Judicial independence – a substantive component?

By Justice Edwin Cameron,* judge of the Constitutional Court of South Africa

I. Introduction

1. Lord Bingham observed (with not unwonted wit and brevity) that '(i)t is a truth universally acknowledged that the constitution of a modern democracy governed by the rule of law must effectively guarantee judicial independence.' [1]
2. Archibald Cox, a former United States Solicitor General (and the first special prosecutor in the Watergate matter), noted three reasons for judicial independence:
   - first, to guard against abuse of executive power,
   - second, to halt legislative erosion of fundamental human rights, and
   - to provide assurances to the public that judges are impartial and fair in their decision-making processes. [2]
3. The concept derives from the separation of powers – the principle that as a check to abuse government power be distributed between executive, legislature and judiciary, and that the sphere of each should be respected by the others.
4. The principle has especial significance in its application to the judiciary. The notion has been well-trodden by courts and scholars. Most agree that it entails two things:
   - first, institutional independence – the judiciary must enjoy some organizational insulation, in a sphere of operation independent of other branches of government, and
   - second, decisional independence – individual judges must be able to make their decisions on the facts and the law without pressure or interference. [3]
5. These two components of judicial independence concern the externalities of judicial work. And they are of course vital if courts and judges are to work free from external pressures.
6. But this does not satisfactorily capture all we ordinarily mean when we speak of the independence of the judiciary. While they are necessary to being independent, they do not sufficiently describe what it means.
7. This is because the externalities do not take account of factors internal to the judging process. These, also, we commonly speak of as bearing on judicial independence.
8. Let me expand. For a judge to be independent requires something more than institutional and decisional autonomy. It requires –
   (a) an internal commitment to legal reasoning and legal values, as distinct from the pursuit of or acquiescence in politically directed outcomes, and
   (b) a willingness to take a stand.
9. Stated abstractly, this seems obvious. But I propose to get practical. We will look at three landmark cases, from three jurisdictions, whose outcomes have been criticised on many grounds – including that the judges were weak, were untrue to their calling, and that they strayed from the proper conception of their job. In short, the decisions are criticised because they did not manifest judicial independence.
10. But first let us consider the traditional elements of an independently functioning judiciary. For in the flesh and blood of judicial working, they are vital.
11. When the Southern African Chief Justices' Forum [4] (SACJF) met in Johannesburg in August 2010, two of the five topics the region's Chief Justices put forward for detailed discussion were
    - 'the dangers of politicizing the judiciary, … a topic with respect to which the chief justices agreed that courts must continue to resist any interference or political pressure with their decisions', and
    - 'modern challenges to the independence of the judiciary, … on which the chief justices agreed that there was a need for a long-term programme to educate people about the importance and meaning of the independence of the judiciary'. [5]

II. Judicial independence – two traditional facets

Institutional Independence

12. Institutional independence is a necessary incident of the separation of powers. It gives the judiciary insulation from the other branches of government. It allows judges to do their job – which is to serve as an effective check on the exercise of power.
13. The separation of powers principle also permits judges to guard themselves from being drawn into politics, by declaring some disputes 'non-justiciable'.
14. This can be a duck-out. But it can also assist in a proper delineation of the role of judges.
15. In the court in which I sit, it has found application in cases concerning the enforcement of social and economic rights. The court has insisted that in a functioning democracy the primary job of determining social programmes, and of delivering public goods and services, belongs to government, and that the court should not usurp those tasks, or, once it has been established that the programmes are reasonable, to any great extent oversee them. [6]
16. The South African Constitution strongly enunciates the courts' institutional independence. The supremacy of the Constitution, and the rule of law, are founding values of our democratic order. [7]
17. More detailed provisions spell out what *judicial authority* entails:

* I am most grateful to my foreign law clerk, Nwamaka Ejebe, for help with this talk.

