition. As Colvin observes: 'despite the institutional differences Canada has traditionally used the basic English model of Executive – Judiciary relations with extensive executive control over the judiciary and with the protection of judicial independence being left largely to constitutional convention.'[79]

From the perspective of most formerly English colonial states, judicial independence did not develop or follow in the Westminster tradition for various reasons. According to Vyas Vash:

> *'Independence of the judiciary is a relatively new concept for Third World countries. During the colonial era, the judiciary was an integral branch of the executive rather than an institution for the*

---

76 *De Lange v Smith NO* 1998 (3) SA 785 (CC) para 124.

77 *Beauregard v The Queen*[77] (*Beauregard*) 1981 130 DLR (Federal Court Canada) 433 .

78 Ibid.

79 Colvin op cit note 62.

administration of justice. The colonial administration was mainly interested in the maintenance of law and order. It had no respect for the independence of the judiciary or for the fundamental rights of the ruled. The judiciary was that part of the structure which enforced law and order. It was therefore identifiable as an upholder of colonial rule. To an average citizen, the judiciary, as an instrument of control of the executive power, lacked credibility and therefore enjoyed little respect. The judiciary was viewed with suspicion. This attitude unfortunately did not change with independence, because in many Third World countries the judiciary has continued to be manipulated, in a variety of ways, by the executive. It is in this context that the doctrine of independence of the judiciary has acquired new importance in the Third World countries'.[80]

Furthermore, the definition of judicial independence in *Beauregard* focuses on non-interference in the individual judge's adjudicative functions as its core concern while it seems to include institutional independence only obliquely. Whilst the *Beauregard* definition may have sufficed for societies governed according to common law traditions, it may not adequately cover the comprehensive meaning of the concept of institutional judicial independence for developing democracies with written constitutions.

The focus of judicial independence in constitutional democracies that were formerly governed under common law shifted from curbing abuse of executive power to ensuring fair dispute resolution through the application of constitutional principles and the rule of law. It is submitted that the fundamental principle underlying the idea of judicial independence is primarily constant, although it has developed and evolved in application under varying conditions and circumstances. Therefore, it must be the principle, rather than the manner and method of application by any jurisdiction, that should inform the domestic constitutional and legislative policy in separating judicial functions from legislative and executive authority. This implies that a certain level of caution is required in the adoption of models of foreign jurisdictions without adaptation to domestic circumstances where conflicts may arise, as arguably occurred in the application of foreign and old-order legislation to determine the conditions of independence of South African Magistrates' Courts under the Constitution.[81]

80 Vyas Y 'The Independence of the Judiciary: A Third World Perspective' (1991) *Third World Legal Studies* 127 - 177 at 131.

81 See Chapter 5 for discussion of the impact of old-order legislation on Magistrates' Courts.

Hence the focus of this thesis is directed to the principles of judicial independence and the separation of powers that inform international human rights instruments and guidelines, regarding the right of access to courts universally.

3.3 Judicial Independence as a Human Rights Value

The instrumental worth of the concept of judicial independence as a means to an end rather than an end in itself better clarifies and enables understanding of why judicial independence is valued and protected. As Burbank observes:

> *'Foremost is the fact that judicial independence is not an end in itself but a means to an end which requires that the inquiry focus on the goal(s) to be achieved in determining the quantum and quality of independence (and accountability). It remains for the different polities to define what it is they want from their courts and the measure (or quality) of judicial independence they believe is necessary or appropriate in order to secure it'.*[82]

Hamilton's observation about why judicial independence is a critical value in the democratic project and the dangers inherent in the lack of it in the democratic state holds true for the present as it did then;

> *'This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men,… have a tendency… to occasion dangerous innovations in the government, and serious oppressions of the minority party in the community'.*[83]

As the rule of law is the guiding principle in the impartial resolution of disputes the independence of the judiciary assures court users that judges decide disputes solely on their application of the law. The most significant value of the independent judiciary lies in its role in constantly guarding the inherent natural rights of everyone by the application of law which then implicitly enables democratic functioning of the entire constitutional state.

The history of the development of judicial independence shows, despotism, oppression and tyranny are realities wherever the abuse of power cannot be checked by a strongly independent institution established for that precise purpose. It is for this reason that international law

82 Burbank op cit note 58 at 7.

83 Hamilton op cit note 75 at 405.

instruments embody the right of access to independent courts as a fundamental human right to be strictly observed by all nations. The Universal Declaration of Human Rights states: 'It is essential if man is not compelled to have recourse as a last resort to rebellion against tyranny and oppression that human rights be protected by the rule of law.'[84]

The International Congress of Jurists declared that the rule of law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard the civil and political rights of the individual in free society but also to establish social, economic, educational, and cultural conditions under which his legitimate aspirations and dignity may be realized.[85]

3.3.1 Judicial Independence in International Law Instruments

Most international human rights instruments provide that judicial independence is a requirement for the fair resolution of disputes which is a fundamental human right universally. Some of these frequently quoted international instruments[86] and resolutions of international judicial organisations broadly define the concept. For example, according to the Draft Principles on the Independence of the Judiciary (also known as the Syracusa Principles):

> *'Independence of the judiciary means (1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and (2) that the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature'.*[87]

These international human rights instruments broadly define judicial independence allowing for adaptability and individual differences in interpretation by member states, but they do contain

84 Universal Declaration of Human Rights was adopted by the United Nations General Assembly 1948 December 10. http://www.unhcr.org/refworld/docid/3ae6b3712c.html accessed 15 April 2018.

85 International Commission of Jurists Congress was held in New Delhi in 1959. Accessed from https://www.icj.org/rule-of-law-in-a-free-society-a-report-on-the-international-congress-of-jurists-new-delhi-india-january-5-10-1959/ on 15 April 2018.

86 See - *Bangalore Principles* op cit note 72 Value 1 and *Beijing Statement of Principles of Independence of the Judiciary*, *Beijing Principles* Pacific LAWASIA Region adopted by LAWASIA Council 2001. See also - *Syracusa Draft Principles of Judicial Independence* - Article 2.

87 Note 86 Article 2 *Syracusa Draft Principles of Judicial Independence*.

substantive guidelines that enable states to establish institutions and measures aimed at protecting judicial independence.

The strong connection of human rights protection to fair trial rights and the rule of law makes the general United Nations' and regional bodies' instruments on the subject of independence of judiciaries a primary source of authority and indeed even an obligation for the protection of judicial independence universally. *The Universal Declaration of Human Rights (UDHR)*[88] pertinently indicates this connection as follows: 'Everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.'

The *United Nations Basic Principles on the Independence of the Judiciary*[89] sets out in the First Principle that: 'The independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary'. The right of access to independent courts for fair trials is similarly embodied in the instruments of all United Nations Regional agencies.[90]

The *International Commission of Jurists* (ICJ) points out that a judiciary that is independent of the other branches of government is a necessary condition for the fair administration of justice and is intrinsic to the rule of law.[91]

International law instruments such as the *UN Basic Principles on the Independence of the Judiciary, United Nations Declaration of Human Rights,* UN Regional instruments, and international guidelines such as the International Bar Association's *Minimum Standards of Judicial Independence* have facilitated the development of judicial independence frameworks for

---

88 See - Article 10 *Universal Declaration of Human Rights,* United Nations General Assembly 1948 December 10. http://www.unhcr.org/refworld/docid/3ae6b3712c.html accessed 15 April 2018.

89 *United Nations Basic Principles on the Independence of the Judiciary, (UN Basic Principles*) adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146of 13 December 1985.

90 See - Article 7 of the *African Charter of Human and Peoples' Rights*, adopted April 1996 at the 19th session of the *African Commission on Human and People's Rights*. Article 25(1) of *American Convention on Human Rights* adopted at the Inter – *American Specialised Conference on Human Rights* on 22 November 1969. *Charter of Fundamental Rights of the European Union; Beijing Principles Pacific LAWASIA* Region adopted by LAWASIA Council (2001).

91 International Commission of Jurists '*International Principles for the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioner's Guide* 1 (2007) Geneva.

domestic application in lieu of suitable foreign models. Because of the universal recognition and acceptance of these tools for the structuring of judicial independence provisions, these are important instruments that guide and direct democracies in transition or established democracies that are reforming their judicial systems.

The fundamental right of access to courts in any democracy is grounded on the presumption of the impartiality and independence of the dispute resolution forum. This right would be meaningless if there is no guarantee that the court deciding the dispute is impartial and independent.[92] Chief Justice Ismail Mohamed simultaneously defines and encapsulates the essence of judicial independence, and its significance as follows:

> *'The constitutional covenant would be mortally wounded and the civilization which it seeks to mediate would be dangerously imperilled. It is for this reason that every organ of the state and every component of civil society has a vested interest in the protection of the independence of the judiciary. Subvert that independence and you subvert the very foundations of a constitutional democracy. Attack the independence of judges and you attack the very foundations of the freedoms articulated by the Constitution to protect humankind from injustice, tyranny and brutality. The independence of the judiciary is crucial. It constitutes the ultimate shield against the incremental and invisible corrosion of our moral universe which is so much more menacing than direct confrontation with visible waves of barbarism'.*[93]

Although the difficulty to frame the definition of judicial independence seems to be a perennial problem, it is suggested that the study does not evidence any significant difference in the principles of the concept irrespective of the dispute resolution forum wherein it applies. It seems that almost universally the concept of judicial independence is defined with reference to the philosophical theories of separation of functions of government, the nature of the judiciary's relationship to the other state organs and entities and especially its value in ensuring that the governance of the constitutional state is anchored in the rule of law. The objective assurances that judges function impartially and independently are embodied in the essential conditions of judicial independence, which is the subject of discussion in the following chapter.

---

92 The significance of the relationship between the fundamental right of access to courts and judicial independence is highlighted in Chapter Six of this thesis.

93 Mahomed I "The independence of the Judiciary" (1998) (115) *SALJ* 658 – 667 at 666.

3.4 Conclusion

In trying to define the concept of judicial independence, it is inevitable that many issues have to be engaged with, demonstrating that defining judicial independence is not simple. These constraints notwithstanding, some core aspects that are essential to broadly define the concept have been examined in this chapter.

The following comprehensive statement by the American Bar Association contains a summary of the definitional elements of judicial independence that are presently universally applicable.

> *'A truly independent judiciary is one that issues decisions and makes judgments which are respected and enforced by the legislative and executive branches; that receives an adequate appropriation from Congress; and that is not compromised by politically inspired attempts to undermine its impartiality.... Judicial independence includes the independence of an individual judge as well as that of the judiciary as a branch of government. Individual independence (otherwise known as decisional independence) is both substantive, in that it allows judges to perform the judicial function subject to no authority but the law, and personal, in the sense that it guarantees judges job tenure, adequate compensation and security'.*[94]

There are three broadly discernible courses that the evolutionary development of judicial independence has taken from the earliest record of its genesis in England some centuries ago to the present time when independent judiciaries are characteristic of free democratic societies governed through the rule of law. The first is associated with the executive control over judges' independent decisions which was a development leading to judges' security of tenure. The second is the course of development of the American application of the doctrine of the separation of powers. American judicial independence represents a breakaway from the colonial influence of Parliamentary government to constitutionalism which separates the authority of the judiciary from the other two branches. The third is the course that has been to a significant extent informed

94 American Bar Association Chicago 1997 ii – iii 'An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence.
https://www.americanbar.org/content/dam/aba/administrative/public_education/resources/jud-independence- last accessed on 12 May 2018.

and shaped by international law and focused on the connection between judicial independence and human rights.

As the history of judicial independence indicates, the establishment of even a moderate level of separation of powers that enables governments to function stably was the product of the sustained resistance of societies to the abuse of power. The fact that judicial independence continues to generate debates globally, indicates that judiciaries experience new types of challenges as a high level of social inequality tends to have destabilising impacts on communities and societies. As Shetreet points out:

> *'Even once achieved, the continuation of judicial independence is not a matter of course. It is constantly subject to challenges, sometimes by other branches of government, and at other times as the result of internal developments, changing political circumstances, or social and economic pressures. Violations of accepted principles of judicial independence have occurred in countries that represent all forms of government and all geographic regions in the world. Challenges to judicial independence include interference with personal independence through legislation, including legislation abolishing security of tenure, lowering the retirement age, or abolishing certain courts so as to effectively end the service of a judge'*.[95]

Although it is irrefutable that the main pathways to establishing and strengthening the concept of judicial independence were created and shaped by the common law as represented in the law of England and further advanced by the Americans through the stricter application of the doctrine of separation of powers, these pathways seem in some ways deficient. The United Kingdom with its parliamentary system, still functioning largely through conventions, has no clear separation of powers to ensure the institutional independence of the judiciary. Although this may have been mostly successful for a homogenous society it may be more challenging to apply in increasingly diverse ones in common law jurisdictions. In the United States of America, the federal judiciary is probably the epitome of a co – equal organ of government but most state judiciaries are less equal in terms of administrative autonomy. In addition, in several states, judges are elected to office and may be in the same way voted out of office. Clearly this practice conflicts with the essential conditions of judicial independence.

Finally, the concept and value of judicial independence has become entrenched in constitutions of developing democracies through the international law instruments that advance people's

95 Shetreet op cit note 56 at 293.

rights of access to court as a fundamental human right. However, in some of these states the constitutional guarantee of judicial independence may be perceived to be merely formal. The reality for these jurisdictions is that the implementation of the guarantees embodied in broad constitutional principles, without specific provision for safeguards, has not promoted the protections required by the constitutional imperatives and has enabled these states to avoid effective implementation. Cumaraswamy, makes the following apposite comments:

> *'The UN Basic Principles are bare minimum standards: they were adopted after a considerable dilution in the face of the Eastern bloc's opposition to "Western concepts". With the collapse of that ideology should the Basic Principles not be reviewed and those principles which were dropped restored with new additions? For example, should the need for financial autonomy of the judiciary not be addressed in the Standards? …On the other hand, can the Basic Principles be expanded with creative and purposive interpretations? If so, who should be the authority? Maybe national courts could give some life and nurture these Standards'.*[96]

A significant shortcoming in the courses of development of the principles of judicial independence is the paucity of consideration of the weaker protection of the independence of lower courts across jurisdictions internationally. The implication of this deficiency is that regardless of how well the higher courts are insulated against external interference, the level of judicial independence will still have to be measured by the level of strength or weakness of the judicial majority constituted by the lower courts. Weak judiciaries that are unable to steadfastly apply the rule of law, fall to become ineffective, which then imperils public confidence in them and their legitimacy.

The lower courts are the frontiers for the resolution of the conflicts fuelled by the innumerable social ills that plague societies in every jurisdiction around the world. But it is a remarkable phenomenon and indeed a concern that the lowest courts are the least equipped in every way to resolve the legal disputes underlying the conflicts. Cumaraswamy expressed this concern as follows:

> *'Very often when the issue of judicial independence is addressed, it is often addressed in the context of the superior judiciary. It would appear that the UN Basic Principles too may have failed to address this class of judges. The independence of judges sitting in the lower judiciary like magistrates' courts, district courts or provincial courts are becoming a matter of some concern.*

96 Cumaraswamy P UN Special Rapporteur on Independence of Judges and Lawyers *CIJL Yearbook* 1999 63 – 84 at 82.

This also includes judges of statutory tribunals. To what extent is their independence guaranteed? It must be borne in mind that in many jurisdictions these courts dispose of more than 70% of the total number of cases brought before all the courts, particularly criminal cases. This is the forgotten class of judges, the silent majority, whose independence is not given much attention'.[97]

This broad analysis of the international perspectives on judicial independence shows that there is no clear model by which to frame the definition, principles, application, and implementation of this indispensable element of democratic governance. This by no means implies that such a model may not be achievable albeit and inevitably through the sustained demand upon all public institutions to ensure that citizens have the right of access to independent courts.

Undoubtedly though, there are valuable insights that could be gained from the survey of the subject particularly the relationship of the definitional concepts, impartiality, and separation of powers, to the practical application of individual and institutional independence. Most significantly the evaluation of the developments towards greater judicial independence may provide a useful gauge by which to assess the status of judicial independence in the lower courts in South Africa and accordingly may inform the transformational challenges presented by the country's protracted undemocratic history. The human rights values that are manifest in the Constitution of South Africa reflect the principles embodied in the universally recognised international law instruments and therefore provide a basic framework for the application of the principles of judicial independence and for the establishment of institutions to protect this value. These protections, described as the essential conditions of judicial independence or the minimum standards of judicial independence are examined in the following chapter.

97 Ibid at 79.

CHAPTER FOUR

The Essential Conditions for the Protection of Institutional Judicial Independence in Comparative Perspective

4.1 Introduction

> *'An independent and impartial judiciary is an institution of the highest value in every society and an essential pillar of liberty and the rule of law. The objectives and functions of the judiciary shall include: To resolve disputes and to administer the law impartially between persons and between persons and public authorities; To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and to ensure that all people are able to live securely under the rule of law'*.[98]

This chapter lays the basis for the arguments made in Chapters Five and Six regarding a central theme of this thesis: the importance of judicial independence in ensuring the right of access to independent courts to lower court users. In this regard it examines and evaluates the framework of universally accepted guidelines and measures that were developed to ensure that judges can adjudicate impartially without apprehension of reprisals from any external source.

The essential conditions of judicial independence and the minimum standards of judicial independence discussed in this chapter serve to clarify and illustrate the complex meanings,

98 *Mount Scopus Standards of Judicial Independence.* This was formulated by *The International Project of Judicial Independence of the International Association of Judicial Independence and World Peace*, approved on 19 March 2008 and consolidated in 2015. *Mount Scopus Standards* is an updated and consolidated version of previous international authoritative guidelines such as the *International Bar Association* and *New Delhi Minimum Standards of Judicial Independence.* Accessible at http://www.jiwp.org/#!mt-scopus-standards/c14de.

interpretations, and operation of the concept of judicial independence which is broadly defined in the context of its history in Chapter 3. Importantly this chapter seeks to draw attention to the value of minimum conditions of judicial independence and the high bar that has been set to ensure that judicial independence is not compromised. Of significance in this chapter is the reflection of the magnitude of the subversion of judicial independence principles that occurred during the pre-democratic era. In this respect, the values that have crystallized and embodied in the essential conditions of judicial independence, serve as a gauge of the level of judicial independence of MCs at present and as a powerful guideline to remedy the failures of the courts of the past and advance the project to transform and reform the judiciary in the constitutional era.

4.1.1 The Developmental Background of Judicial Independence Protection

The basic premise underlying judicial independence is the freedom of judges to decide disputes 'without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'[99] The reality is that judges around the world experience threats in various guises solely because of the nature of their work they do. The International Commission of Jurists reports that 'many judges around the world suffer from subtle and not-so-subtle pressure, ranging from killings and torture to extortion, transfer proceedings for carrying out their professional duties, and unlawful removal from office.'[100] Therefore democratic states provide for the protection by law of judges against these attacks, pressure and influence while ensuring that they decide disputes according to the law alone.

Safeguards for judicial independence protection developed according to international law principles and guidelines, provide for a set of basic standards that enable states to ensure that judges carry out judicial responsibilities without concerns for their own security and for the

99 Principle 2 *United Nations Basic Principles of Judicial Independence*. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Accessible at https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary. Accessed on 2nd April 2022.

100 International Commission of Jurists(ICJ*)* 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors' Practitioner's Guide' No. 1 at 24.

assurance of the public that judges decide disputes according to law, without interference. Historically, judicial independence and the recognition of the value of the concept universally, in advancing human rights through the rule of law, are perceptibly the key determinants in how jurisdictions internationally have crafted the measures required for the protection of their judges and judiciaries. In emphasising the interdependence between the protection of human rights and the independence of judges, Shetreet states that:

> *'An important part of the agenda of the international community and its human rights agencies must be devoted to ensure effective mechanism of enforcement of human rights both in domestic and international systems of justice. For substantive human rights are worthless without an effective mechanism for their enforcement. The enforcement of rights is assured by an independent and impartial tribunal… The establishment of clearly stated international standards on the meaning of judicial independence will enhance the promotion of human rights. The emerging transnational jurisprudence… will no doubt contribute to the furthering of human rights in the years to come'.*[101]

As the defining features of judicial independence indicate, it is essential that the judges' individual independence is protected in every dispute to be resolved and that of the judiciary collectively, as an institution functioning separately from the other organs of government. To this end various judicial organisations internationally have collaborated to issue guidelines that aid national governments and international law organisations, to establish basic minimum standards for the protection of judicial independence: *The Mount Scopus Standards of Judicial Independence* (Mt. Scopus), a universally recognised document distinguishes the different dimensions of judicial independence and proceeds to direct how each aspect of judicial independence must be protected. It provides that:

> *2.2 Each judge shall enjoy both personal and substantive independence.*
>
> *2.2.1 Personal independence means that the terms and conditions of judicial service are adequately secured by law so as to ensure that individual judges are not subject to executive control; and*
>
> *2.2.2 Substantive independence means that in the discharge of his/her judicial function, a judge is subject to nothing but the law and the commands of his/her conscience.*

101 Shetreet S 'Judicial Independence, Liberty, Democracy and International Economy' in '*The Culture of Judicial Independence: Rule of Law and World Peace'* (Shimon Shetreet ed.) (2014) 15.

2.3 The judiciary as a whole shall enjoy collective independence and autonomy vis-à-vis the executive.

The protection of institutional independence is based on several fundamental principles which according to Shetreet are (i) the rule against *ad hoc* tribunals, (ii) intentionally stripping courts of their jurisdiction, (iii) the standard judge principle which requires that listings are done according to a pre – determined plan, (iv) post decisional independence and respect for judgments, (v) judges must not be a part of the administrative arm of the executive, and (vi) judicial terms of office must not be changed during term except as a benefit.[102]

Most democracies recognise the need for judicial independence as well as the basic tenets that underpin the concept. To varying degrees, the measures instituted for the protection of individual judges' adjudicative independence and the institutional independence of their judiciaries reflect these principles. As the discussion about the complexity of the concept and its various meanings in the previous chapter suggests, much of the discourse revolves around the different interpretation and application of the principles of judicial independence in different jurisdictions. The strength of the protection of judicial independence may often be gauged by examining the depth and reach of the guarantees embodied in the protective provisions.

Where the essential conditions of judicial independence are included in constitutions in addition to a general declaration, the implication is that judicial independence is strongly protected. Axiomatically therefore, protections provided for in ordinary legislation may be relatively shallow because ordinary law may be easily amended or even repealed. In this regard Shetreet remarks:

> *'In the normative analysis of the regulation of judicial issues, it must be recognized that certain matters should be regulated in the constitution whereas others may be regulated by ordinary legislation. When a matter is regulated in ordinary legislation, the legislature can create an amendment through simple majority. In contrast, protection granted by the constitution is modifiable only by constitutional amendment. Therefore, in order to better guard judicial independence, issues such as the terms of office for judges should be protected in constitutional provisions'.*[103]

In sum, the essential safeguards that democratic states' constitutions should embody in preserving judicial independence are the appropriate mechanism for appointment of judges,

102 Shetreet op cit note 56 at 289.

103 Ibid at 288.

provision of security of tenure and terms of service for judges, respect for and acceptance of judgments by the elected organs.

It is noteworthy that common law jurisdictions with no written constitutions are excluded from this comparison because the principles and practical application of judicial independence are usually found in conventions that have developed over the centuries and perceived as adequate and effective. In this respect this statement of De Smith is apposite:

> *'In Britain, the independence of the Judiciary rests not on formal constitutional guarantees and prohibitions but on an admixture of statutory and common-law rules, constitutional conventions and parliamentary practice, fortified by professional tradition and public opinion'.*[104]

The justification for the weaker levels of protection of the judicial independence of lower courts where the Constitution is supreme is not readily apparent save for the observation that many of these jurisdictions have historical links to English common law where conventions are still the mainstay of democratic governance as Shetreet points out:

> *'Nevertheless, what was recognized was the traditional English conception of judicial independence, which can be traced back to the Act of Settlement, 1701. Under this conception of judicial independence, the Executive appoints the Judiciary but the Legislature guarantees security of tenure and financial security to judges of the superior courts. Other aspects of judicial independence, together with the independence of lower-level judges, are then left to the good faith and good sense of the Executive, bolstered by the standards of constitutional convention'.*[105]

The emphasis on the strength of the protection of judicial independence from an international law perspective is considered necessary to advance a central theme of this thesis, that the inferior of protection of judicial independence of lower courts in constitutional democracies may be more likely to be based on an historical legacy rather than a substantive legal premise.

4.2 Minimum Standards of Judicial Independence

The International Commission of Jurists (ICJ) describes these as preconditions of independent judiciaries:

104 De Smith *Constitutional and Administrative Law* (1st Ed 1971), at 365-366.

105 Shetreet op cit note 56 at 232.

'There are a number of preconditions to a fully independent judiciary, the most rudimentary of which are enunciated in the UN Basic Principles on the Independence of the Judiciary. Judges must be personally autonomous and insulated from pressures and influences and inducements from the political branches or other external sources. They should be appointed on the basis of objective criteria and should receive adequate and fixed remuneration established by law and not reduced during their tenure. They should serve for life or for a long fixed term, and should not be suspended or removed from office except for reasons related to their capacity to carry out judicial functions. Judges must also have institutional independence regarding administration of courts and assignments of judges'.[106]

The set of minimum standards and essential conditions of judicial independence is the outcome of development of the concept according to circumstances prevailing at some time, phase or event in history. As Shetreet suggests, judicial independence and its constitutional protection constitute a developmental, ongoing process rather than a single act. Therefore, it may not be possible to lay down all the conditions in advance, either in the constitution or otherwise, which will secure and ensure perpetual independence of the judiciary. Such conditions will have to be checked and revised from time to time.[107] However some of these are so basic that without them judicial independence does not exist. The conditions most essential for the existence of judicial independence are discussed in the following sections.

4.2.1 Security of Tenure

'If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty'.[108]

Measures instituted for the protection of judicial independence are to a significant extent informed by the historical experiences of judges who came under attack from rulers and

106 Centre for The Independence of Judges and Lawyers of the International Commission of Jurists *'Attacks on Justice*: *A Global Report on the Independence of Judges and Lawyers'* (2002) at 11.

107 Shetreet S 'Justice in Israel: A study of the Israeli Judiciary' 1994 4 as cited by Singh MP in 'Securing the Independence of the Judiciary: The Indian Experience' (2005) 10 Indiana *International and Comparative Law Journal* 245 – 292 at 248.

108 Madison J *The Federalist No. 78*, at 469.

governments and were often dismissed simply for deciding disputes impartially. Hence the original concession of the Act of Settlement of 1701 that judges have the right to security of tenure depending upon good conduct, not at the pleasure of the king, state or government remains central to the protection of the individual judge's decisional independence.

The ICJ issued the following pronouncement regarding the security of tenure of judges:

> *'One of the basic conditions for judges to retain their independence is that of security of tenure. Unless judges have long-term security of tenure, they are susceptible to undue pressure from different quarters, mainly those in charge of renewing their posts. This problem is particularly acute in countries where the executive plays a predominant role in the selection and appointment of judges. In such countries, judges may be subjected to, and succumb to, political pressure in order to have their posts renewed, thereby compromising their independence'.*[109]

There is broad consensus in international law and jurisprudence that security of tenure of judges is the primary means employed to ensure that judges are not discharged owing to judicial decisions that go against the executive or that are unpopular. The United Nations Basic Principles stipulate that:

> *'States have the duty to guarantee the conditions of service and tenure in their legislation: The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law"… Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists'.*[110]

The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* provide that:

> *'Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office" and that "the tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law'.*[111]

---

109 De Smith op cit note 106 at 51.

110 Op cit note 89 - *UN Basic Principles.*

111 See - Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Principle A, paragraphs 4 (l) and (m) from 201.

The *Latimer House Guidelines*[112] and *Beijing Statement of Principles of the Independence of the Judiciary*[113] embody provisions for the security of tenure of judges. *The Universal Charter of the Judge*[114] provides that: 'A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered'.

Most democracies follow international law stipulations in ensuring the security of tenure of judges by providing appropriate conditions within constitutions or within the body of ordinary laws. This is because the most critical aspect of institutional judicial independence, once a judge is appointed, is ensuring that the judge is not discharged from judicial service arbitrarily. As Kirby J in *Fingleton v The Queen,* points out: 'Security of tenure reinforces the independence of mind and action of judicial officers essential to the proper discharge of their functions'.[115] It is noteworthy that the Canadian Supreme Court in *Ella v Alberta*[116] held that life tenure is an essential aspect of judicial independence, an important value for all judges regardless of status or place of judicial service and that the same amount of independence is required for all judges.

International law also provides guidelines for the removal and dismissal of judges should they be found to be incapable of performing judicial functions or on account of serious misconduct or criminal conduct. Judges may not be dismissed for *bona fide* errors made in the course of judicial functioning as principles of judicial independence give them immunity against dismissal for such mistakes. The *UN Basic Principles* state: 'without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.'[117]

---

112 Latimer House Guidelines for Ensuring the Independence and Integrity of Magistrates issued by Commonwealth Magistrates and Judges Association and based on the Latimer House Guidelines adopted 19 June 1998.

113 *Beijing Statement of Principles of the Independence of the Judiciary* in the LAWASIA Region, paragraphs 18-21. *Beijing Statement of Principles of the Independence of the Judiciary* in the Law ASIA Region, adopted by the Chief Justices of the Law ASIA region and other judges from Asia and the Pacific in 1995 and adopted by the Law ASIA Council in 2001.

114 Universal Charter of the Judge Article 8. The universal Charter of the Judge, approved by the International Association of Judges (IAJ) on 17 November 1999.

115 *Fingleton v The Queen* (2005) 216 ALR 474 at 507.

116 *Ell v Alberta* (2003) 1 SCR 857 at 874.

117 Op cit note 89 *UN Basic Principles.*

States have a duty to establish clear grounds for removal of judges and appropriate disciplinary procedures that are fair. 'The determination as to whether the particular behaviour or the ability of a judge constitutes a cause for removal must be taken by an independent and impartial body pursuant to a fair hearing.'[118]

According to the IBA, the 'grounds for removal of judges shall be fixed by law and shall be clearly defined and all disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.'[119] Justice King in commenting on the importance of security of tenure and in particular the standard that the IBA sets makes the following pertinent observation:

> '*Despite the fundamental importance of the topic from the point of view of the independence of the judiciary, there is a surprising lack of unanimity as to the principles involved and, in many countries, a surprising lack of attention to the topic. One would think that if security of tenure is to mean anything, it must at least mean that the security can only be disturbed for breach of some clearly enunciated and promulgated rule of conduct'.*[120]

It seems that the security of tenure discourse has not properly addressed the criticism about what constitutes judicial misconduct because actual cases of misconduct and impeachment of judges have been rare. In many common law jurisdictions, there has been no set procedure to discipline judges of higher courts while at lower court levels magistrates are subjected to disciplinary processes and sometimes dismissed. However, the questions remain; what conduct constitutes judicial misconduct, what are the criteria to determine judicial incapacity, and how can it be determined whether the tribunal tasked with the disciplinary enquiry is sufficiently independent.

4.2.2 Financial Security

The financial independence of judges is an integral aspect of judicial independence both for the individual judge as well as all judges as a collective. As an essential condition of judicial independence, the remuneration of judges is regularly a constituent part of the security of tenure cluster and hence regarded as a crucial aspect of it. *The IBA Minimum Standards* require that

118 Op cit note 111 at 56 - (ICJ Principles and Guidelines).

119 IBA *Minimum Standards of Judicial Independence* Clause 29.

120 King J 'Minimum Standards of Judicial Independence' (1983) 8 *International Legal Practitioner* 65 – 68 at 68.

judges' salaries and pensions be fixed by law and adequate, entrenched in Constitutions or secured by law and that remuneration not be decreased.[121]

However, decades after this and other international pronouncements the conflicting approaches adopted by governments on financial security of judges continue to generate considerable tensions especially in common law jurisdictions, where different standards of judicial independence seem to apply for the different levels in the hierarchy of courts and judges' remuneration is sometimes not fixed by law.

Three Canadian cases have a direct bearing on the issues related to financial security of judges and their judicial independence. In *Valente* the court found that external, objective aspects of judicial independence of the individual judge are guaranteed by security of tenure, financial security, and the institutional independence of the court to which the judge belongs. Although it is not clear from *Valente* whether financial security of judges also has a bearing on collective judicial independence, *Valente* is seen as a significant authority on collective judicial independence. In *Beauregard v Canada*[122] the court dealt with the relationship of financial independence pertinently. Referring to financial security as one of the essential components of the principle of judicial independence Teresa Kaykowsky remarks that:

> *'The Beauregard judgment has been taken to stand for the proposition that if any hint that a law is dealing with this matter were enacted for an improper or colourable purpose or if there were discriminatory treatment of judges vis-a- vis other citizens then serious issues relating to judicial independence would arise'.*[123]

The third Canadian case on the issue of financial independence dealt with the question of judicial independence of the provincial courts in *Re Provincial Court Judges*.[124] The Queen's Bench of Alberta held that the salary reduction of provincial courts judges was unconstitutional because it was not part of an overall economic measure. This finding was endorsed by the Supreme Court of Canada when it held that salary reductions for provincial court judges violated the principles of judicial independence and held that any reductions to judicial remuneration could not take

121 International Bar Association *Minimum Standards of Judicial Independence*; articles 14; 15.

122 *Beaugard v Canada* (1986) 2 SCR 56

123 Kaykowsky T 'Judicial Independence' *Law Now* (1998) 21 at 23.

124 *In Re Provincial Court Judges* (1997) 3 SCR 3.

those salaries below a basic minimum level of remuneration which is required for the office of a judge.

Kaykowsky makes the following observation on analysing the findings in *Re Provincial Court Judges*:

> *'The primary purpose of financial security is to serve as a means to secure the goal that the courts are free and appear to be free from political interference through economic manipulation by other branches of government, and that they do not become entangled in the politics of remuneration from the public purse. A judge should be placed in a position where he or she has nothing to lose by doing what is right and little to gain by doing what is wrong'.*[125]

There is general acceptance in the literature on judicial independence that financial security of judges has a direct bearing on institutional judicial independence. Beloff observes:

> *'It has been argued that there is a need to avoid reduction not only in formal but in real terms. Otherwise judges can be compromised by a side wind. Shetreet writes…Withholding salary increase may be an indirect method of interfering with independence at times of higher rates of inflation'.*[126]

The issue of remuneration of judicial officers has been a source of conflict between the judiciaries of the various states and their executive governments in Australia. As Mack and Anleu remark:

> *'If a government has the ability to arbitrarily reduce the salaries of the judiciary generally or, worse, of a particular judicial officer, this could be a means of punishment for unwelcome decisions… The principle that judicial remuneration is not to be reduced during a judicial officer's tenure is a recognised constitutional convention. However, the extent to which the convention is formally recognised is different for magistrates compared with other judicial officers'.*[127]

Lowndes expressed similar concerns about the independence of certain tribunals that make recommendations regarding remuneration of magistrates in Australia, which in his view are subject to political influence because the same tribunals also determine the salaries of members of parliament. Lowndes supports the argument that because of the potential threat to magistrates' independence the remuneration of magistrates should be linked to these of the Supreme Court judges so that any increase in the salaries of the latter would automatically and

---

125 Kaykowsky op cit note 123.

126 Beloff MJ 'Paying Judges, Why, Who, Whom, How Much' *Denning law Journal* (2006) 18 1- 37 at 26.

127 Mack and Anleu op cit note 19 at 389.

proportionately result in an increase of magistrates' salaries. He argues that the advantages of such an arrangement would be the elimination of political interference, greater certainty and impartiality and may also offer a level of inalterability to magistrates' remuneration.[128]

The following observation made by the editor of the *Criminal Law Quarterly* of Canada illustrates how the inequality in the protection of remuneration of lower court judges affects their independence and the public perception that lower court users have the right of access to justice that is of a lower quality than those whose disputes are resolved in the superior trial courts:

> *'Given that the clientele of criminal courts come from the most disadvantaged sections of society while the clientele of the superior courts are frequently corporations and the more advantaged, care must be taken to avoid any hint of second class justice…t(T)he focus of concerns in the 1990's was salaries which even in the most generous of jurisdictions lag well behind those of superior courts…The fact that provincial court judges continue to receive substantially lower salaries than their fellow trial judges is a sign of second class justice'.*[129]

However, there is another aspect of judicial independence that adequate judicial remuneration influences albeit in an indirect way. To ensure that only the most competent candidates are appointed to judicial positions the remuneration of judicial officers should be adequate. High quality of judicial decision – making comes with competent, skilled, diligent, and independent-thinking judges. Lawyers of this calibre are very successful in private practice and command excellent pay and therefore would not be keen to accept diminished financial security as judges, even if the idea of adjudication appeals to them. The appointment of mediocre judges over a period will ultimately weaken the quality of judgements and the standing of judges in society. The pay and service conditions of judges must be sufficient to attract the best lawyers to the bench and retain them by ensuring that salaries are not reduced during tenure. The ABA in its report submits that:

> *'Congress' repeated blocking of the judicial cost of living adjustments that were established as non – discretionary by the Ethics Reform Act of 1989 has resulted in erosion of judicial pay that due to inflation is now so low that it seriously threatens the independence that the Compensation*

128 Ibid.

129 Editor *Criminal Law Quarterly* 'Beyond Salary Commissions for Provincial Courts' (1999) Crim.L.Q.1 at 43.

Clause was supposed to ensure and risks becoming insufficient to attract and retain well – qualified jurists from diverse economic and societal backgrounds'.[130]

The three principles that underpin the importance of financial security of judges according to Beloff, are the non – reduction of individual judges' salary during tenure, the non- reduction of judicial salary collectively and provision for salary guarantees of judges at time of appointment. He adds that 'These are guarantors of independence, but they are not by themselves, guarantors of excellence'.[131]

Citing Holdsworth with approval, Beloff states that if the remuneration of judges is continuously reduced, which occurs especially when remuneration is not adjusted in line with inflation, it will not induce the ablest lawyers to accept judicial office which then seriously impacts the administration of law and impairs intellectual standards of excellent legal systems.[132] Importantly society is entitled to only the highest quality of dispute resolution at the trial level in order that costly and time consuming reviews and appeals can be avoided.

An overview of the issues pertaining to judges' remuneration and judicial independence indicates that although the international law guidelines are quite clear and appear not to be particularly complex to implement, governments seem reluctant to engage with the relevant sectors including representatives of the judiciary to find enduring solutions to an age –old problem. As a result, considerable tensions persist, even in well – established jurisdictions between judiciaries and the other branches. The issue of judges' remuneration, more than any other, creates a sense that judiciaries may be kept in a perpetually weakened state by controlling the remuneration of judges, their primary resource.

4.2.3 Appointment of Judges

4.2.3.1 General

Some of the most intractable and common challenges of judicial independence are those related to the selection and appointment of judges. The general notion that judicial independence is a

130 ABA op cit note 94.

131 Beloff op cit note 126 at 36.

132 Ibid.

complex subject that is difficult to define and quantify may be at least partly attributable to what informs the principles underlying the appointment of judges. The application of the principles of separation of powers is central to the question of the legitimacy of the institution invested with this function and probably explains the difficulties experienced by democratic states globally in the treatment of this issue. The executive traditionally appoints judges in both common law and civil law jurisdictions. However, there are obvious political considerations that impact on the question of how to protect the independence of the judiciary from executive and legislative power in deciding disputes impartially while ensuring judicial accountability.

The tension in the appointment of judges comes down to the establishment of mechanisms to check and balance the exercise of power of all organs of government. The appointment of judges by the elected organs is a means by which to prevent the aggregation and potential misuse of power by the judiciary should it be given sole authority to select its members. But by all international law standards and scholarly literature both values, judicial independence, and judicial accountability, have to operate in tandem without compromise of either of them. As aptly observed in a report by Mayne: 'the tension that exists between the principles of independence and accountability is not a conceptual tension. It is not that the requirements of both these principles could not be resolved without the sacrifice of aspects of either one of the principles; rather the tension inhered in the operation of the principles.'[133]

Although it seems that there are many approaches to appointing judges, it is evident that generally the authority to select and appoint judges is not to be vested entirely in a single institution and especially not the judiciary. Considering that the accountability of judges is derived through the rule of law and not the rule of the majority, tensions between the judiciary and the elected branches are likely to continue regardless of whether the power to appoint judges is vested in the executive or retained indirectly by the electorate through their representatives in the legislature. Because the rule of law is the basis upon which judiciaries protect the fundamental human rights of individuals, international law has developed sets of guidelines or principles by which states may ensure that political motivation in the appointment of judges does not undermine judicial independence in their jurisdictions. Various measures adopted or devised

133 Greg Mayne, a researcher for CIJL, made this statement in a report on 'Meeting of the CIJL Workshop on Judicial Corruption' contained in the *CIJL* Yearbook 2000 (Editor R D Nicholson) 11 – 35 at 14. Accessed from www.cijl.org and last visited on 1May 2020.

by states according to international law principles and their effectiveness are examined in the following section.

4.2.3.2 Judicial Selection and Appointment Processes

According to the ICJ the important issues related to the appointment of judges are the criteria for appointment, the nature of the body appointing the judges and the processes involved in the appointments. Internationally, the criteria for selection of judges are usually clearly stated but the constitution of the appointing body and its methods are not so clearly determined. This issue is left open in international judicial independence guidelines for each state to resolve according to the circumstances befitting the particular jurisdiction. According to the *Mount Scopus Standards* based on the *Montreal Declaration*, 'The method of judicial selection shall safeguard against judicial appointments for improper motives and shall not threaten judicial independence'.[134]

However as judicial accountability is also a primary value internationally, the following clauses of the *Mount Scopus Standards* make appropriate provision stating that it would be legitimate for the executive and legislature to participate in judicial appointments, but that due consideration be given to judicial independence. The *Mount Scopus Standards* also regard judicial councils favourably provided a balance is maintained in the composition of membership.[135]

Similarly, other international law instruments contain guidelines promoting principles of judicial independence as well as judicial accountability. For instance, the Council of Europe requires that the selection of judges be made independent of the government and administration but qualifies the requirement by stipulating that where governments appoint judges, the appointment procedures must be transparent and based on objective criteria.[136] The *African Guidelines* on judicial appointments make similar recommendations.[137]

By all accounts the establishment of sound judicial independence principles and mechanisms to protect and defend them does not contradict the values of judicial accountability. Thus, the

134 *Mount Scopus* op cit note 98 article 4.1.

135 Ibid at article 4.2.

136 Council of Europe Recommendation No. R94 Principle 1.2. (c) cited by ICJ as in note 119.

137 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, paragraph 4 (h) as cited by ICJ. See note 111.

contemporary debate is about how to ensure democratic accountability without sacrificing the essential conditions of judicial independence. Colvin describes the accountability - independence relationship as follows:

> *'Judicial independence is not an unqualified ideal. The judiciary like any organ of government must be accountable to the people. Attention needs to be given to mechanisms for securing this accountability. Nevertheless, the contemporary debate over judicial independence reflects justifiable unease about seeking accountability through executive control'.*[138]

Given the checks and balances of the provisos intended to achieve accountability it is inevitable that a considerable amount of tension is generated in this sphere. Malleson observes that:

> *'… t(T)here is growing pressure to rethink the balance between judicial independence and accountability in the judicial appointments process…in countries where judicial activism has developed within established democracies (Canada, Australia, Israel) the dilemma is how to increase judicial accountability by strengthening the link to the electoral process while avoiding the creation, strengthening or revival of partisan political control. For systems in parts of the world …which are moving towards liberal democracy and away from strong state control the challenge is to enhance the independence of the appointments process and to weaken the link with the executive while retaining the democratic legitimacy of their increasingly powerful judiciaries'.*[139]

The independence of the body such as an appointments commission or judicial council is associated with the particular interest each member of the body represents. There is significant potential danger for the judicial independence of appointees when the elected branches dominate the composition of the appointment body and both the legislature and executive share the same political affiliation.

