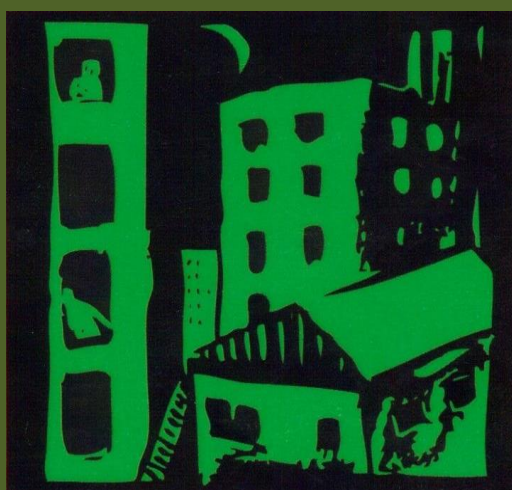


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Institutionalising a military judicial office and improving security of tenure of military judges in South Africa

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1 INTRODUCTION

Challenges of judicial independence facing South African military judges are relatively well known.¹ This article

* Part of the research for this article was conducted when the author was a senior lecturer in the Faculty of Law at the University of Johannesburg in 2013. I am grateful to the anonymous reviewers of this article for their comments on the earlier draft thereof.

¹ For example, Department of Defence *The Ministerial Task Team Report* (2004) points out some of the flaws in the system (on file with the author). For a discussion of these problems, see Tshivhase AE "Military Courts in a democratic South Africa: An assessment of their independence" (2006) 6 *New Zealand Armed Forces Law Review* 96. See also Tshivhase AE "Transformation of military courts" (2009) 24(2) *SA Public Law* 450. For another perspective on the independence of the system and other related issues see also Carnelley M "The South African military court system – independent, impartial and constitutional?" (2006) 34(1) *Scientia Militaria: South African Journal of Military Studies* 55.

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makes concrete suggestions on ways in which certain aspects of the judicial independence of South African military courts could be improved. It particularly argues for the institutionalisation of a military judicial office and for a stronger degree of tenure for South African military judges as part of crafting a suitable model for judicial independence of these courts. The contribution draws inspiration from the idea that there is no single correct formula for achieving the basic requirements of judicial independence. There is therefore a lot of scope to develop different ideas geared to meeting the requirements of judicial independence by military courts. The article is divided into two parts. Part one attempts to make a case for the institutionalisation of a military judicial office while part two makes a proposal for the improvement of security of tenure of military judges taking into account some global trends in this field. Some of the thoughts discussed may find resonance in military justice systems in many parts of the world.

2 INSTITUTIONALISING A MILITARY JUDICIAL OFFICE

The South African Constitution (the Constitution) requires all judicial officers to be appointed to a judicial office.² Section 174(1) provides that “[a]ny appropriately qualified woman or man who is a fit and proper person may be *appointed* as a judicial officer.” (emphasis added). Both the *UN Basic Principles on the Independence of the Judiciary* and the *African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* (the African Union Principles) speak of a term of office for judges.³ It is argued that sections 174 and 176 of the Constitution read with the above-mentioned Principles envisage a judicial office to be institutionalised because the two provisions speak of the appointment of judicial officers and judges holding office.

Furthermore, certain provisions of the Magistrates Act⁴ support this argument. For example, section 10 of this Act, read with section 13, suggests that a judicial office for magistrates is institutionalised. It (section 10) provides that “[t]he Minister shall, after consultation with the Commission, *appoint* magistrates in respect of lower courts...” (emphasis added). Further, in section 13, reference is made to “vacation of *office* and discharge of magistrates”, and “[a] magistrate shall vacate his or her *office* on attaining the age of 65 years.” (emphasis added). These, in my view, show that a judicial office is seen as an institution to which all judicial officers must be appointed.

The recent establishment of the Office of the Chief Justice⁵ reinforces the view that a judicial office must be viewed as an institution in South Africa. Administratively,

² The Constitution of the Republic of South Africa, 1996, s 174(1) and (7).

³ See Principle 11, *UN Principles* and *African Union Principles* and Principle 4(l), *African Union Principles*. These are obviously not binding but have a strong persuasive force and have been referred to with approval by the Constitutional Court in *Justice Alliance of South Africa v President of the Republic of South Africa & others* 2011 (5) SA 388 (CC).

⁴ Magistrates Act 90 of 1993.

⁵ Established in terms of Proclamation No. 44 of 2010 amending Schedule 1 of the Public Service Act, 1994.

the Office is headed by the “Secretary-General: Office of the Chief Justice”. It exists as an independent department alongside other national departments.

In terms of section 174(7) of the Constitution, “[o]ther judicial officers must be *appointed* in terms of an Act of Parliament...” (emphasis added). There is no reason to believe that the judicial officers referred to in section 174 do not include military judges. These judicial officers (military judges) must be appointed to a judicial office, and not assigned to serve as military judges as is currently the case in terms of the Military Supplementary Measures Discipline Act (MDSMA or Military Discipline Act).⁶ The Act provides that appropriately qualified officers must be assigned to the function of military judge or senior military judge.⁷ The assignment must be for a fixed period.⁸ However, the Act does not prescribe the period of assignment, which means that it is up to the appointing authority (Minister of Defence) to determine it.⁹ In practice, the period of assignment for military judges has ranged between one and two years which clearly shows that the assignments to the function of military judge have been temporary or short-term. The full institutionalisation of a military judicial office through a process which ensures that military judges are appointed to a judicial office is an important step in improving the independence of the military judiciary. It will enhance people’s confidence in the military judiciary, and the dignity of a military judicial office. The manner of appointment of military judges and the nature of their office affect the extent to which they feel secure in their positions and how they are seen by those they serve. This is obviously important for enhancement of judicial independence.

