

**A critical evaluation of the independence of the Office of the Chief Justice and  
its role in promoting judicial transformation in South Africa**

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## Declaration

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A critical evaluation of the independence of the Office of the Chief Justice and its role in promoting judicial transformation in South Africa:

I declare that the above dissertation is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

A handwritten signature in black ink, appearing to read 'R J Phatshwane', with a horizontal line drawn underneath it.

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## **Summary**

The legislative supremacy of Parliament has dominated the constitutional law of South Africa for a very long time. In the pre-constitutional era, the judiciary had no power to question the deeds of Parliament. Despite the need for the judiciary to be independent from the two other governmental branches to execute its function effectively, it was surely dependent on them. However, the creation of the Office of the Chief Justice (OCJ) as a separate governmental department by the Constitutional Seventeenth Amendment Act, read together with Superior Court Act, mandated by the requirements of a supreme Constitution (and not Parliament), changed things so that the judiciary is no longer dependent on government for its day-to-day administration. This thesis examines the independence of the OCJ and its role in promoting judicial transformation in the new South Africa.

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## **Key terms**

South African judiciary; Judiciary department; Office of the Chief Justice; Administration of the judiciary; Post-establishment of the OCJ; Parliamentary supremacy; Constitutional supremacy; Judicial independence; Separation of powers; Transformation.

## **Abbreviations**

ANC	African National Congress
CC	Constitutional Court
CJ	Chief Justice
CSAA	Constitution Seventeenth Amendment Act
DA	Democratic Alliance
DCJ	Deputy Chief Justice
DoJ&CD	Department of Justice and Constitutional Development
EFF	Economic Freedom Fighters
ICC	International Criminal Court
IC	Interim Constitution
ICCPR	International Covenant on Civil and Political Rights
JSC	Judicial Service Commission
MJCD	Minister of Justice and Constitutional Development
MP	Members of Parliament
MTSF	Medium-term Expenditure Framework
OCJ	Office of the Chief Justice
PFMA	Public Finance Management Act
SAHRC	South African Human Rights Commission
SCA	Supreme Court of Appeal
TRC	Truth and Reconciliation Commission
UN	United Nations
USA	United States of America

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## Chapter 1

### 1 Introduction

#### 1.1 Background of the study

The South African judiciary had a long and tortuous journey towards independence and, therefore, has the utmost duty and responsibility to sustain its independence and impartiality. It is an established fact that an independent, impartial and upright judiciary is essential to maintain a country's democracy.<sup>1</sup> It is against this background that this study evaluates the independence of the newly established judicial office in South Africa called the Office of the Chief Justice (OCJ) and its role in promoting judicial transformation in South Africa. South African judicial independence is objectively guaranteed in the 1996 Constitution.<sup>2</sup> Additionally, previously decided cases of the Constitutional Court (CC) make it clear that the independence of the judiciary has two components. Firstly, there is institutional independence, which means that the judiciary must enjoy some organisational insulation in its sphere of operation, independent of other branches of government. Secondly, there is decisional independence, meaning that judicial officers must be free to perform their judicial functions on the facts and the law without pressure or interference from any outside force.<sup>3</sup>

The principle of judicial independence is accorded almost universal recognition. The requirement that judges should be independent in their decision-making is acknowledged by all liberal democratic legal systems.<sup>4</sup> Hence, there are a number of international instruments which emphasise the importance of an independent judiciary.<sup>5</sup> The Universal Declaration of Human Rights<sup>6</sup> is an example to that effect,

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<sup>1</sup> *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 (2) SACR 222 (CC), para 67.

<sup>2</sup> Section 165(2) of the *1996 Constitution of the Republic of South Africa*, 108 of 1996; hereafter referred to as the 1996 Constitution.

<sup>3</sup> Cameron E 'Judicial independence: A substantive component?' *Advocate* (December 2010) available at <<http://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp24-29.pdf>>. (Date accessed: 15 October 2016).

<sup>4</sup> Lee H P & Campbell E *The Australian Judiciary* Cambridge University Press (2013) 2ed 7.

<sup>5</sup> Lee H P & Campbell E *The Australian Judiciary* 7.

<sup>6</sup> Universal Declaration of Human Rights is a declaration adopted by the United Nations General Assembly on 10 December 1948; Lauterpacht H *The Universal Declaration of Human Rights* (1948) 25 BYIL 354, wherein Article 10 stipulates that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him."

followed by the International Covenant on Civil and Political Rights (ICCPR),<sup>7</sup> to which South Africa is a party<sup>8</sup> and which protects the right of everybody who is charged with a criminal offence to “a fair and public hearing by a competent, independent and impartial tribunal established by law”.

The judiciary is one branch of government that is an unlikely candidate for despotism; despite the great powers which it is capable of exercising, especially in the area of judicial review, it remains very much at the mercy of the other arms of government.<sup>9</sup> Why, it may be asked, is independence of the judiciary so crucial for the attainment of constitutional government?<sup>10</sup> Of paramount importance is that section 2 of the 1996 Constitution states that this Constitution is the “supreme law” of the Republic, that a law or conduct inconsistent with it is invalid, and that the obligations imposed by it must be fulfilled.<sup>11</sup>

It was held in *Nkabinde and Another v Judicial Service Commission and Others*<sup>12</sup> that there must be a neutral umpire who is impartial to ensure that the supremacy of the 1996 Constitution is protected.<sup>13</sup> Before the arrival of the 1996 Constitution, statutes were interpreted according to the provisions of the Interpretation Act<sup>14</sup> and set rules and principles deriving from common law. However, the arrival of 1996 Constitution changed this by setting out guidelines for interpreting statutes to determine whether they conflict with the 1996 Constitution. Courts are instructed to look outside the words of a specific statute when trying to determine its purpose and meaning.<sup>15</sup> The judiciary exercises the potent power of judicial review; it can declare invalid the legislation

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<sup>7</sup> ICCPR is a multilateral treaty, adopted by the United Nations General Assembly on 16 December 1976, in which Article 14(1) provides protection to the independence of the judiciary of its member states. It commits its parties to respect the civil and political rights of individuals.

<sup>8</sup> UN Treaty Collection: Ratification status to the ICCPR, available at <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en)>. (Date accessed 2016-05-28).

Lee H P & Campbell E ‘*The Australian Judiciary*’ 1.

<sup>10</sup> Lee H P ‘The judicial power and constitutional government- Convergence and Divergence in the Australian and Malaysian Experience’ (2005) *Journal of Malaysian and comparative law* 2.

<sup>11</sup> Section 2 of the 1996 Constitution; the (Supremacy clause).

<sup>12</sup> 2015 (1) SA 279 (GJ), para 59.

<sup>13</sup> Lee HP ‘*The judicial power and constitutional Government- Convergence and divergence in the Australian and Malaysian experience*’ *Journal of Malaysian and Comparative law* 5.

<sup>14</sup> No 33 of 1957.

<sup>15</sup> Schulze H et al ‘Commercial law’ *Juta* (2015) 13.

enacted by the parliament or the legislature of a state claiming the parliament, or the legislature lacks power to make such laws.<sup>16</sup>

The 1996 Constitution embodies fundamental rights and the protection of such rights are entrusted to the judiciary. This was stated in the case of *Glenister v President of the Republic of South Africa and Others*<sup>17</sup> when the court struck down legislation for failing to secure an adequate degree of independence of an anti-corruption body, the Directorate for Priority Crime Investigation. In *Justice Alliance of South Africa v President of the Republic of South Africa and Others*<sup>18</sup> where the President exercised his statutory power to extend the term of office of the then Chief Justice (CJ), the court declared invalid both the purported extension and the relevant enabling provisions. Thus, section 39(2) of the 1996 Constitution provides that, when interpreting any legislation, a court must promote the spirit, purport and objects of the Bill of Rights. Furthermore, section 233 states that, when interpreting any legislation, every court must prefer any reasonable interpretation that is consistent with international law over any alternative and inconsistent interpretation. Therefore, the judiciary is entrusted with the enormous task of protecting the country's democracy. In *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa*,<sup>19</sup> the CC confirmed the relationship between the common law and the 1996 Constitution, holding that the body of common law relating to the control of public power has been subsumed by the 1996 Constitution.

For the courts to exercise this protective role, it must be possible for everybody to see them as a protector of rights.<sup>20</sup> This public confidence in the fairness of the judiciary depends crucially on judges being believed to be impartial, free from bias and free from extraneous influence.<sup>21</sup> This public trust in the courts is displayed when a loser in litigation accepts the decision of the court. The decision will be easily accepted when a decision is rendered by a judicial officer who has conducted a hearing "fairly" and applied legal principles genuinely, and who thereafter gives reasons for arriving at that

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<sup>16</sup> Lee HP 'The judicial power and constitutional Government- Convergence and divergence in the Australian and Malaysian experience' 5.

<sup>17</sup> 2011 (3) SA 347 (CC).

<sup>18</sup> 2011 (5) SA 388 (CC).

<sup>19</sup> 2000 (2) SA 674 (CC) / 2000 (3) BCLR 241.

<sup>20</sup> Lee HP 'The judicial power and constitutional Government- Convergence and divergence in the Australian and Malaysian experience' 5.

<sup>21</sup> Lee H P & Campbell E 'The Australian Judiciary' 17.

decision. However, fundamental and dramatic social change cannot be achieved without a transformed judiciary that understands its constitutionally mandated task and is equipped to undertake it. The Department of Justice and Constitutional Development (DoJ&CD) admits<sup>22</sup> that the OCJ has a significant role to play in transforming the judiciary. This means that the judiciary itself needs to be transformed for it to be in line with the constitutional order and ensure that it can play its transformative role in society.<sup>23</sup>

Apart from demographic change, not much was done to transform the judiciary in the first 20 years of South Africa's democracy. More recently, the pace at which the government has moved to transform the judiciary, especially the governance of the judicial system, has quickened considerably.<sup>24</sup> The governance of the South African judicial system is currently undergoing transformation to conform to the constitutional dictates. Before 1994, the question of governance was not addressed comprehensively by any previous apartheid Constitutions of the country or by any piece of legislation, but after 1994 it was clear that major changes in governance might be necessitated by the transition to a democratic Constitution.<sup>25</sup>

Two recent and notably positive results of the reform process of governance of the judiciary were the enactment of the Constitution Seventeenth Amendment Act (CSAA),<sup>26</sup> which establishes a single court, as well as the Superior Court Act.<sup>27</sup> The CSAA amended the 1996 Constitution to provide that the CC is the highest court in all matters. Before this amendment, the 1996 Constitution<sup>28</sup> stipulated that the CC could only decide on constitutional matters and issues associated with constitutional matters. These amendments made by the CSAA must read together with the Superior Court Act.<sup>29</sup> Both these pieces of legislation advance the notion of a unified single judiciary.

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<sup>22</sup> DoJ&CD Discussion document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State (February 2012) para 3.3.4. (Hereafter the Discussion Document) available at <<http://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf>> (Date accessed: 12 September 2016).

<sup>23</sup> Mhango M 'Transformation and the judiciary' *Juta* (2014) 69.

<sup>24</sup> Mhango M 'Transformation and the judiciary' 69.

<sup>25</sup> Item 16(6) (a) of Schedule 6 of the 1996 Constitution.

<sup>26</sup> Of 2012.

<sup>27</sup> No. 10 of 2013.

<sup>28</sup> Section 176(3)b) of the 1996 Constitution.

<sup>29</sup> No. 10 of 2013.

It is against this background that the OCJ was established, an important step towards more efficient governance and more effective use of resources.<sup>30</sup> The Discussion Document makes a close link between judicial governance and the transformation of the judiciary. It goes without saying that giving the judiciary responsibility for aspects of court administration that are “connected with the courts” is something that could improve judicial accountability and independence, as well as administrative efficiency and access to justice.<sup>31</sup>

On the issue of the OCJ’s role in promoting judicial transformation, the investigation of this crucial concept has almost exclusively consisted of inward-focused reflection by members of the legal profession about the need for transformation of the substance of the law, judicial philosophy.<sup>32</sup> In light of the judiciary itself, CJ Langa’s concurrence in *S v Makwanyane and Another*<sup>33</sup> that there is no single definition proposed that, at the very least, transformative constitutionalism includes the pursuit of some form of economic transformation and a change in legal culture. He also argued that transformation is necessarily an ongoing process, and that there is value in the process of change itself;<sup>34</sup> hence, the Discussion Document acknowledges that the process of rationalisation of the judiciary remains incomplete, and accordingly it seeks to “contribute to the creation of policies will further lead transformation of the judicial system in South Africa”.<sup>35</sup> The change in legal culture identified by Justice Langa primarily concerned the forms of legal reasoning that are considered appropriate for constitutional adjudication. Justice Langa adopted Mureinik’s<sup>36</sup> well-known argument that the Constitution effected a shift from a “culture of hiding behind authority” to a “culture of justification” of the decision taken.

When dealing with the question of legal culture, which was identified as one of the key enabling conditions or challenges for transformative constitutionalism, this study

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<sup>30</sup> DoJ&CD ‘Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State’ (February 2012) available at <<http://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf>>. Para 4.2.6.

<sup>31</sup> Mogoeng M ‘The implication of the office of the Chief Justice for Constitutional Democracy in South Africa’ *STELL LR* (2013) 393, 400.

<sup>32</sup> *Hodgson T M ‘Bridging the gap between people and the law: Transformative constitutionalism and the right to constitutional literacy’ Acta Juridica* (2015) 189-190.

<sup>33</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) 797 B-H.

<sup>34</sup> Brickhill J & Van Leeve Y ‘Transformative Constitutionalism-Guiding light or empty slogan?’ *Acta Juridica* (2015) 141, 143.

<sup>35</sup> Discussion document, preface, I.

<sup>36</sup> Mureinik E ‘A bridge to where? Introducing the interim Bill of Rights’ *SAJHR* (1994) vol 10 31, 32.

assesses how much has changed since Justice Langa wrote. If the 1996 Constitution commits all branches of government to pursue the vision of transformative constitutionalism, it is crucial to be able to identify the role of each branch and to have a coherent understanding of the separation of powers. The jurisprudence of the South African courts, particularly the CC, does not yet reflect a single clear theory of the separation of powers. Instead, as Roux<sup>37</sup> observed, two rival theories emerge. The first approach is best articulated, for Roux, by the court's decisions in the *Treatment Action Campaign*<sup>38</sup> and *Albutt*,<sup>39</sup> while the second approach finds illustration in the decision in *Fourie*,<sup>40</sup> in which J Sachs employed separation of powers concerns to inform his approach to, in effect, leave it to the legislature to decide how to recognise gay marriage. A more recent case of the second approach is found in the "E-Tolling" case.<sup>41</sup> The court in *OUTA* overturned a high court interim interdict concerning the implementation of an e-tolling system on Gauteng roads, primarily on the basis that the high court had erred in failing to consider the separation of powers. However, in *Mhlekwana v Head of the Western Transvaal Regional Authority & another v Head of the Western Transvaal Regional Authority & another*<sup>42</sup> when the argument was made that the Regional Authority Courts Act<sup>43</sup> (Transkei) violated the requirements of section 165(2) of the 1996 Constitution that "the courts are independent and subject only to the Constitution and the law." In addressing this argument, the court referred to Canadian jurisprudence, in which judicial independence involves both individual and institutional relationships.

Justice Cameron characterises the 1996 Constitution as a "practicable, workable charter that has proved itself modestly but practically effective as a basis for the democratic exercise of power." In pursuing the change envisaged by the 1996 Constitution, the challenges include access to justice, legal education, legal culture,

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<sup>37</sup> Theunis R 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a difference?' Paper presented at Conference on Transformative Constitutionalism after 10 Years, Stellenbosch University (8 August 2008).

<sup>38</sup> *Minister of Health and Another No v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another Amici Curiae)* 2006 (2) SA 311 (CC), 315.

<sup>39</sup> *Albutt v Centre for the study of violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at 296.

<sup>40</sup> *Minister of Home Affairs and Another v Fourie and Another (Doctors for life international and Others, Amici curiae); lesbian and gay equality project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC).

<sup>41</sup> *National Treasury and Others v Opposition to urban Tolling Alliance and Others (OUTA)* 2012 (6) SA 223 (CC), 235.

<sup>42</sup> 2001 (1) SA 574 (TK).

<sup>43</sup> No 13 of 1982.



separation of powers and reconciliation.<sup>44</sup> Adopting the frame of Justice Langa's piece, each of these challenges and events since he spoke of in 2006 are commented on in the study.

## 1.2 Problem statement

### 1.2.1 Historical perspective

The fabric of South African law is woven from two cross-cutting strands: the interface between European and indigenous law, and the interaction between principles rooted in different European traditions.<sup>45</sup> It was made out of the rule by Dutch and British powers which left its legacy of substantive law consisting largely of Roman-Dutch and English elements, which made a unique system that has features of both civil and common law.<sup>46</sup> Thus, South African law constituted a mixed legal system in which this varied heritage differences produced friction.

Modern South Africa was born at the beginning of the 20<sup>th</sup> century when the four British colonies merged and became the Union of South Africa.<sup>47</sup> The basic constitutional features of the legal framework within which fundamental rights were dealt with were parliamentary sovereignty and the discrimination against the black majority from representation in all branches of government.<sup>48</sup> The Westminster-oriented South Africa Act<sup>49</sup> was to provide for an inclusive democracy. Instead, the Union of South Africa would be governed by whites, even when they were the minority of the overall population.<sup>50</sup> Politics then were sectional in that government almost entirely served the interests of the white groups. Parliamentary sovereignty and lack of representation of the black population in parliament were the constitutional instruments enabling a minority government to introduce the apartheid system.<sup>51</sup> Due to this governmental structure, the pre-constitutional South African government did not support the doctrine

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<sup>44</sup> Cameron E 'A personal Account' (2014) available at <[http://hsf.org.za/resource-centre/focus/focus-73-social-inclusion/nnattrass-review\\_73.pdf/download](http://hsf.org.za/resource-centre/focus/focus-73-social-inclusion/nnattrass-review_73.pdf/download)>. (Date accessed: 20 June 2015).

<sup>45</sup> Du Bois F 'Wille's principles of South African law' 9<sup>th</sup> Edition *Juta* (2010) 33.

<sup>46</sup> Du Bois F 'Wille's principles of South African law' 33.

<sup>47</sup> Van Wyk D & De Villiers D 'Rights and constitutionalism: The new South African Legal Order' *Juta* (1994) 131.

<sup>48</sup> Mokgoro Y & Tlakula P (eds) 'Bill of Rights Compendium' *LexisNexis* (2013) 1A-9.

<sup>49</sup> 1909.

<sup>50</sup> Van Wyk D & De Villiers D 'Rights and constitutionalism: The new South African Legal Order' 131.

<sup>51</sup> Mokgoro Y & Tlakula P (eds) 'Bill of Rights Compendium' 1A-9.

of the separation of powers.<sup>52</sup> The judiciary experienced encroachment from the executive, despite the government claiming that the judiciary was independent.<sup>53</sup>

Between 1910 and 1990, the main features of the formal South African constitutional regime were the following:<sup>54</sup>

- The evolving scheme of apartheid, typified by the constitutional entrenchment of white rule, and its attendant platform for Afrikaner domination of the political system resulted in more emphasis on “authority” than on “rights”.
- There was formal classification as well as territorial and spatial separation of what came to be known as “population groups”. The authority in this regard was the Population Registration Act,<sup>55</sup> notwithstanding other legislation which contained provisions distinguishing and discriminating between persons on the grounds of race.<sup>56</sup>
- During the later years, nearing the closing years of apartheid era, central executive control of government functions in respect of “white” areas increased in the abolition of the representative (“white”) provincial authorities.<sup>57</sup>

This means that, during the above periods, courts did not have any power to question or review the acts of the executive or the legislature. Section 34 of the 1983 Constitution was evident to this regard, as well as the case of *R v Sachs*,<sup>58</sup> where CJ Centlivres said that:

Court of law do scrutinise such statutes with the greatest care but where the statute under consideration in clear terms confers on the executive autocratic powers over individuals, courts of law have no option but to give effect to the will of the legislature as expressed in the statute. Where, however, the statute is reasonably capable of more than one meaning a court of law will give it the meaning which least interferes with the liberty of the individual.

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<sup>52</sup> Mojapelo P M ‘The doctrine of separation of powers: A South African perspective’ Advocate (April 2013) available at <<http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp37-46.pdf>>. (Date accessed: 02 November 2017).

<sup>53</sup> Gordon A & Bruce D ‘*Transformation and the independence of the judiciary in South Africa*’ CSVr, at available at <[www.csvr.org.za/docs/transition/](http://www.csvr.org.za/docs/transition/)>. (Date accessed: 12 May 2016).

<sup>54</sup> Van Wyk D & De Villiers D ‘Rights and constitutionalism: The new South African Legal Order’ 133. No. 30 of 1950.

<sup>56</sup> Van Wyk D & De Villiers D ‘Rights and constitutionalism: The new South African Legal Order’ 133.

<sup>57</sup> Van Wyk D & De Villiers D ‘Rights and constitutionalism: The new South African Legal Order’ 133.

<sup>58</sup> 1953 (1) SA 392 (A), 399 (G-H).

It cannot be denied that South Africa's pre-constitutional government created a judiciary which was obedient in sustaining their apartheid legal order. The Constitutions also contained nothing relating to judicial protection over the executive and legislature.<sup>59</sup> As a result, it is argued that the Constitutions' failure to contain the entrenched clauses to protect the independence of the judiciary denied any claims of expressive independence. Even though the apartheid judiciary offered the institutions and procedures required for a legal system that satisfied the rule of law, those were not enough to ensure that a system was in place for substantive protections of individual rights.<sup>60</sup> By that time, the judiciary was not representative of the country's population. Apartheid was about ensuring white minority rule over the black majority, so representation of the white minority on the bench was not an issue.<sup>61</sup>

As far as financial resources and efficiency are concerned, few, if not none, of the commentators of the time have implied that the South African judiciary was underfunded or otherwise deficient in this area.<sup>62</sup> The power of the judiciary to be financially stable is extremely relevant to a well-ordered judiciary.<sup>63</sup> This study considers factors leading to judicial efficiency. Among these, it weighs the number of support staff, the filing system, the sufficiency of office equipment, and the availability of current legal sources.<sup>64</sup>

### *1.2.2 Previous dispensation 1994-2012 (Prior to the establishment of the (OCJ))*

The fall of apartheid gave birth to the Truth and Reconciliation Commission (TRC), which considered failures of the apartheid judiciary.<sup>65</sup> The post-apartheid government created the TRC in order to investigate the apartheid government and its specific

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<sup>59</sup> Carpenter G 'Introduction to South African Constitutional law' (Butterworths, Durban, 1987) 361.

<sup>60</sup> Coniglio R 'Methods of judicial decision-making and the rule of law: The case of apartheid South Africa' *Boston University International Law Journal*. A.B., Cornell University, (2012) available at <[http://www.bu.edu/law/journalsarchive/international/volume30n2/documents/note\\_coniglio.pdf](http://www.bu.edu/law/journalsarchive/international/volume30n2/documents/note_coniglio.pdf)>. (Date accessed 28/03/2016).

<sup>61</sup> Coniglio R 'Methods of judicial decision-making and the rule of law: The case of apartheid South Africa' 504.

<sup>62</sup> Coniglio R 'Methods of judicial decision-making and the rule of law: The case of apartheid South Africa' 57.

<sup>63</sup> Gordon A & Bruce D 'Transformation and the independence of the judiciary in South Africa' 22.

<sup>64</sup> Mogoeng M 'The implication of the office of the Chief Justice for Constitutional Democracy in South Africa' 400.

<sup>65</sup> Truth and Reconciliation commission, Truth and Reconciliation Commission of South Africa Report, 103, 105 (1998), available at <<http://www.justice.gov.za/trc/report/index.htm>>. (Date accessed: 20 February 2015).

human rights violations committed between 1960 and 1994.<sup>66</sup> The TRC attempted to answer the following: “how, over the years, people who considered themselves ordinary (and) decent found themselves turning a blind eye to a system which impoverished, oppressed and violated the lives” of the South African people.<sup>67</sup>

As part of the hearing on the judiciary, the TRC investigated the root causes for judicial policy of the old South African judicial independence and the exercise of judicial discretion and wanted to craft recommendations for judicial reform. However, the TRC concluded that failure to defend substantive rights demonstrated that the apartheid judiciary had failed in its legitimate role to uphold the law and was essentially lawless.<sup>68</sup> The end of Westminster-style constitutionalism and subsequent transformation of South Africa from a racially divided society into a democratic, racially inclusive society brought with it a decisive break with the past and the arrival of a “new order” based on the ideals of constitutional supremacy.<sup>69</sup>

In a major departure from the previous judicial structure, the 1993 Constitution created a CC which was the court of final instance over all matters relating to the interpretation, protection and enforcement of the Constitution.<sup>70</sup> When read together with section 4 of the Interim Constitution (IC), it declared the Constitution to be the supreme law of the Republic. This provision empowered the judiciary to exercise constitutional review over parliamentary legislation, thereby reversing the history of constitutional law in South Africa.

The adoption of the 1993 and subsequently 1996 Constitution aimed at establishing a society that is based on the rule of law and set out a wide range of non-negotiable powers of the judiciary. Though the principle of separation of powers does not appear anywhere in the text of the 1996 Constitution, this does not mean that the Constitution has no interest in it. Hence, in the *First Certification*<sup>71</sup> Judgment, the CC pointed out that there are no fixed or rigid constitutional requirements for this principle.<sup>72</sup> Rather,

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<sup>66</sup> Section 3 (1)(a) of the Promotion of National Unity and Reconciliation Act no 34 of 1995.

<sup>67</sup> Truth and Reconciliation Commission 1.

<sup>68</sup> Truth and Reconciliation Commission 103 & 105.

<sup>69</sup> *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) para 6.

<sup>70</sup> Section 98(2) of Act 200 of 1993.

<sup>71</sup> *In re: Certification of the Constitution of the Republic of South Africa*.

<sup>72</sup> *In re: Certification of the Constitution of the Republic of South Africa*, para 111.

it is to be found in the provisions explaining the structure and functions of government and how will they work together.<sup>73</sup> The CC has placed judicial independence at the centre of the South African constitutional system and linked it to this principle of separation of powers. The independence of the judiciary manifests itself in the absence of external interference in the assessment of the facts of a case and the application of the law. But institutional and functional independence are equally important.<sup>74</sup> These aspects of independence require the judiciary to be in control of its administration; additionally, decisions that affects its exercise of its judicial work must be handle by the judiciary only, i.e. the budget of the institution, the human resources available to the court, and the way it conduct its business.<sup>75</sup>

Since 1910, South Africa has had a hierarchical court structure. Judicial authority was divided between, on the one hand, the Supreme Court of South Africa (consisting of an Appellate Division and a number of provincial and local divisions) and, on the other hand, a number of lower courts, principal among which were the magistrates' courts.<sup>76</sup> The IC preserved this hierarchy, but created a CC which became the court of final instance in constitutional matters.<sup>77</sup> There are, however, two very important changes in the jurisdiction of the courts under the 1996 Constitution from its jurisdiction under the IC. Under the IC, the Appellate Division had no constitutional jurisdiction at all.<sup>78</sup> Appeals from Supreme Court divisions which concerned only constitutional matters therefore went straight to the CC. The procedural (and doctrinal) implications of the exclusion of the Appellate Division from constitutional jurisdiction were quite complex.<sup>79</sup> Under the 1996 Constitution, the Appellate Division (now the Supreme Court of Appeal (SCA)) has jurisdiction over constitutional matters. This inclusion should simplify Appellate procedures.<sup>80</sup> A second difference lies in the fact that, under the IC, only the CC determines the constitutionality of national legislation. However, under the 1996 Constitution, divisions of the Supreme Court (now known as the High

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<sup>73</sup> *In re: Certification of the Constitution of the Republic of South Africa*, para 111.

<sup>74</sup> Section 165 of the 1996 Constitution.

<sup>75</sup> *De Lange v Smuts No and Others* 1998 (3) SA 785 (CC) para 159.

<sup>76</sup> Currie I & De Waal J 'The Bill of Rights handbook' 6ed (*Juta*, 2014) 92.

<sup>77</sup> Currie I & De Waal J 'The Bill of Rights handbook' 92.

<sup>78</sup> Ajibola B & Van Zyl D 'The judiciary in Africa' 3.

<sup>79</sup> *Gardener v Whitaker* 1996 (6) BCLR 775 (CC).

<sup>80</sup> Ajibola B & Van Zyl D 'The judiciary in Africa' 3.

Court) may make such a decision, but such order of invalidity must be confirmed by the CC before such order will have any binding effect.<sup>81</sup>

The process for appointment of the first 11 members of the court was quite complicated. The first President of the CC, Justice Arthur Chaskalson, was appointed by the President in consultation with the Cabinet and after consultation with the Chief Justice.<sup>82</sup> The IC made a distinction between “in consultation with”, which means with the concurrence or agreement of the parties who are being consulted, and “after consultation with”, which means that consideration must be given to the views of the person consulted but that no agreement is required.<sup>83</sup>

Four judges of the Supreme Court, Justice Mahomed, Justice Ackermann, Justice Madala and Justice Goldstone were then appointed by the President in consultation with the Cabinet and with the CJ.<sup>84</sup> The procedure for the appointment of the final six members of the court required the involvement of the Judicial Service Commission (JSC).<sup>85</sup> The JSC was a new institution established by the IC and entrusted with a variety of responsibilities relating to the judiciary.<sup>86</sup> It comprises 17 members. The 1996 Constitution also provides for a JSC, but with a different composition; in addition to the existing 17 members, a further six members are appointed by the National Assembly, of whom at list three must be from opposition parties within Parliament. In July 1994, the JSC called for nominations for the remaining six seats on the court. Having received nominations, it prepared a shortlist of 25 candidates, who were interviewed in public. Thereafter, it compiled a shortlist of ten names, which was forwarded to the President. The President then selected six of those names in consultation with the Cabinet and after consultation with then the President of the CC, now known as the CJ.<sup>87</sup>

The governance of the South African judicial system has always been somewhat opaque. Traditionally, the executive branch has been responsible not only for the

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<sup>81</sup> Ajibola B & Van Zyl D ‘*The judiciary in Africa*’ 1-4.

<sup>82</sup> Section 97(2)(a) of the IC – the President of the SCA was the CJ, a procedure derived from the apartheid judiciary since there was no Constitutional Court.

<sup>83</sup> Section 233 (3) and (4) of the IC.

<sup>84</sup> Section 105 of the IC.

<sup>85</sup> Ajibola B & Van Zyl D ‘*The judiciary in Africa*’ 2.

<sup>86</sup> Section 105 of the IC.

<sup>87</sup> Ajibola B & Van Zyl D ‘*The judiciary in Africa*’ 4.

magistracy but also for the administration of the superior courts with regard to finance, support staff and logistics, while matters relating more specifically to adjudication, such as the allocation of judges to cases, have been the province of the judiciary: the CJ, judges president and other heads of court.<sup>88</sup> But there has never been a methodical and comprehensive treatment of the subject in legislation or anywhere else.<sup>89</sup> However, governance of the judicial system has been dealt with obliquely in our successive constitutions and piecemeal in legislation such as the Supreme Court Act.<sup>90</sup> Certain significant features of governance, such as the CJ's headship of the judiciary and the nature and extent of the CJ's powers in this regard, were not made explicit but were largely left to custom and convention.<sup>91</sup> Section 242 of the IC envisaged merely the rationalisation of the courts so as to bring them into line with the structure outlined in Chapter 7 of that Constitution. The 1996 Constitution is more ambitious and seems to mandate reform of a far more fundamental kind. A transitional provision, item 16(6) of Schedule 6, envisages the rationalisation of the courts, including their structure and functioning, and of the legislation governing them, with a view to establishing a judicial system suited to the requirements of the 1996 Constitution.<sup>92</sup> Item 16(6) of Schedule 6 requires the Minister of Justice and Constitutional Development (MJCD) to manage the rationalisation of courts, and directs him to act after consultation with the JSC. This rationalisation of courts came as the result of the recently enacted CSAA and the Superior Courts Act.<sup>93</sup> Both these pieces of legislation address aspects of judicial governance and aim at bringing the governance of the judiciary in line with the 1996 Constitution.<sup>94</sup>

### *1.2.3 Establishment of the OCJ*

The judiciary in many African countries is said not to have operational independence because the executive determines the appointment, promotion and remuneration of judicial officers.<sup>95</sup> The prospect of career mobility for judges, therefore, depends

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<sup>88</sup> Hoexter C & Olivier M 'The judiciary in South Africa' 99.

<sup>89</sup> Hoexter C & Olivier M 'The judiciary in South Africa' 99.

<sup>90</sup> No 59 of 1959, which has now been repealed and replaced by the Superior Court Act 10 of 2013.

<sup>91</sup> Hoexter C & Olivier M 'The judiciary in South Africa' 100.

<sup>92</sup> Item 16(6)(a) of Schedule 6 of the 1996 Constitution.

<sup>93</sup> Hoexter C & Olivier M 'The judiciary in South Africa' 101.

<sup>94</sup> Hoexter C & Olivier M 'The judiciary in South Africa' 101.

<sup>95</sup> Madhuku L 'Constitutional protection of the independence of the judiciary: A survey of the position in South Africa' (2002) *Journal of African Law* 46(2): 232-245.

largely on how well they can court and patronise the executive. In most cases, the budget and funds of the judiciary are controlled by a Ministry of Justice (an executive arm of government), which creates bureaucratic procedures in financial matters and the possibility of discriminatory funding to be used against “erring” courts.<sup>96</sup> In that, the executive is clearly able to exercise a degree of control over the judiciary by holding its purse strings. A restricted budget can create inefficiency and, consequently, a lack of public confidence, eventually leading to a situation where the executive can manipulate a weak and unpopular judiciary.<sup>97</sup>

Judicial independence is a privilege of and a protection for, the people. It is essential to consider what the principle of judicial independence means and why that principle is regarded as being of fundamental importance. In any society, there will always be conflicts between the people and government authorities, and among individuals. The essence of a civilised society is the supplanting of violent retaliation or retribution by a system of courts. Quite obviously, if losers believe the judge to be acting according to the dictates of the government or to be partial towards the other party, they are unlikely to accept the verdict of the judge.<sup>98</sup> In 2012, the South African Government incorporated to its law the CSAA, amending the part dealing with the judiciary in the 1996 Constitution.<sup>99</sup>

Another change that this amendment makes to the 1996 Constitution is that the CJ is now a head of the judiciary. The Superior Court Act<sup>100</sup> also gives effect to this changes by outlining the duties of the CJ as the head of judiciary. The leadership of the South African judiciary have resolved to make their own policies, set their own strategic priorities and develop a concomitant implementation matrix to ensure that South Africa has the fundamentals necessary for the realisation of the South African dream in place.<sup>101</sup> Although the OCJ functions independently outside the Department of Justice

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<sup>96</sup> Ruppel OC, ‘*The role of the executive in safeguarding the independence of the judiciary in Namibia*’ available at <[http://www.kas.de/upload/auslandshomepages/namibia/Independence\\_Judiciary/ruppel.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/ruppel.pdf)> (Date accessed: 20 May 2015).

<sup>97</sup> Ruppel OC, ‘*The role of the executive in safeguarding the independence of the judiciary in Namibia*’ 4.

<sup>98</sup> Lee HP & Campbell E ‘*The Australian Judiciary*’ 7.

<sup>99</sup> Section 165 and 166 of the 1996 Constitution.

<sup>100</sup> No 10 of 2013.

<sup>101</sup> De Vos P ‘*Transcript: Chief Justice Mogoeng on the Rule of law in South Africa: Measuring judicial performance and meeting Standards*’ July 25<sup>th</sup> 2013 available at <[www.Google.co.za/judicialtransformation/report/South African/government.html](http://www.Google.co.za/judicialtransformation/report/South%20African/government.html)> (Date accessed: 18 August 2015).



and Constitutional Development (DoJCD), it is still a governmental department inside the executive which is answerable to the Minister of Justice and Cabinet. The OCJ is therefore not an independent institution outside the executive.<sup>102</sup> This study accepts the view that measures implemented through the Presidential Proclamation are temporary in nature but submits that future enactment of legislations and policies that will address what this document seeks to address be clear on this issue.

The creation of the OCJ is the affirmation of government's commitment to the independence of the judiciary. Of interest is the place of the OCJ in this process of implementing the arrangement with the judiciary.<sup>103</sup> The initial legal status of the OCJ was given by a Presidential Proclamation.<sup>104</sup> In terms of this Public Service Act Proclamation, the OCJ has the status of a government department within the public administration. As recognised in both the 2012 African National Congress (ANC) policy document<sup>105</sup> and the Discussion Document, this is a temporary situation.<sup>106</sup> The CJ has been articulating the need for a capable and independent judiciary as a necessary, but not sufficient condition for development in South Africa.<sup>107</sup> The question which then arises is whether, in a positive sense, the OCJ owes its existence to its claim to the capacity to hold the judicial system accountable. This claim to legitimacy has yet to be addressed and yet to be given precise institutional shape, although the broad institutional parameters are already emerging. However, the value of the above analysis is to enable the assessment and facilitation of appropriate interventions as the process of transforming and regulating the judicial system continues.

#### *1.2.4 Transformation of the judiciary*

An independent judiciary to South Africans would imply courts that are not tied to the apron strings of the executive. Courts that are free from political, ethnic or religious pressures and polarisation. Courts that are adequately funded and funded in a way that does not subject the judiciary to be a beggar institution of the executive. Courts

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<sup>102</sup> Klaaren J 'Transformation of the judicial system in South Africa, 2012-2013' (2015) Vol. 47. *The Geo. Wash. Int'l L. Rev* 481, 497.

<sup>103</sup> Klaaren J, 'Transformation of the judicial system in South Africa, 2012-2013' 501

<sup>104</sup> Klaaren J, 'Transformation of the judicial system in South Africa, 2012-2013' 502.

<sup>105</sup> African National Congress 'Peace and Stability Policy Discussion Document 12-19' (2012), available at <<http://www.anc.org.za/docs/discus/2012/peaceev.pdf>>. (Date accessed: 25 May 2015).

<sup>106</sup> Klaaren J, 'Transformation of the judicial system in South Africa' 502.

<sup>107</sup> Klaaren J 'Transformation of the judicial system in South Africa' 502.

that are staffed by the best available brains, attracted therein, apart from by patriotism, by the honour and dignity of the office and by the prevailing, but tempting and enviable, conditions of service. Courts that are not made incapable of (by reason of ignorance, corruption, favouritism, prejudice, fear or favour) delivering a just verdict.<sup>108</sup>

However, a mere inference of separation of powers in the 1996 Constitution does not guarantee the protection of independence of the judiciary. There are other requirements that need to be fulfilled to realise true independence. So, to transform the judiciary of South Africa, special provision must be made for the mode of appointment, conditions of service and security of tenure of judges and the discipline, including the removal from office of judges.<sup>109</sup> In this regard, it means that, for the OCJ to transform the judiciary, radical transformation needs to be a standing item on its agenda.

All courts in South Africa should be required to report to the CJ in writing on the transformation initiatives undertaken by their respective courts during the preceding year. This includes a variety of factors, including building a bench that reflects the demographic population of the country. However, on the independence of the OCJ, an independent judiciary must be at the heart of human rights protection. The OCJ must appreciate that, without an independent, impartial and competent judiciary, there is no credible institution to protect human rights.<sup>110</sup> However, transformation of the judiciary remains an important and often-controversial issue. Justice Masipa alluded that transformation and empowerment goes together.<sup>111</sup> Deputy Minister of Justice and Constitutional Development John Jeffrey stated that transformation is not just about statistical representativeness, but it is also about attitudes.<sup>112</sup> In *Singh v Minister of Justice and Constitutional Development and Others*,<sup>113</sup> the complainant was a

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<sup>108</sup> Eso J 'Judicial independence in the post-colonial era' in Ajibola B & Van Zyl D (eds) 'The judiciary in Africa' *Juta* 120.

<sup>109</sup> Eso J 'Judicial independence in the post-colonial era' 120.

<sup>110</sup> Pillay N 'The 18<sup>th</sup> Commonwealth Law Conference' (14-18 April 2013) *DeRebus* available at <<http://www.derebus.org.za/wp-content/uploads/2016/07/June2013b.pdf>>. (Date accessed: 03 November 2017).

<sup>111</sup> Law Society of the Northern Provinces held its annual general meeting on 9 September 2015 'A time to reflect on radical transformation' *DeRebus* (December 2015) available at <<http://www.derebus.org.za/lsnp-agm-a-time-to-reflect-on-radical-transformation/>> (Date accessed: 03 November 2017).

<sup>112</sup> Law Society of the Northern Provinces held its annual general meeting on 9 September 2015 'A time to reflect on radical transformation' 13.

<sup>113</sup> 2013 (3) SA 66 (EqC).

vision-impaired Indian female who applied unsuccessfully for several posts as a magistrate. She challenged the criteria and process applicable to the appointments of magistrates on the basis that they discriminated unfairly on the grounds of disability. Her argument was that selection criteria used to shortlist candidates were unfairly discriminatory and based on inflexible racial and gender-based preferences. Her disability was not considered, and neither was the need to redress the legacy of discrimination against persons with disabilities.<sup>114</sup>

Transformation of the judiciary in South Africa can be said to address all the negative things in the judiciary that were inherited from the apartheid judiciary. Those things can include imbalances in the judiciary that were caused by apartheid, and therefore, judicial transformation does not have a single meaning.<sup>115</sup> The late CJ Langa suggested that transformation entails “a complete reconstructions of the state and society, including a redistribution of power and resources along egalitarian lines”.<sup>116</sup> The challenge of realising equality within this transformational project is the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality.<sup>117</sup> Racial and gender representation is one aspect of transformation regarding which it is accepted that such representation leads to the fundamental reconstruction of our society.<sup>118</sup> It suffices to say that much progress has been made since 1994 in ensuring that the bench is racially and gender representative, but more can be done to make it more gender representative. However, of more relevance is the gender representation after the establishment of the OCJ.