' … (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice;

(3) No person or organ of State may interfere with the functioning of the courts; and

(4) 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.'[8]

18. In *South African Association of Personal Injury Lawyers v Heath* the Constitutional Court gave practical bite to the separation of powers when it declared unconstitutional legislation that put a judge at the head of a special investigating unit created to tackle corruption.[9]

Decisional independence

19. The second facet of judicial independence focuses more on the individual judge than on the institution. Decisional independence means protecting judges from undue external pressures from politicians, the public, and the media, to allow them to decide cases on the law and the facts before them.

20. Three key features preserve this feature:

- judicial self-administration (very recently introduced in South Africa, when the Office of the Chief Justice was created, to undertake administration for the judiciary);[10]
- security of tenure; and
- security in emoluments.

21. In *Provincial Court Judges Association (Manitoba) v Manitoba (Minister of Justice),* the Supreme Court of Canada held that the guarantee of judicial independence in the Canadian Charter of Rights and Freedoms prevented provincial governments from reducing the salaries of provincial court judges.[11] The majority noted (Lamer CJ):

'…the purpose of the constitutional guarantee of financial security…is not to benefit the members of the court…. The benefit that the members of those courts derive is purely secondary. Financial security must be understood as merely an aspect of judicial independence, which in turn is not an end itself. Judicial independence is valued because it serves important societal goals—it is a means to secure those goals.'[12]

22. Decisional independence allows judges to make decisions freely, without being swayed by concern for political or career consequences, or for public backlash.

23. As Justice Chaskalson has explained:

'If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution.'[13]

24. This is not to say that judges should be feckless about public opinion. Max du Plessis has urged that when the Constitutional Court gives a ruling that is at odds with public opinion, the Bench should make an engaging effort to explain what it is about. The alternative, he points out, is to risk losing support for the job judges do:

'Once the Constitutional Court has interpreted a section in a way that leads it to find against the public's opinion, it must face the political task of confronting the citizens involved and explaining to them why their opinion is wrong. In other words, the legal (political) task of constitutional adjudication is bound up with the political task of rejecting public opinion.'[14]

25. That the disjunct exists in our society is clear. The Youth League of the governing African National Congress recently attacked a decision of Ms Justice Nomathamsanqa Beshe of the High Court, which halted a provincial conference of the League because of apparent lack of observance of internal rules. Media reports indicated that the League would not observe the ruling, and quoted its secretary general as saying:

'In the Eastern Cape, the judge there took a drunk decision, an absolute drunk decision.'[15]

26. Incidents like these underline that the task of public accounting and explanation is tough, but extremely important.

III. Internalised judicial independence – the commitment to legal autonomy

27. In addition to institutional capacity, and some measure of insulation from political, public and media pressures, do we mean more when we speak of the judiciary being 'independent'?

28. We can approach the question by considering three decisions, one from apartheid South Africa (1964), another from the United States in 2000, and one from the tragic recent history of Zimbabwe (2008).

Case one: Rossouw v Sachs

29. In 1963, Albie Sachs was detained under a law that permitted the police to detain those suspected of certain types of anti-apartheid acts incommunicado for 90 days.[16] He had been convicted of no offence. So he sought a court order equating his status, rights and privileges to those of an awaiting-trial prisoner. Most crucially, he wanted to read and to be able to write. Two High Court judges in Cape Town ruled in his favour. They found that the statute did not expressly deprive him of the right to reading and writing materials. Nor did it do so by necessary implication. Hence Sachs retained that right. They ordered the police to grant him a reasonable (and well-supervised) supply of reading and writing materials.[17]

30. The police appealed against this order. A five-member panel of the Appellate Division unanimously upheld the appeal, overturning the Cape court's order.

31. The appellate judges recognised that the words of the statute said nothing express about whether 90-day detainees had the same rights as awaiting-trial prisoners.[18] So they sought to answer the question by determining the legislature's intent in enacting the detention provision.

