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Judicial Independence

Judith Resnik

Around the world, constitutions and transnational conventions now insist that judges be "independent" from the authorities that employ them. Consider first a few such statements.

Constitution of the Republic of South Africa, 1996
Section 165. Judicial authority…

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.
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.
5. An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

United States Constitution

Article III, Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.…

Council of Europe
European Convention on Human Rights (ECHR)
November 4, 1950

Article 6, 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly…

Basic Principles on the Independence of the Judiciary endorsed, United Nations, General Assembly Resolutions 40/32 and 40/146 (1985)

1. 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.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. 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.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

As you review these provisions, consider the distinctive ideas about what "judicial independence" could mean and how to protect it. One aspect relates to aspirations for impartial judgments in individual cases; the idea is that a judge should be able to make specific decisions without fear of suffering personal sanctions. A contemporary example of a dramatic breach of this norm occurred in Pakistan in 2007 when the Chief Justice and then other justices of that country's highest court were suspended—after making decisions the government disliked and before the court could rule on the legality of General Pervez Musharraf's dual role as president and army chief.

The literature on judicial independence distinguishes a second set of issues, focused on the institutional setting in which judges work—how they are appointed, their length of tenure, mechanisms for removal, their salaries, budgets, facilities, and jurisdiction, as well as whether they run their own internal affairs and set their own procedures. Institutional independence aims to generate environments that equip courts with the resources to render the volume of decisions now expected of them as well as to shape a culture supportive of a unique role for judges.

Although the concept of institutional independence seems straightforward, the demand for judging and the resultant proliferation of working structures for judges raise questions about what forms of bureaucratic organization are appropriate. For example, in the United States, the federal courts have more than 2000 life-tenured judges, aided by some 1600 statutory judges serving for terms. That group in turn has about 30,000 staff

working in more than 500 facilities spread across the country and dealing with about 350,000 civil and criminal filings each year. Each state in turn has its own court system, often with many tiers or a varied set of courts with special jurisdiction. In the aggregate, state courts have more than 30,000 judges and respond to filings numbering in the tens of millions.

These institutional configurations give rise both to more dependence on other branches of government for monetary support and to questions about the kind of institutional position judiciaries ought to have. Who should be the advocates for the funding to sustain judicial facilities and staff and to argue for sufficient compensation for the judges themselves? Should judges go directly to other branches to request budgets and raises? And what about responding to pending legislation that would give courts more or different cases? Should judges provide commentary on bills proposing new crimes or altering the punishment or the factors to be considered when sentencing, or requiring a minimum number of years for incarceration? Should judges opine on legislation to widen or limit their jurisdiction over civil cases, or to change detainees' access to habeas corpus? Could taking positions on such proposals undermine the ability or legitimacy to rule on their legality? As these questions suggest, many hard problems are at the intersection of judicial independence at the individual level and at the structural level. Responses in turn depend on political and legal theories of how powers are separated among judicial, legislative, and executive branches.

The excerpts from South Africa, the United States, the Council of Europe, and the United Nations make plain that overlapping but differing mechanisms are used to protect both forms of judicial independence.To parse the various aspects, one needs to begin with a focus on how one becomes a judge—the techniques used to select and retain judges and how such provisions either protect or undercut judicial independence. As the readings below suggest, terms of office may be too short, or perhaps too long. The next set of issues concerns conditions of work. What are the financial structures and incentives at both the individual and the structural levels? Does the judiciary have a "right" to a budget or to a certain level of salaries?

Another set of questions revolves around the power accorded to judges. What are the parameters of judicial authority in general? Are courts creatures of constitutional text or does their existence depend on legislative or executive action? Can judges set their own jurisdiction? Can they decide any kind of case that comes before them and provide the remedies they believe appropriate, or has a legislature limited access to courts and the kinds of solutions that courts can provide?

Note that historically, discussion of "threats" to judicial independence focused on harms coming from other branches of government, and the questions laid out above about support and jurisdiction reflect that focus. But, during the twentieth century, two new "friends" or "foes" of judicial independence have come to the fore—the media and "repeat player" litigants.