#### *1.2.5 The South African judiciary's 21-year transformation journey*

The tables below set out the journey that the South African judiciary has undertaken since 1994 to date and how it has implemented its transformation agenda to reflect the demographics of the country:

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<sup>114</sup> 2013 (3) SA 66 (EqC) para 10.

<sup>115</sup> Wesson M & Du Plessis M ‘*The transformation of the judiciary*’ 5.

<sup>116</sup> Husain M ‘Lost in Transformation’ DeRebus (December2013) Issue 537 3.

<sup>117</sup> Husain M ‘Lost in Transformation’ DeRebus (December2013) Issue 537 3.

<sup>118</sup> Wesson M & Du Plessis M ‘*The transformation of the judiciary*’ 8.

Table 1.1 Composition of the judiciary in 1994<sup>119</sup>

Judges: Total	White male	Black male	White female	Black female
166	161	3	2	0

It is quite clear from the above table that pre-democratic era, the judiciary was composed almost entirely of white males, drawn from the privileged ranks of the then ruling minority. Before 1990, only one white female had been appointed as a judge in South Africa, while no black judges had been appointed.<sup>120</sup> The first black male judge, Mahomed, was appointed in 1991. When South Africa became a democracy in 1994, out of 166 judges, 161 were white men, two were white women, three were black men and there were no black women at all, as shown in Table 1.<sup>121</sup> There are many perspectives from which the first 21 years of our democracy can be viewed. This chapter deals with the transformation of the judiciary, with emphasis on the way in which the legal setting has undergone fundamental change. Therefore, this chapter demonstrates that, while democracy has not achieved all that it promises, the 1996 Constitution has brought about huge improvements to the judiciary to reflect constitutional obligations, especially the transformation of the bench from an all-white male-dominated bench, to a bench that represents and reflects the demographics of the country.

Table 1.2 Permanent judges from 1994 to 31 May 2012<sup>122</sup>

Divisions	African		Coloured		Indian		White		Total
	M	F	M	F	M	F	M	F	
Constitutional Court	4	2			1		3		10
Supreme Court of Appeal	7	3	1	1	4		7	3	26
Northern Cape (Kimberley)	2	2		1			2		7
Eastern Cape (Grahamstown & PE)	4	2	1		1		5	3	16

<sup>119</sup> Moerane M 'Judging the judges: Towards an appropriate role for the role of the judiciary in South Africa's Transformation' (2003) *Leiden Journal of International Law* 20 (4): 965, 968.

<sup>120</sup> De Vos P 'South African Constitutional Law in Context' 207.

<sup>121</sup> De Vos P 'South African Constitutional Law in Context' 207.

<sup>122</sup> Mojapelo 'Address of the AGM of the Limpopo Law Council' held at Meropa Hotel, Polokwane, on 7 September 2012 available at <[http://www.derebus.org.za/wp-content/uploads/2015/06/Judge\\_Mojapelo\\_speech.pdf](http://www.derebus.org.za/wp-content/uploads/2015/06/Judge_Mojapelo_speech.pdf)>. (Date accessed: 21 May 2016).

Eastern Cape (Bhisho)	1		1				1	1	4
Eastern Cape (Mthatha)	2	1				1	2		6
Western Cape (Cape Town)	5	1	5	4	1	1	9	2	28
North West (Mafikeng)	1	2	1			1	1		6
Free State (Bloemfontein)	4	2	1			1	5	1	14
North & South Gauteng (Pta & Jhb)	31	8	3	1	3	3	25	7	81
Limpopo (Thohoyandou)	1								1
KwaZulu-Natal (PMB & Dbn)	7	3	2	1	3	4	6	1	27
Labour Court	2	1	1			1	4	2	11
Total	71	27	16	8	13	12	70	20	237

Land Claims Court, Labour Appeal Court, Competition Appeal Court judges are seconded from high courts and therefore their statistics are already included in the above table.

The society wished for in 1994 was founded in equal treatment between races and genders, based on equal enjoyment of fundamental rights and freedom. The 1996 Constitution elaborates this vision and designs a government to honour and realise it.<sup>123</sup> The judiciary, though not exclusive in its transformative obligation, was intended to be an important agent of change.

The 1996 Constitution empowers the judiciary so that it can fulfil its obligation,<sup>124</sup> and reconstitutes the judicial system from one which was subordinate to parliament and bound to uphold executive and legislative actions without regard to their egregious human rights violations, to an independent judiciary “subject only to the Constitution and the law”. The 1996 Constitution mandates that the courts apply the Constitution and the law “impartially and without fear, favour or prejudice”. The 1996 Constitution

<sup>123</sup> Cowan BR ‘*The rationale for more women judges in Canada, the United States and the Republic of South Africa*’ available at <[http://www.wmm.com/filmcatalog/promo/The\\_Rationale\\_for\\_More\\_Women\\_Judges-byRuth\\_Cowan%20.pdf](http://www.wmm.com/filmcatalog/promo/The_Rationale_for_More_Women_Judges-byRuth_Cowan%20.pdf)> (Date accessed: 20 June 2016).

<sup>124</sup> Cowan B R ‘*The rationale for more women judges in Canada, the United States and the Republic of South Africa*’ 12.

gives the judiciary important powers, including the power of judicial review; it established a new court, the CC, to be the apex court and empowers this same court to determine whether Acts of Parliament and the conduct of the President are consistent with the 1996 Constitution.<sup>125</sup> The 1996 Constitution further empowers the CC to confirm or reject lower court decisions that raise a constitutional issue.<sup>126</sup>

Particularly given the judiciary's position and powers as during apartheid, legal provisions protecting the judiciary's independence and granting to the courts the power of review over governmental actions are essential components of the creation of an effective judicial system.<sup>127</sup> Moreover, because political and social conditions change and because judicial reform is an ongoing process, the need to cultivate and defend the independence of the judiciary will never disappear, regardless of the existence of 1996 Constitution and other formal guarantees.<sup>128</sup> The South African judiciary has acquitted itself quite favourably since advent of democracy.<sup>129</sup> The jurisprudence of the CC is highly regarded across the world. It has handed down many seminal judgments such as in the cases of *S v Makwanyane and Another*<sup>130</sup>, *Minister of Health and Others v Treatment Action Campaign and Others*<sup>131</sup>, *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>132</sup> and cases dealing with discrimination based on, among other things, sexual orientation. This study submits that the bench has shown itself to be independent; however, the current concerns around the structure and functioning of the OCJ need to be addressed carefully. To embrace and enforce the principles of a fundamentally new legal order, the underlying attitudes of the judiciary must change.<sup>133</sup>

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<sup>125</sup> Cowan BR 'The rationale for more women judges in Canada, the United States and the Republic of South Africa' 13.

<sup>126</sup> Cowan BR 'The rationale for more women judges in Canada, the United States and the Republic of South Africa' 13.

<sup>127</sup> Maduna P 'Address at the banquet of the judicial officers' symposium' 670.

<sup>128</sup> Gordon A & Bruce D '*Transformation and the independence of the judiciary in South Africa*'

<sup>129</sup> Kathrada A '*Lost in transformation*' available at <http://notices.ukzn.ac.za/content/GetFile.aspx?id=5330>. (Date accessed: 21 May 2015).

<sup>130</sup> 1995 (3) SA 391 (CC).

<sup>131</sup> (No 1) 2002 (5) SA 703 (CC).

<sup>132</sup> 2000 (11) BCLR 1169 (CC).

<sup>133</sup> Klare K 'Legal culture and transformative constitutionalism' *SAJHR* (1998) vol 14 146, 148.

### **1.3 Research aims and objectives**

#### *1.3.1 Research aim*

The aim of this study is to analyse the independence of the newly established Office of the Chief Justice and its role in promoting judicial transformation in South Africa. The valuation includes the creation of an administration of the judiciary that reflects the population of the people and that is dedicated to protecting and upholding South Africa's constitutional values, developing an atmosphere of judicial accountability, and improving the competence and appropriateness of the justice system.

#### *1.3.2 Research objectives*

- (a) To evaluate the historical background of the judiciary in South Africa prior to the 1994 democratic dispensation.
- (b) To examine the Office of the Chief Justice and its mechanisms to determine whether they can operate as an instrument of transformation and social change instead of a bulwark for the protection of vested interests.
- (c) To analyse, over 20 years later, the similarities and differences between the independence of the judiciary prior to the establishment of the Office of the Chief Justice and the latter's current independence principles.
- (d) To examine the challenges relating to the Office of the Chief Justice insofar as the judicial independence is concerned and what is needed to overcome those challenges.

### **1.4 Research methodology**

The study consists predominantly of desktop and literature review, based on scholarly books, articles, case law, legislation and internet-based sources. The research adopts a descriptive, critical and analytical approach.

### **1.5 Hypothesis of the study**

This research is grounded in several hypotheses. The 1996 Constitution is the foundation of a sustainable democracy as it provides for separation of powers between the executive, the legislature and the judiciary. The judiciary should be independent to enforce the Constitution and equally protect human rights. It is the custodian and the

watchdog of the 1996 Constitution and the human rights entrenched therein.<sup>134</sup> This study offers an investigation of the question of the independence of the judiciary in South Africa. It argues that, while few of the recent events that are argued in the study displayed some overwhelming challenges to the judicial independence, South Africa must appreciate the continued threats to judicial independence and make means to defend it from being undermined.

Even though some of the concerns seem to have motivated the Superior Court Act,<sup>135</sup> the CSAA and other actions that potentially threaten judicial independence, independence is crucial to an effectively functioning democracy and should not be sacrificed to achieve other ends.<sup>136</sup> The mere fact that a Constitution that enshrines human rights and the independence of the judiciary exists, no matter how it might have been adopted, or that a country proclaims itself a democratic republic, does not mean that such Constitution is actually enforced, that human rights, that the independence of the judiciary protected and that the country qualifies as a fully-fledged democratic state.<sup>137</sup>

It is considering this extensive notion of transformation that the term “transformative constitutionalism” was coined to describe the style and content of South Africa’s democratic Constitution. While there is no uniform understanding of transformative constitutionalism, Klare describes it compellingly as a long-term project committed to “transforming a country’s political and social institutions: an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.”<sup>138</sup>

CJ Langa saw transformative constitutionalism as a permanent constitutional project involving a commitment to inclusive democratic dialogue and a shared responsibility among the three branches of government in cooperation with civil society.<sup>139</sup> And while no single definition of transformative constitutionalism is likely to satisfy all commentators, there is agreement among them that the text of the 1996 Constitution

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<sup>134</sup> Malan K ‘Reassessing judicial independence and impartiality against the backdrop of judicial appointment in South Africa’ (2014) *PER* 1965, 1967.

<sup>135</sup> Act 10 2013.

<sup>136</sup> Gordon A & Bruce D ‘Transformation and the independence of the judiciary in South Africa’ 40.

<sup>137</sup> Chiduzza L ‘Towards the protection of Human Rights: Do the new Zimbabwean constitutional provisions on judicial independence suffice?’ *PER* (2014) 17-20.

<sup>138</sup> Klare K ‘Legal culture and transformative constitutionalism’ 150.

<sup>139</sup> Hoexter C & Olivier M ‘The judiciary in South Africa’ 68.



provides the basis for transformative constitutionalism.<sup>140</sup> The judiciary is necessarily implicated in achieving the goal of transforming South African society and its various institutions. It is not only one of the institutions requiring to be transformed in terms of the 1996 Constitution but, together with the other branches of government, also has an important role to play in realising the transformation of the legal system and of society more broadly.<sup>141</sup>

## **1.6 Rationale and the importance of the study**

The study is of value and relevance to the independence and judicial transformation within the OCJ debate because of South Africa's continued soul-searching for stability and constitutional democratic governance. If this goal is to be attained, researchers, scholars, legal practitioners and academic writers must dedicate time to enrich constitutional debate. It is through debates and engagements that the search for constitutional stability will be achieved, in line with the principle of the 1996 Constitution of encouraging constitutional and democratic governance and doing away with unconstitutional changes of government.

## **1.7 Limitations of the study**

There are other ways of approaching this topic; indeed, it is significant to note what this study does not attempt to do. This study is not an argument about the content, shape, or direction of the separation of powers doctrine in the South African Constitution. Indeed, closely tied with separation of powers doctrine is the question of what vision of democracy lies behind different conceptions of the judicial system in South Africa.<sup>142</sup> This study is also not an argument in terms of moral reasoning about the regulation of the judiciary.

The study examines the state of constitutionalism and judicial independence immediately after the creation of the OCJ. The study briefly examines the concept of parliamentary sovereignty and covers the period immediately after independence, how things have unfolded since then, divided into the periods between 1990 and 2012 and then from 2012 to date (after creation of the OCJ), which have seen existing

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<sup>140</sup> Pieterse M 'What do we mean when we talk about transformative constitutionalism?' 161-3.

<sup>141</sup> Pieterse M 'what do we mean when we talk about transformative constitutionalism?' 165.

<sup>142</sup> Klaaren J 'Transformation of the judicial system in South Africa' 504.

constitutions being amended. Although the study addresses the issue of promotion of judicial transformation, and the word transformation is a broad concept, only the transformation of the judiciary with relevance to the establishment of the OCJ dominates the discussion by and large.

In scrutinising the question of independence of the judiciary, several factors arise as relevant. These include the strength and length of tenure; the security of conditions of service; the scope and nature of judicial training; and the extent of administrative control over management and finances. The study is, however, in the main, limited to the way in which judges exercise their independence and how they are selected for and appointed to their position. While all these efforts would also be worthwhile, the aim here is more limited to the independence and judicial transformation spearheaded by the newly established OCJ.

## **1.8 Conclusion**

The establishment of the OCJ is a positive step towards a judiciary that is operationally autonomous from the state. The education and training of judges and magistrates have been formalised by the establishment of the South African Judicial Education Institute; diversity in the judiciary is a high priority of the JSC; and mechanisms to ensure judicial accountability have been put in place, including a code of conduct and comprehensive legislation to deal with complaints against judges.<sup>143</sup>

As far as the transformation of the society is concerned, the study engages with “transformative constitutionalism” and “transformative adjudication”. The courts exercising their independence are enjoined to advance the transformative project. By discussing some of the CC’s jurisprudence, the study demonstrates that the court has successfully engaged in transformative adjudication in several cases. The study acknowledges some missed opportunities, where the court failed to advance the elements associated with transformative constitutionalism or engaged in regressive or formalistic reasoning. The study maintains that transformative adjudication has taken root in South Africa.

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<sup>143</sup> Hoexter C & Olivier M ‘The judiciary in South Africa’ 98.

## Chapter 2

### 2 Historical backdrop of judicial independence, examining the role of the judiciary pre-1994

#### 2.1 Introduction

This chapter investigates the concept of judicial independence together with its role in South Africa during apartheid. It is contended that South African history revealed the vulnerability of the judiciary to manipulation even while the pretence of independence was maintained. Apartheid policy was the legal order. The purpose of this chapter is to reflect on the judicial independence in South Africa and the role of the judiciary in entrenching its independence, as well as whether the independence of the judiciary was recognised from the outset. Reflection is done on the judiciary during the period of the Boer Republics, especially in the Transvaal and the Orange Free State, for purposes of trying to determine the development of role of judiciary. Corder's<sup>144</sup> work discusses the period from 1910 to 1950 and Forsyth's research<sup>145</sup> deals with the period from 1950 to 1980. The period from 1910 to 1950 establishes the influential era of the role of the South African Appellate Division, while the period from 1950 to 1980 covers the period of the South African Appellate Division.<sup>146</sup> Therefore, the study attempts to discover judicial developments and approaches in resolution of cases during the apartheid era. The exploration considers the conditions within which the judiciary was operating with the help of a comparative study of other countries.<sup>147</sup>

#### 2.2 The judiciary

Shetreet defines a judiciary as:

An organ of government not forming part of the legislative organs of government, which is not subject to personal, substantive and collective controls and which

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<sup>144</sup> Corder H 'Judges at work-the role and attitudes of the South African judiciary' (1984) available at <<https://www.amazon.com/Judges-Work-Attitudes-Appellate-Judiciary/dp/0702114359>> (Date accessed: 25 May 2016).

<sup>145</sup> Forsyth CF 'In danger for their talents- A study of the Appellate Division of the Supreme Court of South Africa' (1985) *Juta* 278.

<sup>146</sup> Ramaite MS '*The role of the judiciary in a modern state with a tradition of legislative supremacy*' (1996) LLD Thesis, available at <<http://uir.unisa.ac.za/handle/10500/15854>>. (Date accessed: 12 May 2016).

<sup>147</sup> Ramaite MS '*The role of the judiciary in a modern state with a tradition of legislative supremacy*' 41.

performs the primary function of adjudicating legal disputes between the state and legal subjects and between individuals among themselves.<sup>148</sup>

According to the 1983 Constitution, the judiciary was a third branch of the body politic. It was made up of the Supreme Court, composed of the Appellate Divisions, the provincial divisions and the local divisions, and the inferior courts (magistrates' and regional courts).<sup>149</sup> The judiciary's need to be independent had a special mention in the preamble of the 1983 Constitution, which obviously had little practical consequence, just as was the case under the South Africa Act and the 1961 Constitution, since courts had no power to pronounce on the duly enacted legislations of Parliament.<sup>150</sup> However, the major change to the South African judicial system was the establishment of the CC in terms of section 98(1) of the IC.<sup>151</sup>

### **2.3 Development of judicial independence in South Africa**

The history of constitutional law in South Africa is the history of the creation and consolidation of state power. Before the occupation of the Cape by the Dutch-East India Company in 1652, South Africa was inhabited by the indigenous black people.<sup>152</sup> Since the occupation was solely for commercial purposes, they did not establish a government. Between 1652 and 1795, the Cape was governed by a governor, who was the chief representative of the Dutch-East India Company. All three branches of government vested in single body, which was the Political Council.<sup>153</sup> The judicial functions were performed by the Political Council as the Council of Justice. In 1785, a High Court was established which replaced the Council of Justice.<sup>154</sup> From this time until 1806, the Cape was a possession of the Dutch East-India Company, which was, in turn, a subject of the Republic of the United Netherlands.<sup>155</sup> The colony that emerged from the Dutch settlement was to provide a basis for later colonial conquest of the entire region. The epochal changes were brought about by British colonisation during 1806, after they captured the Cape. Roman-Dutch law remained the common

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<sup>148</sup> Shetreet & Deschenes J (eds) 'Judicial independence: The contemporary debate' *Martinus Nijhoff publishers* (1985) 121.

<sup>149</sup> Hosten W J *et al* 'Introduction to South African law and legal theory' Durban Butterworths (1995) 958.

<sup>150</sup> Hosten W J *et al* 'Introduction to South African law and legal theory' 958.

<sup>151</sup> Interim Constitution Act 200 of 1993.

<sup>152</sup> Ramaite MS 'The role of the judiciary in a modern state with a tradition of legislative supremacy' 42.

<sup>153</sup> Ramaite MS 'The role of the judiciary in a modern state with a tradition of legislative supremacy' 42.

<sup>154</sup> Ramaite MS 'The role of the judiciary in a modern state with a tradition of legislative supremacy' 42.

<sup>155</sup> Currie I and De Waal J 'The new constitutional & administrative law' Volume 1 (*Juta*, 2001) 41.

law of the Cape, although there is less, if not nothing, to note about their contribution to constitutional law.<sup>156</sup> For the British colonies, responsible government was a significant step towards autonomy from the colonial power since the governor general became the representative of the British Crown as a head of state, leaving it to the locally elected executive to govern the colony.<sup>157</sup> The governor general, however, had to assent to legislation and his assent has no formality. He could reserve bills for the attention of the British Crown, who acted on the advice of the British government. The British Parliament duly passed the South Africa Act and the Union of South Africa was proclaimed in 1910.<sup>158</sup>

In 1910, the Union of South Africa was a result of a process of unification which brought together under one flag the four British colonies consisting of the two Boer Republic, which were the Transvaal and the Orange Free State, as well as the Cape and Natal.<sup>159</sup> Under the South Africa Act, by which the Union of South Africa was established because of the representatives of the four former British colonies coming together to form a Union. This Union style of government may be described as a “Westminster” Constitution in which there were two houses of parliament.<sup>160</sup> The lower house (House of Assembly) was a representative (elected) body whose members were elected in accordance with the principle of territorial representation. The upper house (Senate) was an indirectly elected body.<sup>161</sup> The supreme executive formed part of the legislature and was responsible to it, and the judiciary was said to be independent of other two branches of government, but was not supreme, since the courts had no power to declare Acts of Parliament invalid.<sup>162</sup>

The development during this period was the constitutional emancipation of the British colonies. The colonial laws placed several constraints on colonial legislatures and

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<sup>156</sup> Currie I and De Waal J ‘The new constitutional & administrative law’ 41.

<sup>157</sup> Currie I and De Waal J ‘The new constitutional & administrative law’ 42.

<sup>158</sup> Currie I and De Waal J ‘The new constitutional & administrative law’ 43.

<sup>159</sup> Maduna PM *The impact and influence of the Constitutional Court in the formative years of Democracy in South Africa* (1997) available at <[http://uir.unisa.ac.za/bitstream/handle/10500/18713/thesis\\_maduna\\_pm.pdf?sequence=1](http://uir.unisa.ac.za/bitstream/handle/10500/18713/thesis_maduna_pm.pdf?sequence=1)>. (Date accessed: 22 June 2016) 22.

<sup>160</sup> Hosten W J *et al* ‘Introduction to South African law and legal theory’ 952.

<sup>161</sup> Hosten W J *et al* ‘Introduction to South African law and legal theory’ 952.

<sup>162</sup> Hosten W J *et al* ‘Introduction to South African law and legal theory’ 952.

executives. Thus, even after 1910, after the Union, South Africa remained technically subordinate to Britain in a few respects.<sup>163</sup>

### 2.3.1 *The relationship between three branches of government pre-Union*

The South African judiciary before the Union did not create sufficient opportunities to express itself on issues of constitutional interest, especially issues concerning the exercise of legislative authority. By 1806, when British colonisers occupied and imposed their public law on the Cape, the doctrine of parliamentary supremacy had come to dominate. To summarise the history of South African constitutional law, the Union Constitution of 1910 created a divided South Africa. In this divided state, the adoption of parliamentary supremacy ensured that the white minority were politically empowered to manipulate the legal system to perpetuate their dominance over South African society.<sup>164</sup>

In 1890, a serious conflict arose between the judiciary and the executive because the Volksraad sometimes legislated by informal resolution or “besluit”. The first encounter erupted when, in the case of *Dom’s Trustee v Bok NO*,<sup>165</sup> Justice Jorissen dissented from the majority decision, holding that the “Grondwet” (Constitution) bound the legislature. President Kruger was convinced that no such intention had been in the minds of the original draftsmen of the Constitution.<sup>166</sup> In the case of *Hess v The State*,<sup>167</sup> that legislation could be assailed on procedural grounds (though the bench would not interfere with the legislature’s decision to dispense with the three months’ notice requirement on the ground of urgency).<sup>168</sup> The decision in the case of *Brown v Leyds NO*<sup>169</sup> triggered a confrontation between President Kruger and CJ Kotze, and Justice Ameshoff expressly declared “besluiten” invalid, on the grounds that sovereignty was vested not in the “Volksraad” but in the people. President Kruger suddenly pushed a Bill<sup>170</sup> through the Volksraad which rejected the role of the courts to use their powers of judicial review and giving the President the right to dismiss any

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<sup>163</sup> Ramaite MS ‘The role of the judiciary in a modern state with a tradition of legislative supremacy’ 57.

<sup>164</sup> Currie I and De Waal J ‘The new constitutional & administrative law’ 46.

<sup>165</sup> (1887) 2 SAR 189.

<sup>166</sup> Currie I and De Waal J ‘The new constitutional & administrative law’ 71.

<sup>167</sup> (1897) 4 OR 17.

<sup>168</sup> Carpenter G ‘Introduction to South African Constitutional law’ 71.

<sup>169</sup> (1897) 4 OR 17.

<sup>170</sup> Act 1 of 1897.

judge who failed or refused to give him the assurance that he would not exercise the testing right.<sup>171</sup> Be that as it may, the President, determined that any sign of a testing power had to be eradicated, procured the adoption of a law stating this categorically and requiring the judges to renounce any claim to such a power.<sup>172</sup>

The history of that era of the Transvaal and the Orange Free State was very brief. Responsible government had hardly been achieved when the drive towards the Union started to gain momentum.<sup>173</sup> Federations had been mooted earlier (both Sir George Grey and Lord Carnarvon had formulated plans for federations in South Africa), but it was only around 1907 that the movement towards unification of the South African colonies became a workable proposition.<sup>174</sup>

### *2.3.2 Period between 1910 and 1961*

Although the previous Constitutions had earlier experimented with different forms of constitutionalism, the Union Constitution followed the Westminster pattern. Firstly, the Union government consisted of two houses: a directly elected House of Assembly and a Senate, consisting of a mix of nominated members and members indirectly elected by the House of Assembly and the provincial legislatures.<sup>175</sup> But provincial powers were limited in that no ordinance passed by a Provincial Council would be of any effect to the extent that it conflicted with an Act of Parliament, while provincial laws would come into effect only once they had received the assent of the Union Cabinet.<sup>176</sup> Another feature of the Union Constitution was parliamentary supremacy. This doctrine has two aspects. Firstly, Parliament may make or unmake any law it chooses without substantive constraint. Secondly, with Parliament as supreme branch, no other organ of state has powers that can prevail over those of Parliament and all other legislative bodies and organs of state (including courts) are subordinate to the national Parliament.<sup>177</sup> This meant that the judiciary under the Union Constitution had no power or say in the placing of government to certain procedural limitations.

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<sup>171</sup> Maduna PM 'The impact and influence of the Constitutional Court in the formative years of Democracy in South Africa' 29.

<sup>172</sup> Carpenter G 'Introduction to South African Constitutional law' 71.

<sup>173</sup> Carpenter G 'Introduction to South African Constitutional law' 71.

<sup>174</sup> Carpenter G 'Introduction to South African Constitutional law' 73.

<sup>175</sup> Currie I and De Waal J 'The new constitutional & administrative law' 43.

<sup>176</sup> Section 86 & 90 of the Union Constitution.

<sup>177</sup> Currie I and De Waal J 'The new constitutional & administrative law' 44.

### 2.3.3 *The Republic of South Africa under the 1961 Constitution*

The republican ideal had been cherished by the National Party of South Africa for many years, and immediately after the party came into power in 1948, the achievement of a republic was one of its priorities.<sup>178</sup> The principle laid down in the first and second *Harris*<sup>179</sup> cases was accorded statutory recognition in section 59 of the 1961 Constitution. This section provided that the Republican Parliament was “the sovereign legislative authority in the Republic”, and section 59(2) stated that the courts would possess a testing right, but only in respect of legislation purporting to amend or repeal sections 108 and 118.<sup>180</sup> What the 1961 Constitution did was merely to formalise the status of Parliament as a sovereign law-making body. Clearly, the South African constitutional system in terms of the 1961 Constitution was largely a replacement of the Westminster-style constitutional system.

## 2.4 The South African constitutional system as a Westminster system

### 2.4.1 *A Westminster Constitution*

The term “Westminster system of government” is used for that system which developed in Britain (the British Parliament being situated at Westminster).<sup>181</sup> South Africa was characterised with this system in the sense that it transferred to the system by reason of being British colony. At the heart of the Westminster model is the legislative branch, namely Parliament. In Britain, Parliament comprises the House of Commons (the directly elected lower house) and the House of Lords (the unelected upper house).<sup>182</sup> Parliament is of central importance because it exercises sovereign or supreme law-making powers. This means that any law made by Parliament cannot be undone by anybody or any organ except by Parliament itself.<sup>183</sup> The 1983

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<sup>178</sup> Hosten W J *et al* ‘Introduction to South African law and legal theory’ 953.

<sup>179</sup> *Harris v Minister of the Interior* 1952 (2) SA 428 (A). The first *Harris* case, which arose from the adoption of the Separate Registration of Voters Act in 1951, the legislation in terms of which coloured voters in the Cape Province were placed in the usual manner (by an ordinary majority in a bicameral sitting). The validity of the law was challenged by a coloured voter, and the matter eventually fell to be decided by the Appellant Division. It was held that the adoption of the Statute of Westminster had had no effect on the entrenched clause and dismissed the argument that a sovereign parliament cast in the Westminster mould could not be subject procedural restrictions and remain sovereign.

<sup>180</sup> Section 59 of the Constitution of 1961.

<sup>181</sup> Carpenter G ‘Introduction to South African Constitutional law’ 74.

<sup>182</sup> De Vos P & Freedman W ‘South African Constitutional Law in Context’ *Oxford University Press* (2014) 31.

<sup>183</sup> De Vos P ‘Freedman W, South African Constitutional Law in Context’ 42.



Constitution displayed certain important deviations from the Westminster model. The state President and the Office of Prime Minister were replaced by an executive State President who was both head of state and head of government. Just like the 1961 Constitution, the 1983 Constitution was also a written Constitution.<sup>184</sup> There was a tricameral parliament consisting of three “lower” houses, wherein provision was made for a multi-party Cabinet. However, several cardinal features of the Westminster system remained, for example, the parliamentary procedures which are peculiar to the Westminster system.<sup>185</sup>

#### *2.4.2 The effect of parliamentary supremacy on the courts*

Parliamentary sovereignty, or “legislative supremacy” as it is sometimes called, is generally regarded as the most important characteristic of the Westminster system of government. According to Dicey,<sup>186</sup> the sovereignty of Parliament means that there is no topic on which Parliament is not competent to legislate; that no other body (including the courts) is competent to declare Acts of Parliament invalid; and that no Parliament is competent to impose restrictions on itself which bind its successors. To the Westminster constitutional model, parliamentary government means that the executive branch of government, namely the Prime Minister and the Cabinet, are all drawn from and continue to be members of Parliament.<sup>187</sup> The Prime Minister and his or her Cabinet thus serve as members of the legislature and as members of the executive at the same time. There is no strict separation of powers between the legislature and the executive.<sup>188</sup>

The courts’ function in this model must be viewed considering the doctrine of parliamentary supremacy. As an incidence of parliamentary supremacy, courts under this model enjoy no powers to decide on the constitutionality of legislation, although they may review administrative decisions of the administration.<sup>189</sup> The effect of this limitation on the courts’ powers is that it causes them to serve the interest of Parliament to the detriment of fundamental rights and judicial independence. So, in terms of the parliamentary supremacy, Parliament remains the supreme legislative authority, no

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<sup>184</sup> Carpenter G ‘Introduction to South African Constitutional law’ 81.

<sup>185</sup> Carpenter G ‘Introduction to South African Constitutional law’ 81.

<sup>186</sup> Dicey A V ‘Introduction to the Constitution’ 10<sup>th</sup> ed (MacMillan, London, 1965) 75.

<sup>187</sup> De Vos P & Freedman W ‘South African Constitutional Law in Context’ 43.

<sup>188</sup> De Vos P & Freedman W ‘South African Constitutional Law in Context’ 43.

<sup>189</sup> De Vos P & Freedman W ‘South African Constitutional Law in Context’ 43.

other body could make laws superior to its laws, and no other body (including the courts) could question the validity of duly enacted parliamentary enactments.<sup>190</sup>

## 2.5 Role of the judiciary prior to democratic Constitutions

Any understanding of the judicial role during apartheid years must start with the undeniable fact that, save in very limited circumstances already discussed, the judges had no power to review or quash statutes. Thus, they were obliged to merely apply the legislation as laid down by Parliament, however unjust or abhorrent it might be in their own views. On taking office, they swore an oath to “administer justice to all persons alike without fear, favour or prejudice, and, as the circumstances of any particular case may require in accordance with the laws and customs of the Republic of South Africa”.<sup>191</sup> The judges had been born and brought up under a Constitution founded upon the sovereignty of Parliament. Section 59 of the South Africa Act, 1909 (the Constitution of South Africa) required order and good government of the Union.<sup>192</sup> The Appellate Division had held prior to the apartheid years, in *Sachs v Minister of Justice*<sup>193</sup> that it was a “plain principle that Parliament may make any encroachment it chooses on the life, liberty or property of any individual subject to its sway”.

### 2.5.1 The doctrine of separation of powers (*the trias politica*)

The *trias politica* is usually attributed to the French philosopher Montesquieu, but in fact his work, which appeared in 1748, was based largely on the idea of English philosopher John Locke.<sup>194</sup> Indeed, the concept of a division of governmental powers may be traced as far back as Aristotle. Montesquieu, however, put forward the idea that the functions of government may be divided into three branches of government, which are legislation, executive action or administration, and the administration of justice,<sup>195</sup> though it is universally accepted that the state authority is divided among the legislature, the executive and the judiciary. Although the idea of dividing the power of the state into different functions had been suggested by other political philosophers before Montesquieu, it was Montesquieu who identified the judiciary’s power to resolve

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<sup>190</sup> Hosten W J *et al* ‘Introduction to South African law and legal theory’ 965.

<sup>191</sup> Hoexter C & Olivier M ‘The judiciary in South Africa’ 30.

<sup>192</sup> Hoexter C & Olivier M ‘The judiciary in South Africa’ 30.

<sup>193</sup> 1934 AD 11-37, ACJ Stratford.

<sup>194</sup> Carpenter G ‘Introduction to South African Constitutional law’ 156.

<sup>195</sup> Hosten W J *et al* ‘Introduction to South African law and legal theory’ 965.

disputes as a separate state function and treated it as a form of power equivalent to the legislative and executive power.<sup>196</sup> Montesquieu argued that, “if the judiciary power is not separated from the other two branches, then there is no liberty.” So, it goes without saying that, for the judiciary to perform its functions, it must be as independent as possible from other branches of government.

### 2.5.1 (a) *The meaning, significance and importance of the independence of judiciary*

The principle of judicial independence is fundamental to the discharge of judicial functions. In this regard, the CC, through Justice Ackermann, acknowledged that:

Judicial independence ... is fundamental to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law. This independence, of which structural independence is an indispensable part, is expressly proclaimed, protected and promoted by subsections (2), (3) and (4) of section 165 of the Constitution.<sup>197</sup>

So, protected in this way, the principle of judicial independence ensures that the judiciary can carry out its role as guardian of the Constitution without fear or favour and inspires public confidence in its ability to do so.<sup>198</sup> The purpose served by the judicial independence is that it prevents too great a concentration of power in one official or even in one body. Thus, only the legislature can make laws; only the executive can implement these laws and only the judiciary can enforce the acts of both legislature and executive.<sup>199</sup> An important feature of the doctrine, especially in the United States of America (USA), is the concept of “checks and balances”, whereby the three branches exercise control on one another. For example, the courts ensure that the legislature (Congress) does not adopt legislation that is unconstitutional.<sup>200</sup> Judges are nominated by the President, who is part of the executive, but judicial appointments must be ratified by the Senate (part of the legislature). These checks and balances mean that one branch of government cannot interfere with the functions of another or “cross-delegate” powers and functions.<sup>201</sup> However, a total separation whereby all three branches of government are kept in isolation from one another in watertight

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<sup>196</sup> Joubert W A *et al* ‘The law of South Africa’ Volume 5 Part 3 (LexisNexis Durban, 2012) 7-9.

<sup>197</sup> *De Lange v Smuts NO and Other* 1998 (3) SA 785 (CC) para 59.

<sup>198</sup> Hoexter C & Olivier M ‘The Judiciary in South Africa’ 102.

<sup>199</sup> Hosten W J *et al* ‘Introduction to South African law and legal theory’ 965.

<sup>200</sup> Hosten W J *et al* ‘Introduction to South African law and legal theory’ 965.

<sup>201</sup> Hosten W J *et al* ‘Introduction to South African law and legal theory’ 965.

compartments so that each functions entirely independently of the others would not only be impractical, but would also defeat the objective of this doctrine, which is to ensure that a proper balance between the branches is maintained.

### *2.5.1 (b) The attributes of judicial independence*

The term “independence of the judiciary” has two distinct meanings. The first, which relates to the concept of separation of powers, is that only the judicial branch of government should discharge those functions, free from interference by the other two branches. The second meaning is that individual members of the judiciary should be insulated from external factors, both negative and positive, that might influence them in deciding cases impartially.<sup>202</sup> All the rules securing the independence and impartiality of the judiciary try to ensure that, when judges decide cases, they do so with complete objectivity, taking into consideration only the legal merits of the case concerned and no other factors.<sup>203</sup> These attributes are include but are not limited to: the appointment of judges; the judicial oath they take upon appointment; their security of tenure; financial security; limitation of civil liability; the rule against bias; office of profit; and political non-involvement.<sup>204</sup> These are a number of features that determine the extent of the independence of the judiciary. Next, a look is offered into how the judiciary was protected in the previous dispensation.

### *2.5.2 The exercise of independence by the apartheid judiciary*

#### *2.5.2 (a) Appointment*

The appointment of judicial officers was regulated by section 10(1)(a) of the Supreme Court Act, which empowered the State President (acting, by convention, on the advice of the Minister of Justice) to appoint “fit and proper persons” to the bench. No other qualifications were prescribed by the Act, which suggests that the executive had a free hand in deciding whom to elevate to judicial rank.<sup>205</sup> It is evident that the decision rested almost entirely with the executive and that it was manipulated from time to time to ensure “rebalancing” to reflect the majority opinion in the Houses of Parliament. In

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<sup>202</sup> Boule L et al ‘Constitutional and administrative law: Basic Principles’ (Juta, Cape Town, 1989) 200.

<sup>203</sup> Boule L et al ‘Constitutional and administrative law: Basic Principles’ (Juta, Cape Town, 1989) 200.

<sup>204</sup> Boule L et al ‘Constitutional and administrative law: Basic Principles’ (Juta, Cape Town, 1989) 200.

<sup>205</sup> Ramaite MS ‘The role of the judiciary in a modern state with a tradition of legislative supremacy’ 200.

addition, even though the Supreme Court Act made it possible for any “fit and proper person” to be appointed to the bench, there has been an effective monopoly on judgeships by the Bar, as broadly defined, throughout the history of South Africa.<sup>206</sup>

Most important, and the only means of accountability derived from the apartheid era, is the fact that the administration of justice generally took place in public and that reasoned judgments had to be handed down for judicial decisions, which are themselves subject to public scrutiny, both in the media and through academic commentary. Judicial accountability was, on the other hand, properly balanced by the system of security of tenure, which provided that no judge might be dismissed from office, except in extremely rare circumstances, until retirement at the age of 70.<sup>207</sup> It is argued that the appointment process during apartheid was not transparent and free from influence, since there was no neutral body outside the executive that played a part in the appointment of judges. The free hand of the executive to decide on whom to appoint made sure that judges who were appointed to the bench guaranteed allegiance to the executive rather than the law.

#### 2.5.2 (b) *The judicial oath*

Upon appointment, a judge had to take an oath prescribed by section 10(2)(a) of the Act, in terms of which he or she assumed the obligation to “administer justice to all persons alike without fear, favour or prejudice, and in accordance with the law”. The oath required judges to decide any case that comes before them on its legal merits and without showing either favour or disfavour to the litigants.<sup>208</sup> In short, judges swore to decide all cases independently. However, this meant that judges violated their judicial oath simply by agreeing with the repressive laws and showing favour to the apartheid government.

#### 2.5.2 (c) *Security of tenure*

It goes without saying that judges would not be completely independent if they were concerned that, should they decide against the interests of the executive branch, they might be dismissed from office. For this reason, judges enjoyed security of tenure,

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<sup>206</sup> Kahn E ‘The Quest for Justice: Essays in Honour of Michael McGregor Corbett’ *Juta* (1995) 135

<sup>207</sup> Gordon A & Bruce D Transformation and the independence of the judiciary in South Africa’ 136.

<sup>208</sup> Boule L *et al* ‘Constitutional and Administrative law’ 201.

which means that they could only be dismissed from office in exceptional circumstances. Until 1989, the only way in which a judge could be removed was in accordance with the provisions of section 10(7) of the Supreme Court Act, whereby a judge may be dismissed by the State President only if all three Houses of Parliament have called for dismissal, which they may do only on grounds of misbehaviour or incapacity. Boule<sup>209</sup> argues that no South African judge has ever been removed from office and so, in the normal course of events, despite the summary dismissal of CJ Kotze by President Kruger in the pre-Union era,<sup>210</sup> judges mostly worked until their retirement. This is because judges supported the government laws and were reluctant to review its laws seemingly because they were agreeing with them.

However, even if they did want to give judgments against the ruling party, judges were not protected from arbitrary treatment by government, since their conditions of service were contained in ordinary legislation.<sup>211</sup> This ordinary legislation was easy to amend, and, in theory, there was nothing which prevented the legislature from amending or repealing the provisions dealing with the security of tenure. The government created a system of domination which styled a pragmatic oligarchy. While the entire system rested upon an irrational criterion of biological differentiation, it was maintained by a programme of legislation which was rationally conceived and administered. This legal system was complemented by the recognition that the pragmatic oligarchy operated effectively by means of highly refined legal-bureaucratic devices of control. Therefore, it goes without saying that Parliament was so supreme that there was not a single judge who would even think of applying the law against its wishes. It was clear that judges accepted the notion that their role was to apply the law and not to question it.

#### 2.5.2 (d) *Financial security*

Fear of reduction in salary constitutes as great a threat to judicial independence as fear of dismissal, and for that reason judges enjoyed financial security. Section 10(1)(a) of the Supreme Court Act provided that a judge's remuneration shall not be reduced during office. Their salaries were regulated by the Judges' Remuneration and

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<sup>209</sup> Boule L *et al* 'Constitutional and Administrative law' 202.