32. And this intent alone was decisive. The appeal court stated it had no duty to interpret the provision in favour of the liberty of the subject. On the contrary, it should accord preference to neither 'strict construction' in favour of the individual, nor to 'strained construction' in favour of the executive – it should hold the scales

evenly, and get to the answer to the question before it merely by determining 'the meaning of the section upon an examination of its wording in the light of the circumstances whereunder it was enacted and of its general policy and objects'.[19]

33. Since the purpose of the 90-day detention provision was to induce the detainee to speak,[20] the legislature could not have intended that the detainee would be able to 'relieve the tedium' of his detention by reading and writing. Parliament must therefore have intended to deny him the right to reading and writing materials. So the High Court ruling was wrong. Not only was the wording of the provision inexpress. Ample precedent indicated that unsentenced detainees retained the right to reading and writing materials. Yet the court disavowed these considerations in favour of a construction that enhanced the purposes and effect of solitary confinement, namely to induce the detainee to speak. The decision is rightly notorious.[21] It is seen as unduly executive-leaning at a time when the courts' duty was to stand firm against white fright and for individual rights. The consequence of the appeal court's ruling in *Rossouw v Sachs*, quite plausibly, was the dismal list that ensued of brutal deaths in detention – including many alleged 'suicides'. The courts had not merely washed their hands of those in the power of the police – they had given their imprimatur to solitary confinement and detention without trial: this when at their disposal lay the clear power to do otherwise.
34. What is pertinent to our theme today is this. *Rossouw v Sachs* is not criticised because anyone suggests the five judges had insufficient institutional autonomy to take a different decision. It is not criticised because anyone suggests they took orders or acted under pressure from the apartheid police minister. It is criticised because it was an abdication of judicial power, and a profanation of judicial principle. It is South Africa's *Liversidge v Anderson*.[23]
35. Instead of guarding individual rights, and giving proper effect to law and legal precedent, the appellate judges yielded to political expediency: they used their power to help the apartheid government's security apparatus. In this, they violated the substantive, internal, component of judicial independence.

Case two: Bush v Gore

36. In the United States, the Supreme Court's decision to terminate the Florida ballot recount in *Bush v. Gore*,[24] thereby deciding the outcome of the 2000 US Presidential election, offers not dissimilar instruction. The majority of the Supreme Court decided to hear the case despite a well-developed political question doctrine. Five judges in the majority then applied a previously unheard-of version of equal protection, and an unprecedented willingness to determine questions of state law, to reach their decision.
37. In dissenting from the grant of certiorari on the decision of the Florida Supreme Court, Justice Stevens expressed his dismay at the majority's willingness to hear the case:

    'To stop the counting of legal votes, the majority today departs from three venerable rules of judicial restraint that have guided the Court throughout its history. On the questions of state law, we have consistently respected the opinions of the highest courts of the States. On questions whose resolution is committed at least in large measure to another branch of the Federal Government, we have construed our own jurisdiction narrowly and exercised it cautiously. On federal constitutional questions that were not fairly presented to the court whose judgment is being reviewed, we have prudently declined to express an opinion. The majority has acted unwisely.'[25]

38. In their *per curiam* decision on the merits, the Supreme Court majority found that the Florida Supreme Court's method of implementing the manual recount violated the 14th Amendment's Equal Protection Clause as '…inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount…'[26]
39. Constitutional law scholars have decried the decision as deficient in logic and lacking in precedential deference. Cass Sunstein stated that the decision 'lacked support in precedent or history, that it raised many unaddressed issues with respect to scope, and that it might well have authorised equality problems a serious as those that it prevented.'[27] Richard Epstein, although approving the outcome, has suggested that the equal protection argument was 'a confused nonstarter at best, which deserved much of the scorn that has been heaped upon it.'[28] And Akil Amar has highlighted the ironies inherent in the majority position:

    'Justices who claim to respect states savage state judges. Jurists who purport to condemn new rules make up rules of breathtaking novelty in application. A court that frowns on ad hoc decision-making gives us a case limited to its facts. A court that claims it is defending the prerogatives of the Florida Legislature unravels its statutory scheme vesting power in state judges and permitting geographic variations. The real problems in Florida identified by the justices were problems in the election laws themselves, not the Florida courts. The case that bears the name of a professed strict constructionist is as activist a decision as I know. When my students ask about the case, I will tell them that we should and must accept it. But we need not, and should not, respect it.'[29]

40. Laurence Tribe rightly raised the spectre of the court's acting like '…a judicial swat team leaping into the fray, halting the ongoing political process, and attempting to impose its own resolution…'[30] Bruce Ackerman has called the decision a 'blatantly partisan act, without any legal basis whatsoever.'[31]
41. In dissent, Justice Stevens lamented the loss of public faith in the judiciary:

    'What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.'[32]

42. The charge against *Bush v. Gore* is that the majority intervened in the election process on legally inconsistent and unwarrantable

grounds to impose a directly political outcome. The criticism is not that the majority took instructions from the White House or the Republican Party, but that it violated accepted judicial doctrines (separation of powers and federalism), in seeming pursuit of a non-judicial objective – to secure the election to the Presidency of a candidate whose election the majority appeared to consider the Florida courts would obstruct.[33] In this, the court is accused of violating its fidelity to law, and of bringing the Court closer to what has recently been characterised as 'a superlegislature responding to ideological arguments rather than a legal institution responding to concerns grounded in the rule of law'.[34]

43. No one believes any more that law and politics are entirely distinct. But the practice of law, and the job of a judge, proceed from the premise that there is a relative autonomy of legal discourse, in which legal principle, rules, precedents and outcomes preponderate.

44. As Archibald Cox explains, independence permits judges to decide cases:

'…according to a continuity of reasoned principle found in words of the Constitution, statute, or other controlling instrument, in the implications of its structure and apparent purposes, and in prior judicial precedents, traditional understanding, and like sources of law. (…) A decision 'according to law' … implies a generality of principles binding the judges and applied consistently to all persons of yesterday, today, and tomorrow.'[35]

45. The *Bush v Gore* majority is criticised for failing to do this. Their failure is seen as a breach of the independent capacity afforded them to decide matters not politically, but legally.

Case three: Mike Campbell (Pvt) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement

46. Lest I be accused of seeking controversy in safe harbours, let me turn to the current dispute over the implementation of the land reform program in Zimbabwe.

Since before the end of white minority rule in 1980 there has been widespread agreement that land reform in Zimbabwe is essential: to redress gross historical injustice, and to enable landless persons to reduce their dependence and poverty. But the implementation of the programme was supposed to conform with standards and safeguards in the Constitution of Zimbabwe. And the Zimbabwean courts were supposed to be the guarantors of the rights in issu

47. For a time they were. In 2001, a unanimous five-judge Bench of the Zimbabwe Supreme Court granted an interdict against unlawful land invasions, but postponed its operation. The court explained:

'It is overwhelmingly obvious that the farm invasions are, have been, and continue to be, unlawful. Each Provincial Governor, each Minister in charge of a relevant Ministry, even the Commissioner of Police, has admitted it. They could do nothing else. Wicked things have been done and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. Laws made by Parliament have been flouted by the Government. The activities of the past nine months must be condemned.

But that does not mean that we can ignore the imperative of land reform. We cannot punish what is wrong by stopping what is right.'[36]

48. In 2008, a group of farmers severely affected by land seizures in Zimbabwe contended before the Supreme Court that Amendment 17, which introduced section 16(B) into the Constitution in 2005, violated their rights under the Declaration of Rights. They were white. Specifically they contended that the new provision violated their right not to have private property compulsorily acquired without the authority of a law, their right to protection of the law, their right to a fair hearing, and their right not to be treated in a discriminatory manner on the grounds of race. The Supreme Court ruled that Amendment 17 was constitutionally valid, and dismissed their claim. But a further issue before the court was whether the amendment was being *implemented* in a constitutional fashion. In particular, the applicants claimed that the implementation of Amendment 17 discriminated against them on the basis of race because the government had targeted for acquisition agricultural lands owned only by white farmers – and that government ignored factors besides the race of the land owner.