2.1 Institutionalisation of a military judicial office viewed comparatively

This section discusses the extent to which a military judicial office is institutionalised in five countries chosen for comparative analysis.¹⁰ Almost all of the countries considered are common law and democratic jurisdictions which have recently reviewed their military justice systems, and most importantly, have shown some commitment to the principle of judicial independence in structuring military courts. These are countries which can be considered to be at the cutting edge of the reform of military justice systems the world over. They are as follows: New Zealand, the United Kingdom, Canada, the United States,¹¹ Australia, and to some extent, India because it only recently engaged with military court reforms but in a limited fashion.

⁶ S 14(1)(b) of the Military Discipline Supplementary Measures Act 16 of 1999 (MDSMA or Military Discipline Act).

⁷ S 13(2).

⁸ S 15.

⁹ S 14(1)(b).

¹⁰ In this part of the article, the focus is on whether judges are appointed to a judicial office or are assigned to serve as judicial officers without looking at issues of tenure: those are dealt with later.

¹¹ The United States military justice system is the most famous in the world probably because of its publicity, and that country has held debates about its system many times and in different forums, including courts.

Countries on the African continent do not feature in this study mainly because the military laws of countries that could have been considered hardly show any signs of respect for the principle of judicial independence in regard to military courts, and therefore do not offer any positive lessons for South Africa, given the progress already made by this country.¹² Examples of such countries are Zimbabwe,¹³ Tanzania,¹⁴ Ghana,¹⁵ and Uganda.¹⁶ For the most part, these countries are still trapped in the old British court martial system. The countries surveyed will now be analysed.

The United States still follows the system of military judicial assignments in the strict sense of the term; but the office of a military judge exists—having been created in 1969, 19 years after the enactment of the Uniform Code of Military Justice (UCMJ) in 1950.¹⁷ Before that, there were no military judges as known today. Trials were presided over by military law officers who had very limited powers and could even be overruled by lay members of courts martial.¹⁸ In terms of the UCMJ military judges are *assigned* to each general or special court martial on an ad hoc basis.¹⁹ Their term expires when the trial comes to an end as they are not full-time. However, after *Weiss v. United States*, the Army and the Coast Guard created three-year terms of office by regulation, but other branches of the services did not follow suit.²⁰ Strikingly, a military judge may be

¹² In fact, there are signs that countries like Uganda are looking to South Africa, among others, for inspiration on the reform of the military justice system. For example, suggesting reform for Uganda's military justice system, Naluwairo R "Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal" (2012) 12 *African Human Rights Law Journal* 448, at 461 observes that "[a] number of countries, including...South Africa, have undertaken similar reforms to secure the institutional independence of their military tribunals."

¹³ See Defence Act: Chapter 11:02, 1972.

¹⁴ See, for example, Military Court Act 15 of 1964.

¹⁵ See Armed Forces Act 105 of 1962.

¹⁶ The Uganda Peoples Defence Forces Act 7 of 2005. Although this Act was adopted in the modern era, there are no signs in the Act of any commitment on the part of Uganda to the principle of judicial independence in relation to military courts. This Act says nothing about the independence and impartiality of military courts in that country. For a discussion of the flaws relating to judicial independence in the Ugandan military justice system see Naluwairo (2012).

¹⁷ The United States military justice system was substantially reformed in 1950 because of the dissatisfaction with the then system during World War II (Lederer FI & Zelif BH "Needed: An independent military judiciary. A proposal to amend the Uniform Code of Military Justice" in Fidell ER & Sullivan DH (ed) *Evolving Military Justice* (Annapolis: Naval Institute Press 2002).

¹⁸ For an incisive historical development of the United States military justice system, see Lederer & Zelif (2002).

¹⁹ S 826. Art 26(a).

²⁰ *Weiss v United States* 510 U.S 163 (1994). See specifically Army Regulation 27-10 Legal Services: Military Justice (2005) reproduced in Fidell ER "Judicial Independence" in Fidell ER, Hillman EL & Sullivan DH *Military justice cases and materials* 2nd ed (Danvers: LexisNexis 2012) at 834.