<sup>210</sup> Maduna PM 'The impact and influence of the Constitutional Court in the formative years of Democracy in South Africa' 30. The dismissal came as a result of the reminder made by CJ Kotze about government's procrastination in dealing with amendments to the Grondwet in order to guarantee the independence of the judiciary, which resulted in his dismissal from the bench.

<sup>211</sup> Judges' Remuneration and Conditions of Employment Act no. 88 of 1989.

Conditions of Employment Act.<sup>212</sup> In terms of section 2 of the Act, judicial salaries (which were not taxable) were determined by the State President. However, regulating the position of the judiciary by constitutional norms ensures greater judicial independence; financial security is better guaranteed when it is constitutionally guaranteed.

It is clear in these instances that judges were faced with a predicament in that their decisions merely rubber-stamped the wishes of the government. Even when a judge was determined to be independent from executive or legislature, the precedent the government made against that was overwhelming. The *Brown* case is an example of the unhealthy relationship between the judiciary and executive which resulted from unpopular decisions. After the passing of the Volksraad law which declared the Volksraad laws valid, all judges and landdrosts were required to swear an oath before joining the bench that they would not rule against the validity of legislation of the Volksraad.<sup>213</sup> This, however, hampered judges' independence because, in order to ensure that judges perform their duties effectively, it is important for government to ensure that laws are in place to protect them to exercise their functions without fear or favour of any person.

#### 2.5.2 (e) *Limitation of civil liabilities*

To discharge their function, judges must be secure in the knowledge that they will incur no civil liability for what they say or do in the line of duty. For example, the freedom a judge must enjoy to deliver judgment against someone would be severely prejudiced if he or she could be sued in delict for delivering a judgment which was not in accordance with the law, but which the judge in good faith believed was in accordance with the law when he or she delivered it.<sup>214</sup> The reason for this rule is obvious, as the judicial task would be made impossible if a judge could be sued for defamation every time he or she expressed unfavourable views about a litigant while delivering

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<sup>212</sup> Act 88 of 1989.

<sup>213</sup> Ramaite MS 'The role of the judiciary in a modern state with a tradition of legislative supremacy' 62.

<sup>214</sup> *Penrice v Dickenson* 1945 AD 6. It was held that delictual damages will not be awarded against a judicial officer (whether a judge or magistrate) unless it is shown that he acted with malice. This principle was applied in *May v Udwin* where it was held that a judicial officer can raise the defence of qualified privilege to a defamation action and will be liable for defamatory statements only if the plaintiff can prove that the judicial officer was malicious in what he said, that is, that he was actuated by personal spite, ill-will or an improper, unlawful or ulterior motive.

judgment, or made an adverse finding regarding the credibility of a witness.<sup>215</sup> During apartheid times, section 25(1) of the Supreme Court Act afforded judges a different kind of immunity. In terms of this section, no civil summons or subpoena could be issued against a judge without the permission of the court out of which the process was to be served.<sup>216</sup> The reason why such permission was needed is not entirely clear and it has also never been tested, but it is submitted that it might be the fact that it intended to protect judges from unwarranted attacks against them.

#### 2.5.2 (f) *The rule against bias*

The concept of judicial independence includes the principle that a judicial officer should have no interest in the outcome of a case before him or her, a principle which is often expressed in the form of the maxim “*nemo iudex in sua causa*”. The practical implications of this principle are that, where a judge (or a member of his or her immediate family) has any financial interest, however slight, in the outcome of a case, he or she must recuse him- or herself.<sup>217</sup> Much research has been conducted in recent times into the appointment of South African judges, their social background and the decisions they make, in an attempt to discover first whether the executive is biased in whom it appoints to the bench, and secondly, whether judges are subject to a significant (albeit subconscious) bias because of their personal and political background.

Controversy surrounded the appointment of six additional judges of appeal to the Appellate Division by the National Party government during the constitutional crisis of the 1950s, and the elevation of LC Steyn to the office of Chief Justice a few years later.<sup>218</sup> Both events have been cited as examples of the executive appointing to the appeal court judges sharing its political philosophy. It should also be remembered that the legislature increasingly restricted the scope within which the judiciary can act,<sup>219</sup>

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<sup>215</sup> Boule L *et al* ‘Constitutional and Administrative law basic principles’ 203.

<sup>216</sup> Boule L *et al* ‘Constitutional and Administrative law basic principles’ 203.

<sup>217</sup> *Dimes v Grand Junction Canal Proprietors* (1852) 2 HLC 759, 10 ER 301, where a decision by the Lord Chancellor was set aside claiming he owned shares in the canal company in whose favour he had given judgment.

<sup>218</sup> Boule L *et al* ‘Constitutional and Administrative law basic principles’ 205.

<sup>219</sup> The Ouster (or, ‘privative’) clauses are legislative provisions which are intended to prevent the court from exercising its review jurisdiction over specified administrative decisions. When effective, they give the administration carte blanche to act as it pleases, without regard for the standard of legality which judges set for the conduct of those in public office: authorisation, regularity, fairness and reasonableness. A typical example is the clause appearing in s 29 (6) of the Internal Security Act 74



with the result that South Africa had a generally independent judiciary whose effectiveness was reduced because of its diminished jurisdiction to inquire into the legality of governmental actions.

Finally, it is necessary to mention that judges must not only be impartial but must be seen to be impartial. For this reason, a person who impugns the integrity of a judge, thereby diminishing the standing of the judiciary and public respect for the courts, was held criminally liable for contempt of court. This did not, of course, prevent people from criticising judicial actions in good faith, but only if they imputed improper motives, partiality or unfairness to a judge where they were found liable for contempt.<sup>220</sup>

### 2.5.2 (g) *Offices of profit*

A further rule securing the judicial independence was contained in section 11 of the Supreme Court Act, which prohibited a judge from holding any office of profit or receiving any other remuneration in respect of services provided, apart from the salary he or she earned as a judge. To be completely independent, it was thought to be necessary that a judge should be in no one else's employ and should not be bound to perform services for gain, as this might affect his or her ability to decide cases in a wholly objective manner.<sup>221</sup> That condition was over and above allegiance to the apartheid regime.

## 2.6 Conclusion

It is clear from the above principles that, during apartheid, the courts retained their formal independence. However, it should not be overlooked that there were many occasions on which a court, faced with a choice, chose to adopt the most pro-executive interpretation of the law.<sup>222</sup> In other words, the judiciary facilitated the implementation of apartheid policy. Pre-apartheid South Africa was not a legal utopia. There was injustice aplenty and a legal culture that did not favour racial equality.<sup>223</sup> It is evident that, throughout the apartheid era, the judiciary enjoyed many of the formal structural

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of 1982, which states that "No court of law shall have jurisdiction to pronounce on any action taken in terms of this section, or to order the release of any person detained in terms of the provisions of this section".

<sup>220</sup> Boule L *et al* 'Constitutional and Administrative law basic principles' 206.

<sup>221</sup> Boule L *et al* 'Constitutional and Administrative law basic principles' 206.

<sup>222</sup> Hoexter C & Olivier M 'The judiciary in South Africa' 66.

<sup>223</sup> Gordon A & Bruce D 'Transformation and the independence of the judiciary in South Africa' 25.

protections of independence. For instance, courtrooms were generally open to the public, and although career advancement may have “depended on not incurring the political displeasure of politicians”, all judges had security of tenure and of salary. No judge of South Africa was ever removed from office during the apartheid years.<sup>224</sup>

The previous South African Constitutions claimed the authority of the white citizens only, justifying the exclusion of others by means of arguments based on sophistry. Fundamental psychological truths were ignored, such as the fact that laws which the public do not believe in are ultimately doomed to failure, no matter how draconian their enforcement.<sup>225</sup> The legitimacy crisis troubling the South African judiciary prior to 1994 must be laid largely at the door of the legal system itself. If the entire legal order is perceived to be illegitimate, it is difficult, if not impossible, for one branch of government functioning within that order to maintain its credibility. The fact that the courts managed to achieve as much respect and acceptance as they did among the public at large, including the excluded majority who had no say in the laws the courts were enforcing, redounds to the credit of the judges and magistrates serving during that period.<sup>226</sup> However, there was a necessity for the birth of a new politico-legal system which was supported by the new constitutional order, characterised by clear enforcement of the need of separation of powers. The mere mentioning of the separation of powers would not be enough, but the clear and enforcement and respect thereof would certify the modern constitutional order.

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<sup>224</sup> Gordon A & Bruce D ‘Transformation and the independence of the judiciary in South Africa’ 25.

<sup>225</sup> Carpenter G ‘Public opinion, the judiciary and legitimacy’ 110.

<sup>226</sup> Carpenter G ‘Public opinion, the judiciary and legitimacy’ 111.

## **Chapter 3**

### **3 Evaluation of the independence of the Office of the Chief Justice and its transformation in post-apartheid South Africa**

#### **3.1 Introduction**

South African history, as discussed in the previous chapter, demonstrated a need for a new constitutional dispensation. Despite countless changes that have occurred in the country under the new dispensation, there is still more that needs to be done to transform the South African society towards the vision and spirit of the new Constitution. There is no doubt that the CSAA presents an interesting change which has the potential to take the South African past to a new era if implemented well. The CSAA has been described as a transformative document because it lays the foundation for transformation of the judiciary from all previous orders. The 1996 Constitution has not only opened new horizons of making the judiciary a separate governmental department, but has also created emerging constitutional contestations as scholars, politicians, lawyers and courts go through the process of understanding it. However, this chapter tries to find the importance of the independence of the OCJ to achieve in its role as a transformative agent. The objective is to establish several influences that may have a power in facilitating or injuring the process of transformation, as the results of the independence of the OCJ are a concern.

#### **3.2 Independence of the judiciary in a democratic South Africa**

The seventeenth amendment to the 1996 Constitution has some unusual features as it was preceded by an agreement between different parties. These different parties agreed on a few constitutional principles, and a constitutional assembly had to draft a Constitution on these principles. As a result, the CC had to certify that the Constitution complied with them.<sup>227</sup> It seems, however, that several points enjoyed widespread approval at the time of the multi-party negotiating process. Firstly, the system used in the past to appoint judges was considered unacceptable and would have to be replaced.<sup>228</sup> Secondly, some form of advisory body, either a JSC or Judicial

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<sup>227</sup> Harms LTC 'Transparency and accountability in the judicial appointment process' 37.

<sup>228</sup> Corder H 'The judiciary and a Bill of Rights in a changing South Africa' in 'The quest for Justice' Essays in honour of Michael McGregor Corbett Chief Justice of the Supreme Court of South Africa' by Khan E (*Juta*, 1995) 135.

Appointments Advisory Committee, would have to be appointed to help in the process of selection of candidates for judicial office.<sup>229</sup> Thirdly, a role would have to be found for the legislature to ensure a level of public legitimacy in a democratic system. Fourthly, the composition of the advisory body referred to above becomes of prime importance in light of the high political profile cases which the judiciary would have in government in the future.<sup>230</sup> Fifthly, in regard to the criteria for the appointment of persons to judicial office, besides the normal requirements of knowledge of the law, honesty, and sobriety and so on, probably the most important factor in a transitional South Africa is that the bench should be diversified to reflect the overall population of the country as soon as possible.<sup>231</sup> In a nutshell, this means that the 1996 Constitution should be in a position to correct all the negative processes that caused imbalances by undemocratic South Africa.

### *3.2.1 Independence of the South African judiciary post-1994 (prior to the establishment of the OCJ)*

Judicial independence is inextricably linked to the separation of powers, which in South Africa is not absolute since it allows some degree of overlap between the three branches of government.<sup>232</sup> However, the 1996 Constitution has placed the judicial independence at the heart of the constitutional system and linked it to the principle of separation of powers.<sup>233</sup> However, judicial independence is measured by an objective standard based on whether a well-informed, thoughtful and reasonable person would perceive a court to be independent.<sup>234</sup> This perception has to be based on a balanced view of all the material information, with the objective observer being sensitive to South Africa's complex social realities. Judicial autonomy is protected in different ways by different countries in the world. However, section 165 of the 1996 Constitution is specifically designed to deal with the countries' judicial authority. CJ Chaskalson, when he was dealing with section 165 of the 1996 Constitution, elaborated on the

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<sup>229</sup> Corder H 'The judiciary and a Bill of Rights in a changing South Africa' 137.

<sup>230</sup> Corder H 'The judiciary and a Bill of Rights in a changing South Africa' 137.

<sup>231</sup> Corder H 'The judiciary and a Bill of Rights in a changing South Africa' 137.

<sup>232</sup> Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) paras 106-113.

<sup>233</sup> Seedorf S & Sibanda S 'Separation of powers' in Woolman S & Bishop M (eds) 'Constitutional law in South Africa' 2<sup>nd</sup> Ed (*Juta*, 2013, revision services) 12-28).

<sup>234</sup> *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC)/ 1999 (7) BCLR 725 (CC) (SARFU II) para 48. The test was subsequently confirmed in the case of *Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC)/ 2002 (8) BCLR 725 (CC) paras 33.34.

significance of this section in the democratic country.<sup>235</sup> He highlighted that the section states that the judicial authority of South Africa belongs to the courts and nothing else.<sup>236</sup> Section 167 of the 1996 Constitution, before the Seventeenth Amendment, stated that the “CC is the court of final jurisdiction in all constitutional matters”.<sup>237</sup> It had no jurisdiction in matters that were not connected with the Constitution.

However, there were two very important changes in the jurisdiction of the courts under the 1996 Constitution from its jurisdiction under the IC. Under the IC, the Appellate Division had no constitutional jurisdiction at all.<sup>238</sup> The appeals from Supreme Court divisions which concerned only constitutional matters therefore went straight to the CC. Under the 1996 Constitution, the Appellate Division, now known as the SCA, has jurisdiction over constitutional matters.<sup>239</sup> The other difference lies in the fact that, under the IC, only the CC could determine the constitutionality of the national legislation. However, under the 1996 Constitution, divisions of the SCA (now known as the High Court) may make such a decision, but such order will only be of force once confirmed by the CC.<sup>240</sup> There can be no doubt that the role of the CC as the court of final instance in respect of the enforcement and protection of the fundamental rights enshrined in the 1996 Constitution is particularly important. The wording on the 1996 Constitution is clear that courts are independent from any outside sources and subject only to the Constitution and the law.<sup>241</sup>

### *3.2.2 International and regional recognition of independence of the judiciary*

There are several international and regional instruments that make general reference to the concept of judicial independence.<sup>242</sup> These instruments concern themselves

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<sup>235</sup> Klare K ‘Legal culture and transformative constitutionalism’ *SAJHR* (1998) 146, 149.

<sup>236</sup> Van der Westhuizen ‘A few reflections on the role of the courts, government, the legal profession, universities, the media and civil society in a constitutional democracy’ 256.

<sup>237</sup> Section 167 of the 1996 Constitution before the Constitution Seventeenth Amendment Act.

<sup>238</sup> O’Reagan C M E ‘The enforcement and protection of Human Rights: The role of the Constitutional Court in South Africa’ in Ajibola B & Van Zyl D ‘The judiciary in Africa’ (1998) *Juta* 1, 4.

<sup>239</sup> O’Reagan C M E ‘The enforcement and protection of Human Rights: The role of the Constitutional Court in South Africa’ 4. This inclusion should simply be for appellate procedures.

<sup>240</sup> O’Reagan C M E ‘The enforcement and protection of Human Rights: The role of the Constitutional Court in South Africa’ in Ajibola B & Van Zyl D ‘The judiciary in Africa’ 5.

<sup>241</sup> Section 165 (5) of the 1996 Constitution.

<sup>242</sup> For example, Article 10 of the Universal Declaration of Human Rights (1948) available at <<http://www.un.org/en/universal-declaration-human-rights/>>. (Date accessed 12/04/2015); Article 14(1) of the International Covenant on Civil and Political Rights (1966) available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>>. (Date accessed 12/04/2015); Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental

with the independence of courts, which member states must recognise for their countries' democracy to grow. Under the guidance of the UN, several recommendations have been adopted to clarify the meaning and scope of the notion of judicial independence in terms of the UN and the ICCPR. This is contained in the UN Basic Principles on the Independence of the Judiciary, which calls on member states to guarantee judicial independence domestically through constitutional or legal provisions and highlights certain standards for attaining judicial independence.<sup>243</sup>

At our regional level, there have also been several initiatives. In Africa, the African Charter on Human and Peoples' Rights is now in its 38<sup>th</sup> year since it came into force,<sup>244</sup> with South Africa being a member and ratifying the African Charter<sup>245</sup> which binds all member states. The Charter contains an extensive list of fundamental rights and freedoms of persons and implores all members to adopt effective and efficient measures to ensure their realisation.<sup>246</sup> The core of these obligations lies in Article 26, which is read together with Article 7 of the Charter. Article 26 requires guarantees on the independence of the judiciary and the national institutional establishments for the promotion of the rights enshrined in the Charter. After recalling that justice is a core element of democracy, the African Commission of Human and Peoples' Rights,

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Freedoms (1950) available at <<http://www.coe.int/web/conventions/full-list/-/conventions/treaty/005>>. (Date accessed 15/05.2015); Article 8 (1) of the Inter-American Convention on Human Rights (1969) available at <[https://en.wikipedia.org/wiki/American\\_Convention\\_on\\_Human\\_Rights](https://en.wikipedia.org/wiki/American_Convention_on_Human_Rights)>. (Date accessed 21/05/2015) and Article 7 (1) of the African Charter on Human and Peoples' Rights (1981) available at <<http://www.chr.up.ac.za/index.php/documents-by-theme/african-charter-achpr.html>>. (Date accessed: 12 May 2015).

<sup>243</sup> These principles were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan available at <<http://www.unhchr.ch/html/menu3/b/h.comp50.htm>>. (Date accessed 08 September 2016). Also the international standards, endorsed by the resolutions of the General Assembly of the United Nations (UN) in 1985, include two principles:

1. The independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution of 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, based on facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

<sup>244</sup> Adopted by the Organisation of African Union on the 27<sup>th</sup> June 1981 and entered into force on 21 October 1986 available at <<http://www.ancl-radc.org.za/sites/default/files/images/achprcall.pdf>>. (Date accessed 12/07/2015).

<sup>245</sup> South African ratify the Charter on the 09/07/1996 available at <<http://www.achpr.org/instruments/achpr/ratification/>>. (Date accessed: 29 March 2017).

<sup>246</sup> Article 1 of the African Charter.

established under the Charter in 1981, adopted a Resolution on the Respect and Strengthening of the Independence of the Judiciary in 1996.<sup>247</sup> This resolution calls upon member states of the African Union to meet certain minimum standards to guarantee the independence of the judiciary on the continent. These include sufficient resources, adequate working and living conditions for judges, and the recognition of universal principles of judicial independence.

Courts are expected to act as protectors of the law who independently exercise their judicial power without any functional or individual interference. Such interference usually comes from executive and legislative officials, political parties, the military and the judicial hierarchy itself.<sup>248</sup> From the above, it can be concluded that the principle of judicial independence, as it is internationally recognised, takes on two main dimensions, which are adjudicative independence of individual judges and institutional independence of the judiciary. Although these two dimensions are essential to true judicial independence, they are not always easy to differentiate. The split of the constituent elements belonging to each of the two dimensions of judicial independence are discussed in the next section.

### *3.2.3 Dimensions of judicial independence*

Table 3.1 below shows the dimensions of the adjudicative independence of individual judges as well as institutional independence of the judiciary.

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<sup>247</sup> African Commission of Human and Peoples' Rights, 19<sup>th</sup> Session, 03/26-04/04/1996, Ouagadougou, Burkina Faso.

<sup>248</sup> Westhuizen J 'A few reflections on the role of the courts, government, the legal profession, universities, the media and civil society in a constitutional democracy' 258.

Table 3.1 Dimensions of judicial independence<sup>249</sup>

Adjudicative independence of individual judges	Institutional independence of the judiciary
<ul style="list-style-type: none"> <li>• Important decision-making</li> <li>• Security of tenure</li> <li>• Financial security: pay, benefits and retirement plan</li> <li>• Continuing education</li> <li>• Ethics and conduct standards</li> <li>• Accountability</li> </ul>	<ul style="list-style-type: none"> <li>• Administration of justice by judges</li> <li>• Management of the court</li> <li>• Assignment of judges to cases, determination of sittings and lists of the court, as well as related areas such as the allocation of courtrooms and management of administrative staff</li> <li>• Conduct review and removal of judges</li> <li>• Administrative and institutional relationships with the legislative and executive government bodies</li> </ul>

Because judicial independence involves judges occupying a privileged position in their community and in society, and making unpopular decisions, judicial independence is susceptible to attack by uninformed or irresponsible critiques made out of context.<sup>250</sup> It always needs to be appreciated that judicial independence exists for the protection of the community in a democratic country, and that each dimension of judicial independence is a necessary element that exists to uphold that overall objective.<sup>251</sup> An attack upon any of the components of the principle of judicial independence may very well compromise the institution or its members. For example:

- An elected official’s attempt to intervene with a judge regarding one of his or her decisions is a violation of the judge’s individual independence and separation of powers.

<sup>249</sup> Canadian Judicial Council ‘Why is judicial independence important to you?’ (2016) available at <<https://www.cjccm.gc.ca/cmslib/general/Why%20is%20Judicial%20Independence%20Important%20to%20You.pdf>>. (Date accessed: 12 October 2016).

<sup>250</sup> Canadian Judicial Council ‘Why is judicial independence important to you?’ 6.

<sup>251</sup> Canadian Judicial Council ‘Why is judicial independence important to you?’ 6.



- Unilateral reforms to the judicial system attempted by governments directly interfere with the principle of institutional judicial independence. The necessary improvements to the administration of justice must be initiated, planned, determined and implemented in close collaboration with the head of the judiciary, who manages judicial officers as a cooperative body.<sup>252</sup>

Unlike the acts from Botswana's judiciary where its independence has been questionable. These questionable acts occur in several situations in which the executive and the judiciary exercise each other's functions. The scope for this overlapping appears well defined:<sup>253</sup> the executive exercises limited judicial functions in two main ways. The first is the exercise of the presidential "prerogative of mercy."<sup>254</sup> The second area in which the executive exercises some judicial functions in Botswana is in the regular creation of administrative tribunals and other disciplinary bodies, and conferring on them the right to determine matters that traditionally come within the jurisdiction of courts of law.<sup>255</sup> However, the courts have repeatedly stressed their inherent or common-law right to review the proceedings and decisions taken by these administrative bodies and tribunals, to ensure that they do not exceed the powers conferred on them and that they conform to the ordinary rules of natural justice.<sup>256</sup>

The existence of a CC alone is not sufficient to guarantee that politicians respect the Constitution.<sup>257</sup> Politicians, even if they originally agreed to establish judicial review, soon find that its exercise by the CC is often burdensome for them. The 1996

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<sup>252</sup> Canadian Judicial Council 'Why is judicial independence important to you?' 7.

<sup>253</sup> Fombard CM 'The separation of powers and constitutionalism in Africa; The case of Botswana' (2005) available at <<http://lawdigitalcommons.bc.edu/twlj/vol25/iss2/2/>>. (Date accessed: 12 May 2016).

<sup>254</sup> Section 53-55 of Botswana Constitution. According to it, the President has the power to pardon convicted criminals with or without condition, alter their sentences, or commute them altogether. These powers in terms of section 53 of the Botswana Constitution enable the president to:

- (a) Grant to any person convicted of any offense a pardon, either free or subject to lawful conditions;
- (b) Grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offense, and
- (c) Substitute a less severe form of punishment for any punishment imposed on any person for any offense; and
- (d) Remit the whole or part of any punishment imposed on any person for any offense or of any penalty for forfeiture otherwise due to the Government on account of any offense.

<sup>255</sup> Fombard CM 'The separation of powers and constitutionalism in Africa; The case of Botswana' 331.

<sup>256</sup> Fombard CM 'The separation of powers and constitutionalism in Africa; The case of Botswana' 331.

<sup>257</sup> Grimm D 'Constitutional adjudication and constitutional interpretation: Between law and politics' (2011) available at <<http://nujlawreview.org/wp-content/uploads/2015/02/dieter-grimm.pdf>>. (Date accessed: 23 May 2016).

Constitution put politics under constraints and the CC exists to enforce these constraints.<sup>258</sup> There are a number of judgments that have gone against government policy/stance or laws passed that were declared to be unconstitutional and government was forced to amend them to reflect the present constitutional position, such as CC declaring that the death penalty was unconstitutional<sup>259</sup> and court pronouncements in numerous cases, for example, where the court pronounced that it was necessary for gays and lesbians to be given equal protection of the law, in which it give recognition to same-sex marriages.<sup>260</sup>

It has been observed that the behaviour of the federal courts in the USA has been strategic rather than based upon legal principle when dealing with government cases.<sup>261</sup> Peretti argues that judges do not always use their freedom to decide impartially and exclusively according to the law, but political attitudes exert a substantive influence on them.<sup>262</sup> When he was conducting a study on the behaviour of the CC, Roux<sup>263</sup> analysed several judgments concerning politically controversial issues. He argues that, though the court provides a legally convincing reasoning, it guards its own legitimacy by taking care of two additional considerations, namely its own institutional security and public support.<sup>264</sup> He argues that this could be ascribed to the dominant position of the ruling party, the ANC. Malan, on the other hand, argues that the court weighs its options when confronted by serious cases against the government. He alludes that the court ruled in favour of government on matters that were ideologically important to the ruling party, even though its legal reasoning was jurisprudentially questionable, and as result suffered severe criticism.<sup>265</sup> He argues that the reason for that is that the risk in terms of the court's institutional security and

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<sup>258</sup> Grimm D 'Constitutional adjudication and constitutional interpretation: Between law and politics'

<sup>259</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

<sup>260</sup> *Minister of Home Affairs and Another v Fourie and Another (Doctor for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC); and also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC) and *Satchwell v President of the Republic of South Africa and Another* 2002 (9) BCLR 986 (CC).

<sup>261</sup> Peretti T 'Does judicial independence exist? The lessons of social science research' available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1307819](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1307819)<. (Date accessed 24 July 2016).

<sup>262</sup> Peretti T 'Does judicial independence exist? The lessons of social science research' 133.

<sup>263</sup> Roux T 'Principle and pragmatism on the Constitutional Court of South Africa' *International Journal on Constitutional Law* (2009) vol 7(1) 106-138.

<sup>264</sup> Roux T 'Principle and pragmatism on the Constitutional Court of South Africa' 136.

<sup>265</sup> Malan K 'Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa' 1988.

thus forfeiting the support of the ANC by ruling against them is higher than the risk of attracting firmly legally premised (theoretical) criticism.<sup>266</sup>

South Africa is believed to have several pathologies of a dominant party democracy that seem to be caused by the ANC's electoral dominance.<sup>267</sup> The ANC's dominant status has damaged many procedures and mechanisms that should operate through political means to check its power.<sup>268</sup> However, there has been recently a noticeable decrease in political party dominance in South Africa. Divided government identifies all these instances in which the party that occupies the executive branch does not have either an absolute majority or a plurality in the legislature.<sup>269</sup> These extra-party organisations can mobilise against a dominant party that attempts to limit judicial independence.<sup>270</sup> However, the CC did not strike down policy that increased the dominant party's majority through floor crossing. Bickel's<sup>271</sup> assertion is that the judiciary with all material facts is dependent on the executive. Thus, Fiss<sup>272</sup> alludes that judges make judgments with the hope of voluntary compliance, since without voluntary compliance, they are inherently weak and precarious.<sup>273</sup> Apart from the above arguments, more understanding on the intended principle of judicial

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<sup>266</sup> Malan K 'Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa' 1988.

<sup>267</sup> Choudhry S "He had a mandate"; The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) 2 *Constitutional Court Review* 1-86, 11.

<sup>268</sup> Choudhry S "He had a mandate"; The South African Constitutional Court and the African National Congress in a dominant party democracy' 11.

<sup>269</sup> Daily Sun 'Give Black women a chance' – Tuesday, March 07/2017, when the EFF leader Julius Malema accused President Zuma of overlooking Justice Bess Nkabinde for the position of Deputy Chief Justice of the Constitutional Court. In response to these allegations, the President responded to Julius Malema regarding why Justice Nkabinde cannot be selected. Times Live 'Zuma tells Malema why his judge of choice is not eligible for top job' TMG Digital 2017/03/07; that Constitutional Court judges hold office for a non-renewable term of 12 years. The acting Deputy Chief Justice Nkabinde would be discharged from active service on 31 December 2017 after serving a non-renewable term of 12 years at the Constitutional Court.

<sup>270</sup> Mabuza E 'Justice Minister withdraws Bill that would take South Africa out of International Criminal Court (ICC)' OCJ newsletter 14/03/2017. The DA approached the court to challenge the government's decision to withdraw from the ICC by notifying the UN of its intention to revoke its ratification of the Rome Statute, which establish the ICC. The court ordered President Zuma, International Relations and Cooperation Minister as well as Justice and Correctional Services Minister to revoke the notice of withdrawal. Deputy Judge President Phineas Moja said that "there is prematurity and procedural irrationality in the notice to withdraw from Rome Statute by the executive without parliamentary approval".

<sup>271</sup> Bickel A M 'The least Dangerous Branch: The Supreme Court at the Bar of Politics (1962) *Bobbs-Merill Indianapolis* 252.

<sup>272</sup> Fiss OM 'The limits of judicial independence' *Miami Inter-Am L Rev* (1993) 57, 64.

<sup>273</sup> Fiss OM 'The limits of judicial independence' 64.

independence is needed for keeping the legislature and the executive in check than what orthodox doctrine proclaims, which is discussed below through several cases.

### 3.2.3 (a) *Langa v Hlope*<sup>274</sup>

This case, though it deals with defamation, is still connected to the executive branch. In 2008, Judge President Hlophe allegedly approached two relatively new members of the CC, Justices Jafta and Nkabinde, seeking favourable treatment for Jacob Zuma, then the Deputy President, in several pending cases. These justices then reported the matter to their senior colleagues,<sup>275</sup> and the CC filed a public complaint with the JSC. The CC's decision revealed that Hlophe had apparently told Nkabinde that Hlophe had a "mandate" to approach her, and that the cases were important for Zuma's future.<sup>276</sup> Hlophe allegedly also told Nkabinde there was "no real case against Mr Zuma."<sup>277</sup> Judge Jafta told a similar story, though he viewed parts of the discussion as confidential because of his long friendship with Hlophe. Hlophe allegedly told Jafta that he was "our last hope."<sup>278</sup> Both justices alluded that they rejected Judge Hlophe's advances. The CC's complaint said that Hlophe engaged in misconduct.<sup>279</sup>

Judge Hlophe responded by accusing the CC of defaming him because the court did not give him a hearing prior to publishing the said accusations. The JSC initially refused to find either side of complaints worth pursuing. However, the court in *Langa v Hlope*<sup>280</sup> found that the Hlophe defamation claim had no merit. The SCA alluded that the public had a strong interest in knowing what may have occurred. The Supreme Court also reversed the JSC, in part by finding that the CC's complaint against Hlophe should not be dismissed.<sup>281</sup> The court found that the sufficient evidence that was present permitted that Hlophe be charged with "gross misconduct" as contemplated

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<sup>274</sup> 2009 (4) SA 382 (SCA) 382.

<sup>275</sup> *Langa v Hlope*, 387.

<sup>276</sup> *Freedom Under Law v Acting Chairperson; Judicial Service Commission and Others* 2011 (3) SA 549 (SCA), 34.

<sup>277</sup> Kende MS 'Constitutional rights in two worlds: South Africa and the United States' *Cambridge University Press* (2009) 4.

<sup>278</sup> *Freedom Under Law*, 32.

<sup>279</sup> *Freedom Under Law*, 50.

<sup>280</sup> *Langa v Hlope*, 397.

<sup>281</sup> *Langa v Hlope*, 397.

by section 177 of the 1996 Constitution. Meanwhile, Zuma became the President and appointed new judges.<sup>282</sup>

The JSC's Judicial Conduct Committee referred the relatively new CJ Mogoeng of the CC and requested that he appoint a disciplinary tribunal to resolve the Hlophe issues.<sup>283</sup> The appointment of the committee was done in 2013 and the trial was supposed to take place in late 2013.<sup>284</sup> Unfortunately, more complications arose. Judge Jafta and Judge Nkabinde refused to testify before the tribunal because they believed it lacked constitutional and legal legitimacy. The tribunal upheld its own authority to proceed, despite the concerns and refusal by two justices.<sup>285</sup> Moreover, the judges appealed to the North Gauteng High Court in Johannesburg, challenging the Tribunal's ruling.<sup>286</sup>

### 3.2.3 (b) *Glenister v President of South Africa I*<sup>287</sup>

In this case, the CC was dealing with the establishment of a new anti-corruption agency. It ruled that the government violated the 1996 Constitution by establishing an anti-corruption agency that lacked sufficient independence from political influence. Since there was nothing in the 1996 Constitution specifying that there must be such an agency, the court relied on international conventions that require governments to fight corruption, as well as on the evidence of corruption among South Africa's national prosecuting authorities.<sup>288</sup>

When making a decision, the court was unusually divided five to four, and one of the dissenters who supported the ANC later became the CJ appointed by President Zuma.<sup>289</sup> *Glenister* is the CC case after which President Zuma made a statement in

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<sup>282</sup> Kende MS 'Constitutional rights in two worlds: South Africa and the United States' 7.

<sup>283</sup> Kende MS 'Constitutional rights in two worlds: South Africa and the United States' 7.

<sup>284</sup> Kende MS 'Constitutional rights in two worlds: South Africa and the United States' 7.

<sup>285</sup> Kende MS 'Constitutional rights in two worlds: South Africa and the United States' 7.

<sup>286</sup> Kende MS 'Constitutional rights in two worlds: South Africa and the United States' 8. The SCA's decision to trail Hlophe demonstrates the real reflection of an independent judiciary, given the fact that Hlophe was apparently canvassing for the Deputy President. The question then arises as to whether the Constitutional Court could handle the matter, looking to their interests which are in conflict in this matter, if this matter can finally reach them on the subsequent appeals. However, the Constitutional Court majority so far has demonstrated the ability to handle these complex developments effectively yet diplomatically.

<sup>287</sup> 2011 (3) SA 347 (CC).

<sup>288</sup> Kende MS 'Constitutional rights in two worlds: South Africa and the United States' 10.

<sup>289</sup> Kende MS 'Constitutional rights in two worlds: South Africa and the United States' 7. This raises a suspicion whether the appointment was not made as the result of a political favour.

connection with issuance of the “Discussion Document.”<sup>290</sup> *Glenister* then gave Parliament 18 months to create a more adequate agency.<sup>291</sup> This case has problems when examined using formalist constitutional methodology, but the new South African Constitution was instead meant to be interpreted in a transformative and internationalist manner.<sup>292</sup>

### 3.2.3 (c) *Justice Alliance of South Africa v President of the Republic of South Africa and Others*<sup>293</sup>

This case dealt with the constitutional validity of the conduct of the President of South Africa in the process of extending the term of office of the CJ. The President based his authority to extend such term in part on the Judicial Remuneration Legislation enacted in 2001.<sup>294</sup> The Court said that section 176(1) did not appear to give the President the power to extend the term of just one judge, even the CJ.<sup>295</sup> This case is an important case regarding separation of powers and the independence of the judiciary, since the President’s efforts to intrude in judicial matters were rejected based on the protection of judicial independence.

### 3.2.3 (d) *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others*<sup>296</sup>

The court in this case rejected arguments by the Democratic Alliance (DA) to re-open the closed prosecutorial investigation into whether President Zuma had committed financial crimes. The Court upheld the DA’s application to review much of the documentary and other evidence relied upon by prosecutors.<sup>297</sup> This might allow a

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<sup>290</sup> Tamukamoyo H ‘*Double speak about judicial reform in South Africa raises alarm bells*’ ISS Africa (March 23, 2012) available at <https://www.issafrica.org/iss-today/double-speak-about-judicial-reform-in-south-africa-raises-alarm-bells->>. (Date accessed: 31 August 2016). In such a statement he stated that “We don’t want to review the Constitutional Court, we want to review its powers. It is after experience that some of the decisions are not decisions that every judge in the Constitutional Court agrees with.”

<sup>291</sup> Tamukamoyo H ‘*Double speak about judicial reform in South Africa raises alarm bells*’ 47.

<sup>292</sup> Tamukamoyo H ‘*Double speak about judicial reform in South Africa raises alarm bells*’ 47.

<sup>293</sup> 2011 (5) SA 388 (CC)

<sup>294</sup> Kende MS ‘*Constitutional rights in two worlds: South Africa and the United States*’ 7. This raises a suspicion whether the appointment was not made as the result of a political favour.

<sup>295</sup> Kende MS ‘*Constitutional rights in two worlds: South Africa and the United States*’ 9.

<sup>296</sup> 2012 (3) SA 486 (SCA).

<sup>297</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA). The Supreme Court explained its justification as follows:

In the constitutional era clearly empowered to scrutinise the exercise of public power for compliance with constitutional prescripts. That much is clear from the Constitutional Court

determination about whether the prosecutors dropped the investigation because of improper political influences.

The government did not turn over materials even though they were given two-week deadline in March 2012. Finally, in July 2013, the DA petitioned to force the government's compliance with the earlier court order. In August 2013, over the objections of the attorney for President Zuma, the North Gauteng High Court ruled in favour of the DA, and mandated that the NDPP disclose the required documents and tapes within five days.<sup>298</sup> President Zuma, however, has received leave to appeal.<sup>299</sup>

### 3.2.3 (e) *Democratic Alliance v President of the Republic of South Africa and Others*<sup>300</sup>

This case concerns President Zuma's decision to appoint Menzi Simelane as the National Director of Public Prosecutions. Simelane, as Director-General of the Department for Justice, had been a party to a dispute that involved the previous National Director, Pikoli. The dispute was in respect of the relative powers of the Minister for Justice and the National Director. Then-President Mbeki had ultimately suspended Pikoli and had later appointed a commission of enquiry to inquire into Pikoli's fitness for office. Simelane had prepared the government's submissions to the commission and had also given evidence before it, and the Commission in its report had been critical of those submissions and of Simelane's evidence. Notwithstanding this, Simelane was later appointed to succeed Pikoli as the National Director. It was held that the decision to appoint Simelane was irrational and hence incompatible with

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judgments set out above. It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available ... by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed. The DA, in its application to compel discovery, has merely asked for an order directing the office of the NDPP to despatch within such time as the court may prescribe the record of proceedings relating to the decision to discontinue the prosecution, excluding the written representations made on behalf of Mr Zuma to the office of the NDPP. Subject to the question of standing which is dealt with next I can see no bar to such an order being made.

<sup>298</sup> Kende MS 'Constitutional rights in two worlds: South Africa and the United States' 7. This raises a suspicion whether the appointment was not made as the result of a political favour.

<sup>299</sup> Kende MS 'Constitutional rights in two worlds: South Africa and the United States' 7.

<sup>300</sup> 2013 (1) SA 248 (CC).

the principle of legality in that evidence showing that Simelane was in fact not fit and proper for the position concerned had been ignored.<sup>301</sup>

### 3.2.3 (f) *Democratic Alliance v President of the Republic of S A; In re: Democratic Alliance v President of the Republic of S A and Others*<sup>302</sup>

In this case, the matter was heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.<sup>303</sup> The matter went to court after the stroke of midnight, while most residents of the country had retired for the night. The President announced to the populace what he called radical changes to the National Executive (the Cabinet) by removing the Minister of Finance, Pravin Gordhan, and his deputy, Mcebisi Jonas. The President stated: "I have decided to make changes to the National Executive in order to improve efficiency and effectiveness."<sup>304</sup>

The DA approached the court, seeking to obtain the reasons why the President had removed former Minister Gordhan and his deputy, Jonas. However, the President's stance on this was that the DA was not entitled to the records at all. The President's contention was that the decision was subject to the doctrine of legality and therefore the applicant was entitled to the reasons for the decisions, but not the record. However, the President's attorneys agreed that granting the President five calendar days to file and furnish the records and the reasons was reasonable.<sup>305</sup>

### 3.2.3 (g) *Assessment of cases*

The abovementioned cases are all acts in which the interests of the current President of the ANC, since December 2007 as the Deputy President, and since April 2009 as the President of the country, were at stake.<sup>306</sup> Most prominent of all, Jacob Zuma, faced multiple corruption charges after his financial adviser, Schabir Shaik, was sentenced to 15 years in prison for related offences. Given the ANC's electoral

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<sup>301</sup> Malan K 'Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa' 2011.

<sup>302</sup> (9 May 2017) (24396/2017) [2017] ZAGPPHC 148/ 2017 (4) SA 253 (GP).

<sup>303</sup> Erasmus 'Superior Court Practice' main volume Revision Service 44, B1, 33-36.

<sup>304</sup> Jamal S '*Executive decisions by the President can be reviewed, says Judge*' (2017/08/09) available at <<http://www.sundayworld.co.za/news/2017/05/09/executive-decisions-by-the-president-can-be-reviewed-says-judge->>. (Date accessed: 28 August 2017).

<sup>305</sup> *Democratic Alliance v President of the Republic of SA*, para 39.