In common law jurisdictions, the conventional practice of judicial appointments rests with the executive and appears to have found broad acceptance. In the view of Justice Kirby of the Australian High Court, political appointments in the common law tradition are not all bad. He suggests that there are some advantages in the common law tradition of appointments of seasoned professional barristers although the lack of diversity associated with this tradition needs to be addressed. Kirby also suggests that it is unlikely that any common law jurisdiction

138 Colvin op cit note 62 at 249.

139 Malleson K 'Introduction' in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World.'* Malleson K & Russell P H (eds) (2006) 3 – 10 at 4.

would, for several reasons, replace its system of appointments with the civil law system in Europe or the American system of appointment by election.[140]

For states transitioning from undemocratic or oppressive former regimes the establishment of independent judicial commissions appears to be the preferred approach to ensuring greater transparency and facilitation of the independent selection process. However, the formal institution of judicial commissions is no guarantee that appointments of judges are impartial and apolitical. This is because in many instances the judicial commission merely recommends the appointments, but the head of the state is entitled to reject the recommendation and choose to appoint someone preferred by him or her. As Madhuku of the University of Zimbabwe points out, the constitutions permit the President to make the final decision over the appointment of a judge after consultation with the Judicial Service Commission, in the case of Zimbabwe, and after consultation with the Supreme Council of the Judiciary, in Mozambique and Tanzania. Madhuku makes an important point about the weakness of mere formality in judicial independence protections when he states:

> *'It is evident …that the extent to which the appointment of judges is free from political manipulation is also dependent on the independence of the Judicial Service Commission. Needless to say, if the Judicial Service Commission is merely the president's alter ego, there will be little difference, in practice, between countries where the president is required to act "on the advice of the Commission" and where he or she acts alone or merely "after consultations with" the Commission".*[141]

Evidently, the balancing of judicial independence with judicial accountability is directed more at preventing an unelected judiciary from becoming too powerful, which may happen, if allowed to appoint its members independently of the other branches. There may be some merit in such a notion if judges of the highest courts do wield any such power in constitutional democracies, but it is unlikely that lowest courts which have no law - making authority could pose any kind of threat to the political branches should the judiciary be vested with more power to appoint judicial officers to lower courts. As the, often quoted, statement of Alexander Hamilton suggests '…the judiciary is one branch of government which is an unlikely candidate as a despot, despite the

140 Kirby M 'Modes of Appointment and Training of Judges: A Common Law Perspective' (1992) 41 *Journal of the Indian Law Institute* 147 – 159 at 154.

141 Madhuku L 'Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa (2002) 46 *Journal of African Law* 232 – 245 at 238.

great powers it can exercise especially in judicial review, it remains very much at the mercy of other arms of government.'[142]

In Malleson's view, there is also a need to strike a different balance in independence and accountability between trial courts and highest courts of review. This is based on the fact that, for the top review courts, their decisions have far-reaching social and political implications hence the appointment of judges to top courts is justifiably politically inclined. On the other hand, the potential threats to judicial independence at the highest level are lower because these judges are at the top of their careers and unlikely to be seeking promotion so better able to withstand pressure from their selectors. By inference the potential threats to lower court judicial independence ought not to be perceived as insignificant on account of lesser jurisdiction.[143] The question remains whether a similar measure of judicial accountability should be required in respect of judicial appointments for lower courts as for higher courts.

In the final analysis the impact of the dominant authority in the appointment process may be irrelevant because judges decide cases according to law and pre – determined listings and case – load allocations. In addition, the highest courts consist of panels of judges with members regularly dissenting. The opportunity for political or any other sort of manipulation is probably non – existent. The nub of the argument is that there is little benefit to be gained in appointing judges in anticipation of a particular pattern of judicial outcomes. The following observation of Kirby aptly illustrates the point:

> *'Governments could sometimes be greatly disappointed by the decisions of their appointees once safely in office. There is risk in judicial commissions and legislative confirmation proceedings that the appointment process will opt for the 'safe' or 'unknown' candidate rather than the intellectually vibrant, energetic or bold appointee'.*[144]

142 Madison et al op cit note 110 Chapter 78.

143 Malleson op cit note 139.

144 Kirby op cit note 140 at 142.

A positive feature of the old common law system of judicial appointments according to Kirby is that it is more likely to accept candidates regarded as controversial although potentially risky for the appointment institution.[145]

It is in the public interest that the entity seized with this responsibility, selects, and appoints only the most appropriately qualified candidates to judicial positions and to ensure that judicial accountability is not achieved by sacrificing judicial independence. This leads the discussion to the issue of the criteria employed in selecting judges and how judicial independence is affected.

4.2.3.3 Judicial Selection Criteria

International law guidelines on the criteria for the selection of judges are unambiguous and embody similar basic principles. The UN *Basic Principles* state that judicial officers must have personal integrity and be properly qualified and trained. In addition, appointments must not discriminate on grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth, or status.[146]

The European Charter on the statute for judges and the Council of Europe contain provisions like the UN *Basic Principles*.[147]

The *African Principles and Guidelines on the Right to a Fair Trial* stipulates that:

> *'The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability …and… No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions'.*[148]

The one constant criterion in judicial selection required in international law is the professional qualification in the practice of law or attainment of formal legal qualifications and judicial education. Traditionally, in most common law jurisdictions professional judges are appointed from the ranks of practising advocates. In civil law countries candidates are appointed on

145 Ibid.

146 Op cit note 89 Principle 10. (UN Basic Principles).

147 Council of Europe, Recommendation R (94) 12 Principle I.2.

148 Op cit note 89 - *UN Basic Principles* Principle A, paragraphs 4 (i) and (k).

completion of legal and judicial education and practical training in judicial functions. Civil law judges are described as career judges as they are appointed into public service upon qualifying as judicial practitioners and remain in judicial service, rising in the ranks with experience in adjudication. Fixing the minimum qualification for judicial appointments assures the public that political and corporate interference in the independence of the judiciary is substantially reduced if not eliminated completely. As Madhuku observes:

> *'The setting of minimum qualifications for appointment restricts the degree of manouevre by those empowered to make judicial appointments, thereby contributing to an independent judiciary… More fundamentally, minimum qualifications ensure that appointments are made on merit'.*[149]

The requirement of a basic minimum qualification in legal education and a certain level of judicial education are the only objective criteria for qualification as a professional judge. Other criteria such as integrity, ability, efficiency etc., albeit necessary qualities for judges, are abstract qualities which are difficult to assess and therefore are subjective evaluations that may not satisfy the need for assurance of competence.

The objective perception of judicial independence is likely to be enhanced when judicial appointments are consistently made based on minimum legal and judicial education qualifications that can be objectively established. In this respect, civil law systems of judicial appointments are less likely to attract controversy as the main criterion is a required level of judicial education. A problem with the civil law appointment system though, relates to the institutional independence of judiciaries where there is neither clear constitutional separation of powers nor conventional practice of judicial independence. As career judges within the civil service of the country, the thinking that the judiciary is executive - inclined may be inevitable.

In common law jurisdictions, candidates are likely to be all similarly qualified in the practice of law albeit through private practice rather than state service. Judges in the common law tradition are appointed by the executive according to convention over many centuries. The fact that judges are selected from private practice suggests that they are better equipped to function more independently than their civil law counterparts. In addition, judges from England are drawn from the ranks of lawyers who had established a reputation of excellence as barristers. These two

149 Madhuku op cit note 141 at 241.

characteristics seemed sufficient to satisfy the executive that they were qualified and competent although the appointment could still be perceived as purely political in the absence of further objective criteria, such as diversity, to offset the similarity of candidates' legal career profiles.

It is noteworthy that in the lower courts in England most less serious crimes and civil disputes are resolved summarily on the facts of the disputes by panels of lay, volunteer magistrates. Magistrates are assisted by legal advisers to decide legal issues that may sometimes arise. This lower court judicial system in England and Wales has worked successfully for more than a century without serious conceptual conflicts between judicial independence and accountability. Obviously issues of the judicial independence in lower courts had little or no consequence in this situation as magistrates worked as part – time judicial officers who volunteered their services for limited periods per year. However, the impact of the English dual hierarchal system on judicial administration in South Africa was enormous. The nature and effects of this historical legacy will be discussed in greater detail below when the judicial independence of lower courts is dealt with.

Judges in several American states are elected by citizens and confirmed by the legislatures, as the choice of judges by the electorate is a means to secure judicial accountability. But the objective perception of judicial independence in the election system is hindered because of the influence of powerful corporations involved in the election campaigns of judges. As the Human Rights Committee of the United States of America reports on the election of judges: 'While this may seem more democratic, and thus more transparent than appointment by a designated body, popular election raises many issues as to the suitability of the candidates elected.'[150] The Committee expressed its concern about the 'impact the system of election of judges may have on the implementation of the rights provided under article 14 of the Covenant (the right to be tried by an independent and impartial tribunal).' The Committee encourages the efforts made by some states to adopt a merit selection system by an independent institution.

Judicial appointment criteria generally evidence the compliance with international law guidelines that candidates for judicial positions must be professionally qualified and that there should be no discrimination against candidates based on race, gender, class, or ethnicity. However, all the

150 UN Human Rights Committee on United States of America Concluding Observations UN Human Rights Committee on United States of America Concluding Observations CCPR/C/79/ A/50/40 paras. 266-304, paras. 288 and 301 as cited by ICJ. See note 119 at 49.

different systems' judicial selection criteria demonstrate weakness in some aspect of judicial independence.

In civil law jurisdictions, the perception may be created that judges are executive – minded when adjudicating disputes between private citizens and the state especially when decisions go against the private citizen. In common law jurisdictions the appointment of judges by the executive is manifestly political with no objective measure that the appointee is appropriately qualified for adjudication although they may have considerable legal expertise. The election system in some states of the USA is largely perceived as lacking in independence owing to the influence of powerful corporates in lobbying voters to elect particular candidates.

Some jurisdictions especially those of relatively well – established democracies seem to have navigated the challenges associated with judicial independence with varying degrees of success but the democracies in transition seeking a more constantly reliable appointment system that can be objectively perceived as manifestly judicially independent, may have to devise systems uniquely suited to those jurisdictions. This may be achieved by the requirement that candidates for judicial office are professionally qualified in independent adjudication at institutions with the appropriate accreditation.

4.2.3.4 Judicial Independence and Temporary Appointments

Security of tenure is affected by the common practice of appointing acting or temporary judges as such judges can be removed or suspended without disciplinary enquiry or their short- term judicial service contracts might not be renewed without reasonable cause. The lack of tenure security for temporary judges adversely affects the judicial independence of the temporary judge and the collective independence of the judiciary. Conditions are imposed on temporary judges usually by the head of the court which has the effect of pressurising judges to function in a particular way. Non – compliant temporary judges may be threatened with dismissal on some pretext that does not constitute misconduct. This problem is particularly acute in countries where the executive plays a predominant role in the selection and appointment of judges. In such countries, judges may be subjected to, and succumb to, political pressure to have their posts renewed, thereby compromising their independence.

Institutional judicial independence is threatened when acting judges are appointed too often leading to the independence of the judiciary being called into question.[151] The right of citizens to proper administration of justice is impacted by temporary appointments as these appointments are not subjected to a similar level of scrutiny as regular judges. The constitutional validity of temporary appointments may be called into question when these appointments are made on a large scale. The majority judgment in *Forge vs Australian Securities and Investments Commissio*n[152] when it held as follows:

> *'The appointment of a legal practitioner to act as a judge for a temporary period in the expectation that that person would at the end of appointment return to active practice may well present more (constitutional) problems. The difficulties of those would be intensified if it were to be appear that the use of such persons as judges were to become so frequent and pervasive that as a matter of substance the court as an institution could no longer said to be composed of full-time judges having security of tenure until a fixed retirement age. As was said in North Australian Aboriginal Legal Aid Service Inc. v Bradley there may come a point where the series of acting rather than full time appointments is so extensive as to distort the character of the court'.*[153]

All international norms and conventions discourage the appointment of temporary judges. Cumaraswamy reported the appointment of temporary judges as a significant concern. He stated:

> *'In many countries, judges are appointed on a temporary basis. They are sometimes designated as provisional, part-time, ad hoc, judicial commissioners, etc.. Are these appointments consistent with the concept of judicial independence? While accepting the fact that such appointments are necessary for the dispensation of justice to avoid delays yet the inherent danger is there'.* [154]

The following statement of John Lowndes regarding the appointment of fixed term magistrates expresses why this practice is strongly objectionable:

> *'Fixed term appointments to any magisterial or judicial office…strike at judicial independence, the fundamental purpose of which is the maintenance of the rule of law…. Judicial independence is*

---

151 See - Trengove J 'The Prevalence of Acting Judges in the High Court: is it consistent with an independent judiciary? *Advocate (December* 2007) 37 – 39.

152 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at 87.

153 See - Dzidzic A '*Forge v. Australian Securities and Investments Commission*: The Kable Principle and the Constitutional Validity of Acting Judges.' (2007) 35 *Federal Law Review* 129 – 143.

154 Cumaraswamy op cit note 97 at 80.

at risk if future appointment or security of tenure is, or appears to be, within the gift of the Executive. …The independence of the judiciary ... exists to serve the public interest and is constitutionally safeguarded to ensure that judicial functions are, and are seen to be, exercised with complete impartiality and independence'.[155]

Trengrove expressed his concern on the frequent practice in South Africa of Acting judicial appointments as follows: …'service by acting judges brings complications which require careful management…the practice of a substantial parallel Bench of acting judges appointed by the Minister…could ultimately become a tool by which the independence of the judiciary may be compromised.'[156] As all (permanent and temporary) magistrates in South Africa are appointed by the Minister, the concern expressed by Trengrove is obviously relevant to MCs and is therefore dealt with in depth in Chapters Six and Seven.

4.2.4 Internal Judicial Independence

In so far as the discussion on the principles of separation of powers may inform the definition of institutional judicial independence, they are limited to those threats external to the judiciary. But the potential threat to judges' individual independence may arise from within the judiciary especially from judges more senior in the judicial hierarchy. The International Bar Association Standards of Judicial Independence (IBA) provides that 'in the decision – making process a judge must be independent *vis -a- vis* his judicial colleagues and superiors.'[157] The *Montreal*

155 Lowndes J, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond' (2000) 74 *Australian Law Journal* 592. See also the original paper delivered at the Northern Territory Bar Association Conference by Chief Judge John Lowndes 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond' at 47.

157.Trengove op cit note 154.

158 Article 46 IBA Minimum Standards of Judicial Independence Adopted 1982.

Declaration affirms the IBA provision and adds that 'any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment fairly'[158]

According to Shetreet, internal judicial independence can be considered as 'collective independence but on a micro level. It demands that individual judges be free from unjustified influences not only from entities external to the judiciary, but also from within.'[159] Shetreet explains further that for certain types of adjudicative functions, independence requires that judges be free from directives or pressures from peers or those who have administrative responsibilities in the court such as the chief judge of the court or the head of the division in the court.[160]

The potential threat to judicial independence internally is often much subtler and may not be so readily and publicly perceptible but poses a danger particularly to junior judges in lower courts who aspire to advance their careers in the judiciary. But the more significant issue under these circumstances is that the decisions of judges so influenced are likely to impact on the findings and outcomes of disputes and consequently the right of litigants to independent tribunals.

A description of the conditions within the judicial system that conduce to threatening judicial independence is detailed by Agmon – Gonnen, as follows:

> *'At first sight, the issue seems to concern the judicial system's internal administration, that is, unimportant administrative matters such as fiscal, docket and case flow... However, the very management of these administrative matters largely determines the extent to which judicial independence is protected... The first type of violation relates to instructions given to the judge regarding how to conduct upcoming or current hearings in terms of sequence, pace, or quantity, in order to achieve efficiency. This type of violation includes both administrative directives given in the framework of civil procedure regulations established by the Minister of Justice, as well as administrative directives given by the Minister of Justice and the Courts Administrator. Such*

158 Clause 9.2 *Montreal Declaration* Adopted 10 June 1983.

159 Shetreet op cit note 56 at 286.

160 Ibid.

instructions comprise interference in "judicial matters," in which the judge should have independence by virtue of the Basic Law: The Judicature'.[161]

In Agmon – Gonnen's view, the establishment of administrative procedures and legal procedures relating to judges' work may impair their independence to conduct the trial impartially and independently according to conscience and the law.

Agmon – Gonnen goes on to identify a second type of potential violation of internal judicial independence which occurs apparently in the normal course of administrative directives, such as case distribution among judges: cases may be allocated to particular judges with ulterior purpose; cases may be given to particular judges irregularly, based on the subject matter. This type of internal administrative directive may influence the outcome of cases according to the internal arbitrary directives of judges, in administrative roles in particular cases. The obvious, common example of such interference is the assignment of a judge to a civil court because the judge's criminal court decisions do not find favour with the senior judicial head of a court or the central administration of the judiciary. Another is the administrative decision not to assign new cases at all to judges who have accumulated backlogs because of the pace of case disposition.[162]

As Agmon – Gonnen points out, the danger of over – emphasis on judicial output has negative consequences for the quality of dispute resolution and in turn the right of court users to fair and correct decisions. With the global increase in litigation without appropriate capacity of judicial systems to cope there may be a tendency on the part of the non – judicial branches to pressure judges to work faster.[163] Where administrative directives cause judges to keep pace with norms and standards devised for the average case and the average judge by opaque methods, the pressure on judges who work slower than the 'average' to conclude a case that may fall outside the average in terms of complexity may be reasonably perceived as interference in independent judicial functioning.

By all accounts achieving efficiency in judicial administration is a legitimate and desirable goal which the judiciary itself no less than the other branches of government should regard as an

161 Agmon – Gonnen M 'Judicial Independence: The Threat from Within' *Israel Law Review* (2005) 38 120 – 153 at 124.

162 Ibid.

163 Ibid at 152.

important aspect of democratic governance. Efficiency and justice through the courts are not mutually exclusive concepts and as Shetreet opines; justice and efficiency enhance each other, and adds that in case of conflict, 'justice should prevail.'[164] This means that administrative directives should not promote speedy case disposition at the expense of fair trials. As Justice Bazelon of the Federal Appeals Court in District of Columbia cautions, 'whatever gain there may be in speed will be more than counterbalanced by loss in the quality of decisions.' [165]

In an address delivered by Justice Convington to judges of the United States District and Appeal Courts, he stated:

> *'It is incumbent upon the judges themselves to fight back if efficiency programs become overzealous and interfere with 'total and absolute independence of judges in deciding cases or in any phase of the decisional function.' An independent judiciary is not a luxury. The country can afford some inefficient judges if the price of efficiency is damage to decision autonomy'.*[166]

Internationally, there is a real concern that the independence of lower court judges in particular is increasingly exposed to threats brought about by the demand for speedier resolution of disputes. The volume and variety of the caseloads together with resource constraints of lower courts may subject some lower court judges to undue pressure from their seniors in administration who value productivity above quality. The contemporary debate on internal judicial independence is, to a significant degree, the cause of the apparent tension between higher ranking administrative judges and those in large numbers, making up the lower ranks.

It is submitted that the aspect of internal institutional independence deserves specific mention to reflect a clearer definitional framework for the concept particularly because of its substantial significance to judicial functioning in lower courts. To the extent of their adjudicative functions, judges may not be interfered with, or influenced by other judges.

---

164 Shetreet S 'The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts' (1979) 13 *University of British Columbia Law Review* 52 at 79.

165 Per Justice Bazelon D in *Stanley v. Illinois*, 1972 405 U.S. 645 at 656.

166 Convington J 'Autonomy v. Efficiency: The Continuing Debate on Judicial Supervision of Federal Trial Judges' (July 23, 1973), Unpublished paper cited by Agmon- Gonnen see op cit note 164 at 138.

4.2.5 Administrative Judicial Independence

4.2.5.1 General

In this section, the focus is directed to the significant developments in institutional judicial independence internationally, that advance the autonomy of judiciaries in their administrative judicial functioning. This area of judicial independence is the essence of institutional judicial independence based on the principles of separation of powers and more than any other essential condition of judicial independence distinguishes individual independence of judges from institutional independence of the judiciary.

As noted in Chapter Two, magistrate's courts in common law jurisdictions were part of the executive government and therefore the debate about separation of powers and judicial independence was only partially applicable to the lowest level of courts. Lower courts in most if not all common law jurisdictions have been incorporated into the judiciaries over the decades with the maturing of democracy in these states. This meant that since then judicial independence would have been automatically, albeit more formally than substantively, conferred on lower courts with statutorily limited jurisdiction.

However, as generally only the individual independence of judges of higher courts themselves was given substantial recognition in most common law jurisdictions, the lower courts were brought under similar and even greater constraints when they merged. Hence the struggle for some level of institutional autonomy for lower courts was always expected to follow from the progress of institutional judicial independence of courts at the top of the judicial hierarchy.

Indeed, considerable progress towards greater institutional independence for higher courts may have been made in some jurisdictions, notably the United States of America and more recently Canada and other commonwealth jurisdictions. However, it seems that the attainment of autonomy in the administration of judicial functions involving access to and management of resources for the effective operation of courts is still fraught with intractable problems even for the higher courts with inherent jurisdiction. Axiomatically therefore any notion of administrative judicial autonomy for lower courts seems only remotely realisable as generally the interests that the higher courts serve, are perceived to have greater impact on political development of democratic states than the lower courts with limited jurisdiction. Yet some stronger movement towards the achievement of a greater level of institutional independence in matters of judicial

administration may not be indefinitely deferred, if the primary role of the courts to resolve the disputes of the general populace is to be maintained and advanced.

4.2.5.2 The Substantive/Decisional - Administrative Judicial Independence Dichotomy

Administrative judicial independence as an aspect of institutional judicial independence may be described as still in its formative stages of development conceptually and as developing incrementally in common law jurisdictions. There are no bright lines between purely adjudicative functions and judicial functions that are administrative in nature. Part of the reason for the slow progress towards judicial self – government is the lack of clear demarcations in respect of the area of authority and control of each organ of government. Constitutional principles require that each branch of government exercised exclusive authority over its core function only. But the need for checks and balances implied that some functions overlapped and so presented as sites of tension and jurisdictional conflict that had to be resolved by way of court challenges in certain jurisdictions. Some direction in response to the issues of institutional judicial independence must be sourced from international human rights instruments as institutional judicial independence is an essential value in the preservation of the rule of law.

The UN *Basic Principles* embodies the international community's broad vision of the diverse meaning and scope of the institutional independence of the judiciary. In principle the articles stipulate in broad terms that state parties must ensure the institutional independence of judiciaries but are not prescriptive regarding the nature of essential conditions for institutional independence and stipulates that 'The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'. Regarding court administration, the UN *Basic Principles* state: 'The main responsibility for court administration including supervision and disciplinary control of administration personnel and support staff shall vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.' [167]

The Human Rights Committee, in terms of the International Covenant on Civil and Political Rights (ICCPR) has noted that 'lack of clarity in the delimitation of the respective competences

167 Article 32 *Draft Universal Declaration on the Independence of Justice* ("*Singhvi Declaration*")

of the executive, legislative and judicial authorities, may endanger the implementation of the rule of law and a consistent human rights policy'.[168] The Committee has recommended that states adopt legislation and measures to ensure that there is a clear distinction between the executive and judicial branches of government so that the former cannot interfere in matters for which the judiciary is responsible under international law.[169.]

International legal instruments are characteristically principles stated in broad terms therefore states develop jurisprudence through their court decisions which in turn inform the practical application of the principles to individual cases. Arguably one of the most significant aspects of *Valente* related to the finding that 'security of tenure and financial security are safeguards of the individual judge's freedom from outside influence whereas institutional independence protects the judges as a collectivity'[170] and are described as indispensable. This point is emphasized in the following statement:

> *'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'.*[171]

More specifically related to the definition of administrative judicial functions, the court in *Valente* stated that collective institutional independence relates to the control which judges have over the job they do. The court described it as the facet of independence related to matters of administration having a direct bearing on the exercise of the judicial function.[172]

The widespread impact of *Valente* should be viewed in the context of the issue before the court which was the interpretation of section 11 (d) of the *Canadian Charter of Rights and Freedoms (Charter),*[173] which at the time was still in the early stages of development. *Valente* however does not clearly determine which aspects of judicial administration pertain to the control of the work

168 Op cit note 151.

169 Ibid.

170 *Valente v The Queen* op cit note 21.

171 Ibid.

172 Ibid at 187.

173 The Supreme Court of Canada held that judges holding office during executive pleasure do not have security of tenure demanded by section 11(d) of the Charter. The court found that constitutional conventions that Canada inherited from England did not provide sufficient safeguards for judicial independence and required 'specific provision of law.' See *Valente* at 702.

that judges do, and which are matters that are purely administrative and therefore fall under executive control. As previously mentioned, *Valente* has to some extent, through *Van Rooyen*, negatively influenced the development of institutional independence of South African Magistrates' courts. This issue will be discussed in more detail in the following chapters where the focus is directed to the status of judicial independence in South African lower courts. But at this point the following remark about *Valente* made by Chief Justice of Western Australia Wayne Martin is apposite:

> *'It seems that the movement towards greater judicial control of court administration was impeded by the Supreme Court of Canada in Valente v The Queen in which it was held that the independence of the judiciary did not require court administration to be subject to judicial control but only functions directly related to the adjudicative process such as the assignment of judges, the scheduling of trials and allocation of court rooms was required to be under the control of the judiciary'.*[174]

The impediments of *Valente* notwithstanding, Canadian jurisprudence on institutional judicial independence may have benefited from the *Deschenes Report*,[175] which the Canadian Judicial Council adopted and endorsed. The *Deschenes Report* identifies the core area of exclusive judicial responsibility beyond the functions that are primarily adjudicative in nature which include the authority to appoint and manage court staff, case flow management (preparation of trial lists and order of cases, assignment of judges to cases and allocation of court rooms), and directives for officers of court and officials of extra- judicial agencies whose functions involve cooperation with judicial administration.

Further advances made in the implementation of the principles of institutional judicial independence are documented in *The Latimer House Guidelines on Preserving Judicial Independence* (*Latimer Guidelines*)[176] which provide greater clarity in practical terms of the

---

174 Martin W 'Court Administrators and the Judiciary: Partners in the Delivery of Justice' (2014) 2 *International Journal for Court Administration* 3 – 18 at 9.

175 Report written by Chief Justice Deschenes, titled *Maitres Chez Eux* 1981 (Masters in their own House Independent Judicial Administration of the Courts), commissioned by the Canadian Judicial Council.

176 Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence (Adopted on 19 June 1998 at a meeting of the representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association. Published in 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors' Practitioners Guide No. 1 issued by International Commission of Jurists, Geneva 2007 at 221.

scope of judicial functions beyond the purely decisional aspects. This document is significant for the developmental process of institutional judicial independence and may serve as an authoritative source for the development of a new model for the determination of clearer boundaries in matters of judicial administration between the judiciary and the executive. The *Latimer House Guidelines* provide specifically that the magistracy must be given adequate autonomy especially in internal management of courts, that all necessary resources for court operations be controlled by the courts, that court staff be appointed by the head of the courts and that court staff be linked to the judiciary and not the executive.

The issue of responsibility for judicial administration that fall outside of the core aspects of judicial functions, remain unresolved with the result that the formal attainment of institutional judicial independence has not yielded substantive change especially in accessing and managing resources appropriated for judicial functions. Most judiciaries in common law jurisdictions are totally reliant on the executive branch to access funding from legislatures for all judicial operations and manage to centrally the resources on behalf of the courts. In South Africa, MCs likewise are wholly dependent on the political branches for resources as the discussion on the topic in Chapter Six indicates.[177]

There are various schools of thought, proposing visions of the ideally autonomous judiciary. There are even divergent views as to what the ideally independent judiciary is in so far as administrative self – government is concerned.

The key findings of the Australasian Institute for Judicial Administration, the Canadian Judicial Council and the Council of Europe Commission for the Efficiency of Justice are like the findings in Bunjevac's studies on court administration. According to the reports of these institutions, structural deficiency in the organisational design of the executive model of court administration presents significant impediments for the strategic long -term planning of courts' activities. In effect these deficiencies do not promote judicial independence, efficiency, and judicial quality.[178]

The common factor in these findings is that the executive model of court administration has failed to promote the right of access to courts indicating the urgent need for judicial autonomy. Many common law jurisdictions though continue to maintain the executive administration model

177 See Chapter 6 Paragraph 6.3.2.

178 Bunjevac T 'Court Governance in Context: Beyond Independence' (December 2011) *International Journal for Court Administration* .

especially in the lower courts. However, those jurisdictions which have adopted models of judicial self – government seem to have achieved some measure of success in delivering a better quality of justice, notably Victoria. On the success of judicial self-government in Victoria Bunjevac remarks:

> *'The establishment of CSV (Court Services Victoria) has given the judiciary an opportunity to act with one voice in relation to any and all matters that affect the operation of the courts. Most importantly the new organisational structure has removed the inherent structural barriers that plagued court administration in the executive model thus giving the courts a suite of new opportunities to improve the effectiveness, efficiency and ultimately the quality of justice'.*[179]

The movement towards judicial self - governance has been steadily strengthening in the formerly common law countries both because it is an essential aspect of separation of powers principle and because courts do not operate effectively without organisational control of their administration. Justice Robert Nicholson expresses the view that the very existence of judicial independence cannot be separated from adequate and proper judicial administration because the latter requires that policy making and policy administration are controlled by the judiciary.[180] Chief Justice Leonard King of the South Australian Court in the same vein remarked that the essential principle that the judiciary has constitutional responsibility for the administration of justice means that it should be responsible for the administration of the courts.[181]

4.3 Conclusion

The need to protect the independence of judges was recognised in societies for almost if the recognition of the concept of judicial independence. In reflecting on the history of the concept, why it took root, developed, and evolved organically, it is quite clear that the independence of judges, especially from a country's political leaders and other powerful entities, is as essentially about the protection of citizens as democratic governance is to them. It is submitted that the

179 Bunjevac T 'Court Services Victoria and the New Politics of Judicial Independence: A Critical Analysis of the Court Services Victoria Act 2014' (2015) 41 *Monash University Law Review*299 – 328 at 327.

180 Nicholson R D 'Judicial Independence and Accountability: Can they Co – Exist? (1993) 67 *Australian Law Journal* 404 at 422.

181 King L J 'A Judiciary – Based State Court Administration – The South Australian Experience' (1993) 3 *Journal of Judicial Administration* 133 at 136.

occasional tensions between the organs of government may be inevitable but do not evince a contradiction of foundational democratic principles and values.

As the history of the protection of judicial independence reflects, in the earlier years of the development of the concept, the security of tenure and remuneration of judges were the primary mechanisms democracies established for the protection of judicial independence. These measures remain the central pillars of judicial independence protection and have become entrenched as indispensable institutional mechanisms as such. The protection of their security of tenure enabled judges and judiciaries at the higher levels to fearlessly and effectively to check the political organs from abusing their law-making and executive powers against citizens. However, the safeguards that were provided for in the legislation of common law jurisdictions and supported by well – established conventions, were not effective enough to prevent other less obvious interferences in independent judicial functioning and especially the impact of the quality of dispute resolution at the level of first instance trial courts.

As the right of every citizen to a fair trial before an independent and impartial judge, won recognition as a fundamental human right it became increasingly evident that judiciaries were institutionally still significantly fragile in relation to the political organs. This has the effect of weakening the right of access of litigants, to independent and impartial courts as the non – judicial organs held the significant power and authority to appoint and impeach judges. especially in jurisdictions where appointments and dismissals of judges are not constitutionally entrenched.

Recently established constitutional democracies with historical roots in common law jurisdictions and Westminster-style parliamentary governments would have had to contend with the challenges of adapting new judicial systems to those created for more homogenous, foreign systems. Hence, in more modern democracies, the influence of international law on human rights protection in legislatures has seen the more rapid evolution of the concept of judicial independence and institutions for the protection of independence of judges.

These circumstances created considerable impetus for jurists internationally to collaborate in formulating principled guidelines that enabled new democracies and even some well – established ones alike, to strengthen judicial independence in their jurisdictions. These guidelines known as the minimum standards of judicial independence enabled the development

of what Shetreet describes as a culture of judicial independence[182] by which democracies may gauge the standard of judicial independence protections.

182 Shetreet op cit note 56.

CHAPTER FIVE

The Harmful Effects of Old Order Laws on the Attainment of Institutional Judicial Independence and Judicial Transformation of Lower courts

5.1 Introduction

The change of regime from parliamentary sovereignty to constitutional democracy was of particular importance to the judiciary at lower court level because, for the first time in their history, Magistrates' Courts (MCs) were separated from the executive organ of government and given formal recognition as judicial institutions under the Constitution.[183] However while the granting of formal judicial independence provides the foundation for the conditions upon which the lower courts must function in relation to the other branches of government, this formal provision in itself, may not be sufficient to give effect to its constitutional aim and objective. Certain essential conditions need to be created and entrenched by law to ensure that courts perform and be seen to perform judicial functions impartially and without interference from any source externally or internally.[184]

Whilst the Constitution provides for the essential conditions of judicial independence of superior court judicial officers,[185] it omits to do so for lower court judicial officers. Instead, the Constitution stipulates that an 'Act of Parliament' is required to provide that 'the appointment, promotion, transfer, dismissal of or disciplinary steps against these judicial officers take place without favour or prejudice.'[186] This chapter deals with the question whether any law creates the essential conditions for MCs to function as in fact, institutionally independent, so that they may satisfactorily fulfil their role as the primary forum for dispute resolution. The engagement with the issues is necessary and important to advance the transformation of the judiciary, particularly that of the lower courts, given the history[187] of firstly, the dual judicial hierarchal system inherited

183 The Constitution - s 165.

184 See Chapter 4.

185 Ibid - s 176 – 177.

186 Ibid - s174 (7).

187 The history of MCs is set out in Chapter 2.

from England and secondly, the strong ties to the executive before the constitutional democracy was established.

Since the Constitution was adopted, no parliamentary enactment has specifically provided for the essential conditions of judicial independence of lower courts in accordance with the universal principles of the concept. The Magistrates Courts Act (MCA)[188] which is the primary law governing the administration of justice for the lower courts, must be considered 'old order' legislation,[189] having been enacted more than 75 years ago. The Magistrates Act[190] (MA) that was passed in 1993, shortly before the establishment of the constitutional democracy, must arguably also be considered an 'old order' law. Although its enactment during the transition period signified a shift in the status of magistrates from public servants to judicial officers, it does not, it is suggested, create the essential conditions required for lower courts to function as institutionally independent. This means that MCs continue to function presently in terms of their status quo ante, without a legal pathway to the realisation of judicial independence as envisaged in the Constitution. It will be argued that beyond this critical deficiency, the existing legal framework for the governance of MCs represents a structural barrier to the de facto realisation of institutional judicial independence.

Judicial independence is an instrumental value[191] that is aimed at benefitting court users by creating the conditions that seek to assure them that disputes are resolved by courts impartially, in accordance with the rule of law. Therefore, whilst the arguments and critique in this chapter of the thesis focus on the theoretical aspects of judicial independence, they lay the basis for the topic of discussion in the next chapter which deals with the value of institutional judicial independence to the realisation of the right of access to the fair and effective adjudication of disputes in the lower courts. This constitutes the core problem that this thesis engages with and proposes to advance the argument that the effectiveness of lower courts is severely constrained by the absence of a system within which the mechanisms are provided to ensure that the institutional independence of lower courts is adequately protected.

188 Magistrates Courts Act 32 of 1944.

189 Constitution - s 1, Schedule 6.

190 Magistrates Act 90 of 1993.

191 Chaskalson op cit note 7. Also see - section 3.3 of Chapter 3.

This chapter begins with a brief discussion of the meaning and significance of the provision in the Constitution that MCs are independent and its implication for transformation of MCs in the light of their history in the pre – democratic period. The main body of this chapter comprises a critical evaluation of the legislative framework consisting of the MCA and MA that govern and regulate the functioning of MCs and assessing the level of challenge it presents in advancing their de facto independence. A substantial section of this evaluation involves the analysis of the Constitutional Court's (CC) judgment in *Van Rooyen,*[192] in view of its findings related to the meaning of judicial independence, in so far as its application to MCs is concerned and the impact of this judgment on the judicial functioning of lower courts.

5.1.1 The Constitution and Judicial Transformation of Magistrates Courts

From the earliest days of South Africa's transition to democracy, most jurists and commentators seem to agree that the transformation of the judiciary is necessary for the democratisation of South African society as envisioned by the Constitution. Indeed, given its repressive history, it would not be reasonably expected that the judiciary of the pre – constitutional era could emerge in the newly established constitutional democracy as a legitimate societal institution without undergoing substantial change.

The Preamble to the Constitution refers unequivocally to the administration of justice under the new dispensation in calling for the 'recognition of the injustices of the past; healing the divisions and establishing a society based on democratic values, social justice, fundamental human rights and equal protection by law of every citizen'. The Preamble envisions a major role and responsibility for the judiciary to respond to this call. The following statement of former Chief Justice Pius Langa expresses a view of what should inform and guide the judicial transformation effort:

> *'…the judiciary and the courts could not remain unaffected. Since 1994 they also had to meet the challenge posed by the demands of a transforming landscape; they had to adjust to new imperatives not least of which is the need for more effective delivery of justice equally to every person in South Africa and in a manner that is infused with the values of the new constitutional order. Quite clearly the judiciary could not stand aside or remain in the past that has been*

192 *Van Rooyen* case op cit note 17.

comprehensively disowned by the people of South Africa…The judiciary must not only keep pace it must be part of the march as members of the community they serve'.[193]

The MCs are not exempt from any of these injunctions. Langa stresses the importance of the independence of the judiciary and calls on judicial officers to safeguard, amongst others, democratic values of human dignity and equality and to ensure that justice is accessible. This vision impels judicial transformation in the independence and accessibility of the courts and includes 'the need for more effective delivery of justice equally to every person in South Africa'[194]. This vision of a transforming judiciary necessarily draws into its focus the functioning of lower courts as the major component part of the judiciary.

What aspects did the judiciary of the pre-constitutional era have to change to engender sufficient public confidence in its primary role as the provider of judicial service in the newly established democratic state? There is a large body of scholarly literature about political and social transformation generally and on judicial transformation specifically.[195.] These reflect a general agreement among jurists that transformation of the judiciary is necessary, although the views differ on what the objectives and focus of the transformation should be. However, what is missing in the judicial transformation discourse is, how to go about changing the relationship of the MCs to the executive branch of government to align the functioning of lower courts with the recently attained judicial independence. The paucity of scholarly literature on this subject may be attributable to the fact that an adequate response would require engagement with a rather extensive and complex body of jurisprudence involving the meaning of judicial independence, and how effective judicial dispute resolution is related to this concept.

In the *Van Rooyen* case, the constitutional validity of various provisions of the MCA and MA was challenged in the CC[196] on the claims of inconsistency of these laws with the judicial independence of MCs. The CC adopted an approach that resulted in the preservation of the legislative framework governing MCs and effectively, the existing division, according to status, of their inferiority to the superior courts. An analysis of this judgment does not seem to evidence

193 Langa op cit note 11 at 671.

194 Ibid.

195 See - Mhango M 'Transformation and The Judiciary'. (eds. Hoexter and Olivier) '*The Judiciary in South Africa'*. Also see - Moerane MTK 'The Meaning of Transformation of the Judiciary in the New South African Context' (2003) 12 *The Advocate* 708.

196 *Van Rooyen* case op cit note 17.

any significant interrogation of the question posed above i.e., in what respect must there be change in how MCs function upon attaining the status of judicial independence. It is suggested that such an engagement with the challenges presented may have produced a different outcome: one that advances transformation and enhances the value of the MCs to the judiciary.

5.2 The Magistrates Courts Act and De Facto Judicial Independence

The MCA was the primary law governing the functioning of MCs for over 75 years and continues to provide the legal framework for the functioning of MCs, more than 25 years since South Africa became a constitutional democracy. The MCA, a legacy of England's rule and influence over South Africa from 1806 to 1961, was adapted and promoted as an agency of the South African National Party government after the Statute of Westminster,[197] when England's dominions attained self-government status. During the pre-constitutional era the MCA together with innumerable other laws that applied at the time, did not enjoy the popular support of the majority, and was therefore perceived as being legitimately applicable only to the enfranchised minority. However, and despite the association of MCs with a repressive regime, the MCA transited uneventfully and emerged in the constitutional era where it holds a status of considerable authority over the majority of the court users.

Without any further interrogation of the MCA in the early years of democracy, it seems to have been accepted that this law would adequately serve the purposes it had served previously without concerns of contradiction with the basic principles and values that the Constitution embodies. However, the very acceptance of the passage of the MCA wholly, as good law, is indicative of the state's reconciliation with the significant difficulties that the old order represents.[198] Arguably the state also accepted that this law may not be compatible with the principles of the separation of powers and the institutional independence of MCs in a constitutional democracy. The following critical examination of the MCA aims to substantiate this view and provides the basis for the argument.

5.2.1 The MCA Connection with the Executive

A major problem with the MCA is that, as a law devised to govern lower courts of a parliamentary sovereign state in a common law jurisdiction, it is most unlikely to be compatible with the various

197 The Statute of Westminster of 1931.

198 See notes 48 – 62 in Chapter 2.

principles of constitutionalism under which the judiciary has to function since the constitutional democracy was established.[199] When it was enacted, the MCA was not intended for application in a judicial system ordered under a government with a constitution as its supreme law, as at the time, South Africa was governed under the Westminster parliamentary system.

As there was no strict separation of the functions of government under that system, it led to considerable overlapping of functions and flexibility in understanding and interpreting the concept of judicial independence. In direct contrast to its previous position, the MCA governing MCs under the Constitution, modelled on the clear separation of powers and especially an independent judiciary, places MCs in relationship with the executive that may be perceived as inappropriately connected and not sufficiently separated. The high level of dependence of MCs on the executive and the extensive involvement of the latter in the functioning of MCs may be perceived as unjustified executive interference that is contrary to the principles of judicial independence.[200]

5.2.2 The MCA and Dichotomous Judiciary

With the MCA as the primary law governing the lower courts but an entirely different set of laws for the judicial administration of the superior courts, an extraordinary set of circumstances has developed that may be described as a paradox: while the Constitution brings MCs into the judiciary,[201] the MCA, the Supreme Court Act[202] and its successor, the Superior Courts Act (SCA)[203] have in effect enabled their exclusion from the mainstream for the foreseeable future. While the Constitution wills the divisions of the past to be bridged, the judiciary steadfastly relies on the MCA to anchor its largest component, the MCs, and thereby keeps the historic division between the superior and lower courts firmly entrenched and apparently extremely difficult to breach.

---

199 Ibid. See also Chapter 3 Notes 96 – 98.

200 Olivier op cit note 2 at 323.

201 Constitution s16 (6a) Schedule 6 provides that every court must be rationalised, as soon as practically possible after the coming into operation of the Constitution. The SCA is a product of this imperative but the same is not evidenced in so far as MCs are concerned.

202 Act 59 of 1959.

203 Act 10 of 2013.

The retention of the superior/inferior division of the judicial system presents with problems on two levels; the first is the complete separation of the courts in law and in fact, arguably without a sound legal basis and second the creation of the reasonable perception that lower court users have access to an inferior standard of justice compared to those who access the superior courts.

With the establishment of a democratic state in which the Constitution is supreme, the superior courts' position in terms of independence and authority was considerably enhanced. The status of MCs however, in relation to the superior courts, remains the same and continues to be inferior in status although the role of MCs has expanded and become much more complex over the decades.

It is true that the SCA that improved the administrative judicial independence of the superior courts, was relatively recently enacted which may imply that MCs too may look forward to such a prospect in the future. However, the reason for the missed opportunity to align the administrative judicial independence of lower courts with that of superior courts and the transformative vision of the Constitution, remains obscure. The following observation of Olivier suggests that there is some degree of ambivalence in certain organs of government to integrate the judicial administrations of the lower and superior courts:

> *'As part of a broader strategy aimed at establishing an integrated structure for regulating the judiciary and magistracy, the harmonisation of some functions of the Judicial Service Commission and the Magistrates Commission has been proposed by the government…However this proposal was ultimately jettisoned and was not included in the final Act'.*[204]

It may also be argued that the Constitution itself allows for a different legal mechanism to be devised by which to ensure that lower court judicial officers would be able to function independently, and that this distinction justifies the aforementioned exclusion evidenced in the legislation. However, the difficulty that this argument presents is that it presumes that the different mechanism to ensure substantive individual independence of lower court judicial officers need not provide the same level of protection afforded to judges. Obviously, such a disadvantageous outlook may not be attributed to the Constitution. In addition, the notion that the Constitution favours a divided judiciary and inequality in allocation of resources, based on the status of the courts in the hierarchy, is untenable.

---

204 Olivier op cit note 2 at 336. The final Act that Olivier refers to is the Constitution Seventeenth Amendment Act, 2012.

Although it may be argued that the High Court's superior jurisdictional powers set it at a senior level in the hierarchy, this is not sufficient in principle to maintain the division that was devised for a different type of judicial system of a different government in a different time.

For several decades before the constitutional state was established, MCs were repurposed, through numerous amendments of the MCA, so radically, that at the stage of the Interim Constitution being adopted they bore no resemblance to the Magistrates courts of England. The jurisdiction of all MCs, district and regional, civil, and criminal, had been increased considerably and many, if not all magistrates were professionally qualified in the principles and application of criminal and civil law. This is a very different set of circumstances to those existing in England where magistrates are still mostly lay volunteers presiding over minor disputes and charges.[205]

It is noteworthy that a significant development occurred in the organisation of the lower courts in the judicial system of England with the recognition of professional judicial officers, as District Judges. District Judges were previously referred to as stipendiary magistrates presiding in Magistrates Courts alongside the long-established magistracy in England. This is a significant development because it signals that in England, a clear distinction has been established between professional judicial officers in the lower courts who are recognised as judges, and magistrates, who are still lay persons in the community volunteering judicial services. The relevance to the circumstances of South African MCs is obvious in that professional judicial officers in lower courts have not been accorded recognition as judges while common law as well as civil law jurisdictions universally have.

