



# **Assessing the Performance of South Africa's Constitution**

## **Chapter 5. The Performance of the Judiciary**

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# Chapter 5. The Performance of the Judiciary

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## 5.1. Introduction

The purpose of this chapter is to evaluate the performance of the Constitution in respect of the judiciary. In order to measure the performance of the Constitution in this regard, we have to consider the performance of the judiciary itself: whether it has been structurally and operationally transformed according to constitutional prescripts and whether it is fulfilling its constitutional purposes. While thin compliance with concrete goals are easily measurable, the achievement of these goals in a 'thick' sense, as well as abstract objectives are more complex and challenging to determine. We shall examine some of the problems of the design of judicial institutions in South Africa in the Constitution as well as the manner in which they have functioned in relation to key stress points which have arisen in the past 20 years.

## 5.2. Goals of the Constitution

No feature of the South African state escaped the depredations of apartheid. The judiciary was no exception. On the one hand, the judiciary sought to cultivate an aura of independence and excellence. There was a strong attempt to separate law from politics and suggest it was value neutral.<sup>1</sup> On the other hand, none of this was possible given the nature of the apartheid system which attempted massive social engineering through law. As a result, the judiciary, of necessity, became implicated in enforcing measures which were repugnant to basic values of equality and social justice.<sup>2</sup> Furthermore, in a system of parliamentary sovereignty, the judiciary did not have the authority to consider the substance of legislation and could only pronounce upon procedural aspects of the adoption and application of laws.<sup>3</sup>

Under these circumstances, there were instances where the judiciary showed itself committed to justice and prepared to use the little room that it had to ameliorate the effects of apartheid policies. In a study of the Appellate Division from 1950 to 1980, Forsyth finds that the Court was ready to restrain the executive and legislative branches of government within the bounds of the law during the earliest years of official apartheid. In 1950, the Appellate Division formulated a principle that legislation cannot be interpreted to sanction unequal treatment where this was not expressly provided for.<sup>4</sup> The principle was applied in at least two other cases with the effect that the unequal treatment of people of different races were invalidated.<sup>5</sup> In the matter of *R v Ngwevela*<sup>6</sup>, the Appellate Division held that a person was entitled to a hearing before being 'restricted' in terms of the Suppression of Communism Act<sup>7</sup> since it was not expressly enacted that the *audi alteram partem* rule should not apply.<sup>8</sup>

The 'coloured voters' saga' is perhaps the best illustration of the judiciary's predicament in the context of a ruthless regime determined to give effect to its apartheid policies. The National Party won the national election in 1948 with a small majority. The United Party continued to exercise control over the Cape Province. At the time, the electorate in this province was not exclusively white but included 'coloured' (mixed-race) people on a common voters roll if they earned a threshold annual salary and owned property.<sup>9</sup> The NP government wanted to remove 'coloured' voters from the common voters' roll in the hope of strengthening its hold over the province

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<sup>1</sup> Cameron, 1998: 436. Dugard also famously wrote that '[m]any South Africans ... attribute the "excellence" of the South African ... judiciary to their acquiescent, neutral, "objective" attitude to the will of the Parliament.' He asserted that the judiciary under apartheid claimed to be 'politically neutral' while they were, in fact, blind to their own prejudice in favour of the status quo; 1981: 372.

<sup>2</sup> Corder, 1984: 240.

<sup>3</sup> Dugard, 1978: 14.

<sup>4</sup> The first of these cases was *R v Abdurahman* 1950 (3) SA 136 (A). In this matter, signs were introduced at a railway station indicating that people of different races ought to use different carriages. The accused had incited a large group of people to ignore these signs. The Appellate Division held that the Railways and Harbours Regulation and Control Act 22 of 1916 did not expressly authorise unequal treatment and must not be construed to do so.

<sup>5</sup> *Tayob v Ermelo Local Road Transportation Board* 1951 (4) SA 440 (A) and *R v Lusu* 1953 (2) SA 484 (A).

<sup>6</sup> 1954 (1) SA 123 (A).

<sup>7</sup> 44 of 1950.

<sup>8</sup> *Ngwevela* 131 H to end.

<sup>9</sup> Davis, 2009: 19.

in future elections.<sup>10</sup> The NP passed the Separate Representation of Voters Act 46 of 1951 by using the ordinary bicameral procedure<sup>11</sup> in order to place coloured persons in the Cape Province on a separate voters' roll.<sup>12</sup> However, section 152 of the South Africa Act of 1909 (which was the Constitution of the Union), read with section 35 provided that any law which sought to change the common voters' roll had to be passed by a joint sitting of the two Houses of Parliament and had to be 'agreed to by not less than two thirds majority of the total number of members of both Houses'.

In the matter of *Harris v Minister of Interior*<sup>13</sup>, the Separate Representation of Voters Act was successfully challenged. The Appellate Division held that the Statute of Westminster had not repealed the provisions of the South Africa Act which entrenched the common voters' roll and therefore an Act which changes the composition of the voters' roll had to be passed by a special majority.<sup>14</sup>

Subsequent to the *Harris* case, Parliament enacted the High Court of Parliament Act 35 of 1952 under which a 'High Court of Parliament' was established. This body consisted of all the members of Parliament from both Houses and it was given the jurisdiction to review judgments of the Appellate Division in which an Act of Parliament had been declared invalid.<sup>15</sup> Unsurprisingly, the *Harris* case was brought before the 'the High Court of Parliament' and overruled. The High Court of Parliament Act was challenged in the Appellate Division and held to be invalid.<sup>16</sup>

A few years later, the relentless NP came up with a legislative strategy to remove coloured voters from the common voters' roll.<sup>17</sup> The government enacted the Appellate Division Quorum Act in 1955 in order to increase the quorum of the Appellate Division to eleven where the validity of an Act of Parliament was considered.<sup>18</sup> At the time, there were only six members of the Appellate Division and five new appointments had to be made. The five new members were chosen on the basis of their proven willingness to defer to the executive.