<sup>306</sup> Malan K 'Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa' 2009.



dominance, the case was effectively the only thing standing between Mr Zuma and the presidency.<sup>307</sup>

At the ANC congress in Polokwane in 20 December 2007, when Mr Zuma ousted President Mbeki from the presidency post, the ANC resolved to reform the directorate (Scorpions) and incorporate it into the national police, ostensibly on grounds of efficiency.<sup>308</sup> The Scorpions, a unit falling under the prosecuting authority, not the police, adopted a best-practice approach of teaming prosecutors, investigators and intelligence analysts to take on high-profile cases and targets. Such challenges were regarded as beyond the capabilities of a police service stretched thin by a post-liberation crime wave and hamstrung by its own bleak apartheid history. However, almost from the unit's inception, there were those in the ruling party who claimed the Scorpions were being abused by then President Mbeki to focus on his political enemies' indiscretions.<sup>309</sup>

Glenister<sup>310</sup> took the case through courts following the decision taken at the ANC's 2007 Polokwane conference to disband the Scorpions and tried to save the Scorpions from being dissolved. Despite the Scorpions' success in achieving a conviction rate of 90% and pursuing high-profile cases, including the arms deal investigation that led to the conviction of Zuma's former financial adviser on fraud and corruption charges, it was formally disbanded in October 2008 after the parliament adopted the National Prosecuting Amendment Act<sup>311</sup> and the South African Police Service Amendment Act.<sup>312</sup>

The case of Jackie Selebi who was appointed in 2000 as the first National Police Commissioner is similar. This was a political appointment by the ANC-led government. In 2010, he was tried and convicted of corruption and was also found guilty and jailed for 15 years for violation of section 4(1)a(a)bb of the Prevention and Combating of

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<sup>307</sup> Berger S 'South African crime-fighting unit stung by its own success' (2008) available at <<http://www.thenational.ae/news/world/africa/south-african-crime-fighting-unit-stung-by-its-own-success>> (Date accessed: 03 April 2017).

<sup>308</sup> Berger S 'South African crime-fighting unit stung by its own success' 2.

<sup>309</sup> Sole B 'South Africa and the Scorpions: The slow death of an Elite Anti-Corruption Squad' (2009) available at <<http://www.globalintegrity.org/2009/02/post-330/>>. (Date accessed: 04 April 2017).

<sup>310</sup> *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC).

<sup>311</sup> No 36 of 2008.

<sup>312</sup> No 57 of 2008.

Corrupt Activities Act<sup>313</sup>. It was alleged that Selebi had receive cash payment totalling about R1.2 million from convicted drug trafficker Glen Agliotti in exchange for turning a blind eye to his drug smuggling business in South Africa and for passing confidential information to Glen Agliotti.<sup>314</sup>

Additionally, the Public Protector in her investigations had to answer whether President Zuma has enabled or turned a blind eye, in violation of the Executive Ethics Code, to alleged corrupt practices by the Gupta family and his son in relation to allegedly linking appointments to *quid pro quo* conditions.<sup>315</sup> This question, unless remedied, could lead to more maladministration in government. The recent South African Social Security Agency (Sassa) social grants system crisis which had South Africa standing to get answers is also an example of how the ANC-led government turn a blind eye to maladministration and corruption in government. The South African social grants were administered and distributed by Cash Paymaster Services (CPS), a subsidiary of US-based Net1 UEPS Technologies, after it was awarded a five-year, R10 billion tender in January 2012. The tender was declared invalid by the Constitutional Court<sup>316</sup> in November 2013, and Sassa was instructed to initiate a new tender process. In 2015, Sassa issued a new tender but did not award it, opting to move the payment of social grants in-house.<sup>317</sup>

The Star<sup>318</sup> reported that Gordhan (Minister of Finance) wrote to Dlamini (Minister of Social Development) on 1 February 2017 and said CPS should not be one of the service providers considered for the distribution of social grants. It was reported that Gordhan wanted a new contract to be awarded to the commercial banks and South African Post Office, and Dlamini was quoted as rejecting Gordhan's proposal. In February, Sassa said the only way to make social grant payments must be with the current service provider, the same one whose contract was declared null and void by

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<sup>313</sup> No 12 of 2004.

<sup>314</sup> *S v Selebi* (25/09) [2010] ZAGPJHC 53 (5 July 2010).

<sup>315</sup> Public Protector South Africa 'State of Capture (2016/17) Report' 4.

<sup>316</sup> *Allpay Consolidated investment holdings (PTY) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC).

<sup>317</sup> Ngoepe K '*Social Development Promises to pay grants but does not say how*' (2017) available at <<http://www.huffingtonpost.co.za/2017/02/17/social-development-promises-to-pay-grants-but-does-not-say-how/>>. (Date accessed 06 April 2017).

<sup>318</sup> Ndaba B '*Gordhan, Dlamini square off on grants issue*' (2017) *The Star* available at <<http://www.iol.co.za/capetimes/news/gordhan-dlamini-square-off-on-grants-issue-7762089->>>. (Date accessed: 06 April 2017).

the CC. However, Dlamini assured recipients that grants would be paid on time but without indicating how that would happen. She has been criticised for her role in the Sassa payment crisis by the CC, but she has largely blamed Sassa for the confusion and uncertainty.<sup>319</sup>

There are many judgments that have been given against organs of state, but these orders have not until to date been complied with. However, as far as court orders for the payment of money are concerned, the common-law position is that a judgment debtor may be held in contempt of court for failing to comply with an order to pay money.<sup>320</sup> In the social assistance cases in the Eastern Cape, the judiciary has “developed” this part of the common law to provide for a contempt of court remedy in cases where the provincial government did not comply with money orders.<sup>321</sup> Despite these efforts, the SCA in *Javiya v Member of the Executive Council for Welfare, Eastern Cape*<sup>322</sup> overturned this development, in that the courts cannot retrospectively develop a new criminal offence and that it would be unfair to hold a government official in contempt for failing to pay the state’s debts whereas that same person cannot be held in contempt for failing to pay his or her own personal debts. This principle developed in *Javiya* by SCA was criticised by Judge Froneman, sitting as a single judge in the South Eastern Cape Local Division, in that it places the state above the law, since the result is a situation where there is no way to ensure that the state complies with a money order.<sup>323</sup> The failure to comply with court orders have gave rise to debates on how these failures could be remedied.

These failures were dealt with in *Nyathi v Member of the Executive Council for the Department of Health Gauteng*,<sup>324</sup> in which the Court held that section 3 of the State Liability Act<sup>325</sup> (which prohibits the attachment of state assets in the execution of judgments) constitutionally invalid. The court criticised the state for its failure to comply with a court order, and expressed dissatisfaction with the laxity of public officials and

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<sup>319</sup> Ngoepe K ‘Social Development Promises to pay grants but does not say how’ 2.

<sup>320</sup> Currie I & De Waal J ‘The Bill of Rights Handbook’ 205.

<sup>321</sup> *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TK); and *East London LTC v MEC for Health, Eastern Cape* 2001 (3) SA 1133 (CK).

<sup>322</sup> 2004 (2) SA 611(SCA).

<sup>323</sup> *Kate v MEC for the Department of Weafare, Eastern Cape* 2005 (1) SA 141 (SE).

<sup>324</sup> 2008 (9) BCLR 865 (CC).

<sup>325</sup> No 20 of 1957.

the flawed conduct in the office of the state attorney.<sup>326</sup> However, the *Nyathi* judgment did not bring an end to poor public services, which seem to be dragging on unendingly and unaffected by whatever the courts might have to say.<sup>327</sup> However, in the *DA v President of the Republic of SA*, the court demonstrated that, when politicians fail, only the judges can save the day. It goes without saying that many of the cases that the judges must adjudicate now should have never have landed before them in the first place.

The Limpopo textbook case,<sup>328</sup> the social grants crisis<sup>329</sup>, the Nkandla looting scandal,<sup>330</sup> the nuclear procurement process debacle,<sup>331</sup> the Hlaudi Motsoeneng soap opera<sup>332</sup> and many cases against the Speaker of Parliament are but some that should have been resolved much earlier. The fact that these matters ended up before the courts is not an illustration of a South African judiciary with an appetite for political power, nor is it an indication of a society that has suddenly turned litigious. It is evidence of a culture of clumsiness, wrongful decision-making, taking shortcuts and malfeasance.

#### *3.2.4 Judicial independence post 1994 (after the establishment of the OCJ) and transformation*

Despite what has been achieved over 23 years of democracy in realising the values in the 1996 Constitution, there are still challenges that confront the state in its endeavour to transform the judiciary.<sup>333</sup> The Minister of Justice and Constitutional Development, Masutha, alluded that the establishment of the OCJ represents a critical intervention to help “lay the foundations for democratic and open society in which

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<sup>326</sup> *Nyathi v Member of the Executive Council for the Department of Health Gauteng*, paras 52, 60 and 63.

<sup>327</sup> Malan K ‘Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa’ 2009.

<sup>328</sup> *Basic Education for All and Others v Minister of Education and Others* [2016] JOL 34897 (SCA).

<sup>329</sup> *Black Sash Trust v Minister of Social Development and Others (Freedom under Law NPC Intervening)* 2017 BCLR 543 (CC).

<sup>330</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC).

<sup>331</sup> *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* [2017] 3 ALL SA 187 (WCC).

<sup>332</sup> *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] 4 ALL SA 719 (SCA).

<sup>333</sup> DoJ ‘Discussion Document’ 17.

government is based on the will of the people and every citizen is equally protected by law.”<sup>334</sup>

Additionally, in the last Medium-term Expenditure Framework (MTSF) period during the 2014/2015 financial year, he transferred all the High Courts from the DoJ&CD to the OCJ (as a separate government department).<sup>335</sup> He also alluded that plans are in place to transfer lower courts which have not been transferred to date by the end of the current MTSF period. In parallel to these developments, engagement with stakeholders regarding a court administration model will continue to guide discussions on the judicial independence envisaged in the 1996 Constitution.<sup>336</sup> Like many democratic countries, South Africa has managed to place its judiciary outside government pressure by removing it as an extension of the DoJ&CD. However, what is more controversial is the independence of the judicial power from an institutional point of view. It is clear from the 1996 Constitution that the Constitution still imposes a duty on organs of state to assist and protect the courts to ensure, among other things, their independence, impartiality and efficiency.<sup>337</sup> As a result of this, the judiciary as an institution is not totally independent, simply because of executive power over financial matters.

#### *3.2.4 (a) South African judiciary: Governance and administration*

The South African judicial system has, naturally enough, been shaped by the country’s history and its changing political order. Its historical foundations are very different from the constitutional foundations of today, as the courts were initially established as an extension of the government administration, without any separation of powers or judicial independence.<sup>338</sup> Today, after the adoption of the democratic Constitution, the judicial system is necessarily shaped and informed by these two important principles. The governance of the South African judicial system has always been somewhat opaque. Traditionally, the executive branch has always been responsible for the administration of the superior courts regarding finance, support staff and logistics, while matters relating more specifically to adjudication, such as the allocation of judges

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<sup>334</sup> OCJ ‘Strategic Plan’ 5.

<sup>335</sup> DoJ&CD Strategic Plan 2015/20 available at <<http://www.justice.gov.za/MTSF/mtsf.pdf>>. (Date accessed: 12 April 2016).

<sup>336</sup> DoJ&CD Strategic Plan.

<sup>337</sup> Section 165(4) of the 1996 Constitution.

<sup>338</sup> Hoexter C & Oliver M ‘The judiciary in South Africa’ 99.

to cases, have been the province of the senior judiciary: the CJ, judges' president and other heads of courts, including magistrate courts.<sup>339</sup>

Although attributes of personal independence as discussed in Chapter 2 serve to insulate individual judges from potential prejudice in the discharge of their functions, these attributes were insufficient to protect judges as a corporate branch of government. Interference with judicial independence can affect the judiciary as a corporate branch of government and adversely affect judges collectively. However, there has never been a methodical and comprehensive treatment of the subject of judicial independence of judiciary as a corporate body in legislation or anywhere else, except the work of Coetzer,<sup>340</sup> who suggested a workable plan which can remove the judiciary from the executive department. He suggested, firstly, that administration of the courts should be taken out of the executive, which is a public service as it was under the DoJ&CD; secondly, that an office which is like the one of Lord Chancellor in Britain should be adopted; thirdly, that a Council of Justice along the lines suggested by the Hoexter Commission<sup>341</sup> should be created; and lastly, that the CJ should play a larger out-of-court role.<sup>342</sup>

In the South African context, the transformation of the legal system includes the transformation of justice as mandated by the 1996 Constitution.<sup>343</sup> The 1996 Constitution, which is the supreme law of the land, is the source and foundation of policies that are geared towards the achievement of an effective, efficient and transformed administration of justice.<sup>344</sup> The reform of the judicial system, which includes measures to establish a judiciary that is representative of the racial and gender demographics of South Africa society, among others, is an important element of the transformation of the administration of justice.<sup>345</sup> This transformation is drawn from the principles that it indicates:

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<sup>339</sup> Hoexter C & Oliver M 'The judiciary in South Africa' 99.

<sup>340</sup> Coetzer J PJ 'Die Regsadminstrasie en Verwante Sake in n' Nuwe Bedeling' (1991) *Consultus* 104 at 106, 107.

<sup>341</sup> The Hoexter Commission recommended the establishment of a Council of Justice which would advise the Minister of Justice on matters pertaining to the administration of justice.

<sup>342</sup> Maduna PM 'The impact and influence of the Constitutional Court in the formative years of Democracy in South Africa' 193.

<sup>343</sup> OCJ 'Strategic Plan' 6.

<sup>344</sup> DoJ&CD Strategic Plan, 17.

<sup>345</sup> DoJ&CD Strategic Plan, 17.

- (a) an important marker of transformation, as the diversity provision recognises;
- (b) a form of redress to remedy injustices of the past, in particular the absence of black people and women from the judiciary;
- (c) a measure that will enhance a deeper, substantive change that is not only about its demographics; and
- (d) an attitudinal shift away from apartheid-era executive-mindedness towards transformative, value-laden and constitution-based adjudication.<sup>346</sup>

The 1996 Constitution endorses the process of transformation as a measure that is designed within the framework of the Constitution.<sup>347</sup> The transformative vision was laid down by the court in *Van Heerde*,<sup>348</sup> as it held that “the design of such measures is not positive or reverse discrimination as others argue but an integral part to reach the goal of ensuring the achievement of the right to equality.”

#### 3.2.4 (b) *Establishment of the OCJ*

Before the proclamation of the OCJ as a national government department, the CJ was not properly capacitated to execute his functions adequately without relying on the executive. In September 2010, the OCJ was established as a national government department under the Public Service Act<sup>349</sup> by Proclamation.<sup>350</sup> The main aim behind the creation of the OCJ was to build the capacity required for the CJ to perform the different functions mandated in the 1996 Constitution and other legislations in respect of the dual roles of the head of judiciary and head of the CC.<sup>351</sup> The OCJ has produced an approved strategic plan<sup>352</sup> which seeks to support the judicial reforms aimed at improving the efficiency and effectiveness of the administration of the courts. This strategic plan is a milestone in the transformation of the judiciary in South Africa in that it is the first strategic plan to be developed by the newly proclaimed OCJ.<sup>353</sup> The strategic plan explains that the aim is to transform the judiciary with the view to the development of an independent, efficient, effective and accessible judicial system. In

<sup>346</sup> Discussion Document para 2.4.3.

<sup>347</sup> SAHO ‘South African History Online’ available at ><http://www.sahistory.org.za/article/history-south-african-constitution-1910-196>>. (Date accessed: 06/12/2017).

<sup>348</sup> *Minister of Finance and Other v Van Heerde* 2004 (11) BCLR 1125 (CC), para 29.

<sup>349</sup> No. 103 of 1994.

<sup>350</sup> No. 44 GG 33500 of 3 September 2010.

<sup>351</sup> Hoexter C & Oliver M ‘The judiciary in South Africa’ 112.

<sup>352</sup> OCJ Strategic Plan 17.

<sup>353</sup> OCJ Strategic Plan 18.

this regard, the head of the new department is a secretary-general, which precisely reduces the impression that this new department is an institution under the control of the executive.<sup>354</sup>

A cause for concern is the style of court administration found in the OCJ strategic plan.<sup>355</sup> The strategic plan stipulates that there is a need to provide the CJ with resources and capacity. This seems to have become conflated with the move towards a system of court administration based in the judiciary.<sup>356</sup> However, the DoJ&CD stated in their 2009-2010 annual report<sup>357</sup> that the creation of the OCJ was a temporary measure and part of the transition to the establishment of a court administration for the judiciary as a separate branch of government.

Moreover, the National Development Plan (NDP)<sup>358</sup> calls for the strengthening of judicial governance and the rule of law. Every country has legislation that governs how the public purse is managed. In South Africa, the Public Finance Management Act<sup>359</sup> (PFMA) and Local Government: Municipal Finance Management Act<sup>360</sup> lay down the basic rules for public financial management in effecting section 216 of the 1996 Constitution, which provides for control by the National Treasury.<sup>361</sup> The PFMA gives effect to section 213 to 219 of the 1996 Constitution. These sections require national legislation to establish a national treasury, and to introduce generally recognised accounting practices, uniform treasury norms and standards, measures to ensure transparency, as well as expenditure control, operational procedures for borrowings, guarantees, procurement and oversight over the revenue funds.

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<sup>354</sup> Hoexter C & Oliver M 'The judiciary in South Africa' 112. The Secretary-General gave an overview that her objective is to provide strategic leadership and direction towards the attainment of the vision of the OCJ; furthermore, her priority will be to support the Chief Justice and the Judiciary in their efforts to create an independent, transformed and accountable Judiciary; and to ensure that the OCJ is fully capacitated to execute its mandate.

<sup>355</sup> OCJ Strategic Plan.

<sup>356</sup> OCJ Strategic Plan, para 4.

<sup>357</sup> DoJ&CD Annual Report 2009-2010 Available at <[www.gov.za/sites/www.gov.za/files/anr2009-2010.pdf](http://www.gov.za/sites/www.gov.za/files/anr2009-2010.pdf)>. (Date accessed: 12 September 2016) para 284.

<sup>358</sup> South Africa Government National Development Plan (NDP) available at <<http://www.gov.za/issues/national-development-plan-2030>>. (Date accessed 12 September 2016) Chapter 14.

<sup>359</sup> No 1 of 1999 as amended by Act No. 29 of 1999.

<sup>360</sup> No 56 of 2003.

<sup>361</sup> Pauw J C *et al* 'Managing public money' (2015) *Pearson Holdings* 52.



The detailed regulation of the use of allocated funds is found in the Treasury Regulations that first came into effect on 5 June 2000. These regulations cover the whole field of practical management without being unduly detailed.<sup>362</sup> They range from internal control to planning and budgeting, asset and liability management, banking and cash management, and accounting and reporting, among other things. Although the executive, in the form of the National Treasury, promulgated these regulations, the regulations must be consistent with the PFMA.<sup>363</sup>

One of the few countries that say something in its Constitution about the participation of the judiciary in the budget allocation process is Uganda. However, all it states in Article 128(6) of Uganda's Constitution is that the "judiciary shall be self-accounting and may deal directly with the Minister of Finance in relation to its finances."<sup>364</sup> The absence of more precise constitutional provisions in the South African 1996 Constitution that deals with the budget for the judiciary has made it easy for the judicial budget to be reduced for purely political reasons.<sup>365</sup> On the other hand, in some Latin American countries, such as Costa Rica, the budget of the judiciary is guaranteed as a percentage of the national budget<sup>366</sup> in the Constitution.

As already argued, the location of the OCJ under the public administration framework, which is directly accountable to Cabinet, seems not to be in line with the constitutional democracy.<sup>367</sup> The OCJ as a body owes in its existence to its claim to the capacity to hold the judicial system accountable. This claim is now going to be assessed and to be given precise institutional shape, although the broad institutional parameters are already emerging.

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<sup>362</sup> Pauw J C *et al* 'Managing public money' 52.

<sup>363</sup> Pauw J C *et al* 'Managing public money' 52.

<sup>364</sup> Constitution of Uganda available at <[http://www.track.unodc.org/LegalLibrary/LegalResources/Uganda/Laws/Uganda%20Constitution%20\(1995\).pdf](http://www.track.unodc.org/LegalLibrary/LegalResources/Uganda/Laws/Uganda%20Constitution%20(1995).pdf)>. (Date accessed: 06 December 2017).

<sup>365</sup> Fombad C M 'Some perspectives on the prospects for judicial independence in post-1990 African Constitutions' 32.

<sup>366</sup> Natasha M et al 'Failed states and institutional decay: Understanding instability and poverty in the developing world' (2013) *Bloomsbury* 147.

<sup>367</sup> Klaaren J '*Transformation of the judicial system in South Africa, 2012-2013*' available at <<http://wiser.wits.ac.za/sites/default/files/JLE302-cropped.pdf>>. (Date assessed 20 July /2016).

### 3.2.4 (c) Assessing the role of the OCJ

It was observed that the OCJ was created because it was critical to the judicial independence that the judiciary be protected against economic manipulation. To achieve this independence, it was also observed that the judiciary must be treated as an equal branch to the executive and legislature and should also not be dependent on the executive for funding. Though the OCJ has the capacity to change the judicial landscape, it focusses is primarily structured to assist the CJ as the head of judiciary. While acknowledging the importance of judicial independence as a bulwark of democracy, the formula for determining or measuring the independence of the judiciary in a state has not been settled.<sup>368</sup> Although many attempts have been made to assess how “independent” the judiciary is in different countries, most have been unsuccessful, and there are inherent problems with measuring the concept as well.<sup>369</sup>

Stephenson<sup>370</sup> observed that most attempts to measure judicial independence in different countries have been unsuccessful because of several factors. Part of this failure is due to the difficulties of gathering comparative data on this topic and combining different elements into a composite index.<sup>371</sup> Although most attempts to measure judicial independence focus on formal or technical provisions, “issues like the judicial budget, the selection process, tenure, and the like”, this approach is often inadequate.<sup>372</sup> Formal provisions and institutional structure are important, but they do not in and of themselves ensure true independence, hence formal protections are not sufficient to evaluate the true independence of the judiciary.<sup>373</sup> Various governmental and non-governmental guidelines have been drafted internationally and regionally by experts, with the aim of fleshing out and agreeing on what could be considered as the basic elements of judicial independence. Although these documents have no binding

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<sup>368</sup> Manyatera G ‘A critique of the superior courts judicial selection mechanisms in Africa: The case of Mozambique, South Africa and Zimbabwe’ (2015 LLD Thesis: University of Pretoria) available at <[http://repository.up.ac.za/dspace/bitstream/handle/2263/52440/Manyatera\\_Critique\\_2015.pdf?sequence=1&isAllowed=y](http://repository.up.ac.za/dspace/bitstream/handle/2263/52440/Manyatera_Critique_2015.pdf?sequence=1&isAllowed=y)>. (Date accessed 21 October 2016).

<sup>369</sup> Stephenson M ‘Judicial Independence: What It Is, How It Can Be Measured, Why it occurs’ available at <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JudicialIndependence.pdf>>. (Date used: 21 September 2016).

<sup>370</sup> Stephenson M ‘Judicial Independence: What It Is, How It Can Be Measured, Why it occurs’ 1.

<sup>371</sup> Manyatera G ‘A critique of the superior courts judicial selection mechanisms in Africa: The case of Mozambique, South Africa and Zimbabwe’ 30.

<sup>372</sup> Stephenson M ‘Judicial Independence: What It Is, How It Can Be Measured, Why it occurs’ 3.

<sup>373</sup> Stephenson M ‘Judicial Independence: What It Is, How It Can Be Measured, Why it occurs’ 3.

effects, they provide evidence of a high level of support for what may be regarded as certain universally agreed core elements of judicial independence.<sup>374</sup>

However, the separate budget for the OCJ has finally transformed the judiciary to be in line with the basic requirements of the 1996 Constitution. Moreover, since the OCJ is a government department, and to some extent is reliant on other government departments to ensure that their budgets receive value for money, the DoJ&CD as well as the Department of Public Works play an important role in the effective functioning of the courts, their responsibilities and the effective implementation of their budget. An example of this is when there are unacceptable conditions, such as lights and air conditioning that do not work, and the Department of Public Works do not display enough interest in their work to ensure that the working conditions of judges receive the necessary attention.

### **3.3 Analysis of the different elements of the independence of the judiciary**

Although judicial independence may be an abstract social value, its existence depends upon specific institutional elements that can be analysed. The essential elements of these institutional arrangements are:

- (a) the guarantee of a fixed tenure, subject to a limited process of removal or discipline for misconduct or disability;
- (b) fixed and adequate compensation;
- (c) sufficiently high minimum qualifications in terms of education and experience; and
- (d) limited judicial immunity.<sup>375</sup>

#### **3.3.1 (a) Selection and judicial appointments**

Problems with independence of the judiciary begin at the point when a judge is selected. Frequently, the process is politicised or dominated by the executive, a majority party in the legislature, or the judicial hierarchy,<sup>376</sup> and designed to ensure the responsiveness of the judiciary to those either formally or informally responsible for

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<sup>374</sup> Fombad C M 'Some perspectives on the prospects for judicial independence in post-1990 African Constitutions' 25.

<sup>375</sup> Plank T E 'The essential elements of judicial independence and the experiences of Pre-Soviet Russia' (1996) *William & Mary Bill of Rights Journal* vol. 5:1- 8.

<sup>376</sup> USAID 'Guidance for promoting judicial independence and impartiality' 13.

appointments.<sup>377</sup> It is often essential, therefore, to revise the appointment process as a necessary step in strengthening judicial independence.<sup>378</sup> Although the 1996 Constitution established a more transparent and fair appointment process than existed in the past, there are issues that have emerged in the past two decades that potentially challenge the independence of the judiciary and suggest that certain reforms are necessary.<sup>379</sup> The process to appoint judges, as discussed in Chapter 2, has changed significantly to ensure accountability, transparency and openness. The procedure is now prescribed by the 1996 Constitution.<sup>380</sup> However, the whole process of judicial independence is enforced by the powers that are vested in the JSC in the fulfilment of its Constitutional mandate.<sup>381</sup>

### 3.3.1 (b) *The Judicial Service Commission (JSC)*

The JSC was established by the IC and entrusted with a variety of responsibilities relating to the judiciary.<sup>382</sup> Under the IC, it comprised 17 members, which were the CJ, who presided over the JSC, one judge president chosen by the judges president, the MJCD, two practising advocates and two practising attorneys appointed by the profession, one professor of law appointed by the deans of all South African law schools, four senators appointed by the Senate, and four persons named by the President, two of whom shall be practising lawyers.<sup>383</sup>

The 1996 Constitution also provides for a JSC, but with a different composition. In addition to the existing 17 members, a further six members are appointed by the National Assembly, of whom at least three must be from the opposition parties within Parliament, which make the total number 23.<sup>384</sup> Therefore, 15 of the 23 members are representative of the executive and the legislature,<sup>385</sup> which can lead to the perception that the appointment process of judges is not an independent one since it involves too many members from the executive, which they can easily influence.

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<sup>377</sup> USAID 'Guidance for promoting judicial independence and impartiality' 13.

<sup>378</sup> USAID 'Guidance for promoting judicial independence and impartiality' 13.

<sup>379</sup> Discussion document para 2.4.8.

<sup>380</sup> Section 175 of the 1996 Constitution.

<sup>381</sup> Mojapelo P 'The doctrine of separation of powers: A South African perspective' (April 2013) *FORUM Advocate* 39.

<sup>382</sup> Section 99(3) of the IC.

<sup>383</sup> Section 99 of the IC.

<sup>384</sup> Section 107 (8) of the 1996 Constitution.

<sup>385</sup> Husain M 'Lost in transformation' 4.

The United Kingdom's Judicial Appointment Commission is made up of 15 members: two members from the legal profession, five judges, one member of the tribunal (who is a judge), one magistrate and six laypersons, including the chairman.<sup>386</sup> There are no representatives from the executive or legislature. In Nigeria, the Nigerian National Judicial Council is comprised of 25 members. Most of these members are serving and retired judges, five of whom represent the legal profession, and two are laypersons.<sup>387</sup> In India, the CJ nominate judges for appointment to the Prime Minister, after private consultations with other judges. Although this process is deemed not transparent, there is, however, no direct involvement of the legislature and the executive. The importance of the composition of the JSC was given in *Judicial Service Commission and Another v Cape Bar Council and (Centre for Constitutional Rights as amicus curiae)*,<sup>388</sup> as the Court held that:

It has been created in a structured and careful manner to ensure that persons from diverse political, social and cultural backgrounds, representing varying interest groups would participate in its deliberations.<sup>389</sup>

The JSC's function is crucial because the appointment of the CJ and the Deputy Chief Justice (DCJ), as well as the President and Deputy President of the SCA, is made by the President after consultation with the JSC.<sup>390</sup> Thereafter, all other judges of the CC are appointed by the President from a list drawn up by the JSC.<sup>391</sup> This shift in the process for the appointment of judges from the past is important in constitutional transformation, as argued in Chapter 2, since judicial appointments were made by the Minister of Justice in the past. Additionally, the names of potential candidates were not made known in the past, nor were candidates for judicial office interviewed in public, which was clearly not a fair process. However, the shift made by the IC and the 1996 Constitution is a positive step forward to maintain the credibility of the judiciary as an independent body that reflects democratic South Africa.<sup>392</sup>

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<sup>386</sup> Husain M 'Lost in transformation' 4.

<sup>387</sup> Husain M 'Lost in transformation' 4.

<sup>388</sup> 2012 (11) BCLR 1239 (SCA).

<sup>389</sup> *Judicial Service Commission and Another v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* 2012 (11) BCLR 1239 para 35.

<sup>390</sup> Section 174(3) of the 1996 Constitution.

<sup>391</sup> Section 174(4) (a) of the 1996 Constitution.

<sup>392</sup> O'Regan CME 'The enforcement and protection of Human Rights: The role of the Constitutional Court in South Africa' 3.

Section 174(1) provides that “any appropriately qualified woman or man who is fit and proper person may be appointed as a judicial officer.” Section 174(2) provides that “the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.” The issue is the relationship between the requirements of being “appropriately qualified” and being a “fit and proper person” on the one hand, and the need for the judiciary to broadly reflect the country’s population in terms of race and gender on the other. The zeal of the JSC to affirm and adhere to its constitutional responsibilities is drawn from the diversification of the judiciary, as assessed in the below tables:

*Table 3.2 Racial and gender profile of judges in 1994<sup>393</sup>*

<b>Race</b>	African		White		Total
<b>Gender</b>	Female	Male	Female	Male	
<b>Total</b>	0	3	2	160	165

*Table 3.3 Racial and gender profile of judges on 30 November 2009*

<b>Race</b>	African		Coloured		Indian		White		Total
<b>Gender</b>	Female	Male	Female	Male	Female	Male	Female	Male	
<b>Total</b>	18	66	6	14	10	10	15	77	216

*Table 3.4 Racial and gender profile of judges on 31 July 2014*

<b>Race</b>	African		Coloured		Indian		White		Total
<b>Gender</b>	Female	Male	Female	Male	Female	Male	Female	Male	
<b>Total</b>	35	71	8	15	12	13	24	65	243
<b>%</b>	14.40	29.22	3.17	6.17	4.94	5.35	9.88	26.75	100

Although the tables show that the percentage of white male judges is still high as compared to the percentage of black people, the judiciary has made significant progress since the adoption of the 1996 Constitution. However, the JSC can still do much to ensure that candidates are questioned more intensely on broader

<sup>393</sup> Statistics in tables 1-3 was made available by the DoJ&CD on 26 August 2014.

considerations of transformation. The proper functioning and structuring of the JSC would enable the judiciary to meet the imperatives of independence, of being subject only to the Constitution and the law, and of applying the law impartially and without fear, favour or prejudice according to the Constitution.<sup>394</sup> Shetreet stresses that a judiciary cannot be composed in total disregard of the society and that “an important duty lies upon the appointing authorities to ensure a balanced composition of the judiciary, ideologically, socially, and culturally and the like.”<sup>395</sup>

In Australia, Atkinson was appointed to the Queensland Supreme Court bench in September 1998 along with other female appointments, one as President of the Court of Appeal, in what was apparently a deliberate campaign by the Attorney-General to make the judiciary more representative. The Queensland Bar Association openly criticised Atkinson’s appointment, saying that she had not been chosen on merit, and attacked the Attorney-General for seeking to achieve a so-called representative judiciary.<sup>396</sup> The criticism calls for a revisiting of some very current issues: the concept of “merit” in relation to judicial appointments and the criteria of suitability for judicial office, and the desirability of seeking a more representative judiciary, particularly as here in terms of gender. In 1994, as Table 1 showed, there were 165 judges in the bench. Only two were white women. Both the CC having two out of 10 female judges and SCA having seven female judges out of 25 judges have been a matter of significant public debate.

*Table 3.5 Racial and gender profiles of judges as of 31 July 2014*<sup>397</sup>

### 3.5.1 Constitutional Court

<b>Race</b>	African		Coloured		Indian		White		Total
<b>Gender</b>	Female	Male	Female	Male	Female	Male	Female	Male	
<b>Total</b>	2	5						3	10

<sup>394</sup> Section 165(2) of the 1996 Constitution.

<sup>395</sup> Shetreet S ‘Who will judge: Reflections on the judicial process and standards of judicial selection’ 61 *Australian Law Journal* (1987) 766 at 776.

<sup>396</sup> Hamilton B ‘Criteria for judicial appointment and ‘merit’ (1998) available at <<http://www.austlii.edu.au/au/journals/QUTLawJI/1999/2.pdf>>. (Date accessed: 25 May 2017).

<sup>397</sup> Statistics by the Department of Justice and Constitutional Development.

### 3.5.2 Supreme Court of Appeal

Race	African		Coloured		Indian		White		total
Gender	Female	Male	Female	Male	Female	Male	Female	Male	
Total	3	8	1	1	1	4	2	5	25

It is clear from the above tables that, two decades after the adoption of the CSAA, progress has been made in increasing the number of women on the bench. Of course, the lack of women in the senior judiciary reflects their absence in the upper echelons of the profession more generally, and particularly among the senior bar, which remains “somewhat homogenous”.<sup>398</sup>

However, it is clear from the tables that section 174(2) is achieving its purpose to ensure that the judiciary is broadly reflective of the gender and racial composition of South Africa. The question that still remains is whether section 174(2) seeks an appropriate demographic representation of the judiciary, or whether it is only a guide in the appointment process.<sup>399</sup> Ultimately, the challenge faced by the JSC is to interpret the selection criteria in a way that appropriately balances the constitutional imperative of achieving a more demographically representative bench with the need to maintain a competent and able judiciary in which the public has confidence.<sup>400</sup> It is acknowledged that considerable progress has been made since 1994, but it has also proven not be a process that is well received and embraced by all in South Africa.

#### 3.3.1 (c) The position of the OCJ regarding selection and judicial appointments

The Constitution of Zimbabwe Amendment Bill,<sup>401</sup> if enacted, will give the President a free hand in appointing senior judges, namely the CJ, the DCJ and the judge president of the High Court. These are all senior judges. As the title suggests, the DCJ deputises for the CJ, while the judge president of the High Court oversees that court.<sup>402</sup>

<sup>398</sup> Davis R & Williams G ‘Reforms of the judicial appointments process: Gender and the bench of the High Court of Australia’ available at <[http://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0006/1708134/27\\_3\\_8.pdf](http://law.unimelb.edu.au/_data/assets/pdf_file/0006/1708134/27_3_8.pdf)>. (Date accessed: 25 April 2017).

<sup>399</sup> Siyo L ‘The independence of South African Judges: A constitutional and legislative perspective’ 5.

<sup>400</sup> Hoexter C & Olivier M ‘The judiciary in South Africa’ 144.

<sup>401</sup> (No1) Bill, 2016 (HB 15, 2016) available at <<http://www.zimllii.org/content/constitution-zimbabwe-amendment-no-1-bill-2016-hb-15-2016-analysis-veritas-zimbabwe->>. (Date used: 26 April 2017).

<sup>402</sup> (No1) Bill, 2016 (HB 15, 2016).



At present, under section 180 of the Zimbabwe Constitution,<sup>403</sup> all judges, including the CJ, the DCJ and the judge president, are appointed by the President from the list of three nominees selected by the JSC after interviewing prospective candidates. However, the Bill proposes to change this open process in the case of the three senior judges, in that they will be appointed by the President after consultation with the JSC. What “consultation” means is explained in section 339(2) of the Constitution Amendment Bill.<sup>404</sup> According to this section, the President will have to inform the JSC of the person whom he proposes to appoint, will have to give the JSC a reasonable opportunity to comment on the proposal, and will have to give careful consideration to the JSC’s comments; however, he will not be bound to follow any recommendations the JSC may make.<sup>405</sup> If he makes an appointment inconsistent with the JSC’s recommendations, the Bill states that he will have to inform the Senate, but the Senate will not be able to set aside the appointment, since the president’s decision will be final.<sup>406</sup> However, it is argued that in South Africa there are challenges regarding the appointment of judges which the OCJ must overcome to realise the transformation of the judiciary. For example, the OCJ must reflect on the questions that have been raised about the President’s extensive power of appointing judges. The former DCJ Moseneke, as one of those who have questioned such powers, stated that:

A careful examination of the powers of the national executive chapter in the constitution displays a remarkable concentration of the president’s powers of appointment.<sup>407</sup>

According to him, the way power is currently allocated is not always optimal in terms of advancing the democratic project. The enactment of the CSAA, the CJ has become the head of judiciary. The CJ is also the Chairperson of the JSC and thus presides over meetings and interviews of candidates for judicial office. The CJ must provide leadership to the commission in the discharge of its constitutional function of selecting judges and must ensure that public interviews are conducted in an open and fair manner.<sup>408</sup> Importantly, too, the CJ, as chairperson of the Judicial Conduct Committee,

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<sup>403</sup> Amendment No. 20 Act, 2013.

<sup>404</sup> Amendment No. 20 Act, 2013.

<sup>405</sup> (No1) Bill, 2016 (HB 15) 2016.

<sup>406</sup> Clause 6 of (No1) Bill, 2016 (HB 15) 2016.

<sup>407</sup> Tabane ‘Powers of the national executive’ (2014) available at <<http://www.news24.com/Archives/City-Press/Moseneke-calls-for-review-of-president-powers-20150429>>. (Date accessed: 27 August 2017).

<sup>408</sup> Hoexter C & Olivier M ‘The judiciary in South Africa’ 144.

is the enforcer of discipline against fellow judges. It follows then in South Africa that the role of the JSC is not to act as a rubber stamp for the President's choice. Harm is done to the OCJ as well as to the JSC itself if the commission is not seen to engage rigorously with a candidate to ascertain his or her suitability for appointment.<sup>409</sup>

This was witnessed by the appointment of the first black woman as the President of the Supreme Court in March 2017. The President, in terms of section 174(3) of the 1996 Constitution, appointed Justice Mandisa Muriel Lindelwa Maya after consultation with the JSC.<sup>410</sup> While the President has the final say in appointing judges, the involvement of the JSC has always ensured protection against any possibilities of bias. The JSC in the appointment demonstrated its intention to deal with the myriad reasons given for the slow pace of diversifying the judiciary in terms of gender. One such reason given is that women are not keen to be nominated to the bench,<sup>411</sup> while others argue that the small number of women is mainly due to the unwelcoming nature of both the legal profession and the courts to women.<sup>412</sup>

The EFF leader Julius Malema has accused President Jacob Zuma of overlooking Justice Bess Nkabinde for position of DCJ of the CC.<sup>413</sup> In answering the accusation, the President said in a statement that:

A CC Judge hold office for a non-renewable term of 12 years. The Acting Deputy Chief Justice (Nkabinde) will be discharged from active service on 31 December 2017 after serving a non-renewable term of 12 years at the CC. It is mandatory that she retires on completion of the 12-year term at the CC. The President does not have powers to extend the term of a CC Judge once she/he has served a full term.

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<sup>409</sup> Hoexter C & Olivier M 'The judiciary in South Africa' 144.

<sup>410</sup> PanaPress '*President appoints first female President of Supreme Court of Appeal*' (2017) available at <<http://www.panapress.com/South-Africa--First-female-appointed-president-of-South-Africa-s-Supreme-Court---3-630507035-0-lang2-index.html>>. (Date used: 26 April 2017).

<sup>411</sup> Mnyongani F '*The judiciary as a site of the struggle for political power: A South African perspective*' available at <<http://ancl-radc.org.za/sites/default/files/The%20Judiciary%20as%20a%20Site%20of%20the%20Struggle%20for%20Political%20Power%20-%20A%20South%20African%20Perspective.pdf>>. (Date accessed: 26 April 2017).

<sup>412</sup> Mnyongani F '*The judiciary as a site of the struggle for political power: A South African perspective*' 9.

<sup>413</sup> Daily Sun '*Give black woman a chance-Malema*' (2017) Tuesday March 07 available at <[HTTP://WWW.DAILYSUN.CO.ZA/NEWS/NATIONAL/GIVE-BLACK-WOMEN-A-CHANCE-MALEMA-20170307](http://www.dailysun.co.za/news/national/give-black-women-a-chance-malema-20170307)>. (Date used: 27 April 2017). Malema alluded that he hoped that Zuma was not overlooking Nkabinde to punish her for disclosing that the Judge President of the Western Cape High Court, John Hlope, had allegedly tried to influence her on a matter related to Zuma's corruption charges.

However, in terms of the OCJ Annual Performance Plan of 2016/17,<sup>414</sup> the OCJ is determined to support the JSC in recommending candidates for judicial appointment by providing the Commission with secretariat and administrative services. Over the medium term, R82.3 million is budgeted for the work of commission under the JSC sub-programme in the Judicial Support and Court Administration programme.<sup>415</sup> Judicial officers will undergo continuous training from the South African Judicial Education Institute.