This means that the South African equivalent of England's District judge[206] is the District Magistrate: the status of the judicial officer in South Africa is determined by the title and not the jurisdiction, the qualification or functioning of the particular court in the judicial system. Even more irreconcilable with the factual and practical reality is that the MCA in its definition of 'magistrate' does not distinguish between judicial officers appointed to district courts and those appointed to regional Courts: all MCs are lower courts although the jurisdictions and qualifications of magistrates of the levels are very different. The South African equivalent of England's Crown and County Court[207] is the Regional Court and while the judicial officers of this

205 See generally - Milton op cit note 35. Also, Moir op cit note 35.

206 'Courts and Tribunal Judiciary' Crown Copyright Accessed from www.judiciary.uk.gov. Last accessed on 23 August 2021.

207 Ibid.

level of court in England (and other common law and civil law states) hold the title of judge, they are regional magistrates, not judges, in South Africa.

It is certainly not unusual in the context of structure, that judicial systems in both common law and civil law jurisdictions are organised according to a hierarchy for obvious reasons, inter alia, to ensure that the decisions of lower courts may be reviewed by higher courts. However, the separation of first instance trial courts into a superior level and an inferior level that enables the retention of executive control over the administration of lower courts, is inexplicable except for the historical dichotomy of the judicial system.

The separated judicial system, after the establishment of the constitutional state, has the effect of deepening the divisions between the superior courts and the MCs, while it entrenches the historic socio – economic inequalities inherent in distinction by class and race. The superior – inferior dichotomy in effect enables and justifies the unequal allocation of resources, apparently according to a construct based on the notion that the independence of superior courts needs to be protected more robustly than that of lower courts. This reasoning is subjected to closer scrutiny in the following subsections dealing with the MA and the judgment in *Van Rooyen*.

Although the right of access to courts[208] is a right equally available by law to all people, the reality is that the socio – economic background of most people needing judicial dispute resolution service, imposes limits on the level of court in the hierarchy that they may be able to access. This, it is argued, necessitates the provision of the highest standards of adjudication at the entry level courts, as this may be the only dispute resolution forum that most court users can afford. Approaching the separation of the courts according to status in the hierarchy from this perspective, reveals the harm implicit in the division. In the next chapter dealing with the right of access to courts, this issue is discussed in greater detail.

As MCs, from relatively early in the pre – democracy era, existed and functioned by virtue of the MCA, its history is undistinguishable from its present *de facto* status. Stated differently, the strong structural divisions characteristic of England's dual judicial hierarchy of superior and inferior courts and the administrative control of MCs by the executive in the apartheid era, are the essential determinants of MCs' status in the constitutional state. Neither of these legacies that presently abide in the MCA is consistent with the vision of transformative judicial functioning

208 Constitution - s 34.

and these inconsistencies represent significant harms that may result from the continued retention of the MCs under the MCA. The concern is that the adoption of England's institution of Magistrates Courts, and the MCA as an old order law, representing the executive in the recent undemocratic state, are anachronistic and out of place in a constitutional democracy.

5.3 The Magistrates Act and its Effect on Institutional Judicial Independence

The Magistrates' Act (MA) passed during the negotiation phase of the Interim Constitution[209] established the structure for the governance of magistrates in the new constitutional democracy. However, there is little to no evidence that it was produced by consensus among the negotiating parties. It seems that the timing of the enactment of the MA was significant for the protection of tenure of the magistrates who were serving in the employ of the Department of Justice at the time as the transition from the old regime to the new was imminent. This was achieved by the establishment of the Magistrates Commission (Commission) under the MA with the main objective of ensuring that 'the appointment, transfer or discharge of, or disciplinary steps against judicial officers in the lower courts take place without favour or prejudice and that the applicable laws and administrative directions in connection with such action are applied uniformly and correctly' and to 'ensure that no influencing or victimization of judicial officers of lower courts takes place.'[210]

The Commission in effect was interposed as the institution between the executive and magistrates so that the former no longer had direct authority over magistrates in the performance of judicial functions. Some of the authoritative literature on the subject suggests that the MA and the establishment of the Commission have brought significant reform to the independence and status of magistrates.[211] The MA indeed formally shifted to the Commission some of the administrative authority over magistrates that the Minister of Justice previously held. However, from another perspective the MA did not substantially alter the status of magistrates or the lower courts for the better in relation to the entire judiciary.

209 The Interim Constitution 1993.

210 Section 4(a) and (b) MA.

211 See - Hoexter op cit note 26 at 22.

The objective in the enactment of the MA at a point in time, when the Interim Constitution would have reached a rather advanced stage of finalisation anticipating significant radical institutional changes for all organs of government, is not clear. Particularly problematic is the renewal and acceptance of an institution that was 'comprehensively disowned by the people of South Africa'[212] as the MCs of the apartheid era were. Also suggestive of incongruence, is the adoption by a transforming constitutional democracy of an institution that had evolved and developed under parliamentary sovereignty in a foreign setting several centuries in the past.[213] The acceptance at the wrong time and place of an ill – fitting and awkward law was a retrograde step and one that seems to have consigned the lower courts to a permanent state of inferiority. The following remarks of Makau wa Mutua are apposite:

> *'The organisation and administration of the magistracy under the Magistrates' Act preserves almost intact the apartheid system of the administration of justice – since 95% of all legal matters are handled in the magistrates courts –and makes it very difficult for Dullah Omar, the Minister of Justice and an internationally acclaimed human rights lawyer to implement his policies to transform the magistracy'.*[214]

The urgency for change with the advent of democracy was driven by the need to discard the old oppressive laws and replace them with laws consistent with constitutional values underpinned by fundamental human rights. MCs in the pre-constitutional period represented the old repressive values because the laws they enforced were anti – democratic. Therefore, all laws that promoted racial discrimination and other laws that enabled the violation of human rights, once removed from statute books, would have led to a judicial administration within which only laws that are just would have been applied and enforced. Many of these discriminatory laws[215] which were mainly enforced in the MCs in the past were repealed or in the process of being removed from statutes when the MA was passed. Hence the process of legitimising the judiciary at lower court level had already begun as MCs were bound to apply the letter of the prevailing law and the precedents set by higher courts.

---

212 Langa op cit note 11.

213 See - Corder op cit note 43 at 202. Also see - Truth and Reconciliation Report on Institutional Hearing 1998 Volume 4 Chapter 4 Paragraph 41.

214 Wa Mutua M 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' (1997) 10 *Harvard Human Rights Journal* 63 - 114 at 106.

215 See - Forsyth op cit note 9 at 31.

The adoption of the Interim Constitution[216] automatically extinguished the power of the previous judicial administration, including MCs, to legally enforce repressive laws. Thus disarmed, the judiciary, like the political branches, would have been expected to advance the process of transformation holistically for the long-term success of the judicial system. Under the circumstances, the piecemeal rendering of the lower courts, out of a transforming executive authority, to governance under the Commission can be seen as an egregious misdirection. The following comment by Fernandez suggests that the MA was passed by the apartheid regime with the aim of preserving its values and removing and insulating the magistracy from the civil service and Ministry of Justice under a new, democratic dispensation:

> *'The trouble with this new law and indeed with the host of other enactments passed through Parliament at record speed over the past three years is that it reflects a desperate bid by the National Party to preserve the status quo in the administration of justice. It forms part of the panoply of laws that the government has been sneaking in through the back door'.*[217]

The concern expressed in this statement seems to contrast with the view that the establishment of the Commission represents a significant advancement of lower courts in attaining judicial independence. The concern may, in some sense, be justified when evaluating the power and authority of the Commission to fulfil the role of protecting the institutional independence of MCs beyond the decisional independence of lower court judicial officers. Although the Commission replaces the executive in administering judicial functions of magistrates, it does not enjoy the same level of authority as the JSC does in respect of judges. The main shortcoming of the MA is that as an ordinary Act of Parliament it may be easily amended or repealed without due regard for the constitutional stipulation that there must be a statute enacted to ensure the judicial independence of lower court judicial officers.

With the Commission (instead of the JSC) ensconced as the watchdog of magistrates' judicial independence, the envisaged transformation of the judiciary became infinitely more complicated. Mutua opines about the dual judicial independence entities as follows:

---

216 The Interim Constitution came into effect on the 27 April 1994 when South Africa became a constitutional democracy.

217 Fernandez, Lovell *Analysis and Critique of the Present South African Structures Administering Justice* in Norton, Michelle (ed.) *Reshaping the Structures of Justice for a Democratic South Africa*: Papers of a Conference Organized by the National Association of Democratic Lawyers, Pretoria, (October 1993), 116 – 119.

> '…*the bifurcated judiciary – governed by two different commissions, different laws, rules and expectations – only perpetuates the mediocrity of the magistracy and indefinitely postpones the reform of the judiciary as a whole'.*[218]

Although the Constitution envisages that a different law should be enacted for the governance of lower courts, this does not imply that the MA, already in existence at the time the Constitution was adopted, is that law.

Considering that the values of judicial independence are aimed at ensuring the right of access to courts, the rule of law and justice rather than for the personal benefit[219] of judicial officers, the structure, composition, and functions of the Commission do not manifest a transformative outlook. Arguably these aspects of the Commission, contradict its objectives which in the main are that appointment of magistrates be made without bias and their security of tenure and financial security be protected. Apart from the obviously weaker protection of security of tenure afforded by ordinary legislation rather than the guarantee provided in the Constitution for judges, the dominant position of the executive in regulating the composition and functioning of the Commission makes its objectives effectively unattainable.

The key areas where the executive exercises undue control over the MCs via the Commission are apparent in the membership of the Commission, the appointment of magistrates and in the power of the executive to regulate the service conditions of magistrates. The most problematic issue is the Commission's powerlessness to advance the administrative judicial independence of Magistrates' courts; administrative independence being an essential condition of collective judicial independence. As former Chief Justice Sandile Ngcobo pointed out in regard to the significance of administrative judicial independence as a principle of the separation of powers: 'the judiciary cannot be said to be a genuinely independent and autonomous branch of government if it is substantially dependent upon the executive branch not only for its funding but also for many features of its day-to- day functions and operations'.[220] This aspect of judicial independence, arguably the most significant for effective lower court functioning, is vaguely referred to as the last objective of the MA.[221].

---

218 Wa Mutua op cit note 218 at 108.

219 See - Chapter 3 under 'Definition of Judicial Independence.'

220 Ngcobo op cit note 24 at 697.

221 See - s 4 (h) Magistrates Act 90 of 1993.

5.3.1 Regulations under the Magistrates Act

The MA provides that the Minister may make regulations[222] concerning conditions of service after the Commission makes recommendations and the CC held that this ministerial power may be delegated. The CC stated that the process of fairness in the making of regulations was ensured by the Commission and that the Minister was bound to make regulations only upon the recommendation of the Commission. It seems though there are instances when regulations were made without the recommendation of the Commission. One such instance was found by a researcher at the DGRU[223] who remarks as follows:

> *'In the course of our research, we discovered a significant lacuna in the legal framework for dealing with complaints against magistrates…On paper, it appears as though the process for lodging complaints against magistrates is set out in regulations promulgated in terms of section 6A of the Magistrates Act. …These regulations have been legally brought into operation. However, we have been advised that the regulations are not being implemented and applied in practice. The reason for this is found in section 16(1) of the Magistrates Act. "The Minister may, after the Commission has made a recommendation, make regulations regarding the following matters in relation to judicial officers in the lower courts: (a) (i) The requirements for appointment and the appointment, promotion, transfer, discharge and disciplinary steps'."*[224]

According to this report, no recommendation was made by the Commission in respect of these regulations. Consequently, they would have been promulgated irregularly and would therefore render them vulnerable to being set aside if they were to be challenged. The regulations had established a complaints committee for each cluster and regional division, to deal with complaints. The processes involved in the setting up of the structures and committees were not undertaken as seems to be required by the regulation owing to the lacuna referred to in the abovementioned report. The absence of the framework structures affects not only how the complaints by the public are processed, but also on the regularity of the processes, without the force of law, undertaken by the Commission upon respondent magistrates. The CC in *Van Rooyen* declined to set aside these regulations.

---

222 Magistrates Act, s 16.

223 *Democratic Governance and Rights Unit* at the University of Cape Town.

224 'The Coalface of Justice: An Analysis of Misconduct Proceedings Against Magistrates in South Africa.' *Democratic Governance Unit* at the University of Cape Town. First Edition 2020 at 8.

The Minister has no authority to change or depart from the Commission's recommendations. The difficulty that arises though is in the wording of s 16 of the MA which provides that 'the Minister *may* after the commission has made a recommendation make regulations' which means that the Minister does not have to make any regulation at all after the recommendation of the Commission that it should.[225] According to Franco and Powell this power – not to make regulations at all – is a 'significant power if the Minister wishes to block attempts at reform by the Commission'[226] Olivier observes that one of the most important roles of the Commission is to act as a check on the Minister's authority to make regulations but the wording of the section allows the Minister to ignore the recommendations by not making the regulations at all.[227]

The failure to make regulations in respect of service conditions is a key challenge for the transformation of the lower courts and has been the source of much tension between the magistrates and the elected branches from the earliest time since the Constitution was adopted. The powerlessness of the Commission is more clearly and regularly manifested in this advisory function than in any others as the regulation of financial security is an ongoing concern for judicial officers and a crucial aspect of judicial independence. Again, as in the case of recommendations for appointment of magistrates, even if the Commission has competently and diligently performed its work in making the appropriate and necessary recommendations in respect of service conditions, the effort would have been wasted if ignored and not converted into regulations by the Minister of Justice. It was this impotence of the Commission that forced regional magistrates to take to litigation in the cases of *Van Rooyen*[228] and *Association of Regional Magistrates of South Africa v The President and Others* (*ARMSA)*[229] and for members of the Judicial Officers Association of South Africa (JOASA) to consider strike action.[230] The conundrum that confronted magistrates became more problematic when the CC in both cases dismissed their substantive claims and JOASA members faced with misconduct enquiries had to back down. Thus, the Minister has managed to effectively block reform of the lower court judicial independence by simply refusing to make regulations.

---

225 Magistrates Act - s 16.

226 Franco and Powell op cit note 22 at 571.

227 Ibid.

228 *Van Rooyen* case op cit note 17.

229 *Association of Regional Magistrates of South Africa v The President* (2013) ZACC 13.

230 Monama T 'Magistrates Threaten Strike Action' Daily Dispatch 26 September 2011 at 1.

5.3.2 Evaluation of the Role of the Magistrates' Commission in Judicial Independence

Asking the question how the Commission has advanced the personal judicial independence of magistrates and the institutional independence of MCs since the adoption of the Constitution offers a perspective from which to evaluate this institution. Conversely, the question can be asked whether the status of magistrates or the courts in terms of judicial independence would have been any different if the Commission were not created at all. Given that no major changes took place at the level of superior courts[231] immediately after the adoption of the Constitution except for the creation of the CC, MCs too would have continued to function as before in terms of the provisions on transitional arrangements until the envisaged process of rationalising of all courts was dealt with. With the Constitution in place as the supreme law of the land, radical changes in all societal institutions were imminent and inevitable as new laws consistent with the Constitution replaced old repressive ones. Any provision in the MCA that was inconsistent with the constitutional principles and values would have been discarded as those inconsistent with such other old order laws. Under the circumstances it is doubtful that the MA that was primarily enacted to create the Commission, served a useful purpose. On the contrary, the MA seems to have prolonged the delay in the holistic court rationalisation process.[232]

The fact that the MA, in establishing the Commission, enabled the severance of the lower courts from executive control and ended the civil servant status of magistrates, may be seen as advancing judicial independence of magistrates. However, this shift in supervision of lower courts from the executive to the judiciary should not be seen as the *sine qua non* of their judicial independence. In many well-established common-law jurisdictions without written constitutions, courts function as judicially independent institutions under sovereign parliamentary rule. The principles of the separation of powers doctrine direct that the three arms of government function independently of each other and that the amount of influence over each other's functioning be limited. The Commission's specific purpose was to ensure the security of tenure of magistrates

231 See - Olivier op cit note 2 at 120. A decision was taken during the Interim Constitution negotiations that existing judges would continue as before and did not have to reapply for judge's positions. See also - Corder op cit note 43 at 202. See also Corder op cit note 9 at 258 for some of the reasons for retaining judges from the pre-constitutional era.

232 Constitution schedule - 6 s1.

through the institutional independence of MCs from the other organs of government. These comments of Franco and Powell offer an apt response to the question whether the Commission has been effective in its role.

> *'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…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 Magistrates' Commissions and the system within which it works, we have argued that neither condition is met'.* [233]

MCs, as all other courts, would have to apply the law impartially and independently and be afforded adequate protection regardless of the political nature of the regime. Being a constituent part of the judiciary, rather than the executive, facilitates the operation of the doctrine of the separation of powers applicable to the lower courts. Therefore, there should not be an extraordinary amount of significance attached to the formal change of place of MCs from one branch of government to another where the protection of judicial independence remained substantially unchanged.

An overview of the main functions of the Commission, as an agent or guardian of lower court judicial independence posits little that can be viewed as remarkable. The remarks of Morne Olivier capture the essence of this view. He writes:

> *'In spite of many significant improvements since the apartheid era, the regulation of the magistracy remains troublesome in some respects. Several undesirable links persist between the executive and the magistracy such as the performance of administrative functions by magistrates and the regulation by the executive of some of their conditions of service. While the Magistrates' Act explicitly recognises the importance of judicial independence some of the Minister's powers are questionable in this regard. Various important ministerial decisions…may be taken merely 'after consultation' with the Magistrates' Commission. …It would be preferable for such decisions to be taken in consultation with the commission. As regards the appointment of magistrates it*

233 Franco and Powell op cit note 22 at 577.

would be best for them to be appointed by the Minister on the advice of the commission and not merely after consultation with the commission'.[234]

Olivier seems to suggest that there is no need for the existence of the Commission in a single judicial system within which the JSC would be the governing institution for all levels of the courts. The following remark also suggest that the Commission has not been very effective in achieving its objectives:

'This would bring the mechanism for appointment of magistrates into line with the regime applying to judges. It would be a step towards the amalgamation of the appointment functions of the Magistrates' Commission and the Judicial Service Commission as well as the establishment of a unified judiciary under a single governance framework'.[235]

In one area of the transformation agenda the Commission has achieved a measure of success. This relates to the demographic representativeness of the lower court bench. At the time the MA was passed more than 90% of magistrates were white males. At present the number of white males has been reduced to around 26%[236]. This is an important consideration viewed in the light of the concern expressed that the MA was passed to ensure that the status quo of the apartheid regime and its system of administration of justice be retained. Hence, despite the criticism that the executive is over-represented in the newly reconstituted Commission, the fairer reflection of the population demographic on the lower court bench must be acknowledged as a significant success for the Commission.

Further, in terms of gender diversity, there has been some considerable improvement with about 17% of magistrates now being African female. The strategy employed by the Commission to achieve a fair reflection of the population demographic attracted some controversy[237] but the JSC too has come in for serious criticism about its methods to achieve transformation in the demographic make-up of the composition of superior court benches.[238] In addition there appears to be a general consensus among scholars that the notion of judicial transformation in post-apartheid South Africa goes well beyond the issues of demographic representativeness

234 Olivier op cit note 2 at 353.

235 Ibid.

236 Ibid at 330.

237 Ibid at 334.

238 Olivier M and Hoexter C 'The Judicial Service Commission' in Hoexter C & Olivier M (eds) *The Judiciary in South Africa* 154 – 199 at 155.

and diversity. As Catherine Albertyn aptly remarks: 'There is no question that representivity, the need for the judiciary to reflect major social groups, is a worthy goal. But…it is perhaps a necessary but not sufficient condition for transformation.' She adds that beyond representivity and diversity the judiciary should reflect:

> *'d(D)ifferent understandings of constitutional values and judicial philosophies which will impact on structural and systemic inequalities within the institution, its modes of legal reasoning and decision – making, its legal culture and the way in which judges do their work in a constitutional setting'*[239]

Apart from the demographic transformation mentioned above, the main overall achievement of the MA and the Commission was the formal separation of magistrates from the executive civil service to governance under a semi – independent body. (Olivier describes the position of the MCs as *a statutorily – provided sui generis status*.[240]) But, although the repressive conditions of employment by the executive no longer controlled the conduct of magistrates after the establishment of the Commission, the MA did not significantly alter the relationship of dependence of MCs on the executive to function effectively. The MA was arguably not necessary at all, given that the Interim Constitution shortly afterwards guaranteed MC's judicial independence. Therefore, a separate regulatory body for lower courts, which is what the Commission is, seems unnecessary, when the Interim Constitution established a Judicial Service Commission which ought to have served as the governing body for the whole judiciary.

As the foregoing discussion indicates, neither adjudicative individual independence of magistrates nor the collective or institutional independence of the MCs has been substantially improved through the MA. In fact, in many respects the MA stands in conflict with the principles of the separation of powers which in turn underpins the principles of judicial independence. In this sense, the MA is arguably one of the most harmful laws pertaining to the judiciary in the constitutional era as it continues to enable the executive to determine every aspect of lower court judicial administration and diminishes the status of MCs as independent, under the Constitution. Considered against the global basic standards for independent judicial functioning the MA is an inappropriate law for the objective it needed to achieve. This is because the MA narrowly focuses

---

239 Albertyn C 'Judicial Diversity' in Hoexter C & Olivier M (eds) *The Judiciary in South Africa* (2014) 245 – 287 at 286.

240 Olivier op cit note 2 at 336.

on reducing a limited level of control the executive formerly exercised over magistrates, rather than ensuring judicial independence as a value for all court users.

5.4 The Van Rooyen Judgment and its impact on the development of Lower Court institutional independence

The CC judgment in *Van Rooyen* has affected the development of lower court judicial functioning through its findings on the constitutionality of various provisions of the MCA and the MA. This section examines the findings in *Van Rooyen* that significantly impact on the role of MCs and their value in the judicial system, in the post – apartheid constitutional state i.e. from a transformative perspective. Particularly important to the analysis is the effect of this judgment on what institutional judicial independence means for the MCs as opposed to its meaning for the superior courts. Although the following discussion traverses some of the ground touched on earlier, many aspects of this judgment, require particular attention because of their serious implications for the legal development of the lower courts' judicial independence. As these are the findings of the highest judicial authority, the consequences are irreversible unless the legislature intentionally enacts appropriate reform.

The CC deals with the various provisions of the MCA, the MA, and its regulations extensively in the judgment but for the particular purpose of this thesis, a similarly detailed examination of the issues is not considered necessary. The primary issue is whether the separation of powers as required for the independent functioning of lower courts, is adequately provided for in the 'Act of Parliament' referred to in the Constitution. Therefore, the analysis is confined to aspects of the judgment that have a significant bearing on the independent judicial functioning of lower courts and are identified as follows:

5.4.1 The definition of judicial independence according to *Van Rooyen* and influence of Canadian case law on the definition;

5.4.2 The Agency of the Magistrates' Commission (Commission) in ensuring institutional judicial independence according to *Van Rooyen*; and

5.4.3 A summary of the impact of *Van Rooyen* in the evolution and development of the judicial independence of lower courts.

It must be pointed out from the outset though, that issues that are important aspects to each of the topics of discussion are evident throughout the judgment i.e. not confined to a particular part

of the judgment under a particular sub – heading, for example the definition of impartial and independent courts which is dealt with in the beginning of the judgment also features as important to the issue under discussion on the Magistrates' Commission. The considerable amount of overlapping that occurs throughout the judgment of 150 odd pages presents a measure of difficulty for the task at hand.

5.4.1 The Definition of Judicial Independence in Van Rooyen

In so far as the meaning of judicial independence is concerned, the CC in *Van Rooyen* seems to have relied on Canadian Supreme Court judgments albeit indirectly through the CC judgment in *De Lange v Smuts*.[241] Although this is not objectionable in principle, this thesis argues that an issue as important as the independence of the judiciary requires a comprehensive engagement with all available significant authorities. Such an engagement with the jurisprudence, it is suggested, would or at least could have produced different outcomes from a transformative perspective.

Omitting to engage comprehensively with the international instruments allowed for lacunae to develop in critical issues pertaining to the functioning of MCs, to advance the right of lower court users to courts that are institutionally independent which they never had historically. A focus on the value of MCs as the primary provider of dispute resolution to most people since the adoption of the Constitution, instead of their inferiority in status would have been beneficial for lower court communities but at the same time could not have caused any harm in any quarter.

Van Rooyen presented the CC with one of the most serious challenges at the time of South Africa's transition to a constitutional democracy, as the issues that had to be decided pertained to a core aspect of constitutionalism: the independence of the judiciary as an organ of government. Writing for the unanimous court, Chaskalson CJ sets out the relevant sections of the Constitution:

> *'Judicial independence and impartiality are also implicit in the rule of law which is foundational to the Constitution, and in the separation of powers demanded by the Constitution. This requirement is buttressed by the provisions of sections 165(3) and (4) of the Constitution. Section 165(3) states that no person or organ of state may interfere with the functioning of the court and section 165(4)*

241 *De Lange v Smuts* case op cit note76.

requires that [o]organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts'.[242]

As MCs had been institutionally moved out of the executive branch to the judiciary in terms of section 165 of the Constitution, various issues arose in respect of the constitutionality of the provisions of the MCA and the MA, which form the legislative framework for the governance of lower courts. As Franco and Powell point out:

'…before the Magistrates Commission was established in 1993…magistrates lacked independence from the executive 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 removed from the public service and the Magistrates Commission was established'.[243]

Therefore, when the constitutional challenge (which Franco and Powell describe as 'inevitable'[244]) was presented, there would have been little doubt that the CC's findings would have significant implications for the functioning of the judiciary as a whole in relation to the executive branch. Since the High Court had already made critical findings regarding the invalidity of the laws in question when the CC was seized with the matter in terms of section 172 (d) of the Constitution, this judgment would have been justifiably anticipated as pivotal, from which the judiciary of the future would take shape. In other words, if the findings of unconstitutionality of the relevant sections of the MA and MCA by the High Court had been confirmed by the CC, any future challenges about judicial independence would[have probably been presented from the position of unified judiciary, integrating all courts in the judicial system, which is arguably what the Constitution envisages.[245]

As it stands, however, the CC in *Van Rooyen* seems to follow an approach to the definition of judicial independence that seeks to emphasise the significance of the difference in status between the superior courts and the lower courts under the Constitution and affirms the historic

242 *Van Rooyen* case op cit note 17 at para 17.

243 Franco and Powell op cit note 22 at 562.

244 Ibid at 563.

245 Constitution - Section 16(1) Schedule 6.

inferiority of the MCs. In *Van Rooyen,* the status quo, based on the common law was the embraced and advanced rather than the adoption of a transformative approach that the new Constitution envisages, heralding a break from the past.

This approach is evident in the interpretation given to particular provisions in Constitution by the CC in *Van Rooyen* and quite obviously evident in the CC's approval of certain findings of the Canadian Supreme Court in *Valente* v *The Queen*.[246] It will be argued that, as the CC emphasises at the outset, these differences are crucial, the subsequent evaluation of discrete provisions of the MA reflects outcomes that are mainly consistent and justifiable in terms of these definitive interpretations. It is noteworthy that the CC finally reversed the High Court's findings of unconstitutionality, save two of the 38 disputed provisions, that served before it for consideration. The following paragraphs deal with the reasoning underlying the CC's interpretations of the relevant constitutional provisions and the finding of significant authority in *Valente* in determining the meaning of institutional judicial independence.

5.4.1.1 The Influence of *Valente* in the definition of judicial independence in *Van Rooyen*

As the CC in *Van Rooyen* finds *Valente* to be the most appropriate and valuable authority for the purpose of determining what 'an independent and impartial court' is, and in view of the influence this case has on the meaning of the concept in South African law, it requires closer examination.

The following finding in *Valente* provides more insight into how judicial independence is manifested in the relationships as informed by the doctrine of separation of powers in democratic governance. According to Le Dain J, judicial independence, 'connotes, not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive branch of government, that rests on objective conditions or guarantees.'[247]

This dictum encapsulates the essential differences between the concept of subjective impartiality in all adjudication and the objective conditions that determine the nature of the relationship between the members of the judiciary and the political branches that demonstrate the

246 *Valente* case op cit note 21.

247 Ibid - Headnote.

independence of the judiciary as an institution, and which enables judicial officers to perform judicial functions impartially.

The significance of this tenet articulated in *Valente* is recognised in *Van Rooyen,* and it also cites with approval the test in *Michel Genereux v Her Majesty the Queen,*[248] *(Genereux*) that is applicable in determining whether the tribunal 'from the objective standpoint of a reasonable and informed person will be perceived as enjoying the essential conditions of judicial independence.'[249]The CC affirms that the test for judicial independence is objective as it is for impartiality and finds that *Valente* explains the requirement as follows:

> *'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'*[250]

These principles of judicial independence have been applied universally as a significant starting point to guide and inform the establishment of institutions to ensure the essential conditions of judicial independence and to that extent were found justifiably relevant in *Van Rooyen.* However, the issue for determination by the Canadian Supreme Court in *Valente* was not these fundamental principles but their application in the context of the impartiality of judicial tribunals functioning as such in terms of section 11(d) of the Canadian Charter of Rights and Freedoms. It was in this context that *Valente* was cited with approval in *De Lange v Smuts* and its application to the issue in the latter case seems undisputed: the importance of context cannot be over emphasised as the following examination of *Van Rooyen* indicates.

In *De Lange*, the issue related to the substantive meaning of the term 'fair trial' in the context of section 12(1)(b) of the Constitution was framed as follows:

> *'…the concept of 'fair' is implicit in the guarantee of section 12(1)(b) of the 1996 Constitution… This requires addressing the crucial question of what is to be understood by 'fair trial'…In particular it raises the question whether this… 'fair trial' guarantee requires that the officer presiding at the meeting of creditors and issuing the warrant committing the examinee to prison*

248 *Genereux* 1992 S.C.R. 259.

249 *Van Rooyen* case op cit note 17 at para 32.

250 Ibid.

under section 66(3) must be a member of the judicial arm of the state, acting as such at the time'.[251]

An observation of Ackermann J that is of enormous significance, not only in distinguishing *Valente* from *Van Rooyen,* but to the provision in the Constitution that MCs are independent of the other organs of government, and as such have a critical and central role in ensuring the right to freedom and security of persons, is the following:

'This question, though simple, raises profound issues concerning the nature of the constitutional state and the separation of powers which must ultimately be resolved within the context of the 1996 Constitution. It is essential, in my view, to consider our constitutional history prior to the introduction of the interim and 1996 Constitutions in the process of determining what the purpose of the 1996 Constitution is in regard to these and related matters and ultimately in determining the correct construction of the fair trial guarantee in section 12(1)(b)'.[252]

Ultimately, the 'fair trial' issue involving the analysis of the meaning of 'an impartial and independent tribunal' made it relevant in *De Lange* to consider Canadian Supreme Court judgments which in this case the CC found to be 'instructive'. Ackermann J stated:

'Section 11(d) of the Canadian Charter guarantees a person who is charged with an offence the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal . . . It is of course immediately apparent that this provision differs significantly from that of section 35(3)(c) of the 1996 Constitution which guarantees every accused a fair public trial before an ordinary court. For the limited purpose however of deciding what an independent tribunal or forum is for purposes of section 34 of the 1996 Constitution, the views of the Canadian Supreme Court on section 11(d) of the Charter are instructive'.[253]

Having qualified the applicability of *Valente* to the issue, the judgment in *De Lange* states:

'In the leading case of R v Valente three essential conditions of independence were identified, that could be applied independently and were capable of achievement by a variety of legislative schemes or formulas. The first was security of tenure, which embodies as an essential element the requirement that the decision-maker be removable only for just cause, secure against interference by the executive or other appointing authority. The second was a basic degree of financial security free from arbitrary interference by the executive in a manner that could affect

251 *De Lange* case op cit note 76 at para 43.

252 Ibid.

253 Ibid at para 69.

judicial independence. The third was institutional independence with respect to matters that relate directly to the exercise of the tribunal's judicial function . . . judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function'.[254]

Having approved the finding in *Valente* regarding the test applicable to determine whether a tribunal is independent, the CC in *De Lange* cites with approval the following clarification regarding the standard of the structural aspects of the objective guarantees:

'It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter, which may have to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial independence for purposes of s. 11(d) must bear some relationship to that variety. Nevertheless, the essence of the security afforded by the essential conditions of judicial independence must be provided or guaranteed, although this need not be done by any particular legislative or constitutional formula'.[255]

Having had regard to the 'instructive dicta' cited from *Valente*, Ackermann J stated:

'I am far from convinced that the first two essential requirements for independence referred to in the Canadian cases, namely those of security of tenure and a basic degree of financial security free from arbitrary interference by the executive in a manner that could affect judicial independence, are present in the case of officers in the public service. It is unnecessary, however, to pronounce definitively on these requirements, for such officers undoubtedly lack the required objective structural independence and are not reasonably perceived to possess it'.[256]

According to *De Lange,* therefore, the value of the main tenets of *Valente* are relevant in assessment of the impartiality and independence of **tribunals**, established for the resolution of disputes in terms of section 34 of the Constitution and ***not courts*** (author's emphasis). The main reasons for the decision in *De Lange* are of importance when considering the relevance of *Valente* to *Van Rooyen* which is that officers in the public service who are not judicial officers

254 Ibid at para 70.

255 Ibid at para 72.

256 Ibid at para 73.

are not perceived to have the essential conditions of judicial independence. In this regard, the CC in *De Lange* stated:

> *'(t)They are officers in the public service in the executive branch of the state and therefore do not enjoy the judicial independence which is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law. This independence, of which structural independence is an indispensable part, is expressly proclaimed, protected and promoted by subsections (2), (3) and (4) of section 165 of the Constitution'.*[257]

In the same vein, *De Lange*, alludes to how the nature of the relationship existing between the tribunal and the executive reflects the independence or lack thereof of the tribunal:

> *'In sum, officers in the public service, who answer to higher officials in the executive branch, do not enjoy the independence of the judiciary and therefore cannot, without danger to liberty, commit to prison witnesses who refuse to cooperate in proceedings, such as the present. I accordingly conclude that the committal provision of section 66(3) infringes section 12(1)(b) of the Constitution…'*[258]

To the extent that *Valente* has relevance to what judicial independence means and the test applicable to determining the nature and level of protection of their judicial independence, its relevance in *De Lange* is clear. However, the correlation between the same citations from *Valente* used in D*e Lange* applied to *Van Rooyen* is less clear. The main issue in *Valente* is whether the Provincial Court in Ontario Canada is an independent tribunal for purposes of section 11(d) of the Canadian constitution.[259] As MCs in South Africa are independent according to the Constitution, the question that had to be dealt with in *Valente* does not arise in *Van Rooyen.* But, as the definition of impartiality and independence is based on the meaning given to the concept in *De Lange*, as applied to non – judicial tribunals and not to courts recognised as such in terms of section 165 of the Constitution, it is axiomatic that MCs' institutional independence seems to have been equated to or gauged on a similar plane as non – judicial tribunals.

---

257 Ibid at para 70.

258 Ibid at para 75.

259 Section 11(d) of the Canadian Charter of Rights and Freedoms states. 'Any persons charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.'

This suggests, in the absence of evidence to the contrary, that the CC in *Van Rooyen* sees the judicial independence of MCs like that of tribunals that the judgment in *De Lange* refers to. According to this construction, the institutional independence of MCs need not be protected any differently from that of non – judicial administrative tribunals although the judicial authority vested in MCs is decidedly different to non – judicial tribunals and as unambiguously indicated in *De Lange*.

In this respect, it seems that the CC contradicts itself, otherwise a concern arises that *Van Rooyen* disregards the recognition in the Constitution that MCs are independent and accountable only to it and the law and that it passes lightly over the inherent danger of reducing a constitutional command to a mere formality without practical value. A strong argument has been made in *Van Rooyen* that there is no such contradiction evident in the Constitution as it implicitly draws a distinction between the MCs and superior courts in respect of protection of the judicial independence of each of them. This issue is of major significance in this chapter but also for the argument of the entire thesis. Therefore, it is dealt with fully in the following subsection. In any event and regardless of the merits and demerits of this argument, it is suggested that *Valente* has been given undue weight of authority in respect of the challenges specific to *Van Rooyen*

In *Van Rooyen*, the CC expresses emphatic approval of the finding in *Valente* that 'it would not be feasible to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter, which may have to be applied to a variety of tribunals.'[260] This statement is not an easy one to analyse or interpret especially as the terms 'feasible', 'most rigorous' and 'elaborate' are capable of complex meanings in different circumstances, at best they may be described as ambiguous. Added to that are even more complex concepts: judicial independence, 'constitutional requirements and the interpretation of 's11(d) of the Charter'. Unsurprisingly, no attempt was made in *Van Rooyen* or anywhere else to explain these terms. Arguably the meanings of these terms have not yet been fully determined in Canada, as the following observation in *Valente* suggests:

> *'Provincial court judges contend that they should have the same constitutional guarantees of security of tenure and security of salary and pension as superior court judges.* ***Whatever may be***

260 *Van Rooyen* case op cit note 17 at para 20.

the merits of this contention from the point of view of legislative or constitutional policy, I do not think that it can be given effect to in the construction and application of s. 11(d). *To do so would be, in effect, to amend the judicature provisions of the Constitution".*[261]

It is noteworthy that those provisions of the provincial laws that were the subject of contestation in *Valente* were amended to ensure greater security of tenure and conditions of service for the judges of Ontario Provincial courts, even before the Supreme Court judgment in *Valente* was handed down.[262] This implies that the most important challenge in *Valente*[263] on behalf of the judges of the Ontario Provincial Court, although not successful, had considerable merit. This meant that the intervention of the legislature was called for, to ensure compliance with the requirements of judicial independence instead of weakening of the protection of judicial independence of the court to make it consistent with the impugned law.

The challenges confronting *Valente* in the application of s 11(d) to criminal dispute resolution, arguably, arises from the fact that there is no clear distinction between the judicial function of ordinary criminal courts and administrative tribunals with jurisdiction to decide criminal matters. The Constitution of South Africa makes such a distinction as is evident in sections 34 and 35 which specifically ensures the fair trial rights of persons accused of criminal offences and avoids the type of problem that the Supreme Court of Canada had to deal with in *Valente* and other cases.

For instance, in the case of *Genereux,*[264] the main issue raised is whether a General Court Martial is an independent and impartial tribunal for the purposes of s. 11(d) of the Canadian Charter of Rights and Freedoms. The appeal was allowed on the basis that the structure of the General Court Martial at the time of the accused's trial infringed his right to be tried by an independent and impartial tribunal guaranteed by s. 11(d) of the Charter. It was held by the Canadian Court of Appeal that:

"…An accused who is charged with offences under the Code of Service Discipline and is subject to the jurisdiction of a General Court Martial may invoke the protection of s. 11 of the Charter… A parallel system of military tribunals, staffed by members of the military who are aware of and

261 *Valente* case op cit note 21 at 693.

262 Ibid at 703.

263 Ibid.

264 *Genereux* 1992 S.C.R. 259.

sensitive to military concerns, is not, by its very nature, inconsistent with s. 11(d). The existence of such a system, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by compelling principles. The accused's right to be tried by an independent and impartial tribunal must thus be interpreted in this context and in the context of s. 11(f) of the Charter, which contemplates the existence of a system of military tribunals with jurisdiction over cases governed by military law. In view of s. 11(f), the content of the constitutional guarantee of an independent and impartial tribunal may well be different in the military context than it would be in the context of a regular criminal trial…".[265]

In *Genereux,* La Mer CJ emphasises the importance of context for the application of s 11(d) of the Charter in the following remark: 'The requirements of s. 11(d) are sensitive to the context in which an adjudicative task is performed. The Charter does not require, nor would it be appropriate to impose, uniform institutional standards on all tribunals subject to s. 11(d)'[266] The importance of consideration of context especially when the authority cited with approval is imported from a foreign jurisdiction with an entirely different structural regime of government, is emphasised in the following remarks of Ackermann J:

'In attempting to give flesh to fundamental constitutional concepts and values such as the separation of powers and the rule of law, it is instructive to note how other democratic countries based on freedom and equality regulate detention or committal to prison in circumstances comparable to those of the present case, and to what extent the intervention of a judicial officer is considered essential. At the end of the day it is of course our Constitution which has to be construed and its values applied in the South African context'.[267]

This caution that the CC itself had applied in *De Lange*, is overlooked in *Van Rooyen* by attaching greater weight of authority to a particular *dictum* in *Valente* that, when applied to the South African judicial system, has the effect of retarding rather than strengthening the judicial independence of lower courts. The CC in *Van Rooyen* seems satisfied that the citations from *Valente* that found approval in *De Lange,* could be definitive of the institutional judicial independence of MCs in South Africa. It will be argued that they cannot be, as there seems to be no substantial legal basis for such an application in South African law.

265 Ibid.

266 Ibid at 304.

267 *De Lange* op cit note 76 para 48.

A matter that has been given little consideration is the potential harm in applying foreign law principles developed in parliamentary legal systems to resolve conflicts of a constitutional nature in a developing constitutional democracy. In common law jurisdictions the relationship of different courts and other dispute resolution tribunals to the executive government is different from that of courts in a constitutional democracy which are independent of the other branches of government. Certain aspects of judges' individual independence are administered by the executive as the benefits of public servants.

The main issue in *Valente* is whether the Provincial Court in Ontario Canada is an independent tribunal for purposes of section 11(d) of the Canadian constitution.[268] As MCs in South Africa are independent the question that was dealt with in *Valente* does not arise in *Van Rooyen* . Unlike administrative tribunals whose institutional independence may need to be assessed as and when challenges to it are brought, MCs are ordinary courts in South Africa since the adoption of the Constitution.

In concluding, this assessment of the influence of *Valente* on the findings of the CC in *Van Rooyen*, it must be acknowledged that the determination of the meaning of the concept of judicial independence in varying circumstances has been considerably facilitated through the principles established in *Valente* as indicated above. However, its value in deciding the issues in V*an Rooyen* is not substantial because there is no paucity of scholarly literature and international law sources on which the issues of judicial independence could have been decided. Indeed, in *Valente* several of these leading authorities were quite extensively examined by the Supreme Court of Canada.[269]

5.4.1.2 The Meaning of Judicial Independence of Magistrates' Courts in the Constitution.

It is important, that it be noted that this thesis posits the view that the significant reasoning in *Van Rooyen* reflects an approach that seeks to retain the pre – constitutional divisions between the MCs and superior courts. This was alluded to in the introduction to the discussion of the

268 Section 11(d) of the Canadian Charter of Rights and Freedoms states. 'Any persons charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.'

269 *Valente* case op cit note 21 at 677.

definition of judicial independence in *Van Rooyen* and to that end finds support in texts from *Valente* and the Constitution. The following discussion deals with these constitutional provisions.

The CC in *Van Rooyen* construes various provisions in the Constitution and imputes to them meanings that form the basis for the conclusion that MCs and lower court judicial officers are not entitled to the same level of protection as superior courts and judges. The following statement unambiguously affirms this view in that;

> *'Judicial independence can be achieved in a variety of ways; '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…This seems to me to be implicit in the Constitution itself. The jurisdiction of the magistrate courts is less extensive than that of the higher courts. Unlike higher courts they have no inherent power, their jurisdiction is determined by legislation and they have less extensive constitutional jurisdiction.*[270] *The Constitution also distinguishes between the way judges are to be appointed and the way magistrates are to be appointed. Judges are appointed on the advice of the Judicial Service Commission;*[271] *their salaries, allowances and benefits may not be reduced;*[272] *and the circumstances in which they may be removed from office are prescribed*[273]*. In the case of magistrates, there are no comparable provisions in the Constitution itself, nor is there any requirement that an independent commission be appointed to mediate actions taken in regard to such matters'.*[274]

This statement requires closer examination as there is a significant contextual difference between the 'tribunals' referred to in *Valente* and the 'courts' that *Van Rooyen* relates to. In this statement the CC seems to equate the tribunal, which is an executive body, performing functions in an administrative capacity, to 'courts' whose independence is guaranteed under the Constitution. To state that such an equivalence is implicit in the Constitution cannot be accepted as an accurate proposition. The obvious differences between these institutions, clearly spelled out in *De Lange* are ignored in *Van Rooyen*.

---

270 Section 17(1).

271 Section174(6).

272 Section 176.

273 Section 177.

274 *Van* Rooyen case op cit note 17 at par a28

Furthermore, V*an Rooyen* presumes that the jurisdictional differences between the superior and lower courts necessarily imply that MCs are inferior because the nature of the jurisdiction indicates a role of less importance. Such a presumption is justly refuted, as the constant arguments made in this thesis indicate. Lower courts perform indispensable judicial functions and are more valuable in the judiciary to most citizens than superior courts. Importantly, this negative view of MCs is inconsistent with the vision of the Constitution regarding judicial transformation.