Consider first the role of what used to be called "the press" and is now more broadly the media, sending out information through a range

of technologies and especially over the internet. Some commentators see courts and the media as interdependent institutions in democratic orders. Many jurisdictions' systems express commitments to the freedom of the media, unfettered from government control and working in conjunction with courts to shape a lively public debate about legal and social norms. The media thus have an important role to play as an intermediary, interpreting judicial rulings and bringing wanted (or uncomfortable) attention to issues related to courts. Further, technologies such as television and the internet can enable courts to try to put themselves directly before the public eye.

Another set of relevant actors are what social scientists have termed "repeat players"—such as government lawyers, public interest litigators, bar associations, or business and corporate entities appearing regularly before judges. In many countries, such groups try to affect selection of judges, the rules of procedure, and the coverage of decisions by the press. Hence, attitudes toward courts and judicial authority are shaped not only by legal texts and practices but through the lenses provided by court users and observers.

Furthermore, as judiciaries in some countries have transformed themselves into multitasking dispute resolution centers, new questions have emerged about whether judges ought to be accorded unique forms of insulation. If, in the provision of "alternative dispute resolution," judges serve as mediators or settlement advisors, ought they be specially insulated? Features of adjudication—its presumptively public processes and the rendering of decisions disseminated to the public—can be used to sustain commitments to, or provide justifications for, judicial independence. Alternatively, new modes of decision making that rely on more private processes may undercut such commitments.

A substantial body of law addresses the range of challenges flagged above. Below are three examples in which judges themselves have reasoned about a few of these issues.

Starrs v. Ruxton

[2000] J.C. 208 (H.C.J.) (Scot.)

Lord Justice-Clerk (Cullen), Lord Prosser, Lord Reed

[The Lord Advocate of Scotland became, pursuant to new legislation in 1998, a member of the Scottish Executive, and subject under Scottish law to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention.") A challenge was brought under the Convention to his power to appoint judges (called Sheriffs) for one year terms. Under the process, the Secretary of State also had the power to recall such an appointment.

The argument was that such appointments violated the rights of the accused under Article 6(1) of the Convention to fair trial by "an independent

and impartial tribunal." In terms of the process, in "1998 there were 77 applications; 26 candidates were interviewed, 23 appointments were made, and in addition 3 persons were appointed without being interviewed. In each case appointments were made in December for one year only, being the following calendar year."]

Opinion of the Lord Justice-Clerk (Cullen):

20. The Solicitor General was unable to explain why a period of one year had been chosen. . . .

23. [Explanations to candidates included] the following:

> 7. Permanent Appointments: whilst, in recent years, many of those successful in obtaining appointments to the permanent shrieval Bench have earlier served as Temporary Sheriffs, it should be noted that, at any point in time, the number of Temporary Sheriffs interested in a permanent appointment very substantially exceeds the number of vacancies and there is no guarantee whatsoever that service as a Temporary Sheriff will eventually lead to a permanent appointment.

. . . [This issue is addressed in a] number of decisions of the European Court of Human Rights and of the European Commission. In *Findlay v. United Kingdom* (1997) 24 E.H.R.R. 221 at para. 73 the court stated that:

> In order to establish whether a tribunal can be considered as "independent," regard must be had *inter alia* to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. . . .

24. . . . [W]hether a tribunal is independent and impartial embraces the question whether it presents the appearance of independence from an objective standpoint. For example in *De Cubber v. Belgium* (1984) 7 E.H.R.R. 326 the fact that one of the judges of the court which had given judgment on the charges against the applicant had previously acted as investigating judge gave rise to the misgivings as to the court's impartiality. . . .

In a number of cases the court has found that lack of independence and lack of impartiality are inter-linked. Thus, in *Bryan v. United Kingdom* [(1995) 21 E.H.R.R. 342] the court recognised that the fact that the appointment of an inspector, who had the power to determine a planning appeal in which the policies of the appointing minister might be in issue, could be revoked by the minister at any time gave rise to a question as to his independence and impartiality. In the circumstances, it did not fall foul of Article 6(1) by reason of the scope of review which was available to the High Court in England. In *Findlay v. United Kingdom* the court was satisfied that there was objective justification for doubts as to the independence and impartiality of the members of a court martial where they were subordinate to the convening officer who acted as the prosecutor. In that case the process of review did not provide an adequate guarantee. In Çiraklar v. Turkey [(2001) 32 E.H.R.R. 23], the court observed that it was difficult to disassociate impartiality from independence where the members of a

national security court included a military judge. While there were certain constitutional safeguards, the members of the court were still servicemen and remained subject to military discipline and assessment. Their term of office was only four years. In these circumstances the court held (at para. 40) that there was a legitimate fear of their being influenced by considerations which had nothing to do with the nature of the case. There was objective justification for fear of lack of independence and impartiality. . . .