Over the medium term, about 225 judicial education courses will be conducted, including, among others, courses on legislation such as the Domestic Violence Act,<sup>416</sup> Maintenance Act<sup>417</sup> and Immigration Act.<sup>418</sup> The OCJ has been allocated an increased amount of R17.2 million in 2017/18 and R17.9 million in 2018/19 to facilitate training of judicial officers in the Judicial Education and Research programme.<sup>419</sup> It is clear that the OCJ is concerned with judicial education that will foster a high standard of judicial performance and ultimately ensure the “fair and efficient administration of justice”.<sup>420</sup> The importance of judicial education and training is to validate all judges and, more specifically, women judges. This access to education should be a pathway to decent work for women.<sup>421</sup>

CJ Mogoeng Mogoeng confirmed this by stating that women need to take on leadership roles in the judiciary.<sup>422</sup> When he was addressing the panel on the first day of interviews for new judges as a Chairperson of the JSC, he stipulated that more is needed to be done to fast-track gender transformation. The first round of April 2017 judges’ interviews was focused on positions for the DCJ and for a position at the SCA.<sup>423</sup> The CJ mentioned that one of the recommendations about Zondo to replace current acting DCJ of the CC Bess Nkabinde, whose term would end in December

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<sup>414</sup> Office of the Chief Justice Annual Performance Plan available at <<http://www.judiciary.org.za/doc/OCJ-APP-2016-2017.pdf>>. (Date accessed: 12 April 2016).

<sup>415</sup> OCJ Annual Performance Plan.

<sup>416</sup> No 116 of 1998.

<sup>417</sup> No 99 of 1998.

<sup>418</sup> No 13 of 2002.

<sup>419</sup> OCJ Annual Performance Plan 18.

<sup>420</sup> Moseneke D ‘Access to education and training: Pathway to decent work for women’ (2011) 14 *PELJ* 1 at 6.

<sup>421</sup> Moseneke D ‘Access to education and training: Pathway to decent work for women’ 6.

<sup>422</sup> News24 ‘*Gender transformation in spotlight at JSC*’ (2017) available at <<http://www.news24.com/SouthAfrica/News/gender-transformation-in-spotlight-at-jsc-20170403>>.

(Date accessed: 02 May 2017).

<sup>423</sup> News24 ‘*Gender transformation in spotlight at JSC*’ 1.

2017, was his support for and promotion of women within the judiciary.<sup>424</sup> Notwithstanding what former DCJ of the CC Justice Moseneke said about the concentration of power of appointment on the President, the current procedure for appointment of judges is transparent, in that nominees on the shortlist for appointment are chosen after public advertisements and public interviews; it also respects the separation of powers in that the nominees are selected by the JSC without interference from the executive or Parliament.

In the recent April 2017 interviews, the JSC experienced many challenges regarding interviewing its candidates. First, Judge Cecile Williams withdrew from the Northern Cape judge president and deputy judge president race, alleging that a colleague who was contending for one of those positions, was already tipped for the position.<sup>425</sup> CJ Mogoeng Mogoeng said they had received a letter from Williams, who decided to withdraw from the race. Referring to the letter, Mogoeng put to the remaining candidate, Judge Violet Phatshoane, “It is rumoured that the Judge President Frans Kgomo was grooming you for the Judge President or Deputy President-ship,” adding that Williams was seemingly displeased about this.<sup>426</sup> Mogoeng also highlighted that Phatshoane was seven years Williams’s senior and questioned whether she did not foresee a problem in this. Not responding to the allegations of her alleged grooming, Phatshoane said she did not foresee any problems which may arise, adding that, if there were any challenges, they would need to be “ironed out” accordingly.<sup>427</sup>

Judge President Kgomo, one of the commissioners of the JSC, defended himself, saying when the judicial positions were advertised, he sent them out to all the judges in the Northern Cape High Court, adding that he had wished all of them luck if they intended to apply.<sup>428</sup> With William withdrawing from the interviews, Phatshoane

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<sup>424</sup> News24 ‘Gender transformation in spotlight at JSC’ 1.

<sup>425</sup> Times Live ‘*Certain lawyers ‘groomed’ for senior positions, JSC hears*’ (2017) available at <<http://www.timeslive.co.za/local/2017/04/05/Certain-lawyers-groomed-for-senior-positions%E2%80%9A-JSC-hears>>. (Date accessed 04/05/2017).

<sup>426</sup> Times Live ‘*Certain lawyers ‘groomed’ for senior positions, JSC hears*’ (2017) 1.

<sup>427</sup> Times Live ‘*Certain lawyers ‘groomed’ for senior positions, JSC hears*’ (2017) 1.

<sup>428</sup> Times Live ‘*Certain lawyers ‘groomed’ for senior positions, JSC hears*’ (2017) 1. Earlier in the interviews, Commissioner Sfiso Msomi asked Phatshoane whether there were any factions in Northern Cape High Court division. She answered, “I have not been aware of any factions”, adding that she worked well alongside Williams. When pressed from another commissioner, though, on whether any other judges had had issues with Williams, Phatshoane revealed that there had been issues in the past. “It was about a judgment she has written in Afrikaans and the other colleague was not conversant with Afrikaans.” The judge who was not fluent in Afrikaans approached Williams

became the only candidate to be interviewed for the Northern Cape Deputy Judge President position but could not be recommended.<sup>429</sup>

The JSC also did not make recommendations for the deputy judge president position in the North West High Court. Two judges were interviewed for the position.<sup>430</sup> North West High Court Judge President Monica Leeuw had expressed unhappiness about a colleague being interviewed for the job of her Deputy, stating that it was not healthy. Judge President Monica Leeuw, who sits on the panel of commissioners, painted an unpleasant picture of her junior, Judge Annah Kgoele, saying the two of them had “ons and offs”.<sup>431</sup>

### 3.3.1 (d) *Security of tenure*

As is evident in South Africa’s century-long struggle for judicial independence,<sup>432</sup> the most important element is an assurance that judges will not be removed or disciplined because of their decisions. Tenure of judges, either for life or until a specified retirement age, is the strongest way to provide this assurance. The independence of judges depends, in part, on a guarantee that judges will not be dismissed or face the threat of dismissal from office for deciding adverse to the interest of the government of the day or powerful business or other societal interests aligned with the government.<sup>433</sup>

The 1996 Constitution provides that a judge of the CC is appointed for a non-renewable term of 12 years or until the age of 70 (whichever comes first),<sup>434</sup> except

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about issues of having difficulties in reading the judgment. Williams was reported to have responded by telling the said judge to “consult the dictionary”.

<sup>429</sup> News 24 ‘South Africa: JSC recommends Tlaletsi as Northern Cape Judge President’ (2017) available at <<http://www.polity.org.za/article/jsc-recommends-tlaletsi-as-northern-cape-judge-president-2017-04-06>>. (Date accessed 04 May 2017).

<sup>430</sup> News 24 ‘South Africa: JSC recommends Tlaletsi as Northern Cape Judge President’ 2.

<sup>431</sup> Chabalala J ‘JSC hears of unhealthy relationship at North-West High Court’ (2017/04/05) available at <<http://www.news24.com/SouthAfrica/News/jsc-hears-of-unhealthy-relationship-at-north-west-high-court-20170405>>. (Date accessed 28 August 2017). However, Kgoele appeared calm during her interview and said that she was puzzled by Leeuw’s claims as her relationship with her superior was healthy. A JCS member then asked her that how she would work under someone who perceived her as a problem child. She responded that the complaints were not that she was not a fit judge, which meant, “I work professionally, I do my job”.

<sup>432</sup> President Kruger dismissed Kotze Chief Justice in 1897 when the decision of the Court in *Brown v Leyds* NO (1897) 4 OFF Rep 17, triggered a confrontation between President Kruger and Chief Justice Kotze.

<sup>433</sup> De Vos P & Freedman W ‘South African Constitutional Law in context’ 238.

<sup>434</sup> Section 176(1) of the 1996 Constitution.

where an Act of Parliament extends the term of office of a CC judge<sup>435</sup>. Section 4 of the Judges' Remuneration and Conditions of Employment Act<sup>436</sup> extends this term to 15 years of active service, and the judge must retire when he or she reaches the age of 75.<sup>437</sup> This means a judge who has not served on any other court before appointment to the CC will normally serve a fixed term of 15 years on that court, provided, again, that he or she does not reach the age of 75 before the end of this 15-year period. Judges of other courts hold office until discharged from active service in terms of an Act of Parliament.<sup>438</sup> The Judges' Remuneration and Conditions of Employment Act governs this position. Section 3 of the Act is a replicate to section 176(1) of the 1996 Constitution.

The provision in section 176 of the 1996 Constitution that an Act of Parliament could extend the term of office of a CC judge was effected by an amendment of the Constitution in 2001.<sup>439</sup> The provisions of the Judges' Remuneration and Conditions of Employment Act then purported to give effect to the provisions of section 176.<sup>440</sup> Section 8 of the Judges' Remuneration and Conditions of Employment Act authorised the President to request a CJ or the President of the SCA at the end of their term of service "to continue to perform active service for period determined by the president" on the condition that this extension could not go beyond the date on which the CJ or President of the SCA turned 75 years of age.<sup>441</sup> The section was ostensibly passed in accordance with the amended section 176(1) of the 1996 Constitution, which authorises Parliament to extend the term of office of a CC Judge,<sup>442</sup> which was eventually held unconstitutional as discussed earlier in this chapter.

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<sup>435</sup> Section 176 was amended by the Constitution Sixth Amendment Act of 2001.

<sup>436</sup> No 47 of 2001.

<sup>437</sup> De Vos P & Freedman W 'South African Constitutional Law in context' 238. This means that a Constitutional Court judge, who has been in active service on a High Court or on the SCA for three or more years, will usually serve a fixed term of 12 years on the Constitutional Court. This is unless the judge turns 75 before completing the 12-years term, in which case the judge will retire when reaching the age of 75.

<sup>438</sup> Section 176(2) of the 1996 Constitution.

<sup>439</sup> De Vos P & Freedman W 'South African Constitutional Law in context' 238.

<sup>440</sup> De Vos P & Freedman W 'South African Constitutional Law in context' 238.

<sup>441</sup> De Vos P & Freedman W 'South African Constitutional Law in context' 239.

<sup>442</sup> De Vos P & Freedman W 'South African Constitutional Law in context' 239.

### 3.3.1 (e) *Judicial discipline (removal from office)*

The formal steps regulating the removal of a judge from office consist of a finding by the JSC that the judge concerned “suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct”,<sup>443</sup> followed a resolution supported by at least a two-thirds majority of the National Assembly calling for the removal of such judge.<sup>444</sup> Once the first two steps have been achieved, the President must remove such a judge, or may suspend such a judge from office.<sup>445</sup> However, the Judicial Service Commission Act, which provides detailed processes on the appointment of judges, fails to regulate matters of judicial discipline. There has as yet been no attempt to remove a judge from office, which can be seen as good self-discipline observed by the judiciary as a whole.<sup>446</sup> There has been an instance of a decision to pursue an investigation that might have the potential to become a recommendation for removal from office, but the judges resigned before the JSC could start.<sup>447</sup> Despite the judges from previous era being seen as upholding parliamentary supremacy, the common-law to judicial discipline for misconduct had not being given so grave as to warrant impeachment. Even after South Africa became a democratic country, however, specific attention was not given to this matter during the process of drafting the Constitution.<sup>448</sup> As a result, the 1996 Constitution is silent on the matter of judicial discipline in respect of conduct that does not warrant removal from office.

### 3.3.1 (f) *The position of the OCJ regarding security of tenure, judicial discipline and the removal of judges*

The judiciary is accountable for the efficient exercise of the judicial function. Governance within and accountability of the judiciary are important components of judicial independence and separation of powers, and may include practices such as publishing periodic reports of judicial activities, simplified rules and procedures, public hearings, well-reasoned judgments delivered within a reasonable time and proactive

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<sup>443</sup> Section 177(1)(a) of the 1996 Constitution.

<sup>444</sup> Section 177(1)(b) of the 1996 Constitution.

<sup>445</sup> Section 177(3) of the 1996 Constitution.

<sup>446</sup> Hoexter C & Olivier M ‘The judiciary in South Africa’ 213.

<sup>447</sup> Judge Ismail Hussain of the then Transvaal High Court resigned on the eve of the JSC meeting at which he would have had to account for conduct relating to an arbitration in which he presided after assumption of office as a judge. However, the JSC have until to date proved unwilling to confront the issue of potential impeachment even after the Facebook comment made by Judge Mabel Jansen, who also resigned before the JSC could investigate.

<sup>448</sup> Hoexter C & Olivier M ‘The judiciary in South Africa’ 213.

judiciary leadership.<sup>449</sup> Of value to the OCJ are the procedures established by the Judicial Services Commission Act, which created a tribunal and closed a lacuna, as the task of disciplining judges previously lay with the JSC, without any clear procedures established about how complaints ought to be dealt with.<sup>450</sup>

This Judicial Conduct Tribunal, consisting of two judges and a non-judicial member of the public selected from a list approved by the CJ together with the MJCD, must inquire into the complaint laid against the “accused judge” and submit a report containing its findings to the JSC.<sup>451</sup> It is hereby argued that this procedure qualifies with the principle of checks and balances as it does not entrust power to remove a judge solely with the judiciary, but also opens a room for the executive to check, which removes the over-concentration of power in the judiciary regarding the removal of judges. However, Judge Motata, who has been on special leave since he crashed his Jaguar into the wall of a Johannesburg home in 2007 while drunk, is challenging the JSC’s disciplinary structures in the CC.<sup>452</sup> Despite the High Court in Pretoria finding in December 2016 that the JSC is free to decide how it investigates judges, Motata claimed that the JSC’s conduct committees and tribunals breach the doctrine of the separation of powers because these include non-judicial members. State legal adviser Bassett argued in court papers that Motata’s claim is flawed in that, though these bodies help, it is the JSC that has the final say on recommendations for dealing with misbehaving judges.<sup>453</sup>

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<sup>449</sup> Albertyn C ‘Judicial independence and the Constitution Fourteenth Amendment Bill’ SAJHR (2006) 126 at 133, as to what types of norms and standards the Chief Justice is capable of doing is a question of fact because when Lord Mackay, Lord Chancellor from 1987 to 1997, required the High Court judge then serving as President of the Employment Appeals Tribunal to follow certain administrative procedures to clear up the backlog of cases, the judge resigned from the bench rather than accept the directive. A debate in the House of Lords alleged a serious breach of judicial independence, but the matter died without any discussion of where independence ended, and accountability began. See, Lord Mackay of Clashfern, the Lord Chancellor in the 1990s, 44 *Current Legal Probs.* 241, 258 (1991) 50.

<sup>450</sup> Siyo L & Mubangizi J C, *The independence of South African judges: A constitutional and legislative perspective* 834.

<sup>451</sup> Freedman W ‘Understanding the Constitution of the Republic of South Africa’ 273.

<sup>452</sup> *The Times* ‘*Drunk-driving judge Motata may be disciplined by Judicial Service Commission, says state*’ (2017) available at <<http://www.timeslive.co.za/local/2017/03/13/Drunk-driving-judge-Motata-may-be-disciplined-by-Judicial-Service-Commission%E2%80%9A-says-state>>. (Date accessed 03 April 2017).

<sup>453</sup> *The Times* ‘*Drunk-driving judge Motata may be disciplined by Judicial Service Commission, says state*’ 1. Bassett argued that the “Judicial Conduct Committee and Tribunal are bodies that assist the JSC in establishing whether a complaint will prima facie indicate incapacity, gross incompetence or gross misconduct”.



These include disciplinary proceedings pending against Judge Mabel Jansen, who resigned when the JSC was still busy processing the complaint and Judge Hlophe. Jansen, who was placed on special leave in May 2016, came under fire for a string of Facebook comments in which she said that 99% of the criminal cases she heard were “of black fathers/uncles/brothers raping children as young as five years old”. Judge Jansen wrote to President Jacob Zuma and the MJCD, Masutha, informing them of her resignation with immediate effect on 1 June 2017.<sup>454</sup> Despite the announcement made by the JSC that it had accepted the recommendation of the Judicial Conduct Committee to discipline Jansen before her immediate resignation, this chapter argues that Jansen received a mere slap on the wrist by resigning.

The Department of Justice said that the escalating rate of racial incidents in the country has required government to take steps to prevent this, including the development of the Draft Prevention and Combating of Hate Crimes and Speech Bill<sup>455</sup>. However, the department acknowledges the fact that the legislation in itself will not end racism but will instead deter people from racist behaviour. Though the decision by the JSC to discipline Judge Jansen was going to set an example to all judges who might have discriminatory tendencies, her resignation during the process denatured the chance to create a precedent. The same is true of proceedings against Hlophe, who stands accused of trying to influence CC justices, as they have been delayed for years.<sup>456</sup>

Section 177 of the 1996 Constitution only caters for disciplinary proceeding against Judges, not acting judges. Corder writes that there is a practice of appointing senior lawyers to the bench for period of one to three months, usually to replace a judge on long leave or to help reduce a backlog of pending trials which:

...has... been part of the administration of justice in South Africa for decades. As well as serving the direct purpose of allowing the court concerned to keep pace for its services, it has allowed those who are likely at some stage to be considered for judicial appointment a limited opportunity to experience a judicial work, thus better

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<sup>454</sup> Ramotsho K ‘Judge Mabel Jansen resigned amid disciplinary process by the JSC’ (2017/06/01) *DE REBUS* available at <<http://www.derebus.org.za/judge-mabel-jansen-resigned-amid-disciplinary-process-jsc/>>. (Date accessed 29 August 2017).

<sup>455</sup> GenN698 GG40367/24/10/2016.

<sup>456</sup> The Times ‘Drunk-driving judge Motata may be disciplined by Judicial Service Commission, says state’ 1.

informing any subsequent decision as to the person's suitability for judicial office.<sup>457</sup>

Section 175(2) provides that the MJCD must appoint acting judges "after consulting the senior judge of the court on which the acting will serve". The section makes no mention of the circumstances in which such an appointment may be made, and no involvement by the JSC is contemplated.<sup>458</sup> The decision must be made in good faith, having due regard for the advice given, but the advice of the senior judge does not bind the Minister. However, the Judicial Service Commission Act defines a judge who is subject to the rules of the JSC as including:

...any person holding the office of judge in a court of similar status to a High Court.... And includes any Constitutional Court Judge or Judge performing judicial duties in an acting capacity.<sup>459</sup>

It goes without saying that the only recourse that currently exists when someone lodges a complaint against an acting judge is lodging a complaint with their professional body, for example the Bar Council or Law Society.<sup>460</sup>

### 3.4 Conclusion

The 2005 Constitution Fourteen Amendment Bill (Draft)<sup>461</sup> proposed constitutional and legislative amendment and could have included: placing the judiciary under the authority of the Minister of Justice with regard to the "administration and budget of all courts"; allowing the Minister almost unchecked power to make rules of court; requiring judges to undergo government-controlled judicial training; and allowing for the lodging of complaints against judges, where the complaints were not decided upon by their peers.<sup>462</sup>

However, governance is important to the operation of the court system in the same way that it is important to the operational success of other public enterprises and to

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<sup>457</sup> Corder H 'Appointment, Discipline and Removal of Judges in South Africa, in Lee H P (ed), *Judiciaries in comparative perspective* (2011) 105.

<sup>458</sup> Tilley A 'The role of the JSC in complaints about acting judges' (2017) available at <<https://www.dailymaverick.co.za/opinionista/2017-02-06-the-role-of-the-jsc-in-complaints-about-acting-judges/#.WQnQOeV95PY>>. (Date accessed 03/04/2017).

<sup>459</sup> Section 7 of Judicial Service Commission Act No. 9 of 1994.

<sup>460</sup> Tilley A 'The role of the JSC in complaints about acting judges' 2.

<sup>461</sup> GN 2023 in GG 28334 OF 14 December 2005); Superior Court Bill B52 of 2003 (Working Draft of 19 October 2005).

<sup>462</sup> Section 165 of 1996 Constitution Fourteenth Amendment Bill (Draft).

the profitability and effectiveness of private corporations. Governance of the courts is important because it involves the basic structural and operational relationships between the judicial and executive branches of government in the provision of judicial services.<sup>463</sup> This chapter argued that, although the creation of the OCJ is a good step forward for independence of the judiciary because the judiciary is better equipped to run its own administrative affairs, enhancing administrative independence from the executive, there is a worrying trend of executive redrawing the lines of judicial independence and separation of powers. However, South Africa's tripartite separation of powers has the result that, theoretically, Parliament makes laws while the judiciary applies them. The study has argued that nothing in this separation is ever quite that clear-cut. This is because of interpretation by the courts of the meaning of a piece of legislation, coupled with the precedent system, means that other courts are bound by that legislation as interpreted by the courts, until a superior court places a different interpretation on it, or the legislature amends it.<sup>464</sup> This does not mean that the courts determine statute law, but their function is to interpret and apply a statute without amending or altering its provisions. It does, however, mean that a lower court applies a higher court's interpretation of the wording of an Act, rather than applying the wording of the statute itself. So OCJ as a corporate entity of the unified judiciary in South Africa will be able to run its affairs should it be intrusted wholly to them.

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<sup>463</sup> Sallmann P 'Extract on courts' Governance from going to court, A discussion paper on Civil Justice in Victoria, Department of Justice, Victoria, April 2000 The Eighteenth AIJA Annual Conference.

<sup>464</sup> Schulze H *et al* 'General principles of Commercial law' 13.

## Chapter 4

### 4 Identified challenges to protecting and promoting judicial independence in South Africa

#### 4.1 Introduction

This chapter describes certain incidents that raise doubts about the integrity of some parts of the South African judiciary. On 11 February 2013, President Zuma signed the Constitution Seventeenth Amendment Bill (6B-2011), which was brought into operation on 23 August 2013.<sup>465</sup> The Act amends section 167 of the 1996 Constitution to make the CC the apex court in the country to deal with all matters of law.<sup>466</sup> In relation to the constitutional goal of enhancing representativeness, the constitutional provisions can be criticised for their rather narrow focus.

This chapter describes a series of major challenges to the independence of the judiciary after the establishment of the OCJ. The first are the financial challenges, not unique to the judiciary, of trying to maintain its operations and the quality of those operations in an era of soaring budget deficits. The second stems from the increasingly divisive politics that surround the country and permeate so many aspects of our lives, which have invaded the appointment process for the intermediate appellate courts to a remarkable degree, causing people to see the role of judges differently and some judges to see themselves and their role differently.<sup>467</sup> Lastly, there is the accountability of judges, where some of the confusion in the debate over the independence and accountability of judges is highlighted.

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<sup>465</sup> Proclamation R35 GG 36774 OF 22 August 2013.

<sup>466</sup> Currie I & De Waal J 'The Bill of Rights Handbook' 97.

<sup>467</sup> Section 4 of Norms and Standards for the Performance of Judicial Functions. The coordination of the judicial functions of all magistrates' courts falling within the jurisdiction of Division of the High Court is the responsibility of the Judge President of that division. The heads of the various Courts will manage the judicial functions and ensure that all Judicial Officers perform their judicial functions efficiently. In the case of the magistrates' courts, the heads, who are the Regional Court Presidents and the heads of the administrative regions will account for such management to the relevant Judge President. The Chief Justice said that, prior to the Constitution Seventeenth Amendment Act, the President of the Supreme Court of Appeal and the judges' president honoured invitations to meetings convened by the Chief Justice, and programmes organised by him, out of sheer civility and recognition of some moral authority he had over them. He added that the Chief Justice was generally regarded as nothing more than the head of the highest court in the land, with little or no say in the operational matters of all other courts. Similarly, magistrates attended meetings conveyed by a Judge President of a division of the High Court out of sheer deference to a senior judicial officer in the province. Some in positions of leadership simply ignored those meetings.

Even though the previous chapters in this study argued that judicial independence is fairly protected by the 1996 Constitution, challenges to its independence are not unique to the period prior to its establishment, but recent events have highlighted the difficulties facing a judicial branch that can neither enforce its own decisions nor fund its own operations. Shifting the judicial budget from the DoJ&CD to the OCJ, making the CJ the head of the judiciary and consolidating all courts into a single, unified whole go a long way to giving true meaning to the spirit of the 1996 Constitution, according to which the authority of the judiciary vests in the courts. These changes have drastically increased the institutional independence of the OCJ and helped to solidify its status as equal to other branches of government.

Challenges to courts, to an independent judiciary and overall to the administration of justice come from many sources and take many forms. From the inception of the Republic of South Africa, courts have been the target of criticism and complaint by political and social commentators and by movements from every corner of the ideological spectrum. This chapter discusses these challenges to the independence of the judiciary that are operative today and seem severely troubling. By discussing these challenges, the chapter investigates some fundamental changes that are occurring as result of the establishment of the OCJ.

## **4.2 Political challenges**

### *4.2.1 Governance and financing of the judiciary*

Previously, the South African judiciary was governed and financed according to the English legal system in which court administration was dealt with by the DoJ&CD, as already stated in Chapter 3.<sup>468</sup> The administration of the courts was but one facet of the responsibilities of the department, which included the prosecuting authority, the Chapter 9 institutions, the South African Law Commission and the administration or a host of legislation that fell under it. The operational needs of the courts were supplied through the machinery of the Department.<sup>469</sup> As result, the provision of administrative functions and other services connected with the administrative of justice were bound up with the bureaucracy of the broader public service.<sup>470</sup> Senior members of the

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<sup>468</sup> Ngcobo SS 'Delivery of justice: Agenda for change' *SALJ* (2003) 688, 689.

<sup>469</sup> Ngcobo SS 'Delivery of justice: Agenda for change' 689.

<sup>470</sup> Ngcobo SS 'Delivery of justice: Agenda for change' 689.

judiciary were responsible for administrative functions which were closely related to adjudication, while the executive was responsible for the administration of finance, logistics and support staff.<sup>471</sup>

This raises important concerns concerning judicial independence, including administrative challenges that have preoccupied the judiciary over the years. The establishment of the OCJ has gone a long way to give the true meaning to the spirit of the 1996 Constitution, in that the administration of the judiciary falls wholly in the hands of the judiciary. Therefore, the main task of the CJ as a leader of the judicial authority has been strengthened to ensure that the rule of law is upheld.<sup>472</sup> Now, judges' president of various courts can be important spokespersons for the judiciary in relation to the other powers of state and the public at large. They can act as managers of independent courts instead of managers under the influence of the executive.<sup>473</sup>

However, in light of this chapter's findings, the potential threat to judicial independence that might arise from an internal judicial hierarchy of the OCJ<sup>474</sup> is noted, because authority granted to the CJ to establish "norms and standards for the exercise of judicial functions of all courts"<sup>475</sup> places too much power in the hands of a single individual while neglecting to place the administration of individual courts into the hands of its presiding judges.<sup>476</sup> The CJ must therefore respect that a judge president or judge, in particular a judge working in the court he or she presides over, is in the performance of his or her functions and is no-one's employee. So it goes without saying that a judge deciding a case does not act on any order or instruction of a third party inside or outside the OCJ, including the CJ him- or herself or the head of that particular court.<sup>477</sup> The CJ or judge president should not have the power to decide questions relating to a judge's remuneration or housing and should never execute his or her duties in a way that puts pressure on a judge or influences a judge to decide a

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<sup>471</sup> See Chapter 3 at 3.3.2 (a).

<sup>472</sup> OCJ 'The establishment of the Office of the Chief Justice 2010-2013' 3.

<sup>473</sup> Consultative Council of European Judges (CCJE) '*Challenges for judicial independence and impartiality in the member states of the Council of Europe*' available at <[http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf\(2016\)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.asp](http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf(2016)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.asp)>. (Date accessed 05 January 2017).

<sup>474</sup> Consultative Council of European Judges (CCJE) '*Challenges for judicial independence and impartiality in the member states of the Council of Europe*' 7.

<sup>475</sup> Section 165 (6) of the 1996 Constitution.

<sup>476</sup> Du Toit L 'Assessing the performance of South Africa's Constitution' 22.

<sup>477</sup> Du Toit L 'Assessing the performance of South Africa's Constitution' 22.

case in a certain way.<sup>478</sup> Judges in their judicial institution may share the facts of the cases and discuss specific relevant legal issues with colleagues, including senior judges.<sup>479</sup> However, this consultation process must be regarded as advisory, and never as authoritarian instruction, since impartiality requires that, in the discharge of his or her judicial duty, a judge is answerable to the law and his or her conscience only.<sup>480</sup>

Although the 1996 Constitution mandates that the powers of the constitutional government be separated among three independent branches, the judiciary, still under the OCJ,<sup>481</sup> is financed, like all other part the constitutional government, through appropriate Bills passed by Parliament and signed by the President. The judiciary does not have the power of the purse. So, judiciary independence must always be understood as qualified by its dependence on the other branches for its budget. It is not a violation of constitutional independence that the South African courts lack power of purse, but the administrative model that the courts are in conflicts with constitutional values.

#### *4.2.2 Assessment of CSAA and the Superior Courts Act regarding administration of the judiciary*

The CSAA has amended section 165 of the 1996 Constitution by adding subsection (6), which reads:

The Chief Justice is the head of the judiciary and exercises responsibility over the establishment of norms and standards for the exercise of judicial functions of all courts.

Subsequently, the OCJ has been established to provide administrative and professional support to the CJ in the carrying out of his or her functions and duties.<sup>482</sup> The Superior Courts Act places the management of “judicial functions”, such as the determination of sitting schedules, assignment of judicial officers to sittings and case-

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<sup>478</sup> Du Toit L ‘Assessing the performance of South Africa’s Constitution’ 22.

<sup>479</sup> Dung L T ‘Judicial independence in transitional countries’ 12.

<sup>480</sup> Dung L T ‘Judicial independence in transitional countries’ 12.

<sup>481</sup> Address by Minister TM Masutha, MP (Adv) at the occasion of the budget debate of the Office of the Chief Justice, 17 May 2017, National Assembly, Cape Town, available at file<[http://www.judiciary.org.za/doc/BV-Speech\\_17-May-2017.pdf](http://www.judiciary.org.za/doc/BV-Speech_17-May-2017.pdf)>. (Date accessed 25 May 2017.

<sup>482</sup> Du Toit L ‘Assessing the performance of South Africa’s Constitution’ 12.

flow management, under the control of the judiciary.<sup>483</sup> Court administration is, however, still under the control of the executive.<sup>484</sup> Expenditure incurred in the administration and functioning of the judiciary is to be paid from moneys allocated by Parliament.<sup>485</sup> It is evident that very little has changed in relation to the financial independence of the judiciary, even after the establishment of the OCJ, which still remains under executive control. Arguably, the only model of court administration suited to a democratic South Africa is an independent administrative agency or set of agencies that are entirely accountable to the judiciary.<sup>486</sup> All funding supporting the OCJ should be sourced directly from Parliament, as is done in the case of the Auditor-General.<sup>487</sup> The Auditor-General is mandated to audit and report on the accounts, financial statements and financial management of “all national and provincial state departments and administrations”.<sup>488</sup>

In addition to the duties prescribed by this section, and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of any institution funded from the National Revenue Fund, a provincial revenue fund or a municipality, among others.<sup>489</sup> However, despite powers set out by the 1996 Constitution, the Auditor-General has also other powers and functions which are prescribed by national legislations. The most significant legislation in this regard is the Public Audit Act.<sup>490</sup> The purpose of the Public Audit Act is to provide guiding principles to the Auditor-General and gives effect to the provisions of the Constitution by establishing the oversight mechanism, for example the Standing Committee on Auditor-General, which is to oversee the Auditor-General. This Act also assigns functions to the Auditor-General and outlines the appointment process of the Auditor-General and his or her deputy.

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<sup>483</sup> Section 8 of the Superior Court Act of 2013.

<sup>484</sup> Section 8 of the Superior Court Act of 2013.

<sup>485</sup> Section 10 of the Superior Courts Act.

<sup>486</sup> Hoexter C & Olivier M' The judiciary in South Africa'114.

<sup>487</sup> Section 181(2) of the 1996 Constitution. There must be two-thirds support from both houses of Parliament for the nominee and there is no debate on the issue. Also, the application of the PFMA as it is amazingly wide; it covers departments, legislatures, constitutional institutions such as the Public Protector but not the Auditor-General).

<sup>488</sup> Section 188(1) of the 1996 Constitution.

<sup>489</sup> Section 188(3) of the 1996 Constitution.

<sup>490</sup> No. 25 of 2004.



Section 55(2) of the 1996 Constitution prescribes that the National Assembly must provide for oversight mechanisms to ensure that all organs of state in the national sphere of government are accountable to it and maintain oversight over the executive and constitutional institutions. Therefore, the Standing Committee on Auditor-General was established in 2005 and its mandate is outlined in section 10(3) of the public Audit Act, which prescribes that the Standing Committee on Auditor-General must assist and protect the Auditor-General in order to safeguard its independence, impartiality, dignity and effectiveness.<sup>491</sup> This would allow for an administration that is accountable to and controlled by the judiciary, but accountable also to Parliament for how it spends its funds.<sup>492</sup> However, according to the constitutional goal of independence, there seems to have been minimal compliance.

The move of the OCJ away from the executive-based model to the separate department model of court administration was a result of, firstly, deficiency, in that the executive-based model compromises the independence of the judiciary. Secondly, it is said that it is not as effective in delivering services as the other models in which the judiciary plays a key role in the administration of courts.<sup>493</sup> The issue of court administration cannot therefore be determined without regard to both the status and the role of the judiciary in a constitutional democracy. Courts play a vital role of resolving disputes impartially according to law in South African constitutional democracy. However, the first Hoexter Commission<sup>494</sup> concluded that the principal cause of inefficiency in the functioning of the courts lies in the provision of administrative functions and other services in connection with the administration of justice. In this regard, it found that:

- (a) In the performance of its administrative functions in connection with the administration of justice, the Department of Justice demonstrated a lack of appreciation of the true financial and administrative needs of the judiciary.

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<sup>491</sup> Parliament of the Republic of South Africa 'The role of Constitutional institutions supporting democracy in facilitating effective and proactive oversight over the Executive' (23/02/2012) available at <<http://www.sals.gov.za/projects/ics/2012/masutha.pdf>>. (Date accessed 30 August 2016).

<sup>492</sup> Parliament of the Republic of South Africa 'The role of Constitutional institutions supporting democracy in facilitating effective and proactive oversight over the Executive' 2.

<sup>493</sup> Ngcobo SS 'Delivery of justice: Agenda for change' 694.

<sup>494</sup> Hoexter Commission 'Commission of inquiry into the structure and functions of the courts' fifth and final Report II (1983) available at <<http://www.sahistory.org.za/archive/the-hoexter-commission-and-the-independence-of-the-judiciary->>. (Date accessed 30 August 2017), para 3.2.

- (b) The business of providing support services and staff in respect of courts invariably becomes bogged down in the larger bureaucracy of the public service, to such an extent that proper attention is not always devoted to the specialised needs of the judicial machinery.
- (c) A bureaucratic feature that is particularly inimical to the judicial function is spreading over several departments the responsibility for the provision to court of services, staff and related facilities.
- (d) There was no planned or even conscious cooperation or liaison between those concerned with the various aspects of the administration of justice between the Department of Justice and the judiciary.

Executive-based court administration is fraught with ambiguities and confused lines of authority. The employees of the courts are also the employees of the executive. As employees of the court they have responsibilities to the judiciary and, in particular, to the head of the court, but they are also subject to the authority of their departmental superiors and are subject to Public Service direction and control.<sup>495</sup> As the then-CJ of South Australia, Hon Len King J, observed in this context:

There is not the slightest doubt that a perverse minister or departmental head could frustrate, or at least limit, the effectiveness of the independent judicial arm of government. The system can operate only due to the goodwill of all involved in it and to the observance by servants of the executive branch of conventions touching the activities of officers of the court in the discharge of their duties and their relationships with the judiciary. Although, by reason of goodwill and observance of conventions, the system usually operates in tolerable fashion, the dual responsibility of officers of the court, on the one hand to the court and the judiciary and on the other to their Public Service superiors and ultimately to the Minister, can create tensions which operate to the detriment of efficient administration of the courts. The dual responsibility is, too, a factor which, in my view, operates to inhibit the development of a more streamlined and effective court administrative structure.<sup>496</sup>

#### *4.2.3 The OCJ model of court administration*

The OCJ is under the model known as the separate department model. This model consists of a specially created department that provides a range of services to the judiciary. As is the case with the executive-based model, the judiciary has no

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<sup>495</sup> Section 45 of the Public Finance Management Act no 1 of 1999 as amended by Act No. 29 of 1999 lays definite financial management responsibilities of all public managers.

<sup>496</sup> King L 'The separation of powers' in Australia Institute of Judicial Administration Courts in a Representative Democracy' 25.

responsibility or power over the administration of courts. Instead, there is a separate state department dedicated exclusively to the interests of the courts.<sup>497</sup> This system is like those in New Zealand and Denmark. In New Zealand, a Department for Courts was created to carry out the administration of courts and tribunals, enforcement of court orders relating to fines and debts, and the administration of the Maori Land Court and Waitangi Tribunal.<sup>498</sup> The establishment of this Department was a result of the Report of the Court Services Review Committee, which identified the need for a separate agency to focus on the core business of courts and address issues being faced by court administration.

In Denmark, an independent state unit, the Court Administration, was established on 1 July 1999 pursuant to the Court Administration Act, 1998. The unit is headed by a Board of Governors (the Board) composed of one Supreme Court judge, two high court judges, two county court judges, one deputy judge, two court clerks, one practising lawyer and two persons with special managerial experience. The Board is responsible for the administration of the judiciary and appoints a director to head the Court Administration. The director is charged with the day-to-day administration of the judiciary.<sup>499</sup>

This model does not overcome the problem of judicial independence as the separate department is still an arm of the executive branch of government and the problem of divided loyalties continues to arise, just like in the past, when judiciary looked very much like a unit within the DoJ&CD.<sup>500</sup> To understand and recommend on where to locate the administration of the judiciary in South Africa to be in line with the Constitution, a comparative study is undertaken below.

### **4.3 Recommendations on court administration suited for the OCJ**

According to the prevailing theory inherited from Montesquieu and others, as discussed in Chapter 2, the various branches of government are required to be as separate as possible. This must be done to avoid a situation where the executive becomes hostile towards the judiciary and ends up holding its purse strings tied to

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<sup>497</sup> Ngcobo SS 'Delivery of justice: Agenda for change' 700.

<sup>498</sup> Ngcobo SS 'Delivery of justice: Agenda for change' 700.

<sup>499</sup> Ngcobo SS 'Delivery of justice: Agenda for change' 700.

<sup>500</sup> Ngcobo SS 'Delivery of justice: Agenda for change' 700.

punish the judiciary for unfavourable decisions made against the executive. The CSAA and Superior Court Act make provisions for the rationalisation of the structure of the superior courts and for matters relating to court administration. It also vests additional powers and functions in the CJ.<sup>501</sup> However, these two pieces of legislation deal with all the workable solutions put forward by Coetzer<sup>502</sup> except for the centralisation of the administration of courts, which must be divorced from the public service. The chapter now looks at possible solutions which the South African judiciary can undergo in order to fulfil the constitutional obligation.

#### *4.3.1 Various models of court administration*

There are different models of court administration that exist to be used in order to prescribe decision-making in the organisation.<sup>503</sup> What is of importance in these models, is the role of the judiciary in decision-making. These different kinds of models can be discussed summarily as follows:

- (a) The executive model – in this model, although there are many variations, policy and operational decision-making are the responsibility of an executive department headed by a cabinet minister.<sup>504</sup> In our situation before the creation of the OCJ, it was headed by a Minister of Justice.
- (b) The independent commission model – this model contemplates a range of decision-making in court administration being undertaken by an independent commission which, by definition, would be beyond both executive and judicial control. The independent commission model offers some advantages – most notably, it provides a level playing field.<sup>505</sup>
- (c) The partnership model – this model involves different decision-making mechanisms through which the judiciary and executive would collaborate in

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<sup>501</sup> Section 9(2), 11(1) (c) and 54 of the Superior Court Act.

<sup>502</sup> Coetzer JPJ 'Die Regsadministrasie en Verwante Sake in n nuwe Bedeling' 110.

<sup>503</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration' 9 available at <[https://www.cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_other\\_Alternative\\_en.pdf](https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_Alternative_en.pdf)>. (Date accessed 12 May 2017).

<sup>504</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration' 9.

<sup>505</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration' 9.

setting the direction for court administration. Neither the judiciary nor the executive under this model could impose a decision on the other.<sup>506</sup>

- (d) The executive guardian model – this model involves a lead executive role in court administration decision-making but allows for judicial intervention in certain circumstances.<sup>507</sup>
- (e) The limited autonomy model – this model provides for judicial control and autonomy over certain areas of court administration decision-making. Under this model, the executive continues to control the setting of overall court administration budgets, but the court is self-governing within that global budget.<sup>508</sup>
- (f) The limited autonomy and commission model – this model incorporates the features of the limited autonomy model but joins that model with the use of an independent commission on issues surrounding the global budget, which falls outside the scope of limited autonomy, and in this way provides self-governing courts and the executive with a mechanism for avoidance and resolution of budget disputes.<sup>509</sup>
- (g) The judicial model – this model establishes judicial control over virtually all court administration decisions, including the setting of the global budget.<sup>510</sup>

In this regard, the models that have emerged in the United States, Australia and Ireland are discussed, and then compared to the model used in South Africa.

#### *4.3.1 (a) The United States Federal Court model*

In the USA, the federal courts are controlled and administered by three institutions. The first is the Judicial Conference of the USA, which is the national policymaking

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<sup>506</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration' 9.

<sup>507</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration' 10.

<sup>508</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration' 10.

<sup>509</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration' 10.