49. They contended that this approach to implementing Amendment 17 violated the prohibition in the Constitution of Zimbabwe on racial discrimination. Section 23(1)(a) of that Constitution expressly prohibits both direct and indirect discrimination: it provides that 'no law shall make any provisions that is discriminatory either of itself or in its effect.'

50. This was a separate and substantive complaint. Yet in its judgment, the Supreme Court gave no serious consideration to it. It disposed of the complaint in a few cursory and disengaged sentences:

'It must be stated at this stage that the law as embodied in the provisions of s 16(B)(2)(a)(i) of the Constitution and the acquisition of the pieces of agricultural land which resulted from its operation had no reference at all to the race or colour of the owners of the pieces of land acquired. There was no question of violation of s 23 of the Constitution to be considered in this case. No more shall be said on the alleged violation of s 23 of the Constitution.'[37]

51. But the complaint was not that the impugned laws were expressly race-based, but that their implementation was. To deal with that complaint on the basis that there was no express racial discrimination in the laws themselves was a sheer act of judicial evasion.

52. The applicants however were nothing if not persistent. They took their case to the Southern African Development Community Tribunal – a court consisting of senior judges from member States. A panel of five judges from Angola, Botswana, Malawi, Mauritius and Mozambique heard the case.[38] They took seriously the claim that the Supreme Court of Zimbabwe glancingly ignored. They upheld the claims unanimously on a number of grounds. But, in addition, by a majority of 4:1, they found that the government of Zimbabwe had discriminated against the applicants on the ground of race because of the way in which Amendment 17 had been implemented.[39]

53. The SADC Tribunal made damning findings. It stated that 'the differential treatment afforded to the Applicants would not [have] constituted racial discrimination' if:

' … (a) the criteria adopted by [the government of Zimbabwe] in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated lands, and (c) the lands expropriated

were indeed distributed to poor, landless and other disadvantaged and marginalised individuals or groups, rendering the purpose of the programme legitimate'.[40]

54. But since the suppositions failed to apply, the Tribunal found that there was racial discrimination, and upheld the complaints.[41]

55. The applicants' victory was short lived. The High Court refused to make the award enforceable within Zimbabwe, on grounds of public policy.[42]

56. And at a recent summit meeting of the Southern African Development Community, regional leaders did not require Zimbabwe to enforce the tribunal's decision.[43] On the contrary, the summit leaders declined to renew the terms of the SADC judges – with the result, it appears, that the tribunal has been suspended for six months, while SADC reviews its mandate.[44]

IV. Conclusion

57. The evasion by the Supreme Court of Zimbabwe in *Campbell* of the argument about indirect racial discrimination is hardly more creditable, judicially, than the appeal court's endorsement of the apartheid government's objectives in *Rossouw v Sachs*. Both courts were called upon to give effect to legal values. Both appeared instead to forsake legal principle in favour of endorsing a programme of political action on extra-legal grounds.

58. The complaint against the majority judgment in *Bush v Gore* is similar – that the court defied legal coherence, consistency and doctrine in pursuit of an overtly political objective.

59. All three courts are accused not just of giving debatable decisions. They are accused of failing in their judicial duties. They are accused of failing properly to exercise the distinctive and independent nature of their power as judges.

60. Judicial independence goes further than a claim against government and society. It embodies not only an assertion that society must create and respect the institutional and decisional circumstances necessary for independent decision-making. It entails a claim against judges themselves. It requires those who take up judicial office to exercise it, fearlessly and freely, and to do so, by their honest lights, in fidelity to law and legal principle.