As correctly stated in *Van Rooyen*, the essential conditions of judicial independence of judges are entrenched in the Constitution: this is indeed the surest mechanism to ensure that the superior courts perform judicial functions impartially. However, the provision of this guarantee for judges and not for other judicial officers, by no means implies that the legislation providing such protection for the latter group may be inferior in standard or inadequate for the purpose to be served by that law. No provision in the Constitution reflects acceptance of such inequality in standards for different courts. Therefore, the argument that the Constitution itself is authority that lower courts are less deserving of an equivalent standard of the protection of their independence and impartiality is not sufficiently persuasive. It is eminently arguable that it is a constitutional imperative[275] that an Act of Parliament provides specifically for these essential conditions of judicial independence in a manner that ensures that the executive is prevented from interfering in the judicial functions[276] of judicial officers in lower courts, especially through ministerial regulation.

5.4.2 The Agency of the Magistrates' Commission in ensuring Institutional Judicial Independence according to Van Rooyen.

5.4.2.1 The Independence of the Commission

The contemporary debates universally on the separation of powers and judicial independence indicate a shift in approach towards the establishment of judicial commissions to ensure that accountability can be maintained without violating the principles of judicial independence. The balancing of the interests of the various groups that the membership of the judicial commission

275 Constitution - Section 174(7).

276 Ibid - Section 165(3).

represents is the primary objective and the whole point for the establishment of such an institution. Where the interests of the executive and that of other entities are more strongly represented in the judicial commission than the judicial organ itself the perception is inevitable that the court is not independent in its functioning. In *Van Rooyen* it was not disputed that magistrates themselves had very limited representation in the Commission whilst most of the membership comprised other entities with the executive enjoying the strongest representation. The question is how the reasoning of the CC in *Van Rooyen* dealt with this anomaly and reconciled its interpretation of the concepts with the perception created by the factual circumstances.

The CC rejected the High Court's finding that the Commission is not perceived to be an independent institution. It is necessary to critically analyse the CC's finding that the strong executive component in the Commission does not create the perception that its decisions and recommendations are influenced by the executive. The CC seems to find justification for the re – composed Commission, with a relatively large non – judicial membership, in the need for institutional demographic transformation. The implication is that because demographic transformation was apparently achieved in the Commission after its recomposition, the reasonable observer may not perceive the Commission to be under executive control and fully capable of ensuring that the appointment of magistrates is independent even though it is comprised of most non- judicial members.

By drawing the issue of demographic transformation of that body into the discussion about executive influence over an independent judicial body, the CC tends to obscure the topic of independence. It is suggested that the importance of demographic representativeness notwithstanding, it does not seem relevant to how the Commission is perceived in its ability to execute its functions independently of the executive. This enquiry pertains to the separation of powers and therefore ought to have been directed to the appropriate law and jurisprudence to resolve the issue of whether the strong representation of the executive in the Commission may be perceived as undue influence in its functions.

The reason the CC gives for the finding that the Commission may be perceived as adequately independent of the executive is not particularly clear because it approaches the question of perception of bias from a negative standpoint. The CC finds that the Commission's membership is not perceived as conflicting with or undermining of the magistracy or unable to ensure that the

appointment and dismissal of magistrates takes place without fear or favour, which is not the same as finding that the Commission is perceived as independent. The reasoning solely in the negative seems to avoid engagement with the legal principles of the concept of judicial independence which it is argued may have produced a clear principle upon which the question, whether the Commission could be perceived as independent of the executive**,** could be determined.

Apart from the executive-leaning structure of the Commission, which the High Court had found to be inconsistent with the Constitution, the CC paid no attention to the historical connection of the magistracy with the executive. It is suggested that this history is likely to create or confirm the existing perception of the reasonable observer that the executive exercises considerable control over the institutional independence of the lower courts, which is not only a reasonable perception but also a matter of fact.

The CC explains that the Commission cannot be perceived as lacking independence because of the following considerations:

(i) 'The fact that the executive has a strong influence in the appointment of the members of the Magistrates' Commission does not mean that magistrates' courts lack institutional independence'.[277] The strong executive influence does not necessarily mean that the Commission will make decisions or recommendations that may be favourable to the Minister. 'There is no reason to believe that members of the Commission will not discharge these and other duties with integrity or that viewed objectively there is any reason to fear that they will not do so.'[278]

(ii) The composition of the Commission does have the effect of giving 'a greater say to the legislature and executive in the composition of the Commission'[279] but in itself is not objectionable as the JSC which is similarly structured has been recognised by the Constitution as appropriately constituted for the purposes of appointment and dismissal of judges. The composition of the JSC is the constitutional norm in this respect and should therefore be considered as the template for the composition of the Commission.

277 *Van Rooyen* case op cit note 17 at para 71.

278 Ibid at para 72.

279 Ibid at para 73.

(iii) The Constitution itself and the judicial safeguards in place 'prevent the executive and legislature from taking control of the magistracy.'

These are factors by which CC concludes that the Commission can ensure that the appointment and dismissal of magistrates are executed independently, and that no victimisation of magistrates occurs in performing of their judicial functions**.** It is argued that none of these alone nor all of them together constitute the essential conditions that are required for independent adjudicative functioning of judicial officers at any level of the judicial system. Each of these is considered briefly to illustrate this submission.

In so far as the integrity of the individual members of the Commission is concerned, even accepting that condition as a fact, integrity is not a measurable norm upon which to ensure that institutional judicial independence is secured and is not one of the legal tenets of the concept of judicial independence. Furthermore, it raises the question: why is the integrity of the members of the JSC not an adequate measure to ensure the independence of judges, considering that the higher courts enjoy the strong protections provided in the body of the Constitution without the need to depend on the integrity of the members of the JSC to ensure that the appointment of judges is done without favour or prejudice? It is submitted that the integrity of the members of the Commission or the reputation of the entire body is unlikely to provide an appropriate substitute for substantial guarantees required for the protection of institutional judicial independence.

The CC's reasoning on the second point is that the high level of executive representation in the Commission is not objectionable because the Commission's composition is not different to that of the JSC and that since such a level of executive involvement is acceptable for higher courts, it would be likewise acceptable for the lower courts. For several reasons, it is not quite correct that the Commission, in composition, is a 'template' of the JSC composition. Firstly, although the political organs hold majority representation in the JSC, their representation in the Commission is much greater, a reason, according to the High Court, that justifies the finding that the Commission was lacking independence to function effectively.

Furthermore, in suggesting that if the composition of the JSC is not objectionable for it to function independently, the composition of the Commission should not impede independent functioning, the CC's finding implies that the Commission need not in its own right be differently and appropriately structured to execute its specific functions which are not identical to those of the

JSC. The reasoning in this respect is problematic because the CC notionally differentiates between the higher and lower courts in terms of status and functioning yet imposes a set of standards by which the lower courts' independence must be determined: standards which do not adhere to those that are universally accepted tenets of institutional judicial independence, particularly, internal judicial independence.

Moreover, there is no requirement that the Act of Parliament that creates a regulatory body for magistrates must perform its functions with a judge as chair. It is submitted that for the Commission to be seen to function independently requires that it be composed of members who promote its independent functioning: the large non – judicial membership component with the head being a judge, not a magistrate, is not consistent with the principles of constitutionalism or judicial independence. For the lower courts to be objectively seen to be an integral component of the judiciary it does not suffice that the head of its governing body be a member of the judiciary. It is submitted that it would be more constitutionally appropriate for the Chief Justice, or a delegate of the Chief Justice to be the head of lower courts that are incorporated into a single judicial council established for all courts and judicial officers.

Secondly, as the chairperson of the Commission is a judge the superior courts are represented in the Commission, but magistrates have no representation in the JSC. This suggests that a judge is the chairperson of the Commission for no other reason than that magistrates are not sufficiently independent of the executive or that, as lower court judicial officers, their status does not qualify them to manage and decide matters pertaining to MCs. The lack of representation of lower courts in the JSC is noteworthy as it is the only legal sector (which is not a public service entity) without representation in the JSC; an absence which is significant because the various and frequent interactions that occur especially between the High Courts and MCs which, since the enactment of the SCA, has increased[280]. When considering how large the political component of the JSC is, the notion of lower courts being represented in it can only have positive implications for the independence of the entire judiciary. This subject will be of much greater relevance in a later chapter but is noteworthy here to point out some of the discrepancies that have not been considered in *Van Rooyen*.

280 See - Section 8(4)(c) SCA 10 of 2013.

On the third point that the higher courts protect the lower courts in ensuring their independence, there is no substantive evidence that the higher courts have ever successfully advanced lower court independence. *Van Rooyen* itself suggests that lower courts are not entitled to equal protection of judicial independence and again in *ARMSA*[281] the CC rejected the High Court finding regarding remuneration of magistrates.

The CC seems not to have considered the challenges involved in litigating these conflicts in terms of the resources of judicial officers. The fact that impecunious litigants will be challenging the power of the state with vast resources to defend itself, is precisely the reason that judicial independence must be secured without having to litigate. The guarantees of the essential conditions of judicial independence effectively ensure that courts and judicial officers will not have to launch challenges to be decided by the courts themselves, to maintain their independent status.

5.4.2.2 The Functioning of the Commission in Ensuring the Essential Conditions of Judicial Independence

The CC in *Van Rooyen* examined several of sections, mostly in the MA, subjecting them to testing for constitutionality and determining the correctness or otherwise of the High Court in finding that they passed muster. As the MA established the Commission as an institution that enables lower court judicial officers to function impartially, the issues in *Van Rooyen* involve all aspects of this institution: its composition, functioning and its effectiveness. In *Van Rooyen* the CC approved the definition of judicial independence as determined in *Valente* which also informed the determination of the essential conditions of judicial independence and the applicable testing of the relevant laws, for judicial independence. This sub – section deals with the findings made in *Van Rooyen* in respect of these essential conditions: Appointment of Judicial Officers and Security of tenure, financial Independence, and administrative judicial independence.

281 *ARMSA* op cit note 230.

5.4.2.2.1 Appointments and Security of Tenure

5.4.2.2.1.1 Appointment of Judicial Officers

Section 9 of the MCA and Section 10 of the MA make provision for the appointment of magistrates. The High Court held that both these sections are unconstitutional mainly because the power of the Minister to appoint magistrates who have not been recommended by the Commission constitutes a violation of the doctrine of separation of powers in a constitutional democracy. The CC rejected this argument on the ground that such executive authority in judicial appointments occurs in other well - established democracies such as Australia, the United States, Canada, and Germany[282]

The comparison with foreign law without ensuring a degree of compatibility seems to have led to a finding that could be perceived as irreconcilable with domestic constitutional principles. The reasoning of the CC in *Van Rooyen* in drawing this comparison seems not to have factored in the importance of context. Australia and Canada are common law jurisdictions which draw on the English tradition of conventions in ensuring that no transgressions of judicial independence occur. A democratic state, where the Constitution is supreme, may not fall back on these time – honoured conventions, customs and practices that enable the balance of power in such common law jurisdictions to be maintained.

Further, the CC has not acknowledged that both these countries are unions consisting of self-governing states or provinces, each relating differently with the federal government in matters affecting the judiciary. Moreover, in Canada in particular and Australia to some extent, the federal government is being constantly challenged to develop and reform the common law meaning of judicial independence and the institutional protection of judicial independence[283]. In *Van Rooyen* the CC did not engage with the issues that presented as problems of judicial independence for these countries but accepted the status quo as adequate authority.

The CC finds support in the *First Certification* case for rejecting the High Court's view that the power of the Minister to appoint magistrates is inconsistent with the constitutional principles of

282 *Van Rooyen* case op cit note 17 at para 107.

283 *Valente* case op cit note 21 at 702.

separation of powers.[284] The CC in the *First Certification* case made the following remarks about executive involvement in judicial appointments:

> '*Appointment of judges by the executive or a combination of the executive and parliament would not be inconsistent with the CPs. The JSC contains significant representation from the judiciary…It participates in the appointment of the Chief Justice, the President of the Constitutional Court and the Constitutional Court judges, and it selects the judges of all other courts. As an institution it provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments. In the absence of any obligation to establish such a body, the fact that it could have been constituted differently, with greater representation being given to the legal profession and the judiciary, is irrelevant'.*[285]

The CC in *Van Rooyen* proceeds to compare these powers of the JSC, referred to in the *First Certification* case, to the Commission's authority to recommend appointments to the Minister through the following remarks:

> *'It is thus clear that the fact that the Minister is not bound by the recommendations of the Magistrates Commission is not constitutionally objectionable. The First Certification Judgment held that the executive could have retained the power to appoint judges (and magistrates) itself without infringing the institutional independence required by the Constitutional Principles. Thus, 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 is a check on the exercise of executive power, and not a flaw in the appointment process'.*[286]

The cited *dictum* of the *First Certification* case seems to illustrate the very significant differences between the powers of the JSC and those of the Commission rather than their similarities and could in fact support a finding that is opposite to the finding on this issue in *Van Rooyen.* The JSC has the power and authority practically to select judges of all superior courts which is obviously a vastly greater power than the Commission's, to recommend the appointment of magistrates to the Minister. In *Van Rooyen,* the CC seems to disregard this important consideration which the *First Certification* case highlights in the cited dictum when it points out

284 *First Certification* case op cit note 5 at para 108.

285 Ibid at para 124.

286 Ibid at par 159.

that the political component of the JSC is not a particularly relevant consideration in the issue of judges' appointments. Not only is the reasoning in *Van Rooyen* arguably a non sequitur, it suggests that the power of the Minister to appoint magistrates without perceptible accountability (a power that the JSC does not have in the appointment of judges) is not inconsistent with the principles of separation of powers. This reasoning, it is submitted, is flawed: the Commission is arguably doubly disadvantaged in its primary function of ensuring the independent appointments of magistrates in view of not only the imbalance in the composition of its membership but also in its relative powerlessness in the final decision on the appointments made by the Minister.

Generally, therefore, the CC's finding of the authority in the law of foreign jurisdictions and its own precedent set in *First Certification*, that the Minister's power to appoint judicial officers is not inconsistent with principles of separation of powers, is problematic on many levels. It is also noteworthy that *Van Rooyen* presented an opportunity for the CC to critically engage with foreign law, international law, and domestic jurisprudence, to craft a solution that advances the judicial independence of lower courts: in this respect the CC's approach in trying to retain and preserve the class divisions between the levels of courts is a lost opportunity to advance the transformative ideals of the Constitution.

5.4.2.2.1.2 Security of Tenure

The large body of scholarly literature and jurisprudence on the significance of security of tenure as a primary means to ensure judicial independence is a strong indicator of its centrality to the separation of powers debate.[287] The independence that security of tenure affords judges, is the fundamental condition that enables them to adjudicate impartially without fear of dismissal. As such, security of tenure is the very essence of judicial independence from the very beginnings of the development of the concept of the separation of the power of the executive and the legislature for the purpose of preventing them from influencing independent judicial decision – making based on the rule of law.

In terms of section 174(7) of the Constitution, judicial officers of lower courts must be appointed by an Act of Parliament which must ensure that the appointment, promotion, transfer, or dismissal of, or the disciplinary steps against them, takes place without favour or prejudice. This

287 See - Chapter 4 Essential Conditions of Judicial Independence: Security of Tenure.

provision in effect requires that the legislation enacted to ensure the security of tenure of lower court judicial officers be in accordance with those provided by this section for the protection of the judicial independence of judges. It is noteworthy that section 174, unlike the Interim Constitution, omits to endorse the Magistrates Commission and impliedly the MA, in anticipation of new legislation with the more transformative outlook that the final Constitution envisages for the judiciary.[288]

The MA was enacted before the adoption of the Interim Constitution which vested all existing courts at the time with judicial authority and judicial independence. Thus, the MA is old - order legislation, arguably unnecessary,[289] enacted months before the Interim Constitution, by a previously non-democratic Parliament, at a time when MCs were manifestly not judicially independent. The suggestion that the Commission could effect the sea change of establishing institutional judicial independence for lower courts at the time is not justifiable under the circumstances. Clearly the idea of establishing the Commission was to ensure the continuance of the functioning of lower courts without disruption during the transition that was imminent. It is submitted that the primary objective of the Commission was to ensure that the new judicial administration did not negatively impact the status and service conditions of the magistrates serving at the time and evidently not particularly aimed at the development of security of tenure as an essential condition of judicial independence.

The CC in *Van Rooyen* was seized with the task of deciding whether the objectives of the MA and the means it employs to achieve those objectives, substantially accord with the values embodied in sections 165, 166 and 174 of the Constitution which are fundamentally different from those reflected in old order legislation such as the MA. *Van Rooyen* consists of several findings which in the final result saved the MA from being declared unconstitutional, but it may be argued that saving the MA from being rejected as unconstitutional does not mean that the security of tenure of lower court judicial officers is effectively protected under the MA, as required by the Constitution.

Although old order legislation that was not repealed was legitimised when the Constitution was adopted, the question is whether its legitimacy is consonant with the spirit and the values the

288 Constitution - Schedule 6.

289 See - notes 226-230 above.

Constitution espouses and importantly whether it reflects a generally transformative outlook. A central argument that is advanced in this thesis is that the MA was never intended to be transformational of the lower courts; on the contrary it seems to have been enacted on the eve of democracy with the aim of preserving the old order. [290]

A further significant consideration that the MA was not particularly aimed at protecting judicial independence is the fact that a disproportionately large number of provisions of the MA had to be modified, changed, or rejected outright by the CC in *Van Rooyen*, compared to those that passed the test for constitutionality and judicial independence without qualification. This is indicative of the lack of emphasis and engagement with principles of the separation of powers, judicial independence, and possible conflicts with the anticipated constitutional provisions prior to the enactment of the MA. It is submitted that if these matters had been discussed and debated before the MA was enacted it seems improbable that consensus could have been reached regarding their constitutional validity.

An overview of the treatment of some issues and the nature of the findings in *Van Rooyen,* evidences a degree of awkwardness in the deliberation on each challenged provision of the MA and MCA, to enable reconciliation of laws representing completely different value systems. In the process the core aspects of judicial independence: the distinction between institutional and individual judicial independence; the essential conditions of judicial independence and the mechanisms of protection of each essential condition for each level of courts, do not emerge clearly but seem to be rather vaguely scattered over the 270 paragraphs of the entire judgment. Given the suggestion that the MA could have had no vision of an institutionally independent lower judiciary at the time of its enactment, it is noteworthy that the CC makes findings on the security of tenure of magistrates without a theoretical analysis, distinguishing security of tenure as an aspect of individual judicial independence from security of tenure as an aspect of lower courts' institutional independence.[291]

Particularly significant in this respect is that security of tenure is an essential condition of judicial independence and as such ought to have received an appropriate degree of attention that such a universally accepted principle of constitutionalism ordinarily receives, as is evident from the

290 See - Chapter 5 at Sub – sec 5.3.

291 Franco and Powell op cit note 22 at 577.

discussion of this subject in Chapter 3. The decisions on various disputed issues were not based on the legal theories expounded by the various scholarly works or basic universal principles developed in the application of security of tenure to the concept of judicial independence.

In addition, the method adopted of analysing each disputed provision and delivering a separate decision in each instance, produced a voluminous final judgment which in effect consists of several different judgments on the constitutionality or otherwise of the relevant provisions of the MA. It is suggested that such a piecemeal analysis obscures rather than illuminates the fundamental principles upon which the court challenge was based and in the final analysis does little to establish how the various provisions of the MA ensure that magistrates are not at risk or objectively perceived, as such, of being unfairly dismissed or prejudiced for impartial adjudication, that may appear to be unfavourable to organs of government including the judiciary.

Chaskalson CJ acknowledges the significance of security of tenure when he remarks that 'protection against removal from office lies at the heart of judicial independence',[292] but immediately adds the following:

> *'The fact that members of the higher judiciary have greater protection than members of the lower judiciary, does not mean that the protection given to the lower judiciary is inconsistent with judicial independence. The question depends upon the nature of the protection given to the members of the lower judiciary viewed in the context of the functions that they are required to perform'.*[293]

This remark implies that the CC accepts that the security of tenure of magistrates is not protected as well as that of judges but the weaker protection of security of tenure is justified because the nature of lower court judicial functions does not require the same level of protection of judicial independence as higher courts. The CC seems to assume that magistrates in South African courts perform judicial functions that do not expose them to the high levels of the risk of reprisals which apply to judges. Yet gauging by the relatively large number of misconducts enquiries[294] brought by the Commission and recommended by it for impeachment of magistrates, it may be argued that the vulnerability of magistrates to insecurity of tenure since the MA was enacted,

---

292 *Van Rooyen* case op cit note 17 para 161.

293 Ibid.

294 The Coalface of Justice: An analysis of misconduct proceedings against magistrates in South Africa. *Democratic Governance and Rights Unit* University of Cape Town. First edition 2020 at 27. See also Olivier note 2 at 342.

may not be any lower than when MCs were a part of the executive. Indeed, it is remarkable that although all courts and judicial officers' function independently according to the Constitution, not a single judge has faced impeachment at any time for misconduct[295]. It is common knowledge that there was no tribunal established for misconduct enquiries against judges before the judicial conduct crisis referred to in legal writings as the 'Hlophe Saga'[296]**.** However, this lacuna reflecting a legacy of the English law approach to judicial conduct, is a manifestation of the discrepancy existing in the old order law that magistrates are not as deserving of judicial independence as judges are. The CC in *Van Rooyen* has also, it seems, had no regard for the inequality represented under the circumstances between judges and magistrates.

If indeed as lower court judicial officers, magistrates should not be entitled to the protections higher court judicial officers are entitled to, the question must be asked: on what principled legal basis must the different protections be structured? As the central issue in *Van Rooyen* this ought to have been properly interrogated but the reasons for the various findings in this case do not reflect that it was.

As discussed above, the Canadian Supreme Court's decision in *Valente* to a significant extent influenced the CC's findings in *Van Rooyen* and in particular its reasoning that the essential conditions of lower courts' judicial independence need not be protected as strongly as that of superior courts. Based on the rationale in the discussion above, it is argued that the relevant dictum from *Valente* does not constitute adequate authority on which the CC made the finding that security of tenure of lower courts need not be protected as that of superior courts are.

There seems to be an assumption that the judicial function of magistrates does not involve judicial decision – making of a 'sensitive' nature,[297] implying that lower court decisions do not affect legislative and executive authority. This assumption disregards the fact that most serious criminal disputes are decided by magistrates who may make decisions that are not favourable to the state and against which the state will not have the right of appeal or review. The state or its many agencies are regularly also parties in civil disputes before lower courts involving unlawful conduct or malpractice on the part of state employees or even public office bearers.

295 At the time of writing the JSC had recommended to the National Assembly that Hlophe JP be subjected to impeachment proceedings.

296 Olivier op cit note 241 at 188.

297 *Van Rooyen* case op cit note 17 at para 25.

Magistrates' findings against the state as employers directly or vicariously will be likely to have some impact on the relevant organ of authority. The CC's main findings in *Van Rooyen* related to security of tenure are examined in the light of these considerations.

5.4.2.2.1.2.1 Grounds for Impeachment and Removal of Magistrates

The MA provides for the dismissal of a magistrate upon grounds of misconduct, continued ill health or incapacity to carry out duties efficiently. The CC did not find these grounds to be inconsistent with judicial independence for the following reasons:[298]

(i) The grounds for dismissal of judges in other common law jurisdictions are the same.
(ii) Similar grounds for dismissal are considered appropriate protection of independence of officers of Chapter 9 institutions.
(iii) The Commission has to make its own recommendation after that of the judicial officer presiding over an impeachment enquiry.
(iv) Natural justice rules are applied.

The issue at hand was whether the security of tenure provisions of the MA ensure that dismissal or disciplinary action against magistrates, takes place without favour or prejudice. The test for judicial independence is an objective one: whether the security of tenure of magistrates is perceived by the reasonable well-informed observer to be adequately protected.[299] The following analysis of the reasons given by the CC for its answer in the affirmative to the question posed suggests that the principles of separation of powers and judicial independence were not sufficiently interrogated and therefore there is an apparent disconnect between the enquiry and the outcome.

(i) Misconduct or continued ill- health or incapacity to function efficiently are the grounds for removal of judges in various other common law jurisdictions.

Generally, 'good behaviour' is the foundational measure by which the security of tenure of judges is and has been assessed for centuries. Viewed in the context of its early application and this formulation was crafted to curb the power of monarchs and the executive to arbitrarily dismiss

298 Ibid at para 158 – 211.

299 *De Lange* case op cit note 76.

judges serving at their 'pleasure'. The primary aim of this convention in common law jurisdictions was evidently not to set up an elaborate enquiry to determine the fitness of judges to hold office but to enable judges to adjudicate fearlessly. The fact that the impeachment of judges for misbehaviour in common law jurisdictions is extremely rare lends credence to this observation.

It is submitted that the comparison in *Van Rooyen* between the grounds for removal of magistrates as provided in the MA and the conventional practice in well – established democracies appear to be made outside of the relevant context and is thus inappropriate. The MA in fact contains a large body of regulations that suggests micro – management of the conduct of magistrates by the executive through the Commission.[300]

(ii) The Comparison of Judicial Independence with Independence of Chapter 9 Institutions.

In finding that security of tenure to ensure judicial independence of lower courts is adequate because the independence of Chapter 9 institutions is similarly protected by the Constitution, the CC seems to disregard the basic tenet of judicial independence that *all* courts are only subject to the Constitution and the law, hence the comparison is of doubtful relevance.

The CC in making this comparison also omits to refer to the critical difference between the judicial independence of courts and the independence of Chapter 9 institutions which is contained in section 181(5) of the Constitution, in that the latter are accountable to the National Assembly and requires them to report their activities to it annually. On the other hand, no court is accountable to any given organ of the state because of the applicability of judicial independence uniquely to courts.

(iii) The Role of the Magistrates' Commission in Ensuring Security of Tenure.

The Commission has an important role in deciding whether a magistrate should be dismissed on any of the grounds provided in the MA. The recommendation of the Commission is a requirement for all matters regarding the appointment, promotion, transfer, and disciplinary steps of judicial officers of lower courts.[301] In terms of this provision the regulations made in respect of discharge and disciplinary steps, would require the recommendation of the Commission. Section

300 Olivier op cit note 2 at 349.

301 Magistrate Act - Section 16.

6A provides that the Minister 'shall make regulations (a) creating a structure and prescribing procedures in terms of which members of the public may report to such structure any alleged improper conduct or any conduct which has resulted or might result in any impropriety or prejudice on the part of the magistrate and (b) determining the powers and functions of such structure.' Section 6B provides for the establishment of committees or a committee to deal with complaints. Section 6C refers to the aspect of judicial independence and non – interference by the committee or Commission.

These regulations, called the Complaints Procedures Regulations,[302] were purportedly passed according to law, however, they are not being applied in practice as it appears that they were not first recommended by the Commission. In effect there are no formal complaints procedures through which disciplinary steps against magistrates may be initiated or processed, as the committees referred to in the regulations were never established. It is a concern that the CC in *Van Rooyen* seemed unaware of this lacuna and proceeded to make findings regarding these regulations on the assumption that they had the force of law. It seems also extraordinary that Counsel representing the state and the Minister of Justice omitted to bring this discrepancy to the attention of either the High Court or the CC.

The CC in rejecting the High Court's finding that section 6 and the regulations it provides for, are inconsistent with the Constitution, stated as follows:

> *'There is no basis for this finding. It fails to have regard to the fact that section 180(c) of the Constitution makes provision for a complaints system to be determined by national legislation. National legislation is defined in section 239 of the Constitution as including subordinate legislation made in terms of an Act of Parliament. It fails to have regard to the fact that the regulations passed by the Minister are subject to constitutional control. If they contain provisions that are inconsistent with the independence of the courts they will be invalid for that reason, not because they were made at the instance of the executive'*.[303]

302 Complaints Procedure Regulations, 1998, GN R1240 in GG 19309 of 1 October 1998.

303 *Van Rooyen* case op cit note 17 at para 100.

303 Ibid at para 128.

According to section 180(c) of the Constitution; 'National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including-…(b) procedures for dealing with complaints about judicial officers…'.

National legislation does provide for a complaints system for dealing with complaints against magistrates and that the Minister must make the appropriate regulations. However, a complaints system was not established and the relevant regulations that were passed into law without the recommendation of the Commission were relied upon by the CC in finding that the impeachment procedures provided for in the regulations are not unconstitutional

The act of the Minister in making regulations without the prior recommendation of the Commission 'will not be valid' as the CC itself points out.[304] This situation presents as gravely problematic and prejudicial for both complainants and accused magistrates, it would have been incumbent upon the Commission and the Minister to remedy it without delay.

The power to impeach magistrates through an ordinary resolution of Parliament and ultimately the security of magistrates` tenure rests with the Commission. All substantive and procedural aspects regulating the enquiry into fitness of magistrates to continue to hold judicial office, upon being accused of misconduct, incapacity owing to ill – health, or incompetence are determined by the Commission. These powers include the following: determining the nature of conduct that may constitute misconduct; deciding what constitutes incapacity; and determining what constitutes inefficient performance of judicial functions.

The Commission also has the authority to decide what accusation of misconduct requires a preliminary investigation and what constitutes sufficient information to initiate a preliminary investigation. Further, the Commission has the sole authority to decide to dispense with a preliminary investigation and proceed with misconduct enquiry and suspend the magistrate without pay before the misconduct enquiry has commenced.[305] The CC found that it is not unconstitutional for the Commission to suspend a magistrate before the finalisation of a disciplinary enquiry and impeachment, and it also found that it is not objectionable that a magistrate is not paid during the suspension period if the Commission so recommends. The CC

---

305 Magistrates Act - Section 13(3)(a) and (b).

stated: ‘There is no reason why a magistrate who is not fit to hold office, and is removed from office for that reason, should be paid for the period during which she or he is under suspension prior to removal.’[306]

This remark suggests that a magistrate may be presumed to be guilty even before guilt has been proved and is contrary to all fair trial principles and rights and under any circumstances is prejudicial, regardless of the profession or office of the person accused of misconduct. It is submitted that such a remark should give cause for considerable concern, especially when expressed by the highest court in the land. The implications of such power are far – reaching and are likely to have severe consequences that may have the potential to be disproportionately harsh in relation in the outcome of the misconduct enquiry.

It seems that the CC holds the view that repayment of salary, withheld during suspension, without time limits, has no prejudicial consequences for the magistrate, if not finally removed from office.[307] It is submitted that such a view held by any court would be incorrect as the financial hardships visited upon a judicial officer during the period without salary cannot be adequately ameliorated by restoration of remuneration if the misconduct enquiry of the Commission fails. Such a view of the court would probably be surprising also, considering that such obvious prejudice is ‘anti – judicial’.

The CC seems to lightly dismiss the notion that the prejudice in this instance is unjust but does not explain the principle invoked to justify such prejudice. The question does arise though as to why such a drastic measure as suspension without pay is necessary prior to impeachment and removal of a judicial officer. Although in appropriate cases suspension from office may be clearly necessary pending the enquiry into misconduct to ensure the integrity of the judiciary, the necessity to withhold remuneration is not so obvious. The imputation is inescapable that this measure embodies a punitive element and has the effect of pressurising an accused magistrate to resign by disabling access to resources needed to defend against litigation by the state with vastly larger resources.[308]

306 Op cit note 17 at para 175.

307 Ibid.

308 Ibid.

There is also the perception that magistrates accused of misconduct tend to use delaying tactics to remain in paid employment for as long as possible and therefore should be blamed for the long delays experienced by the Commission's tribunals in finalising enquiries[309]. The regulation that permits suspension without pay is seen to deter the accused magistrate from delaying finalisation of the enquiry through the removal of an incentive. If indeed the main purpose of this regulation is simply no more than a strategy to hinder the right of recourse of a judicial officer to fair dispute resolution, it is undoubtedly a most undesirable wielding of power by the executive over a judicial officer.

Although it may be true that an accused magistrate may attempt to defer a negative anticipated outcome by interrupting the smooth flow of the process with intervening applications of various types, the tribunal has the responsibility to decide each application on its own merits in the usual way. It is plainly a mistake to blame unduly long delays on the respondent magistrates when only the tribunal can allow such delays. In any event there is no evidence that long delays are solely caused by respondent magistrates as some postponements may be at the instance of the state or the tribunal itself. The point that needs to be emphasised in this regard is that the harm inflicted, and the prejudice visited upon the accused magistrate by this law cannot be justified under the rule of law. The probabilities are that several options would be available to the state to recover financial losses should the enquiry finally lead to removal of the magistrate from office. A regulation that permits the suspension of a magistrate without pay, constitutes an egregious attack on the security of tenure of a judicial officer and as such ought not to have passed constitutional muster.

Apart from the applicability to magistrates of the general principle of fair dispute resolution, the core issue, being security of tenure of judicial officers and judicial independence, calls for consideration of the universally applied minimum standards and safeguards. The integrity of the Commission as the disciplinary tribunal and the right of review of administrative action that the CC finds to be satisfactory mechanisms for security of tenure of judicial officers,[310] arguably, do not meet the appropriate and acceptable relevant standards.

309 Ibid. see - https://www.news24.com/news24/southafrica/news/magistrates-use-every-trick-in-the-book-to-delay-disciplinary-hearings-parliament-hears-20190829. Last accessed 22 November 2020.

310 *Van Rooyen* case op cit note 17 at para 176.

The wide discretionary powers of the Commission to closely regulate the conduct of judicial officers may create the perception that magistrates are accountable to the Commission. One of the objectives in establishing the Commission was to prevent the executive from dismissing magistrates arbitrarily but the considerable regulatory powers vested in the Commission may have the effect of contradicting this objective. Besides the considerable power of the Commission conferred upon it by the regulations governing dismissal of magistrates, that may create the perception that the Commission may not be sufficiently independent of the other arms of government, the composition of the membership of the Commission does not reflect that it functions independently from an objective perspective. The fact that the overwhelming number of recommendations for dismissals had resulted in impeachments by Parliament and confirmation by the executive since the establishment of the Commission, does not gainsay this perception.

The regulatory framework that deals with the security of tenure of magistrates does not seem adequate for the nature of the responsibility implicated, and the risk of unreasonable, arbitrary, or even prejudiced findings is considerable. Accordingly, the Commission would be unable to ensure that the dismissal of magistrates is not contrary to the principles of judicial independence and that the appropriate level of separation of powers can be maintained.

As the security of tenure of judicial officers is a core element in the determination of whether the court in which the judicial officer presides is perceived to be independent, the focus should be directed at the nature of the external objective conditions of impartial judicial decision – making. Analysis and considerations of the CC in *Van Rooyen* that the MA adequately provides for the security of tenure of lower court judicial officers, show that this outcome, arguably, conflicts with the universally required minimum standards for judicial independence.

5.4.2.2.2 Financial Independence

As the discussion of the subject of remuneration of judicial officers in Chapter Three indicates, financial independence is an aspect of institutional judicial independence impacting the relationship of the judiciary with the other organs of government that control the remuneration of judicial officers. At the time *Van Rooyen* was decided the law applicable to the determination of salaries entitled the Minister of Justice to determine magistrates' salaries in consultation with the Commission.

Section 12 of the Magistrates Act deals with the determination of magistrates' salaries. The CC held that there were 'significant guarantees,'[311] including the right to judicial review, that ensured that lower courts' judicial independence was not violated. It is not clear what the CC means by 'significant guarantees'. Considering that section 12(6) of the MA which provides that the remuneration of magistrates shall not be reduced except by an Act of Parliament, does ultimately entitle the legislature to reduce salaries of magistrates, the term guarantee seems meaningless.

The CC seems to rely on the power and the integrity of the Commission in finding that the financial independence of judicial officers of lower is adequately protected as it did in respect of other aspects of judicial independence. This is clearly suggested in the following remark by Chaskalson CJ: 'Although the majority of the members of the Commission are nominees of the legislature and the executive, I do not think that in itself, this undermines the role of the Commission as an independent intermediary in the determination of magistrates' salaries.'[312] This statement reflects an interpretation of judicial independence that is inconsistent with the notion that the core characteristics that go to determining whether a court is independent is tested from the perception of the reasonable observer. The test is not the reasonable perception of impartiality of the institution that participates in determining the remuneration of judicial officers but the reasonable perception of the presence of external objective conditions that magistrates' remuneration is not arbitrarily determined or reduced. It is unlikely that the Commission's composition, reflecting such an obvious imbalance of interests, may be reconcilable with a reasonable perception of being independent.

Since the judgment there has been a development in the procedure in determining the remuneration of magistrates, in that the Independent Commission for the Remuneration of Public Office Bearers Act[313] (Remuneration Act) was amended to include magistrates as public office bearers. However, all this amendment implies is that the Minister of Justice has no longer any direct influence in the fixing of salaries of judicial officers as it was when the Minister determined salaries of magistrates after recommendations of the Commission. This function of the Magistrates' Commission was replaced by the Independent Remuneration Commission (IRC) which is required to consult with representatives of public office bearers (which excludes public

311 *Van Rooyen* case op cit note 17 at para 148.

312 Ibid.

313 Act 92 of 1997.

servants) before making recommendations to the President on the salaries of all categories of public office bearers. The President is not obliged to accept the recommendations of the IRC and is not bound to even entertain submissions of categories of public office bearers.[314]

Whereas the Commission's independence would have been considerably weakened by the weight of political influence previously, the IRC's relationship with the lower courts in the specific role of salary determination is encumbered by the lack of any mechanism that separates processes impacting on the judicial independence of lower courts from those of other public office bearers.[315] As the CC in this case acknowledges: 'Parliament and the executive, the other two arms of government, are in a different position. They have control over the public purse and are entitled through legislation and executive action to determine their own remuneration and conditions of service.'[316]

The obvious difficulty that confronts the lower court judicial officers but not judges, is the failure of the CC in both *Van Rooyen* and *ARMSA* to acknowledge the lack of a clear constitutional provision that ensures that the remuneration of judicial officers may not be reduced except as a 'coherent part of a public economic measure' [317] There seems to be considerable reluctance on the part of the political branches to align the primary provision in the Constitution that MCs are independent with various laws including section 12 of the MA that have the effect of contradicting it. The CC in this instance of financial independence as in other essential conditions of judicial independence places a high degree of reliance on judicial review and the protection of superior courts to safeguard the financial independence of judicial officers of lower courts. The findings in *ARMSA* demonstrate how easily political organs can see off court challenges in respect of judicial remuneration when laws protecting judicial independence are not constitutionally guaranteed or entrenched. As the CC observes in *Van Rooyen:*

> *'Judicial officers ought not to be put in a position of having to do this, or to engage in negotiations with the executive over their salaries. They are judicial officers, not employees, and cannot and should not resort to industrial action to advance their interests in their conditions of service. That makes them vulnerable to having less attention paid to their legitimate concerns in relation to such*

314 ARMSA op cit note 230 at para 58.

315 *Van Rooyen* case op cit note 17.

316 Ibid at para 139.

317 *Re Provincial Court Judges* op cit note 123.

matters, than others who can advance their interest through normal bargaining processes open to them'.[318]

The CC's finding that section 12 of the MA is not unconstitutional represents a significant setback to the attainment of *de facto* conditions of independent judicial functioning of lower courts. Importantly it does little to change the perception of the reasonable observer who is conscious of the history of MCs that magistrates may be manipulated by the political branches as they depend on the latter to perform their functions. Under the circumstances the objective perception of impartiality may become constrained.

5.4.2.2.3 Administrative Judicial Independence

In defining judicial independence *Valente* categorised the elements of security of tenure and financial independence as aspects that determine the individual independence of judges while it held that the independence of the institution to which the judicial officers belong is necessary to guarantee the institutional independence of the judicial officers as a collective.[319] This court states that collective institutional independence was a facet of independence concerned with matters of administration bearing directly on the exercise of the judicial function.[320] *Valente* further distinguished between adjudicative administrative functions and purely administrative functions and stated that the former is most important in ensuring the independent functioning of courts.[321] However there is a lack of a clear theory by which to distinguish between adjudicative administrative functions and purely administrative roles that affect court functioning. According to Franco and Powell, *Valente* seems not to reflect a vision of institutional judicial independence and accordingly also does not deal with the principles of separation of powers in any substantial detail.[322]

In some respects, the lack of engagement on the issues of administrative judicial independence in both *Valente* and *Van Rooyen* may be associated with the historical contexts in which these issues were being considered. *Valente* being a Canadian judgment was decided according to the level of administrative independence of tribunals in relation to the executive government of

318 *Van Rooyen* case op cit note 17 at para 139.

319 *Valente* case op cit note 21 at 687.

320 Ibid.

321 Ibid.

322 Franco and Powell op cit note 22.

the tribunal concerned. Similarly, the MA was passed when the government was still a parliamentary sovereignty and when *Van Rooyen* was decided there was no vision of the magistracy having any administrative independence.

It is submitted that as the definition of judicial independence was an important part of the issues that had to be determined in Van *Rooyen*, the question of the autonomy of courts regardless of the level of the court in the hierarchy, required careful consideration. The CC in Van *Rooyen* did not give this any attention although the opportunity to do so presented itself when the definition of institutional judicial independence was discussed. This omission lends support the view that Van *Rooyen* may not be seen as wholly authoritative on the question of whether MCs function as independently as the Constitution requires them.

Section 165 of the Constitution unambiguously provides that MCs are independent and leaves no room for suggestion that the independence of lower courts is in any manner different from the independence of the superior courts. Arguably, the laws enacted for the protection and support of lower courts' independence, ought to have equal or equivalent effect as those for the superior courts.

Administrative judicial independence is the centre of court autonomy and impacts on the right of access to lower courts particularly severely as the everyday operation of court functions requires a high level of efficiency to ensure that court users are not prejudiced through the lack of judicial control of administrative functions of courts. The CC in Va*n Rooyen* seems to accept the definition of administrative independence according to that given in *Valente*[323] but *Valente* may not be the most appropriate authority in respect of the issues of administrative judicial independence as the relevant Canadian jurisprudence[324] indicates. The lack of thorough interrogation of this subject in *Van Rooyen* is a further indication of the unjustifiably low value that has been accorded to judicial functions of lower courts.

5.4.5. Concluding Remarks on the Van Rooyen Judgment

The CC's approach to the laws governing and regulating MCs, reflects a level of restraint and deference to the legislature and executive that may be perceived as invalidating the cause that gave rise to the initial issues litigated before the High Court. The idea seems to be the

323 *Van Rooyen* case op cit note 17 at para 29.

324 See - Franco and Powell op cit note 22 at 576.

preservation of the law as far as possible, as the alternative, foreseeably, could cause considerable disruption for the then, newly established independent judiciary and a need for urgent legislative and executive action. From the perspective of the philosophies of constitutionalism, judicial restraint and jurisprudential conservatism as opposed to judicial action that compels change, the approach in *Van Rooyen* may be justified. [325] From the perspective of the applicants in the cause of action, however, the approach of the CC in this case appears as flatly dismissive, leaving little room or opening from which to revisit those serious concerns of lower court users, upon which the cause of action was founded.[326] In this respect the judgment represents a setback in the realisation of the vision of a unified judicial system, in that it has served to endorse the historically inferior classification of Magistrates' courts in perpetuity. In the process the instrumental value of lower court judicial independence was not acknowledged and in fact bypassed**.**

This thesis posits the view that the approach of the CC in *Van Rooyen,* in not recognising the value of lower courts in providing the most accessible and effective forum for the majority, since the establishment of the constitutional democracy and an independent judiciary, is contrary to transformative constitutionalism which requires the superior courts and the CC in particular to adjudicate with a transformative outlook. As Mhango observes, 'the South African transformative project presupposes a unique approach to constitutional adjudication that is aimed at achieving the transformative objectives and values of the Constitution'[327] Citing the remarks of Moseneke J, Mhango states:

> '…*In order to achieve the Constitution's transformative objectives, there is a need for a judiciary that embraces and actively engages in transformative adjudication. 'Transformative adjudication …is a way of achieving transformative constitutionalism: it is what judges must do in order to achieve the aims of transformative constitutionalism*'.[328]

From the perspective of this thesis, not only was the adjudication of the CC in *Van Rooyen* not transformative, but it has had the enduring negative impact of suspending the development of

325 *Van Rooyen* case op cit note 17 at para 88.

326 Ibid at para 86.

327 Mhango op cit note 198 at 79.

328 Ibid.

judicial independence for lower courts by retaining the MA and MCA intact, which is arguably contrary to the transformative vision of the Constitution.

The provisions in section 165 referring to the protection of institutional independence of the courts must be considered against the protection of judicial independence of judicial officers, provided for in terms of section 174 (7). This sub – section provides the constitutional mandate for an Act of Parliament to provide for the independent appointment of magistrates and for the protection of the security of tenure of magistrates. As the appointment and security of tenure of superior court judges are provided for in the same section of the Constitution, this indicates that the legislation, aimed at ensuring that the appointment of lower court judicial officers is independent and their security of tenure is protected, must accord with the constitutional objectives envisaged for the independence of judges. The Constitution does not explicitly or implicitly suggest that the legislative or other means that are required to ensure the individual judicial independence of magistrates or the institutional independence of MCs, albeit different, may be inferior to that mandated for judges.