27. . . . In *Att.-Gen. v. Lippé*, [[1991] 2 S.C.R. 114 (Can.)] Lamer C.J., whose judgment in this respect was concurred in by the other members of the court, said at page 139:

> The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this"end." If judges could be perceived as "impartial" without judicial "independence," the requirement of "independence" would be unnecessary. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

He went on to say at page 140:

> Notwithstanding judicial independence, there may also exist a reasonable apprehension of bias on an institutional or structural level. Although the concept of institutional impartiality has never before been recognised by this court, the constitutional guarantee of an "independent and impartial tribunal" has to be broad enough to encompass this. Just as the requirement of judicial independence has both an individual and institutional aspect . . . , so too must the requirement of judicial impartiality.

In Ref. re Territorial Court Act (N.W.T.) (1997) 152 D.L.R. (4th) 132, Vertes J. expressed the same idea when he stated at page 146 in regard to concepts of independence and impartiality:

> Recent jurisprudence has recast these concepts as separate and distinct values. They are nevertheless still linked together as attributes of each other. Independence is the necessary precondition to impartiality. It is the *sine qua non* for attaining the objective of impartiality. Hence there is a concern with the status, both individual and institutional, of the decision-maker. The decision-maker could be independent and yet not be impartial (on a specific case basis) but a decision-maker that is not independent cannot by definition be impartial (on a institutional basis). . . .

[In the case of Scotland's one year appointments, factors interact.] The first of them was the fact that the term of office of a temporary sheriff was limited to one year. The period for which the appointment of a tribunal subsisted was plainly a relevant factor in considering its independence. In Campbell and *Fell v United Kingdom* [(1984) 7 E.H.R.R. 165], which was concerned with a prison board of visitors, a term of three years or less as the Home Secretary might appoint was regarded as "admittedly short," though it was accepted by the court that there were understandable reasons for that. In *Çiraklar v Turkey* the four year term of office, which was

renewable, was plainly one of the factors which led the court to conclude that there was a lack of objective independence and impartiality.... [T]he Latimer House Guidelines for the Commonwealth which were adopted by the Commonwealth Parliamentary Association on 19 June 1998... stated...

> Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure....

33. [The government has argued] that a fixed-term appointment was not objectionable provided that there were sufficient guarantees of the independence and impartiality of the judge who held such an appointment....

In the present case it was important to note that the temporary sheriff took a judicial oath. There was no question of the Lord Advocate attempting to influence temporary sheriffs in what they did. The fact that their commission was in respect of every sheriffdom in Scotland had the effect of distancing the Lord Advocate from particular cases, and he had no part in deciding in what sheriff court they served. The limitation of their commission to one year at a time simply reflected the temporary nature of their appointment....

44. It is clear that in other parts of the world time-limited appointments of judges have given cause for concern. In the present case it might have been a reassurance if the reasons for this period were at least consistent with concepts of independence and impartiality. However,... the Solicitor-General was not able to give any reason why that period had been selected. He suggested that it might have been due to the possibility of a drop in the number of temporary sheriffs who were needed. That suggestion lacks plausibility in view of the manifest expansion in the use of temporary sheriffs as the demands on the system as a whole have increased over the years. Rather than a control over numbers, the use of the one year term suggests a reservation of control over the tenure of office by the individual, enabling it to be brought to an end within a comparatively short period. This reinforces the impression that the tenure of office by the individual temporary sheriff is at the discretion of the Lord Advocate. It does not, at least prima facie, square with the appearance of independence.

45. Then there are what I have referred to as the restrictions applied by the Lord Advocate in determining whether a temporary sheriff qualifies for re-appointment. I refer to the minimum period of work which the temporary sheriff is expected to perform and the age limit of 65 years. For present purposes it does not matter that these do not form part of the terms of his appointment. What matters is that they clearly form part of the basis on which the temporary sheriff's prospective tenure of office rests. Neither is sanctioned by statute. They are matters of ministerial policy. They may change as one Lord Advocate succeeds another. As the Solicitor-General made clear, his description of the policy applied by the present Lord Advocate cannot be regarded as binding a successor. How such restrictions

are applied is evidently a matter for his discretion, as the practice of the present Lord Advocate in regard to the age limit demonstrates. The tendency of these restrictions is significant. The first tends, if anything, to eliminate the temporary sheriff who would prefer to sit only occasionally, and to encourage the participation of those who are interested in promotion to the office of permanent sheriff, or at least in their re-appointment as a temporary sheriff. The second may also have a similar effect.