The government also enlarged the Senate and changed the way in which Senators were elected in order to add many more NP senators to a joint sitting of the two houses of parliament.<sup>19</sup> The Prime Minister brazenly expressed that the purpose of the enactment of the Senate Act of 1955 was primarily to ensure that coloured voters are placed on a separate voters' roll and secondly, to assert the sovereignty of Parliament.<sup>20</sup> Subsequently, the Separate Representation of Voters Act 46 of 1951 was reinstated using the entrenched procedure.<sup>21</sup>

The Senate Act was challenged in the matter of *Collins v Minister of the Interior*<sup>22</sup>. The Court was clearly no longer prepared to resist government to the same extent as it had done previously.<sup>23</sup> The majority of the reconstituted Court presiding over the *Collins* matter held that the Senate Act was valid as no fault could be found with the procedure according to which it was passed.<sup>24</sup> Schreiner JA wrote a lone dissent in which he held that a Senate created simply to ensure the necessary two-thirds majority for the National Party when the two houses sat jointly was not a 'House of Parliament' within the meaning of section 152. The government, in its unwavering

<sup>10</sup> Davis, 2009: 20.

<sup>11</sup> Following the ordinary bicameral procedure meant that the passing of the Act was agreed to by a simple majority only.

<sup>12</sup> Forsyth, 2014:34.

<sup>13</sup> 1952 (2) SA 428 (A).

<sup>14</sup> Davis, 2009: 24. The Statute of Westminster, 1931 gave the Parliaments of 'Dominions' (which is what South Africa was prior to 1961) the power to legislate contrary to the law of England. The *Harris* case turned on what was meant by 'Parliament': the Appellate Division held that the rules identifying Parliament were to be found in the South Africa Act of 1909 and that the Act required a special majority in order to change the common voters' roll. Forsyth, 2014: 34-35.

<sup>15</sup> Forsyth, 2014: 36.

<sup>16</sup> The Appellate Division held that this 'High Court of Parliament' was simply 'Parliament functioning by another name'. It was not a court which could be approached by citizens to appeal against decisions of the Appellate division. *Minister of Interior v Harris* 1952 (4) SA 769 (A) at 784D.

<sup>17</sup> Davis, 2009:27.

<sup>18</sup> Forsyth, 2014: 36.

<sup>19</sup> Senate Act 53 of 1955. Prior to this enactment, the four provinces of the Union of South Africa were equally represented in the Senate. Senators were elected in a way that reflected the strength of various parties in a particular province. The Act allowed a larger number of Senators for the larger provinces and Senators were no longer elected to proportionally represent the strength of a party in a province.

<sup>20</sup> The Prime Minister at the time was JG Strydom. Davis, 2009: 29.

<sup>21</sup> Forsyth, 2014: 37.

<sup>22</sup> 1957 (1) SA 552 (A).

<sup>23</sup> Davis argues that the concern the Court expressed with substance rather than form in the *Harris* matter was no longer evident in the majority decision in the *Collins* case, 2009: 30.

<sup>24</sup> Davis, 2009: 31.

determination, achieved the result it sought to and made clear how it intends to respond to opposition from the judiciary. In so doing, it severely undermined the independence of this branch of government by effectively 'packing' the court.

In Forsyth's view, the judiciary gradually abandoned the role that it could have had as 'the guardian of civil liberties' in the face of an increasingly authoritarian government.<sup>25</sup> He goes so far as to accuse the judiciary of failing to keep the executive within the bounds of the law and often bearing the responsibility for an even less humane outcome than what the apartheid legislation prescribed.<sup>26</sup> He attributes this gradual adoption of a 'pro-executive stance' to the fact that judges appointed after the 1950s were generally conservative-minded and perhaps shared the government's fear of 'black rule'. The government's unequivocal expression in the coloured voters' case that it would not allow the judiciary to interfere with the implementation of its ideology was a further disincentive to attempt judicial restraint of the executive.<sup>27</sup> Of course, there were exceptions to this and some judges did attempt to resist the worst depredations of apartheid within the constraints of the law. A major debate was raised amongst lawyers who were more friendly towards human rights as to whether they should resign from the apartheid bench or attempt to work within the system.<sup>28</sup>

With the adoption of the new Constitution it was therefore clear that there needed to be significant changes to the judiciary and its make-up to render it fit for a new constitutional dispensation. In particular, a virtually all-white, conservative bench could not be granted the power to strike down laws and actions of a new democratically elected government. The constitution thus ultimately included an overarching objective to transform the judiciary. In doing so, there were several key specific internal goals we have identified.