There also appears to be no evidence of the establishment of an adequate theoretical premise upon which the findings could be made that the legislation in question does secure all the essential conditions of judicial independence in terms of the approved definition. The implication of this discrepancy is that, based mainly on its interpretation of the meaning of institutional judicial independence, which was substantially derived from Canadian case law, the CC in *Van Rooyen* rejected the High Court's finding of unconstitutionality of the MA. However, there remains much uncertainty as regards the legal justification for the inequality in the standard of judicial independence provided for the lower courts as that for the higher courts. Therefore, the *Van Rooyen* judgment should not be viewed as the most authoritative on the question of whether the organs of the state by legislative or other means do ensure that lower courts are functioning independently and effectively. As Franco and Powell aptly point out in the following remarks:

> *'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'.*[329]

Van Rooyen is remarkable for the absence of a vision of a transformed judiciary that serves the most historically disadvantaged, vulnerable, and marginalised persons as it should serve all others that approach it. It seems that the CC in *Van Rooyen* focuses on the MCs 'historical image' as not yet quite deserving of the upper-class status of the higher courts and tends to distance the courts from the communities they serve by validating the close connections of MCs with the executive which is reminiscent of the history of MCs.

Van Rooyen presented an opportunity to reflect on the insights of the judicial transformation discourse and 'transformative adjudication' that could have changed the course of lower court functioning and considerably advanced the accessibility of the judiciary to those who had been previously excluded from it. The main shortcoming in the approach to institutional independence, is that it fails to recognise the significance of the guarantee of judicial independence of MCs and its special value in advancing the right of access to courts and justice for everyone, that is enshrined in the Bill of Rights.[330]

5.5 Conclusion

MCs' functioning is determined by laws that prevent the full realisation of transformational objectives. The MCA is administered by the Department of Justice and Constitutional Development and controls all aspects of judicial administration of MCs while the MA through the Commission deals with the governance of magistrates with only limited powers to ensure the institutional independence of MCs and individual independence of magistrates. The MA, being an ordinary Act of Parliament, cannot protect the independent functioning of MCs as effectively as appropriate provisions in the Constitution can. It is submitted that for lower courts to function as the Constitution envisages, both the MCA and the MA would have to be repealed and replaced by laws that provide that judicial independence of all aspects of lower court functioning is as well protected as those of courts higher in the judicial hierarchy. The universal minimum standards of judicial independence determined by international law principles as well as the best practices that have developed in well-established democracies should be the guidelines that inform the domestic law on judicial independence.

329 Franco and Powell op cit note 22 at 577.

330 Constitution - s 34.

Much has been written and said, especially in the earlier years of democracy, about judicial transformation. There seems to be some broad consensus that judicial transformation as a multi – faceted concept is conducive to various interpretations and meanings. There also seems to be agreement that although the Constitution signalled the need for judicial transformation to begin in earnest it envisions an ongoing process of change that constantly looks to fulfilling the fundamental right of access to courts. However, there is a thinness in the discourse on how transformation of the judiciary may impact on the communities which depend on lower courts as the centre of help for the countless number and variety of problems they encounter in their daily lives.

Any policy or plan for a programme of action towards transformation of the judiciary that omits the lower courts from its purview, is unlikely to be perceived as a positive development, because public confidence in the judicial system is developed from the experiences of most court users. This thesis argues that because the fundamental structural legal framework that was inherited from the pre – constitutional era continues to dominate every aspect of the functioning of the lower courts, the idea of transformation of access to courts and justice is unrealistic. As the foregoing discussion indicates, the MCA, MA, and the CC's decision in *Van Rooyen,* that affirms the validity of these laws, impede, hinder, and even constitute a blockage to transformation. Therefore, it is argued that while these laws are retained in form and substance, the transformation of the judiciary is not achievable.

For as long as the magistrate/ judge dichotomy underpins and frames the debates about the judicial independence of lower courts, the more elusive remains the vision of effective and equal delivery of justice to all citizens. There is merit in preserving the hierarchical structure of courts in a judicial system. However, the maintenance of artificial divisions under completely different governing bodies is unreasonable and unnecessary in a constitutional democracy. The hierarchical structure ought to serve a particular purpose that is not suggestive of an inferior quality of justice, the lesser competence of judicial officers, or the lesser or greater importance of judicial functions of the court. The true value in the preservation of the hierarchy of courts should be premised on principles beyond the inferences of inferiority apparently suggested by the Constitution according to the CC in *Van Rooyen*

If the main reason for maintaining the hierarchy of courts is the fact that it facilitates due process of dispute resolution from the entry point through to the highest court of appeal and review, then

perhaps the hierarchical system requires no further justification than a claim of the right of recourse and access to a higher court. The hierarchical structure is also conducive to the operation of the well-established common law convention of judicial precedent or *stare decisis*. However, the structure of the judicial system to enable due process should not be interpreted to suggest that the courts of first instance or the decisions of all lower courts are inferior if not approved by a higher court. Such an interpretation would contradict the fundamental right to equality before the law especially for those who are unable to access the higher courts for any reason.

The Constitution envisions an integrated, single, and unified judiciary in which there is no need for a separate, inferior magistracy that is a remnant of English lay magistrates' [331] courts. This notion of a transformed judiciary is envisioned by academics and judges, Mhango,[332] Mtshaulana,[333] Van Dijkhorst,[334] Olivier,[335] and Mogoeng CJ.[336]

According to the *Discussion Document on the Transformation of the Judicial System*,[337] published by the Department of Justice:

> *'The Constitution envisages a single unified judicial system with a hierarchical court system…A single judiciary is broadly a mechanism through which judges and magistrates, as judicial officers are appointed and regulated in a manner that is consistent with the independence of the judiciary'.*[338]

331 See - Seago *et al* op cit note 41 at 10. See also Morgan R; Russell N made this remark in the introduction to a report titled 'The Judiciary in the Magistrates' Courts' (University of Bristol) 2000 at page xiii which was commissioned by the Lord Chancellor and British Home Office. Also see, Chanock M 'Writing South African Legal History: A Prospectus' *The Journal of African History* (1989) 30 265 – 288 at 269.

332 Mhango op cit note 198 at 68.

333 Mtsaulana P M *Advocate* (2008) 1.

334 See - Van Dijkhorst K 'The future of the Magistracy' (2000) First Term *Advocate* 39 – 42.

335 Olivier op cit note 2 at 354.

336 Moegoeng M 'Single Judiciary discussed at Judicial Officers Association AGM' (2014) March 8 – 10 at 8. See also s 8(4)(c) SCA 10 of 2013.

337 Department of Justice and Constitutional Development 'Discussion Document on the Transformation of the Judicial System (2012) February.

338 Ibid at para 4.2.6.4.

One of the main features of a single judiciary is the 'establishment of a single governance framework for the judicial officers of the superior courts and lower courts under the Chief Justice as head of the judiciary'.[339]

A unified judicial system was envisaged by the Constitution of 1996 and a *Five Year Plan* was developed according to 'Justice Vision 2000'[340] attributed to the late Dullah Omar, the first Minister of Justice in the democratic South Africa. No progress was made on this plan. The enactment of the SCA[341] and the establishment of the Office of the Chief Justice[342] appear to have re-commenced with the process to transform the judiciary in line with the Constitution. However, there is but little evidence to suggest that lower courts are any closer to attaining a level of judicial independence that appropriately equips them to administer justice effectively and efficiently. Some degree of autonomy in the accessing, allocating and managing resources for court functions is an essential aspect of administrative judicial independence. In the following chapter the study examines these challenges and shows how the principle of judicial independence is integrally connected to the right of access to lower courts in South Africa.

339 Ibid at para 4.2.6.6 (a).

340 Ibid at para 2.5.8.

341 Act 10 of 2013.

342 Constitution 17th Amendment Act 2012.

CHAPTER SIX

The Right of Access to Courts and the Independent Judicial Functioning of Lower Courts

6.1 Introduction

> *'A right which is not properly implementable is no right at all. A right of access to courts counts for nothing if the courts in question are unable or unwilling to provide the adjudicative context which the right in question requires. In this connection, the right of access to courts is perforce a right of access to courts staffed by judicial officers who are independent and impartial, who are able and willing to discharge their functions without fear or favour or prejudice'.*[343]

The Constitution provides that everyone has the right to have any dispute resolved in accordance with law and in a fair public hearing.[344] The right of access to courts promotes democratic governance by providing society with the basic mechanisms to have disputes resolved fairly by impartial and independent courts, applying the laws of the land. Thus, it may be said that the right of access to courts embodies and connects these three basic components; fair dispute resolution; the law; and courts. Each of these manifests significant values but the right holds no meaning unless these constituent parts are harmoniously conjoined to attain the objective of ending a conflict. Section 34 of the Constitution distinguishes courts from other dispute resolution institutions as the discussion of *Van Rooyen* indicates; the distinguishing factor being the guarantee of judicial independence of the courts which need not be present for other dispute resolution entities. The right of access to dispute resolution is a fundamental human right universally[345] because the value of the right is an essential aspect of governance in a constitutional democracy. The guarantee that the judiciary is independent of other state organs

343 McCreath H and Koen R 'Defending the Absurd: The Iconoclast's Guide to Section 47(1) of the Superior Courts Act 10 of 2013' (2014) 17(5) *PER/PELJ* 1788 – 1826 at 1808.

344 Constitution - Section 34.

345 See - Chapter 3 Note 106 to 109.

underscores the value and significance of the right and the importance of ensuring its full realization.

The right of access to courts in contemporary discourse has popularly been viewed as a means of ensuring the fairness of dispute resolution from the position of the disputants 'in the arena'. The idea of the court itself as an indispensable component of the right may not be highly visible in the scholarly literature, yet it constitutes the essential element in society's notion of access to a neutral and competent arbiter. The function of lower courts in ensuring the fulfilment of this right seems to feature even less in the public debates although the interactions of lower court users with the judiciary is the most voluminous. This could be attributable to the pre – democratic history of MCs, when not only was the independence of the courts not guaranteed but MCs were not readily accessible to all and obviously therefore, even less perceived as effective in resolving disputes for all who need such service. The process of transforming the lower judiciary in order that this right may be fully realized has lacked momentum for various reasons discussed in Chapter Five. It will be argued in this chapter that the historic impediments to independent and effective lower courts continue to hinder the realization of the right to bring disputes before a court and have them effectively resolved.

This chapter focuses on the significance of judicial independence in lower court dispute resolution and in particular on the role of the political branches in providing the essential conditions that enable the courts to adjudicate effectively. It will be argued that effective judicial resolution of disputes requires that the courts be institutionally independent as judicial independence is an integral aspect of effective court functioning. As the former Chief Justice Sandile Ngcobo aptly observes:

> *'The key to a successful transition into a society where democratic values, social justice and fundamental human rights prevail- is the ability of our people to meaningfully assert and claim the rights in the Constitution and in the Bill of Rights. The constitutional guarantee of the right of access to courts provides a vehicle for our people to vindicate these rights…But if courts are to perform this crucial role they must be independent and impartial…Just as public confidence in the courts…would be undermined if the courts are not independent public confidence in the judicial system would equally be undermined by an ineffective, inefficient and inaccessible justice system'.*[346]

346 Ngcobo S "Enhancing Access to Justice: The Search for Better Justice" is the title of the speech given by Chief Justice Sandile Ngcobo in the opening remarks of the Access to Justice Conference held in Johannesburg 7 -10

Ensuring that the courts function effectively is a constitutional imperative.[347] In its ordinary meaning 'effectiveness' describes the degree to which something is successful in producing a desired result.[348] Hence courts may be described as effective when disputes are mostly resolved correctly, promptly, fairly, and satisfactorily for the parties and in accordance with substantive and procedural law. Axiomatically, judgments and judicial decisions that are erroneous, unfair or unduly delayed are ineffective and result in diminishing the value of the right of access to courts. Effective dispute resolution in lower courts requires in the main two ingredients: the first is the quality of adjudication by the judicial officer, involving the application of substantive and procedural law; and the second is the expedition with which disputes are resolved i.e. without undue delay. The political branches, particularly the executive, have important roles in both these aspects of judicial functions, although they impact on the right of the court user in different ways.

The quality of adjudication is the core aspect of the judicial function and involves the competence of the judicial officer in deciding the dispute correctly and fairly per the law. Obviously, judicial officers must be accountable for their decisions, as judgments have consequences not only for the parties who access the courts in particular cases, but for the broader society. However, for the purpose of the arguments being made in this chapter, the focus is on the accountability of the non – judicial organs to ensure that the judiciary as an institution performs its role effectively. This accountability arises out of the power and functions of non – judicial institutions to select and appoint lower court judicial officers. This means that these institutions must ensure that only properly qualified, fit, and proper persons are appointed to judicial office in order that lower courts users may be assured of a high standard of judicial performance.

In so far as promptness and efficiency of dispute resolution are concerned, the issue is the level of accountability that attaches to the executive to provide the human and material resources that are required by courts for the performance of judicial functions. Therefore, the responsibility of

(July 2011). Accessed from Pierre de Vos Blog Publication *Constitutionally Speaking* 29 August 2021. www.constitutionallyspeaking.co.za.

347 Constitution - s 165(4).

348 See Oxford English Dictionary 3rd Edition.

ensuring the effectiveness of courts in both aspects, quality of adjudication and efficiency of judicial performance, rests primarily with the non – judicial organs.

On the first issue, quality adjudication, it is argued in this chapter that the executive's extensive involvement in performance of judicial functions conflicts with the doctrine of separation of powers and the principles of judicial independence and impedes rather than assists in effective adjudication. An examination of the mechanisms established for the appointment of judicial officers and the selection of candidates for appointment shows significant limitations that tend to weaken the capacity of lower courts to serve their primary purpose.

On the second issue, the efficiency of dispute resolution, it is argued that the extensive control over judicial administration and all aspects of lower court functioning, save for the court's judgment, imposes constraints on the day-to-day operation of the courts, causing undue delay in the finalisation of cases. The following sections consisting of the analysis of, firstly, the workings of the institutions established to select and appoint judicial officers and secondly, the judicial administration of lower courts, show the nature and extent of the difficulties that lower court users experience in realising the full value of the right of access to courts.

6.2 The Meaning of the Right of Access to Courts

The thesis in this respect, argues that right of access may not be fulfilled as a constitutional guarantee under the circumstances of diminished institutional independence that presently determine the judicial functioning of lower courts. Before discussing the significance of the link between the right of access to courts (right of access) and judicial independence, it is necessary to determine the meaning of the right of access in the context of its application to dispute resolution in the lower courts.

As the right of access to court under section 34 (and all other rights in the Bill of Rights) is applicable to all courts mentioned in section 165 and 166 of the Constitution, the existing jurisprudence on the subject is of general relevance to all courts.[349] Thus, the meaning of the

349 Section 165(1) of the Constitution provides that judicial authority is vested in the courts and section 166 provides that the courts are: The Constitutional Court; the Supreme Court of Appeal; the High Courts and High Courts of Appeal and Magistrates' Court; any other court similar to High courts and Magistrates' Courts that may be established by law. The jurisdictional limits of all Superior Courts are provided for in sections 167 to 169 of the Constitution. The jurisdictional limit of Magistrates' Courts is contained in section 170 of the Constitution.

right of access to courts is analysed in terms of its general applicability, but attention must be drawn to the marked divergence in the functioning and operation of the right of access in the lower courts which, it will be argued, is owing to the weaker state of institutional judicial independence at this level of the hierarchy of courts.

The section 34 right bears special significance as a fundamental right in that it enables the realisation of all other rights embodied in the Constitution by providing the means to exercise and enforce them through the courts. In any ordered society the public obtains access to justice through the operation and application of law. The public has the right to use the courts and judicial authority to ensure the fair application of the rule of law to resolve the dispute and settle it justly for the parties involved. The Constitutional Court stated in *Lesapo v North West Agricultural Bank and Another:*[350]

> *'The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful regulated and institutionalised mechanisms to resolve disputes without resorting to self- help. The right of access to courts is a bulwark against vigilantism and the chaos and anarchy it causes. Construed in this context of the rule of law and the principle of self – help in particular access to court is indeed of cardinal importance…'*

The most important of these processes, foundational to the right of access, is the ability of the party seeking justice to bring the dispute to the courts, and the ability of the party against whom justice is sought to defend itself. In the words of Gerald Friedman JP:

> *'As a part of this new human rights culture it came to be recognised that the provision for effective access to justice was of paramount importance since the possession of the right of access to the courts was meaningless unless coupled with that right, there were effective mechanisms whereby citizens were able to vindicate or defend their rights'.*[351]

Friedman cites with approval the observation of Capelletti and Garth that 'effective access to justice can thus be seen as the most basic requirement – the most basic human right of a modern

350 *Lesapo v North West Agricultural Bank and Another* 2001(1) S A 409 (CC).
351 Friedman G "Access to Justice" (1996) 113 *SALJ* 335 – 342 at 336.

egalitarian legal system which purports to guarantee and not merely proclaim the legal rights of all'.[352]

The right of access has featured in the judicial transformation discourse somewhat narrowly, more as an aspect of accessibility to justice, to the law, legal representation, and equality of arms for indigent people charged with criminal offences, than as a constitutional value integral to the functioning of the courts themselves. As Budlender observes:

> *'Access to justice should be a core concern of the courts, for it goes to the very essence of their function. If people in need are not able to bring their cases to court and present them effectively, then the courts cannot satisfactorily perform the function entrusted to them by the Constitution.'*[353]

Although the primary role of the judiciary is emphasised in this observation of Budlender, the point he makes relates to the meaning of the right in terms of the capability of prospective litigants of civil claims to bring and present their disputes to the courts for lawful resolution and indeed this constitutes a 'core concern of the courts'. The emphasis in the right of access discourse has been the court users' challenges rather than the constraints of the judiciary in functioning independently of the political organs.

Notwithstanding the paucity of reference to the effectiveness of dispute resolution in the rights discourse in general and to lower courts in particular, it is submitted that, most issues of the right of access: the right of access to the law, the right to legal representation, and the right to seek justice, are matters inextricably linked to dispute resolution which is the primary role of the court itself. Inevitably the value of the right of access to court inheres in the court before which the dispute is brought for resolution.

---

352 Ibid.

353 Budlender G 'Access to Courts' (2004) 121 *SALJ* 339 at 342. See also - Rankin M 'Access to Justice and the Institutional Limits of Independent Courts' *Windsor Yearbook of Access to Justice* (2012) 30 101 – 138. See also - Dugard J 'Courts and The Poor in South Africa: A critique of Systemic Judicial Failures to Advance Transformative Justice'. (2008) 28 *SAJHR* 214 – 238.

6.2.1 The Right of Access to Judicial Dispute Resolution

The section 34 right entitles litigants to request the courts to resolve their disputes: the courts constitute the essential component in enabling the realisation of the right. This means that the right of access of the court user simultaneously entails an obligation upon the state to provide the court that will resolve the dispute. In other words, the right of access and the value that the court represents, are indivisible concepts. From this perspective, the right of access as the forum for dispute resolution will be of limited value without the provision of the guarantee that the court is independent. Therefore, in principle, even under circumstances of litigants being equally favourable in preparation and presentation for a trial to proceed before a court, the right may not be realised where the court fails to resolve the dispute effectively through the independent and impartial application of the law.

At this juncture, it is necessary to draw attention to the intrinsic connection between the section 34 right and the constitutional guarantee of judicial independence, as well as the constitutional imperative in terms of section 166 that requires the organs of state to assist and protect the courts to function independently, impartially, and effectively. As the courts are the core components of all three provisions, the judicial function is the indispensable instrument for the section 34 right to be realised.

Judicial functions of lower courts involve the adjudication of disputes by a single judicial officer. The question is ‘how do the organs of government assure the court user that such an important function is entrusted to a properly qualified, skilled and competent judicial officer who functions impartially and independently and is also seen to do so?’. The answer to this question requires substantial engagement with the principles of the judicial function involving the impact of institutional judicial independence on the right of access and effectiveness of lower courts. Some answers are proposed to this question by examining and evaluating the relevant jurisprudential principles dealt with in detail in Chapter Three. However, it is necessary to contextualise the application of the section 34 right to the conditions under which judicial dispute resolution occurs in MCs and which, undoubtedly, is quite different from those in superior courts.

6.2.2 The Right of Access to Lower Courts

Although all courts in the judicial system must be accessible to everyone needing to enforce a right or pursue a claim, in practical terms, the right is exercised and enforced at lower court level on a much greater scale than at any other forum. This is obviously owing to the rather expansive jurisdictional competence of lower courts, albeit their lacking the inherent jurisdiction of the High Courts. The jurisdictional implication of the right of access for lower courts is the provision of easy and immediate access to virtually every statutory law and a large body of the common law. The fact that the lower courts deal with the largest volume of litigation and charges, creates conditions and circumstances for lower courts and their users, that are not experienced at any other level of the judicial hierarchy. Therefore, the term 'courts of limited jurisdiction', commonly used to describe lower courts, is a misnomer that lends credence to the unfortunately negative perception of the inferiority of value of the work of lower courts. Arguably, this term misrepresents the reality, which is that the level of public confidence in the judicial system, and therefore, the legitimacy of the judiciary, rests substantially in the performance of lower courts. Former Chief Justice Ismail Mahomed made the following observation about the lower courts:

> *'It is in the Magistrates' Courts that justice is tested in its most crucial, most pervasive, most voluminous, most pressurized, and logistically most demanding dimensions – in literally thousands of cases every day…the continuous struggle for the legitimacy and the efficacy of the instruments of justice is substantially lost or won in the Magistrates Courts'*.[354]

A fact of considerable significance is that virtually all adjudication in lower courts takes place before a single judicial officer who is solely responsible and accountable for the judgment, unlike trial courts in many jurisdictions (State courts in USA for example) where juries decide disputes and the judge simply directs proceedings and pronounces rulings and verdicts. Judgments of single judicial officers have major implications for the economical utilisation of resources for the resolution of disputes that may have similarly serious consequences to those decided in the superior courts.[355]

---

354 Mahomed I 'Address at Annual General Conference of the Judicial Officers Association of South Africa.' (1998) (1) *The Judicial Officer* 47 – 52 at 48.

355 Section 145(1) Criminal Procedure Act 51/1977. See also Du Toit et al Commentary on the Criminal Procedure Act Volume 1 (21 -4). Also see - *S v Porrit & Another* 2016(2) SACR 700 (GJ) at {64}. In many common law jurisdictions internationally, juries pronounce verdicts after trials.

The considerable benefit of the ready accessibility of inexpensive courts for decision of the most serious and complex litigation may not be attained without ensuring that the judicial officers seized with such a grave responsibility are well trained, skilled, and competent, so that the risk of judicial mistakes may be limited. The full value of adjudication by a single judicial officer may only be realised if the judgment effectively resolves the dispute.

Given that most people must obtain access to fair dispute resolution in the lower courts, it is in those courts that the effectiveness of the judiciary is most frequently tested, not only for substantively just outcomes, but for procedural efficiency. As Justice Wallis points out in the following statement:

> *'These disputes that are the bread and butter of our courts should not only result in a just decision in the court that hears them – although that is obviously a requirement – but the processes to which ordinary people are subjected by our courts should also be just. In other words, substantive justice in the form of a just result is a necessary but insufficient condition for ordinary justice. Of equal importance at least is procedural justice: a judicial process that is perceived by all involved in and affected by it as just and fair. And I am afraid that I do not believe that ordinary people in South Africa are receiving the ordinary justice that is their due. They find their encounters with the justice system slow, costly and frustrating…The principal manifestation of this failure of justice is to be seen in the delays that are endemic to both our civil and criminal courts'.*[356]

These remarks are instructive in determining the second aspect of the meaning of the term 'effectiveness of the courts' that is mentioned in the introduction of this chapter: effective dispute resolution includes the efficiency of the judicial processes to avoid undue delay. The right of access to courts is severely impeded by the long delays court users experience, as this causes them prejudice. Hence the lower courts in particular are exposed to attacks from every sector of society as they struggle to manage the volume of the case load while trying to ensure that every litigant and court user is afforded the fair and satisfactory hearing and attention they are entitled to. However, the issue of undue delay is not one that the lower courts can resolve without the ability as autonomous institutions to access and manage the necessary resources for effective court functioning.

356 Wallis M 'Ordinary Justice for Ordinary People': The Eighth Victoria and Griffiths Mxenge Memorial Lecture (2010) 127 *SALJ* 369 – 381 at 371.

As the primary body for dispute resolution, the lower courts, epitomise the essence of the right of access to justice through the courts. Therefore, there seems to be no clear justification for the inadequate attention given to this subject in the political sphere, the scholarly legal literature or in the general public discourse. Indeed, the higher judiciary itself seems to pass lightly over the capacity constraints and challenges of MCs to give effect to the right of access to lower trial courts, although the opportunities to draw attention to them are abundant in their regular and sometimes overly and adversely critical reviews of the quality and efficiency of adjudication in the lower courts.[357] It is submitted that the undertaking of incumbents' responsibility with regard to the right of access and effectiveness of lower courts should not be further deferred lest the conditions deteriorate and imperil the stability of communities that these courts must serve.

6.3 Institutional Independence and Effectiveness of Lower Courts

The essential conditions of judicial independence particularly pertinent to the right of access to independent and effective courts is the independence of the entity that appoints judicial officers and the institutional independence of courts to administer judicial functions. The following subsection (6.3.1) aims to show how the limited independence of the Commission in its function of selecting judicial officers and the Minister's power to appoint them, affects the right of access to effective courts. The lack of administrative judicial independence and its impact on effective court functioning are dealt with in subsection 6.3.2.

6.3.1 Selection and Appointment of Judicial Officers

357 The Western Cape Division of the High Court, acting in terms of section 302 and 303 of the Criminal Procedure Act; the "automatic review" function of the High Court, made scathing remarks about the lack of due diligence on the part of district magistrates in 7 different reviews; (*S v Jacobs*, *S v Swart*, *S v Damon*, *S v Jas, S v Klaasen*, *S v Swanepoel* and *S v Xhantibe;* respectively, case numbers C 1191/13, B927/14, 526/14, 14/17,682/16, 1907/17,310/17). The reviewing judge acknowledges that it the duty of administrative officers to send case records timeously for automatic review but states: 'magistrates have duties and functions which go beyond ***merely adjudicating the matters that come before them*** (author's emphasis). In terms of the Constitution and the law they have a duty that the judgments of their courts and matters relating thereto are given effect to and they ***should not sit idly by and take it for granted*** (author's emphasis**)** that the administrative components will implement and give effect to their directives.' It is difficult to miss the extraordinary implication in this statement that there could be more important duties of judicial officers than adjudication of disputes and that generally magistrates may be idle. See also - Howie CT, 'Judicial Independence' (2003) *SALJ* 679 – 684 at 682, where the SCA President remarks that the High Court's order that the magistrate deal with a bail application by a certain time, imposes unwarranted restrictions on the magistrate and amounts to constraint of the magistrate's independence and dignity.

6.3.1.1 Impartial Appointment as an Essential Condition of Judicial Independence

The MA, not the Constitution, has established the Commission and informs its functions, of which an important one is the selection of judicial officers. The Commission must ensure that appointments of judicial officers of lower courts are impartial, but the MA is silent on how it does this or how the Commission is seen to act impartially in this function.

The Commission may not be perceived as functioning independently in its role of selecting judicial officers in view of the dominant party-political component of its membership:[358]there is no balance of interests and only a small part represents the judiciary. This defeats the purpose of the establishment of a judicial commission and calls into question its role in ensuring an independent judicial administration and therefore has drawn criticism from various quarters.[359] The Commission's ability to be impartial is constrained and this conduces to compromise it in its role of appointing judicial officers.

6.3.1.2 The Role and Responsibility of the Magistrates Commission and the Minister in Ensuring Judicial Quality

As the Commission and the Minister have the role and responsibility for the selection and appointment of judicial officers respectively, they have a duty to the court user to ensure that only appropriately qualified, trained, and skilled persons are appointed to judicial positions in order that dispute resolution is effective. This function and power of appointing judicial officers requires that certain selection criteria be determined and applied.

From the outset it must be borne in mind that the adjudicative function and judicial dispute resolution involve the application of the same type of skills regardless of where in the judicial hierarchy the court is located. The fact that judicial officers who preside in lower courts of South Africa are called magistrates may have created the impression that magistrates do not perform the same functions as judges: they do, and as previously noted in most jurisdictions are correctly titled as judges. This is a rather significant issue and very relevant to the determination of the required qualification for judicial office that the Commission and Minister need to apply their minds to when selecting and appointing judicial officers for lower courts. By the same token, and at least to the extent that first instance trial courts have concurrent jurisdiction, the constitutional

358 Magistrates Act - s 3(1)(a).
359 Van Dijkhorst op cit note 3 at 39. See also *Van Rooyen* case at para 46 – 47. Also see - Olivier op cit note 2 at 334.

principles applicable to the selection of puisne judges need to be consistent with those applicable in the selection and appointment of judicial officers for lower courts.

The Constitution provides that any appropriately qualified, fit and proper person may be appointed as a judicial officer[360] which means that like judges, magistrates (theoretically), do not require a LLB degree to qualify for appointment.[361] According to the Regulations under the MA, the qualification criterion is considered as sufficient where the candidate holds a three-year qualification in law;[362] although it seems that there is a requirement of legal experience of at least five years, post – university, for district court positions and seven years for regional court posts.[363]

The lowering of the legal academic qualification for all magistrates and the discarding of the pre – appointment training[364] and testing for regional magistrates may have broadened the pool of qualifying candidates for judicial positions but in the process has affected the standard by which to assess the basic qualification of all judicial officers before being considered for selection. An appropriate qualification should not be interpreted to mean 'any qualification in law' as with other professions,[365] the profession of adjudication requires that judicial officers be professionally qualified to perform judicial functions. This implies that beyond a legal qualification, judicial officers need to be educated and trained in adjudicating impartially, fairly and effectively. It will be argued that the executive regulation of qualification criteria for judicial officers is inconsonant with judicial independence and does not evidence the application of an objective standard of assessment by which to ensure that judicial officers of lower courts will perform competently.

The criteria for selection and appointment of judicial officers, being a matter related to the institutional independence of the courts, is informed by the Constitution. As such the role of the Commission in selecting appropriately qualified persons for judicial office is to assist the courts to ensure the fulfilment of the right of access. The extensive regulation of judicial functions has

360 Constitution - s 174(1).

361 Magistrates Courts Act S 10 as amended by the Magistrates Courts Amendment Act 19 of 2010.

362 Olivier op cit note 2 at 329.

363 Ibid.

364 Van Dijkhorst op cit note 3 at 40.

365 Amy M T 'Judiciary School: A Proposal for a Pre – Judicial LLM Degree' *Journal of Legal Education* (2002) 52 130 – 144 at 133.

the effect of creating constant tension in the interactive space between the application of the constitutional value of judicial independence and the Commission's approach to it, as manifest in the regulations. The remark of Olivier that, 't(T)here is hardly an aspect of the regulation of the magistracy that does not impact on judicial independence in one way or another,'[366], captures the essence of these pervasive tensions. The import of some of these regulations requires further discussion.

For instance, the regulation that requires the Director – General or head of a court to submit a confidential report,[367]recording his impressions of the candidate's appearance, legal knowledge and other relevant characteristics, is inconsistent with a fundamental principle and essential condition of judicial independence and seems to contradict an objective of the Commission which is to ensure that judicial officers are not influenced or victimised.[368] The Constitution requires that the Act of Parliament that provides for the appointment of lower court judicial officers, ensures that appointments are made impartially. The contents of such confidential reports may be reasonably perceived as attempts from a position of executive power to influence the Commission in its selection of candidates for judicial positions. In this respect it may be argued that not only is this procedure inconsonant with institutional judicial independence, it serves to weaken and offends against the structural protection that judicial independence affords to the judiciary.

There is a lack of transparency in the processes of recruitment and selection of judicial officers by the Commission as the short – listing deliberations are not public and not open to the media.[369] Hence the public has no way of knowing how each candidate's qualification was evaluated and compared. The Commission was challenged in the Equality Court[370] on the correctness of its short – listings and found to have erred at least on at least two occasions.

The fact that the Minister or his nominee has a role in the selection of magistrates and holds the sole entitlement to appoint or reject the selection made by the Commission, is arguably a conflict

366 Olivier op cit note 2 at 349.

367 Regulation 4(3) – (5) GN R361 GG 15524 of 11 March 1994 in terms of section 16 Magistrates Act 90 of 1993.

368 Magistrates Act - s 4(b).

369 See - Olivier M 'Is the South African Magistracy Legitimate' (2001) *SALJ* 118 166 – 176 at 171.

370 *Singh v Minister of Justice and Constitutional Development* 2013 3 SA 66 (EqC) and *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (EqC).

of interest[371] and therefore could be regarded as a fatal irregularity. It may even be a cause for concern about the legitimacy of the institution as it is currently composed and structured. In view of these problems and concerns the question arises whether the Commission enjoys legitimacy or is seen to be legitimate, as an institution responsible for deciding how well - qualified and competent the judicial officers of the nation's lower courts are.

As independent and impartial decision – making is the essence of the judicial function and the foundational value that the judiciary represents in the democratic state, it is axiomatic that ensuring the quality of judgments should be the domain of the judiciary. It should be the prerogative of the judiciary to determine the minimum standard requirements for the appropriate qualification and the constitutional requirement of fitness to hold judicial office at lower court level. The excessive involvement of the Magistrates Commission in the selection of lower court judicial officers is inconsistent with the principles of separation of powers and judicial independence and so is the entitlement of the Minister to appoint judicial officers to lower courts; a similar power to the President's in appointing the Chief Justice.[372] The following statement of Olivier and Hoexter expresses a concern about the dangers of excessive political influence in the selection of judges by the JSC but is of equal relevance to the appointment of other judicial officers:

> *'The great danger of a party – political agenda is that it jeopardises the quality of the judiciary and the independence of the JSC, and very possibly of the judges chosen by it. If JSC commissioners are not obliged to apply their minds to the criteria and which candidates best meet them, this facilitates the appointment of judges simply on the basis that they are sympathetic to the government – all in the name of transformation'.*[373]

The argument that is sometimes advanced favouring political involvement in judicial appointments is that it serves the need for assurance of judicial accountability. There may be a modicum of merit in this argument in so far as the superior courts are concerned owing to their jurisdictional competence to decide constitutional disputes and to review legislation which has political implications. However, this argument cannot be justifiably applied to lower courts which

371 Olivier op cit note 2 at 173.

372 Olivier op cit note 2 at 324.

373 Hoexter and Olivier op cit note 241 at 175.

have no jurisdiction to decide constitutional disputes nor the competence to invalidate any law.[374] As virtually all aspects of judicial administration involving lower courts and judicial officers are extensively regulated,[375] it is unlikely that judicial accountability is lacking here. From this perspective and evidently at this time, the entire, apparently arduous, and extremely costly process involved in the nomination, selection and appointment of lower court judicial officers may, in the final analysis, be rather unnecessary.[376]

It has been found by the CC that it is not extraordinary for the executive to appoint judges as this happens in many well-developed democracies and therefore a politically oriented JSC and by the same token, such a Commission, cannot be unconstitutional.[377] This finding is not entirely correct because the reasoning behind the finding is based on a flawed premise which was developed by considerations that were taken out of the context from the applicable circumstances of the jurisdictions being compared. Hence it is important that the essential conditions of judicial independence, including an independent institution for appointing judicial officers, be adequately provided for in their constitutions.

The independent appointment of judicial officers for the lower courts is further compromised by the fact that the Minister is entitled to appoint magistrates who have not been recommended by the Commission.[378]

---

374 Constitution - s 170.

375 Magistrates Act - s 16.

376 Ibid.

377 *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) Paragraph 124.

378 Magistrates Act - s 10

Whether or not such a power has been exercised by a Minister since the establishment of the Commission is irrelevant (although one such appointment was recently successfully challenged).[379] The question is why the head of an executive organ in a constitutional democracy that guarantees that Magistrates Courts are independent, should be invested with such significant power which not only he himself may exercise but may also delegate to the Director General who is a public servant. Such a direct exercise of executive authority which is reminiscent of the pre – democratic history of MCs, is, arguably, neither justifiable nor legally correct for a constitutional democracy.

As previously argued the Commission occupies such an enormous space in the existence of the lower courts and in all aspects of the functioning of judicial officers in these courts, that the perception is and inevitable that the Commission has all but replaced the former executive with the executive of the present constitutional state. If the Commission was established to ensure that the appointment of magistrates, inter alia, must take place without favour or prejudice, it is unclear how it would achieve this objective with the limited participation of the judiciary, extensive involvement of the political sector and the sole authority of the Minister to decide whether to appoint the candidate selected by the Commission.

The guarantee of judicial independence that provides the legal and theoretical basis for the right of access to the courts does not without more translate into the factual reality that the judicial officer deciding a dispute is properly qualified and trained to resolve disputes impartially and effectively. Under the circumstances, the institutional judicial independence of lower courts seems illusory.

---

379 See - Reportable judgment of Raulinga J in *M Kroukamp v Minister of Justice and Constitutional Development*; Gauteng Division of High Court Pretoria Sitting as Equality Court; Case Number 74236/2013 dated 16 August 2021. See also the recent SCA judgment *The Magistrates Commission and Others v Richard John Lawrence* (Case no 388/2020) [2021] ZASCA 165 (2 December 2021). Potterill AJA found that the 'Commission was fixated on excluding candidates from a particular group and no flexibility or deviation from that targeted group under any circumstances even have been considered.' (para 28). In the same case Ponnan JA remarked, 'the rigidity of the approach (a rigidity that is generally eschewed by our courts) and failure to have regard to any factor other than race was thus both unlawful and unconstitutional. (para 104).

6.3.1.3 The Role and Responsibility of the Commission and the Executive in Ensuring the Right of Access to Effective Courts

The competence of the judicial officer in judicial decision – making is a justifiable expectation for a litigant or court user. The judgment of a court is the primary and most visible manifestation of accountability of that court to the Constitution and the rule of law. A well – reasoned judgment not only assures the litigant that the court is impartial and independent but reflects the courts' accountability. Therefore, it is incumbent upon the judicial appointment authority to ensure that judicial officers have acquired a satisfactory level of competence in adjudication before appointment to judicial office. The following sub – sections deal with the relationship of judicial quality and its importance to the effectiveness of the lower courts which impacts the right of access to courts. In discussing the quality of adjudication and courts' effectiveness the core issue of this thesis, the inferiority of the lower courts and the perception as such, is underlined. It is of considerable importance that the non –judicial organs responsible for demographic and diversity transformation also ensure that appointees to judicial positions have been adequately trained to resolve disputes under the Constitution.

In the case of lower courts, transformative adjudication would necessarily involve the acquisition of entirely new skills. This is the overlapping area of authority between the judiciary and the non-judicial state functionaries and potentially a site of tension between them. The core argument on this issue is that, as there is no pre – appointment judicial education institution that is independently controlled by the judiciary, the non - judicial organs hold the power of determining what transformative adjudication means and whether the candidate seeking appointment is appropriately qualified for independent and transformative adjudication. This means that the political organs control impartial adjudication: the essence of the judicial function. These issues require an examination of the principles of adjudication generally, and the meaning of transformative education in the context of lower courts' independent judicial education and training.

The requirement that judicial officers are properly qualified and trained is a universally recognised principle and applied as an element of the fundamental right of access to fair trials. The *African Principles and Guidelines on the Right to a Fair Trial* state: 'The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability… No person shall be appointed to judicial

office unless they have the appropriate training or learning that enables them to adequately fulfil their functions'.[380]

The importance of judicial qualification and competence for adjudication is also a well-established criterion in developed common law democracies. Lord Bonomy of the Judiciary of Scotland, addressing a Commonwealth Magistrates and Judges conference stated:

> *'It is axiomatic that the principal ingredient for a high quality judicial system is able and talented judges…It is now widely accepted that the selection of judges with the characteristics and qualities that ensure that a judicial system that is both fair and effective is through an open, transparent selection process in which every candidate with the necessary qualification has an equally fair chance of being appointed on merit'.*[381]

In common law jurisdictions, there seems to have been acceptance in the recent past that judges appointed from the ranks of practising advocates would be competent to perform judicial functions without any particular education or training in adjudication. This practice presumes that qualification as legal counsel is the equivalent of qualification for judicial office and that a newly appointed judge would automatically have the knowledge, skills, and character to adjudicate and resolve all manner of disputes from the date of appointment. Superior court judges in South Africa were also appointed according to the common law tradition,[382] until recently, when the judicial profession was opened to others with legal qualifications and experience. This development expanded the pool of candidates from which judges could be selected for appointment and advanced the achievement of diversity in the ranks of judges.

The question of a candidate's qualification for the just and effective adjudication of disputes was not addressed, however, as the Judicial Service Commission's appointment criteria do not require appointees to be qualified or trained particularly for judicial functions. The issues of adequate qualification for judicial competence persist and arguably have increased since it became unnecessary to have achieved seniority and success as a legal practitioner in the superior courts to be appointed as judge under the new dispensation. As the nature of

---

380 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, doc. cit., Principle A, paragraphs 4 (i) and (k).

381 Bonomy I 'Judicial Accountability in the 21st Century'. The Right Honourable Lord Bonomy of the Scotland Judiciary delivered this paper at the Commonwealth Magistrates and Judges Conference held in Dar – es – Salaam, Tanzania, on 26th September 2017.

382 Olivier op cit note 241 at 118.

adjudication is substantially the same throughout the judicial hierarchy, the attributes that are sought in judicial officers of superior courts should be similarly sought in lower court judicial appointees. The issues of the qualification of lower court judicial officers should be approached in the same way as it is for judges; mindful that practising attorneys and state prosecutors would not necessarily be qualified for appointment as judicial officers without prior judicial education.

The quality of lower court dispute resolution and the performance of magistrates have been considerably influenced by the historical circumstances of lower courts in the pre – democratic era. Therefore, in addition to the challenge presented by the disjuncture between legal education and judicial education that confronts effective dispute resolution in the superior courts, the quality and independence of the judicial function in the lower courts represents a barrier to the right of access to courts that serve most court users.

A significant gap has developed between the circumstances under which magistrates functioned and were qualified to function in the past and those of judicial officers in lower courts since democracy. As no independent institution existed or has been established to ensure that the lower courts are capacitated to make the transition from executive to judicial status it would be unrealistic to expect substantial change in the performance of lower courts.

Under the circumstances and background sketched above, typically, a newly appointed judicial officer may commence judicial duties with a basic law degree and five years of legal practice either as a prosecutor, attorney, or advocate. There would be really no time for a newly appointed judicial officer to ease into the job of adjudicating, as from the first moment, a large case load of mainly criminal or family court disputes, awaits decisions in an open court. The stresses, strains and pressures of these conditions are problematic[383] not only for the judicial officer who is a novice but for litigants and other court users as these are conditions highly conducive to bad decisions, rulings, and erroneous court orders.

383 See generally - 'Democratic Governance and Rights Unit University of Cape Town' 'The 2019 Survey of South African Magistrates' Perceptions of their Work Environment' but in particular the survey from pages 44 – 47.

6.3.1.3.1 Impact of Judicial Errors on the Right of Access to Lower Courts

As Armytage observes: 'the essence of judging is a highly complex, intellectual, problem-solving process which resists procedural description or predictable outcomes.'[384] The impairment of the right of access to courts under these conditions, is likely to appear quite conspicuous, as lower courts make thousands of rulings and decisions every court day and judicial errors are inevitable. Every mistake, even those that are relatively minor, negatively affects one or more court users. As previously mentioned, lower court judicial officers are regularly criticised for mistakes in their judgments by High Court judges during reviews or appeals and by court users and judicial administrators for delays in delivering judgments. Some serious judicial errors and irregularities can be linked to incompetence which may reflect a lack of knowledge and or experience in aspects of substantive, or procedural law, relevant to adjudication. Irregularities that on review are found to be not in accordance with justice are indicative of a lack of knowledge or appreciation of fundamental rights.

Some common mistakes made by judicial officers in the lower courts that cause severe and irreparable harm include the imposition of incompetent sentences, wrongly denying bail, incorrectly admitting inadmissible evidence or refusal to admit admissible evidence, and denial of the right to call witnesses. Errors occurring frequently, on a large scale, whether minor or major, should not be normalised because in a democracy, citizens must be able to trust the courts to resolve legal conflicts fairly, correctly, and effectively. The true value of the right of access to a court is entirely lost when a court's final decision is incorrect or arrived at through an irregular process.