46. There was, in my view, some force…that the terms of appointment might tend to encourage the perception that temporary sheriffs who were interested in their advancement might be influenced in their decision-making to avoid unpopularity with the Lord Advocate.…

49. …[T]he power of recall…is incompatible with the independence and appearance of independence of the temporary sheriff.…I regard the one year limit to the appointment as being a further critical factor arriving at the same result. As regards the difference in the basis of payment as between a temporary and a permanent sheriff, I would not be disposed to regard this in itself as critical. Rather it illustrates the difference in status to which I have already referred. I also accept that in this case there is a link between perceptions of independence and perceptions of impartiality, of the kind which has been categorised in Canada as institutional impartiality. I consider that there is a real risk that a well-informed observer would think that a temporary sheriff might be influenced by his hopes and fears as to his perspective advancement. I have reached the view that a temporary sheriff, such as Temporary Sheriff Crowe, was not an "independent and impartial tribunal" within the meaning of Article 6(1) of the Convention.…

Tumey v. Ohio

273 U.S. 510 (1927)
Justices: Taft, C.J. and Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, and Stone JJ.

Opinion of the Court by Chief Justice Taft:

…All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.…But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

The mayor of the Village of North College Hill, Ohio, had a direct, personal, pecuniary interest in convicting the defendant who came before

him for trial, in the twelve dollars of costs imposed in his behalf, which he would not have received if the defendant had been acquitted.

…[I]n determining what due process of law is, under the Fifth or Fourteenth Amendment, the Court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. Counsel contend that in Ohio and in other States, in the economy which it is found necessary to maintain in the administration of justice in the inferior courts by justices of the peace and by judicial officers of like jurisdiction, the only compensation which the state and county and township can afford is the fees and costs earned by them, and that such compensation is so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty, or as prejudicing the defendant in securing justice even though the magistrate will receive nothing if the defendant is not convicted.

We have been referred to no cases at common law in England, prior to the separation of colonies from the mother country, showing a practice that inferior judicial officers were dependant upon the conviction of the defendant for receiving their compensation. Indeed, in analogous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject-matter which he was to decide, rendered the decision voidable.…

As early as 12 Richard II, A. D. 1388, it was provided that there should be a commission of the justices of the peace, with six justices in the county once a quarter, which might sit for three days, and that the justices should receive four shillings a day "as wages," to be paid by the sheriffs out of a fund made up of fines and amercements, and that that fund should be added to out of the fines and amercements from the Courts of the Lords of the Franchises which were hundred courts allowed by the king by grant to individuals.…

The wages paid were not dependant on conviction of the defendant. They were paid at a time when the distinction between torts and criminal cases was not clear…and they came from a fund which was created by fines and amercements collected from both sides in the controversy.…

From this review we conclude, that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law, unless the costs usually imposed are so small that they may be properly ignored as within the maxim de minimis non curat lex.

The Mayor received for his fees and costs in the present case $12, and from such costs under the Prohibition Act for seven months he made about $100 a month in addition to his salary. We cannot regard the prospect of receipt or loss of such an emolument in each case as a minute, remote,

trifling, or insignificant interest. It is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence, that the prospect of such a prospective loss by the Mayor should weigh against his acquittal.

These are not cases in which the penalties and the costs are negligible. The field of jurisdiction is not that of a small community, engaged in enforcing its own local regulations. The court is a state agency, imposing substantial punishment, and the cases to be considered are gathered from the whole county by the energy of the village marshals, and detectives regularly employed by the village for the purpose. It is not to be treated as a mere village tribunal for village peccadilloes. There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law.…

Reference re Remuneration of Judges of the Provincial Court (P.E.I.)

[1997] 3 S.C.R. 3 (Can.)
Justices present: Lamer, C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, and Iacobucci, JJ.