### **Representivity**

A surface-level aim of the Constitution is to change the demographic composition of the bench. At the end of apartheid, there were 166 judges of which only three were black men and two were white women.<sup>29</sup> It is clear from these statistics that there was a real need for change in this regard. This goal corresponds with the Ginsburg criterion of legitimacy which would include a consideration of whether the judges fairly reflect the make-up of the population: if judges are only drawn from one group, it is unlikely the judiciary will be seen as legitimate. Moreover, diversity can also enhance decision-making given that the courts are tasked in the Constitutional order with ruling on difficult matters which require a range of experience and perspectives. The Constitution reflects these concerns and 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'.<sup>30</sup> There are further requirements that a person has to be 'appropriately qualified' and 'fit and proper' in order to be appointed as a judicial officer.<sup>31</sup>

### **Independence**

The Constitution clearly articulates independence as a goal for the judiciary. Section 165(2) provides that 'the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'. Section 165(3) provides: 'No person or organ of state may interfere with the functioning of the courts. Section 165(4) provides that: 'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts'. Certain aspects of the broader goal of independence are enshrined in the Constitution: for instance, the Constitution provides that the remuneration of judges may not be reduced and contain provisions which cover the terms of office and removal of judges.<sup>32</sup>

It is the role of the judiciary to uphold the Constitution and to exercise checks and balances on the other branches of government within the scheme of the separation of powers. The judiciary must be able to act as a guardian of

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<sup>25</sup> Forsyth, 1985: 225.

<sup>26</sup> Forsyth, 1985: 226, 236. In this regard, the case of *Rossum v Sachs* 1964 (2) SA 551 (A) serves as an example. In this matter it was entirely up to the Court to decide whether or not long-term detainees (in terms of the General Law Amendment Act 37 of 1963) were entitled to reading and writing material. The Appellate Division held that they were not because the purpose of the detention was to 'induce' the detainee to speak and his or her boredom ought not be relieved. (Forsyth, 2014 :43-45).

<sup>27</sup> Forsyth, 2014: 59.

<sup>28</sup> Dugard, 1984.

<sup>29</sup> Du Bois, 2006: 287.

<sup>30</sup> Section 174(2) of the Constitution of the Republic of South Africa, 1996.

<sup>31</sup> Section 174(1).

<sup>32</sup> Sections 176 and 177.

the Constitution and uphold the rule of law without fear or favour. It must also be seen to be independent in order to ensure public confidence in its ability to fulfil its mandate.<sup>33</sup>

This goal speaks to two of Ginsburg's four external criteria for measuring constitutional performance: legitimacy and agency costs. As part of assessing whether the courts are subject only to the Constitution and the law, it is important to consider the public's perception of the courts' independence and competence (which we include from the survey we conducted). The Constitutional prescript that no person or organ of state may interfere with the functioning of the courts overlaps with Ginsburg's suggestion to consider the level of corruption in the judiciary and whether they are acting in their own interest or the public interest.<sup>34</sup>

Ginsburg's external criterion relating to the channelling of conflict is also important to consider here and relates to two overlapping internal goals of the judiciary: independence and the judiciary's role within the separation of powers. One important function of the judiciary is to provide another institutional setting within which disputes can be resolved where they are often not addressed within the general realm of politics. The judiciary has had to deal with conflicts of values and rights as well as over institutional structures such as the boundaries of provinces.<sup>35</sup> The judiciary also plays a role in ensuring that the interests of the poor are considered where they are often not adequately addressed by the political classes.<sup>36</sup> Courts also often are asked to act as independent arbiters in intra-government disputes and those between political parties.<sup>37</sup> This criterion will be considered in more detail in the discussion of the judiciary's goal of providing checks and balances to the other two branches of government.

### ***A judiciary suited to a democratic South Africa***

The judiciary is an example of South Africa's model of transformation in that much of the 'old' system remained as it was but that it was envisioned that its substance would change incrementally.<sup>38</sup> In terms of section 241 of the Interim Constitution, it was decided that sitting judges would continue in office and that there would be no need for them to reapply or be reappointed in terms of some formal procedure.<sup>39</sup> Subjecting all judges who served under apartheid to a vetting process was deemed to be impracticable, if not impossible. Considering that apartheid was defined and enforced by the legal system, it is fair to say that all practising judges and lawyers made themselves guilty of legitimising an unjust system.<sup>40</sup> In his written submissions to the Truth and Reconciliation Commission (TRC), former Chief Justice Corbett expressed the view that it is the duty of a judge to uphold and protect the laws of the Republic, even where these laws were not aligned to justice.<sup>41</sup> The many judges who were deeply troubled by the injustice which they were compelled to enforce had the option of resigning (had they accepted appointment in the first place), or opposing the apartheid system by staying on the bench and making use of whatever little discretion they were afforded.<sup>42</sup> Practically speaking, it is questionable whether judges could be held to account for actively supporting apartheid in their judicial role or for failing optimally to use the leeway they had to oppose it. In light of the inherent dilemma involved in being a judicial officer in a system where laws do not align with justice, it would have been extremely difficult for a body such as a vetting board to draw a line between judges who can and who cannot be considered fit to serve under a democratic dispensation. The Constitution would either have had to force all the judges out of their roles which may have created a crisis in the courts; or to accept that many sitting judges would continue in their roles but limit their power (as was the eventual constitutional compact).

<sup>33</sup> Ebrahim, 2014: 102.

<sup>34</sup> Section 165 (3).

<sup>35</sup> *Khumalo and Another v Holomisa* 2002 (5) SA 401; *Merajong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC).

<sup>36</sup> Bilchitz, 2015: 100.

<sup>37</sup> *Mazibuko v Sisulu and Another* [2013] ZACC 28; 2013 (6) SA 249 (CC).

<sup>38</sup> Davis, 2009:7.

