

1993

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Recommended Citation

Mikva, Abner J. "The Need for an Independent Judiciary: Implications for South African Reform." *American University International Law Review* 8 no. 2/3 (1993): 621-625.

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THE NEED FOR AN INDEPENDENT JUDICIARY: IMPLICATIONS FOR SOUTH AFRICAN REFORM

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The need for an independent judiciary is not always as apparent as it was at the time of the American Revolution and separation from British colonial rule. One of the most troubling thorns in the side of the American colonists was the frequent and multifarious interference with colonial judges and their justice by the mother country. When the Declaration of Independence was drafted, the colonists' objection to this interference was prominent among the list of grievances against the English king:

He has made Judges dependent on his Will alone, for the terms of their offices and the amount and payment of their salaries.¹

It followed that the framers did provide for judicial independence in the United States Constitution. Article III provides life tenure for all federal judges, as well as protection against diminution of their compensation. But because of the immediately preceding colonial history, the independent judiciary in the United States may have been conceived more as a reaction to monarchic abuse than as an essential ingredient of a democracy. Most of the state constitutions in the United States provide for an elected judiciary, with not much insurance for independence; whatever their shortcomings, these constitutions do provide a democratic framework for state government. In its search for a new constitutional structure, South Africa may wish to review the necessity, features and complications of an independent judiciary.

The need for an independent judiciary is directly related to the power of the judiciary. If, in a country's constitutional scheme, the judicial branch is not expected to play a major role, its independence, *vel non*, is of less moment. The more judges are called upon to challenge political and popular will, the more necessary their independence. If the function of judges is limited to private disputes, reviewing administrative functions and providing individual justice to citizens aggrieved by narrow governmental decisions, their antimajoritarian role is minimal. While

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1. THE DECLARATION OF INDEPENDENCE paras. 10, 11 (U.S. 1776).

their function in criminal cases can elevate their profile and their unpopularity, it is in the policy areas that their role becomes critical. If the judges are given the role of reviewing the actions of the political branches as against a written constitution and its protective features, judicial independence must be built into the constitution itself. When judges are called upon to review the actions of these other branches in order to effectuate individual constitutional guarantees, they are in direct conflict with the very sources of power from whom they must be protected. A current example in the United States is the dispute over an individual's "right" to exercise freedom of speech by burning an American flag. When the Supreme Court recently ruled that an individual had such a right,² and declared unconstitutional a Texas criminal statute banning flag burning,³ members of both other branches of government condemned the Justices' action.

In addition, to the extent that a constitution ordains and defines separate legislative and executive powers, judges unavoidably will be called upon to resolve disputes *between* the two political branches. Such disputes raise to a boiling-point the losers' anger and unhappiness with the judges. Disputes such as the Watergate controversy in the United States, which pitted the legislative branch directly against the executive at several key points, simply could not have been resolved through constitutional principles if the federal judiciary had not been independent. There is under current consideration in the Congress an amendment to the Constitution which will require the President and the Congress to balance the budget every year.⁴ If this constitutional amendment is adopted, it will be up to the courts to provide both an enforcement procedure and substantial interpretation of the terms of the amendment. Again, without an independent judiciary (and perhaps even *with* an independent judiciary) it would be impossible for the courts to perform such functions.

The genius of a constitution which seeks to provide for separation of executive, legislative and judicial power is in its ability to create checks and balances—ones that permit each branch to act independently, without diminishing the authority for ultimate coordinated action. For a judiciary to be truly independent, it must be protected from any institution or group capable of creating pressure. This means not only the ancient power of sovereigns to dismiss judges at their pleasure, but also

2. *Texas v. Johnson*, 491 U.S. 397 (1989).

3. TEX. PENAL CODE ANN. §42.09 (a)(3) (West 1989).

4. H.R.J. Res. 490, 103d Cong., 1st Sess. (1992).

the more subtle ability of officials to interfere with the administration of justice. In the United States, the President and the Congress have threatened to exercise pressure over the Supreme Court by changing the number of justices who make up the Court. The most notorious of these efforts, albeit unsuccessful, was that of Franklin Delano Roosevelt, who tried to increase the number of justices in order to thwart the Court's power to declare unconstitutional various measures which President Roosevelt believed were important to the country's economic health. On other occasions, Congress has exercised its influence by increasing or decreasing the number of justices authorized to serve on the Court. States possess an even greater arsenal of political tools with which to influence judges. In addition to limiting tenure, most states now provide for the popular election of judges. In California, a number of the judges of the state's highest court lost their seats because the court was perceived to be too lenient in dealing with criminal appeals. In Oregon, a state high court judge was accused of "wrapping himself in the Constitution" when he tried to explain some of his unpopular decisions.