Opinion by Chief Justice Lamer (La Forest, J. dissenting in part):

1. The four appeals handed down today—*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* (No. 24508), *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* (No. 24778*), R. v. Campbell, R. v. Ekmecic and R. v. Wickman* (No. 24831), and *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)* (No. 24846)—raise a range of issues relating to the independence of provincial courts, but are united by a single issue: whether and how the guarantee of judicial independence in s. 11(*d*) of the Canadian Charter of Rights and Freedoms [which provides that " Any person charged with an offence has the right…(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal"] restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court judges.…

118. The three *core characteristics* of judicial independence—security of tenure, financial security, and administrative independence—should be contrasted with what I have termed the *two dimensions* of judicial

independence.... [W]hile individual independence attaches to individual judges, institutional or collective independence attaches to the court or tribunal as an institutional entity. [As Justice Le Dain explained in *Valente* [1985] 2 S.C.R. 673, at 687], the two different dimensions of judicial independence are related in the following way:

> 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 or tribunal 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.

121. ...[F]inancial security has *both* an individual and an institutional or collective dimension. *Valente* only talked about the individual dimension of financial security, when it stated that salaries must be established by law and not allow for executive interference in a manner which could "affect the independence of the individual judge" (p. 706). Similarly, in *Généreux* [[1992] 1 S.C.R. 259], this Court...held that performance-related pay for the conduct of judge advocates and members of a General Court Martial during the Court Martial violated s. 11(*d*), because it could reasonably lead to the perception that those *individuals* might alter their conduct during a hearing in order to favour the military establishment.

122. ...[T]o determine whether financial security has a collective or institutional dimension, and if so, what collective or institutional financial security looks like, we must first understand what the institutional independence of the judiciary is....[T]he conclusion...builds upon traditional understandings of the proper constitutional relationship between the judiciary, the executive, and the legislature....

131. ...[F]inancial security for the courts as an institution has three components, which all flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be *depoliticized*.... [T]his imperative demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse....

133. *First*, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political

interference through economic manipulation. What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions, and for the sake of convenience, we will refer to the independent body required by s. 11(*d*) as a commission as well. Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, though those recommendations are non-binding, they should not be set aside lightly, and, if the executive or the legislature chooses to depart from them, it has to justify its decision—if need be, in a court of law.…[W]hen governments propose to single out judges as a class for a pay reduction, the burden of justification will be heavy.

134. *Second*, under no circumstances is it permissible for the judiciary —not only collectively through representative organizations, but also as individuals—to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence.…[S]alary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behaviour of parties to those negotiations which are inimical to judicial independence.…Negotiations over remuneration and benefits, in colloquial terms, are a form of "horse-trading." The prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.

135. Third, and finally, any reductions to judicial remuneration, including de facto reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.…

La Forest, J. (dissenting in part):

296. The primary issue raised in these appeals is a narrow one: has the reduction of the salaries of provincial court judges, in the circumstances of each of these cases, so affected the independence of these judges that persons "charged with an offence" before them are deprived of their right to "an independent and impartial tribunal" within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?…I cannot concur with his conclusion that s. 11(*d*) forbids governments from changing judges' salaries without first having recourse to the "judicial compensation commissions."….

Furthermore, I do not believe that s. 11(*d*) prohibits salary discussions between governments and judges. In my view, reading these requirements into s. 11(*d*) represents both an unjustified departure from established precedents and a partial usurpation of the provinces' power to set the salaries of inferior court judges pursuant to ss. 92(4) and 92(14) of the *Constitution Act, 1867*....

329. ...While both salary commissions and a concomitant policy to avoid discussing remuneration other than through the making of representations to commissions may be desirable as matters of legislative policy, they are not mandated by s. 11(*d*) of the *Charter*.... By its express terms, s. 11(*d*) grants the right to an independent tribunal to persons "charged with an offence." The guarantee of judicial independence inhering in s. 11(*d*) redounds to the benefit of the judged, not the judges....Section 11(*d*), therefore, does not grant judges a level of independence to which they feel they are entitled. Rather, it guarantees only that degree of independence necessary to ensure that accused persons receive fair trials....

335. I agree that financial security has a collective dimension. Judicial independence must include protection against interference with the financial security of the court *as an institution*. It is not enough that the right to a salary is established by law and that individual judges are protected against arbitrary changes to their remuneration. The possibility of economic manipulation also arises from changes to the salaries of judges as a class.