61. It requires of judges two distinct commitments, one methodological, and the other substantive:

- It requires judges to show fidelity to the rule of law by applying legally autonomous values and considerations, and by abjuring the pursuit of overtly political objectives in reaching their decisions. This commitment does not presume a naïve insulation of law from politics, but insists that legal values and legal reasoning are distinct, and that they prevail in the determination of cases.
- It requires judges to use their power in contested cases to defend the weak and the injured and the victimised, even when unpopular or politically inconvenient.

62. Non-fulfilment of either of these requisites entails a failure of the commitment to judicial autonomy and independence. In contrast, the assertion of the power of judicial reason, in fidelity to law and legal principle, can confer considerable benefits in helping to create a healthy, open, vigorously critical and prosperous society.

Endnotes

[1] Thomas Bingham *The Business of Judging: Selected Essays and Speeches* (Oxford University Press 2000) 55.

[2] Archibald Cox 'The Independence of the Judiciary: History and Purposes' (2006) 21 *University of Dayton Law Review* 565 at 567-74.

[3] See Bingham above n 1 at 56; *Provincial Court Judges Assn. (Manitoba) v Manitoba (Minister of Justice)* (1997) 46 CRR. (2d) 1 at 118.

[4] Johannesburg, South Africa, 13-14 August 2010. The forum embraces Angola, Botswana, Kenya (absent), Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia, Zanzibar and Zimbabwe.

[5] Council of Europe, Venice Commission, document CDL-JU(2010)014syn prepared for Commission meeting at Strasbourg on 18 August 2010, and distributed by the Commission on 8 September 2010.

[6] See most recently *Mazibuko v City of Johannesburg* (2009) ZACC 28; 2010 (4) SA 1 (CC).

[7] Constitution 1996 s 1(c).

[8] Constitution 1996 s 165(2)-(4). Section 165 is headed *Judicial Authority*.

[9] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at para 25-26. Chaskalson P on behalf of the Court said:

'Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent. The separation required by the Constitution between the legislature and executive on the one hand, and the courts on the other, must be upheld otherwise the role of the court as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights, and other provisions of the Constitution, will be undermined.'

[10] See Franny Rabkin, 'New Office 'Likely to Strengthen Judiciary'' *Business Day* 14 September 2010, available at http://allafrica.com/stories/201009140888.html, accessed on 14 September 2010.

[11] *Provincial Court Judges Assn. (Manitoba)* above n 3.

[12] *Provincial Court Judges Assn. (Manitoba)* above n 3 at 9.

[13] *S v. Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 88.

[14] Du Plessis 'Between Apology and Utopia - The Constitutional Court and Public Opinion' (2002) 18 *S. Afr. J. on Hum. Rts.* 1 at 8.

[15] See Dominic Mahlangu and Nkululeko Ncana 'League official slams "drunken court rulings"' (28 July 2010) http://www.timeslive.co.za/local/article574925.ece/League-official-slams-drunken-court-rulings, accessed on 14 September 2010; Sibusiso Ngalwa, 'Official not sorry for "drunk" slur on judge' (09 August 2010) http://www.capetimes.co.za/?fSectionId=3531&fArticleId=vn20100809045343164C802836&fFeed=, accessed on 14 September 2010.

[16] Section 17 of Act 37 of 1963.

[17] *Sachs v Rossouw* 1964 (1) SA 290 (C) (summary).

[18] *Rossouw v Sachs* 1964 (s) SA 551 (A) at 557F-H (OgilvieThompson JA, Steyn CJ, Beyers JA, Botha JA and Wessel JA concurring).

[19] *Rossouw v Sachs* at 563-564.

[20] *Rossouw v Sachs* at 561A.

[21] *Rossouw v Sachs* at 561-564.