Although judicial mistakes may be remedied through the process of appeal or review, the prejudice to a party either substantively on the merits or in costs, may be irreversible. It is therefore of importance that trials are procedurally fair and that the judgments of the trial courts are mostly correct in accordance with the law. Importantly, the poor quality of judicial decisions will not inspire confidence in the courts and therefore devalues the right of access to the lower courts. As Carpenter points out: 'This "remedy" is in truth of very limited scope. Not only are

384 Armytage L 'Judges as Learners: Reflections on Principles and Practice' *Centre for Judicial Studies*. Accessed from www.educatingjudges.com. On 9 April 2018.

appeals costly so that this avenue is closed to all but a few, there are only a limited number of litigants that may benefit. The possibility of appeal provides no solace to the public at large.'[385]

6.3.1.4 Independent and Impartial Adjudication: An Essential Element of the Right of Access to Courts.

Adjudication under the Constitution requires all judicial officers to apply laws in accordance with the principles, values and rights enshrined in the Bill of Rights. The right of access to courts and fair trial rights bring to the fore the values of impartiality and judicial independence which encapsulates the role of courts in giving effect to these rights. The profound significance of the role of the judiciary in giving effect to these values, was eloquently expressed thus by Chief Justice Mahomed:

> *'…the professional and ethical standards and the judicial temper which should inform the conduct of judges in the pursuit of justice... is dominated by two components: justice which is procedurally fair and seen to be fair in its execution and justice which is substantially fair in its impact on those affected by its operation. Both these aims are capable of intelligible and rational articulation. The complexity lies in their attainment, because of the inherent difficulty involved in balancing competing interests and conflicting values of compelling weight…'*[386]

It is argued accordingly that the fulfilment of the right of access to justice through the courts may involve a considerable amount of difficulty for judicial officers at all levels of the hierarchy of courts in the early stages of development of an independent judiciary. Hence the qualification provision in the Constitution needs to be applied with due regard to the complexity of the adjudicative responsibility of each court. Inevitably judicial officers in the lower courts will be confronted with several distinctly different challenges in performing their judicial functions from those of magistrates before democracy. Yet as the application of all law requires consistency with constitutional principles and values, lower courts are required to perform judicial functions with the same level of diligence as superior courts and therefore need to be appropriately qualified.

---

385 Carpenter G 'Judiciaries in the Spotlight' CILSA (2006) 30 361 – 384 at 382.

386 Mahomed op cit note 13 at 115.

As there is no formal standard of assessment to determine the capability of an aspirant judicial officer, it will be argued that the selection and appointment of lower court judicial officers, as it is currently appraised and executed, does not ensure that judicial officers are appropriately qualified to apply and give effect to various constitutional provisions that impact on dispute resolution. The following sections examine some of the most significant weaknesses that lead to errors and ineffectiveness in judicial decisions.

6.3.1.4.1 Qualification for Impartial Adjudication

One of the criticisms levelled against MCs in the past related to the appointments of magistrates exclusively from the ranks of senior prosecutors. Magistrates were perceived to be biased in favour of the state as they were public servants in the employ of the state, and this caused them to be labelled as executive – minded. The change in the system of selecting and appointing magistrates during the transition to democratic governance enabled the appointments to be opened to lawyers from the private sector and at the same time brought about necessary and significant change in the demographic representativeness of the judiciary at lower court level. Presumably opening the field to candidates from outside the public service would contribute to the establishment of a more independent – minded judiciary at lower court level. However, the question of appropriate qualification for independent adjudication seems not to have received the required level of attention.

The adoption of the qualification provision for judicial appointments from the pre – constitutional era was bound to be problematic for the lower courts in particular, because of the different contextual circumstances between the original knowledge source and the destination of its application. Judges in common law jurisdictions were mainly drawn from the ranks of advocates, mostly senior barristers, invited to join the judiciary after having litigated for several years in the same courts. Their knowledge and familiarity with the law and legal system were not likely to have been often challenged. The meaning of ‘appropriately qualified’ for a barrister practising law in the United Kingdom is not the same for a state or private lawyer appearing in the courts of South Africa even before democracy. England’s barristers would be manifestly unqualified for contemporary South African courts for several reasons, one of which is the political regime; England is a parliamentary sovereignty. The other significant and obvious difference being the less diverse, more homogenous, social demographic constituencies served by that judiciary. Carpenter’s observation is apposite:

'…t(The) British judiciary has traditionally been a small and extremely homogeneous group. Thus it can afford greater individualism of approach and still retain its coherence. Until recently this was true of the South African judiciary as well. Today, however, this is no longer the case in Britain; and the present South African judiciary can by no stretch of the imagination be described as homogeneous. In fact, the requirement of diversity and representivity militates forcefully against any notion of a homogeneous 'old boys club'. [387]

The wholesale importation of some concepts without substantial adaptation is unlikely to work properly. The appointment of practising advocates to judicial positions in South African courts is one of them.

6.3.1.4.2 Requirements for Transformative Adjudication

To be appropriately qualified for South African courts, lawyers should be required to become knowledgeable in interpreting and applying the laws according to the Constitution. Hence both advocates and attorneys may satisfy the qualification requirement for judicial office provided they have an appropriate amount of experience in constitutional rights litigation. Judicial officers serving at lower court level should not be exempted from the requirement of education, training, and experience in constitutional law and in particular the application of the rights under section 34 and section 35. The following analysis of the selection criteria suggests that new appointees are unlikely to be appropriately qualified to be appointed as judicial officers.

A general legal qualification, whether it's a junior or LLB degree, does not necessarily adequately equip anyone to apply the law correctly and competently in the resolution of disputes. Recent law graduates are not better equipped than, for instance, experienced law clerks or other lay persons knowledgeable about court functions. The general legal practice experience requirement of five years or seven years' post – university is also not a satisfactory measure of qualification without some standard form of evaluation of the nature of the adjudicative experience. Experience as a prosecutor for a minimum number of years after law school would not be sufficient experience to adjudicate complex civil disputes in the regional courts. Likewise, several years of litigation involving commercial law is unlikely to enable a lawyer to adjudicate criminal trials in the regional courts: experience should be jurisdiction specific. Both former public

387 Carpenter op cit note 383 at 365.

prosecutors and lawyers from the private sector are likely to be disadvantaged as judicial officers, owing to their limited professional expertise in adjudication.

Without pre-appointment training in adjudication neither former prosecutors nor defence lawyers in criminal courts would be likely to be properly qualified and skilled in resolving disputes impartially. In neither instance is the focus of the litigating party the impartial resolution of conflicts as each needs to represent a partisan interest, of which they would need to disabuse themselves before taking up positions as fit and proper judicial officers. Although private legal practitioners may be less connected to the executive than prosecutors, the lack of experience in work involving complainants and victims of crime would not adequately prepare them to step competently into an adjudicatory role where attributes of impartiality and independence are critical.

The problem, probably unique to South African MCs, is that magistrates stepped into their judicial roles without any qualification or training in impartial and independent adjudication as required by the Constitution. This lack of formal judicial education and training of judicial officers persists which means that judicial officers acquire judicial skills after appointment, often apparently, through trial and error. However, as noted above, judicial errors are not harmless and therefore may be perceived as denial of justice which negatively impacts on the public confidence in the judiciary. There is then a compelling need for pre – appointment judicial education and training and ongoing judicial education for those appointed as judicial officers after the adoption of the Constitution.

In the decades before democracy magistrates, prosecutors and administrative personnel were given in-service training, appropriate to their functions, by Justice College, an educational and training institution attached to the Department of Justice. The need for a separate judicial education institution since democracy, saw the establishment of the South African Judicial Education Institute (SAJEI)[388] established in 2008 and the commencement of its programme in 2012. SAJEI like many other judicial education institutions in common law jurisdictions focuses on the ongoing judicial education of serving judicial officers to keep them up to date with the developments in substantive and procedural law. SAJEI's programmes are not aimed at pre-appointment judicial education or training and therefore would have no role in ensuring that

388 South African Judicial Education Institute Act 14 of 2008.

judicial officers are appropriately qualified before being appointed. There are other shortcomings of SAJEI that are examined in the following subsection dealing with judicial education and training of lower court judicial officers.

6.3.1.4.3 The Role of Judicial Education and Training in the Quality of Adjudication

The realisation that even much experience as practising advocates may not be sufficient qualification for judicial function provided the impetus for the establishment of judicial education institutions in common law jurisdictions, relatively recently. As Gregorczuk aptly observes, 'Because judges were historically appointed from the ranks of more senior practising advocates they were presumed to be appropriately qualified'.[389] Quoting a remark of Australian Judge Wood, Gregorczuk states: 'The conventional wisdom seems to have been that a competent trial judge will emerge from the chrysalis of an experienced advocate within the few minutes required for taking the oaths of office'. Judicial appointment institutions have a critical role in ensuring that not only the technical qualifications (formal legal qualifications and experience in legal practice) of candidates are considered but their training in social context, human rights as well as diversity aspects of independent and impartial adjudication. Deputy Chief Justice Moseneke stated that the quintessential attributes of a good judicial officer go beyond integrity, fairness, and impartiality.[390] He aptly points out that the right of access to justice is;

> *'…bound to be illusionary without judicial probity, competence and effectiveness. Powerful constitutional and social imperatives permit no debate on whether or not judicial education is necessary. It is a crucial means towards equal justice for all. Whatever suited the past, in this country and other jurisdictions, today it is well settled that a judiciary worthy of the name cannot execute its task properly without a conscious, well-planned and well-resourced judicial education programme which offers lifelong learning for those charged with so important a public task… it bears repetition that our transition to constitutional democracy has raised sharp legitimacy, competence and effectiveness questions, which render judicial education not only desirable but urgent'.*[391]

---

389 Gregorczuk H 'The Desirability of Judicial Education in Australia' (1996) 14 *Journal of Professional Legal Education* 77 – 95 at 78.

390 Moseneke D "Access to Education and training: Pathway to Decent Work for Women" (2011) (11) *PER/PELJ* 261 at 265.

391 Ibid.

Ensuring the quality of dispute resolution in the lower courts in the future is likely to present challenges because of the lack of a structured source from which judicially educated and trained judicial officers may be drawn at the time of their initial appointment. There is broad consensus in the discourse on judicial education that legal education is not equivalent to judicial education. Furthermore, the thinking that substantial experience in litigation or prosecution provided the learning base for adjudication is no longer receiving unqualified acceptance among scholars and jurists.

Over and above these considerations that determine the meaning of the requirement of appropriate qualification for judicial office, there seems to be no specific requirement that aspirant judicial officers be adequately knowledgeable in certain disciplines unique to the profession of legal dispute resolution in a constitutional democracy. The *Bangalore Principles*[392] set out the core values of judges as including independence, impartiality, equality, integrity, propriety, competence, and diligence. When the focus is directed to the need for these values to give effect to the fundamental right of access to courts, there should be no debate that judicial education and training of aspirants before appointment is not optional.

The judicial training programme provided by SAJEI is primarily aimed at the orientation of new appointees to enable them to transition to their judicial role from the field of private or public legal practice. These programmes usually consist of lectures or seminars in areas of law most frequently engaged with during criminal trials and civil dispute resolution. The relatively short duration of these training programmes is not designed to develop comprehensive skills for the various complex socio – legal disciplines required for judicial functioning.

The further and continuing development of judicial skills that SAJEI primarily provides, serves the purpose of ensuring that judicial officers are kept informed and knowledgeable of new laws and legal developments impacting on dispute resolution. As these continuing judicial education programmes are not mandatory, it is not possible to assess the level of development of judicial skills of any judicial officer even several years after appointment. Some judicial officers use as many of the training opportunities as possible while others may not attend any at all after appointment.

392 The *Bangalore Principles of Judicial Conduct* 2002. Accessed from www.undoc.org.

The question of the independence and capacity of judicial educators employed by the institution is an additional site of uncertainty. As Armytage observes:

> '… *educators should make efforts to ensure that judges recognize the independence and integrity of the process in order to appease any concerns of possible indoctrination. Equally, the formative nature of the judicial role can create discomfort for some judges under conditions which could possibly be seen to erode the authority of their role. Both these considerations contribute to the need for an independent, discrete process of education'.*[393]

Armytage expresses the view that judicial education and training must be 'judge – led and court-owned' as it is in the interests of independence and autonomy that the institution is led by the judiciary rather than the executive to avoid the constraints in independent decision – making.[394] Judicial education institutions also need to have some degree of financial autonomy to access the appropriate programmes without constraints imposed by the executive that creates subservience of the judiciary to the political entities.

In sum, independent, pre – appointment and ongoing judicial education and training are crucial requirements for effective dispute resolution that enables the fulfilment of right of access to courts. As the discussion above indicates judicial officers appointed to lower courts in South Africa are arguably not appropriately qualified for adjudication nor will they be in the future, under the current laws. In the following chapter the thesis proposes a judicial education institution and training system aimed at providing the judiciary with appropriately qualified and skilled judicial officers for all levels of the hierarchy of courts.

The next section of this chapter turns to the second aspect of effective court functioning: the administrative judicial independence of the lower courts and its effect on the efficiency of dispute resolution.

---

393 Armytage L 'Judges as Learners: Reflections on Principle and Practice' *Centre for Judicial Studies*. Accessed from www.educatingjudges.com on 5th February 2021.

394 See - Kovuru P R 'Training our Judges Better: How and By Whom' *Economic and Political Weekly* 22 February 2014. Accessed from Gale Academic One File link.gale.com/apps/doc/A359617457 on 20 December 2020.

395 Commission of Inquiry into the Structure and Functioning of the Courts Fifth and Final Report Part II 1983 Para 1.3.11 68 – 69

6.3.2 Administrative Judicial Independence and Effective Functioning of Lower Courts

More than a decade before the advent of a constitutional democracy in South Africa, the Hoexter Commission found that inefficiency in the functioning of the courts was owing to a lack in provisioning of administrative services to the courts. The Commission found that administrative functions for the administration of justice provided by the Department of Justice lacked appreciation for the real financial and administrative needs of the judiciary.[395]

When the Constitution was adopted and entrenched the doctrine of separation of powers, the judiciary, including the MCs, was fully vested with authority over judicial functions. However, as the administrative needs of the judiciary continue to be determined by the non – judicial organs, the judiciary is in effect not institutionally independent. The efficient functioning of lower courts is constrained by challenges in readily accessing the human and material resources required for day-to-day court operations. Since the establishment of a constitutional democracy and the need for the judiciary to be transformed, there have been constant calls for judicial autonomy by the heads of the judiciary. In this regard, the following statement of Chief Justice Ngcobo is apposite:

> *'At a conceptual level, one cannot talk about the judiciary as a genuinely independent and autonomous branch of government if it is substantially dependent upon the executive branch not only for its funding but also for many features of its day-to-day functions and operations. The practical dimension flows directly from this. While the judicial officers may be free to operate independently and to hand down fair and impartial decisions according to law, their ability to do this may be constrained in various ways, notably by the financial, human and physical resources available to perform their tasks. A key element of this is the extent to which the judiciary has control over its own resources and thus is able to determine its policy and strategic priorities and how funds are to be allocated to pursue those priorities'.*[396]

Chief Justice Mogoeng more recently expressed similar concerns when he stated:

> *"Institutional independence concerns the day to day operations of courts and is required to ensure that they are not directly or indirectly controlled or seen to be controlled by other arms of government... The placement of court administration in the hands of the Ministry has given rise to*

396 Ngcobo op cit note 24 at 697.

an unfortunate public perception that the Minister for Justice and Constitutional Development is the head of the Judiciary. This openly articulated perception… has the unintended effect of undermining the authority, dignity, independence and efficiency of the courts, contrary to the thrust of section 165(4) of the Constitution'.[397]

The concerns expressed by the Chief Justices about the importance of administrative judicial independence are relevant to all courts although high levels of dependence on the executive for court administration resources may negatively impact the judicial functioning of the superior courts differently from the lower courts. This difference should not be understood as less harmful to users of lower courts. The area of most tension between the political organs and the superior courts lies in the authority of superior courts to review legislation, a significant power that requires the robust protection of judicial independence. As Gordon and Bruce point out:

'*Control by the minister of court budget …creates the potential for executive infringement on the judiciary's institutional independence. Threats by the executive to withhold or reduce resources and even the mere knowledge that the judiciary is dependent on the executive for its resources could put pressure on judges and impair the ability of courts to effectively and impartially watch over the other branches of government'.*[398]

On the other hand, most of the judiciary consist of the lower courts where most dispute resolution takes place and where considerably more human and material resources are required. In practice, courts often come to a standstill when any essential component for a court operation is not available and not easily accessible. The impact on access to the courts is direct and immediate and most frequently manifested in delays. As Chief Justice Ngcobo points out:

'Because 'justice delayed is justice denied', meaningful access to the courts is compromised where the courts operate inefficiently. There are at present huge delays in the justice system. In particular, there are delays in getting cases to trial and delays in delivery of judgments. Both these factors

397 Mogoeng M 'The Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa' (2013) 24 *Stellenbosch Law Review* 393 – 405 at 397.

398 Gordon A and Bruce D 'Transformation and the Independence of the Judiciary in South Africa' *The Centre for the Study of Violence and Reconciliation'* at 37.

limit the accountability of the judiciary and endanger public confidence in the judiciary. Our courts generally suffer from huge backlogs'.

It will be argued that inaccessibility of the courts owing to the constant lack of resources that leads to delays in dispute resolution, constitutes a site of serious tension between the courts and the communities the courts serve. Although the courts are not responsible for most delays, the public probably perceives delays in court functions as failings of the judiciary. As the Chief Martin of West Australia aptly observes:

'Because systems of administration of courts are infrequent topics of members of the public…members of the community understandably hold the courts accountable for their performance…Very few would be aware that the department has the exclusive responsibility for providing human resources to the court and there is nothing which I or any other member of the judiciary can do if adequate resources are not provided. This means that in a very real sense the department officials who make the decisions with respect to allocation of human resources are not accountable for the consequences and those who are held accountable lack the authority to discharge their responsibilities'.[399].

The central theme of Chief Justice Ngcobo's various speeches while he held office was that the judiciary could not be perceived as genuinely independent and autonomous if it depended substantially upon the executive branch for its funding and day to day operations. The message seems constant: that the entire judiciary required transformation from executive based control of court administration to one that is more under the control of the judiciary.[400]

The establishment of the OCJ to provide administrative support in the functions and duties of the Chief Justice, may be seen as a step in the right direction towards the status envisioned for the judiciary by Ngcobo. However, the OCJ was established as a national government department under the Public Service Act 103 of 1994 in terms of executive proclamation[401]. As Ebrahim points out that the current placement of the OCJ is far from ideal and although it may

---

399 Martin W 'Court Administrators and the Judiciary: Partners in Delivery of Justice' (2011 December) *International Journal for Court Administration* 1 – 12 at 8. See also - Brennan J T 'Judicial Fiscal Independence' (1971) 23 *University of Florida Law Review* (2) 277 – 288 at 279.

400 Ebrahim H 'Governance and Administration of the Judicial System' in Hoexter and Olivier (eds.) *The Judiciary in South Africa* 99 – 115 at 103.

401 Proclamation 44 GG 33500 dated 3 September 2010.

be a transitional development may be 'a distraction'[402] and seen as a 'strategy' to use the OCJ as a platform through which to control the judiciary by replacing the Minister with the Chief Justice.[403]

Thus, it seems that the concerted effort of the former chief justice has not yet yielded significant success even for the independent judicial administration of superior courts. What is clear though is that the OCJ is less likely, in the near future, to make the lower courts more easily and readily accessible to the public as it is too far removed from support for day-to-day functions of lower courts. The Constitution 17th Amendment Act[404] and the SCA[405] both evidence no sign of integrating the MCs with the superior courts for purposes of judicial administration.[406] The further deferment of the project to begin the transformation of the lower courts to make them more accessible and effective remains as a formidable challenge.

6.3.2.1 The Jurisdictional Challenges in Accessing Lower Courts

As a result of the fact that the centre of judicial administrative authority of the lower courts is vested in the executive, the judicial function and court operations are hampered by the bureaucracy that is entailed to access the required resources efficiently. Beyond bureaucratic constraints the problem of access to resources goes to issues of budgetary allocation between the judiciary and the executive for lower court operations. The courts must compete with various other government entities which are administered by the Department of Justice, such as Correctional Services, the National Prosecuting Authority, the Legal Aid Board, and the Chapter 9 institutions.

The lower court judiciary is not represented in any forum through which its own peculiar resource needs can be presented to Parliament and to the Treasury. Lower courts are funded according to what the Department of Justice deems sufficient for lower court functions with the result that the constant under - funding impedes efficient court operations and adversely impacts on judicial functioning. Before the establishment of the OCJ Chief Justice Ngcobo expressed strong

402 Kuvuru op cit note 399 at 100.

403 Ibid at 113 - 114.

404 The Constitution Seventeenth Amendment Act 2012 dated 1 February 2013.

405 Act 10 of 2013.

406 Olivier op cit note 2 at 336.

concerns about how the dependence of the courts on the executive impacts on judicial efficiency. Now more than a decade later they remain as pertinent for the lower courts as ever they did, when he stated:

> *'Our courts are administered and controlled by the Department of Justice and Constitutional Development (the Department). The administration of the courts is but one facet of the responsibilities of the Department which includes the prosecuting authority, the Chapter 9 institutions and the South African Law Commission and the administration of a whole host of legislation that falls under it. The material needs of the courts including personnel and stationery are supplied through the machinery of the Department. For the provision of accommodation and other support services including repairs to existing premises courts are dependent regardless of the possible urgency of any need in relation to these services, upon the Department and the Department of Public Works. As a result the provision of administrative functions and other services connected with the administration of justice is bound up with the bureaucracy of the broader public service'.*[407]

Most delays in lower courts are attributable to some form of resource constraint. In the main there are two categories of resources required for efficient judicial functioning: human resources as in court personnel and infrastructural resources such as court rooms and court equipment. All judicial and court administration personnel perform functions that support the initiation of judicial proceedings or the operations of the court during and after hearings. This component of judicial administration which was historically executive – controlled, continues to function under the administrative Department of Justice.

The administrative personnel of lower courts are not recruited, employed, and supervised by the judiciary. Hence, a court clerk, registrar or interpreter deployed to a court may not be individually directed to execute any administrative task by the court to which the member is posted by the Department of Justice. If a directive of the court is not executed, there may be no accountability for the prejudice that may be caused for the court users. These circumstances are the sites of constant tension between the judiciary and the court management as the courts have no

---

407 Ngcobo op cit note 24 at 426. At the time Chief Justice Ngcobo was making a strongly appeal for greater judicial autonomy in the administrative aspects of judicial functions of the judiciary as a whole. However only some advancement was achieved in this respect several years later when the financial administration of the superior courts was transferred to the OCJ in 2010.

authority to coordinate court functions and access resources to ensure that delivery of judicial services is not obstructed owing to bureaucratic considerations. As Ngcobo explains:

> *'The Judiciary must "determine its policy and strategic priority and how funds are to be allocated to pursue those priorities". This entails determining which personnel is best suited to support it in the execution of its constitutional obligations and that those functionaries be answerable to judicial authority. It must identify all the needs that are closely related to the proper functioning of the courts, budget for them, prioritise them and have them carried out under its watch'.*[408]

The constant struggle of MCs to function effectively continues nearly a decade after the enactment of the SCA and the establishment of the OCJ. Considering that of the approximately 2.4 million criminal cases that are received in MCs each year only about 1000 are referred to the High Court for trial,[409] this means that primarily the right of access to courts is either given effect to or denied in the lower courts.

6.3.2.2 Delays in Dispute Resolution and Impact on the Right of Access to Courts

The nature of judicial service is essentially rights oriented. Unlike other service industries judicial service is essentially concentrated on the rights of its users and qualifies as a service of a special kind or a service *sui generis* which is aimed at proper compliance by the courts with all the rights that are entailed in enabling the courts' accessibility. Courts ordinarily prioritise fair trial rights above expenditure of time and resources required to ensure adjudicative fairness and due process. As the resource needs of the lower courts are not aligned with the supplier of the resources, effective dispute resolution is imperilled by constraints of the bureaucracy, impacting the rights of court users to fair hearings in all categories of disputes, criminal, civil and family, that serve in the lower courts. The most serious impediments to the right of access to courts in each of these categories are examined in the following sub – sections.

6.3.2.2.1 Criminal Courts

The most prevalent systemic difficulty is the high volume of cases that are dealt with by lower courts. The lower courts regularly crowd out trials by postponing them several times because

408 Ngcobo op cit note 24 at 689.

409 Statistics provided by the Office of the Chief Justice for 2016. There were also more than 677 000 civil cases in the district courts and about 40 000 civil trials in the Regional Courts. In addition, there were over 680 000 family violence protection orders issued and maintenance enquiries received in the family courts in 2016.

they are often unable to get to all the scheduled trials for the court day: backlogs are commonplace in lower courts as they fail to cope with the high volumes.[410]

The legal framework for the context in which criminal trials are conducted is provided by the Constitution and it does not permit the courts to disregard the application of fundamental rights, or the specific rights of accused persons at any stage. The right to have criminal trials to begin and end without undue delay is a fundamental right of accused persons that is founded on the universal human rights principle that one is innocent until proven guilty.[411] The deprivation of a person's liberty without lawful cause is a serious human right violation and is intolerable in any society governed by rule of law. As the CC held on the issue of unreasonable delays in criminal cases in *Sanderson*:

> *'Of the most important factors bearing on the enquiry…the first is the nature of the prejudice suffered by the accused. Ordinarily the more serious the prejudice…the shorter must the period be within which the accused is tried. Awaiting – trial prisoners in particular must be the beneficiaries of the right in section 25(3(a). In principle the continuing enforcement of section 25(3(a) rights should tend to compel the state to prioritise cases in rational way. Those cases involving pre – trial incarceration or serious occupational disruption or social stigma or the likelihood of prejudice to the accused's defence or in general cases that are already delayed or involve serious prejudice should be expedited by the state. If it fails to do this it runs the risk of infringing section 25(3(a)'.*[412]

The lack, inadequacy or unavailability of human and material resources are the reasons for the largest number of delays in criminal courts. The high volume of crime and criminal cases inevitably leads to scheduled trials being postponed which is prejudicial, not only to accused persons but to others required to attend court proceedings as witnesses. Wallis J remarks on the impact of delays on those compelled to participate in court cases:

> *'It denies the accused a reasonably speedy trial although this is a constitutional requirement. It denies the victim of crime the satisfaction of the perpetrators of the crime being brought to justice. It denies families and communities of closure. It grossly inconveniences witnesses and often they*

410 According to the statistics provided by the Office of the Chief Justice for 2016.

411 Article 9 3 International Covenant on Civil and Political Rights 1976 999 *United Nations Treaty Series (UNTS).* Also in Article 6 1 European Convention on Human Rights 1953 213 *UNTS* 222.

412 *Sanderson v Attorney General* – Eastern Cape 1998 2 SA 38 (CC) at para.31.

disappear or refuse to cooperate with the prosecution. Frequent delays result in cases being withdrawn simply because of the tide of cases coming on behind'.[413]

6.3.2.2.2 Civil and Family Court Delays

The right of access to courts includes access to civil justice to all litigants of all claims under the law. Access to civil courts as a basic human right is stressed in the following statement by Friedman J: "The focus on access – the means by which rights are made effective – now also characterises modern procedural civil scholarship."[414]

Chief Justice Ngcobo remarked on the problems affecting the administration of justice thus:

'Our civil justice system suffers from a number of weaknesses: it is slow, it is complex and it is fragmented and overly adversarial. These weaknesses combine to produce a system that is gradually becoming inaccessible to the average person. In a country like South Africa where there are gross disparities in wealth and education the system becomes unequal for those who are wealthy and those who are poor and the result it produces is similarly unequal. In a country where the majority is illiterate and poor the majority suffers'.[415]

Delays in resolving civil disputes invariably result in severe economic prejudice to litigants often causing claimants more economic and financial loss than the monetary value of the claim. This may therefore shape the public perception that courts are ineffective. Effective and efficient resolution of civil disputes influences economic well-being of all sectors of society from the most modest of monetary claimants to major business and corporate entities. Van Loggerenberg expressed his view about the state of civil procedure in South Africa as follows:

'The greatest challenge facing South African lawmakers is that of making litigation less costly and the courts more accessible to a far greater number of people. More and more South Africans are dismayed by, amongst others, court delay and court inefficient procedural rules. Their dismay is fuelled by high costs of litigation, late settlements, restricted resources and the like. The advantage however, of the South African civil procedural system is that it is not cast in stone but could subject to the Constitution, be developed to make it more accessible to the public whilst

413 Wallis M "Ordinary Justice for Ordinary People: The Eighth Griffiths and Victoria Mxenge Memorial Lecture" (2010) 127 *SALJ* 369 – 381 at 372.
414 Friedman op cit note 355 at 336.

415 Ngcobo op cit note 24 at 706.

protecting the public's fundamental rights, entrenched in the Constitution and in particular the right to a fair trial embedded in sec.34 thereof'.[416]

In so far as civil and family court disputes are concerned, the demands upon lower court judicial resources are considerable also because of the much higher volumes of litigation.[417.] The discrepancy does not seem to be justifiable when all that distinguishes the claims instituted in the High Courts from those in MCs is often just the monetary jurisdiction. Litigants do not benefit from a High Court civil trial either for the same reasons as accused persons in criminal trials in High Courts derive little benefit. In addition, civil litigation in the High Courts does take much longer to be finalised also, mainly because the pace of trials is managed by the parties rather than the courts.

No less significant is the role of lower courts that are at the coalface of legal resolution of family and related conflicts, such as maintenance, child support, domestic violence, and divorce. These are voluminous[418] and administration - intensive judicial functions requiring substantial human and material resources to be employed efficiently. This sector of court users is among the most economically and socially vulnerable members of society and most in need of courts' resources to ensure their effective protection and well-being.

6.3.2.3 Transformation of Administration of Judicial Functions

The considerably increased jurisdiction of lower courts since independent status was acquired has an important bearing on the right of access to courts. In effect the increased jurisdiction greatly expanded the availability of many more district and regional courts to many thousands of people who previously had to use the High Courts for these purposes.

Although the legislature, responded to the call for greater accessibility of the courts by these enactments, neither the vastly increased case – load of every judicial officer nor their corresponding skillset development, seems to have been factored in by the political organs to correlate with the additional jurisdictional capacity. Under the circumstances, the best intention behind the increased legal capacity of the lower courts, may not materialise on account of the

416 Van Loggerenberg D "Civil Justice in South Africa" (2016) 3(4) *BRICS Law Journal* 125 – 147 at 146.

417 Ibid.

418 National statistics issued by the Office of the Chief Justice for 2016 reflects that there were 478 848418 domestic violence protection orders issued by family courts country wide which constitutes 95% of family court matters dealt with by district courts.

inability of the courts to meet the demand of the increased forum accessibility. The contrary may in fact be the outcome, as the pre – existing problems of delays due to resource constraints is likely to be further compounded.

Transformation of the administration of judicial functions of all courts is envisioned in the Constitution and as Chief Justice Mogoeng points out the transformation of court administration is directed at ensuring that day to day operations of courts are not directly or indirectly controlled by other arms of government.[419] Administrative judicial independence is important for the accessibility of lower courts as they are to the superior courts, despite the jurisdictional differences and therefore the almost total dependency of the lower courts on the non – judicial organs for its resources, is inconsonant with judicial independence.

6.4 Conclusion

In this chapter the thesis has argued that everyone's right of access to courts to resolve disputes is inextricably linked to the essential value that the courts represent, which is impartiality and independence. Without the assurance that the courts are institutionally independent of the other organs of government, the formal right of access to the courts is rendered meaningless. Because of the extensive controls by non – judicial organs in the judicial functioning of the courts, the judiciary remains incapable of ensuring that the lower court users have their disputes resolved effectively.

Judicial functioning implies that judicial officers are required to produce judgments and rulings that resolve the disputes effectively. To do so, they need to be properly qualified and competent to ensure the correctness of judgments and in addition, they require the resources for the efficient administration of judicial functions. It is argued that the right of access to courts is denied when the judgments of the court do not correctly and acceptably resolve the disputes and or when the judgments are unduly delayed owing to the lack or inaccessibility of resources.

The selection of judicial officers by the Commission and the appointment by the Minister do not testify to the appropriateness of the qualification that they are appropriately qualified for competent adjudication of disputes. Judicial officers are selected and appointed without the

---

419 Mogoeng op cit note 402 at 397.

.

necessary judicial education and are not required to undergo judicial training after appointment, hence the risk of judicial errors is substantial. The prejudice to the litigants is often significant and irreversible. Merely enabling court users to present their disputes for resolution by a court is likely to be futile if the dispute is not effectively resolved.

As the executive controls judicial resources, the lower courts are powerless in preventing much of the unduly long delays that make the courts inaccessible to many litigants. The lower court judiciary is not represented in any forum, through which its own peculiar resource needs can be presented to Parliament and to the treasury. Lower courts are funded according to what the Department of Justice deems sufficient for lower court functions with the result that the constant under-funding impedes efficient court operations and adversely impacts judicial functioning.

The bifurcated structure of the judicial system is inherently unequal and will continue to infringe the fundamental rights of lower court users. The fact that the unequal protection of the independence of lower courts has been accorded legitimacy by the Constitutional Court[420] enables the political organs to discriminate against the lower court in the provision of support for their effective functioning. The implication that the independence of lower courts is less important than that of higher courts, enables the political organs to avoid accountability for failing to provide the necessary support required of them towards ensuring the independence, dignity, and effectiveness of the major component of the judiciary.

Under the constrained circumstances in which judicial functioning occurs in the lower courts, the following insightful questions by Martin will resonate with the South African judiciary since democracy:

> *'But can a court which lacks the capacity to decide where and when it will sit because it depends on the executive government for resources, truly be said to be independent? Can a court which lacks the capacity to appoint and fully control its staff truly be described as independent? Can a court in which most staff are appointed and ultimately controlled by the most prolific litigant in the court truly be said to be impartial?'.*[421]

---

420 *Van Rooyen* case op cit note 17.

419 Martin op cit note 404.

421 Ibid.

As the governance over the lower judiciary remains with the non – judicial organs, it is unlikely that the right of access to effectively functioning courts, can be ensured. The question remains: Are the MCs courts, as they are presently structured, in fact institutionally independent?

In the following chapter, this thesis proposes reforms that involve the restructuring of the judicial system to incorporate the lower courts into the mainstream of the judiciary and to bring the administrative governance of the lower courts under that which is applied to the superior courts. This requires that old order laws that impede transformation of access to courts be repealed and replaced by legislation that advances the institutional independence of lower courts sufficiently to answer the question posed in the previous paragraph in the affirmative.

CHAPTER SEVEN

Proposals for Reform

7. 1 Introduction

> "*Our everyday question to our court system and the people who work in it should be: 'Does this enhance justice for ordinary people?' and, if the answer is in the negative, those involved should be asking: 'What can I do about it?'.*" [422]

7.1.1 Recognition of the Value of Lower Courts

Through the study of the history, status, and present legal capability of MCs to provide South Africans a viable judicial dispute resolution service, this thesis has set out to identify the major impediments to the transformation of the lower courts and to show how the lack of transformation adversely impacts on the right of access to the courts as guaranteed by the Constitution. The primary contention of this thesis is that the weakness of the judiciary at the lowest level of the system, lies in the fact that MCs do not perform their judicial dispute resolution function independently of the other organs of the state and the perception that they do not is reasonable and justified. As the analysis above indicates, the current legal framework governing the structure and functioning of MCs reflects a high level of dissonance with the principles of judicial independence. Hence the right of access to courts in which judicial impartiality and independence is implicit, cannot be ensured. The recommendations proposed for the reform and transformation of lower courts are aimed at the alignment of the constitutional vision of independent courts with the realities of judicial functioning at lower court level and the advancement of the project to give full recognition to the role of lower courts in ensuring the right of access to courts.

422 Wallis op cit note 419 at 381.

Evidently, the initial hurdle to reform arises from the want of an unequivocal recognition, particularly by the political branches, of the invaluable role of the lower courts in the judiciary, in maintaining societal stability. This seems to have enabled successive administrations since the advent of democracy to perpetuate the notion that MCs perform less important judicial functions than the superior courts. Such a position of non – recognition has also enabled the political branches to avoid engagement with the judicial transformation imperatives of the Constitution.

Some of the negative perceptions may be associated with the history of MCs being agents of the executive government in enforcing apartheid.[423] This history may have created the perception that magistrates were not as well – trained and competent as judges because they were generally appointed from the ranks of public prosecutors. However, it is doubtful that only this history itself, still significantly shapes this public perception. Moreover, in view of a growing recognition among jurists[424] that MCs are the face of the judiciary and that the core function of the judiciary, which is dispute resolution, takes place mainly in these courts, the perception that lower courts do less important work is hardly reconcilable with the reality.

As this thesis has consistently argued, MCs perform judicial functions that are of equal importance as those performed by superior courts: any suggestion to the contrary is not legally justifiable. However, the perception that the judicial functions in lower courts are performed by inadequately qualified and incompetent judicial officers, could well have formed through the experiences of users of lower courts. Considered in the light of the findings of this thesis, particularly in Chapter Six, which discusses the relevance of the quality of judicial dispute resolution to the right of access to independent and impartial courts, this perception may, to a significant extent, be correct and therefore requires to be appropriately addressed. Indeed, the reforms proposed in this chapter give focused attention to the connection between the concepts of institutional judicial independence and the effectiveness of dispute resolution at lower court level.

---

423 Chapter 2 generally.

424 Olivier op cit note 2. Also see - Van Dijkhorst op cit note 3. 'The future of the Magistracy' *Advocate* 2000 First Term 39 – 42 at 42 and DGRU op cit note 293.

7.1.1.1 The *Van Rooyen* Factor

By affirming the historical status of MCs courts as justifiably inferior *Van Rooyen* contributed to the deepening of the perception that the work of lower courts is of much less importance than that of the superior courts. Hence, as Olivier observes; 'magistrates are not regarded as highly as judges due to a perception that magistrates perform less important work than judges, are less qualified and less competent.[425]

When considered in the context of the problem these proposals aim to address, however, *Van Rooyen* has little significant impact because it makes findings that are narrowly confined to the interpretation of specific sections of the MA. In this respect the relevant findings in *Van Rooyen* should be viewed as extremely time and circumstance sensitive and can only be relevant for the time the MA or the provisions in question, remain intact as law, and not beyond. Importantly, the CC seems not to have considered that the judicial independence of lower courts is as important to lower court users as it is to those able to access the superior courts.[426]

7.1.2 Summary of Foundational Principles Underlying Reform Proposals

In sum, the principles upon which these reform proposals are based are the following:

The right of access to courts provision in the Bill of Rights entitles lower court users to impartial and independent dispute resolution, as those whose disputes are heard in the superior courts. As the impartiality and independence of judicial decisions constitutes the essence of all dispute resolution, the forum available to litigants for the hearing of the dispute should have no bearing on the quality of the judgment or its effectiveness. The right of access to courts and the right to equality before the law are not qualifiable according to the jurisdiction or the hierarchy of the court deciding the dispute.

A significant aspect of the principles connecting the rights of access to courts, the right to equality before the law and the right to impartial and independent dispute resolution is that the judgments of the lower courts are equally enforceable as those of the superior courts by the responsible organs of the executive. (Section 165 (5)) One of the fundamental principles of institutional

425 Olivier op cit note 2 at 319.

426 See - Chapter 6 generally on the link between the right of access to courts and the judicial independence of lower courts.

judicial independence protection is post – decisional independence and the respect for judgments[427] of all courts.

The guarantee of the independence and impartiality of the MCs is not qualified in the constitutional provision in which MCs are listed as independent with superior courts. This thesis maintains that the Constitution does not authorise the legislature and executive to provide a lower standard of judicial independence than it provides for superior courts and judges.

The MA and MCA are inadequate in ensuring that lower courts function independently and impartially and therefore need to be repealed and appropriately replaced. The MA does not ensure that the essential conditions of judicial independence are satisfied in respect of the independent appointment of judicial officers, their security of tenure or the remuneration and service conditions. The retention of the MCA from the past century to serve as the central vehicle for the administration of justice for most of the judiciary after the adoption of the Constitution, is unjustifiable and unsustainable.

Since judicial authority is vested in the courts, the judicial officers who preside in the MCs are performing judicial functions. Therefore, judicial officers of MCs are judges in all but name. The name 'Magistrates Courts' and the title 'magistrate' inherited from England do not describe the work of lower courts. This thesis proposes that the classification of lower courts as magistrate courts and the judicial officers as magistrates be changed and given names and titles that accord with their present functions and importance to the judiciary and to society. In a seminal paper delivered by John Lowndes on the issue of the judicial officers of lowest courts in Australia being titled 'magistrates' Lowndes cites with approval the statements of Briese and Michelides as follows:

> *'There is often a perception that the work done by magistrates is trivial, inferior, non-qualitative judicial work: nothing could be further from the truth. The present "Magistrate/Judge" dichotomy is responsible for this perception and perpetuates an artificial distinction between the role of judges and magistrates and the work they perform. The renaming of magistrates as "judges" would remove this erroneous perception'.*[428]

427 Shetreet op cit note 56.

428 Briese CR 'Future Directions in Local Courts of New South Wales' (1987) 10 *New South Wales Law Journal* (1) 133 in a paper delivered at the Northern Territory Bar Association Conference by Chief Judge John Lowndes 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond' at 47.

As Lowndes points out, other common law jurisdictions, notably Canada, New Zealand and more recently England have eliminated the designation ‘magistrate’ and replaced it with the title ‘judge’.[429]

By international norms, in both common law and civil law jurisdictions, professional adjudicators belong to the occupational category of judges and are accordingly referred to as judges. The Constitution itself does not attach the title ‘magistrate’ to officers presiding in lower courts which is an indication that the Constitution envisages that the title of magistrate be eliminated in the laws pertaining to lower courts.

7.2 The Proposed Reform Framework

The reforms proposed should create conditions that enable all communities in society to access lower courts that are manifestly more valuable than before and will be perceived as such. The realisation of this value demands that fundamental changes be made to various sections of the Constitution. Therefore, the following section (7.2.1) consists of the proposed constitutional amendments and the discussion of the considerations underlying these proposals.

The amendments to the Constitution in themselves will probably not adequately resolve certain other issues that significantly affect the right of access to the lower courts, although the fundamental principles of this right will be dealt with through appropriate constitutional amendments. Of these, the most important is the need for reform in the administrative judicial functions of the lower courts and for legislative action to increase the autonomy and or better representation in the determination of allocation of resources for efficient functioning of the judiciary at lower court level. Section 7.2.2.1 contains proposals for reforms in this area.

7.2.1 Constitutional Amendment

Although it is quite clear what aspects of lower courts’ structure and functions must be reformed, how these changes must be affected requires interrogation of the more complex questions of constitutionalism and the doctrine of separation of powers.

The higher judiciary of South Africa as provided for in the Constitution, substantially manifests in character, objectives and function, the principles of the doctrine of separation of powers and judicial independence that are usually embodied in codified constitutional systems. This is remarkably different to the judicial systems that are characteristic of common law jurisdictions.

429 Ibid at 51.

Nonetheless, the transition, from a period in its history, when judicial independence was limited by an undemocratic parliamentary regime, to a position of vastly greater authority, in a constitutional democracy, was unobstructed and relatively seamless.

While the superior courts and judges were adopted as the judiciary in 1994, the MCs and magistrates remained effectively under the governance of a pseudo - parliamentary system and not considered part of the judiciary for most purposes. An untenable paradox emerges for the MCs, straddling different types of governmental authority: the Constitution recognises MCs as 'courts' as it does the superior courts but omits to protect their independence as adequately as the superior courts and judges.

The challenge lies in determining whether and if so how, the doctrine of separation of powers applies to MCs in the judicial system: as applied in jurisdictions governed under the constitution as the supreme law, or whether it is to be applied as it is in the common law judicial systems in parliamentary sovereign states. The fact that six decades before democracy, the political position of the South African government diverged and developed differently from that of England, after the passage of the Statute of Westminster, has added another layer of complexity to the issues of judicial independence of lower courts. This means that no clear determination can be made as to the approach applied to constitutionalism and the doctrine of separation of powers when consensus was reached about the status of MCs in the judicial system, at the time of the transition to democracy. This scenario has no well-known jurisprudential precedent. Hence it is suggested that when the question of MCs judicial independence arose in *Van Rooyen* the CC resorted to the Canadian precedent set in *Valente,* which, as argued, has not contributed to answering the problem question.

The South African Constitution is often described as one of the most progressive and advanced in the protection of citizens' rights and therefore it should be the primary resource sought to answer the uniquely South African question: what does it mean that MCs are independent? The answer to the question; what principle of constitutionalism requires that MCs, that decide most judicial disputes in the country, be separated from the judiciary for purposes of protection of their judicial independence, should be found in the Constitution itself. This thesis proposes that if the Constitution provides no clear answers to the questions posed then the solution would be to seek that it be amended appropriately to remedy the lacuna or defect. Accordingly, in the following paragraphs the aim is to analyse the relevant provisions of the Constitution to

determine the legal basis for the different treatment of MCs judicial independence compared to that given the superior courts.