<sup>39</sup> Item 16 (1) of Schedule 6 of the Constitution provides that every court existing when the new Constitution took effect continues to function and exercise jurisdiction and anyone holding judicial office continues to hold office subject to the amend or repeal of authorising legislation and consistency with the Constitution.

<sup>40</sup> This view was expressed by Justice Edwin Cameron in his submission to the TRC on the role of the judiciary under apartheid. He added that even judges who interpreted ambiguous legislation in favour of the recognition of human rights were lending support to an unjustifiable system by participating in it, 1998: 436.

<sup>41</sup> Corbett, 1998: 18.

<sup>42</sup> Friedman, 1998: 57.

The Truth and Reconciliation Commission (TRC) invited the judiciary to address them on a number of matters including 'the relationship between law and justice' and 'the role of the judiciary in applying security legislation'.<sup>43</sup> Most regrettably, the judges refused to account for their actions in person. The reason given for this refusal was the feared effect that questioning by the TRC might have had on their independence.<sup>44</sup> Considering that judges were to continue in office without accounting for their role in the enforcement of apartheid in any way, there was an intensified need for internal transformation of the bench and a limitation on the power of sitting judges.<sup>45</sup>

Even though much of the judicial system remained as it was prior to the adoption of the Constitution, a critical shift from parliamentary sovereignty to constitutional supremacy drastically changed the role of the judiciary. Under the previous regime, the legislature and executive was not kept in check by the judiciary; the judiciary could do little other than review legislation on mere procedural grounds. Under the current regime, the judiciary has wide powers to strike down even acts of parliament on substantive grounds (for instance, that it does not conform to the rights in the bill of rights). The 1996 Constitution mandates the courts to declare any act or legislation which is inconsistent with the Constitution invalid.<sup>46</sup>

The Constitution has entrenched the principle of separation of powers by vesting judicial, legislative and executive authority in three different branches of government in terms of sections 43, 85, 104, 155, 156 and 165. The judiciary is subject to the Constitution and the law only. It is tasked to exercise checks and balances over the executive and legislature and plays a crucial part within the separation of powers. The courts have furthermore retained their authority to review the exercise of all public power. In the pre-Constitutional era, the courts exercised this power in terms of their inherent jurisdiction and in recognition of the sovereignty of Parliament.<sup>47</sup> Section 33 of the Constitution now forms the basis of judicial review of administrative action.<sup>48</sup> The Promotion of Administrative Justice Act 3 of 2000 was adopted to give effect to section 33 and the judiciary exercises its review authority in terms of this Act.

While the immediate restructuring of the whole judicial system was not envisioned, the Interim Constitution importantly created a Constitutional Court which would serve as the highest court in all constitutional matters and be the ultimate guardian of the Constitution.<sup>49</sup> This new court was to be made up of mostly new judges appointed after the new constitutional dispensation had come into operation. The creation of this Court was critically important because it prevented judges who continued from the old system from having the ultimate say on the validity of legislation or conduct of the President. The new Constitutional Court thus was an essential feature of the design of the post-apartheid judiciary and a limitation on the power of judges who continued from the old regime from enforcing conservative views on the new order. Furthermore, Schedule 6 of the Constitution, which contains the transitional provisions, envisioned the establishment of a judicial system suited to the requirements of the Constitution by 'rationalising' all courts in terms of their structure, composition, functioning and jurisdiction as soon as practically possible after the new Constitution came into effect.<sup>50</sup> The structure of the High Courts, for instance, was arranged according to the pre-1994 system<sup>51</sup> and only recently have divisions of the High Court with a main seat in each of the nine provinces been established.<sup>52</sup>

A judiciary which is suited to a democratic South Africa would also be structured and function in a way which maximizes access to justice: if people cannot access courts, they are unlikely to be seen as legitimate and will not be able to perform their constitutional functions described above.<sup>53</sup> Section 34 of the Constitution provides that

<sup>43</sup> The Editor of the *South African Law Journal*, 1998: 16.

<sup>44</sup> Corder, 2014: 260.

<sup>45</sup> Budlender, 2005: 724.

<sup>46</sup> Section 172.

<sup>47</sup> Klaaren, 2006: 63-1. Judicial review and the application of administrative law principles were subject to Parliament.

<sup>48</sup> Section 33 provides that '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must—(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration'.

<sup>49</sup> Section 167(5).

<sup>50</sup> Item 6(a) of Schedule 6.

<sup>51</sup> In terms of Item 16(4)(a) of Schedule 6 of the Constitution, the provincial and local divisions of the Supreme Court, as well as the Supreme Courts established for Transkei, Bophuthatswana, Venda and Ciskei, became individual High Courts.

<sup>52</sup> Section 6 of the Superior Courts Act 10 of 2013 and section 12 of the Constitution Seventeenth Amendment Act, 2012.

<sup>53</sup> If financial constraints prevent a segment of the population from accessing justice, the excluded segment is likely to reject the legal system and other formal public institutions. A rejection, in turn, would lead to social and political conflict and a refusal to channel this conflict through the established systems. Buscaglia, 2001:2.

'[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent tribunal or forum'. While the goal of achieving the right of access to justice cannot rest on the judiciary alone, the judiciary's responsibility towards its realisation will be considered in this chapter.

The Constitution also prescribes the approach courts are to follow when reading the law under the democratic dispensation. Section 39(1)(a) provides that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. Section 39(2) provides that: 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. The Constitution itself thus envisions that the courts should break from their 'value neutral' approach of the past and embrace their task in a manner which actively promotes the underlying values of the Constitution. The Constitution was also designed expressly to affect all other aspects of the legal system.