The disparity between the different branches of service was unsuccessfully challenged before the United States District Court for the District of Columbia in *Oppermann v United States* 2007 Civil Action No. 06-1824 (EGS). Available at <https://casetext.com/case/oppermann-v-us> (accessed November 2013). The Court relied on the following three reasons: that the due process clause does not require military judges to have fixed terms as held in *Weiss v. United States*; the principle that considerable deference is owed to the considered professional judgment of appropriate military officials; and that Congress has specifically sanctioned distinctions among the different arms of services in authorising each service Secretary to prescribe regulations for the manner in which military judges are organised. See also *Sanford v. United*

assigned non-judicial duties while serving as a judicial officer.²¹ The ad hoc system might be good for the administration of the military justice system in the sense that it allows those in charge of the system to chop and change military legal personnel as they see fit, a practice which some refer to as the flexibility element of the system. Indeed, flexibility is generally useful for the military justice system given that the system sometimes functions to satisfy operational needs of the military which may require rapid deployment of personnel on occasion. However, this should not be at the expense of the independence of military judges.²² Judicial independence must trump flexibility in this respect. Flexibility is required only in so far as far as it relates to the ability of military judges to deploy to any place the military may require, for purposes of exercising judicial functions. Commenting on the United States military justice system, Fidell observed as far back as 1990 that “one feature of the system that has proven to be change-resistant is the failure to afford military...judges the basic protection of a fixed term of office.”²³

Until 2009, Australia had fully institutionalised a military judicial office in order to enhance the independence of military courts.²⁴ The reforms made provision for full-time military judges *appointed* to the Australian Military Court created as a permanent court.²⁵ However, in a dramatic turn of events, the High Court of Australia declared the provisions creating the Australian Military Court to be unconstitutional in *Lane v Morrison*²⁶ for a number of reasons. Key among these are: (a) the Australian Military Court exercises the judicial power of the Commonwealth otherwise than in accordance with Ch III of the Australian Constitution and it cannot validly exercise the judicial power of the Commonwealth of Australia;²⁷ and (b) the fact that the Australian Military Court makes binding and authoritative decisions of guilt or innocence independently of

States 2009 No. 08-5402. Available at <http://cases.justia.com/federal/appellate-courts/cadc/08-5402/08-5402-1215552-2011-03-24.pdf?ts=1411134050> (accessed March 2015) where the United States Court of Appeals for the District of Columbia Circuit acknowledged that for a due process claim in the court martial context, judicial deference is at its highest when reviewing congressional decision making in the area of military justice as held by the US Supreme Court in *Weiss v United States*. This is based on Congress’s balancing of interests, some of which are unique to the military. In this case, the Court held that a court martial trial with a jury less than that of a civilian jury panel (six or more members) was not in violation of the due process clause of the Fifth Amendment because the right to a jury does not apply to the military as held by the US Supreme Court in *Ex Parte Quirin* 317 US. 1 (1942). Accordingly, the Court declined to set aside a conviction by a military court martial consisting of less than six persons and found no fundamental defect with the military court’s conviction.

²¹ UCMJ s 826. Art 26(c).

²² This system was nevertheless not overturned by the United States Supreme Court in *Weiss v United States* where the Court relied unpersuasively on the long history of uniqueness of courts martial.

²³ Fidell ER “Military judges and military justice: The Path to Judicial Independence” (1990) 74 *Judicature* 14 at 14.

²⁴ This was done through the Defence Legislation Amendment Act 2006.

²⁵ For some discussion of events leading to the reform of the Australian military justice system see Department of Defence, Australian Government Response to the Senate Foreign Affairs, Defence and Trade References Committee *Report on the effectiveness of Australia’s military justice system* (2005) at 5. Available at http://www.defence.gov.au/mjs/docs/MJ_GOVERNMENT_RESPONSE_4oct052.pdf (accessed 20 June 2006).

²⁶ *Lane v Morrison* (2009) 239 CLR 230.

²⁷ *Lane v Morrison* (2009) at para 114.

the chain of command of the defence forces. This case dealt with issues peculiar to the Australian Constitution which may be of limited relevance in the context of the South African Constitution. While the case will clearly make people pause and think about the nature of military courts for a moment, it is unlikely that it (on its own merits) would have wider implications for military justice systems in other jurisdictions for the above stated reason—especially in the countries considered in this article.²⁸

The Australian government moved in very quickly to address the vacuum left by *Lane*. It passed two pieces of legislation—the Military Justice (Interim Measures) Act²⁹ and the Military Justice (Interim Measures) Act.³⁰ According to the explanatory memoranda, the purpose of the two Acts is to return to the service tribunal system that existed before the creation of the Australian Military Court.³¹ This is a temporary measure until the government can enact other legislation that would create a Chapter III court.³²

In the current system (at the time of writing), military judicial officers are *appointed* for each general court martial or restricted court martial. In other words, they are appointed on an ad hoc basis as and when a court martial is convened by way of a convening order.³³ The appointment terminates at the end of the trial. This means that a military judicial office is currently not institutionalised in Australia. However, this system does not in any way represent how the Australian military justice system would look like in the near future given that the government seems determined to create a permanent Military Court of Australia with its judicial officers appointed on a full-time basis, as already discussed above.³⁴ The current system should therefore be viewed within the context in which it was enacted. It is a stopgap situation while the government tries to address the flaws identified in *Lane v Morrison* in relation to the creation of the Military Court of Australia.

The United Kingdom institutionalised military judicial office decades ago, but military judicial officers are still referred to as judge advocates although they are now

²⁸ However, the ruling was a major setback for the newly created Australian Military Court and has created some crisis in the Australian military justice system. For an incisive discussion of that case, and its aftermath see Cochrane K "Lane v Morrison" (2009) 61 *AIAL Forum* 62.