<sup>510</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration' 10.

body for federal courts. It consists of heads of the federal courts and is chaired by the CJ of the USA. Its main responsibilities include:

- approving the annual budget request of the judiciary (which is prepared by the administrative office and the budget committee of the Judicial Conference);
- proposing, reviewing and commenting on legislation which may affect the workload and procedures of the courts;
- drafting and amending the general rules of practice and procedure for litigating in the federal courts, subject to the formal approval of the Supreme Court rules in Congress;
- promoting uniformity of court procedures and the conduction of court business;
- exercising authority over code of conduct, ethics and judicial discipline;
- making recommendations to Congress for additional judgeship; and
- reviewing space and facility's needs.<sup>511</sup>

The second institution is the Administrative Office of the USA, which provides a broad range of legislative, financial, automation, management, administrative and programme support service to the federal courts. The third institution is the Federal Judicial Centre, which is the primary research and education agency of the judiciary.<sup>512</sup> These institutions are independent and are under the control of the judiciary. They were created in response to the need to place the control and administration of the courts under the judiciary, a move that was more consistent with the separation of powers. As in this country, the administration of the courts was initially under the control of the executive. The shift came about as result of a movement for the reform of the judiciary to address the concerns relating to efficiency in the administration of justice.<sup>513</sup>

#### 4.3.1 (b) *Australia*

Australia has two systems of judicially-based court administration models. The first is the judicial autonomy model, in which each court individually controls its own administration. This model applies in the Australian federal courts where courts enjoy

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<sup>511</sup> Ngcobo SS 'Delivery of justice: Agenda for change' 700.

<sup>512</sup> Ngcobo SS 'Delivery of justice: Agenda for change' 701.

<sup>513</sup> Ngcobo SS 'Delivery of justice: Agenda for change' 701.

administrative and financial autonomy.<sup>514</sup> Each court in the federal scheme controls its own administration and support staff and is governed separately.

However, in South Australia, a different model is applied. An independent authority, the Court Administrative Authority, governs state courts and is a means for the judiciary to control the provision of the administrative facilities and services required by state courts to carry out their judicial functions.<sup>515</sup> This authority is made up of the State Courts Administrative Council (which consists of the Chief Justice of the Supreme Court, Chief Judge of the District Court and the Chief Magistrate of the Magistrate Court, as well as an associate member from each of these courts) and the State Court Administrator, who is the Council's Chief Executive Officer. The State Court Administrator is responsible for the control and management of the Council's staff and the management of property that is under the Council's care, control and management.<sup>516</sup> The Court Administrative Authority is responsible for the provision of administration services and facilities that state courts require in discharging their judicial and administrative functions and it does this under the direction and control of the judiciary through the State Courts Administrative Council.<sup>517</sup>

#### *4.3.1 (c) Ireland*

Ireland established the Court Service (the Service) on 9 November 1999 under the Courts Service Act, 1998. The functions of the Service are to manage the courts, provide support services for the judges, provide information on the court system to the public, provide, manage and maintain court buildings, and provide facilities for users of the courts.<sup>518</sup> The Act also established the Board of Service, consisting of the heads of the various courts as well as one expert in a specific area of court business, the Chief Executive Officer, nominees of the Council of the Bar of Ireland and the Law Society of Ireland, an elected member of the staff of the Service, a nominated officer of the Minister of Justice, Equality and Law Reform, a court user's representative, a nominee from the Irish Congress of Trade Unions, and a representative who has relevant knowledge and experience in commerce, finance or administration.<sup>519</sup> The

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<sup>514</sup> Ngcobo SS 'Delivery of justice: Agenda for change' 701.

<sup>515</sup> Ngcobo SS 'Delivery of justice: Agenda for change' 702.

<sup>516</sup> Section 17(2) of the South Australian Courts Administration Act, 1993.

<sup>517</sup> Section 10(1) of the South Australian Courts Administration Act, 1993.

<sup>518</sup> Section 5 of the Ireland Courts Service Act, 1998.

<sup>519</sup> Section 11(1) of the Ireland Courts Service Act, 1998.

composition of the Board reflects a broader philosophy of governance of courts and the court system, one that is considerably more community-orientated. The Board considers and determines policy in relation to the Service and oversees the implementation of that policy by the Chief Executive.<sup>520</sup>

#### *4.3.1 (d) Comparative analysis of the USA, Australia and Ireland to South Africa*

The question as to who should run the courts in South Africa must be determined in the light of the nature and scope of the judicial function. The exercise of the judicial function involves at least two main functions, namely decision-making and court administration.<sup>521</sup> Within the court administration function, two broad categories of court administration may be identified. The first category consists of case-flow management and records, statistics and information systems management. The second category consists of budgetary and financial management, space and equipment management, and other administrative functions.<sup>522</sup> All these functions are essential to the exercise of judicial power. So, executive-based control over the budgetary and financial management (second category) is not necessarily incompatible with judicial independence.

Section 165(4) of the 1996 Constitution contemplates that courts will receive assistance from other organs of state “to ensure the independence, impartiality, dignity, accessibility and effectiveness of courts”.<sup>523</sup> However, the 1996 Constitution outlaws any interference with the functioning of the courts. Much therefore depends on how such control is exercised. It requires a proper relationship to be maintained with the judiciary. However, the dangers inherent in executive-based court administration render it undesirable to entrust the second category to the executive.<sup>524</sup>

In this context, the then CJ of South Australia observed:

Control of the purse strings and of court staff could be used to hamper the ability of the courts to deliver justice. If courts do not have clear and unchallengeable control over the spending of their budgets and over the court staff, there is always the danger that a future generation of parliamentarians and public servants may have a diminished grasp of the conventions surrounding the relationship between the executive and the judiciary. Modern political history in Australia has

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<sup>520</sup> Section 13(3) of the Ireland Courts Service Act, 1998.

<sup>521</sup> Ngcobo SS ‘Delivery of justice: Agenda for change’ 704.

<sup>522</sup> Ngcobo SS ‘Delivery of justice: Agenda for change’ 704.

<sup>523</sup> Ngcobo SS ‘Delivery of justice: Agenda for change’ 704.

<sup>524</sup> Ngcobo SS ‘Delivery of justice: Agenda for change’ 705.



demonstrated how weak a reed convention can be when it is subjected to political pressure. I have no doubt that the capacity of the courts to deliver independent justice can best be secured by placing every aspect of the administration of the courts under the ultimate control of the judges who are responsible for the delivery of that justice.<sup>525</sup>

Though the OCJ is still undergoing the stages process, it is submitted that stage 2<sup>526</sup> should be disregarded (as it will still place category 2 under the control of executive) and stage 3 should be implemented. It is observed that the best way for the courts to deliver justice is to be left alone to do their own administration and to have ultimate control of the judiciary. This does not mean that the executive has no part to play in that kind of court administration. But, according to CJ Mogoeng Mogoeng, the kind of court administration model that is compatible with the OCJ is one led by a Judicial Council comprising members of the judiciary only.<sup>527</sup> In many cases, judicial councils are composed primarily of judges. But Mogoeng alluded that they have decided that that Council, to be constituted by Heads of Courts, will have to be guided by an Advisory Board whose members will be drawn from a wide range of disciplines for purposes of judicial accountability and transparency.<sup>528</sup> The creation of an autonomous judicial council, however, assumes the redistribution of formal authority from the politically controlled Ministry of Justice to the politically independent judicial council. The judicial council is thus designed to insulate the judiciary from overt political influence while placing the responsibility of governing and monitoring judicial behaviour in the hands of independent judicial authorities.<sup>529</sup>

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<sup>525</sup> King L 'The separation of powers' in Australia Institute of Judicial Administration Courts in a Representative Democracy' 25.

<sup>526</sup> Phase 2: the establishment of the OCJ as an independent entity similar to the Auditor-General. The South Africa's Auditor-General is the 'external auditor' for all government departments and other institutions that receive public funds, in all sphere of government. The office of Auditor-General was established by the South African Constitution, making it one of the state institutions supporting constitutional democracy, also called 'Chapter 9 Institutions', after the chapter 181(e) of the Constitution. The Auditor-General is independent of any department and reports directly to Parliament, the provincial legislatures and municipal councils.

<sup>527</sup> Mogoeng M 'The Office of the Chief Justice and its implications' 4.

<sup>528</sup> Mogoeng M 'The Office of the Chief Justice and its implications' 9.

<sup>529</sup> Beers DJ 'Judicial self-governance and the rule of law: Evidence from Romania and the Czech Republic' 7.

#### 4.3.2 Which court administration model is suited for the OCJ?

Brian Dickson<sup>530</sup> explains that the requirements of administrative independence for the courts are:

Independence of the judicial power must be based on a solid foundation of judicial control over the various components facilitative and supportive of its exercise... Effectively, the financial and administrative requirements of the judiciary for the dispensing of justice are in the hands of the very ministers who are responsible for defending the Crown's interests before the courts... Preparation of judicial budgets and distribution of allocated resources should be under the control of the chief justices of the various courts, not the ministers of justice. Control over finance and administration must be accompanied by control over the adequacy and directions of support staff.

In the *Mackeigan* case, McLachlin J noted the importance of financial and administrative independence, and the importance to avoid relations between the branches of government to the judiciary and how they must be separated from each other as follows:

What is required, as I read *Beauregard v Canada*, is avoidance of incidents and relationships which could affect the independence of the judiciary in relation to the two critical judicial functions-judicial impartiality in adjudication and the judiciary's role as arbiter and protector of the Constitution.<sup>531</sup>

Since there has never been any argument advocating for a judiciary acting as an island from government, the co-working relationship between the three branches of government is of paramount importance. It is hereby argued that a judicially based court administration model as advocated by the CJ of South Africa<sup>532</sup> poses a danger of unchecked judicial power, which may result either in an excessive or improper exercise of that power or in abdication or neglect of duty.<sup>533</sup> In that instance, the limited autonomy and commission model is advocated, as is the responsive or consumer-oriented model.<sup>534</sup> It is a mixed model which places the control of judicial power neither

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<sup>530</sup> In the case of *The Queen v Beauregard* [1986] 2 S.C.R. 56, para 30. In which he pronounced, "the role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system".

<sup>531</sup> *Mackeigan v Hickman* [1989] 2 S.C.R. 796 para 56.

<sup>532</sup> Mogoeng M 'The implication of the Office of the Chief Justice for constitutional democracy in South Africa' 400.

<sup>533</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration' 3.

<sup>534</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration' 3.

exclusively in the hands of the political branches of government nor exclusively in the hands of the judiciary, but moderately in the judiciary itself, the political branches and society.<sup>535</sup> The reason for advocating for this model is that it:

Combines a reasonable degree of political and societal responsibility, without, however, either subordinating judges to the political branches, to political parties, and to societal organisations, or exposing them to the vexatious suits of irritated litigants.<sup>536</sup>

This model will be useful in the OCJ because it shows that the role of the judiciary demands responsiveness to the needs, ideals and aspirations of society, and that the “politicisation” and “socialisation” of the judiciary in a modern democratic state is unavoidable.<sup>537</sup> It also shows, more importantly, that the judicial role is limited by judicial, political and societal considerations.<sup>538</sup> The judiciary in South Africa is becoming more independent of the executive. This recent development of the creation of the OCJ for transferring the administration of the personnel from the Ministry of Justice to the OCJ is a step towards the enhancement of judicial autonomy. Now we see the OCJ having higher degree of influence in the budget preparation for the whole judicial sector,<sup>539</sup> in recruitment of court officials, in appointment of judges and in provision of training for court staff. It is hereby argued that, though the OCJ under this current style of court administration seems to have gained more external independence from the executive, the study’s recommended style of court administration can take the OCJ to an equal balance with the executive.

#### **4.4 Attacks on the South African judiciary**

This challenge is run against what the 1996 Constitution contemplates.<sup>540</sup> The question of judicial independence revolves around the theme of how to assure that judges decide according to law, rather than according to their own whims or to the will

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<sup>535</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration’ 3.

<sup>536</sup> Cappelletti M ‘Who watches the watchmen?: A comparative study on judicial responsibility’ *The American Journal of Comparative Law* (1983) Vol 21(1) 1, 1-9.

<sup>537</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration’ 49.

<sup>538</sup> Canadian Judicial Council (September 2006) Report of the Alternative Models of Court Administration’ 49.

<sup>539</sup> OCJ ‘Strategic Plan’ 7.

<sup>540</sup> Section 165 of the 1996 Constitution, in that judges must decide cases according to law, rather than according to their own whims or to the will of the political branches of government.

of the political branches of government.<sup>541</sup> However, over the past decade, the relationship between the other two branches of government and the judiciary has been tense and conflict-ridden. In 2005, the ANC's National Executive Committee made a statement expressing the view that the judiciary does not share in the transformative vision of the 1996 Constitution and does not view itself as "accountable to the masses".<sup>542</sup> In 2011, the executive was quick to express its irritation at losing two high profile, politically-loaded cases before the CC.<sup>543</sup>

In *Justice Alliance of South Africa v President of the Republic of South Africa*,<sup>544</sup> the Court struck down legislation which extended the term of the CJ. In February 2011, then-MJCD Jeff Radebe announced that the DoJ&CD would engage the services of research institute to undertake an assessment on how the decisions of the CC advance social transformation.<sup>545</sup> Since this announcement, the initiative has been labelled both an "assessment" and a "review" of the CC and SCA's decisions. In an interview, President Zuma expressed the view that "the powers of the CC need to be reviewed" since it often delivers dissenting judgments, which he views as casting a shadow of doubt on whether or not the majority decision is "absolutely correct".<sup>546</sup>

Independence of the judiciary is being challenged by the unprecedented attacks being levelled against it. These attacks emanate from members of both other branches of government, especially high-ranking officials of the leading political party. They are triggered most often by judicial decisions, such as the "Bashir" matter,<sup>547</sup> wherein the executive undermined the rule of law and disregarded court order by allowing Al-

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<sup>541</sup> King C D 'Current challenges to the Federal Judiciary' (2006) vol 66(3) *Louisiana Law Review* 661 at 665.

<sup>542</sup> ANC 'ANC statement on 93<sup>rd</sup> anniversary celebration' (08/01/2005) available at <<http://www.anc.org.za/content/anc-statement-93rd-anniversary-celebration->>. (Date accessed 30 August 2017).

<sup>543</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347(CC), where the court held that the legislation creating an anti-corruption body for the country was inconsistent with the Constitution. A legislative amendment replaced the country's specialised crime fighting unit, which was located in the National Prosecuting Authority, with a different body and located it within the South African Police Service (SAPS).

<sup>544</sup> 2011 (5) SA 388 (CC).

<sup>545</sup> DoJ 'Media Statement on the Assessment of the Impact of the Decisions of the Constitutional Court and the Supreme Court of Appeal on the South African Law and Jurisprudence' (26/03/2012) available at <[http://www.justice.gov.za/m\\_statements/2012/20120326\\_m\\_transformation-torms.html](http://www.justice.gov.za/m_statements/2012/20120326_m_transformation-torms.html)>. (Date accessed 05 June 2017).

<sup>546</sup> Du Toit 'Assessing the performance of South Africa's Constitution' 24.

<sup>547</sup> *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Other* 2015 (5) SA 1 (GP).

Bashir, President of Sudan, to leave the country in contravention of an International Criminal Court (ICC) warrant for his arrest. The Gauteng High Court ordered that he should not be permitted to leave but arrested and handed over to the ICC. Gwede Mantashe (ANC Secretary General), Blade Nzimande (SACP General Secretary) and the ruling party itself have claimed that judges have overreached themselves in trying to order the arrest of President al-Bashir.<sup>548</sup>

While the ICC found South Africa to have acted unlawfully by failing to arrest Sudanese President, the South African government said it remains committed to the principles of international justice.<sup>549</sup> The pre-trial chamber in The Hague ruled that South Africa failed in its obligations to the court to arrest al-Bashir when he attended the African Union summit in Johannesburg two years ago. Amnesty International has described the South African government's conduct as a "shameful failure", saying that no state should follow this example. However, the blatant disregard of a court order had the potential to result in a constitutional crisis.

The ANC also found itself at odds with the judiciary, lashing out at Gauteng High Court Judge Bashier Vally's decision to order President Jacob Zuma to explain his reasons for firing former Minister of Finance Pravin Gordhan and his deputy Mcebisi Jonas. ANC claimed that the judgment signifies unfettered encroachment of the judiciary into the realm of the executive, pandering to the whims of the opposition who want to co-govern with the popularly elected government through the courts.<sup>550</sup>

However, if the judiciary is to play an effective role in promoting constitutional governance in South Africa, it is contended that it must liberate itself from being perceived as the handmaiden of the executive, and must act boldly and decisively to enforce both the letter and spirit of the law.<sup>551</sup> Many recent cases discussed in Chapter

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<sup>548</sup> eNCA 'Gwede Mantashe criticizes judiciary as being problematic' (2015) available at <<http://www.enca.com/south-africa/gwede-mantashe-criticises-judiciary-being-problematic->>. (Date accessed 05 June 2017).

<sup>549</sup> Khoza ML 'South Africa government seeking legal advice on ICC ruling over Omar al-Bashir arrest' (07/07/2017) available at <<http://ewn.co.za/2017/07/07/sa-govt-seeking-legal-advice-following-icc-ruling-on-al-bashir-s-failed-arrest->>. (Date accessed 06 September 2017).

<sup>550</sup> Sunday world 'ANC lashes out at judge who want Zuma to explain reshuffle' available at <<http://www.sundayworld.co.za/news/2017/05/05/anc-lashes-out-at-judge-who-wants-zuma-to-explain-reshuffle-?platform=hootsuite->>. (Date accessed 26 May 2017).

<sup>551</sup> Fombad C M 'Constitutional reforms and constitutionalism in Africa: Reflections of some current Challenges and Future prospects' (2011) available at <<http://www.repository.up.ac.za/bitstream/handle/2263/16941/Fombad-paper-2011.pdf?sequence=1->>. (Date accessed 26 May 2017).

3 which were against the President or the popularly elected government demonstrated that judges in South Africa today are acting as the last line of defence to arrest the looming authoritarian resurgence.<sup>552</sup> The Nkandla judgment proved that Mogoeng Mogoeng was nobody's bag carrier. Judges do not interfere; more often than not, they have been invited into these skirmishes. As Dali Mpofu, for the United Democratic Movement, pointed out in his submission, the CC is not interfering. It is simply doing its job. It is what it is there for, its *raison d'être*. Constitutional matters are its province, its mandate. It is the court of last resort. It provides legal clarity and finality.<sup>553</sup>

Moseneke's words echoed the sentiments of a judgment of the earlier years of our constitutional democracy, when judges were asked to venture into relatively uncharted territory. The CC had been asked to rule on the Speaker of the National Assembly's decision of 6 April 2017 that "she does not have the power to prescribe that voting in the motion of no confidence in the President of the Republic of South Africa be conducted by secret ballot."<sup>554</sup> However, the CC declared that the Speaker of the National Assembly has the constitutional power to prescribe that voting in a motion of no confidence in the President of the Republic of South Africa be conducted by secret ballot.<sup>555</sup> The court also ordered that the Speaker's decision of 6 April 2017 that she does not have the power to prescribe that voting in the motion of no confidence in the President be conducted by secret ballot be set aside.<sup>556</sup> On 8 August 2017, the National Assembly convened to consider and vote on a motion of no confidence in the President of the Republic, Jacob Zuma by secret ballot.<sup>557</sup> This came after six weeks after the CC ruled that it was her decision alone as to how the vote in this constitutional

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<sup>552</sup> Cases like the Limpopo Textbook case, the Hlaudi Motsoeneng soap opera and many cases against the Speaker of Parliament, the social grants crisis, the Nkandla looting scandal, the nuclear procurement process debate among the others.

<sup>553</sup> Sunday Times 'When our politicians fail us, only our judges can save the day' available at <<http://www.timeslive.co.za/sundaytimes/opinion/2017/05/21/When-our-politicians-fail-us-only-our-judges-can-save-the-day->>. (Date accessed 26 May 2017).

<sup>554</sup> *United Democratic Movement v Speaker, National Assembly and Other* 2017 (8) BCLR 1061 (CC).

<sup>555</sup> *United Democratic Movement v Speaker, National Assembly and Other*, paras 58-59; 64, 67-68 and 91.

<sup>556</sup> *United Democratic Movement v Speaker of the National Assembly and Other*, para 97.

<sup>557</sup> Mbeki T 'The people shall govern- what does this mean?' (28 August 2017) available at <<http://www.politicsweb.co.za/opinion/what-do-we-mean-by-the-people-shall-govern--thabo-->>. (Date accessed 06 September 2017).

motion would go. The Speaker of the National Assembly, when making her decision in a carefully prepared statement, made frequent reference to the CC judgment.<sup>558</sup>

Another relevant case is the Treatment Action Campaign's bid to overturn government's decision not to provide Nevirapine, which prevents mother-to-child transmission to HIV positive pregnant women.<sup>559</sup> In the strictest of terms, this was purely a policy matter that many believed should have been left in the hands of governors and administrators. Despite this, judges ordered that the state provide the drug to mothers and their unborn babies. But, even then, they were conscious that, even though there were obvious rights, they were venturing into an area where there would be budgetary implications.<sup>560</sup> It is often said by the members and supporters of the executive that policymaking is its domain and has nothing to do with the courts. It is also said that court decisions that impact on policy made by the executive violate the separation of powers.<sup>561</sup> However, the fact remains that, as soon as executive policy translates into law or conduct, that law or conduct must be consistent with the 1996 Constitution. Otherwise, courts have no choice but to do their duty and declare that law or conduct invalid.<sup>562</sup>

Attacks on the judiciary have been a periodic feature of the rule under Jacob Zuma. A commitment to mutual respect emerged from a meeting between the judiciary and government leaders in late 2015, but it is now under strain.<sup>563</sup> According to a report in the media (Bongani Hans "ANC protests against the judiciary", *The Mercury*),<sup>564</sup> the ANC in KwaZulu-Natal challenged Parliament to pass a law that would restrict the

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<sup>558</sup> Merten M 'Vote of no confidence: Baleka Mbete decides on secret ballot, opposition parties say it's time to put country above party' (7/08/2017) available at <<https://www.dailymaverick.co.za/article/2017-08-07-vote-of-no-confidence-baleka-mbete-decides-on-secret-ballot-opposition-parties-say-its-time-to-put-country-above-party/->>. (Date accessed 06 September 2017).

<sup>559</sup> News 24 'Jury is in on ANC's failures' available at <<http://www.news24.com/Columnists/Mondli-Makhanya/jury-is-in-on-ancs-failures-20170519->>>. (Date accessed 26 May 2017).

<sup>560</sup> News 24 'Jury is in on ANC's failures' 3.

<sup>561</sup> Daily Maverick 'Op-Ed: The question of 'judicial overreach' available at <[https://www.dailymaverick.co.za/article/2017-05-23-op-ed-the-question-of-judicial-overreach/-](https://www.dailymaverick.co.za/article/2017-05-23-op-ed-the-question-of-judicial-overreach/->)>. (Date accessed 01 June 2017).

<sup>562</sup> Daily Maverick 'Op-Ed: The question of 'judicial overreach' 1.

<sup>563</sup> De Rebus 'Profession stands behind Chief Justice and judiciary in raising concern on attacks on the judiciary and the rule of law' 2015 (Aug) DR 14. President Zuma noted the 'historic' nature of the meeting. He stated that the meeting, requested by the Chief Justice, was a result of concern regarding public statements made questioning the integrity of the executive and judiciary.

<sup>564</sup> IOL 'Restricting courts from Parliament would require constitutional changes' available at <<http://www.iol.co.za/capetimes/opinion/restricting-courts-from-parliament-would-require-constitutional-changes-9286760->>>. (Date accessed 01 June 2017).

courts from interfering with the affairs of the legislature and President Jacob Zuma's decisions. In addition, the ANC also called for Parliament to make it a punishable offence for political parties to abuse the courts.<sup>565</sup> On 8 July 2015, the CJ issued a request on behalf of the heads of court and senior judges of all divisions to meet the President and discuss the danger of repeated and unfounded criticism made against the judiciary as well as refusal to follow court orders.<sup>566</sup> He stated that criticism of that kind has the potential to delegitimise the courts and undermine their public purpose. The CJ together with his top officials of the judiciary met with President Zuma and executive members of government on 27 August 2015.<sup>567</sup> The parties agreed to exercise care when it comes to pronouncements criticising one another and that court orders should be complied with.<sup>568</sup>

The way in which the judiciary is being attacked under the current administration without success could lead to executive members and supporters being frustrated and opt that the only way to deal with it is to starve them, raising the spectre that further constraints on the judiciary's budget would be pay-back for controversial decisions. However, since Zuma's inauguration in 2009, judges have done more than surely any other sector of society to put boundaries around President Zuma's demeanour. Almost from the first moment of his presidency, they have challenged his power to do what he wants.

Just a few weeks after his ceremony, he nominated Advocate Menzie Simelane to position of National Director of Public Prosecutions, and his nomination was eventually struck down by the courts,<sup>569</sup> while in 2016, one of Zuma's weakest moments was surely the CC judgment on Nkandla.<sup>570</sup> And in between, his government has lost case

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<sup>565</sup> Legalbrief 'Parliament challenged to restrict 'interference' by courts' (30/06/2017) available at <<http://legalbrief.co.za/diary/legalbrief-today/story/parliament-challenged-to-restrict-interference-by-courts/pdf/->>. (Date accessed: 05 September 2019)

<sup>566</sup> The Citizen 'Zuma on judiciary: We mustn't antagonise each other' (2015) available at <<http://citizen.co.za/news/news-national/655996/zuma-in-high-level-meeting-with-sas-top-judges/>>. (Date accessed 05 June 2017).

<sup>567</sup> The Citizen 'Zuma on judiciary: We mustn't antagonise each other' 1. ANC chair Sihle Zikalala said Parliament should pass a law that would punish political parties who unsuccessfully took parliamentary matters to court.

<sup>568</sup> Du Toit L, 'Assessing the performance of South Africa's Constitution' 26.

<sup>569</sup> *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC).

<sup>570</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC).



after case, almost always in humiliating fashion.<sup>571</sup> However, it is not surprising that Zuma did not try to influence the way in which judges are appointed. This is probably a reflection of how difficult it would be to do so. In order for a democratic system to function effectively, it is essential that the each branch of government adheres to the rule of law and submits to the checks and balances which the other branches exercise over it.

While the judiciary has achieved the goal of playing its role within the separation of powers, the exercise of its powers has been met with attacks from the executive, a decision by the President to review the powers of the courts and, most alarmingly, non-compliance with court orders on the part of the state.<sup>572</sup> The tension between governing parties and the judiciary is not unique to South Africa and must be assessed in the broader context of the structure and nature of democratic government, since it has been 400 years since the battle of separation of powers took place in the 17<sup>th</sup> century between King James I of England and his Chief Justice, Edward Coke.<sup>573</sup> In any democracy in which the judiciary has the power to review and declare invalid government actions, tension will exist between the judicial branch and other branches.<sup>574</sup> It is also important to recognise that, even in countries with much older and much more established democracies, like the USA,<sup>575</sup> debates continuously flare up about the role of the judiciary.

Though it has been noted that the tension between the executive and judiciary date back to time immemorial, both branches must be aware of the damage they can cause to the South African democracy if diligent care is not given to the proper exercise of power. It is hereby argued that all the branches of government must be aware of their roles and functions in terms of the separation of powers and, where one arbitrarily

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<sup>571</sup> *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] 4 ALL SA 719 (SCA), Hlaudi Motsoeneng saga; *Basic Education for All and Others v Minister of Education and Others* [2016] JOL 34897 (SCA), Limpopo textbook case; *Black Sash Trust v Minister of Social Development and Others (Freedom under Law NPC Intervening)* 2017 BCLR 543 (CC), Social grant crisis and *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* [2017] 3 ALL SA 187 (WCC) the nuclear procurement process debacle.

<sup>572</sup> Du Toit L, 'Assessing the performance of South Africa's Constitution' 23.

<sup>573</sup> Powell J 'An independent judiciary: Edward Coke' (2000) available at <<https://www.libertarianism.org/publications/essays/independent-judiciary-edward-coke->>. (Date accessed 05 September 2017).

<sup>574</sup> Barnes R 'Trump get a powerful lesson in role of judiciary' (2017) available at <<https://www.washingtonpost.com/.../trump...role...judiciary/.../a8f2f8d4-ef28-11e6-9662->>. (Date accessed 19 July 2017).

<sup>575</sup> Barnes R 'Trump get a powerful lesson in role of judiciary' 2.

steps into another's branch, lawful remedies must be met without resorting to unwarranted attacks, as clashes will continue to be there, and what is important will be informed knowledge on what is meant by the separation of powers.

#### **4.5 The appointment processes**

The independence of the judiciary is also undermined by the process by which judges are appointed, a process that involves both the executive and legislative branches. While Chapter 3 concluded that the 1996 Constitution indicates a more transparent and fair appointment process than during apartheid, by representatives of all three branches of government, there are various issues that have surfaced in the past 23 years of democracy that potentially challenge the independence of the judiciary and suggest that certain reforms might be necessary. These challenges include the tension between the need for demographic transformation and the need for an experienced and well-qualified judiciary, the influence of politicians on the JSC and the appointment of acting judges. However, with regard to the JSC selecting judges, there is a more detailed congruence between judicial appointments and the goal of independence being questionable.<sup>576</sup> In terms of appointment, there exists a concern that the ruling party uses its dominant position on the JSC to ensure that judges are appointed who are more likely to be sympathetic towards government and deferential to its policies.<sup>577</sup>

##### *4.5.1 Race and gender transformation*

Judicial representativeness is constitutionally required, as its inclusion is driven by the universal recognition that an all-white, all-male judiciary would be both illegitimate and absurd in a democratic South Africa.<sup>578</sup> Even the preamble to the 1996 Constitution states that "South Africa belongs to all that live in it, united in their diversity." Section 9 of the 1996 Constitution further indicates the right of all citizens to be equal before the law, as well as equal in the protection and benefits of the law.<sup>579</sup> The need for diversity is driven by a history of racial exclusion. Diversity and representivity can be justified by greater institutional legitimacy, public confidence and accountability; equality; a better quality of deliberation and judicial process; and/or improved legal

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<sup>576</sup> Du Toit L, 'Assessing the performance of South Africa's Constitution' 17.

<sup>577</sup> Du Toit L 'Assessing the performance of South Africa's Constitution' 17.

<sup>578</sup> Hoexter C & Olivier M 'The judiciary in South Africa' 260.

<sup>579</sup> Section 9 of the 1996 Constitution.

outcomes.<sup>580</sup> Finally, diversity on the bench can also improve the quality of justice meted out by the courts.<sup>581</sup> In a diverse society, judges from different racial backgrounds, genders and sexual orientations will often bring different perspectives to bear. This can improve the quality of jurisprudence and strengthen the intellectual output of the judiciary.<sup>582</sup>

For example, the reaction of the verdict in 2005 corruption trial of Durban businessman Schabir Shaik illustrates the ways in which race, and a judge's background, may be used to undermine popular judicial decisions, even where these are based on careful reasoning.<sup>583</sup> Presiding over a close friend of an ANC leader, Justice Squires is a white man who served as a judge during apartheid and was a member of the Rhodesian Parliament under Ian Smith whose race and political background quickly became fodder for criticism of his suitability to preside over the case.<sup>584</sup>

In the case of *S v Scott-Crossley*,<sup>585</sup> the appellant was convicted of the murder of Simon Chisale and sentenced to life imprisonment. He was convicted of a planned or premeditated murder, which prescribes a minimum sentence of life imprisonment. The appellant's conviction arose from an incident on the appellant's farm on 31 January 2004. On the day in question, Mr Chisale ("deceased"), a former employee of the appellant, arrived on the farm to collect pots which he claimed he had left behind when the appellant dismissed him from his employment in November 2003. According to testimony given during the trial, Chisale was attacked with machetes and tied up for hours before being thrown into the lion enclosure. In September 2007, the SCA set aside Scott-Crossley's murder conviction and said that he was an "accessory after the fact". It backdated his five-year sentence to September 2005. Another farm worker was sentenced to 15 years for carrying out the assault, even though the original trial judge held that Scott-Crossley was the mastermind. COSATU criticised the fact that

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<sup>580</sup> Hoexter C & Olivier M 'The judiciary in South Africa' 260.

<sup>581</sup> De Vos P & Freedman W 'South African Constitutional law in context' 234.

<sup>582</sup> De Vos P & Freedman W 'South African Constitutional law in context' 235.

<sup>583</sup> *S v Schaik and Others* 2005 JDR O716 (D) at 76. In this case, Justice Hillary Squires of the Durban High Court in June 2005 handed down a guilty verdict against a businessman Schabir Shaik, finding that he was guilty of two counts of corruption and one count of fraud relating to deal with a French arms company. Shaik was sentenced to 15 years' imprisonment. Although then-Deputy President Jacob Zuma was not also on trial, Justice Squires found, among other things, that a "mutually beneficial symbiosis" had existed between Zuma and Shaik, his former financial advisor.

<sup>584</sup> Gordon A & Bruce D 'Transformation and the independence of the judiciary in South Africa' 46.

<sup>585</sup> *Scott-Crossley v S* [2007] SCA 127 (RSA).

the SCA had indicated that Chisale was dead before he was thrown to the lions, but did not rule on who killed him.<sup>586</sup> Though the South African Human Rights Commission (SAHRC) denounced the race-based attacks on Justice Squires, acknowledging that judicial transformation is an ongoing process and that the judiciary is not yet demographically representative of the people, the SAHRC argued that is unacceptable to use issues of race to “cast doubt on the work of the Court”.<sup>587</sup>

Balancing the need for racial and gender representivity with the need for a competent, well-qualified judiciary poses a difficult challenge.<sup>588</sup> Many believe that the JSC has not adequately met the challenges and has focused more on race and gender while ignoring legal competence when making judicial appointments. They argue that the JSC’s attitude led to experienced and highly-qualified white male candidates being overlooked in favour of less qualified and experienced black or female candidates.<sup>589</sup> However, it is submitted that this is no longer the case since the establishment of South African Judicial Education Institute Act.<sup>590</sup>

#### 4.5.1 (a) *Training programmes for judicial officers*

The South African Judicial Education Institute Act was enacted with the sole purpose of providing entry-level education and training for aspiring judicial officers to enhance their suitability for appointment to judicial office.<sup>591</sup> In 2012, Judge Mandisa Maya, who demonstrated an independent-minded in the judgment of her 2011 dissenting SCA judgment in *Minister of Safety and Security v F*,<sup>592</sup> faced a difficult interview – more difficult than Judge Zondo, who was interviewing for the same position. She was asked to comment on the “trend” in the media of identifying judges through their judgments, as being progressives or conservatives. She was also quizzed on whether judges who ruled against the executive were “anti-government” and hence “said to be progressive”, on her understanding of the separation of powers doctrine and whether

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<sup>586</sup> The Guardian ‘South African farmer who threw man to lions released from jail’ (21/08/2008) available at <[https://www.theguardian.com/world/2005/jan/25/southafrica.andrewmeldrum->](https://www.theguardian.com/world/2005/jan/25/southafrica.andrewmeldrum-). (Date accessed 11 September 2017). COSATU stated “it is clear that those who are rich and white will continue to be treated differently to those who are poor”.

<sup>587</sup> Gordon A & Bruce D ‘Transformation and the independence of the judiciary in South Africa’ 46.

<sup>588</sup> Gordon A & Bruce D ‘Transformation and the independence of the judiciary in South Africa’ 47.

<sup>589</sup> Gordon A & Bruce D ‘Transformation and the independence of the judiciary in South Africa’ 47.

<sup>590</sup> No. 14 of 2008.

<sup>591</sup> Section 5 (b) of the South African Judicial Education Institute Act 14 of 2008.

<sup>592</sup> 2011 (3) SA 487 (SCA).

there were “judicial cults” developing a round certain judges at the CC, where she had previously acted.<sup>593</sup> While describing her vision for turning the court around, Maya explained on how, while acting as head of the SCA for six months, she found herself “begging” colleagues to attend a diversity seminar to which there had been “vociferous opposition”. Since the establishment of this training programmes, balancing the need for racial and gender representivity with the need for a competent, well-qualified judiciary poses no more danger.

However, this study argues that the biases and prejudices of other head of courts which are deeply rooted within them are still a challenge in embracing diversity. It is a common knowledge in society that families, friends, peers, books, teachers, idols and others influence people on what is right and what is wrong. This early learning is deeply rooted within them and shapes their perceptions about things and how they respond to them. What they have learned and experienced gives them their subjective point of view, known as bias. These biases serve as filtering devices that allow them to make sense of new information and experience based on what they already know. Many of people’s biases are good as they allow them to assume that something is true without proof. Otherwise, they would have to start learning anew on everything that they do. But, if they allow their bias to shade their perceptions of what people are capable of, then the bias is harmful. They start prejudging others on what they think that they cannot do. These biases, which are caused by stereotypes, can:

- (a) block or distort one’s view of reality and the truth;
- (b) seriously hamper communication and co-operation;
- (c) foster aggression and unhealthy competition; and
- (d) give rise to prejudice and discrimination.

Justice Mpati, the Deputy President of the SCA, explained:<sup>594</sup>

To achieve the objectives of the Constitution we [the judiciary] need to strike a balance – gender and race representivity on the one hand, and competence, integrity and skill on the other.

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<sup>593</sup> Maya M ‘*Judges matter*’ (2017) available at <<http://www.judgesmatter.co.za/interviews/april-2017-interviews/jsc-candidates/judge-mandisa-maya/>>. (Date accessed: 07 July 2017).

<sup>594</sup> Mpati L ‘Transformation in the Judiciary- A constitutional imperative’ paper presented at the inaugural lecture, University of Free State, (06/10/2004).

When Roslyn Atkinson was appointed to the Queensland Supreme Court bench in September 1998 along with two other female appointments,<sup>595</sup> in what apparently was a deliberate campaign by the Attorney-General to make the judiciary more representative, the Queensland Bar Association openly criticised her appointment. The association questioned her appointment, saying she had not been chosen on merit, and attacked the Attorney-General for seeking to achieve a so-called representative judiciary.<sup>596</sup> The criticisms that were levelled against a candidate with very broad qualifications, such as Justice Atkinson, serve as a very clear illustration that her appointment was criticised based on an outdated view of the judicial role.

As shown above, the challenge of representivity is not unique to South Africa. In essence, the criteria for appointment advantage one particular group in society, i.e. long-experienced advocates at the senior Bar, and thus operate in a discriminatory way in relation to lawyers from diverse fields of legal endeavour.<sup>597</sup> While most commentators and investigative bodies have advocated the need for broad criteria that go far beyond legal and advocacy skills, and encompass such personal qualities as breadth of vision and willingness to listen and understand the viewpoints of others, there is also a strong, but not uniform, call for judicial appointments to fairly reflect society.<sup>598</sup> The JSC is investigating a policy aimed at regulating the appointment of acting judges as a way to bring more women to the bench. Even after the first interviews of judges in April 2017, there were still only 86 women out of 241 judges.<sup>599</sup> However, the JSC has acknowledged that far more needs to be done to attract women to the bench. It has found that one of the main barriers is the lack of opportunities women receive as acting judges. The JSC is proposing that judges' president be given

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<sup>595</sup> Hamilton B 'Criteria for judicial appointment and 'merit' 9.

<sup>596</sup> Hamilton B 'Criteria for judicial appointment and 'merit' 10. The association considers the Attorney-General's approach of making judicial appointments for the purpose of achieving a "representative judiciary" rather than to maintain a bench of the highest legal calibre to serve the people of Queensland fundamentally wrong in principle and contrary to the interests of the community as a whole.

<sup>597</sup> Hamilton B 'Criteria for judicial appointment and 'merit' 10.

<sup>598</sup> Mogoeng M 'Mogoeng calls for more women in the judiciary' (2017) available at <<http://www.destinyconnect.com/2017/04/04/mogoeng-calls-women-judiciary/>>. (Date accessed: 10 July 2017).

<sup>599</sup> Legalbrief 'JSC strategy to attract women to Bench' (25 April 2017) available at <<http://www.legalbrief.co.za/story/jsc-strategy-to-attract-women-to-bench/>>. (Date use: 11 September 2017). However, in those interviews the JSC recommended an additional five woman on the bench.

clear guidelines and list, complete with a pool of female candidates, from which to choose.<sup>600</sup>

#### *4.5.1 (b) The role of the JSC in appointing judges*

The role of the JSC in the appointment of judges differs depending on the nature of the appointment to be made.<sup>601</sup> The President as head of the national executive has a relatively wide discretion when he appoints the CJ and DCJ who both serve in the CC. When making these appointments, he appoints the person of his choice after consulting the JSC and the leaders of parties represented in the National Assembly.<sup>602</sup> Also, when he appoints the President and Deputy President of the SCA, he appoints the person of his choice after consultation with the JSC; however, in these circumstances the President is not obliged to consult the leaders of parties represented in the National Assembly.<sup>603</sup> When the President appoints the other judges of the CC, the JSC prepares a list of nominees with three more names than the number of appointments to be made and submit the list to the President.<sup>604</sup> The President may make appointments from the list, but can also initially refuse to appoint someone from the list provided by the JSC. However, if the President refuses to appoint from the list, he must provide the JSC with reasons for the refusal to appoint. As a result, the JSC will be required to supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.<sup>605</sup> With regard to the other judges to the SCA, high courts and other specialised courts, the JSC plays a decisive role in their appointments.<sup>606</sup>

No guidance is given in the 1996 Constitution or in the JSC procedure on how and when consultation should take place. In the absence of guidance on what “consultation” means in the context of section 174(3) of the 1996 Constitution, it has been taken to mean announcement of a preferred candidate prior to his appointment. In a memorandum on the appointment of the CJ, prepared on behalf of Freedom Under Law, it was expressed that consultation ought to take place during the formative stages

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<sup>600</sup> Legalbrief ‘JSC strategy to attract women to Bench’ 1.

<sup>601</sup> De Vos P & Freedman W ‘South African Constitutional Law in Context’ 231.

<sup>602</sup> Section 174(3) of the 1996 Constitution.

<sup>603</sup> Section 174(3) of the 1996 Constitution.

<sup>604</sup> Section 174(4) of the 1996 Constitution.

<sup>605</sup> Section 174(4)(b) & (c) of the 1996 Constitution.