To summarise, the Constitution's goals for the judiciary are the following:

To create a judiciary that is representative of South Africa's population in terms of race and gender;

To create a judiciary that is independent: here we consider three sub-questions, namely, appointments, discipline and administration;

The establishment of a judicial system suited to the requirements of the Constitution and the new South Africa: here we consider five sub-questions, namely, the rationalisation of the courts; the establishment and exercise of power by the Constitutional Court; the exercise of judicial review by the courts; the consideration of substantive values in the interpretation of law; and the accessibility of courts.

### 5.3. Institutional design flaws

In this section, we focus on considering the provisions of the constitution on their face, their relationship with the goals we have identified and some of the concerns that arise in relation to them.

In relation to the Constitutional goal of enhancing representivity, the constitutional provisions can be criticized for their rather narrow focus. The fact that race and gender are singled out in the Constitution is of course important given South African history. Yet, it means that they would inevitably be prioritised over other aspects of difference in the judicial selection process. While it goes without saying that the composition of the almost exclusively white and male bench of 1994 had to be changed, the focus placed on race and gender in this process can lead to a shallow conception of diversity that fails to ensure the representation of other groups such as sexual, religious and cultural minorities and people living with disabilities. It can also lead to the adoption of a rather narrow view of what transformation implies, focused on the race and gender of appointments without considering whether in fact the judges themselves are deeply committed to advancing the transformative judicial project.<sup>54</sup>

When we look at the provisions surrounding independence, some aspects such as removal and financial independence are guaranteed. Yet, other aspects of independence of the judiciary are not: these include the discipline of judges short of removal and the administration and governance of the judiciary which were not dealt with in the text of the Constitution.<sup>55</sup>

The Judicial Service Commission was created in order to assist with the transformation of the judiciary. Its tasks were to make decisions in terms of the appointment and discipline of judges and to advise the judiciary on any matter regarding the administration of justice. One of the main purposes of a judicial selection commission is to establish a judicial appointment process which is independent.<sup>56</sup> On its face though, the JSC was not well-designed to achieve its goal. The Constitution provides that, when making appointments, the JSC is constituted

<sup>54</sup> Albertyn, 2014: 276-277.

<sup>55</sup> Since the Constitution Seventeenth Amendment Act has come into operation in August 2013, section 165 as amended now contains provisions regulating the administration of the judiciary.

<sup>56</sup> Malleon, 1999: 37.

of 23 members of which 15 are either politicians or political appointees.<sup>57</sup> This composition is a result of a compromise during constitutional negotiations. The ratio is approximately 65 per cent political members to 35 per cent legal professionals<sup>58</sup> while in certain other African constitutions, the balance between government officials and legal professionals is the other way around.<sup>59</sup> This imbalance between political and other actors in South Africa allows for political consideration to have an undue weight in making appointments.

The unusually large size of the JSC when making appointments, though not as troubling as its composition, is also counter-productive to the purposes of the Commission.<sup>60</sup> With 23 members, the South African JSC is much larger than some of its African counterparts.<sup>61</sup> Such a large body is not conducive to decision-making and the scheduling of meetings where all the members can be present.

The composition of the JSC was challenged in the *First Certification* case.<sup>62</sup> It was submitted that Parliament and the executive are overrepresented on the JSC.<sup>63</sup> The Constitutional Court held that while there are Constitutional Principles requiring the separation of powers between the three branches of government<sup>64</sup> and an 'appropriately qualified, independent and impartial' judiciary<sup>65</sup> there were no principles calling for the creation of a JSC.<sup>66</sup> The Court held that the fact that the executive participates in the appointment of judges does not mean that judiciary is not independent – the judiciary, legal profession and opposition political parties also participate in the appointment process.<sup>67</sup> It reasoned that, considering there is no obligation to establish a JSC in terms of the Constitutional Principles, it is of little importance that the JSC which had been established could have been constituted differently.

As it stands, this composition of the JSC for the purposes of making judicial appointments goes against the very purpose of its existence.<sup>68</sup> As will be seen in section 3 below, the fact of this composition and questionable appointment decisions that have subsequently been made has raised a number of questions concerning the independence of the judiciary.

## 5.4. Compliance

### *Thin compliance*

#### *Representivity*

As mentioned above, in 1994, only three out of 166 judges were black and two were female.<sup>69</sup> This picture has drastically changed over the course of the past 20 years. On 30 June 2015, out of a total of 239 judges, 105 were black, 24 coloured, 24 Indian and 86 white. There has also been a significant improvement in terms of gender representation: 81 of the 239 judges, which is about one third of the judiciary, are women.<sup>70</sup> Even though the

<sup>57</sup> Section 178(5) of the Constitution provides that when the JSC considers any matter except the appointment of a judge, it sits without the members drawn from the National Assembly and National Council of Provinces.

<sup>58</sup> The four 'presidential designates' have thusfar been lawyers. Yet, they remain political appointees by virtue of being designated by the head of the executive.

<sup>59</sup> In Kenya, only two of the 11 members are government officials in terms of Article 171 of the Constitution of Kenya. The five-member JSC of Namibia has only one government official in terms of section 85(1) of the Constitution of the Republic of Namibia. Hoexter, 2014: 168.