²⁹ (No.1) of 2009.

³⁰ (No. 2) of 2009.

³¹ Military Justice (Interim Measures) Bill (No. 1) 2009.

³² There is some skepticism as to whether the government has the power to do this. See Cochrane (2009) at 73. In fact, the Military Court of Australia Bill 2012 which was meant to remedy the crisis created by *Lane v Morrison* lapsed when parliament dissolved on 05 August 2013. See http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4853 (accessed 09 July 2015)

³³ See s 119(1) of the Military Justice (Interim Measures) Act (No 2) 2009.

³⁴ The government seems to have found a way out of *Lane v Morrison*. See recent comments of the Attorney-General and the Minister of Defence outlining the plan for the new Australian Military Court published on 24 May 2010. Available at http://www.australia.to/2010/index.php?option=com_content&view=article&id=2938:military-court-of-australia&catid=122:security&Itemid=169 (accessed 07 June 2010).

civilians.³⁵ These officers are *appointed* by the Lord Chancellor (a civilian), and hold a judicial office until they retire at the age of 70 years.³⁶ A judge advocate is specified for each court proceeding by or on behalf of the Judge Advocate General.³⁷ In contrast, and in an unprecedented reform of its military justice system, New Zealand has recently done away with the concept of judge advocates and fully institutionalised a military judicial office.³⁸ The system now boasts a Chief Judge, Deputy Chief Judges, and other judges who preside over the court martial, all of whom are *appointed* to a judicial office by the Governor-General by warrant.³⁹ Canada led the way in the institutionalisation of a military judicial office as far back as 1998 following a successful challenge against the independence of its general court martial in *R v Généreux*.⁴⁰ In that country, military judges are *appointed* by the Governor in Council, and they hold a judicial office.⁴¹

Of the five countries surveyed, only the United States assigns officers to serve as military judges instead of appointing them to a judicial office. The rest use the system of appointments and have fully institutionalised a military judicial office, although Australia is not yet fully there but strongly heading in that direction. There is a clear emerging trend to fully institutionalise a military judicial office because this approach enhances the independence and status of military courts. With the establishment of permanent military courts and military judges in 1999, South Africa is moving towards full institutionalisation of a military judicial office. What needs to be done now is to ensure that military judges are appointed to a military judicial office instead of being assigned to the function of a military judge. This approach is more consistent with the Constitution, the relevant *UN* and *African Union Principles* mentioned above, and is Principles consistent with emerging foreign trends. Moreover, it does not require a major policy shift given that all members of the Court of Military Appeals are appointed, including the lay members.

3 DETERMINING THE TENURE OF MILITARY JUDGES

Judicial officers need not necessarily be appointed for life.⁴² However, it is important to fix judicial appointments for a relatively long period of time⁴³ for reasons that will become clear later in this section. There are two concerns regarding the tenure of South African military judges—the first being the lack of legislative clarity on the tenure required, and the second relating to the practice of fixing judicial assignments for a

³⁵ S 155(1) of the Armed Forces Act 2006 (c.52).

³⁶ Ss 29 and 30 of the Courts Martial (Appeals) Act 1951 (c 46).

³⁷ S155(5) of the Armed Forces Act 2006.

³⁸ See Griggs C “A new military justice system for New Zealand” (2006) 6 *New Zealand Armed Forces Law Review* 62 for a comprehensive account of these reforms.

³⁹ Ss 12, 13 and 14 of the Court Martial Act No. 101 2 of 2007.

⁴⁰ (1992) 88 DLR (4th) 110.

⁴¹ See s 2 of the Security of Tenure of Military Judges Act, S.C. 2011 c 2.

⁴² Nowak M *U.N. Covenant on Civil and Political Rights CCPR Commentary* (Kehl am Rhein: NP Engelverlag 2005) at 320.

⁴³ Nowak (2005) at 320.

period of one year or two years. As Fidell puts it, “a system of justice that today leaves judges insecure in their judicial office is a remarkable anachronism.”⁴⁴

Comparatively, standards and practices vary across the various jurisdictions. In Australia, judge advocates and defence force magistrates have no tenure. They are appointed for each court martial from a panel of judge advocates.⁴⁵ Those on the panel remain on it for a maximum period of three years but are eligible for re-appointment.⁴⁶ However, with a new Military Court of Australia on the horizon, judges to be appointed to that court are set to get tenure similar to that of judges on the federal bench.⁴⁷ The problem of appointing judges on a case by case basis was dealt with by the Canadian Supreme Court in *R. v. Généreux*.⁴⁸ In that case, the Court held that there was no objective guarantee that a career of a military judge would not be affected by decisions tending to favour an accused rather than the prosecution. The Court held, further, that, a reasonable person might well have entertained an apprehension that the person chosen as judge advocate had been selected because he had satisfied the interests of the Executive, or at least not seriously disappointed executive expectations in previous proceedings. South Africa correctly moved away from a system of appointing military judges on a case by case basis in 1999 following *Freedom of Expression Institute & others v President, Court Martial & others*⁴⁹ which declared such a system unconstitutional. There is no need to discuss, further, the pros and cons of ad hoc appointments of military judges.⁵⁰

Again with reference to Australia, the invalidated system had radically changed the situation when the Australian Military Court was created in 2007. In terms of the relevant law at the time, military judges were appointed to hold office for ten years, and this was done in order to enhance the independence and impartiality of military courts.⁵¹ To further strengthen their independence from the chain of command, military judges were not to be eligible for promotion during their tenure as judges.⁵²

The United States uses an approach very similar to that used in Australia at the time of writing—no fixed term of office or life tenure for military judges with the exception of three year terms in the Army and Coast Guard which have been created by regulation,

⁴⁴ Fidell (1990) at 14.