336. The fact that the potential for such manipulation exists, however, does not justify the imposition of judicial compensation commissions as a constitutional imperative. As noted above, s. 11(*d*) does not mandate "any particular legislative or constitutional formula": *Valente*, *supra*, at p. 693....This Court has repeatedly held that s. 11(*d*) requires only that courts exercising criminal jurisdiction be reasonably perceived as independent. In *Valente*, *supra*, Le Dain, J. wrote the following for the Court at p. 689:

> Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for the purposes of s. 11(*d*) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. 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. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees....

337. In my view, it is abundantly clear that a reasonable, informed person would not perceive that, in the absence of a commission process,

all changes to the remuneration of provincial court judges threaten their independence. I reach this conclusion by considering the type of change to judicial salaries that is at issue in the present appeals. It is simply not reasonable to think that a decrease to judicial salaries that is part of an overall economic measure which affects the salaries of substantially all persons paid from public funds imperils the independence of the judiciary. To hold otherwise is to assume that judges could be influenced or manipulated by such a reduction. A reasonable person, I submit, would believe judges are made of sturdier stuff than this.…

349. I now turn to the question of discussions between the judiciary and the government over salaries. In the absence of a commission process, the only manner in which judges may have a say in the setting of their salaries is through direct dialogue with the executive. The Chief Justice terms these discussions "negotiations" and would prohibit them, in all circumstances, as violations of the financial security component of judicial independence. According to him, negotiations threaten independence because a "reasonable person might conclude that judges would alter the manner in which they adjudicate cases in order to curry favour with the executive" (para. 187).

350. In my view, this position seriously mischaracterizes the manner in which judicial salaries are set. *Valente* establishes that the fixing of provincial court judges' remuneration is entirely within the discretion of the government, subject, of course, to the conditions that the right to a salary be established by law and that the government not change salaries in a manner that raises a reasonable apprehension of interference. There is no constitutional requirement that the executive discuss, consult or "negotiate" with provincial court judges.…Provincial judges associations are not unions, and the government and the judges are not involved in a statutorily compelled collective bargaining relationship. While judges are free to make recommendations regarding their salaries, and governments would be wise to seriously consider them, as a group they have no economic "bargaining power" vis-à-vis the government. The atmosphere of negotiation the Chief Justice describes, which fosters expectations of "give and take" and encourages "subtle accommodations," does not therefore apply to salary discussions between government and the judiciary. The danger that is alleged to arise from such discussions—that judges will barter their independence for financial gain—is thus illusory.

Notes and Questions

1. First, consider questions of appointment illustrated by *Starrs v. Ruxton*. Note also that a decision of the South African Constitutional Court, reviewing the procedures for appointment of magistrates and oversight of them, also relied on *Valente* and, while concluding that problems existed, did not vacate the convictions rendered. *See Van Rooyen v. State* 2002 (5) SA 246 (CC) (S. Afr.).

   If a one-year appointment and possible recall or reappointment by the Lord Advocate undermines the perception of impartiality, what other systems of

appointments are problematic? Would it be better to have fixed, nonrenewable appointments of several years, as is provided in the Constitutional Court of Germany and in the Conseil Constitutionnel in France? Should appointing authorities not be able to select judges to "bench climb"—moving from one level of court to another? What about popular elections—as opposed to the official appointment—of a judge for a specified term? What rules should govern those elections? If elected, ought judges be able to stand for reelection?

Consider also a distinction drawn between "impartiality" and the "appearance of impartiality." How coherent is the line between the two? What about the distinction between the fact and the perception of independence? Can one design systems to respond to these concerns?

As one might imagine, the literature on these issues is vast. For a focus on the interaction among factors, *see* Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 Geo. L.J. 965 (2007); for discussion of the relationship of methods of selection and the longevity of service to legitimacy of courts in democracies, *see* Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 Cardozo L. Rev. 579 (2005). The relationship between majoritarianism and judicial elections is discussed by David E. Pozen in *The Irony of Judicial Elections*, 108 Col. L. Rev. 265 (2008), and the fall 2008 volume of the *American Academy of Arts and Sciences' Journal*, *Daedelus*, is devoted to the topic of judicial independence. Analyses of the law in Europe on these issues can be found in Human Rights Law and Practice (Lord Lester of Herne Hill & David Pannick eds., 2d ed. 2004); Martin Kuijer, The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirement of Article 6 ECHR (Leiden het: E.M. Meijers Institute 2004).