[22] See Mathews and Albino, 'The Permanence of the Temporary- An Examination of the 90- and 80-day Detention Laws' (1966) 83 *SALJ* 16; AS Mathews *Law, Order and Liberty in South Africa* (Juta, Cape Town 1971) 136-41; John Dugard *Human Rights and the South African Legal Order* (Princeton University Press 1978) 333-36.

[23] (1941) 3 All ER 388, [1942] AC 206 (HL).

[24] 531 U.S. 98 (2000).

[25] *Bush v. Gore* 531 U.S. 1046, 1047 (2002).

[26] *Bush* above n 24 at 109. Seven justices (Kennedy, O'Connor, Rehnquist, Scalia, Thomas, Breyer and Souter JJ) found an equal protection violation, but disagreed on the remedy. Souter and Breyer JJ considered that the case should be remanded back to the Florida Supreme Court to implement a uniform procedure in a manual recount. The five-member majority, who prevailed, held, determining Florida state law, that December 12, the day of the Supreme Court decision, was the final day for Florida's recount.

[27] Sunstein 'Order Without Law' in Sunstein & Epstein (eds) *The Vote: Bush, Gore & The Supreme Court* (University of Chicago, Chicago 2001) at 215.

[28] Epstein ' "In such Manner as the Legislature Thereof May Direct": The Outcome in Bush v Gore Defended' in Sunstein & Epstein (eds) *The Vote: Bush, Gore & The Supreme Court* (University of Chicago, Chicago 2001) at 14.

[29] Amar 'The Supreme Court: Should We Trust Judges?' *LA Times* M1 (Dec. 17, 2000). See also Stone *Equal Protection? The Supreme Court's Decision*

in Bush v. Gore (2001). http://fathom.lib.uchicago.edu/1/777777122240/, accessed 13 September 2010. Geoffrey Stone noted –

'What was disheartening to me was not the constitutional principle embraced by the majority, but the votes cast by Justices Rehnquist, Scalia and Thomas in support of that decision, votes that were dispositive of the case, and of the presidency of the United States. No one familiar with the jurisprudence of Justices Rehnquist, Scalia and Thomas could possibly have imagined that they would vote to invalidate the Florida recount process on the basis of their own well-developed and oft-invoked approach to the Equal Protection Clause.'

Stone explained that Justices Rehnquist, Scalia and Thomas rarely every found violations of equal protection. And finding a violation in *Bush v. Gore* meant that '… Justices Rehnquist, Scalia and Thomas have a rather distinctive view of the United States Constitution. Apparently the Equal Protection Clause, which was enacted after the Civil War primarily to protect the rights of newly freed slaves, is to be used for two and only two purposes--to invalidate affirmative action and to invalidate the recount process in the 2000 presidential election.'

[30] Tribe'The Unbearable Wrongness of *Bush v. Gore*' (2002) 19 *Constitutional Commentary* 571 at 598.

[31] Ackerman 'The Court Packs Itself' (February 12, 2001) http://www.prospect.org/cs/articles?article=the_court_packs_itself, accessed on 14 September 2010.

[32] *Bush* above n24 (Stevens J. dissenting) at 128-9.

[33] Morton Horwitz has explained that'[h]istorians will remember the Bush opinion as one of the most partisan ones it ever rendered." Leonard *Souter, Breyer pushed search for consensus* .http://cache.boston.com/news/politics/campaign2000/news/Souter_Breyer_pushed_search_for_consensus+.shtml, accessed on 13 September 2010.

[34] The phrasing is taken, in a different context, from the study of clerkships by Nelson, Rishikof, Messinger & Jo 'The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?' (2009) 62 *Vanderbilt Law Review* 1747 at 1790.

[35] Cox at 566-67.

[36] *Commercial Farmers Union v Minister Of Lands, Agriculture And Resettlement, Zimbabwe* 2001 (2) SA 925 (ZS) (Gubbay CJ , McNally JA , Ebrahim JA , Muchechetere JA and Sandura JA.)