On occasion, efforts have been made to diminish the prerequisites of judicial office in order to pressure judges. While the compensation level is specifically protected from diminution in the U.S. Constitution, Congress has other methods of seeking to "punish" the judiciary. The Constitution leaves to Congress the power to establish all courts "inferior" to the Supreme Court, as well as the jurisdiction of these courts.⁵ As a result, efforts have been made in the past to restrain federal courts through threats to abolish them altogether, or to restrict their jurisdiction over certain unpopular subjects. For true independence, a constitution should protect against any incursions on the judicial power established by the constitution; such protection should include tenure of office, maintenance of compensation and other prerequisites, and a prohibition against dilution of either the power or the jurisdiction of judges as ordained in the constitution.

The method used for selection of judges will also bear on their independence. The defects in electing judges by popular ballot are of course obvious—the popular majority controls the selection and tenure of those charged with protecting minorities from unconstitutional majority impulses. However, even with an appointment process, the political branches can restrict and unduly influence judicial independence. In the United States, the nomination of all federal judges by the President, subject to confirmation by the U.S. Senate, has provided a political dimension to

5. U.S. CONST. art. III, § 1.

the appointment process, mainly because of custom rather than the process itself. One does not train for the "judicial profession" in the United States, as is true in most of the other constitutional democracies and in Great Britain. Frequently, the President will appoint people directly from the political arena, including such examples as Chief Justice Earl Warren, Justice Hugo Black, and Chief Justice William Howard Taft. The confirmation procedures of the United States Senate can create the appearance of a judicial nominee being subject to a political process, as in the cases of Judge Robert Bork and Justice Clarence Thomas. Nonetheless, such indirect political pressures at the appointment stage may in fact be beneficial in protecting against overpoliticization of the courts. The meritocracy ladder used in most European countries avoids such perceptions and misperceptions, but at the expense of the prestige and policy competence of the judiciary. Judges who have never been exposed to the political arena are less likely to understand all of the policy nuances involved in resolving disputes between the two elected branches of government, or in resolving the constitutional challenges brought by individuals against the government.

The more independent a judiciary, the more present is the concern that judicial excesses cannot be restrained or corrected. The protection against such excesses should be set forth in the constitution itself. To the extent that judges misconstrue legislation, the legislative branch can always revise the legislation to correct judicial errors. To the extent that the judges proclaim certain legislation or action unconstitutional, the constitution must obviously allow for amendment. And, to the extent that the conduct of individual judges becomes intolerable, the constitution should provide for a removal process that gives the legislative branch the power to remove a judge, with such special majority vote and under such specific standards as the constitution itself provides. In the United States, the constitutional standard for removal is "treason, bribery, or other high crimes and misdemeanors,"⁶ language that has never been precisely defined. Currently, a commission is studying that impeachment procedure as it relates to judges, to see if it has really stood the test of time. In very recent years, there have been a larger-than-usual number of judges who have been impeached for various criminal offenses. In one case, the judge was acquitted by the jury in the criminal case, but the Congress nevertheless impeached and removed him from his judicial office. If the constitution is to provide a significant role for the judiciary in protecting and effectuating constitutional

6. U.S. CONST. art. II, § 4.

guarantees and provisions, then it must also provide for an independent judiciary that can withstand the conflict engendered by such an antimajoritarian role. Such independence can be achieved by tenure of office, protection against reprisal by the political branches, and the development of the prestigiousness of judicial office. But mostly, such independence can be achieved only by establishing and maintaining a tradition whereby the judges demand and the people support such independence. In that connection, South Africa would appear to be ahead of most of the countries of Eastern Europe as they struggle with developing a true constitutional system and an independent judiciary to maintain it.