As England and Wales have revamped their selection procedures and critics argue that Canada, Australia, and the United States are in need of doing so as well, many commentaries have been produced. *See, e.g.*, Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World (Kate Malleson & Peter H. Russell eds., University of Toronoto Press, 2006); Reforming the Court: Term Limits for Supreme Court Justices (Roger C. Cramton and Paul D.Carrington, eds., Carolina Academic Press, 2006); Kate Malleson, *Parliamentary Scrutiny of Supreme Court Nominees: A View of the United Kingdom*, 44 Osgoode Hall L.J. 557 (2006). Some of this discussion points to the South African process, using merit commissions, as a model. *See* Penelope E. Andrews, *The South African Judicial Appointments Process*, 44 Osgoode Hall L.J. 565 (2006). More generally, interest is focused on comparisons. *See* Lee Epstein, Jack Knight & Olga Shvetsova, *Selecting Selection Systems*, in Judicial Independence at the Crossroads: An Interdisciplinary Approach 191 (Stephen B. Burbank & Barry Friedman eds., Sage Publications, 2002).

2. What are the legal mechanisms for protecting independence other than length of service? Review the provisions of the South African and U.S. Constitutions as well as those of the ECHR and of the United Nations. How do they differ? Are they sufficient? Would you rewrite any of them and if so, with what mandates? As you consider these issues, do note that many judges in the federal system in the United States—including those called "magistrate" and "bankruptcy" judges and "administrative law judges" or "hearing officers"—are not appointed through the Article III process or given life tenure. Some sit for fixed terms, some are appointed as line employees, and some are civil servants, protected by statutes.

Consider also the question of culture: how do rules and laws interact with cultures of professionalism and adjudication? How does one develop or sustain

commitments to independence? What role do the institutional organizations of lawyers, the press, and the development of special interest groups play in that regard? What roles should judges themselves take in these debates?

3. Consider next the question of payment, both to individual judges and to judiciaries. *Tumey* did not rule out "user fees"—and indeed that form of subsidy for courts, with a pay-as-you-go system, is commonplace. The idea is to price services from filing fees to court time. In 2007, England and Wales amended its fee structure for civil court proceedings to graduate the fees depending on the services provided. *See* Civil Proceedings Fees (Amendment), 2007, S.I. 2007/2176, (L. 16), *available at* http://www.opsi.gov.uk/si/si2007/uksi_20072176_en_1 (last visited July 31, 2008).

4. In 1927, the Court in *Tumey v. Ohio* did not propose that federal constitutional due process requirements of impartiality reached "matters of kinship, personal bias, state policy, remoteness of interest." Such matters, the justices reasoned, were a matter of state law. Ought variation be permitted within a federation on those issues? That part of the *Tumey* judgment is no longer good law as the Supreme Court has found that the U.S. Constitution's insistence on due process requires state and federal courts to insist that certain forms of connection by judges to either the parties or the subject matter of a lawsuit renders them unable to decide them. On most points, (see the discussion below about judicial salaries), *Tumey's* holding about the receipt of funds based on decisions for or against a litigant remains the law in the United States. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

   Furthermore, its principles are now supplemented through statutes in many jurisdictions and by canons of judicial ethics. For example, federal judges are subject to the provisions of 28 U.S.C. § 455, excerpted below and setting forth grounds for disqualification. Consider whether this codification captures all (or too many) concerns and whether its reliance on self-appraisal by the challenged judge is wise.

   (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
   (b) He shall also disqualify himself in the following circumstances:
      (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
      (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
      (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
      (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
      (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.…

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:
(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;…(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:
(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;…

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge,—magistrate judge—, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

As you review these grounds, consider whether the statute has it right. Ought a belated discovery (section f) be ignored if the same discovery earlier in a case would have ousted the judge? Ought additional bases to be added? For example, if a judge writes an article expressing a view about a legal issue (for example, that saying prayers in school does not violate religious liberties or that affirmative action ought to be prohibited), should disqualification follow? Consider also who should make decisions about disqualification. Why does the statute ask the challenged judge to decide the question? Should the issue be determined by someone else? By whom? And how?