⁴⁵ S 119 read with ss 117 and 127 of the Military Justice (Interim Measures) Act (No. 1) 2009.

⁴⁶ S 127(2) of the Military Justice Act (Interim Measures) Act (No. 1) 2009.

⁴⁷ See s 11(6) of the Military Court of Australia Bill. However, as already pointed out above, this Bill has lapsed. Australian federal bench judges hold tenure until they retire at 70.

⁴⁸ *R v Généreux* (1992) 1 S.C.R. 259.

⁴⁹ 1999 (2) SA 471 (C).

⁵⁰ For some analysis on the advantages and disadvantages of a fixed term of office for military judges, see *The Military Justice Act of 1983, Advisory Commission Report Vol I (USA)* at 8-9. Available at http://www.loc.gov/rr/frd/Military_Law/pdf/ACR-1983-I.pdf (accessed 18 April 2010).

⁵¹ Sections 188AC(2) and 188(AP)(4) of the Defence Legislation Amendment Act 2006 Schedule 1. See also Department of Defence, Australian Government Response to the Senate Foreign Affairs, Defence and Trade References Committee (2005) for discussions leading to the adoption of the above Act.

⁵² Department of Defence, Australian Government Response to the Senate Foreign Affairs, Defence and Trade References Committee (2005). For an analysis of those reforms, see Jones R “Recent reforms to the Australian Defence Force Discipline System” (2007) 7 *New Zealand Armed Forces Law Review* 77.

as already referred to above. Military judges serve only as long as proceedings last, and at the pleasure of the Judge Advocate General.⁵³ The idea of tenure for military judges was rejected in 1983 by an Advisory Commission mainly because it thought that “[c]reating tenure for judges for the sake of appearance would misleadingly suggest that the system does not currently operate with an independent judiciary”; and also that, in the view of the Commission, “the need to maintain assignment flexibility outweighs any possible benefit regarding appearance.”⁵⁴

The lack of tenure for military judges reached the Court of Military Appeals in *United States v Graf* where the Court held that fixed terms were not required for military judges.⁵⁵ In *Weiss v United States*, the Supreme Court held that a fixed term of office “has never been part of the military justice system.”⁵⁶ However, the *Weiss* judgment is poorly reasoned because it relied too much on the historical make-up of military courts without a substantive engagement with the issues that faced the Court in that case. These two cases have made it easier for the government to maintain the status quo regarding the independence of military judges. Notwithstanding the above authorities, fresh calls have been made to amend the UCMJ to establish an independent military judiciary including tenure for military judges.⁵⁷ The thrust of the argument for this call is that military judges in the current set-up do not present an appearance of independence mainly due to the fact that they lack any form of tenure.⁵⁸

In India, there is a new dawn in the history of the military justice system of that country.⁵⁹ The government recently established the Armed Forces Tribunal which consists of the chairperson (judge or retired judge of a high court) and such number of judicial and administrative members as the Central Government may deem fit.⁶⁰ Members of this Tribunal hold office for a renewable term of four years.⁶¹ However, the Tribunal is not part of the mainstream court martial system as it is largely an appellate forum. The regular military courts are governed in terms of the Army, Air Force, and

⁵³ See s 826 Art 26 of the UCMJ.

⁵⁴ *Advisory Commission Report* (1983) at 9. However, three members of the Commission dissented from the majority opinion.

⁵⁵ 35 M.J. 450 (1992).

⁵⁶ At 178.

⁵⁷ See Lederer & Zelif (2002) at 54-55. Surprisingly, a recent *Report of the Commission on Military Justice* (October 2009), did not raise any issue concerning the independence of military judges despite the glaring problems on the independence of the system. The Commission was sponsored by the National Institute for Military Justice and the American Bar Association. More recently, see also a statement by a group of scholars (including this author) and other individuals calling for the reform of the United States military justice system. Available at <http://www.law.yale.edu/news/16942.htm> (accessed 24 October 2013).

⁵⁸ Lederer & Zelif (2002) at 28-30. This is with the exception of the Army and the Coast Guard which prescribe three year-terms for military judges as has been highlighted.

⁵⁹ See generally, Jha UC “*The Military justice system in India: An analysis* (Gurgaon: LexisNexis 2009) at 257 commenting on the new era and providing some analysis of the Tribunal. For a general analysis of military law systems in the South Asia, see another book by the same author, Jha UC *South Asian military law systems* (New Delhi: KW Publishers Pvt Ltd 2010).

⁶⁰ The Armed Forces Tribunal Act 55 of 2007, s 5.

⁶¹ The Armed Forces Tribunal Act 55 of 2007, s 8.