<sup>60</sup> The unusual size of the JSC is an outcome of constitutional negotiation. See the National Planning Commission *National Development Plan (2030)* 453-454, quoted in Olivier and Hoexter 'Chapter 6: The Judicial Service Commission' 167.

<sup>61</sup> Tanzania's JSC has only 6 members, in terms of Article 112(2) of the Constitution of the United Republic of Tanzania, the Kenyan JSC has 11 members and the Namibian JSC only 5.

<sup>62</sup> *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC) para 121 ('First Certification case').

<sup>63</sup> At para 121.

<sup>64</sup> CP VI.

<sup>65</sup> CP VII.

<sup>66</sup> As above at para 122.

<sup>67</sup> At para 123.

<sup>68</sup> Section 178(5) of the Constitution provides that when the JSC considers any matter except the appointment of a judge, it sits without the members drawn from the National Assembly and National Council of Provinces.

<sup>69</sup> Albertyn, 2014: 275.

<sup>70</sup> Statistics obtained from the JSC.



Constitution does not directly address diversity in the magistracy, it is encouraging to note that in 2013, out of 1711 magistrates almost 60 per cent were either black, coloured or Indian and 39.3 per cent were female.<sup>71</sup>

Under Apartheid, the legal profession was the preserve of white males. The profession has historically been split between the side bar (attorneys) and the bar (advocates). The bar was, and to a large extent continues to be, dominated by white men; and judges have traditionally only been appointed from the ranks of senior advocates (known as senior counsel). In order to achieve a demographically representative bench, the JSC has broken away from the former tradition and has appointed many attorneys (and a few academics) to the bench. In order to widen the pool of candidates which are suitably qualified to serve as judges, legislation has been enacted which provides for the establishment of an institute for the training of judges and magistrates.<sup>72</sup>

It can be said that significant progress has been made in terms of the number of women judges and the achievement of racial representivity of the bench. While directly proportional numerical correspondence between the bench and the population has not yet been achieved, it is doubtful whether this is what the criterion of ‘a judiciary corps which fairly reflects the population’ requires.<sup>73</sup> In a thin sense, significant progress has been made towards achieving the goal of racial and gender representivity in the judiciary.

## **Independence**

### **Appointments**

Gains have also been made in terms of the independence of the judiciary. It can be observed that elements of independence which the Constitution had explicitly catered for were attended to from the advent of democracy. These aspects include the appointment procedure of judges and their terms of employment and remuneration. However, aspects of judicial independence, such as disciplinary proceedings short of removal and the administrative independence of the judiciary, which were not explicitly provided for in the Constitution, only received the attention of the legislature more than a decade after the Constitution came into force. The minimal compliance with different aspects of independence will be discussed in what follows.

During Apartheid, the process whereby judges were appointed was not transparent and no public input was canvassed. Under the authority of section 10 of the Supreme Court Act 59 of 1959, the State President appointed ‘fit and proper’ persons from the ranks of senior advocates. It seems that what happened in practice was that the Minister of Justice would select candidates on the recommendation of the Chief Justice or Judge President of the relevant division and that the appointment would simply be approved by the President. Appointment to the bench was undoubtedly influenced by political factors.<sup>74</sup>

The process of appointment which has been prescribed by the Constitution goes a long way towards supporting the achievement of independence and competence in the judiciary. The process starts with the JSC advertising vacancies twice a year in various media. Certain institutions are also informed of these vacancies.<sup>75</sup> Candidates may either be nominated by an institution or nominate themselves. Nominations include a detailed *curriculum vitae* and a questionnaire focusing on the nominee’s legal background and court experience. Prospective judges (as opposed to existing judges who are nominated for promotion) also have to answer questions regarding their membership of political organisations. An ad-hoc sub-committee of the JSC (screening committee) screens the nominations and compiles a short-list of candidates, taking into account a range of factors.<sup>76</sup> The short-list is

<sup>71</sup> Albertyn, 2014: 275. While the Magistrates’ Commission (MC) is not bound to section 174(2) in the way that the JSC is, the Constitutional Court has held that this standard is relevant to the appointment of magistrates, *Van Rooyen v S* 2002 (5) SA 246 (CC). The Equality Court found the points system which the MC adopted favouring the shortlisting of black and female candidates to amount to unfair discrimination and that it constituted an unreasonable barrier against appointment of white, male candidates in certain districts and regions. The points system has subsequently been abolished, see *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (EqC).

<sup>72</sup> Section 2 of the South African Judicial Education Institute Act 14 of 2008. The development of this institute has, however, been disappointing.

<sup>73</sup> South Africa’s demographics are as follows: 50 percent female, 80 percent black, 8.8 percent coloured, 8.4 percent white and less than 3 percent Asian or Indian. Statistics South Africa (2014). Statistical release: Mid-year population estimates 2014. [online] available at: <http://www.statssa.gov.za/publications/P0302/P03022014.pdf> [accessed on 18 September 2015].

<sup>74</sup> Wesson, 2008:3.

<sup>75</sup> These institutions include the Law Society of South Africa, the Black Lawyers Association, the General Council of the Bar, the National Association of Democratic Lawyers and the Society of Teachers of Law.

<sup>76</sup> These factors include the needs of the relevant court, the views of the Judge President of that court, the candidate’s professional body, race and gender considerations and whether the candidate has acted as a judge in that court or anywhere else.

submitted to the JSC. The screening committee may consider additional nominations and the inclusion of nominated candidates to the short-list upon request by members of the JSC.<sup>77</sup> The finalised short-list is publicly announced for comment, after which public interviews are held.