7.2.1.1 The Meaning of Magistrates Courts' Judicial Independence in the Constitution

There is a significant difference between the concept of judicial independence of the judiciary, in its distinctive position as an organ of the state, and other organs of the state and other entities established in terms of the Constitution. As the discussion in Chapters Three and Four indicates, the nature of judicial independence protection universally, is specific to judicial functions and is not conceptually the same as those that may be instituted for non – judicial bodies. By expressly providing that the appointment and security of tenure of some judicial officers be provided in an Act of Parliament while that of judges are included in the body of the Constitution, implies in principle, the conceptual disassociation of MCs from the judiciary and their association with non – judicial organs and public service entities. As MCs represent the judicial authority of the state and their judgments are equally enforceable as those of superior courts, the association of MCs with non – judicial entities tend to contradict the constitutional imperative that MCs are subject only to the Constitution and the law.

In this respect, the judicial independence of MCs is likened to the independence of all other independent institutions such as the National Prosecuting Authority and some of the Chapter 9 institutions. Independence is the first characteristic of courts but certainly not sufficiently distinctive because non – judicial entities such as the National Prosecuting Authority and all Chapter 9 institutions are independent of the organs under whose auspices, they make their decisions and must function in the public interest impartially, without fear, favour, or prejudice.[430]

Judicial independence as an element of the separation of powers principle, is different from the independence of institutions established under the Constitution: officers of Chapter 9 institutions are, in addition to their accountability to the Constitution and the law, also accountable to the National Assembly. The National Prosecuting Authority and prosecutors function independently but may be called upon by Parliament to explain action or inaction in certain instances. The Minister of Justice also has oversight authority over the National Prosecuting Authority.

430 Constitution - sections 179 and 180.

Whatever the reasons were for this separation of superior courts and lower courts along the lines of a certain view of the concept of judicial independence, they remain obscure and may in fact not be rational or legally explicable (as argued in the critique of *Van Rooyen*). The provision for an Act of Parliament to cater for certain aspects of the judicial independence of lower court judicial officers in a single clause of the Constitution[431] has several implications. The following closer analysis of this clause provides the context for the reform proposed in this respect.

7.2.1.2 Constitutional Protection of Institutional Judicial Independence

The enactment of legislation to provide for the security of tenure of all ranks of judges is not extraordinary in common law jurisdictions. The earliest statutory law that was aimed at preventing the arbitrary dismissal of judges by monarchs, is the Act of Settlement.[432] As it became evident, more recently, that informal conventions were not strong enough to protect various aspects of judicial independence, laws had to be enacted, as protective mechanisms aimed at curbing executive and parliamentary power over the judiciary.[433]

Section 174(7) of the Constitution requires that an Act of Parliament must ensure that the appointment and dismissal of magistrates is impartial. Unlike the mechanisms created for the protection of impartiality of appointments and tenure of judges under the same section of the Constitution, there is no requirement that there be an independent body, especially to ensure the impartiality of appointment and dismissal of magistrates. It should not be assumed that such an Act of Parliament was already in existence at the time the Constitution was adopted, although the Interim Constitution recognises the existence of a Magistrates Commission. As the Constitution is somewhat equivocal in this respect, the interpretation ought to be guided by the universal principles on the protection of judicial independence. As Shetreet points out, judicial independence protection should be included in the body of the Constitution.[434] The realisation of this is reflected in the fact that such protection is ensured in the Constitution for judges. Except for the justification in *Van Rooyen* there is no clear rationale underlying this omission in respect of judicial officers of MCs which are listed with superior courts as independent courts in the Constitution.

---

431 Constitution - s 174(7).

432 See - Chapter 3 Sub – section 3.2.2.1

433 Shetreet op cit note 56 at 319.

434 Ibid.

There is substantial merit in an argument that where the Constitution is the supreme law, especially in a unitary as opposed to a federal state, the appointment and tenure of all judicial officers should be protected in the Constitution itself. Stated differently, there is no reason that a matter as pertinent to constitutionalism as the protection of judicial independence, regardless of the rank of the court, should not be embodied in the Constitution. Therefore, it is argued that it is inevitable that the envisaged transformation of the judiciary necessitates appropriate amendments to the Constitution.

The proposal that the essential conditions of the judicial independence of lower court judicial officers be protected in the Constitution itself directly impacts on sections 174, 176, 177 and 178 as these are the provisions ensuring the independence of judicial appointments, security of tenure, remuneration and removal of judges. As sub – section 6 of section 174 (which provides for the appointment of judges of all courts except the Constitutional Court) would have to be amended to include judicial officers of lower courts, the question arises as to how the role and functioning of the JSC could be adapted for the change in the nature and size of the constituency it must serve.

As the discussion in Chapters Five and Six indicates, the Magistrates Commission has not been effective in ensuring the judicial independence of the courts and of the judicial officers of lower courts. Therefore, this thesis has consistently maintained that the entire MA, under which the Commission exists, needs to be removed from the statutes. Several questions arise then about the replacement body such as (i) What objective/s would such an institution aim to achieve considered in the light of the fact the jurisdiction of entry level courts is markedly different from those of superior and appeal courts? (ii) How would the independence of this body be ensured? (iii) Where within the framework of the Constitution should this institution be located? (iv) Which entities should be represented and in what proportion to the judicial sector represented therein? Some of these questions and the appropriate responses to them have been anticipated in previous chapters, particularly Chapter Four.

(i)The objectives of a lower court governance institution

The objective of providing for a lower court governance body would be mainly to ensure that the appointments and dismissals of judicial officers take place impartially and independently of interference and undue influence, external or internal to the judiciary. The determination of how

to attain and sustain these objectives requires consideration of the instrumental value of judicial independence.

(ii) Ensuring the Independence of the Judicial Appointment Institution

In Chapter Six this thesis discusses the intrinsic connection between judicial independence and the right of access to courts and the importance of effectiveness of adjudication in ensuring the right of access. As the quality of judgments and the efficiency of delivery of judicial service must be the central considerations informing the appointment of all judicial officers, the aim of the appointment institution must in principle be unerringly to appoint only the best qualified and competent persons to preside in the courts. This approach is most likely to eliminate, to a large extent, the room for appointments that are arbitrary and to advance accountability on the part of the appointment institution.

Jurisdictional differences between the lower and superior courts are important considerations in appointments of judicial officers. As first instance trial courts, their jurisdiction is defined in section 170 of the Constitution, and therefore constitute judicial decisions that are circumscribed by the application of the law to the findings of facts. As such, lower trial courts have minimal impact, if any at all, on the substance of the law itself. When the primary criterion in lower court judicial selection is the qualification of the candidate, the value of political representation, in the appointment of the best qualified candidate is limited. Therefore, this function should mainly, although not exclusively, be exercised by representatives of the judiciary and legal practitioners.

Furthermore, under the circumstances, the potential risk of internal interference by judicial officers and undue influence by representatives of practising lawyers, would also be reduced with the selection and nomination being restricted to candidates who are certified as appropriately qualified by a judicial education institution. This aspect of certification of judicial qualification is dealt with in more detail in a sub – section below.

(iii) Where in the Constitution should an Appointment Institution for Lower Court Judicial Officers be provided?

In a judicial system that is not divided between the superior courts and MCs, the body that appoints judicial officers to lower courts need not be a wholly separate institution from the one

that appoints all judges. Indeed, it has been argued in this thesis that such a division constitutes an artificial barrier between the superior and lower courts and serves no justifiable legal purpose. However, the removal of the barrier in the judicial system implies that the authoritative body for the appointment of judges could legitimately also be seized with the function of appointing judicial officers of lower courts. Accordingly, an amendment to the Constitution to give effect to this development is inevitable because the Constitution provides that there is a Judicial Service Commission[435] (JSC) whose function it is to select and recommend judges of superior courts for appointment by the President.

A simple amendment of section 174 (6) would read: 'The President must appoint the judicial officers of all other courts on the advice of the Judicial Service Commission.' It is doubtful that an amendment that simply extends the function of the JSC to incorporate the appointment of lower court judicial officers, without more, will achieve the objective of ensuring the independence and effective functioning of the courts, for several reasons.

The first and obvious reason, though not necessarily the foremost, is that of the vastly increased size of the constituency that will fall directly under the governance and control of the JSC. This may result in some rather unwieldly encumbrances for the JSC, under which it may become difficult for it effectively to execute its constitutional mandate.

Secondly, it is important to determine whether the JSC, as it is currently constituted and functions, needs to employ and apply the same or a similar set of principles, guidelines, and considerations to the appointment of lower court judicial officers, as it does in its functioning as an institution for the appointment of judges. This thesis takes the view that there is no such need, not because lower court judicial officers do less important work but because the lower courts do not have the same jurisdictional authority as the superior courts. The appointment of superior court judges as opposed to other judicial officers must be tailored to suit the particular jurisdictional needs of the particular court at which a judicial vacancy needs to be filled. By the same token judicial officers of lower courts need to be assessed according to the skillset requirements for judicial functioning at first instance trial courts. It is not ideal that the same selection committee that selects judges to superior courts, also has the responsibility to select lower court judicial officers for appointment. The implication regarding an amendment of the Constitution to expand the JSC's role in appointments of judicial officers of lower courts, is that

435 Constitution - s178(1).

such an expansion may threaten to complicate the processes for both levels of hierarchy of courts and render it cumbersome and inefficient.

Thirdly, related to the second reason, for not proposing a simple amendment to section 174(6) is that the membership of the body that selects and recommends appointments to lower courts, need not be as large nor does it need to serve political interests as much the JSC seems to do. As lower courts focus on people's right of access to courts that effectively resolve disputes without external or internal interference, only the qualification and competence of the candidate, objectively assessed, adds value to the judicial selection process.

The fourth reason is related to the importance of establishing a stable judicial appointment and disciplinary institution for lower courts under the Constitution but as a separate and independent body. This could be established as a sub – division of the JSC or as a stand-alone lower court authority headed by the Chief Justice, which it is proposed, be called the 'Lower Courts Judicial Council' (LCJC) or ('Judicial Council for Regional and District Courts') Such an institution would be an appropriate replacement of the Commission and importantly would rid the lower courts of the stigma attached to the MCs association with the executive government of an undemocratic state.

Finally, the JSC at present seems to be experiencing a considerable amount of turmoil owing to the constant criticism of its functioning in appointing the most senior judges of the country.[436.] These criticisms emanating from all sectors of the public, jurists and scholars indicate that various aspects of the JSC need reform and therefore should not be ignored.[437] Hence it could be counterproductive at this time to simply extend the JSC's functions in any way that may complicate the reform process currently being publicly debated.

---

436 Olivier and Hoexter op cit note 241. See also - Corder H 'Comprehensive Review: The JSC is in freefall and the stakes are too high for it to fail.' Opinionista in *Daily Maverick,* www.dailymaverick/opinionista.co.za published on 30 June 2021. Accessed on 11 February 2022.

437 Davis R 'JSC plumbs new depths in Chief Justice interview derailed by anonymous rumours' Media Report, *Daily Maverick* 4 February 2022. Accessed from www.dailymaverick.co.za on 4 February 2022. See also Maughan K 'It's an insult' New low for JSC as Mlambo asked about sexual harassment 'rumours' in CJ interview' media report in News 24 on 4 February 2022. Accessed from *news24.com* on 4 February 2022. See also - Naidoo Lawson 'CASAC takes JSC to Court over ConCourt Interviews' report in *politicsweb* on 3 June 2021. Accessed from www.politicsweb.co.za on 3 June 2021.

At this critical juncture an evaluation is required as to the feasibility of expediting the long overdue reform of lower courts in the interests of better accessibility, while the JSC 's functioning is being increasingly called into question. Although it may be eminently possible to proceed with the transformation of lower courts by giving effect to the proposals made above through the inclusion of separate and additional provisions to Chapter 8 of the Constitution without affecting the operation of the existing sections, there are disadvantages.

The problem with a piecemeal approach to reform is the uncertainty that may be created about the holistic effectiveness of the substantive constitutional reform amendments of different but related sections, at different stages. It seems necessary therefore, to include proposals for the amendment of some sections of Chapter 8 that are directly applicable to the superior courts and in particular to section 178.

Beyond the issues of piecemeal reform of the judiciary through constitutional amendments, alluded to above, there is a matter of broader and deeper significance that requires circumspection about the approach to reform of the Judicial Service Commission. It behoves government to pay heed that the Constitution invests in the JSC the important role of shaping the judiciary as a co – equal arm of the constitutional state with Parliament and the Executive. The JSC is seized with the responsibility of ensuring that the judiciary enjoys the confidence of the public in guarding the Constitution. A weak JSC has the potential to weaken the judiciary as an organ of the democratic state, therefore it is imperative that the weaknesses be identified and remedied.

Gauging by the nature of the barrage of criticisms levelled against the performance of the JSC, beginning more than a decade ago, it is apparent that sight has been lost of the primary objectives of the JSC and its functions, determined in accordance with these objectives. Therefore, at some stage, rather sooner than later, a reformed and strengthened JSC must continue to serve its primary purpose of ensuring the legitimacy and credibility of the judiciary by protecting the individual and institutional independence of judges and the judiciary respectively.

The criticisms levelled against the JSC suggest that the large political component in the membership of the body is perceived as having an overwhelming degree of control over judicial selection which militates against appointment of the best qualified candidates. The other common concern is that the conduct of the commissioners during the interview phase of the judicial selection process is sometimes lacking in decorum. This impacts on the solemnity of the

proceedings and tends to impair the dignity of the interviewees. The televised public display of unrestrained *ad hominem* offensives by commissioners mostly representing the non – judicial sectors of the JSC, undermines the value of the judiciary and the JSC itself.[438] Under the circumstances it seems appropriate to engage with and resolve the current challenges confronting the JSC.

Ultimately, it seems inevitable that the JSC's composition and functioning will need to be reformed through appropriate constitutional amendments. However, in order that the various sectors of society be represented in the JSC, with the objective of ensuring that the judiciary enjoys public confidence, the JSC too, like other constitutional organs and its members should be held accountable to the Constitution and the law. Judges are, correctly, held to the highest standards in respect of their conduct and integrity both professionally and personally as the comprehensive code of conduct, in the Judicial Service Commission Act prescribes. It seems anomalous therefore that the JSC and its members who are responsible for the selection of judges of such high calibre, may not be held to account by law or by some rules developed through convention.

The following sections of this chapter deal with the specific proposed amendments for reform of the lower courts but also entails amendments to the Constitution affecting the superior courts as it is envisaged that the proposed reform of lower courts will not be effective until the JSC functions properly in terms of its mandate.

7.2.1.3 The Proposed Constitutional Amendments

The proposals to amend the Constitution are aimed at fully integrating the lower courts into the judicial system for the purposes of ensuring that they function as independently of the political organs as the superior courts and that their essential conditions of judicial independence are equally well-protected. Although the background and principles applied in the proposed amendments as sketched above draws attention to specific sections of the Constitution that are targeted, various other provisions will be affected and will require amendment.

The proposed amendments to the Constitution follow the principles and themes of the problem questions of this thesis and are grouped accordingly as amendments necessary to give effect to the formal recognition that the lower courts are fully constituents of the judicial organ that function

438 Briese op cit note 436.

separately from the executive and legislature and independently of them; to recognise that the judicial functions of lower courts are equally important as that of superior courts and to remove barriers to attainment of full judicial status; and, to ensure that the independence of lower courts is protected equally as that of superior courts. Ultimately, these amendments are aimed at the realisation of the right of access to all courts, consistently with the best practice in jurisdictions internationally.

7.2.1.3.1 Amendments Recognising the Value and Importance of Lower Courts and Integrating Lower Courts into the Judicial System.

It is necessary to amend various provisions of the Constitution in order develop and establish a judicial system within which the full value of the lower courts is recognised. This implies the ending of the anomaly of a divided judicial system based on the historical association of MCs with the political organs and the integration of all courts from the Apex court to the entry level district court, into a single judicial system. The courts listed as 'Magistrates Courts' would be given names, appropriate to their status and function, in the hierarchal, dispute resolution structure. The first section of the Constitution that will be impacted would be section 166. The proposed amendment is that the name 'Magistrate's Courts' be replaced with 'Regional' and 'District' Courts.

The amendment of section 166(d) facilitates amendments to section 170 by directly referring to the courts as Regional and District Courts and according to these courts their appropriate titles and jurisdictional limits, instead of the current oblique reference to the lower courts, as the courts that are excluded in sections 167, 168 and 169. The inclusion in section 170 of the lower courts by their appropriate names and ranks, shifts the focus from the superior/ inferior - court dichotomy and promotes the perception of a unified judicial branch, while enabling a better understanding in society of the role of each level of court in the hierarchy of the judicial system.

The proposed renaming of lower courts creates the need to accord judicial officers the appropriate titles of Regional Court and District Court judges which would correct their professional title to accord with the adjudicative functions that all judicial officers perform. The title of 'judge' of the Regional or District Court in effect recognises these judicial officers' membership of the judiciary and their marked disassociation from the political organs: an essential characteristic of judicial independence and impartiality. The same title accorded all adjudicators promotes the confidence in court users that adjudication at lower court level applies at the same standards exacted of courts at the level of superior courts.

The naming of the local and intermediate courts as district and regional courts respectively, from the outset in Chapter 8 of the Constitution, creates the foundation upon which the later provisions relevant to the essential conditions of judicial independence of judicial officers of all courts, may be secured.

7.2.1.3.2 Amendments Ensuring Equal Protection of Judicial Independence of All Courts

The appointment, security of tenure, remuneration and removal of judges are provided for in sections 174, 176 and 177 of the Constitution. The amendment of these sections will be required to provide that judicial officers of district and regional courts are brought within the ambit of these protections. The proposed amendments to section 174 are probably the most far – reaching in so far as the protection of the judicial independence of lower courts is concerned.

A significant aspect of the amendment of section 174 is that the inclusion of lower courts through the amendment of subsection 6 materially changes the status and relationship of lower courts with the superior courts as well as that between the political organs and the lower courts and therefore in effect, the independent functioning of the lower courts. The major consequence of this amendment is that it effectively collapses the structural barrier that divides the superior and lower courts and renders unnecessary subsection 7 which provides for an Act of Parliament to ensure that lower courts function independently.

The deletion of subsection 7 directly impacts on sections 176 and 177 which contain the essential conditions of judicial independence relating to security of tenure and remuneration of judicial independence of judges. These sections will have to be amended to include lower court judicial officers and thereby ensure the same level of protections of security of tenure and remuneration for all judicial officers. The amendments of sections 176 and 177 demonstrably gives recognition to the value of independent and impartial adjudication at all levels of the hierarchy of courts and therefore will be dealt with in more detail following the proposed amendments to sections 174(6) and 175, which provide for the appointment of judges and acting judges respectively.

As section 174(6) deals specifically and separately with the appointment of judges and because this is an important essential condition of judicial independence, the amendment in this respect requires closer consideration. Since the criteria applicable to the selection and appointment of superior court judges differ from those applied to lower court judicial appointments, a more in – depth consideration of how it will be applied and operate may be useful. Therefore, the following

subsection deals with the implications of the proposed amendment of section 174(6) of the Constitution on the issue of judicial appointments.

7.2.1.4 The Implications of Amending Section 174(6) of the Constitution on Lower Courts

The replacement of the Magistrates Commission with the JSC as the appointment institution for all judicial officers significantly advances the integration of the lower and superior courts and the recognition of lower courts' institutional independence, both in fact and in law. However, as the discussion above indicates, several problems may be encountered by simply expanding the functions of the JSC; inter alia, the size of the new constituency, the varied nature of the jurisdictions, the differences in political interests in the appointments of judicial officers and not least that the independence of institution is ensured. The following proposals are aimed at overcoming some of these hurdles and facilitating a more efficient integration of the lower courts into the judiciary's mainstream.

7.2.1.4.1 The Role of the Lower Court Judicial Council in Judicial Selection

The establishment of a Lower Court Judicial Council (LCJC) is proposed to serve as an advisory body to the JSC, primarily to ensure that the appointment and dismissal of judicial officers of lower courts occurs independently. The LCJC should be established by an appropriate provision in the Constitution, that the JSC appoints the judges of Regional and District Courts on the advice of the Lower Courts Judicial Council (LCJC).

The LCJC may nominate only the appropriately qualified candidates, certified as such by a newly established judicial education and training authority of South Africa (JETQASA) which may be located within the SAJEI, provided the latter is an independent judicial institution. The context for these proposals has been given in Chapter Six of this thesis and can be summarised as follows.

The proposal that the JSC be the institution responsible for the appointment of lower court judges is informed by the fact that it is the JSC that nominates and recommends the appointment of all judges except those referred to in sub – section 3 – 5; the appointment itself by the President in fact a formality. Therefore, it should be appropriate for the JSC itself to exercise this formal function on the advice of the LCJC. It also seems unnecessary that the President should appoint all lower court judges because the jurisdiction of lower court judges has no significant political implications. Furthermore, it would be in the interest of efficiency that the JSC be tasked with

this responsibility because of the higher frequency rate at which judicial vacancies in the lower courts would need to be filled.

The LCJC will replace the Magistrates Commission which will cease to exist on the repeal of the MA. However, the authority of the LCJC to select and nominate lower court judges for appointment will be considerably circumscribed in terms of the conditions proposed under which it may exercise this function. As it is proposed that a certificate issued by the Judicial Education and Training Qualifications Authority of South Africa (JETQSA) would be a prerequisite for qualification for appointment as a lower court judicial officer, the LCJC may only select and nominate persons appropriately qualified as such. This requirement will ensure that only candidates who have undertaken and completed the judicial education programmes will be eligible for nomination by the LCJC. In effect, over time, all lower court judges will have acquired the skills required for the profession of adjudication. In addition, the composition of the membership of the LCJC, representing the judiciary (majority), private and public legal practitioners, academia, the legislature, the executive, and the human rights representatives ensures the diversity and independence of the LCJC.

7.2.1.4.2 A Judicial Education and Training Academy for Effective Dispute Resolution

The proposed establishment of the LCJC presumes the existence of an institution that certifies the qualification of candidates for judicial office. Such an institution as JETQSA, could be established in terms of section 180 of the Constitution, as discussed in Chapter Six. The judicial academy is proposed with the objective of providing law graduates, who choose to pursue a career in the judiciary, the opportunity to acquire theoretical and practical adjudication skills, before appointment as judges. The primary objectives of the establishment of an independent pre – appointment judicial education institution would be to address the issues related to the quality of adjudication and its associated impact on the right of access to effective courts. The curriculum designed to provide pre – appointment adjudicative skills should yield the following important benefits.

(i) Beyond the acquisition of a substantial knowledge of the basic principles of every primary branch of law, public, private and commercial, trainee judges will acquire, through a thorough study of the Constitution and constitutional law, skills specific to adjudication involving the determination of rights and violation of rights

(i) Comprehensive judicial education in application of criminal and civil procedural law and laws of evidence which should reduce the risk of judicial errors being made by inexperienced appointees.

(ii) Pre – appointment sensitising of judicial officers through social context education.[439]

(iii) Judicial Education in the principles of judicial independence, impartiality and accountability and ethics.[440] Judicial officers should be expected to be aware of the nature of the threats that independent judicial functioning may confront daily and to prevent prejudice to court users as far as possible.

(iv) Education and training in court management are arguably necessary for judicial officers in all trial and first instance courts and are indispensable for lower courts to acquire skills in efficient dispute resolution.[441]

7.2.1.4.3 Independent Judicial Education and Training Institutions

The challenge for a relatively new constitutional democracy to establish an institution to educate and train judicial officers lies in the determination of a policy framework that is consistent with constitutional values, principles, and objective. Chapter Six reveals the shortcomings of the SAJEI which is the institution that the judiciary is reliant on at present to expeditiously narrow the gap in developing urgently required skills for judicial functions, being drawn from the ranks of legal practitioners. SAJEI like many judicial education institutions in common law jurisdictions focuses on ongoing judicial education. The induction and orientation seminars that SAJEI provides to newly appointed judicial officers are unlikely to meet the requirements for certification as appropriately qualified.

This approach adopted by institutions in common law jurisdictions is based on the theory that judges as independent adult learners in any profession, learn selectively that which they find valuable. This is a different approach to judicial education from that which is characteristic of civil law jurisdictions where judges are appointed immediately after graduation from judicial schools and train as they work. As evidenced in the discussion in chapter 3,[442] neither approach

439 See Chapter 6 Sub – section 6.3.1.4.2 Requirements for Transformative Adjudication.
440 See Chapter 6 Sub – section 6.3.1.4.
441 See Chapter 6 Sub – section 6.1.3.1
442 See Chapter 4 Sub – section 4.3.2. Also see Corder's comparative overview of judicial appointment systems internationally in 'The Appointment of Judges: Some Comparative Ideas' (1992) Stellenbosch Law Review 207 – 230.

may be entirely suited to the education of lower court judicial officers in South Africa. Instead, this thesis proposes a hybrid of these adapted to the constitutional setting in which the institutions of judicial education must be located.

The following course of study is proposed for careers in the judiciary: (i) an undergraduate qualification in the general principles of all main branches of law at a university (ii)graduate study and training in an institution for judicial education incorporating the subjects referred to in the previous subsection; and (iii) judicial internship and mentoring in various courts to acquire experience in all areas of dispute resolution, criminal, civil, and family.

7.2.1.4.4 Funding Independent Judicial Education Institutions

To establish an independent institution specifically to cater for the education and training of judges this thesis proposes that it be funded by the national treasury in the same way in which the education of professionals in all other vocational fields is funded. Qualification for judicial work should be obtained through universities as most professions are, although the authority to determine the curriculum structure, programmes, duration, rules etc. should be vested in the judiciary without executive involvement.

Besides the primary benefit of ensuring the quality of adjudication the funding of a pre – appointment academy for judges can be justified owing to the following additional benefits:

Aspirant judges to postgraduate judicial programmes may be assessed for suitability, aptitude, and other character traits prior to acceptance to a judicial education institution.

From a transformational perspective, a constitutional objective may be achievable at an early stage in the selection process through admission of candidate judges in compliance with section 174(2) of the Constitution and in the interests of establishing a diverse judiciary. Those with potential for excellence in independent dispute resolution could be identified and offered some means of support if unable to fund themselves.

Over the long term, appointees to higher courts could be sourced from a pool of these graduates who would be well qualified and experienced to take up vacancies.

The internship service of graduates who would be able to gain experience under supervision or mentorship, while providing relief for judicial officers during leave of absence. Internships combined with mentoring of qualified graduates could satisfy the constant need to fill temporary positions as acting judicial officers. Appointments to acting judicial positions from a pool of

interns hold significant benefits from the perspective of judicial independence and accountability besides development of experience and skills. The arbitrariness factor implied in the authority of the executive and the heads of courts to control the composition of the lower court judiciary through the power to appoint judicial officers temporarily, outside the regular processes, may be eliminated or considerably restricted.

(vi) Judicial interns may play a very significant role as the first responders in dispute resolution in the small claims courts or in community civil courts under the authority and guidance of the head of the local District Court. The difficulties experienced currently in securing the services of commissioners to resolve small claims[443] disputes could be substantially reduced by the deployment of panels of interns to constitute the small claims court. In addition, judicial interns may develop valuable skills as assistant registrars to Regional Civil courts; at present, mostly untrained or inadequately trained administrative personnel perform this function.

(vii) To the extent that assessors have a role under the Constitution, judicial interns or trainee judicial officers may serve this specific purpose whilst gaining experience and developing their skills in court functions. There could be significant cost-saving potential also in assessors being appointed from the ranks of trainee judicial officers rather than those appointments being made from the general public or candidate attorneys without adjudication qualifications.

7.2.1.5 Proposal to Amend the Section 175: Acting Judicial Appointments

Section 175 (2) provides that the Minister of Justice must appoint acting judges of all courts (except the Constitutional Court) after consulting the senior judge of the court where the acting position needs to be filled.

The power vested in the Minister of Justice or a delegate to appoint acting judges merely after consulting with the senior judge of a superior court, seriously impairs the right of litigants to impartial and effective adjudication of their disputes. It is submitted that this provision in the Constitution is problematic and ought to be amended in compliance with the principles of judicial independence applicable to superior courts and judges of superior courts. At least acting

443 Botha A 'Small Claims Courts' *De Rebus* (February 1994) 87.

appointments to superior courts should be made with the concurrence of the Judges President and for fixed periods regulated by national legislation.

Therefore, a simple amendment of this section to include lower court judicial officers is not recommended. Instead, a complete change of the provision is proposed aimed at ensuring the preservation of the tenets of judicial independence and the prevention of arbitrary appointments of potentially unqualified persons or persons not fit and proper to judicial positions. The following amendment to section 175 is proposed:

“The JSC must appoint the judges of Regional and District Courts on the advice of the Lower Courts Judicial Council (LCJC) in accordance with the following procedure:

- The LCJC must nominate and recommend for appointment to the JSC, one person for each vacancy, certified as appropriately qualified by the Judicial Education and Training Qualification Authority (JETQASA) of South Africa, and as fit and proper persons by the LCJC. In addition, it should recommend in order of seniority two or three persons, more than the total number of vacancies to be filled.”

The proposal that Acting judges of Regional and District Courts be appointed by the JSC with the recommendation of the LCJC is based on the need to apply the principles of judicial independence consistently through all ranks of judges. Ideally, there should be no acting appointments but where there is good cause such as the arising of an unexpected vacancy there may be no option but to appoint a judge in an acting position. As the discussion in Chapter 3 indicates, there are significant risks associated with judges appointed on a temporary basis.

The amendment proposed in respect of acting judges to the lower courts requires an additional sub – section to section 175 so that lower courts are located fully within the judicial system.

- Thus, the proposal in this respect is that acting judges appointed to lower courts must be appointed by the JSC on the advice of the LCJC which in turn may only appoint persons who are appropriately qualified, fit and proper persons. National legislation should regulate the fixed time of tenure of acting lower court judges.

  The proposed requirement that acting judges be certified as appropriately qualified by the JETQASA may be readily satisfied by accessing the pool of judicial interns who have

completed their education and training programmes and are awaiting permanent placements.

7.2.1.6 Proposed Amendments to Section 176: Terms of Office and Remuneration

The proposed amendment of section 176 goes to the redressing of the disadvantages and prejudice imposed on the users of lower courts through the historic and persistent division and separation from the judiciary proper. The proposed deletion of section 174(7) and the inclusion of lower court judicial officers in section 174(6) necessitates the amendment of section 176 and 177 to provide that the essential conditions of judicial independence that these provisions guarantee to judges of superior courts, now incorporate lower court judicial officers.

The immediate effect of this reform would be the legal recognition that 'judicial officers', so called, are judges and that this occupational category is an artificial impediment to providing the protection to judges in lower courts individually and collectively, security of tenure and remuneration, that has always been given to judges of superior courts.

The amendment of section 176 will provide that judges of all courts hold office until they are discharged from active service in terms of an Act of Parliament and that the salaries, benefits, and allowances of judges of all courts may not be reduced.

An additional amendment is proposed to section 176 (3) (which provides that the salaries, benefits, and allowances of judges may not be reduced) to ensure that there is no constructive threat to judicial independence through the failure of political organs to regularly review and adjust the remuneration of judges.[444] Accordingly, the following amendment is proposed:

> (1) National Legislation must provide for the annual review and determination by the President of the remuneration of judges of all courts.
>
> (2) The recommendation for determination of the remuneration in terms of sub – section (1) shall be made in consideration of the need to ensure that the salaries of judges may not be reduced.
>
> (3) The institution established to make annual recommendations for determination by the President must ensure that the remuneration recommended may not be lower than the current cost of living as determined by the National Treasury.

444 See Chapter 4 section 4.4.2.

(4) The President shall annually determine the remuneration of judges of all courts and ensure that such remuneration is not lower than that recommended by the institution referred to in sub – section (3).

7.2.1.7 Proposal to Amend Section 177: Removal

As in section 176, the proposal in respect of removal of judges addresses a core aspect of the protection of judicial independence of lower courts and judges of all courts. In terms of this proposed amendment, the JSC will have the authority to call for the dismissal of lower court judges. It is further proposed in addition that the JSC acts with due diligence in executing this important function. National legislation providing for the governance of lower courts should empower the LCJC to assist and support the JSC in the investigation and enquiry into misconduct and other complaints against judges of lower courts. The amendment proposed is the following:

177: Removal

(1) A judge may be removed from office only if: -

(a) The Judicial Service Commission upon finding, within a reasonable time, that the judge suffers from an incapacity, is grossly incompetent, or is guilty of gross misconduct, must, as soon as possible, request the National Assembly to call for the removal from office of that judge.

(b) The National Assembly must call for the removal of the judge, within a reasonable time, by adoption of a resolution with the supporting vote of at least two thirds of its members.

(2) The President must remove the judge from office upon the adoption of the resolution calling for the judge to be removed.

(3) The President, on the advice of the Judicial Service Commission that the judge has been found to suffer an incapacity, is grossly incompetent or is guilty of gross misconduct, must order the suspension of that judge.

7.2.1.8 The Impact of Amendment to Sections 174(6) to 177 on Section 178; The Judicial Service Commission and Proposal to Amend Section 178

In the introduction of the discussion of the amendments proposed to section 174(6) above,[445] several reasons were given for not considering the JSC to be the appropriate authority, directly responsible for the appointment and dismissal of lower court judicial officers. Nevertheless, as the said discussion suggests, the need for the JSC to be reformed cannot be over emphasised in certain critical areas that seem to cause concern, as it remains the primary institution established in terms of the Constitution to ensure that the courts are institutionally independent. With the inclusion of the lower courts in terms of the provisions of sections 174(6) to 177 as proposed, there is a greater need for the JSC to function diligently. The proposed amendments to section 178, are directed at addressing the following matters:

a. the constant criticisms that the political organs are over-represented at the expense of the judicial and legal sectors.
b. the need for the lower courts to be represented in the JSC.
c. the need for the members of the JSC to be as accountable as all other public bodies under the Constitution; and
d. the establishment of a separate governing sub – body to support the JSC in matters related to the lower courts. It is proposed that the composition of the LCJC reflects all sectors of society but should in the majority consist of members of the judiciary and the legal profession.

It is proposed that the issue in (i) and (ii) be dealt with by the inclusion of the following additional members from the judiciary: a senior judge of the Supreme Court of Appeal designated by the Chief Justice in concurrence with the President of the Supreme Court of Appeal and a judge appointed by the LCJC. In addition, it is proposed that the number of political representatives be reduced by amending sub – section 1(h), (i) and (j) so that there are no more than ten members representing the political organs.

It is proposed that the issue in (iii) regarding accountability of JSC members be addressed by the addition of a sub – section to section 178 that provides that the Judicial Service Commission and its members are independent and subject only to the Constitution and the law and must execute the functions assigned to them by the Constitution and National legislation without

445 See under Paragraph 7.2.1.2.

favour or prejudice. Furthermore, that the members must take an oath to uphold the Constitution before commencement of their functions and that all members of the JSC are required to undergo orientation and training as provided in national legislation before assuming office.

As it is proposed that the LCJC be established in terms of the Constitution to be an advisory body to the JSC in the appointment and removal of lower court judicial officers, it is important that it functions and is seen to function independently. Therefore, the issue in point (iv) may be addressed by providing that the LCJC is composed of mainly judicial officers and members of the legal profession including the academia. One member each from the executive and the legislature could suffice to ensure that all the relevant sectors are duly represented.

7.2.1.9 The Effects of the Proposed Amendments to the Constitution on the Essential Conditions of Judicial Independence and the Effective Functioning of Lower Courts

The amendments proposed envisage a major re – positioning of the lower courts in relation to the superior courts and aligns them in accordance with the hierarchy of courts in the judicial system. The constitutional amendments are undoubtedly significant but not extraordinary in terms of normative constitutional development and in effect normalises the functioning of all courts in the system, enabling them to deliver judicial service that is less disjointed but better streamlined and coordinated.

The proposed amendments envisage a major change, albeit gradual, in the notion that the work of lower courts is less valuable and of lower quality than that of the High Courts. The most important effect is the recognition of the institutional judicial independence of the District and Regional Courts through the acceptance that the appointment of lower court judicial officers, their security, remuneration and dismissal, be protected in the Constitution itself.

7.2.1.10 Summary Conclusions: Why Amending the Constitution is Necessary to Ensure Judicial Independence of Lower Courts

In summary, the proposed amendments are informed by principles, values, and fundamental rights that the Constitution embodies, and which need to be given effect to, for the judiciary to function independently as an organ of the state and the courts, including the lower courts, to provide judicial service effectively. Including the protection of the judicial independence of lower courts within the Constitution represents not only a significant development but a necessary one

to the transformation project and to the advancement of the right of access to independent and effective courts.

There is no impediment in principle to the Constitution being amended as proposed but there may well be certain notional barriers that need to be dealt with in view of the seemingly entrenched perception in court communities and the public generally that lower courts are not constituent parts of the judiciary. This thinking in effect may cause concern in some quarters that the proposal to amend the Constitution may unnecessarily, negatively impact the existing integrity of the supreme law. However, when this concern is viewed from the perspective of the core question this thesis aims to address, it becomes apparent that these particular proposals to amend the Constitution have only positive connotations in relation to the evolution, development and transformation of the judiciary.

As the discussion in the previous sub – sections and the analysis of the subject in Chapter Five in particular indicate, there was no rational justification for the omission to provide for the protection of the judicial independence of the largest section of the judiciary in the Constitution. And, as argued, there is no existing Act of Parliament that ensures that all essential conditions of lower court judicial officers judicial independence are adequately protected. This implies that if the Constitution is not amended as proposed, a new Act of Parliament is still required for proper compliance with section 174(7), which it is suggested, presupposes the repeal of the MA and MCA. It is submitted that there should be no plausible reason for any organ of the state not supporting the thinking that the proposed constitutional amendments are necessary, as from a broader transformational perspective, the retention of a divided judicial system threatens the right of access to independent lower courts and is unsustainable.

At this juncture it may be appropriate to give some attention to the attempts by the Department of Justice and Constitutional Development/Correctional Services to issue draft proposals for a law for the governance of judicial officers of lower courts. The latest of one such bill, the Magistrates Bill[446],was published at the time when the final draft of this thesis was being completed. The main objective of this Bill seems to be to enact and give effect to the law that the Constitution provides for in section 174(6). This Bill proposes replacing the MA with a substantially similar law and does not significantly change the status of the courts in relation to the superior courts nor the legal mechanisms required to ensure the protection of the essential

446 A Draft 'Magistrates Bill 2022' was published for comment dated 9 March 2022.

conditions of judicial independence of lower courts and the judicial officers adjudicating in these courts. Generally, this Bill is lacking in any demonstrable insight in the principles of judicial independence and the meaning of the concept of separation of powers which suggests that these aspects of judicial functioning may not be viewed as particularly important for the lower courts. Under the circumstances it is unlikely this draft bill will enjoy the support of either the judiciary at lower court level or even the general public, which will be most impacted by this law if passed, as it does not significantly address the challenges of accessing courts that are independent and effective as the arguments set out in Chapter Six indicate**.**

This thesis has directed its focus on the reasons for the viewpoint that the MA is a bad 'old order' law and therefore should have no place in a constitutional democracy which recognises all courts as independent. If the objective of the proposed new law is not much more than to continue serving the purpose that its predecessor did, it is axiomatic that it falls to be rejected as a law that essentially not only serves little purpose but is retrogressive in outlook from a developmental perspective.

7.2.2 Proposal for Reform of Lower Courts Administrative Judicial Independence and Restructuring of Judicial System

Proposing the reform of lower court judicial functioning involves engaging with some complex considerations is relevant not only to issues of administrative judicial independence but also those relating to the problems arising out of maintaining the bifurcated judicial system from the pre – constitutional era. In addition, the challenges arising from tensions between the superior and lower courts related to resource availability and allocation, presents another layer of complexity that needs to be dealt with because of the impact of resource constraints on lower court users. The reforms proposed must therefore bring about an appropriate degree of separation between the judiciary and the executive and enact a law that integrates the superior and lower courts into a single judicial system. The fair and equitable allocation of resources for both superior and lower courts to function effectively and independently is a factor to be considered in proposing reform of the judicial system

7.2.2.1 Proposal for Reform of Administrative Judicial Independence

In the context of lower court functioning, collective judicial independence implies that the courts must have the authority to access, administer and manage judicial resources without interference from the executive or any organ of government.

As the effectiveness of the courts is largely dependent on the political organs, the courts are not institutionally independent. This is the site of considerable tension between the judiciary and the executive. The constitutional amendments proposed above (7.2.1) will probably not have any significant impact on this essential condition of judicial independence which relates to the independence of administration of judicial functions. This lack of constitutional clarity related to a fundamental principle of the separation of powers creates a situation of considerable vulnerability for the judiciary and may pose a threat to independent functioning of the courts. The users of lower courts are the most adversely affected in this regard as the administration of lower courts, remains firmly under executive control as ever they were before democracy. The proposal for reform is aimed at removing the current impediments to the direct accessibility of the funding of lower courts for judicial functions.

The challenge in proposing reform aimed at greater autonomy of the lower courts is that the legislation dealing with the administrative judicial functioning of the superior courts has the effect of controlling judicial functioning[447]of lower courts but does not provide them with a forum in the judiciary to access resources for lower courts in accordance with the needs of lower court users. The reason for this separation of the higher and lower courts is again obscure, as it is in the case of the exclusion of constitutional judicial protection of the other essential conditions of judicial independence of judicial officers of lower courts.

This thesis proposes that the administrative judicial functions of the lower courts be provided for in national legislation as the SCA does for the superior courts. However, the objective of the new law that replaces the MCA would be to ensure that the resource needs of lower courts in substance and quantity are assessed separately and independently of the superior courts before being presented directly or on their behalf to Parliament for appropriation. The reforms proposed in respect of independent administration of judicial functions envisages the separation of lower courts from the political organs and their integration with the judiciary, which in effect sees the administration of lower courts being drawn from the margin to the centre of the judicial system. The proposed new law for the governance of the lower courts would provide that the Chief Justice, rather than the Minister of Justice, be seized with the responsibility of the administration

447 The Preamble and Section 2 of the SCA provide that the Chief Justice exercises responsibility for the administration of judicial functions of all courts but section 10 provides only for superior court expenditure to appropriated by Parliament.

of judicial functions. This essential condition of judicial independence constitutes a very significant element in the concept of a unitary judicial system, combined with the other essential conditions being embodied in the Constitution.

7.2.2.2 Restructuring the Judicial System and Establishing a Single Judiciary

At present there is no national legislation that addresses the question of the administrative judicial independence of any court: court administration remains a vested interest of the executive. The challenges presented by a lack of clear demarcation in separation of powers and the impact on judicial functions has been dealt with in Chapter Six[448]. Under the circumstances it seems that administrative judicial independence for lower courts is not likely to be realised at least until the issue has been resolved for the superior courts.

However, the proposals for reform in this aspect need not be backward-looking or stagnant. It is suggested that when the debates on the issue of administrative judicial independence progresses and clearer determinations are made regarding the need for constitutional amendment, amendment to national legislation or new laws, these proposals may, where appropriate, be incorporated without delay. The question is how the judicial system can be restructured to bring all courts under the administration of a single, independent judicial institution with the Chief Justice at the helm.

7.2.2.2.1 The SCA: An Impediment to a Unitary Judicial System

As the MCA represents the pre – democratic legal order of lower courts and effectively imposes a division of the judiciary into a superior and inferior class of dispute adjudication, it is proposed that the MCA be wholly repealed and replaced with laws that promote the right of all court users to access courts that are equally, institutionally independent within a single judicial system. However, the major impediment to such a system is the objective underlying the enactment of the SCA which enables the continued maintenance of the class division between the higher and lower judiciary. The proposal to repeal and replace the MCA, without a reconfiguration of the judicial system and integration of the courts, is unlikely to transform the judiciary as envisaged in the Constitution. The SCA is a response to this constitutional requirement, bringing under its administration all courts of higher status than Magistrates Courts.

448 See notes 416 to 431 above.

The project to rationalise the lower courts has not yet properly commenced although the Department of Justice has indicated in *its Discussion Document*[449] that it plans to overhaul the MCA and replace it with a law for the administration of lower courts with similar objectives underlying the enactment of the SCA. To the extent that the proposed new law aims to modernise the judicial administration of the lower courts and streamline the whole judicial system without maintaining the disparities it should not be seen as objectionable. More importantly though, the proposed new law, of the lower courts should not bestow on the executive, power that under- values the judicial authority and the judicial functioning of the lower courts. The question then arises why should a separate new law be necessary to deal with the administration of lower courts? Should there not be one parliamentary act that incorporates all courts into a single judicial system under a single administrative authority with the Chief Justice at the helm?