[37] *Mike Campbell (Pvt) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement (124/06) (2008) ZWSC 1 at* 13 (Malaba JA, Chidyausiku CJ, Ziyambi JA, Gwaunza JA, and Garwe JA concurring).

[38] The tribunal consisted of the Hon. Dr Rigoberto Kambovo; Dr Onkemetse B Tshosa; Justice Isaac Jamu Mtambo, SC; Chief Justice Ariranga Govindasamy Pillay; and Justice Dr Luis Antonio Mondlane.

[39] *Mike Campbell (Pvt) Limited v Republic of Zimbabwe* (2/07) (2007) SADCT 1. The SADC tribunal based its findings on the SADC Treaty and international human rights laws, while the Zimbabwe Supreme Court considered Amendment 17 under Zimbabwe's Constitution.

[40] SADCT above n38 at 54.

[41] Constitution of Zimbabwe section 23(1)(a), as at 14 September 2005.

[42] *Gramara (Pvt) Ltd v Government of the Republic of Zimbabwe* (High Court of Zimbabwe, Patel J, 26 January 2010, X-ref HC 5483/09).

[43] Cornish, *SADC ducks Mugabe matter*, (17 August 2010) http://news.iafrica.com/worldnews/2596900.htm, accessed on 13 September 2010.; Lesieur, *SADC summit mulls Zim land-reform case*, (17 August 2010) http://www.mg.co.za/article/2010-08-17-sadc-summit-mulls-zim-landreform-case, accessed on 13 September 2010.

[44] Du Toit, 'Liggaam wat teen Mugabe beslis "in wese ontbind"' (22 August 2010) http://www.beeld.com/Suid-Afrika/Nuus/Liggaam-wat-teen-Mugabe-beslis-in-wese-ontbind-20100822, accessed on 13 September 2010. Critics have claimed that the review and the suspension are an attempt to avoid enforcement of the Zimbabwean decision: Bell, 'SADC's Motives Questioned Over Tribunal Review' (19 August 2010) *http://allafrica.com/stories/201008200280.html, accessed* on 13 September 2010.

Judicial independence

By Lord Mance, United Kingdom Supreme Court

Introduction

1. Judicial independence is integral to the separation of powers, to the right to a fair trial and to the rule of law. It serves democracy and the public, not judges' interests.[1] Its role and scope must be understood accordingly.
2. Longmans English dictionary defines independence as the quality or state of not being subject to control by others; self-governing; not looking to others for one's opinions or for guidance in conduct; not requiring or relying on other persons or things. No-one, except perhaps Robinson Crusoe in his early years, is independent in the fullest sense of that definition. Judges certainly not.
3. Even independent states are subject to international law. The role of national judges is to apply national law – the essence of law being to treat like cases alike, and to differentiate appropriately between other cases. Judges must be free from control or influence by other institutions, persons or interests which would interfere with this role.

Admissible influences?

4. Some influences are of course admissible, indeed essential. Since judges decide issues, elementary fairness requires that they decide them on the basis of the cases advanced and submissions made by the parties (and sometimes other persons, institutions or bodies) interested in their outcome.
5. Judges in a democracy are also expected to reflect - and interpret the law in the light of - the best (or core) values of the society in which they operate. This can however only be the case where those values are themselves consistent with fundamental principles of the rule of law, such as respect for human dignity and equal treatment regardless of creed, ethnicity or sex (which has not always been the case, and may not be the case in a number of states today).
6. Further, independence and impartiality do not require judges to achieve the impossible feat of approaching issues as if they had been hermits living their lives in caves, devoid of any social or cultural experiences or attitudes[2]. The common law ought, above all, to recognise this, since we value the maturity, understanding and experience, as well as the independence of mind, which long professional practice inculcates. See the JIG's Commentary on the Bangalore Principles[3] - pp 44-45.
7. But these factors in no way amount to control. If and so far as one describes them as influencing judicial decision-making, they promote, rather than injure, the due performance of the judicial role.