Section 174(3) of the Constitution provides that the President must appoint the Chief Justice and the Deputy Chief Justice after consulting the JSC and leaders of parties present in the National Assembly. The other judges of the Constitutional Court are appointed by the President after consulting the Chief Justice and the leaders of the parties represented in the National Assembly.<sup>78</sup> After interviews, the JSC prepares a list of nominees with three names more than the appointments to be made, which is submitted to the President.<sup>79</sup> The JSC is required to give reasons for its recommendations.<sup>80</sup> The President may refer the list of recommended candidates back to the JSC if he considers any of the nominees to be unacceptable. The President appoints Constitutional Court judges from the final list.<sup>81</sup> Judges of all other courts are appointed by the President on the advice of the JSC.<sup>82</sup> The JSC submits a list of names for each vacancy and the President is not given a choice between candidates.

These processes for the appointment of judges are clearly an improvement on what went before. In all cases, there is some consultation that takes place and, in many instances, a detailed deliberative process which involves public engagement. In this way, the constitution hoped to build public confidence in the independence of the judiciary.

### *Discipline*

Prior to 1994, there were no formal mechanisms in terms of which disciplinary measures could be taken against judges.<sup>83</sup>

The Constitution allows for the removal of judges where the JSC makes a finding that a judge concerned suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct and where two-thirds of the National Assembly calls for the removal of such a judge.<sup>84</sup> The process of removal is extremely difficult in order to prevent undue interference with the independence of the judiciary. Up to now, there has been no attempt to remove a judge from office.

Significantly, the Constitution is silent on the matter of judicial discipline in respect of conduct that does not warrant removal from office. Although national legislation may be enacted to provide procedures for dealing with complaints against judges in terms of section 180(b) of the Constitution, there has been an absence of guidelines for disciplinary action against judges. The JSC was created by the Interim Constitution and is empowered to determine its own procedures under the Final Constitution.<sup>85</sup> The Judicial Service Commission Act was passed in 1994 to regulate matters incidental to the establishment of the JSC,<sup>86</sup> but this Act did not make provision for receiving and dealing with complaints against judges or for disciplinary procedures.

The JSC receives many minor complaints against judges which are resolved informally by the intervention of the head of the court concerned or the chair of the JSC.<sup>87</sup> It has also received complaints about the alleged misconduct of two High Court judges as well as the Deputy Chief Justice which will be discussed in detail below.

Successive Chief Justices have drafted a set of codes and processes, based on the Bangalore Draft Code of Judicial Code, 2001<sup>88</sup>. By early 2004, the leaders of the judiciary and the Minister of Justice had reached agreement on a set of legislative measures which would have dealt with misconduct on the part of judges where that does not warrant removal from office. Unfortunately, the leadership of the Ministry of Justice changed after the 2004

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<sup>77</sup> Section 2(d) of the Procedure of Commission (GN R423 GG 24596 of 27 March 2003); Cowen, 2013:9-10.

<sup>78</sup> Section 174(4) of the Constitution.

<sup>79</sup> Section 174(4)(a) of the Constitution.

<sup>80</sup> Rule 2(l) of the JSC Procedure.

<sup>81</sup> The President has not referred any list back to the JSC.

<sup>82</sup> Section 174(6) of the Constitution.

<sup>83</sup> Corder, 2014: 204.

<sup>84</sup> Section 177.

<sup>85</sup> Section 178(6).

<sup>86</sup> Act 9 of 1994.

<sup>87</sup> Corder, 2014: 214.

<sup>88</sup> Adopted by the Judicial Group on Strengthening Judicial Integrity at the Roundtable Meeting of Chief Justices held at the Peace Palace, The Hague on 25-26 November 2002.

general election and the new Deputy Minister of Justice departed from the agreed drafts in significant respects. The whole process was subsequently stalled.

The JSC Act has been amended by the JSC Amendment Act 20 of 2008. This Act came into operation on 1 June 2010 and now provides for the compilation of a Code of Judicial Conduct.<sup>89</sup> It creates a Judicial Conduct Committee (JCC) to receive and deal with complaints against judges from lesser breaches of the Code to those warranting impeachment. More serious breaches may be dealt with by the chairperson of the JCC or may be referred to an investigative tribunal.

The JSC Amendment Act also provides that from early 2014, judges are expected to disclose their interests and those of their immediate family members.<sup>90</sup> In 2011, a complaint was laid with the JCC against Deputy Chief Justice Dikgang Moseneke. It was alleged that Deputy Chief Justice Moseneke had presided over a case in which a tender was contested where one of the litigating parties was a company of which his brother was a director.<sup>91</sup> A six-member committee of the JSC investigated the matter and found that the judge's failure to disclose an interest and recuse himself did not constitute misconduct. Deputy Chief Justice Moseneke has subsequently responded that his brother had not been a member of the company when the tender was awarded or the litigation took place.<sup>92</sup> In keeping a register of judges' interests, the notion that judges may be conflicted when hearing particular matters is curtailed and the perception of judicial independence is bolstered.

Arguably, the adoption of a Code of Judicial Conduct and legislation providing for judicial discipline short of removal should have taken place years before and would have contributed towards the improvement in the judiciary's real and perceived independence. Nevertheless, it is a development that is to be welcomed.

### *Administration*

Prior to 1994, senior members of the 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>93</sup> The Chief Justice's powers in this regard were not made explicit in legislation but were understood in terms of the set conventions of the day.