The following provisions of the Constitution may be the considerations that could be applied in answering these questions. Firstly, the Constitution stipulates that all courts must be rationalised to establish 'a judicial system', 'suited to the requirements of the Constitution'.[450] In this respect it may be justly argued that the enactment of the SCA which is solely applicable to the governance of the Constitutional Court, the Supreme Court of Appeal, and the High Courts, while leaving the MCs out, conflicts with this stipulation of the Constitution because this law evidently does not reflect a vision of the lower courts as being a part of the judicial system. Secondly, the Constitution expressly and unambiguously provides that all courts listed in section 166 under 'Judicial system' are independent; there is little room for an interpretation that infers a division in the organisation of the hierarchy of courts according to different levels of independence or separate judicial systems. Thirdly Section 165 (6) provides that the Chief Justice is responsible for monitoring the Norms and Standards of judicial functions of all courts which reflects the recognition that judicial functions primarily relate to the adjudication of disputes and is uniform in principles of application throughout the whole system although the jurisdictional capacity differs among the different levels.

It is of significance that the Constitution does not classify courts higher in status than Magistrates Courts as superior courts. The title of the law 'SCA' has no nexus in principle with any constitutional provision or value as its predecessor was titled 'Supreme Court Act'. Therefore,

449 Ibid.

450 Constitution Schedule 6 s 16 (6)(a).

this title the (SCA) promotes the notion of a distinctive division between those courts that have inherent power to protect and regulate their own processes and those that do not. It is submitted that this inherent power is not in itself justification to perpetuate the historical segregation and the dichotomous judicial system.

Therefore, the argument that this thesis advances on this issue is that a separate new law enacted with the objective of separating all courts below the rank of High Courts from the judicial system established solely for the administration of superior courts, will probably have the effect of entrenching the division of the judiciary by class.

It may be a fairer and better proposition to include the MCs under the current SCA with an appropriate name change to reflect a unitary judicial system within which judicial functions pertaining to jurisdictional limits are prescribed in the statute.

Ultimately, and regardless of the kind of mechanism set up to attain the objective envisaged by the Constitution by rationalising all courts in the judicial system, this thesis posits the view that the amendments to the Constitution as proposed are unavoidable. This is because the need to protect the judicial independence of the courts for the benefit of all court users cannot be ensured through ordinary legislation that can readily be altered or repealed

7.2.2.2.2 The Impact of the SCA on Judicial Independence of Lower Courts

It is proposed that new national legislation be passed to replace the MCA in order that the lower courts are brought under a single judicial governance system headed by the Chief Justice. This reform proposal, however, does not recommend that the heads of superior courts should have the authority to administer, control or manage judicial functions of lower courts. Such authority of a judge over lower court functions, regardless of the rank in the judicial system, may constitute a conflict with the principles of internal judicial independence. Section 8 (4 -6) of the Superior Court Act, for instance provides that a Judge President has the responsibility to coordinate the judicial functions of MCs. Although the Chief Justice may delegate his or her functions in terms of section 8(4)(a) to any judicial officer in specific cases, there seems no such general authority

to co -ordinate[451], that is vested in a Judge President, over the judicial functions of lower courts as defined in section 8(6). Nor is it a realistic notion that the judicial functioning of the High Courts and the lower courts may be co - ordinated and that such coordination by the Judge President, may aid in the level of court functioning more effectively. It is also not clear why Judges President are seized with this coordination function and how it is to be executed. Several years after the enactment of the SCA this provision seems to have had little impact on the right of access to lower courts and the prospect of beneficial change in this respect, does not show much promise.

General norms and standards administered by the Chief Justice could be useful in tracking the performance of the judiciary to address challenges that courts experience in ensuring the accessibility and effectiveness. However, the issue of delays, backlogs and general efficiency in the lower courts should not, in the main, be associated with the performance of judicial officers. The factors causing delays are dealt with in Chapter Six and indicate that the problem is the accessibility of judicial resources and other factors not associated with individual judicial officers. Hence, it is submitted that the imposition of rules and several layers of oversight and monitoring of judicial officers directed at the expeditious delivery of judgments are not likely to resolve issues of delay. On the contrary the perception may be created that judicial officers function as if to attain a quota which could appear to influence their decision – making. Furthermore, if judicial output and hours of judicial work are used as indicators of the performance standards of judicial officers, when promotions are considered, it could be unfairly prejudicial or beneficial to the applicant.

The accountability requirement of all judicial officers to the Constitution and the law should not be confused or conflated with the role of the judicial officers in the management of the courts over which they preside. The new law that is proposed for the unification of the superior and lower courts under the judicial arm of the state should have the effect of strengthening the independence of the District and Regional Courts to administer their judicial functions without the interference or undue pressure exerted by external or internal organs.

The proposed constitutional amendments will have the effect of integrating the District and Regional Courts into the judiciary with the superior courts consisting of the Constitutional Court,

451 The word ‘coordination’ is not defined in the SCA. The Oxford Dictionary defines the word ‘coordination’ as ‘the organization of the different elements of a complex body or activity so as to enable them to work together effectively’.

the Supreme Court of Appeal, and the High Courts. The differences in the jurisdiction between the superior and lower courts requires the enactment of national legislation that is appropriate for lower court governance and administration. Hence, a law titled the Regional and District Courts Act is proposed which will replace the MCA.

7.2.3.2 Principles for the Reform of Independent Administrative Judicial Functions and Access to Resources

The Constitution Seventeenth Amendment and the SCA may have helped to advance the higher judiciary a step towards judicial self – governance but the lack of further necessary steps towards administrative judicial independence gives cause for doubt that the transformation of the judiciary as envisaged in the Constitution will materialise. As the administrative judicial functions (as defined in section 8 (6) of this law were undertaken by senior judges, even before democracy, while the executive was responsible for administration of all courts, arguably, the SCA has not enabled a clear shift of governance of the judiciary from the executive. Ebrahim makes the following pertinent observation:

> *'The governance of the South African judicial system has always been somewhat opaque. Traditionally, the executive branch has been responsible not only for the magistracy but also for the administration of the superior courts with regard to finance, support staff and logistics while matters relating more specifically to adjudication, such as the allocation of judges to cases have been the province of the senior judiciary: The Chief Justice, Judges President and other heads of court. But there has never been a methodical and comprehensive treatment of the subject in legislation or anywhere else. Rather, governance of the judicial system has been dealt with obliquely in our successive constitutions…'*[452]

Hence, the formalisation of administrative judicial functions after the rationalisation of the various and disparate divisions of the former Supreme Courts may be seen as unifying the judiciary of the state under the helm of the Chief Justice. The SC Act though, has had no substantial impact on the institutional independence of the judiciary at the higher levels of the judiciary and none at the lower levels of the judicial system.

The Office of the Chief Justice (OCJ) was primarily established to assist the Chief Justice in the many functions attached to the highest judicial office, which was extended since the Constitution

452 Ebrahim op cit note 405 at 99.

Seventeenth Amendment was adopted.[453] As the OCJ was designed to provide the structural support for the Chief Justice, it should not be seen as a mechanism that facilitates judicial self – governance. As Ebrahim remarks, any assumption that the OCJ could also be a mechanism to establish a judiciary – based administration would be false because a proper court administration system needs to be established irrespective of the existence of the OCJ.[454]

The Constitution envisages the establishment of a judicial system that not only rationalises the courts structurally to bring them under the constitutional framework but also aims to reform the judiciary in its functioning.[455] The *Discussion Document*[456] issued by the Department of Justice indicates that the executive agreed in principle that judicial functions should be administered by the judiciary. There has been limited progress however, in deciding about the model for court governance and judicial administration. Various models have been examined and plans have been explored.[457] There is also no consensus on whether an independent judicial administrative institution should be established and where it should be located. It is a concern that, after much debate and discussion, there has been no tangible outcome for the establishment of a system of governance and administration of the courts.

Evidently, the judiciary is still not institutionally independent. In so far as financial autonomy is concerned, the judiciary may in fact be less independent than Chapter 9 institutions[458]which could be perceived as an anomaly. The organs of the state seized with the responsibility of assisting and supporting the courts to function independently and effectively seem to flounder.[459] Meanwhile, the lower courts have not featured significantly in any of the plans for administrative reform or in enabling their participation in the decision making of the day-to-day court operations. The implication is that the challenges will persist for lower court users to access the courts and have their disputes resolved effectively while the lower courts themselves have the least capability within the structures to resolve the difficulties that confront them. The problem at the

453 Ibid at 111.

454 Ibid at 114.

455 Constitution - Schedule 6 item 16(6).

456 *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State* (February 2012).

457 Ebrahim op cit note 405 at 107 – 111.

458 Mogoeng op cit note 402 at 393.

459 Ebrahim op cit note 405 at 100.

foundational level is that there is a severe disconnection between the policy makers and their objectives on the one hand, and on the other, the courts that must apply the law to individuals' disputes and ensure fair outcomes. As Ebrahim suggests there seems to be some reluctance on the part of the executive to relinquish control over the administration of judicial functions.[460]

Differing and sometimes even conflicting objectives may be unavoidable when the cabinet member responsible for the administration of the courts is also the member responsible for correctional services and is further seized with the oversight of the prosecuting authority and the Legal Aid Board. Arguably, the leadership and management of the vastly different but important functions reposed in an individual office bearer is unlikely to produce satisfactory outcomes for a portfolio involving judicial administration that normatively falls outside the executive domain.

The question is which organ of the state should be held accountable for the prejudice suffered by court users for the courts' inability to function effectively. The *Discussion Document* suggests that although a separate judicial governance body should be established which would assume responsibility for the administration of judicial functions, but that court administration policy matters and the authority to make rules for courts are not implicitly judicial functions. The *Discussion Document* suggests that the establishment of courts and equipping them are not judicial functions and fall under the latter category. As Ebrahim observes:

> *'a(A)dministrative functions that could be regarded as bearing directly on the performance of judicial functions, include the maintenance of court infrastructure, the determination of the budget needs of all courts and the control of their expenditure, human resources, information management, court management (i.e. management of personnel and resources) case flow management, and communication with other stakeholders in court administration, such as the police, the legal profession and the National Prosecuting Authority'.*[461]

More than a decade ago, former Chief Justice Ngcobo expressed the view that the capacity of the courts to deliver justice effectively can be ensured by placing every aspect of the administration of the courts under the control of the judiciary ultimately.[462] However, as the SCA does not seem to envision the establishment of such an independent institution for the administration of the judicial functions of the judiciary as a whole in the near future, the prospects

460 Ibid at 110.

461 Ibid.

462 Ngcobo op cit note 24 at 697.

of administrative judicial independence for the lower courts seem extremely remote. The implication of this reality is that the right of access to independent courts is not being ensured as required by the Constitution. However, and in the interim the difficulties experienced by lower court users could be alleviated to some extent by the inclusion in the new legislation proposed for the governance of lower courts, a mechanism aimed at enabling increased autonomy in administrative judicial functions.

7.2.2.3 Proposed Model for Lower Court Judicial Administration

The institutional independence of the lower courts requires that the legislation governing the judicial administration of the lower courts, provides for a mechanism or an agency, such as an administrative office, which it is proposed, could be called, the Office for Administration of Regional and District Courts (OARDC) The OARDC should represent the Regional and District Courts through the heads of these courts, in accessing the financial and human resources which are required for effective judicial functioning. Such an institution would be accountable to the Chief Justice but must be independent of the other political organs and separate from the institutions established for the judicial administration of the superior courts. A provision in the proposed new Act should be made that the expenditure incurred in the administration and functioning of the lower courts be paid from funds allocated by Parliament.

It is proposed that the new legislation clearly determines and delineates the parameters of judicial functioning over which the lower courts exercise independent authority: functions that are purely administrative and administrative judicial functions that are intrinsically linked to judicial functions. The following are traditionally administrative judicial functions that fall under the authority of the heads of courts (Chief Judges of District courts and Presidents of Regional Courts): determination of sittings of courts; assignment of judges to courts; assignment of cases and other judicial duties; case flow management procedures.

It is proposed that judicial administration functions that are indispensable for courts to function effectively, which at present, are executive – controlled, should fall under judicial authority and these include appointment and management of administrative court personnel, court managers and language service personnel. Managers responsible for the procurement, allocation and maintenance of court equipment and facilities for court users should be the accountable to the heads of courts. The OARDC should be responsible for proposing the budget for all judicial administration items of lower courts to the Chief Justice for presentation to Parliament.

The independent administration of court functions is an essential condition of judicial independence because it affirms the notion of separation of powers and the judiciary's role in democratic governance as a co – equal functionary with the political branches. Therefore, the judiciary must have the authority to access, control and manage the resources that it requires to ensure its effectiveness in making the courts accessible to the public. The lower courts have not at any time in their history been afforded independence of judicial administration and as apparent from the discussion of the subject in the previous chapters, the consequences are deleterious.

7.2.3. Summary Proposal for Judicial Administration Reform

Judicial administration reform ought to begin with the enactment of legislation that includes representation of the lower courts in governance structures of the judiciary enabling the heads of district and regional courts to formally present to the Chief Justice the resource requirements of each level of court.

The legislation should clearly define 'judicial administration' and distinguish judicial functions from purely administrative functions which then effectively bestows authority upon the heads of courts who will be simultaneously seized with the duty of accountability commensurate with the level of authority. The main effect of this law would be to give the courts control of the job they do and so advance the principles of separation of powers and institutional judicial independence. Ultimately, entrusting the administration and management of the courts to the courts themselves, rather than to the executive, enables the expeditious handling of challenges and blockages caused by excessive executive bureaucracy that impede court functions and operations.

7.3 Conclusion

The recognition of the value of the lower courts to the judiciary and the importance of the effective judicial dispute resolution for the majority on a daily should provide the impetus to earnestly engage with and begin the process of reconfiguring the judicial system in order that the judiciary reflects that it is representative of the entire South African society and is seen to be such. The reforms proposed are aimed at the construction of such a judiciary that functions on the foundational premise of independently deciding disputes according to the rule of law and therefore aim to ensure that the courts at the lower levels of the judiciary are equally enabled to do so.

The proposed reforms indicate that the transformation envisaged in the Constitution is only likely to be achieved through the disintegration of the so - called magistracy and the integration of the

two tiers in the hierarchy of courts, under a single judicial system and the Chief Justice as the head of the judiciary. This proposal makes it inevitable that all matters relevant to the judicial independence of the lower courts, be provided for and embodied in the Constitution. Giving effect to this proposal implies that the application of the principles of judicial independence in South Africa will accord with the normative and universal principles in constitutional democracies generally.

CHAPTER 8

CONCLUSIONS

8.1 Summary

There are serious concerns around the circumstances and conditions under which MCs function. The thesis contextualizes these concerns in terms of the history of MCs and their development as judicial institutions, since the attainment of democracy in 1994. MCs in South Africa have an extraordinary history, and which surprisingly continues to strongly influence their functioning, as the examination of the law governing lower courts in Chapter Five indicates.

As the central theme of this thesis and the core argument is that MCs do not function effectively owing to their substantially diminished institutional independence in relation to that of superior courts, it was inevitable that the concept and principles of judicial independence needed examination in some detail. Throughout the critical arguments made, the various aspects of judicial independence, from its definition to its values and its importance in application to lower court dispute resolution, are significant and impactful.

International law and to some extent foreign law perspectives provide useful insights in how the doctrine of the separation of powers and the concept of judicial independence have informed and shaped the governments of reasonably well – established democracies. Importantly, these principles that developed over the centuries and are continuing to evolve, embody a wealth of juristic scholarship by which developing democracies may gauge the integrity of their judicial systems. The thesis has argued strongly that the judicial independence of MCs has not in fact, substantially improved from the pre – constitutional era when considered and compared with the international minimum standards of judicial independence. This shortcoming is a source of concern as argued in Chapter Five, dealing with the issue of judicial transformation of the MCs as they transitioned from executive governed and controlled entities to the judiciary in terms of the Constitution.

The main challenges in advancement towards de facto judicial independence, are the laws retained from the pre – constitutional era that are not compatible with judicial functioning in a constitutional democracy, particularly as the institution of magistrate courts is a legacy from England, where parliamentary sovereignty dominates. This thesis has argued extensively and in considerable depth that both the MCA and the MA are inherently flawed and must be replaced for the provision in the Constitution that MCs are independent to be as meaningful for the lower courts as it is for the superior courts. The change of name of the lower courts and the title of judicial officers of lower courts would likely be a development that affords more dignity to the lower courts and perhaps alter the persistent perception of inferiority.[463]

Chapter Five is of major significance in its critique of the CC's treatment of lower court judicial independence in *Van Rooyen*. It has been argued that the reasoning regarding the constitutionality of various sections of the MA does not engage adequately with the principles of judicial independence as applied universally. Instead, the CC found authority in *Valente* in reasoning that MCs are not entitled to the same level of protection of judicial independence as the superior courts are. This thesis has argued that the CC ought to have dealt with Canadian decisions with considerably greater circumspection, particularly in view of the vastly different contexts of the source of the authority from the destination in which it was to be applied. It may be argued that certain findings by the CC in *Van Rooyen* could present with challenges in future arising out of its reasoning that the Constitution itself supports the interpretation that MCs need not have their judicial independence protected as the superior courts. However, this thesis posits the view that such an argument would not be sufficiently persuasive to prevent the proposed constitutional amendments from being accepted for its transformative value and import, as explained in Chapter Seven.

In Chapter Six, the argument centres around the adverse impact of diminished judicial independence on the effective functioning of lower courts and takes issue with the view that the judicial independence of lower courts need not be protected equally as well as that of superior courts. The premise of this view is flawed considering that the judiciary is mostly, in terms of constituency, located in the lower courts. The impact of diminished institutional independence is felt in the effectiveness or lack thereof in the quality of the judgments and the efficiency in their

463 Lowndes J, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond' (2000) 74 *Australian Law Journal* 592.

delivery: the quality and the efficiency of lower courts is primarily controlled by the political organs.

The emphasis in this thesis on the education and training of judicial officers is intentional: it is argued that lower court users have the right to have their disputes resolved by appropriately qualified and competent judicial officers. Chapter Six clearly reveals that the selection and appointment institutions are unable to ensure this critical matter of qualification for judicial office since these institutions are themselves not sufficiently independent and that there is at present no institution that provides for judicial education and training before appointments are made.

On efficiency, the thesis shows how dependence of the lower courts on the executive affects the accessibility of the courts. The higher levels of dependence of MCs on the executive compared to the superior courts severely disadvantages users of lower courts in accessing courts within a reasonable time. The delays in settling disputes are most often caused through shortages in judicial resources that are supposed to be provided by the executive as the lower courts have no direct access to these. The thesis emphasises the need to reduce unreasonable delay and chronic backlogs in the lower courts through administrative judicial independence in accessing and managing resources for judicial functions.

Overall, the summary of the arguments goes to the judicial independence of the lower courts and the impact of a lower standard being applied to the concept on the right of access to effective functioning of lower courts. Lower court users are entitled to have their disputes resolved by an impartial and independent court as are superior court users, therefore the focus of reform should be directed to ensure that the judicial independence of lower courts is protected as strongly as it is for the superior courts.

8.2 The Recommendations for Reform

As the reforms proposed direct focused attention on the protection of the judicial independence of lower courts through constitutional guarantees, amendments to the various sections of Chapter 8 of the Constitution become inevitable. In this concluding chapter judicial officers are all referred to as judges as the proposal for name change in previous chapters suggest.

The effect of the proposed constitutional amendments would be to: -

- Ensure that the appointment of all judges is done by an independent institution without excessive political influence.

- Ensure that judges of all courts hold office until they are discharged through an Act of parliament.
- Ensure that the remuneration and other benefits of all judges are not reduced.
- Ensure that the judges of all courts may only be removed upon the finding of the JSC that the judge suffers from an incapacity, is grossly incompetent or guilty of gross misconduct.

The overall effect of these constitutional amendments is that the appointments, security of tenure and remuneration of all judges are equally well – protected by being embodied in the Constitution.

For some of the constitutional amendments to be given effect to, additional national legislation would be required as indicated in Chapter Seven and proposed accordingly.

In addition, the establishment of new national legislation is proposed that repeals the MA and MCA and replaces these with appropriate laws that are consistent with the proposed new constitutional amendments and with constitutional principles and values generally and to advance the rights of lower courts' users to access courts that resolve disputes independently, impartially, and effectively. The reform proposed in this respect is the establishment of an independent agency that represents lower courts in independently managing material and human resources for administrative judicial functions which is an aspect of institutional judicial independence that bears directly on the effectiveness of the lower courts.

Finally, the proposal that the title of lower court judicial officers be changed to district judges and regional judges is aimed at giving recognition to adjudicators, the title that is appropriate to the work they do. The title change also ends the legacy of magistrates' historical link with the executive's colonial and apartheid regimes.

8.3 The Outlook

At the time the introduction to this thesis was written, there were serious concerns about the quality of judicial service at lower court level. Now that this conclusion is being written, some years later, the conditions have not improved for the millions of lower court users across the country. Apart from the sparks of hope seen in the *Discussion Document* and the National Development Plan[464] and an informal proposal for reconstruction of the courts, the outlook for

464 National Planning Commission National Development Plan 2030. Accessed from www.info.gov.za in November 2021. See also 'Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court

the lower court users, the court communities and even the officers of these courts, is not promising.

Whilst the transformation effort at effectiveness of the lower courts is stagnant the demand for it has escalated considerably with the volumes of litigation having multiplied many-fold since democracy. The high levels of violent crime in any community often reflect the mood of that community and its socio – economic challenges. As the courts are not well equipped to act effectively, these ills and tensions threaten stability as victims' resort to self - help in seeking justice and often become offenders themselves and so the vicious cycle of violence continues.

This conclusion is being written as lower courts struggle to cope with enormous backlogs created by the devastating effect of the COVID – 19 pandemic and the severe lock down laws imposed by government to control the spread of the virus.

In addition, the lower courts are the first responders to the high incidence of violence against women and children[465]. In densely populated communities the district courts are inundated with complaints of domestic violence while the regional courts, almost daily deal with violent crimes against women including many which are characterised as femicides.

In the wake of the civil upheaval ('July Unrest') that caused devastation socially and economically in many communities in the densely populated provinces, the lower courts have a critical role in ensuring the impartial, independent, and efficient resolution of conflict. As several hundred additional cases arising out of the crimes and other unlawful conduct during the uprisings will have to be processed in the months to come, there will be more pressure on the already crowded lower court rolls.[466]

Under these volatile circumstances the lower courts hold the centre for the judiciary and for the communities they serve. A particularly important consideration is that no matter how extreme the volume and complexity of the caseload of each lower court, it is unlikely that the pace of case disposition can be speeded up consistently. Every aspect of judicial dispute resolution involves the application of various fundamental human rights that cannot be dispensed with.

---

of Appeal on the Transformation of Society Final Report.' Prepared for the Department of Justice and Constitutional Development by HSRC and University of Fort Hare dated November 2015 at page 28.

465 See Amnesty International Report in News 24 article by Lenin Ndebele 'Covid – 19 Lockdown: 'How homes became 'cages of violence for women, children' dated 9 December 2021.

466 See Justice Minister R Lamola's report to Parliament on 20 November 2021 that 873 cases were heard in 36 lower courts as a consequence of civil unrest. Reported in the Herald TimesLive by Philani Nombembe.

Judicial officers must be constantly and acutely aware that omission or neglect in this area of their functioning would result in the proceedings being set aside on review owing to irregularity. This means that the impact of increased volumes of disputes before the courts for resolution cannot be absorbed by the courts which have no increased capacity commensurate with the volume of demand for their services. It is inevitable that the ill – effects of this will be borne by court users. The impact of these working conditions and environment on the performance of judicial officers under the circumstances should not be underestimated as a recent survey by the DGRU reflects.[467]

The most significant yet insufficiently recognised fact is that the values, purpose, and objectives of the Constitution are demonstrably manifest in the work of lower courts: perhaps more than in any other sector of service in society, public or private. The lower courts are probably where most people experience or become aware of the workings of the Constitution and the Bill of Rights. In this regard the words of Froneman J resonate when he stated that it is;

> '*…Inconceivable that those provisions which are meant to safeguard the fundamental rights of citizens should not be applied in courts where the majority of people have their initial and only contact with the Constitution, namely the lower courts. Such an interpretation would frustrate its very purpose of constituting a bridge to a better future. It would negate the principle of accountability or justification in those courts most of the day to day administration of justice takes place'.*[468]

The integrity of lower courts ultimately rests on their impartiality, both actual and perceived, as so compellingly evinced in these words of Chief Justice Mahomed: 'Its (the courts') ultimate power must therefore rest on the esteem in which the judiciary is held within the psyche and soul of a nation. That esteem must substantially depend on its independence and integrity.'[469]

The potential threats to individual judicial officers of lower courts are extremely high in view of the closeness of the courts to their communities whilst the security is extremely weak and often non – existent.[470] But the greatest value of MCs is their very proximity to communities that offers

---

467 'The 2019 Survey of South African Magistrates' Perceptions of their Work Environment' *Democratic Governance and Rights Unit* University of Cape Town.

468 *Qozeleni v Minister of Law and Order* 1994 (1) BCLR 75 (E) 83j-84a.

469 Mahomed op cit note 13 at 112.

470 Op cit note 4 at 48. 'Magistrates cannot be expected to dispense justice while being left in harm's way.'

them perspectives that are unique to that community and enables the appropriate judicial responses and approach to resolving the disputes in that community.

It is submitted in conclusion that the outlook that this thesis projects may not be particularly bright. However, it should be kept in mind that before democracy, most citizens of South Africa would have associated MCs with a dark regime and now more than 25 years later, no great strides have been taken towards the light envisioned in the Constitution. The lack of optimism persists although there is no paucity of scholarly literature that the Constitution is unambiguously, essentially transformative.[471] In fact the Interim Constitution, as Madlala J states, 'is a document that seeks to transform the status quo ante into a new order'[472]. When the CC itself missed an opportunity in *Van Rooyen* to order a decisive break from the oppressive past by retaining intact old order laws, it effectively and indefinitely placed in suspension the guarantee provided in the Constitution that MCs are independent.

That said, sight should not be lost of the fact that repealing bad law and replacing it with laws that are consistent with the Constitution is the responsibility of the legislature: the Constitution is not self – executing. If not brought to life it will remain just a document promising a grand vision. Restoring hope that the judiciary will be enabled to serve the most marginalised members of society requires urgent, fundamental change in the quality of judicial service that lower courts deliver. It is the power of the political organs to correct the obvious wrongs that bedevil the transformation of the lower courts, and their responsibility to do so without further delay.

There are some critical values and principles of governance that establish and sustain democracies. Citizens must be assured that their governments protect and promote these through their policies and programmes. The impartiality and independence of all courts are such critical values for democratic governance deserve focused attention.

471 Mhango op cit note 198 at 327.

472 *Du Plessis v De Klerk,* 1996 (5) BCLR 658 (CC) at para. 57.

BIBLIOGRAPHY

BOOKS

Anderson, James H, *et al*. *Judicial Systems in Transition Economies: Assessing the Past, Looking to the Future*. Washington, D.C., World Bank, (2005).

Burbank, Stephen B, and Barry Friedman. *Judicial Independence at the Crossroads: An Interdisciplinary Approach*. Thousand Oaks, Calif., Sage Publications, (2002).

Clark, Thomas S. *The Limits of Judicial Independence*. Cambridge, Cambridge University Press, (2011).

Corder, Hugh. *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-1950.* Cape Town, Juta, (1984).

De Smith, Stanley, A. *Constitutional and Administrative, Law* London, Penguin Book, (1971).

Dyzenhaus, David. *Judging the Judges, Judging Ourselves*. Oxford, Hart Pub, (1998).

Fernandez L 'Analysis and Critique of the Present South African Structures Administering Justice' in Reshaping the Structures of Justice' Norten M (ed) (1993) 116 – 119.

Friedland, Martin L, and Canadian Judicial Council. *A Place Apart: Judicial Independence and Accountability in Canada*. Ottawa, Canada, Canadian Judicial Council, (1995).

Gargarella, Roberto, *et al. Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* London, Routledge, Taylor & Francis Group, (2016).

Geyh, Charles Gardner, and Proquest Firm. *When Courts & Congress Collide: The Struggle for Control of America's Judicial System*. Ann Arbor, University of Michigan Press, (2008).Ghosh, Soma. *An Independent and Accountable Judiciary: Pillar of Democracy*. Kolkata, Pragatishil Prokashak, (2005).

Hahlo, H R, and Ellison Kahn. *The Union of South Africa; the Development of Its Law s and Constitution by H.R. Hahlo and Ellison Kahn, with Specialist Contributors.* London, Stevens, [I.E, (1960).

Hoexter Cora and Olivier Morne. *The Judiciary in South Africa*. Cape Town, Juta Law, (2014).

Locke, John. *Two Treatises of Government.* 1689. S.L., Blurb, (2019).

Malleson, Kate, and Peter H Russell. *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*. Toronto, University of Toronto Press Inc., (2007).

Milton, Frank. *The English Magistracy.* London, New York Oxford U.P, (1967).

Sachs, Albie. *Justice in South Africa*. Berkeley, University of California Press, (1992).

Shetreet Shimon, et al. *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*. Leiden; Boston, Martinus Nijhoff Publishers, (2012).

Tarr, George Alan. *Without Fear or Favor: Judicial Independence and Judicial Accountability in the States*. Stanford, Stanford University Press, (2012).

CHAPTERS IN BOOKS

Albertyn C *Judicial Diversity* in Hoexter C and Olivier M (eds.) *The Judiciary in South Africa* (2014) 245 – 287.

Ebrahim H *Governance and Administration of the Judicial System* in Hoexter C and Olivier M (eds.) *The Judiciary in South Africa* (2014) 99 – 115.

Fernandez L *Analysis and Critique of the Present South African Structures Administering Justice* in Norton, Michelle (ed.) *Reshaping the Structures of Justice for a Democratic South Africa*: Papers of a Conference Organized by the National Association of Democratic Lawyers, Pretoria, (October 1993), 116 – 119.

Forsyth C *The Judiciary Under Apartheid* in Hoexter C and Olivier M (eds) in *The Judiciary in South Africa* (2014) 26 – 67.

Hoexter C *The Structure of the Courts in Hoexter* C and Olivier M (eds) *The Judiciary in South Africa* (2014) 1-25

Olivier M and Hoexter C *The Judicial Service Commission* in Hoexter C & Olivier M (eds) *The Judiciary in South Africa* 154 – 199

Mhango M. *Transformation and the Judiciary* in Hoexter C and Olivier M (eds) *The Judiciary in South Africa* (2014) 68 – 98.

Olivier M 'The Magistracy' in Hoexter C and Olivier M (eds.) *The Judiciary in South Africa* (2014) 310 – 351.

JOURNAL ARTICLES

American Bar Association 'Congress Denial of Judicial Cost of Living Salary Increases Violates Constitution' *Academic One File* 2012. Reported in *State News Agency Service* 20 July 2012.

Amy M T 'Judiciary School: A Proposal for a Pre – Judicial LLM Degree' (2002) 52 *Journal of Legal Education* 130.

Armytage L 'Judges as Learners': Reflections on Principle and Practice *Centre for Judicial Studies* 2004. *Accessed from* www.educatingjudges.com 19 November 2020.

Beloff MJ 'Paying Judges, Why, Who, Whom, How Much' (2006) 18 *Denning law Journal* 1-37.

Brennan J T 'Judicial Fiscal Independence' (1971) 23 *University of Florida Law Review* (2) 277 – 288.

Buenger M 'Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times' (2003) 92 *Kentucky Law Journal* 979 – 1050.

Budlender G 'Access to Courts' (2004) 121 *SALJ* 339.

Bunjevac T 'Court Services Victoria and the New Politics of Judicial Independence: A Critical Analysis of the Court Services Victoria Act 2014' *Monash University Law Review* 299 – 328.

Burbank S B 'What Do We Mean by "Judicial Independence"?' (2015) 41 *Ohio State Law Journal* (2003) 64 1-10.

Carpenter G ‘Judiciaries in the Spotlight’ (2006) 30 *CILSA* 361 – 384.

Cameron E ‘A Single Judiciary? Some Comments.’ (2000) 17 *SALJ* 141 – 151.

Chanock M ‘Writing South African Legal History: A Prospectus’ (1989) 30 *The Journal of African History* 265 – 288.

Colvin E ‘The Executive and the Independence of the Judiciary’ (1986) 51 *Saskatchwan Law Review* 229 – 246.

Corder H ‘Judicial Authority in a Changing South Africa’ (2004) *Legal Studies*.

Corder H ‘Establishing Legitimacy for the Administration of Justice in South Africa’ (1995) 2 *Stellenbosch Law Review* 202-216.

Cowling MG ‘Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premise” (1987) 3 *SAJHR* 177.

Devenish G ‘South Africa from Pre- Colonial Time to Democracy: A constitutional and Jurisprudential Odyssey’ (2005) 3 *TSAR* 547 – 571.

Dugard J ‘Courts and The Poor in South Africa: A critique of Systemic Judicial Failures to Advance Transformative Justice’. (2008) 28 *SAJHR 2*14 – 238.

Franco J; Powell C ‘The Meaning of Institutional Independence in *Van Rooyen* v the State’ (2003) 3 *SALJ* 562 – 575.

Ferejohn J ‘Independent Judges, Dependent Judiciary: Explaining Judicial Independence’ (1999) 72 *Southern California Law Review* 353.

Fitzpatrick B, Seago P, Walker C, Wall D ‘New Courts Management and Professionalization of Summary Justice in England and Wales’ (2000) 11 *Criminal Law Forum* 1 – 22.

Gregorczuk H 'The Desirability of Judicial Education in Australia' (1996) 14 *Journal of Professional Legal Education* 77 – 95.

Gready P; Kgalema L 'Magistrates under Apartheid: A Case Study of the Politicisation of Justice and Complicity in Human Rights Abuses' (2003) 19 *SAJHR* 141 – 188.

Devenish G 'South Africa from pre – colonial time to democracy: a constitutional and jurisprudential odyssey' (2005) 3 *TSAR.*

Howie CT, 'Judicial Independence' (2003) *SALJ 6*79 – 684.

Kaykowsky T 'Judicial Independence' (1998) *Law Now* 21.

King J 'Minimum Standards of Judicial Independence' (1983) 8 *International Legal Practitioner* 65 – 68.

King L J 'A Judiciary – Based State Court Administration – The South Australian Experience' (1993) 3 *Journal of Judicial Administration* 133.

Kirby M 'Modes of Appointment and Training of Judges: A Common Law Perspective' (1992) 41 *Journal of the Indian Law Institute* 147 – 159

Langa J 'The Vision of the Constitution' (2003) 120 *SALJ* 670 – 679.

Lowndes J, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond' (2000) 74 *Australian Law Journal* 592.

Mack K; Anleu S R 'The Security of Tenure of Australian Magistrates' (2006) 30 *Melbourne University Law Review* 371 – 398.

Madhuku L 'Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa*'* (2002) *46 Journal of African Law* 232 – 245.

McCreath H and Koen R ‘Defending the Absurd: The Iconoclast’s Guide to Section 47(1) of the Superior Courts Act 10 of 2913’ (2014) 17(5) *PER/PELJ* at 1788 – 1826.

Martin W ‘Court Administrators and the Judiciary: Partners in the Delivery of Justice’ (2014) *International Journal for Court Administration* 23.

Moerane MTK ‘The Meaning of Transformation of the Judiciary in the New South African Context’ (2003) 12 *The Advocate* 708.

Mahomed I “The independence of the Judiciary” (1998) (115) *SALJ* 658 – 667.

Mahomed I ‘Address at Annual General Conference of the Judicial Officers Association of South Africa.’ (1998) (1) *The Judicial Officer* 47 – 52 at 48.

Mahomed I ‘The Role of the Judiciary in a Constitutional State’ (1998) 115 *SALJ* 111 – 114.

Moegoeng M ‘Single Judiciary discussed at Judicial Officers Association AGM’ (2014) March 8 – 10.

Moseneke D “Access to Education and training: Pathway to Decent Work for Women” (2011) (11) *PER/PELJ* 261.

Mtshaulana PM ‘Changes to the Structure of the Judiciary’ (2008) *Advocate* 1.

Ngcobo S ‘Delivery of Justice: Agenda for Change’ (2003) 120 *SALJ* 688 – 705.

Nicholson R D ‘Judicial Independence and Accountability: Can they Co – Exist? (1993) 67 *Australian Law Journal* 404.

Olivier M ‘Is the South African Magistracy Legitimate’ (2001) *SALJ* 118 166 – 176.

Rankin M ‘Access to Justice and the Institutional Limits of Independent Courts’ (2012) 30 *Windsor Yearbook of Access to Justice* 101 – 138.

Seago P Fitzpatrick B; Walker C and Wall D 'The Role and Appointment of Stipendiary Magistrates' (1995) *Criminal Law Forum.*

Shetreet S 'Justice in Israel: A study of the Israeli Judiciary' 1994 4 as cited by Singh MP in 'Securing the Independence of the Judiciary: The Indian Experience' *Indiana International and Comparative Law Journal* 2005 10 245 – 29.

Shetreet S 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges' 2009 10(1) *Chicago Journal of International Law* 275 – 332.

Stevens R 'A Loss of Innocence? Judicial Independence and the Separation of Powers' (1999) 19 *Oxford Journal of Legal Studies* 365 – 402.

Tiede L B 'Judicial Independence: Often Cited, Rarely Understood' (2006) 15 *Journal of Contemporary Legal Issues* 129.

Thring WG 'Comment on the White Paper on the Judicial System: Chapter on the Judiciary produced by the Policy Unit, Department of Justice.' (1999) 116 *SALJ* 858 – 864.

Trengove J 'The Prevalence of Acting Judges in the High Court: is it consistent with an independent judiciary? (2007 December) *Advocate* 37 – 39.

Van Dijkhorst K 'The future of the magistracy' (2000) First Term *Advocate.*

Van Loggerenberg D "Civil Justice in South Africa" (2016) 3(4) *BRICS Law Journal* 125 – 147.

Vyas Y 'The Independence of the Judiciary: A Third World Perspective' (1991) *Third World Legal Studies* 127 – 177.

Wa Mutua M ‘Hope and Despair for a New South Africa: The Limits of Rights Discourse’ (1997)10 *Harvard Human Rights Journal* 63 - 114 at 106.

Wallis M ‘Ordinary Justice for Ordinary People: The Eighth Griffiths and Victoria Mxenge Memorial Lecture’ (2010) 127 *SALJ* 369 – 381.

CONSTITUTIONS

The Constitution of the Republic of South Africa 1996.

LEGISLATION

Magistrates Courts Act 32 of 1944.

Magistrates Act 90 of 1993.

South African Judicial Education Institute Act 14 of 2008.

Promotion of Access to Information Act 2 of 2000.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Superior Courts Act 10 of 2013.

REGULATIONS

Regulation 4(3) – (5) GN R361 GG 15524 of 11 March 1994 in terms of section 16 Magistrates Act 90 of 1993.

SOUTH AFRICAN COURT JUDGMENTS

CONSTITUTIONAL COURT

Association of Regional Magistrates of South Africa v The President (2013) ZACC 13.

De Lange v Smith NO 1998 (3) SA 785.

Du Preez v Minister of Justice and Constitutional Development 2006 (5) SA 592 (EqC).

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 4 SA 744 para 106 – 113.

Van Rooyen v The State 2002 (5) SA 246 (CC).

OTHER SOUTH AFRICAN COURTS

M Kroukamp v Minister of Justice and Constitutional Development; Gauteng Division of High Court Pretoria Sitting as Equality Court; Case Number 74236/2013 dated 16 August 2021.

Magistrates Commission and Others v Richard John Lawrence (Case no 388/2020) [2021] ZASCA 165.

Qozeleni v Minister of Law and Order 1994 (1) BCLR 75 (E) 83j-84a.

Singh v Minister of Justice and Constitutional Development 2013 3 SA 66 (EqC).

FOREIGN COURT JUDGMENTS

Beaugard v Canada (1986) 2 SCR 56.

Ell v Alberta (2003) 1 SCR 857.

Fingleton v The Queen (2005) 216 ALR 474.

Forge v Australian Securities and Investment Commission (2006) 228 CLR 45.

Michel Genereux v Her Majesty the Queen 1992 S.C.R.

In Re Provincial Court Judges (1997) 3 SCR 3.

Valente v The Queen (1986) 24 DLR (4th) 161 (SCC).

INTERNATIONAL INSTRUMENTS

African Charter on Human and People's Rights, (1981).

Bangalore Principles of Judicial Conduct, (2002).

Basic Principles on the Independence of the Judiciary. (1985). Endorsed by General Assembly Resolution 40/32, 29 November 1985 and General Assembly Resolution 40/146, 13 December 1985.

Beijing Principles Pacific LAWASIA Region adopted by LAWASIA Council 2001.

Commonwealth (Latimer House) principles on the three branches of government. (2003) Nigeria.

International Covenant on Civil and Political Rights (1976).

Syracusa Draft Principles of Judicial Independence.

Universal Declaration of Human Rights (1948).

United Nations Basic Principles on the Independence of the Judiciary, (UN Basic Principles).

Universal Declaration of Human Rights, United Nations General Assembly 1948 December 10.

INTERNATIONAL ORGANISATION DOCUMENTS

American Bar Association Chicago 1997 ii – iii 'An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence'.

European Charter on the statute for judges, paragraph 2.1 – 2.2. Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, doc. cit., Principle A.

International Commission of Jurists 'International Principles for the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioner's Guide 1 2007 Geneva.

IBA Minimum Standards of Judicial Independence Clause 29. International Bar Association Minimum Standards of Judicial Independence; articles 14; 15.

Mount Scopus Standards of Judicial Independence. Mount Scopus International Standards of Judicial Independence was formulated by *The International Project of Judicial Independence of the International Association of Judicial Independence and World Peace*, approved on 19 March 2008 and consolidated in 2015.

Universal Charter of the Judge Article 8. The universal Charter of the Judge, approved by the International Association of Judges (IAJ) on 17 November 1999.

SOUTH AFRICAN GOVERNMENT REPORTS AND DOCUMENTS

Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society Final Report.' Prepared for the Department of Justice and Constitutional Development by HSRC and University of Fort Hare dated November 2015

The Hoexter Commission of Inquiry into the Structure and Functioning of the Courts Fifth and Final Report Part II 1983 Para 1.3.11 68 – 69.

Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State (February 2012).

Democratic Governance Research Unit at University of Cape Town 'The Coalface of Justice: An Analysis of Misconduct Proceedings Against Magistrates in South Africa.' *Democratic Governance Research Unit* at University of Cape Town. First Edition 2020.

Democratic Governance and Rights Unit University of Cape Town.
The 2019 Survey of South African Magistrates' Perceptions of their Work Environment'

Department of Justice and Constitutional Development 'Discussion Document on the Transformation of the Judicial System (2012) February.

National Planning Commission National Development Plan 2030.

DOCUMENTS ACCESSED FROM INTERNET SOURCES

Chaskalson A 'The Rule of Law: The importance of independent courts and legal professions' accessed from P de Vos, *Constitutionally Speaking* blog available at: http://constitutionallyspeaking.co.za/arthur-chaskalson-on-independence-of-legal-profession. Last accessed 20 November 2021.

'Courts and Tribunals Judiciary' accessed from www.judiciary.uk. Last Accessed 12 February 2019.

Harms L made this statement during closing remarks at the International Judicial Conference held in Warsaw Poland on 3 October 1998. Cited by Gordon and Bruce Gordon Amy; Bruce D 'Transformation and the Independence of the Judiciary in South Africa' *CSVR Centre for Study of Violence and reconciliation* (2007) October at page 9. www.csvr.org.za. Last Accessed 14 March 2022.

Gordon Amy; Bruce D 'Transformation and the Independence of the Judiciary in South Africa' *CSVR Centre for Study of Violence and reconciliation* (2007) October. Available online at www.csvr.org.za. Last Accessed 15 October 2021.

National statistics issued by the Office of the Chief Justice for 2016 Statistics provided by the Office of the Chief Justice for 2016. . Last Accessed 8 September 2018

The South African Police (SAPS) crime statistics for the period April 2016 to March 2017 Accessed from https://www.saps.gov.za 10 August 2021.

MEDIA REPORTS

Davis R ‘JSC plumbs new depths in Chief Justice interview derailed by anonymous rumours’ Media Report, *Daily Maverick* 4 February 2022. Accessed from www.dailymaverick.co.za on 4 February 2022.

Gerber J ‘Magistrates use every trick in the book Parliament Hears’ https://www.news24.com/news24/southafrica/news/magistrates-use-every-trickin-the-book-to-delay-disciplinary-hearings-parliament-hears-20190829. Accessed 22 November 2020.

Maughan K ‘It’s an insult’ New low for JSC as Mlambo asked about sexual harassment ‘rumours’ in CJ interview’ media report in News 24 on 4 February 2022. Accessed from *news24.com* on 4 February 2022.

Naidoo Lawson ‘CASAC takes JSC to Court over ConCourt Interviews’ report in *politicsweb* on 3 June 2021. Accessed from www.politicsweb.co.za on 3 June 2021.

Corder H ‘Comprehensive Review: The JSC is in freefall and the stakes are too high for it to fail.’ Opinionista in *Daily Maverick,* www.dailymaverick/opinionista.co.za published on 30 June 2021. Accessed on 11 February 2022.