<sup>606</sup> De Vos P & Freedman W ‘South African Constitutional Law in Context’ 232.

before the mind of the President has become fixed, and that, where a “preference” is expressed, the basis of such preference must be exposed, and the views of the consulted parties must be considered in good faith.<sup>607</sup>

However, what this selection process conveys to the public is the notion that the judiciary is yet another political branch of government, a kind of stepchild of the other two branches. Judicial independence is central to the separation of powers, and when the Judiciary is perceived as a stepchild of the political branches of government, the separation of the three branches of government is impaired.<sup>608</sup> This alters the public’s perception of the role of the judge in a way that is damaging to the judge’s ability to say what the law is and his or her authority or credibility in so doing.<sup>609</sup> There is a further complication to this scene that results when a judge has ambition to move ahead, a normal human ambition perhaps, but one that may present a moral hazard to a judge, particularly in view of the current appointment process. Nevertheless, a judge with ambition constantly has his or her eye on what the President or the JSC would think about a decision under consideration and how the decision would affect his or her chances for advancement. Such a judge is sometimes inclined to give the law a push, to do the judicial equivalent of putting his or her thumb on the scale. Some such judges go around the country making speeches to various groups, including well-known groups that seem to be judicial analogues to political parties, about their views of the law.<sup>610</sup>

With regard to nomination, on 27 March 2003, the Minister of Justice published the commission’s procedures for nominating judges in the Government Gazette.<sup>611</sup> When a vacancy occurs in the CC, the JSC announces it publicly and solicits written nominations.<sup>612</sup> Each letter of nomination, along with the candidate’s written acceptance of the nomination and his or her curriculum vitae, is then given to the “screening committee”, an ad hoc subcommittee of the JSC, which prepares a short

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<sup>607</sup> Du Toit L ‘Assessing the performance of South Africa’s Constitution’ 18.

<sup>608</sup> King CD ‘Current Challenges of the Federal Judiciary’ 667.

<sup>609</sup> King CD ‘Current Challenges of the Federal Judiciary’ 667.

<sup>610</sup> *Langa v Hlophe* 2009 (4) SA 382 (SCA) at 382. In 2008, the Judge President of the Cape High Court, John Hlophe, allegedly approached two relatively new members of the Constitutional Court, Justice Jafta and Nkabinde, seeking favourable treatment for Jacob Zuma in several pending cases at the time when Zuma was the Deputy President.

<sup>611</sup> Government Notice R. 423, Government Gazette No. 24596.

<sup>612</sup> Section 2(b) of Government Notice R. 423, Government Gazette No. 24596.



list of candidates.<sup>613</sup> At this time, all members of the JSC may also nominate additional candidates and inform the selection committee of the names of candidates whom they feel strongly should be included on the shortlist.<sup>614</sup> The screening committee then prepares the shortlist, which must include all candidates who qualify for appointment, all candidates placed on the list by a member of the JSC, and all candidates who, in the opinion of the screening committee, have a “real prospect of recommendation for appointment”.<sup>615</sup> All members of the JSC then review the list, and any member may add the name of any candidate who was nominated but not included by the selection committee.<sup>616</sup>

Once the JSC has approved the shortlist, the names of nominees are published and the list is distributed to various interested institutions such as the Law Society of South Africa, the Black Lawyers Association and the General Council of the Bar of South Africa.<sup>617</sup> After the interested parties have had an opportunity to submit comments, the JSC conducts public interviews of each nominee.<sup>618</sup> The commission then deliberates privately and, based on either consensus or majority vote, selects candidates for recommendation.<sup>619</sup> The JSC then informs the President of its recommendations, explains the reasons for choosing each candidate and announces publicly its list of recommendations.<sup>620</sup> The procedures for recommending candidates for vacancies on the SCA and the high courts are essentially the same, except that the regulations do not require the JSC to give the President reasons for its recommendations.<sup>621</sup>

However, the Helen Suzman Foundation has, since 2013, been litigating as to whether the full deliberations of the JSC with regard to candidates should be a matter of public record.<sup>622</sup> The CC is hearing the appeal by the Helen Suzman Foundation. The appeal is against a 2016 SCA judgment that the full deliberations of the JSC, which assists the President in the appointment of judges, must remain confidential. In 2012, the Helen Suzman Foundation launched a legal challenge pertaining to the JSC’s

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<sup>613</sup> Section 2(c) Section 2(b) of Government Notice R. 423, Government Gazette No. 24596.

<sup>614</sup> Section 3(d) Section 2(b) of Government Notice R. 423.

<sup>615</sup> Section 3(e) Section 2(b) of Government Notice R. 423.

<sup>616</sup> Section 3(f) Section 2(b) of Government Notice R. 423.

<sup>617</sup> Section 3(g) Section 2(b) of Government Notice R. 423.

<sup>618</sup> Section 3(i) Section 2(b) of Government Notice R. 423.

<sup>619</sup> Section 3(k) Section 2(b) of Government Notice R. 423.

<sup>620</sup> Section 3m & n) Section 2(b) of Government Notice R. 423.

<sup>621</sup> Section 3(l) Section 2(b) of Government Notice R. 423.

<sup>622</sup> *Helen Suzman Foundation v Judicial Service Commission and Others* 2017 (1) SA 367 (SCA).

interpretation and application of section 174 of the 1996 Constitution when recommending individuals to the President for appointment as judges. When the foundation sought the record of proceedings of the JSC's 2012 recommendations for judges in the Western Cape, the JSC refused to provide the recording of its deliberations (as to who should or should not be appointed) on the grounds that the information was confidential.<sup>623</sup> It is against that background that the foundation is appealing.

The Helen Suzman Foundation argues that the transcript of a recording of the deliberations was highly relevant and should have been part of the "Rule 53 Records",<sup>624</sup> a collection of documents that must, in terms of the rules of court, be handed over when a decision is being challenged. The record is supposed to include all the documents used by a decision-maker. When the case was lodged, CJ Mogoeng Mogoeng, also a chairperson of the JSC, distilled reason, based on the recording of the deliberations, and handed the documents to the foundation and the court. The Foundation argued that that was not enough to satisfy the 1996 Constitution. The SCA found that it would not be in the interest of the public for the deliberations to be part of the record in this case, although it said there may be cases when disclosing such a recording would be necessary.<sup>625</sup>

To date, the JSC has resisted opening its deliberations to the public, presumably in the interest of enhancing a candid and meaningful deliberative process. Although decisions can be taken by majority vote, the JSC's procedures contemplate that decisions should preferably be taken by consensus.<sup>626</sup> To achieve this, and to ensure that a rigorous evaluation takes place, members must be permitted to ventilate their concerns about candidates openly and without censure. If deliberations were open to the public and the media, JSC members might either self-censor (in their own interest or those of a particular candidate) or use the opportunity less to deliberate meaningfully than to score political points.<sup>627</sup> So it goes without saying that the

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<sup>623</sup> *Helen Susman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC).

<sup>624</sup> Rule 53 of the Superior Court Rules in terms of Superior Court Act, 59 of 1959.

<sup>625</sup> *Helen Suzman Foundation v Judicial Service Commission and Others* 2017 (1) SA 367 (SCA) para 39.

<sup>626</sup> Dgru 'Judicial selection in South Africa' (20/08/2013) available at <[http://www.dgru.uct.ac.za/sites/default/files/image\\_tool/images/103/Judicial%20Selection%20in%20SA%2028%20August%20print-ready.pdf](http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/Judicial%20Selection%20in%20SA%2028%20August%20print-ready.pdf)>. (Date accessed: 07 September 2017).

<sup>627</sup> Dgru 'Judicial selection in South Africa' 119.

deliberations play a crucial role in ensuring that the JSC makes the best decision it can.

#### *4.5.1 (c) Appointment of acting judges*

The appointment of acting judges also raises concerns as it bypasses the JSC selection procedure altogether. Section 175(1) provides that the President may appoint a person to be an acting judge of the CC if there is a vacancy or if a judge is absent.<sup>628</sup> The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the CJ. Also, section 175(2) of the 1996 Constitution provides that “the Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.”<sup>629</sup> So it is clear that, in terms of the 1996 Constitution, acting judges are appointed by the Minister of Justice, who acts on the recommendation of the various judges president.

This section grants too much power of appointment of acting judges to the executive. Moreover, the current practice of appointment of acting judges weakens the independence of the judiciary, since the JSC has adopted the practice of requiring a judge to have acted as such prior to being eligible for consideration for permanent appointment.<sup>630</sup> The JSC is very reluctant to consider anyone who has not served as an acting judge. However, the JSC plays no role in acting appointments, as the 1996 Constitution stipulates that these are to be made by the Minister (or the President in case of the CC) with the concurrence of the head of the court to which the appointment is made.<sup>631</sup> This can be seen as the executive and senior judiciary being gatekeepers to judicial appointments. But all has not been lost, as the JSC is now proposing that judges’ president be given clear guidelines and a list, complete with a pool of female candidates, from which to choose. JSC spokesperson Ntsebeza confirmed the implementation of the policy was under discussion. Alison Tilley, of the Judges Matter coalition, reportedly said that there was definitely a need to attract more women to the Bench. This could be achieved by making the appointment of acting judges more

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<sup>628</sup> Section 175(1) of the 1996 Constitution.

<sup>629</sup> Section 175(2) of the 1996 Constitution.

<sup>630</sup> Du Toit L ‘Assessing the performance of South Africa’s Constitution’19.

<sup>631</sup> Section 175 of the 1996 Constitution.

transparent. She suggested that “if you don’t have more women acting, you don’t have more women applying.”<sup>632</sup>

It is argued that, in addition to the CJ’s role in relation to appointment of judges and acting judges, there must be a number of other functions added concerning the appointment and placement of judges in all courts. The consultation requirement should be set out in the policy recommended and also be incorporated in the JSC-enabling legislation. In relation to the placement and use of superior court judges, acting judges of the High Court may only be appointed if the CJ and the judge president of that particular division certify the appointment. Although few people argue that the judiciary should have sole control over the appointment of judges, finding the right balance between politicians, judges and laypersons can be difficult and controversial.<sup>633</sup> The lack of clear standards for assessing the suitability and competence of candidates also increases concerns about the JSC’s motivations in appointing judges. The 1996 Constitution requires only that judges are “appropriately qualified” and “fit and proper person”,<sup>634</sup> but fails to provide specific guidelines. However, the JSC generally considers only candidates who have previously served as acting judges, preferably in the division to which they are seeking appointment. So, to deal with the appointment process, it is clear that there is a need to remove the appointment of acting judges from the Minister’s unfettered control, as well as to provide clear and transparent processes which involve the participation of the JSC.

#### **4.6 Judicial independence and accountability**

This section begins this analysis of the question of public sector accountability as it applies to judicial systems by reviewing the way tensions have played out in debates over judicial reform. These have been conceived as based in the opposition between independence and accountability for many years, but the recent changes in the judiciary modify the way the issues are framed in a number of ways.<sup>635</sup> Based in the hierarchy in the OCJ, the CJ as a head of judiciary is also as an actor with a role to play as part of a public organisation delivering services to the public. If judges as

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<sup>632</sup> Legalbrief ‘JSC strategy to attract women to Bench’ 1.

<sup>633</sup> Gordon A & Bruce D ‘Transformation and the independence of the judiciary in South Africa’ 50.

<sup>634</sup> Section 174(1) of the 1996 Constitution.

<sup>635</sup> Contini F & Mohr R ‘Reconciling independence and accountability in judicial systems’ *Utrecht Law Review* (2007) 26, 27.

independent decision-makers were to be evaluated according to the extent of their independence and quality of their decisions, the newly conceived judiciary is subjected to “managerial” performance methods that neglect fundamental values of the judicial process. In such cases, accountability comes to be seen exclusively from a managerial perspective.<sup>636</sup>

In this regard, it is argued that in the judicial transformation of the OCJ debate, accountability and judicial independence are values that are generally considered to be in tension, if not actually clashing. According to Norms and Standards of Judicial Function,<sup>637</sup> the overall responsibilities for managing judicial functions and overseeing the implementation of the Norms and Standards vests in the CJ as head of the judiciary in terms of section 165(6) of the 1996 Constitution and section 8(2) of the Superior Court Act. However, criticisms that judges are unaccountable are looked into next. The question that must be examined is whether or not the lack of accountability in respect of the substantive decisions which they reach, is a corollary and virtue of judicial independence, and whether or not it would undermine the rule of the law if judges had to account directly or follow orders as an ordinary public servant and may have had to answer to their superiors or Parliament.

It is crucial to understand the behaviours of judges and the outputs of courts in the OCJ as the institutional context in which they operate. One key component of courts’ institutional structure is that the judiciary system is organised as a hierarchy, which creates both problems and opportunities for judges.<sup>638</sup> For instance, one problem for judges at the top of a hierarchy is how to best exercise oversight of lower court judges, whose decisions are often not reviewed by higher courts. One opportunity is that higher courts can reverse errors by lower courts; another is that, as new legal issues emerge, hierarchy provides opportunities for judges to learn from one another.<sup>639</sup>

Theoretical approaches to studying judicial hierarchies typically employ a principal-agent framework in which the high court is the principal and lower courts are the

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<sup>636</sup> Contini F & Mohr R ‘Reconciling independence and accountability in judicial systems’ 28.

<sup>637</sup> Item no. 4 of the Norms and Standards, “Management of Judicial Functions”.

<sup>638</sup> Kastellec J P ‘The judicial hierarchy: A review essay’ (2016) available at <[http://www.princeton.edu/~jkastell/JudicialHierarchyOxford/kastellec\\_oxford\\_review\\_essay.pdf](http://www.princeton.edu/~jkastell/JudicialHierarchyOxford/kastellec_oxford_review_essay.pdf)>. (Date accessed: 05 January 2017).

<sup>639</sup> Kastellec JP ‘The judicial hierarchy: A review essay’ 2.

agents. The high court has the ultimate policymaking authority, but much of this authority is effectively delegated to lower courts, with the high court monitoring authority and reversing the decisions of the lower courts when it desires.<sup>640</sup> The hierarchy of all courts operating in South Africa immediately prior to the commencement of the 1996 Constitution remained in existence after commencement. However, the 1996 Constitution made important changes to the old court structure that had been largely left intact by the IC.<sup>641</sup> Section 166(a)-(e) of the 1996 Constitution stipulates that there are five categories of courts. The rules of precedent or *stare decisis* continue to apply since the doctrine is essential for legal certainty. This doctrine has in recent times been applied with increasing flexibility and judicial insight.<sup>642</sup>

The IC established a seemingly clear division between the jurisdiction of the two appellate courts in relation to constitutional and non-constitutional issues. The SCA was the court of final instance in non-constitutional matters, while the CC was the court of final instance in constitutional matters.<sup>643</sup> The implication of this arrangement was that the CC and the Appellate Division had equal status, and that no appeal lay to the CC from a decision of the Appellate Division or vice versa. A non-constitutional case could proceed as far as the Appellate Division, while a constitutional case could proceed as far as the CC.<sup>644</sup>

The Court Structure of the 1996 Constitution departs from this arrangement. Unlike the Appellate Division, the SCA has jurisdiction to hear and decide constitutional issues. The SCA is empowered to hear appeals in any matter.<sup>645</sup> *Masiya v Director of Public Prosecutions Pretoria (The State) and Another*<sup>646</sup> should first be taken to the SCA because of its jurisdiction and expertise in the common law, an obstacle that is now raised against the quality anticipated of the judges of the CC in terms of their experience and understanding in the application of the law, and the competence of the

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<sup>640</sup> Hansford T G 'The information dynamics of vertical *Stare Decisis*' available at <<http://faculty.ucmerced.edu/thansford/Articles/The%20Information%20Dynamics%20of%20Vertical%20Stare%20Decisis.pdf>>. (Date accessed: 05 January 2017).

<sup>641</sup> Currie I & De Waal J 'The Bill of Rights Handbook' 93.

<sup>642</sup> *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (2) BCLR 121 (CC) para 28.

<sup>643</sup> De Vos P & Freedman W 'South African Constitutional Law in context' 222.

<sup>644</sup> Currie I & De Wall J 'The Bill of Rights Handbook' 108.

<sup>645</sup> Section 168(3) of the 1996 Constitution.

<sup>646</sup> 2007 (8) BCLR 827 (CC) para 17.

court as a whole to hear any type of legal challenge.<sup>647</sup> As it was stated in the constitutional case of *Amod v Multilateral Motor Vehicle Accidents Fund*.<sup>648</sup>

When a constitutional matter is one which turns on the direct application of the Constitution and which does not involve the development of the common law, considerations of costs and time may make it desirable that the appeal be brought directly to this court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance.

The 1996 Constitution confers wide-ranging jurisdiction on the various high courts in respect of constitutional matters as the high courts may decide any constitutional matter except those matters exclusively reserved for the jurisdiction of the CC or matters assigned by an Act of Parliament to another court of a similar status as a high court.<sup>649</sup> However, where a high court declares invalid any provisions of an Act of Parliament or a provincial legislature, such an order must be confirmed by the CC before that order has any force.<sup>650</sup> In such cases, no appeal to the SCA is required and no leave to appeal need be sought from the CC.<sup>651</sup>

Magistrates' courts, on the other hand, do not have jurisdiction to hear constitutional matters. Section 170 of the 1996 Constitution states that magistrate's courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct by the President.<sup>652</sup> Section 110(2) of the Magistrate Court Act<sup>653</sup> states that, when an allegation is raised in a magistrates' court that a law or conduct by the President is unconstitutional and invalid, the magistrate in question must continue and decide the matter on the assumption that the law or conduct in question is valid,<sup>654</sup> and if a litigant wishes to pursue the question, he or she will have to approach the High Court.<sup>655</sup> However, according to the new changes brought by the

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<sup>647</sup> Currie I & De Wall J 'The Bill of Rights Handbook' 108.

<sup>648</sup> 1998 (10) BCLR 1207 (CC) para 7.

<sup>649</sup> Section 169(1)(a) of the Constitution.

<sup>650</sup> Section 167(5) of the Constitution.

<sup>651</sup> De Vos P & Freedman W 'South African Constitutional Law in context' 223.

<sup>652</sup> De Vos P & Freedman W 'South African Constitutional Law in context' 223.

<sup>653</sup> No 32 of 1944.

<sup>654</sup> De Vos P & Freedman W 'South African Constitutional Law in context' 224.

<sup>655</sup> De Vos P & Freedman W 'South African Constitutional Law in context' 224.

CSAA, the coordination of the judicial functions of all magistrates' courts falling within the jurisdiction of the Division of the High Court is the responsibility of the judge president of that division. The heads, who are the regional court presidents and the heads of the administrative regions, will account for such management to the relevant judge president.<sup>656</sup> Challenges faced by judges in the judicial hierarchy can be seen as the internal challenges. By this, it is referred to the challenges emanating from within the OCJ itself. First and foremost is the Chief Justice's relationship with his judges. As it is not unusual for puisne judges to express concern regarding the potential abuse of power by the Chief Justices.<sup>657</sup> Professor Friedland<sup>658</sup> highlights the concerns expressed by puisne judges, which are:

- (a) the power to control when and what education courses judges are allowed to take;
- (b) the power to control attendance at conferences and seminars;
- (c) the power to allocate desirable and undesirable cases so as to reward or punish judges;
- (d) the discretion to approve or disapprove sabbatical and other leave; and
- (e) the influence that can be exerted on appointments and promotions.

The powers of the CJ and judges president put them in such a dominant position that the independence of their judges may be compromised. Opportunities exist for interference because of the unique nature of the heads of courts' administrative authority and supervisory duties.<sup>659</sup> Shetreet<sup>660</sup> wrote about the pressures felt by puisne judges and gave examples of judicial heads manipulating the assignment of cases so as to either punish judges or to ensure that their views prevailed in cases of public importance.<sup>661</sup>

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<sup>656</sup> OCJ' *Government Notice 37390 'Norms and standards for the performance of judicial functions'* 28 February 2014 available at <<http://www.gov.za/documents/superior-courts-act-norms-and-standards-performance-judicial-functions>>. (Date accessed: 17 January 2017).

<sup>657</sup> Vertes JZ 'Judicial independence and the role of the Chief Justice powers, limitations and challenges' (2012) available at <<http://www.cmja.org/downloads/JUDICIAL%20INDEPENDENCE%20AND%20THE%20ROLE%20OF%20THE%20CHIEF%20JUSTICE.docx>>.. (Date accessed: 18 July 2017).

<sup>658</sup> Friedland M L *À place apart: Judicial independence and accountability in Canada* 27.

<sup>659</sup> Vertes J Z 'Judicial independence and the role of the Chief Justice Powers, limitations and challenges' 26.

<sup>660</sup> Shetreet S *Judges on trial: A study of the appointment and accountability of the English judiciary* North-Holland Publishing (1976) 41, 43.

<sup>661</sup> Vertes J Z 'Judicial independence and the role of the Chief Justice Powers, limitations and challenges' 26.



Another example is a Northern Cape High Court judge, Cecile Williams, who made a last-minute decision to decline interviews of April 2017 for two senior positions as she believed that her colleague, who was contending for one of those positions, was already tipped for the position by the judge president of that division.<sup>662</sup> Referring to the letter, CJ Mogoeng put to the remaining candidate, Judge Violet Phatshoane, that “it is rumoured that the JP [Judge President Frans Kgomo] was grooming you for the Judge President-ship or Deputy President-ship,” adding that Williams was seemingly displeased about this.

The apparently Machiavellian hand of former Judge President Frans Kgomo, who retired earlier in 2017, was again evident in the October 2017 interviews as he dominated Judge Bulelwa Pakati’s almost two-hour-long interview.<sup>663</sup> Judge President Kgomo had written to the JSC as he had done before the April round of interviews to decide who would succeed him as the head of the court and also fill the deputy judge president position and made extremely critical remarks about Judge Pakati. Kgomo’s April intervention is believed to have led to the withdrawal of Judge Cecile Williams. Judge Violet Phatshoane, who was also in the running for the current vacancy, is believed to have been groomed for the position by Judge President Kgomo, but the JSC decided again not to fill the vacancy at this time.

In the North-West High Court, two candidates were interviewed by the JSC in April 2017 for the position of deputy judge president.<sup>664</sup> The first candidate to be interviewed was Judge Ronald Hendricks. In *Pilane and Another v Pheto and others*,<sup>665</sup> Hendricks had to rule on whether the respondents were members of the Bakgatla-Ba-Kgafela Royal Family and had the power to call a meeting of the “royal family”. Hendricks found that the respondents were “not core members” of the royal family and did not have the standing to call such meeting. The judgment was severely criticised by academics.<sup>666</sup>

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<sup>662</sup> Business Day ‘Judge withdraws from the interview believing another already tipped for position’ (05/April 2017) available at <<https://www.businesslive.co.za/bd/national/2017-04-05-judge-withdraws-from-interview-believing-another-already-tipped-for-position/>> (Date accessed: 18 July 2017).

<sup>663</sup> Judges Matter ‘October 2017-Interview synopsis’ available at <<http://judgesmatter.co.za/the-jsc/2016-2/jsc-candidates-2/judges-nare-frans-kgomo/>> (Date accessed: 04 October 2017).

<sup>664</sup> Judges Matter ‘No nomination for North-west Deputy Judge President’ (05/04/2017) available at <<http://www.judgesmatter.co.za/opinions/no-nomination-for-north-west-deputy-judge-president/>>. (Date accessed: 11 September 2017).

<sup>665</sup> (582/2011) [2011] ZANWHC 63 (30 September 2011).

<sup>666</sup> Judges Matter ‘No nomination for North-west Deputy Judge President’ 1.

The second candidate for the position was Judge Shane Kgoele. Initially, she appeared ill-prepared and underqualified as she was often ponderous in her responses. When she was unable to go into detail about the challenges the magistracy (judges president and deputy judges president oversee the district magistrates' courts in the province) faces, CJ Mogoeng Mogoeng expressed his irritation: "I thought that in preparation of this interview you would do more [research into the challenges]...that you would curious to know more about the challenges [as a prospective deputy judge president]"<sup>667</sup> North-West Judge President Leeuw confronted interview candidate Kgoele about what appeared to be a long-simmering issue at the court that related to the candidate's refusal to give reasons for a number of cases which had not been finalised by her.<sup>668</sup> This was after a complaint by the Director of Public Prosecutions in the province had been lodged with Judge President Leeuw in 2011.<sup>669</sup> The judiciary in South Africa, like any other institution of democratic governance, has to be accountable to the public for both its decisions and its operations. As a result, no nomination for the North-West Deputy Judge President was made by the JSC.<sup>670</sup> There were also no recommendations made for October interviews.<sup>671</sup>

In the Eastern Cape, during the interviews of 6 April 2017 for a judge president of the Eastern Cape Division of the High Court, judges described the difficulties facing the Eastern Cape's courts. These difficulties included a shortage of female judges.<sup>672</sup> Judge Makula said Grahamstown was a "tricky horse to ride" and had only produced three black judges. He told the JSC that there were 82 advocates in the province, but only 10 of them were black and of those, only three were women.<sup>673</sup> An unimpressed CJ Mogoeng Mogoeng reprimanded a candidate for making light of a serious matter – Deputy Judge President Nhlangulela failed to take seriously claims that some judges in his division were arriving at court as late as 11:00. Replying to Mogoeng's question about whether he was aware of this, Nhlangulela said: "I only have two eyes. If only I had 10 eyes I would know, so now I am relying on what I am told. I am doing my

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<sup>667</sup> Judges Matter 'No nomination for North-west Deputy Judge President' 1.

<sup>668</sup> Judges Matter 'No nomination for North-west Deputy Judge President' 2.

<sup>669</sup> Judges Matter 'No nomination for North-west Deputy Judge President' 2.

<sup>670</sup> Judges Matter 'No nomination for North-west Deputy Judge President' 2.

<sup>671</sup> Judges Matter 'October 2017-Interview synopsis' 1.

<sup>672</sup> Judge Matter 'JSC fail to find new Judge President for Eastern Cape High Court' (06/04/2017) available at <<http://www.judgesmatter.co.za/opinions/jsc-fail-to-find-new-judge-president-for-eastern-cape/>>. (Date accessed: 06 September 2017).

<sup>673</sup> Judge Matter 'JSC fail to find new Judge President for Eastern Cape High Court' 1.

best.”<sup>674</sup> However, Mogoeng failed to find his response funny, especially after another commissioner had pointed out that the matter of judges’ late-coming was reported in the media. Despite this encounter, four candidates were shortlisted for this post as the current Judge President Sangoni was to retire late 2017.

The first candidate to be interviewed was Judge Makula, who stated that he felt apartheid divisions were still evident, structurally and socio-economically, in the Eastern Cape. He stated also that this was apparent in the resourcing of courts, access to justice and the lack of transformation of the legal fraternity in the province.<sup>675</sup> The next candidate was Deputy Judge President Nhlangulela, whose attempts at “blowing his own whistle” showed him up more as a lightweight administrator who appeared to be struggling to deal with the problems in the Mthatha High Court. He then became shrilly defensive when questioned about what may be going wrong in his courts.<sup>676</sup> The third candidate was Judge Smith, who was asked about the case-flow management system initiated by CJ Mogoeng, and said that he had initially been “cynical” of the system, but that he had been convinced of its efficacy after being deployed by Judge President Sangoni to sit on the national Case-flow Management Task Team.<sup>677</sup>

The final candidate was Judge van Zyl, who had been a deputy judge president at the Bhisho seat of the Eastern Cape High Court since 2016 and had acted in that position for three years prior to his appointment. Judge van Zyl appeared to have diligently affected turnaround in the efficiency of Bhisho seat of the Eastern Cape Division of the High Court.<sup>678</sup> He detailed how the introduction of case-flow management in Bhisho had affected turnaround, with a 79% finalisation rate of criminal matters in 2016. Judge van Zyl said, if appointed, he would introduce the system to the other courts in the province, which were lagging behind.

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<sup>674</sup> Judge Matter ‘JSC fail to find new Judge President for Eastern Cape High Court’ 1.

<sup>675</sup> Judge Matter ‘JSC fail to find new Judge President for Eastern Cape High Court’ 2.

<sup>676</sup> Judge Matter ‘JSC fail to find new Judge President for Eastern Cape High Court’ 2. He was asked by Chief Justice Mogoeng Mogoeng about a practice of judges only starting courts at 11 am. When he responded that he did not know of this, despite it being reported in the media, he answered that because he only had two eyes, not 10, and that “I don’t know if am not told”. Mogoeng was not impressed.

<sup>677</sup> Judge Matter ‘JSC fail to find new Judge President for Eastern Cape High Court’ 3.

<sup>678</sup> Judge Matter ‘JSC fail to find new Judge President for Eastern Cape High Court’ 3.

However, somewhat surprisingly, the JSC failed to make an appointment to this position, leaving the Eastern Cape High Court effectively leaderless when the current judge president retires.<sup>679</sup> This is particularly concerning in a division which is so in need of strong leadership. Leadership in Africa has become increasingly important, both in business and in government, due to the wave of democratisation that Africa has experienced in the two decades. Leadership power seems to be important in Africa because it determines the control and distribution of resources.<sup>680</sup> However, leadership power in Africa is determined by many different forces such as tradition, history and socio-political challenges. It is also often obtained and applied in non-conventional ways, such as:

- (a) coups and other forms of violence, with a promise of a quick return to democracy, which is often not delivering upon;
- (b) remaining in power until they die, serving second or third terms, often thanks to rigged elections;
- (c) divine right often aimed at eliminating opposition;
- (d) according to traditional beliefs, habits and practices such as being favoured by the gods or ancestors;
- (e) inheritance (chieftainships);
- (f) being handpicked and enriched by Western organisations for business purposes; and/or
- (g) leaving a position of power only to return a few years later to once again take up the position.<sup>681</sup>

Dubrin<sup>682</sup> argues that one tends to find two types of leadership styles in African societies, namely instrumental and societal leadership. Societal leadership implies a public servant who works for the achievement of community objectives. This leader applies power and influence only if they can be used to solve human problems. The instrumental leader, on the other hand, uses power and influence primarily in the

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<sup>679</sup> Judge Matter 'JSC fail to find new Judge President for Eastern Cape High Court' 3.

<sup>680</sup> Van Zyl E *et al* 'Leadership in the African context' 2<sup>nd</sup> Edition (2016) *Juta* 268.

<sup>681</sup> Van Zyl E *et al* 'Leadership in the African context' 269.

<sup>682</sup> DuBrin A J *et al* 'Leadership' 2<sup>nd</sup> Asia-Pacific Edition *Milton, Queensland: John Wiley & Sons* (2003) 247.

pursuit of personal goals. This type of leader may claim to be committed to community goals, but in practice his or her considerations would be for his or her own interest.<sup>683</sup>

Various forms of power can be employed by leaders to influence others. Power is derived from the organisation, referred to as position power, or the individual, referred to as personal power.<sup>684</sup> Position power includes power that is assigned to a person on the basis of the position that he or she holds in an organisation. This would include authority, the ability to reward or punish, the ability to acquire, share and withhold information, and control of resources and the environment.<sup>685</sup> Personal power is derived from a person's position in the hierarchy of the organisation. It comes from the person's character and behaviour and is not assigned nor acquired through position.<sup>686</sup>

Earlier work by French and Raven<sup>687</sup> identified five sources of power, namely legitimate power, reward power, coercive power, expert power and referent (or reverent) power. In later work, Raven<sup>688</sup> indicated that information power would be the only source of power that allowed subordinates to remain socially independent from the influencing agent.

#### *(a) Legitimate power*

The power that comes from being appointed by the organisation into a leadership position is called legitimate power. A person with this kind of power has the right, considering his or her position, to expect of others to comply with legitimate requests.<sup>689</sup> The level of authority associated with a position determines the amount of power the person occupying the position will hold. Societal norms tend to reinforce the view that a manager has the right to instruct subordinates; the higher the level, the

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<sup>683</sup> Van Zyl E *et al* 'Leadership in the African context' 269.

<sup>684</sup> Bass BM 'Leadership and performance beyond expectations' *New York: The Free Press* (1960) 213.

<sup>685</sup> Van Zyl E *et al* 'Leadership in the African context' 271.

<sup>686</sup> Van Zyl E *et al* 'Leadership in the African context' 272.

<sup>687</sup> French J & Raven B H 'The bases of social power. In Cartwright D (eds) 'Studies of Social Power' Arbor A (1959) *MI: University of Michigan Press, Institute for Social Research* 134.

<sup>688</sup> Raven BH 'A power interaction model of interpersonal influence: French and Raven 30 years later' *Journal of social behaviour and personality* (1992) 217, 244.

<sup>689</sup> French J & Raven BH 'The bases of social power' in Cartwright D (eds) 'Studies of Social Power' 157.

greater the power.<sup>690</sup> A study by Bruins *et al.*<sup>691</sup> indicated that subordinates hold the view that leaders in high status positions have a right to exercise coercive and reward power.

*(b) Reward power*

Reward power is based on the capacity to provide things that others desire and involves the authority to reward employees for compliant behaviour. It relates to how rewards can be employed to influence and motivate action.<sup>692</sup> These rewards could include influence over pay, promotions and other forms of recognition. Subordinates' perceptions of leader effectiveness are positively influenced by leaders' access to and distribution of rewards.<sup>693</sup>

*(c) Coercive power*

Coercive power is the power to punish for non-compliance. This power is based on fear.<sup>694</sup> Leaders employing coercive power often threaten employees with demotions or disciplinary actions, tend to do excessive correction to employees' work and often overrule employee decisions. Bruins *et al.*<sup>695</sup> indicated that subordinates who work with leaders who constantly exercised coercive power become less cooperative, provide negative leader evaluations, and experience less autonomy and increased frustration with both their task and their supervisor.<sup>696</sup>

*(d) Information power*

Information power is power stemming from formal control over the information people need to do their work.<sup>697</sup> Compared to all other bases of power, only information power allows subordinates to remain socially independent from their influencing agent. Social

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<sup>690</sup> Van Zyl E *et al* 'Leadership in the African context' 272.

<sup>691</sup> Bruins AJ *et al* 'Power use and differential competence as determinates of subordinates evaluative and behavioural responses in simulated organisations' *European Journal of Social-Psychology* (1999) 29(7): 843-70.

<sup>692</sup> Van Zyl E *et al* 'Leadership in the African context' 273.

<sup>693</sup> Van Zyl E *et al* 'Leadership in the African context' 273.

<sup>694</sup> Van Zyl E *et al* 'Leadership in the African context' 273.

<sup>695</sup> Bruins J *et al* 'Power use and differential competence as determinates of subordinates evaluative and behavioural responses in simulated organisations' 199.

<sup>696</sup> Bruins J *et al* 'Power use and differential competence as determinates of subordinates evaluative and behavioural responses in simulated organisations' 199.

<sup>697</sup> DuBrin AJ *et al* 'Leadership' 248.

independence does not require the leader's continued use of power to ensure the change in or maintenance of subordinate behaviour.<sup>698</sup> Consequently, information power minimises supervision of subordinate performance as the power is shared by all.<sup>699</sup>

*(e) Reverent power*

Reverent power stems from a person's desirable personal traits. It is based on personal feelings of attraction or admiration that others have for the leader.<sup>700</sup> Leaders with this kind of power possess a quality called charisma. Subordinates are willing to do what the leader wants because they want to please the leader, have the leader like them and/or become like the leader. This attraction gives the leader power to influence the behaviour of others. If a leader is liked and respected by subordinates and peers, he or she will have more influence over them.<sup>701</sup>

*(f) Expert power*

Leaders with expert power earn respect and influence others through experience, knowledge and ability. Expert power may be effective in eliciting target compliance when the leader has expertise beyond that of his or her subordinates. Subordinates tend to accept an expert's opinion and are willing to act in accordance with his or her instructions.<sup>702</sup>

*(g) Prestige power*

Prestige power stems from a leader's status and reputation. Leaders with prestige power have influence based on a credible reputation and/or a track record of success.<sup>703</sup>

Leadership power is applied to achieve anticipated results. People tend to respond in one of three ways to leadership power: compliance, commitment or resistance.<sup>704</sup> The unique nature of the judiciary makes designing effective accountability mechanisms

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<sup>698</sup> Van Zyl E *et al* 'Leadership in the African context' 273.

<sup>699</sup> Van Zyl E *et al* 'Leadership in the African context' 273.

<sup>700</sup> Van Zyl E *et al* 'Leadership in the African context' 273.

<sup>701</sup> Van Zyl E *et al* 'Leadership in the African context' 274.

<sup>702</sup> Van Zyl E *et al* 'Leadership in the African context' 274.

<sup>703</sup> DuBrin AJ *et al* 'Leadership' 248.

<sup>704</sup> DuBrin AJ *et al* 'Leadership' 248.

complicated. Accountability mechanisms cannot interfere with either a court's adherence to impartial decision-making or its responsibility for safeguarding the rights of minorities, as independence addresses freeing the judiciary from prior control of its decision.<sup>705</sup> On the other hand, accountability focuses on having mechanisms in place by which the judiciary as an independent body is required to explain its operations after the fact.<sup>706</sup> To decide on the domain of independence, it is useful to look at the various facets of judicial activity. A judge's inherent judicial responsibility is jurisdictional – the hearing of cases and rendering of judgments.<sup>707</sup> So, for judicial systems to operate properly, there need to be checks on other activities in which any given judge may engage. Firstly, there is the meaning of activity itself: a judge is not free to rule on just any case, and failure to rule constitutes a denial of justice. Undue delays are another potential form of denying justice.<sup>708</sup> Secondly, judges can commit wrongful acts and omissions associated with the discharge of their office. Lastly, disciplinary liability can attach in some instances unrelated to judicial office because judges, by the source of their legitimacy, are expected to be exemplary citizens. So, alcohol or drug abusers, perpetrators of violence, and those who do not fulfil family obligations should not sit on the bench.<sup>709</sup>

Prior to 1994, there were no formal mechanisms in terms of which disciplinary measures could be taken against judges. The 1996 Constitution states that:

A judge may be removed from office only (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.<sup>710</sup>

So, the removal of a judge from his office requires a finding by the JSC of “gross misconduct”. When making such a finding, the JSC sits without its 10 serving members of the National Assembly.<sup>711</sup> The 1996 Constitution does not specify the procedure to

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<sup>705</sup> Du Toit L 'Assessing the performance of South Africa's Constitution' 10.

<sup>706</sup> Du Toit L 'Assessing the performance of South Africa's Constitution' 10.

<sup>707</sup> Perez-Perdomo R 'Judicial independence and accountability' (2000) available at <<http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.196.2393>>. (Date accessed 17/09/2017).

<sup>708</sup> Perez-Perdomo R 'Judicial independence and accountability' 5.

<sup>709</sup> Perez-Perdomo R 'Judicial independence and accountability' 6.

<sup>710</sup> Section 177 of the 1996 Constitution.

<sup>711</sup> Shetreet S & Forsyth C 'The culture of judicial independence: Conceptual foundations and practical challenges' *Martinus Nijhoff Brill* (2011) 74.



be adopted by the Commission in making its finding; rather, it provides that the JSC “may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.”<sup>712</sup> The challenge here is that a high degree of procedural protection is needed in its deliberations.<sup>713</sup> However, the process of removal of judges is extremely difficult in order to prevent undue interference with the independence of the judiciary. Up to now, even after the establishment of the OCJ, there has been no attempt to remove a judge from office.<sup>714</sup>

The 1996 Constitution is silent on matters that are not serious enough to warrant the removal of a judge from office. Currently, there are no guidelines for disciplinary actions against judges.<sup>715</sup> The Judicial Commission Act was passed in 1994 to regulate matters incidental to the establishment of the JSC,<sup>716</sup> but this Act does make provision for receiving and dealing with complaints against judges or for disciplinary procedures.<sup>717</sup> The so-called “Hlophe saga”, which was discussed in the previous chapter, was a major stress point in the life of the judiciary which highlighted the lack of a procedure to deal with judicial discipline.<sup>718</sup> Another stress point highlighting issues of judicial discipline concerned the matter of Judge *Nkola Motata* of the North Gauteng High Court, who was convicted of driving a vehicle while under the influence of intoxicating liquor.<sup>719</sup> The *Motata* matter was the first to utilise the new procedure laid down in the JSC Amendment Act<sup>720</sup> for complaints relating to potentially impeachable conduct. In May 2011, the Judicial Conduct Committee of the JSC decided that there was a *prima facie* case of gross misconduct against Judge Motata based on his conviction for drunken driving and recommended the convening of a Judicial Conduct Tribunal in terms of the new procedure.<sup>721</sup>

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<sup>712</sup> Shetreet S & Forsyth C ‘The culture of judicial independence: Conceptual foundations and practical challenges’ 74.

<sup>713</sup> Shetreet S & Forsyth C (eds) ‘The culture of judicial independence: Conceptual foundations and practical challenges’ 75.

<sup>714</sup> Du Toit L ‘Assessing the performance of South Africa’s Constitution’ 10.

<sup>715</sup> Du Toit L ‘Assessing the performance of South Africa’s Constitution’ 10.

<sup>716</sup> Act 9 of 1994.

<sup>717</sup> Du Toit L , ‘Assessing the performance of South Africa’s Constitution’ 10

<sup>718</sup> Du Toit L ‘Assessing the performance of South Africa’s Constitution’ 11.

<sup>719</sup> *Motata v S* (2010) ZAGPJHC 134 (29 November 2010), after Judge Motata being convicted in the Johannesburg Regional Court and the full bench of the South Gauteng High Court dismissed his appeal.

<sup>720</sup> No. 20 of 2008.

<sup>721</sup> Du Toit L ‘Assessing the performance of South Africa’s Constitution’ 21.