Navy Acts.⁶² The system still resembles largely the old British courts martial system where members serve on an ad hoc basis.⁶³

In complete contrast, military judges of the United Kingdom (judge advocates and civilians), New Zealand (civilians), and Canada have tenure of office until they retire on attaining the age of 70 years⁶⁴ and 60 years in the case of Canada.⁶⁵ Prior to 2001, the age of retirement for judge advocates in the United Kingdom used to be 65 years. In New Zealand, judge advocates used to be appointed on an ad hoc basis as there was no permanent court martial before 2009, just as the situation is currently in the United States and Australia.⁶⁶ The key driver of reform of the New Zealand military justice system has been the New Zealand Bill of Rights Act 1990, and to some extent the developments in Canada and the United Kingdom.⁶⁷

Tenure of office until retirement is probably one of the most effective measures that can be taken to protect the independence of judicial officers. Its advantages are obvious, and need not be emphasised here. Full tenure has been proposed by Lederer and Zeliff for the United States military judges as a way of creating an independent military judiciary. In South Africa, the Constitution does not require life tenure for any judicial officer. Whether or not tenure until the age of retirement should be granted is therefore a matter of a policy choice by the legislature—as long as the adopted scheme ensures that judicial officers are sufficiently independent.

The issue of tenure has been debated by various people in many jurisdictions.⁶⁸ Arising from the debate there are a number of pragmatic reasons which suggest that the idea of tenure until the age of retirement may not be suitable for the military judiciary or in general. The first among these is that in the context of the military, it may cut off military judges from other career opportunities within the military.⁶⁹ While one

⁶² Army Act 46 of 1950; Air Force Act 45 of 1950; and Navy Act 62 of 1957.

⁶³ For a description and critical analysis of courts martial in India, see Jha (2009) at 225-255.

⁶⁴ See s 32 of the Courts Martial (Appeals) Act 1951 (c 46) and s 19(1) of the Court Martial Act 2007 respectively.

⁶⁵ S 2 of the Security of Tenure of Military Judges Act SC 2011, c. 2. Available at <http://laws-lois.justice.gc.ca/eng/acts/N-5/page-57.html#h-104> (accessed 17 July 2012). The new position in Canada follows a ruling by the Court Martial Appeal Court in *R. v. Leblanc* 2011 CMAC 2 that five-year renewable terms with a retirement age determined by regulation were unconstitutional on the basis that they did not provide the judicial independence (security of tenure) required by s. 11(d) of the *Canadian Charter of Rights and Freedoms*. See paras 44-47 in particular. What weighed heavily with the Court was the increased role assigned to military judges in matters of criminal justice and military discipline and the fact that they essentially exercise the same functions and powers as superior and provincial courts of criminal jurisdiction. See paras 42 and 47 of the judgment in this regard.

⁶⁶ For a brief description of the old court martial system in New Zealand, see Griggs (2006) at 80-82.

⁶⁷ See Griggs (2006) at 63-64.

⁶⁸ See for example the discussion in the context of the United States Supreme Court by Calabresi SG & Lindgren J “Term limits for the Supreme Court: Life tenure reconsidered” (2006) 29 *Harvard Journal of Law and Public Policy* 770 in which the authors call for a constitutional amendment to address a number of problems associated with life tenure. Although that discussion takes place in an entirely different context, it serves to highlight potential problems of tenure until the age of retirement.

⁶⁹ This factor was positively considered by the Canadian Supreme Court in *R. v. Généreux*. The Court stated that “[i]t would not...be reasonable to require a system in which military judges are appointed until the age of retirement.” However, the position taken in *Généreux* was challenged by the Court Martial Appeal

acknowledges the fact that the purpose of judicial independence is not necessarily to appease judges, it is important to consider the context in which the concept is being applied. However, career ambitions (beyond the military judiciary) of military judges are usually linked to higher financial incentives and career prospects offered in other positions. This means that adequate remuneration of military judges may partially address the above-mentioned concern.⁷⁰ In any event, tenure until retirement does not necessarily mean that judges cannot be considered for other opportunities outside the military bench if they so desire. The extent to which they would aspire to such career opportunities would largely depend on the premium attached to the military bench by military value systems⁷¹ and their conditions of service with reference to security of tenure and adequacy of remuneration. A report to the House Armed Services Committee in the United States found no significant evidence that service on the military bench inhibited the career prospects of judge advocates.⁷²

Secondly, tenure until the age of retirement may make it difficult to manage appointees who turn out to be poor judges. These will especially occur if the appointment process is not rigorous or where the pool of quality candidates is very limited.

The third concern is that this may well be a move too radical for the military at this point in time considering the fact that a fixed-term assignment was traditionally not even part of the military justice system. It would not be far-fetched to argue that the system has probably not yet evolved into a situation where tenure until the age of retirement may be implemented feasibly, at least for now. Indeed, we are on our way towards tenure until the age of retirement sometime in the near future as judicial independence is an evolving concept. The final, and probably the most important, point is that tenure until the age of retirement by its very nature unreasonably slows down the ascendance of fresh perspectives in any judiciary—something which is useful from time to time. This leads to some discussion of fixed-tenure, which Canada, until recently, offered to its military judges, which India offers to a section of its military judges as already discussed, and of course, South Africa, to some extent.