5. Consider, under the *Tumey* principles, whether federal judges could sit on a case challenging the failure of Congress to give them a cost-of-living ("COLA") salary increase. The judge-plaintiffs argued that they had an Article III right to an undiminished salary and COLAs were part of that guarantee. What judges could sit on that decision? The U.S. Supreme Court has concluded that when cases arise in which all federal judges would be disqualified, all can under a "rule of necessity" sit to hear the case. *See United States v. Will* 449 U.S. 200 (1980). As several commentators have argued, state judges and other alternatives exist.

Does the Canadian approach—of mandating a commission to decide salaries for provincial judges—solve the problem of judicial entanglement? Could the Canadian Court have mandated that its justices' salaries be set that way? Note that in that decision, the majority concluded that the decisions of that commission were subject to judicial review. Consider the parameters, set forth below, outlined in *Reference re Remuneration of Judges of the Provincial Court*, for judicial review of commission decisions.

> 179. What judicial independence requires is that the executive or the legislature, whichever is vested with the authority to set judicial remuneration under provincial legislation, must formally respond to the contents of the commission's report within a specified amount of time. Before it can set judges' salaries, the executive must issue a report in which it outlines its response to the commission's recommendations. If the legislature is involved in the process, the report of the commission must be laid before the legislature, when it is in session, with due diligence. If the legislature is not in session, the government may wait until a new sitting commences. The legislature should deal with the report directly, with due diligence and reasonable dispatch.
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> 180. Furthermore, if after turning its mind to the report of the commission, the executive or the legislature, as applicable, chooses not to accept one or more of the recommendations in that report, it must be prepared to justify this decision, if necessary in a court of law. The reasons for this decision would be found either in the report of the executive responding to the contents of the commission's report, or in the recitals to the resolution of the legislature on the matter. An unjustified decision could potentially lead to a finding of unconstitutionality. The need for public justification . . . emerges from one of the purposes of s. 11(*d*)'s guarantee of judicial independence—to ensure public confidence in the justice system. A decision by the executive or the legislature, to change or freeze judges' salaries, and then to disagree with a recommendation not to act on that decision made by a constitutionally mandated body whose existence is premised on the need to preserve the independence of the judiciary, will only be legitimate and not be viewed as being indifferent or hostile to judicial independence, if it is supported by reasons. . . .
>
> 183. The standard of justification . . . is one of simple rationality. It requires that the government articulate a legitimate reason for why it has chosen to depart from the recommendation of the commission, and if applicable, why it has chosen to treat judges differently from other persons paid from the public purse. A reviewing court does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 analysis. However, the absence of this analysis does not mean that the standard of justification is ineffectual. On the contrary, it has two aspects. First, it screens out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood. Second, if judicial review is sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government, similar to the way that we have evaluated whether there was an economic emergency in Canada in our jurisprudence under the division of powers (*Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373).
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> 184. Although the test of justification—one of simple rationality—must be met by all measures which affect judicial remuneration and which depart from the recommendation of the salary commission, some will satisfy that test more easily than others, because they pose less of a danger of being used as a means of economic manipulation, and hence of political interference. Across-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are *prima facie* rational. For example, an across-the-board reduction in salaries that includes judges will typically be designed to effectuate the government's overall

> fiscal priorities, and hence will usually be aimed at furthering some sort of larger public interest. By contrast, a measure directed at judges alone may require a somewhat fuller explanation, precisely because it is directed at judges alone.
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> 185. By laying down a set of guidelines to assist provincial legislatures in designing judicial compensation commissions, I do not intend to lay down a particular institutional framework in constitutional stone. What s. 11(*d*) requires is an institutional sieve between the judiciary and the other branches of government. Commissions are merely a means to that end. In the future, governments may create new institutional arrangements which can serve the same end, but in a different way. As long as those institutions meet the three cardinal requirements of independence, effectiveness, and objectivity, s. 11(*d*) will be complied with.…

6. What about financing beyond salaries? How do judiciaries obtain new funds for buildings? Staff? In many countries, it is common for a ministry of justice to serve as the "voice" of the judiciary seeking provisions from legislatures. Until 1939 in the United States, departments within the executive branch took that role, and after the Department of Justice was formed in the second half of the nineteenth century, it did so, even as it was a regular litigant within the federal courts. What are the alternatives? A "chancellor" for judges who is not a judge but independent of other branches of government? Judges, as a collective, shaping agendas and submitting their proposals (or testifying) before legislative or executive committees?