A month later, the full JSC found that there were reasonable grounds to suspect that Judge Motata was guilty of gross misconduct and requested the CJ to appoint a Judicial Conduct Committee. However, Judge Motata challenged the decision of the JSC, arguing that its decision be reviewed because Parliament had yet to approve a code of judicial conduct, and no guidelines existed against which it could be measured whether the conduct of the judge constituted gross misconduct or not.<sup>722</sup> Despite the fact that it was held that the JSC was entitled to proceed with its investigation by way of an inquiry conducted by a Judicial Conduct Tribunal or in accordance with such procedure it see fit, neither the Hlophe nor the Motata matters have been resolved, even though years have passed since their occurrence and this has undoubtedly caused damage to the status and trust in the judiciary as an institution.<sup>723</sup>

A total of 54 complaints were levelled against the country's serving judges in the financial year between April 2016 and March 2017.<sup>724</sup> This excludes unresolved complaints that date back more than a decade because of legal disputes over how they be handled. Department of Justice Minister Michael Masutha said the JSC has had to deal with a number of complaints against judges that took time to complete.<sup>725</sup> He stated that "this requires that we engage with the CJ and the judiciary to look at the effectiveness of the current complaints handling mechanism." Secretary-General of the OCJ Sejosengwe stated that 54 complaints were received between April 2016 and March 2017. She also stated that 37 had been finalised and 17 were outstanding.<sup>726</sup> Although she did not comment on the nature of the complaints, Masutha said they ranged from delayed judgments to alleged racist remarks.<sup>727</sup> Leaving aside Judge Jansen, who resigned while facing a disciplinary process over comments she made about rape and race, Masutha pronounced that some unresolved

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<sup>722</sup> Du Toit L 'Assessing the performance of South Africa's Constitution' 21.

<sup>723</sup> Du Toit L 'Assessing the performance of South Africa's Constitution' 21.

<sup>724</sup> DoJ&CD Annual savvy, 2017

<sup>725</sup> Mokone T 'Justice Minister criticises how JSC handles complaints against judges' (17/05/2017) available at <<https://www.businesslive.co.za/bd/national/2017-05-17-justice-minister-criticises-how-jsc-handles-complaints-against-judges/>>. (Date accessed: 11 September 2017).

<sup>726</sup> Mokone T 'Justice Minister criticises how JSC handles complaints against judges' 1.

<sup>727</sup> Weekend Argus '*Bromwell tenants take judge to JSC*' (04/09/2017) available at <<https://www.pressreader.com/south-africa/weekend-argus-sunday.../281590945422076>>. (Date accessed: 11 September 2017). The Bromwell tenants took the judge to JSC after the judge made remarks that the residents regarded as "disparaging" and had created an apprehension that he might be biased against them. In one of the remarks he stated: "Where you have got a person who is not working, who had not got an income, what do you do? What is the point of them being near school? What is the point of them needing transport? Where are they going to go? They have not even got money to spend anything..."

complaints dated back more than a decade because of legal disputes over how they should be handled.<sup>728</sup>

#### **4.7 Conclusion**

The chapter discussed the principle of the institutional independence of the judiciary and provided various models which South Africa can adopt. Due to the nature and experience of constitutional democracy in South Africa, a model of limited autonomy and commission model are advocated for, instead of a judicial model, since these are the most flexible, coherent and constructive frameworks within which to realise the goals for South African judiciary. The method advocated for by Cappelletti was discussed and the conclusion was reached as to what is the most suitable model for South Africa judiciary. The model was chosen based on its responsiveness and consumer-oriented nature since it is a mixed model where all branches of government, as well as society at large, will work together. This attracted the study since the role of the South African judiciary demands responsiveness to its needs.

With all these challenges addressed, what remains to complete the equation is taking effective measures towards the realisation of meaningful judicial independence and sustenance of public confidence through judicial accountability. The foregoing clarification of notions of independence and accountability shows that these values can coexist as elements of good justice. They are, indeed, interlinked, but in practice the need for judicial independence can be used to excuse accountability, just as the need for accountability can be a tool for making judges answerable to politicians.<sup>729</sup>

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<sup>728</sup> Mokone T 'Justice Minister criticises how JSC handles complaints against judges' 1.

<sup>729</sup> Perez-Perdomo R 'Judicial independence and accountability' 6.

## Chapter 5

### 5 Conclusion

#### 5.1 Introduction

Even though the judiciary is under the OCJ, an independent government department outside the Department of Justice where was in the past, it seems that the status quo of the judiciary in terms of administrative independence has not changed. The question that this study intended to answer is what the scope of the current OCJ of South Africa is, to discuss whether the OCJ's role is merely to extend beyond taking the central seat in the South African highest court to shape subordinating Courts. Chapter 3 of the study concluded that judicial independence in South Africa is respected, albeit within narrow confines, since the South African courts have exercised enormous powers of judicial review in the past 23 years. The powers they have exercised, and still exercise, undoubtedly emanate from the 1996 Constitution and are vested in them in the true spirit of democracy.<sup>730</sup> The courts have proven in several cases that the state is not above the law.<sup>731</sup>

CJ Mogoeng Mogoeng said that the institutional arrangements of the judiciary must facilitate the independence of an individual judge to decide case without being unduly influenced by another judge, a politician, a big business or lobby groups.<sup>732</sup> He further alluded that, before both CSAA and the Superior Court Act, the president of the SCA and the judges' president honoured the CJ's directives out of sheer civility and recognition of some moral authority over them, and not as a senior judge of the country.<sup>733</sup> After the implementation of these two legislations, the CJ now heads the judiciary, which has given rise to potential tension between the CJ, the President of the SCA and the judges' president, since there was previously no law which provided for who the nation's top judge was. However, this does not mean that the judges must be submissive to the heads of court in decision-making. Judges must be impartial and independent, and free in determining the facts and applying the laws to the facts

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<sup>730</sup> Okpaluba C 'Judicial review of executive power: Legality, rationality and reasonableness (2)' 403.

<sup>731</sup> The cases already discussed in the study, for example, *Pharmaceutical Manufacturers Association; Masetlha; Albutt*; also, a host of the *Democratic Alliance* cases.

<sup>732</sup> Mogoeng M 'Chief Justice on the role of the courts in the protection of the constitutional order' DeRebus (June 2014) 9.

<sup>733</sup> Mogoeng M 'Single judiciary discussed at Judicial Officers Association of South Africa AGM' 8.

independently without being influenced by any source.<sup>734</sup> So judges inside the OCJ must be independent of colleagues, including their horizontal and vertical bosses.

The discussion concentrated on some problems arising from historical reality, conflict of interest, on potential solutions for such difficulties, and on the course adopted by the political negotiators. There can be no doubt that the procedures for appointment of judges adopted in the IC and the creation of an apex court in all matters mark important steps towards a judiciary more consciously involved in government and also more accountable politically.<sup>735</sup> However, it should be abundantly clear that there is an urgent need to move the interpretive task fulfilled by the judiciary as a whole to a creative, imaginative and comparative human-rights jurisprudence, as there is no ideal or standard constitutional design or model that is irreproachable and unimpeachable, nor one that will solve all problems.<sup>736</sup>

## **5.2 Reflection on the South African judiciary: From legislative supremacy to constitutional supremacy**

The framers of the South African 1996 Constitution were concerned at the time about the kind of judiciary South Africa should have and how it should differ from the apartheid era. The question that arises at first instance is what made the framers of the 1996 Constitution so concerned about providing a separate entity to the judiciary and making itself competent.<sup>737</sup> The answer to this question lies in the very basic understanding that it was to secure the stability and prosperity of the society. The framers at that time understood that such a society could be created only by guaranteeing fundamental rights, and the independence of the judiciary to guard and enforce those fundamental rights.<sup>738</sup>

The independence of the judiciary, as is clear from the study, holds a prominent position as far as the institution of the judiciary is concerned. It is also clear that judicial independence has faced many obstacles in the past, specifically in relation to the

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<sup>734</sup> Dung L T 'Judicial independence in transitional countries' 11.

<sup>735</sup> Kahn E 'The quest for justice' 147.

<sup>736</sup> Fombad M C 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' 1104.

<sup>737</sup> Ambedkar BR '*Independence of judiciary in India: A critical analysis*' available at <<http://mulnivasiorganiser.bamcef.org/?p=482>>. (Date accessed 02/02/2017).

<sup>738</sup> Ambedkar B R '*Independence of judiciary in India: A critical analysis*' 1.

appointment of judges.<sup>739</sup> The government helped to ensure that reforms are put into place by introducing the CSAA. The government saw fit that the only model of court administration suited to this is an independent administrative agency or set of agencies that are entirely accountable to the judiciary.<sup>740</sup>

Despite the work by Coetzer<sup>741</sup> about an answer which could reduce possible manipulation of the central administration of the courts under the new South African constitutional dispensation,<sup>742</sup> the OCJ in the study was necessarily narrower than that of court administration in the full sense. Furthermore, any strategy that seeks to assume judicial control over the court administration system using the platform of the OCJ would merely be replacing the Minister with the CEO of the OCJ (who is appointed by the executive) as executive head over the administration and would not address the demand to allow judicial officers greater control over the administration of their own courts.<sup>743</sup>

The OCJ is still in the first phase of the project and has not yet been given sufficient capacity to assume the large number of functions currently being undertaken by the Department of Justice. Despite also being a fledgling structure that is not yet fully operational in that the magistrates' courts still remain in the Department of Justice, the OCJ already plays an important role in providing institutional support to the CJ in the performance of his duties.<sup>744</sup> However, what is of concern to the study is that, although Parliament theoretically "controls the purse", in practice the real power is in the hands of Cabinet ministers and the treasury.<sup>745</sup> The reality is that both political power and economic control over public expenditure reside in the government of the day. The OCJ, as a national state department, is also being audited by the Auditor-General at part of phase 2 of the establishment of the OCJ as an independent entity.<sup>746</sup> So any

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<sup>739</sup> Ambedkar B R 'Independence of judiciary in India: A critical analysis' 1.

<sup>740</sup> Hoexter C & Olivier M 'The judiciary in South Africa' 114.

<sup>741</sup> Coetzer JPJ 'Die Regsadminstrasie en Verwante Sake in 'n Nuwe Bedeling' 107.

<sup>742</sup> See chapter 3 at 3.4 of the study.

<sup>743</sup> Hoexter C & Olivier M 'The judiciary in South Africa' 114.

<sup>744</sup> Hoexter C & Olivier M 'The judiciary in South Africa' 114

<sup>745</sup> Joubert WA *et al* 'The law of South Africa' (2012) Volume 5 Part 3 *LexisNexis* 282.

<sup>746</sup> Mogoeng M 'The implications of the office of the Chief Justice for Constitutional Democracy in South Africa' 398. Phase 2: the establishment of the Office of the Chief Justice as an independent entity similar to the Auditor-General.

institution that is receiving money from government must account to it fully. Then, the OCJ will be forced to account to Parliament on how it spend its funds.

### *5.2.1 Governance, accountability and the leadership role of the CJ in terms of the CSAA and Superior Court Act*

The judiciary, just like any other government branch, is accountable for its efficient exercise of its judicial function. Governance within and accountability of the judiciary are important components of judicial independence and separation of powers.<sup>747</sup> Both the CSAA and Superior Court Act were put in place because Parliament was concerned with the previous court arrangements which could upset the constitutional balance. These Acts, while referencing that concern, are also viewed as pointing to the live debate at the heart of the nation's constitutional arrangements, as to who, ultimately, has the last word as to how courts are governed.<sup>748</sup>

When leadership is argued, one would think of the general conception of leadership as the notion of a leader being in charge, being able to command, to say this is what we shall do and require it be done.<sup>749</sup> This notion of leadership sits ill in the judicial context, meaning modification is necessary for it not to conflict with the constitutional imperatives of judicial independence and impartiality. Sian argues it in the following lines:

I am concerned about getting the balance right between not going too far in terms of managerial justice, and I am nervous about the Chief Justice acquiring statutory powers in relation to other judges because I think independence of the judiciary to achieve impartiality depends also on independence from judicial management...<sup>750</sup>

As similar view is expressed by Winkelmann:

A feature of most judicial leadership is that it is based on building a consensus. Judicial leaders do not typically adopt a dictatorial style of leadership...I must bring

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<sup>747</sup> Albertyn C 'Judicial independence and the Constitution Fourteenth Amendment Bill' 133.

<sup>748</sup> Cornes R 'A point of stability in the life of the nation: The office of Chief Justice of New Zealand-Supreme Court judge, judicial branch leader, and constitutional guardian & statesperson' 4.

<sup>749</sup> Cornes R 'A point of stability in the life of the nation: The office of Chief Justice of New Zealand-Supreme Court judge, judicial branch leader, and constitutional guardian & statesperson' 5.

<sup>750</sup> Lords Select Committee on Constitutional Reform Bill-Minutes of Evidence (25 May 2004) available at ><http://www.publications.parliament.uk/pa/id200304/1dselect/1dceref/125/4052501.htm>>. (Date accessed: 20 November 2017).

others with me, to convince and persuade that the issues and solutions are as I propose.<sup>751</sup>

Leadership is about influencing, motivating and enabling others to contribute towards the effectiveness and success of the institution. Leaders use various forms of influence, from subtle persuasion to direct application of power, to ensure that followers are motivated to achieve institutional goals.<sup>752</sup> Thus, leadership in the judiciary is a matter not just of the individual (though it certainly starts there), but also a collective endeavour. CJ Roberts of the United States Supreme Court recounted advice he received about holding the reins of power on a top court: “don’t hold them too tightly lest you find they’re no longer attached to anything.”<sup>753</sup> So, it goes without saying that the CJ in the OJC heads the bench and reports to other branches of government on how it runs its functions. The following table illustrates how accountability in terms of reporting by all branches of government takes place in South Africa:

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<sup>751</sup> Winkelmann H ‘Promoting innovative leadership and the role of leadership in planning innovation’ (paper presented to Asia Pacific Courts Conference, Auckland, 8 March 2013), 16.

<sup>752</sup> Naidoo G & Kahn S ‘Transformational leadership: case for the South African National Defence Force’ available at <<http://hdl.handle.net/10500/21062>>\_ (Date accessed: 12 June 2016).

<sup>753</sup> Cornes R ‘A point of stability in the life of the nation: The office of Chief Justice of New Zealand-Supreme Court judge, judicial branch leader, and constitutional guardian & statesperson’ 5.



Table 5.1 Checks and balances effected by each branch of government on the others<sup>754</sup>

Checks	Legislature	Executive	Judiciary
<b>Legislature</b>		The executive checks the legislature by: <ul style="list-style-type: none"> <li>• developing and implementing policy;</li> <li>• preparing and initiating legislation;</li> <li>• making subordinate legislation; and</li> <li>• assenting to Bills passed by the legislature.</li> </ul>	The judiciary checks the legislature by: <ul style="list-style-type: none"> <li>• invalidating laws enacted by the legislature that do not comply with the Constitution; and</li> <li>• ensuring the legislature complies with the procedural requirements prescribed in the Constitution.</li> </ul>
<b>Executive</b>	The legislature checks the executive by: <ul style="list-style-type: none"> <li>• requiring members of the executive to provide full and regular reports concerning matters within their control;</li> <li>• appointing the President;</li> <li>• removing or recalling national executive members; and</li> <li>• approving the extension of states of emergency.</li> </ul>		The judiciary checks the executive by: <ul style="list-style-type: none"> <li>• invalidating acts by members of the executive that do not comply with the Constitution; and</li> <li>• ensuring that the executive fulfils its constitutional obligations diligently and without delay.</li> </ul>
<b>Judiciary</b>	The legislature checks the judiciary by: <ul style="list-style-type: none"> <li>• indirectly taking part in the appointment of judges through selected representatives on the JSC;</li> <li>• taking part in the removal of judges who, before the end of their designated tenure, are proven to be suffering from incapacity or have been found guilty of gross incompetence or gross misconduct; and</li> <li>• passing legislation (in conformity with the Constitution) to respond to judicial decisions (structured dialogue).</li> </ul>	The executive checks the judiciary by: <ul style="list-style-type: none"> <li>• taking part in the appointment of judges as some of its members sit on the JSC, which appoints judges; and</li> <li>• formulating legislation (in conformity with the Constitution) to respond to judicial decisions (structured dialogue).</li> </ul>	

<sup>754</sup> De Vos P 'South African Constitutional law in context' 71.

From the above table, the study concludes that the independence of the OCJ is compromised by the executive-based model of court administration which is currently used. The model of court administration suited to the OCJ as recommended earlier is necessary to be accountable to the judiciary. Despite this, the judiciary, just like the other branches, is subject to important checks on its power. Judges may be removed from office before the end of their designated tenure should they be proven to be suffering from incapacity, or should they be found guilty of gross incompetence or gross misconduct.<sup>755</sup> The process for the removal of a judge entails the JSC investigating and then making a finding on one of the grounds previously mentioned. Thereafter, the matter would come up for the consideration of the National Assembly, which must adopt a resolution supported by two-thirds of all its members ordering the removal of the judge in question. Where such a resolution is successfully passed, the President is then obliged to affect the removal of the judge in question.<sup>756</sup>

### *5.2.2 Reforms because of the CSAA*

It has been demonstrated how an executive-dominated judiciary can impair the independence of the judiciary and, as a result, hamper its role in the transformative constitutionalism of South Africa. The judiciary in South Africa needed a change after the fall of apartheid and adoption of a new democratic Constitution. Accordingly, the vision of the CSAA is to transform the judiciary to be in line with the spirit purported by the 1996 Constitution. The constitutional imperative to restructure the courts in line with the new order needs to be carried out in a manner that engages the institutions of the state in a democratic dialogue that has the establishment of an independent, accountable and efficient judiciary as its goal.<sup>757</sup> It was a necessity that the judiciary break away from the previous position where it was just an extension in the DoJ&CD, to experience judicial institutional development. All the branches now need to engage in a discussion and agree on a vision of an independent and accountable judiciary and work, collectively, to achieve it,<sup>758</sup> though other branches are still left behind as to the real meaning of judicial independence.

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<sup>755</sup> Section 177(3) of the 1996 Constitution.

<sup>756</sup> Section 177(2) of the 1996 Constitution.

<sup>757</sup> Albertyn C 'Judicial independence and the Constitution Fourteenth Amendment Bill' 143.

<sup>758</sup> Albertyn C 'Judicial independence and the Constitution Fourteenth Amendment Bill' 143.

Threats made by the South African ANC Women's League<sup>759</sup> and Youth League after every court ruling in favour of the Constitution and not the ANC resort to the same rhetoric: judicial overreach. In an interview with News24, Matuba, one of President Zuma's ex-wives, who also serves as Secretary-General of the ANC Women's League, said that the CC ruling on the secret ballot shows that the judiciary has too much power and that South Africa's hard-won constitutional democracy needs to be reviewed in favour of the ruling party.<sup>760</sup> However, the speech by the DA Deputy Minister of Justice and Correctional Service, Advocate Werner, during the Budget Vote on the OCJ and judicial administration, stated that:

This uncomfortable reality is of course at the root of all of the ANC's criticism against the judiciary- an ANC which more and more regrets ever insisting on installing constitutional supremacy in our country and who want to go back to parliamentary supremacy, so that they can use their majority to do exactly what they want, without any checks or balances. Therefore, the continues and constant criticism of the judiciary, especially every time the judiciary holds the ANC's exercise of power to be unconstitutional, is, in fact, not only criticism, but part of an active campaign of intimidation against the judiciary.<sup>761</sup>

So far, however, resistance by the judiciary seems to have stopped any potential threats from damaging judicial independence, despite ongoing and continuous criticism towards it by other branches of government.

### *5.2.3 Transformation of the judiciary*

It has been established in this study that the process of transformation is not one that can be achieved overnight. The study acknowledges that, since 1994, significant development has been made regarding the independent judiciary, but it has also proven not to be a process that is well received and embraced by all South Africans. All the challenges about the independence of the judiciary that were discussed in Chapter 4, are derailing the process of balancing the scales in terms of ensuring the

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<sup>759</sup> Claymore E 'The South African ANC Women's League wants judiciary brought under parliamentary control' (22/06/2017) available at <<https://www.thesouthafrican.com/anc-womens-league-wants-judiciary-brought-under-parliamentary-control/>>. (Date accessed: 15 September 2017).

<sup>760</sup> Gallens M 'Constitutional democracy is not working, courts have too much power-ANCWL' (22/06/2017) available at <<http://www.news24.com/SouthAfrica/News/constitutional-democracy-is-not-working-courts-have-too-much-power-ancwl-20170622>>. (Date accessed: 15 September 2017).

<sup>761</sup> Werner 'Speech during the Budget Vote of the OCJ and Judicial Administration "The judiciary must be protected against intimidation" (17/05/2017) available at <<https://www.da.org.za/2017/05/judiciary-must-protected-intimidation/>>. (Date accessed: 15 September 2017).

substantive translation of the law into reality. However, there are, according to Chapter 4, four principles to which the JSC must give proper effect if South African judiciary is to command the trust of an open process. To obtain all the chapter has recommended, it means that the OCJ must take steps to ensure that the pool of candidates is itself a properly diverse one, so that the best and most meritorious candidates can then be appointed from that pool.

To obtain this, it is argued that the OCJ could consider the adoption of formal guidelines or protocols with which to administer its work. First, it could consider paying close attention to institutional mechanisms. The OCJ could consider the adoption of formal guidelines or protocols, such as the “Model Policy on Equality within the Court” adopted by the Canadian Judicial Council in 1998.<sup>762</sup> The policy must make mention of the constitutional quality principles that should be considered by the CJ in carrying out his or her duties and that the work to be done by judges, whether judicial or administrative, should be allocated in an equal manner.

The trend today is to have judges disciplined by their peers, with political control only of Supreme Court judges. In this regard, it is therefore submitted that the role of the CJ needs to be extended to include internal disciplinary issues inside the OCJ. Firstly, where a matter does not warrant impeachment, the CJ must be given the necessary authority to appoint the investigating authority, followed by the disciplinary authority, to address disciplinary matter inside the OCJ. Secondly, in the strengthening of the judicial ethos, judges should be imbued with the scope of their mission, understand the crucial role they play, and rise to society’s expectations for them. This should be a core component of their training.

For example, the Canadian Judicial Council’s “Judicial Education Guidelines”, adopted in 2008, set out that each puisne judge should be credited with 10 days per year for education programmes against their sitting time. The guidelines also set out requirements for education plans and mentoring for newly-appointed judges.<sup>763</sup> These types of guidelines will go a long way to temper the possibility that assignments or

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<sup>762</sup> Vertes J Z ‘Judicial independence and the role of the Chief Justice Powers, limitations and challenges’ 26.

<sup>763</sup> Canadian Judicial Council, available at <[http://www.cjc-ccm.gc.ca/english/news\\_en.asp?selMenu=news\\_pub\\_all\\_en.asp](http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_pub_all_en.asp)>. (Date accessed: 18 September 2017).

decisions as to education opportunities would be used by a CJ or a judge president as a form of punishment or reward. They will provide a framework to the exercise of discretion by a CJ, and they will be known to all the judges. Aside from internalising the importance of their role in the OCJ, judges must know that their performance will be routinely evaluated. The evaluations of greatest weight should come from the high-ranking judiciary and from fellow judges. Another source of evaluation is statistics to implicitly or explicitly compare a judge's performance with that of his or her peers. In these discussed instances, the transformation agenda can be said to be going at a relatively slow pace, with some positive strides to be noted.

#### *5.2.4 Leadership in the judiciary*

Since before the establishment of the CSAA and Superior Court Act, the President of the SCA and judge's president honoured invitations to meetings convened and programmes organised by the CJ out of sheer civility and recognising of the CJ's moral authority over them.<sup>764</sup> The CJ was generally regarded as nothing more than the head of the highest court in the land, with little or no say in the operational matters of all other courts. Similarly, magistrates attended meetings convened by a judge president of a division of the high court out of sheer deference to a senior judicial officer in the province. Some in positions of leadership simply ignored those meetings.<sup>765</sup> However, since the coming into effect of both these legislations, the CJ has been empowered to be the head of the judiciary.

Because of this history, the OCJ, as an institution, will either grow and adapt, or wither and get bypassed. Just as the adjudicating judge long ago ceased to be the passive non-manager of litigation, today, after the establishment of the OCJ, judges must take interest and responsibility for building better systems of justice. Cooke<sup>766</sup> described the relationship between the CJ and judges president as "an awkward one calling for tact by the holder of the respective offices." At times, the relationship ran smoothly; at others, it descended into tension and pettiness. Since the 23 August 2013 reform by both the CSAA and Superior Court Act, the task now rests with the judge's president

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<sup>764</sup> Mogoeng M 'Chief Justice Calls for single judiciary' *DeRebus* (March 2014) 8.

<sup>765</sup> Mogoeng M 'Chief Justice Calls for single judiciary' 8.

<sup>766</sup> McCathy T 'Memorandum on circumstances surrounding the erection of the Court of Appeal Building in Aitken Street' in Bigwood R (ed) *The permanent New Zealand Court of Appeal: Essay on the First 50 Years* Hart Publishing, Oxford (2009) 355, 356.

who are responsible to the CJ for ensuring the orderly and prompt conduct of the High Court's businesses.<sup>767</sup> It is now visible that the CJ plays a proactive macro-level role in court system design. What is now left is the magistracy to join the single judiciary, as this has not yet been achieved.<sup>768</sup> Then-Deputy Minister Jeffrey explained what a single judiciary is by saying: "The term 'single judiciary' would commonly refer to a process through which the magistrates' courts and magistrates are integrated to form part of a unified court system."<sup>769</sup>

### 5.3 The role of the OCJ and the South African judiciary in transformation

Institutional (or collective), as explained by CJ Dickson<sup>770</sup> of Canada in 1986, means:

... When judges reverse their decisions in the wake of political or media criticism, the judiciary as an institution is presented as unacceptably supine. When judges are exposed to removal from office at the behest of politicians who dislike their decisions, they are highly vulnerable to the improper pressure that diminishes their real neutrality. When judges are submitted to unrelenting political attacks by people who would know better, there is a danger that the public will draw from the silence of the judges on implication that the criticism was justified. Yet silence is ordinarily imposed by judicial convention.

It is certainly true that a judge and the institution in the OCJ may in some instances suffer from improper influences, threats or interferences, either directly or indirectly. It is therefore submitted that laws and proactive stances must exist that will protect judges and magistrates from external and internal influence, together with laws that make the judiciary accountable.<sup>771</sup> For example, the CJ has on several occasions called upon the President to meet with him to discuss some of the comments made that seem to attack or criticise some of the decisions taken by the judiciary against the government. While recognising that personal independence is a necessary condition for judicial independence, it is not a sufficient condition. A peremptory condition is

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<sup>767</sup> The OCJ is responsible for supporting the Chief Justice with the monitoring and reporting on compliance with the judicial norms and standards. Quarterly reports from Provincial Efficiency Enhancement Committees within the OCJ are collated and the information analysed by the department.

<sup>768</sup> OCJ Annual Performance Plan 2017/18.

<sup>769</sup> Jeffrey J, 'spoke at the annual general meeting of the Judicial Officers Association of South Africa' (01/03/2014) available at <<http://www.derebus.org.za/single-judiciary-discussed-judicial-officers-association-south-africa-agm/>>. (Date accessed: 18 September 2017).

<sup>770</sup> Commonwealth Magistrates' and Judges' Association Annual Conference 'Judicial independence: The Challenges of the modern era' 13.

<sup>771</sup> Commonwealth Magistrates' and Judges' Association Annual Conference 'Judicial independence: The Challenges of the modern era' 13.

institutional independence.<sup>772</sup> A judge's personal independence is incomplete unless it is accompanied by institutional independence, designed to ensure that the judicial arm fulfil its role of protecting the Constitution and its values.<sup>773</sup> It goes without saying that the role of the OCJ is very important in protecting the judge's personal independence, which is indeed a real challenge.

However, the creation of the OCJ should be a design to build a protective wall around the judicial organs that prevent the executive, the legislature and the media from influencing the way judges actualise their roles as protectors of the 1996 Constitution. Several key decisions mentioned in Chapter 3 are a demonstration of the strongest judicial system South Africa has ever experienced, considering the volatile political climate the country was once under. So, it may be concluded that the courts have exercised enormous powers of judicial review in the 23 years of constitutionalism in South Africa.

The powers the judges have exercised, and still exercise, undoubtedly emanate from the 1996 Constitution and are vested in them in the true spirit of democracy.<sup>774</sup> It is also a fact that they have exercised their judicial authority with a mixture of progressive activism, on the one hand, and in non-absolute terms, on the other. Consequently, they have constantly applied restraint and self-constraint in circumstances where they consider that making a particular judicial order will otherwise impinge upon the doctrine of separation of powers and thereby amount to usurpation of the legislative or executive powers.<sup>775</sup> The contemporary constitutional jurisprudence of South Africa is replete with cases abundantly illustrating the foregoing point which has become a norm of constitutional adjudication since *Pharmaceutical Manufacturers Association through SARFU (3)*,<sup>776</sup> *Masetlha*,<sup>777</sup> *Albutt*,<sup>778</sup> *Association of Regional Magistrates*,<sup>779</sup>

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<sup>772</sup> Chibesakunda P 'Judicial independence: The challenges of the modern era' Commonwealth Magistrates' and Judges' Association Annual Conference 'Judicial independence: The Challenges of the modern era' 13.

<sup>773</sup> Chibesakunda P 'Judicial independence: The challenges of the modern era' 13.

<sup>774</sup> Okpaluba C 'Judicial review of executive power: Legality, rationality and reasonableness (2)' (2015) 30 (1) SAPL 379.

<sup>775</sup> Okpaluba C 'Judicial review of executive power: Legality, rationality and reasonableness (2)' 404.

<sup>776</sup> *President of the RSA & Other v SARFU & Others* 1999 (10) BCLR 1059 (CC).

<sup>777</sup> *Masetlha v The President of the Republic of South Africa & Another* 2008 (1) BCLR 1 (CC).

<sup>778</sup> *Albutt v Centre for the study of violence and reconciliation and others* 2010 (5) BCLR 391 (CC).

<sup>779</sup> *Association of Regional Magistrates of South Africa v President of the Republic of South Africa and Others* 2013 (7) BCLR 762 (CC).

down to *Scalabrini Centre*,<sup>780</sup> and a host of the *Democratic Alliance*<sup>781</sup> cases, among others. Given the many disputes and issues that have come to the courts in the last 23 years and in view of the important role they have played in resolving those wrangles, there can be no doubt that, indeed, the judiciary has been the nerve-centre of the South African democratic experiment. Through their adjudicative role, they have attributed a functional meaning to the distribution of government functions and of enforcing that distribution cases. Through their opinions as to what democracy means in law and practice, what the rule of law represents and what constitutionalism translates into in a real-life situation; through their adjudication over rights of individual and the obligations of the state and its agencies, the courts have shaped the political process as well as demonstrated their pride of place in a distinctly unique and significant way in the governance of the democratic state.<sup>782</sup>

### *5.3.1 Challenges facing an independent judiciary*

The efforts of creating the OCJ were focused on creating a governance structure that engages individuals and institutions from both inside and outside the court system. Within the branch, it draws upon the talents of judges, lawyers, administrators and staff, who are invited to effect policymaking through participation in the work of the Judicial Council and its advisory committees and task forces. Over the past 23 years, since the start of the state funding of constitutional democracy, there has been a close working relationship with all sister branches of government to enhance the ability to advocate effectively for the needs of the judiciary branch and at the same time to provide accountability to them for their actions in expending public funds and meeting public needs.

However, regarding the OCJ, by focusing on increasing access to the courts, improving services, enhancing public safety and cooperating with others to address societal problems more comprehensively and effectively, the OCJ scope of branch governance and commitment responsibilities include far more than the task of managing caseloads. The judiciary sought to create a branch that is perceived as not only fair and effective in adjudicating the individual cases that come before it for

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<sup>780</sup> *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* (2013) 4 ALL SA 571 (SCA).

<sup>781</sup> *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA).

<sup>782</sup> *Okpaluba C 'Judicial review of executive power: Legality, rationality and reasonableness* (2)' 405.



resolution, but also one that affirmatively strives to improve and expand the boundaries of the overall administration of justice for the benefit of the public it serves.

Although it is still necessary to advocate for new programmes in proposing a budget, in its ability to meet current needs, the proposed method of budgeting recommended in Chapter 4 of the study brings about a way from the days of having to start from scratch each year to justify the cost of court operations. Consistent with the OCJ's status as a coequal branch of government, it is now permitted to submit the judiciary's budget proposal directly to the legislature. There has been a great success toward recognition of the judiciary as not just an extension of the Department of Justice,<sup>783</sup> but as a well-defined branch of government able prudently to manage its budget and appropriately to provide fiscal and administrative accountability to others.<sup>784</sup> Of course, there are no guarantees for future cooperation among the branches of government. A particularly unpopular court decision could, without question, result to reduce the OCJ budget, curtail the courts' jurisdiction, or otherwise reduce its ability to perform the constitutional functions.<sup>785</sup> However, by establishing a clearer and stronger institutional identity, the OCJ anticipates being in a better overall position to ensure independence in decision making and thus preserving as a branch and for its ability to perform their core role in democracy. Post argued that:<sup>786</sup>

The most lasting effect of Taft's unique perspective was its root assumption that the federal judiciary was not a collection independent judges, but instead a unified branch of government with functional obligations. No Chief Justice after Taft has been able to escape being evaluated on the fulfilment of these obligations.

Though CJ Taft's assumption deserves to be regarded as a cornerstone of the expectations about the judicial branch today, the true challenge that lies ahead will be how well the courts, at both the state and constitutional level, take the steps necessary

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<sup>783</sup> Mogoeng M 'Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa' 393.

<sup>784</sup> Masutha T M 'Address by Minister TM Masutha, MP (Adv) at the occasion of the budget debate of the Office of the Chief Justice, 17 May 2017, National Assembly, Cape Town'. This was the budget policy statement of the OCJ as its third anniversary of the separate budget allocation for the Office.

<sup>785</sup> Claymore E '*ANC Women's League wants judiciary 'brought under parliamentary control'*'. After every court ruling in favour of the Constitution and not the ANC, resort to the same rhetoric: judicial overreach. In an interview with News24, Matuba, as secretary-general of the of the ANC Women's League, said that the ConCourt ruling on the secret ballot shows that the judiciary has too much power and that SA's hard-won constitutional democracy needs to be reviewed in favour of the ruling party.

<sup>786</sup> Post R 'Judicial management and judicial disinterest: The achievements and perils of Chief Justice William Howard Taft' *Faculty Scholarship Series Paper* (1998) vol 1 4655 50, 67.

to realise the full potential of their role as part of a fully functional branch of government. Balancing between the rule of law and national development remains one of the main challenges to constitutionalism in South Africa. Although the 1996 Constitution recognises and guarantee the independence of the judiciary,<sup>787</sup> the principle remains elusive in practice. However, there is still a lack of commitment to the principle by some political leaders of the leading political party. Many of the constitutional guarantees for the independence of the judiciary are inadequate, as they do not offer adequate protection to the judges, thereby providing room for the manipulation of the judiciary.<sup>788</sup>

One of the challenges that constitutionalism in South Africa faces today is the rising culture of disobedience of court orders, especially by the executive.<sup>789</sup> Genuine criticism of the way the judiciary conducts its business is part of judicial transparency and accountability. However, there are instances when general hostility to the judiciary is exhibited by the executive, probably with a view to intimidate the judiciary and render it submissive.<sup>790</sup> These events are well known, but it is worth briefly restating them to set up the discussion that follows.

They began as a direct consequence of the Squires judgment. The Scorpions case conducted a series of searches on Zuma's private residences and public offices, as well as those of his attorney, Michael Hulley, and the premises of Thint Holdings, one of the companies that was alleged and eventually reached the CC for argument.<sup>791</sup> In between argument and judgment, two relatively junior members of the court (Jafta AJ and Nkabinde J) were approached by the Judge President of the Cape High Court, John Hlophe, in what they later claimed was an attempt to influence their decision. Hlophe, as it was alleged, not only offered unsolicited advice on the legal merits of the

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<sup>787</sup> Section 165(1) of the Constitution.

<sup>788</sup> See Chapter 4, in that, in terms of appointment, there exists a concern that the ruling party uses its dominant position on the JSC to ensure that judges are appointed who are more likely to be sympathetic towards government, as well as the failures of the judiciary to hold judges to account for their unacceptable behaviour.

<sup>789</sup> Sudanese President Omar al-Bashir's visit to South Africa in June 2015 and his subsequent departure from South Africa notwithstanding a court order prohibiting his departure before the merits of the matter had been decided by a court of law available at <<http://www.politicsweb.co.za/archive/albashir-govt-vs-the-salc--sca-judgement>>. (Date accessed: 12 July 2016).

<sup>790</sup> Mzikamanda RR '*Constitutionalism and the Judiciary: A perspective from Southern Africa*' <<https://journals.co.za/content/mlawj/5/2/EJC129935>>. (Date accessed: 06 February 2017).

<sup>791</sup> Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Other 2009 (1) SA 1 (CC).

pending case, but also hinted that he had connections to a higher power with an interest in its outcome.<sup>792</sup> After discussion, judges decided that a complaint should be lodged against Hlophe with the JSC, not in the name of the court, but in the name of all the judges individually.<sup>793</sup>

The lodging of the complaint triggered the most sustained series of political attacks on the court in its history. Hlophe lodged a counter-complaint with the JSC that accused the Langa Court judges of violating the Constitution they had been appointed to defend. Hlophe alleged that Langa should, in his capacity as CJ, have given Hlophe an opportunity to respond to the accusations made against him before lodging the complaint.<sup>794</sup> In the build-up to the court's decision in the search and seizure matter, ANC Secretary-General Gwede Mantashe launched a vicious verbal assault on the judges, accusing them of being "counter-revolutionary" and of standing in the way of true social transformation.<sup>795</sup> These events represent a worrying politicisation of the courts that threatens to undermine their institutional legitimacy.

The increasing use of courts as a forum for political struggles places the spotlight firmly on a judiciary, invariably unelected, to settle fraught political disputes.<sup>796</sup> Attacks on the judiciary are often without justification. Sometimes this is done in the face of consistent high ratings of the judiciary by the society. Such general hostility cannot be conducive to a culture of constitutionalism.<sup>797</sup> Independence of the judiciary is a constitutional principle in South Africa. The South African Constitution requires that judges at all levels enjoy security of tenure, financial security, administrative independence and adjudicative autonomy. Even though certain matters, such as administration, finance and appointments, are ultimately the responsibility of the executive, the study concludes that South African judges enjoy a very high level of independence of the judiciary, especially after the establishment of the OCJ which acts as a protective wall around the judicial organs, preventing all internal and external forces that try to undermine its independence. The creation of the OCJ was positive in

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<sup>792</sup> Roux T 'The Langa Court: Its distinctive character and legacy' *Acta Juridica* (2015) 33, 51.

<sup>793</sup> Roux T 'The Langa Court: Its distinctive character and legacy' 51.

<sup>794</sup> Langa CJ and Others v Hlophe JP 2009 (4) SA 362 (SCA).

<sup>795</sup> Roux T 'The Langa Court: Its distinctive character and legacy' 52.

<sup>796</sup> Roux T 'The Langa Court: Its distinctive character and legacy' 52.

<sup>797</sup> Mzikamanda R R 'Constitutionalism and the Judiciary: A perspective from Southern Africa' 11.

that, always, the court's judges feel free to decide the cases before them on their merits, without influence from government or anyone else.

However, the OCJ's ability to continue achieving these goals will greatly enhanced as it acquires the ability to act, and be treated by others, as a coequal and independent branch of government, not just in name but as a demonstrable reality. The responsibilities and obligations that come with functioning as a true branch of government are substantial, but the ensuing benefits to the administration of justice and to the public the OCJ serve to make it an endeavour well worth the effort. The study concludes that, in this regard, the Seventeenth Amendment Act, together with Superior Court Act, did indeed transform the judiciary by establishing the OCJ. The difficulty which the study encountered, but clearly did not conceptualise, was the executive administration in the context of a regime of separation of powers contains important elements that are essentially political, and that therefore stand in tension with the OCJ's ideals of judicial independence.

#### **5.4 Conclusion**

Tension between the three branches of South African government is inevitable. It is therefore unrealistic to argue that it can be removed. However, the study argues that it can be reduced, if these three branches of government recognise that each has a constitutional role to perform and that each is better left to perform its duties to the best of its ability. Then the OCJ will function fully with its constitutional independence. As Pearce said, "for the good of our society, it is better for the combatants to realise that they are there to serve the people, not their own ends, and to adapt their conduct accordingly."<sup>798</sup> So, the question is whether the OCJ is independent is looking into a judicial independence in relation to the OCJ through the use of the construct of "authority", ensuring that all identified characteristics of judicial independence are included and can be evaluated against the criterion of the rule of law.<sup>799</sup>

Acknowledging the fact that all the elements of judicial independence identified in the study are of importance, it is concluded that it is unrealistic to have absolute separation of all the branches from each other. Relying on these elements to define the

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<sup>798</sup> Pearce 'Executive versus Judiciary' *Public Law Review* (1991) vol 2 179 193.

<sup>799</sup> Richardson K 'A definition of judicial independence' 96.

independence of the OCJ would be restrictive. However, the position that the judges find themselves in now under the OCJ enables them to feel confident in their role being able to apply the law to the facts without “fear, favour or affection”. This is the defining measure of judicial independence and serves to fulfil the aspiration and the requirements of the rule of law.

In relation to the role of the OCJ in judicial transformation must be investigated, with the leadership of the CJ that must be emphasised in relation to the OCJ as a judicial branch in general. The above engagement of this study regarding the CJ’s functions, especially the relatively high-profile engagements between the current holder and members of the elected branch, bear out that hypothesis. Making the CC the highest court and placing the head of the judiciary in it has enhanced the prestige of the OCJ. With all the above observed, the CJ can play a vital role in helping to build broader public understanding of the judicial role and the benefits to the community of judicial independence. However, it is concluded that the transformation of the judiciary in South Africa have started.

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