Military judges in Canada used to be appointed for a fixed term of five years renewable for a further five-year term upon request and recommendation of an independent Renewal Committee. This situation prevailed until 2011. It was the practice and the policy of the Government of Canada to renew appointments.⁷³ The strengthening of the independence of military judges in Canada was the consequence of *R v Généreux*. In that case, the Canadian Supreme Court held that military judges did not have sufficient security of tenure as they were appointed on a case by case basis. This is

Court of Canada in *R v Dunphy and R v Parsons* [2007] CMAC 1, paras 19-20, where the Court held that the rationale behind *Généreux* has changed because military courts look different today. As noted above, this view has been confirmed in *R v Leblanc* by the same Court in 2011.

⁷⁰ The question of remuneration of military judges is complex and needs to be addressed separately.

⁷¹ See generally Fidell (1990) at 19.

⁷² Cited in Fidell (1990) at 19.

⁷³ Department of National Defence *Report on the compensation of military judges* (2004). Available at http://www.forces.gc.ca/site/reports/mjcc04/index_e.asp (accessed 30 March 2006).

now all history as Canada has joined New Zealand and the United Kingdom in offering tenure until the age of retirement, albeit with a lower retirement age, and also that military judges there (Canada) are still uniformed.

Fixed judicial appointment is generally consistent with judicial independence. However, some authorities show that there are fundamental challenges associated with this mode of appointment. These challenges relate to the length of the term, and the renewability thereof. Lederer and Zelif capture the limited effect of a fixed term of office on the independence of military judges as follows:

Unless a military judge is serving the last assignment of her or his career, fixed tenure is of little consequence. The independence problem stems from concern that a military judge's decision will be influenced by his or her interest in future assignment and promotion. On conclusion of a fixed tenure, the judge is once again in competition with all other officers of similar grade for promotions and better assignments. The degree of protection afforded a judge by fixed tenure is thus de minimis.⁷⁴

Similar sentiments were expressed by Stevenson J in *R v Généreux*: that as the tenured term draws to a close, it may be in the interest of military judges wishing to secure re-appointment to please the Executive.⁷⁵ These sentiments are persuasive. In my view, this means that fixed tenure can only be more effective under the following conditions: when the incumbents would not be continuing to serve upon completion of a term or when such terms are renewable through a truly independent process, such as, a properly staffed committee or commission, and when military judges are not eligible for promotion which is subject to the powers that be during their tenure. Before the 2011 amendment, section 165.21(3) of the National Defence Act (Canada) made provision for a Renewal Committee which recommended renewals of terms of office of military judges in that country.

The above discussion shows that there are at least three models regarding tenure of military judges in the countries considered. These can be described as follows: lack of fixed tenure (the United States and Australia (at least for now)); fixed tenure (India and South Africa to some extent); and tenure until the age of retirement (the United Kingdom; Canada; and New Zealand). The model prevailing in the United States and Australia does not support judicial independence despite its strange escape before the United States Supreme Court in *Weiss*. The choice therefore is between tenure until the age of retirement and tenure for a fixed period. Trends among the majority of the countries studied support both models; but there is a very strong movement towards granting tenure until retirement age, as already alluded to. Finally, relevant international law and the South African Constitution support either of these models, in principle.

⁷⁴ Lederer & Zelif (2002) at 49.

⁷⁵ At 317.

3.1 Proposal for tenure of South African military judges in the modern era

It is proposed that South Africa should take a cue from the United Kingdom, New Zealand, and more recently Canada and grant tenure until the retirement age.⁷⁶ An outline of the proposal follows.

Tenure until retirement age is justified for military judges because they compare closely with magistrates, who hold tenure until the age of retirement, currently set at 65 years. However, I have in the past argued for a fixed and renewable term of office of ten years for two reasons. The previously suggested period gives judges enough time to settle in their positions, and to develop their judicial skills without having to worry about the next career move for a considerable period of time.⁷⁷ Appointment for a longer fixed term also ensures acceptability of military judges within the wider scheme of things because most statutory appointments in the Defence Force are for a fixed period.⁷⁸ While there is generally no problem with a fixed term of office, the recent ruling of the Constitutional Court in *Justice Alliance of South Africa v President of the Republic of South Africa and Others*⁷⁹ strongly suggests, however, that a renewable term of office is constitutionally questionable. In this connection, the Court stated the following:

It is well established on both foreign and local authority that a non-renewable term of office is a prime feature of independence. Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment. Non-renewability fosters public confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal.⁸⁰

Although these remarks were made in the context of non-renewability of a term of office of a Constitutional Court judge, there is no reason to suggest that they have no general application to the judiciary as a whole. Moreover, in South Africa, no judicial officers hold office for a renewable term of office, other than military judicial officers. It is either that they hold office until the age of retirement⁸¹ or for a fixed and non-renewable term.⁸²

⁷⁶ As things stand s 52(1) of the Defence Act 42 of 2002 requires that members of the regular force should not be older than 65 years.

⁷⁷ In general, the range for a fixed tenure of military judges was previously between two, five and ten years. It is currently between one and two years in South Africa (as a matter of general practice), was five years in Canada, and until recently ten years in Australia.

⁷⁸ Similarly, this factor played a role in fixing the tenure of Australian military judges at ten years. See Jones (2007) at 94-95 alluding to this.

⁷⁹ 2011 (5) SA 388 CC.

⁸⁰ At para 73. Footnotes omitted.

⁸¹ For example, s 13(1) of the Magistrates Act 90 of 1993 provides that “[a] magistrate shall vacate his or her office on attaining the age of 65 years...” Furthermore, s 3(2)(a) of the Judges’ Remuneration and Conditions of Employment Act 47 of 2001 provides that “[a] judge who holds office in a permanent capacity-

(a) shall, subject to the provisions of s 4 (4), be discharged from active service as a judge on the date on which he or she attains the age of 70 years...” The Court Martial Appeal Court of Canada decision in *R. v.*

The appointment of military judges should be carried out by a truly independent structure⁸³ that could be styled as the Military Judicial Commission (Commission), for example. The Ministerial Task Team correctly suggests that such a structure should follow a transparent and accountable process.⁸⁴ The Commission must be diverse and balanced in its composition. It should be representative of various interests including the military judiciary; the military command; the Parliament; the Ministry of Defence and scholars in the field of military law or judicial independence. Most importantly, it should not be dominated by any specific interest group so that it would not be biased in its approach, particularly to the Executive or the military command.⁸⁵

The process of appointment must ensure that candidates of good quality are appointed to the military bench. The best option is to have a rigorous selection and appointment process to ensure that the best possible candidates are appointed. This must be followed by high quality judicial training of those appointed to the military bench. As a way of building up a pool of appointable candidates to the military bench a system of acting military judges could be implemented as is the case in the civilian system. Another benefit of acting judicial appointments is that it affords acting judges an opportunity to gauge their level of interest in serving on the bench without a permanent commitment.

Finally, military judges should not be subject to any involuntary non-judicial transfer during their tenure of office in order to ensure non-interference by the Executive or the military command. They should also not be eligible for promotion as this can be a negative source of influence on their independence. Instead, military judges who aspire for senior positions within the judiciary or elsewhere should compete for available vacancies as is generally the case in the civilian judiciary. Judges at the Court of Military

Leblanc 2011 CMAC 2 provides very strong authority for this proposal. Delivering judgment in the context of Canadian military judges Letourneau J.A. held: “[i]t seems inconceivable to me, and I say this with all due respect for the contrary view, that military judges, who exercise the same functions and have essentially the same powers as superior and provincial courts of criminal jurisdiction, should be subject to the whims, the unknowns, the uncertainty and anxiety of having their positions come up for renewal every five years. In fact, they are the only judges with such jurisdiction to be subject to short, renewable terms of employment.” As shown above, the same comments could be made about military judges in South Africa and there is no longer justification for offering them lesser measures of protection.

⁸² For example, s 176(1) provides that “[a] Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first...”

⁸³ *The Ministerial Task Team Report* (2004) at 35.

⁸⁴ *The Ministerial Task Team Report* (2004) at 35.

⁸⁵ It may be worth noting that the South African Judicial Service Commission (JSC) is widely perceived by some as biased because it is a body whose membership is dominated by politicians or political appointees. See s 178 of the Constitution. For some critical and interesting reflection on aspects of the JSC see Corder H “Appointment, discipline and removal of judges in South Africa” in Lee HP (ed) *Judiciaries in comparative perspective* (Cambridge: Cambridge University Press 2011). For a discussion of the performance of the JSC during the early stages of its existence see Malleson K “Assessing the performance of the Judicial Service Commission” (1999) 116(1) *South African Law Journal* 36. Furthermore, Malleson K “Assessing the strengths and weaknesses of a Judicial Appointments Commission” (1998) *Amicus Curiae* 16, commenting on the possibility of establishing a judicial appointment commission for the United Kingdom more than a decade ago, cautioned that “[t]he use of a commission is not a panacea...” However, Malleson generally concludes in favour of establishing such commissions.

Judge level would compete for posts at Court of Senior Military Judge and those at Court of Senior Military Judge for posts at the Court of Military Appeals etc. Due to their ineligibility for promotion, members of the Court of Military Judge could be appointed at the level of Lieutenant-Colonel as opposed to Major or Lieutenant-Commander (in the case of the Navy) and members of the CSMJ could be left at Colonel level. The suggested military ranks are relatively senior among officers' ranks. This, together with adequate remuneration, would make a career within the military judiciary more attractive.

4 CONCLUSION

This article has established that a military judicial office is not institutionalised in South Africa because military judges in lower courts are not appointed to a judicial office. This means that a military judicial office is not guaranteed because a judicial function is seen as more of an assignment than an office which is held by the relevant officer. This raises questions about the status of military judges as judicial officers. There is a need to fully institutionalise a military judicial office. This must be done by ensuring that military judges are *appointed* to a military judicial office instead of being assigned to the function of a judge. Institutionalisation of a military judicial office coupled with tenure until retirement age, among others, would significantly enhance the status and independence of military courts because military judges would be guaranteed a judicial office and they would no longer have to be concerned about the renewal of their terms of office. The measures suggested in this article are also consistent with trends in countries which are at the cutting edge of reform of military justice, and South Africa should be keen to continue to be counted as part of these progressive jurisdictions in this field.