Before the Constitution Seventeenth Amendment Act came into operation in 2013, the Constitution also did not make provision for the administration of the judiciary. The only aspect that was specifically regulated related to the remuneration of judges and their tenure which are protected in terms of section 176 of the Constitution. Their conditions of service are furthermore regulated by the Judges' Remuneration and Conditions of Employment Act 47 of 2001.

Over the years, there has been an ongoing debate between the judiciary and the executive regarding the question of judicial self-governance.<sup>94</sup> The judiciary has argued that it cannot be fully independent and autonomous if it is dependent on the executive branch for its funding and operations. Aspects of court administration, such as case-flow and information management, are considered to be so closely related to judicial decision-making that it is a necessary tenet of independence for the judiciary to govern itself in these respects.<sup>95</sup> A model in terms of which the judiciary controls the administration of justice either directly or indirectly through an independent institution was argued for as being most appropriate for South Africa.<sup>96</sup> In 2010, agreement on how this issue could best be addressed was finally reached between then Chief Justice Ngcobo and Minister of Justice Jeff Radebe.<sup>97</sup> It was

<sup>89</sup> Code of Judicial Conduct (GN R865 in GG 35802 of 18 October 2012).

<sup>90</sup> Section 13 (4).

<sup>91</sup> Tolsi, N. (2013). JSC rejects reports of ignoring complaint against Moseneke. *Mail and Guardian*, [online] available at <http://mg.co.za/article/2013-10-10-jsc-rejects-reports-of-ignoring-complaint-against-moseneke> [accessed on 3 October 2015]; *De Lacy and Another v South African Post Office* [2011] ZACC 17.

<sup>92</sup> Tolsi, N, 2013.

<sup>93</sup> Ebrahim, 2014: 99.

<sup>94</sup> Mogoeng, 2013: 397.

<sup>95</sup> Ebrahim, 2014: 105.

<sup>96</sup> Ngcobo, 2003: 704; *NDP 2030: Make it work* at 453.

<sup>97</sup> Mogoeng, 2013: 398.

decided that a judiciary-based system of court administration would be established which would be phased in by the establishment of the Office of the Chief Justice as a national department located within the public service.<sup>98</sup>

The Constitution Seventeenth Amendment Act has accordingly amended section 165 of the 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 Office of the Chief Justice (OCJ) has been established to provide administrative and professional support to the Chief Justice in the carrying out of his functions and duties.

The Superior Courts Act of 2013, which came into operation on 23 August 2013, places the management of 'judicial functions', such as the determination of sitting schedules, assignment of judicial officers to sittings and case-flow management, under the control of the judiciary.<sup>99</sup> Court administration, however, is placed under executive control.<sup>100</sup> Expenditure incurred in the administration and functioning of the superior courts is to be paid from moneys allocated by Parliament.<sup>101</sup>

In terms of the Constitutional goal of independence, therefore, there does appear to have been minimal compliance with the aspects of judicial appointments, disciplinary measures of judges and the governance of the judiciary, even though the last two aspects were attended to belatedly.

### *A judiciary suited to a democratic South Africa*

The creation of a judicial system suited to a democratic South Africa was achieved, at a minimal level, by enabling the courts to review legislation and executive action for their constitutionality and by establishing a new Constitutional Court empowered to uphold the supreme Constitution.

From 1910 to 1996, the South African court structure consisted of a single Supreme Court with various divisions and an Appellate Division at its apex. With the adoption of the 1996 Constitution, this structure largely remained as it was, apart from some changes in names of the High Courts and the creation of a Constitutional Court which was to be the highest court in all constitutional matters.<sup>102</sup> The Appellate Division became the Supreme Court of Appeal which was described as the highest court of appeal 'except in constitutional matters' in terms of section 168(3) of the Constitution. In terms of item 16(4)(a) of Schedule 6 to the Constitution, the various provincial and local divisions under the Supreme Court structure became individual High Courts. The courts' areas of jurisdiction were not altered. The Supreme Courts of the former TBVC states (Transkei, Bophuthatswana, Venda and Ciskei) became High Courts in Umtata (Mthatha), Mafikeng, Thohoyandou and Bhisho respectively and their appeal courts were abolished.

Schedule 6 furthermore envisaged rationalisation of the Courts, including their structure, composition, functioning and jurisdiction, with a view to establish a judicial system suited to the requirements of the Constitution, to be undertaken as soon as practically possible after the adoption of the new Constitution.<sup>103</sup>

In 1997 a strategic five-year plan called *Justice Vision 2000* was released. This plan was aimed at making the administration of justice more effective and more accessible. However, the rationalisation of the courts proceeded at a very slow pace after that. In 2008, it was officially acknowledged that rationalisation was a continuing process based on a policy framework that had yet to be finalised.<sup>104</sup> It was only in February 2012 that the DoJ published

<sup>98</sup> Ebrahim, 2014: 102. The second phase envisions the establishment of the OCJ as an independent entity similar to the office of the Auditor-General. The third phase would be to establish a structure which will provide judiciary-based court administration, Mogoeng, 2013: 398.

<sup>99</sup> Section 8.

<sup>100</sup> Ebrahim, 2014, 106. The Act provides for the appointment of staff of the Constitutional Court, the Supreme Court of Appeal and every division of the High Court in accordance with the laws governing the public service and in consultation with the head of the court concerned. Appointees are employees of the public service. The appointments are made by the Minister, although this power may be delegated to the Secretary-General of the OCJ (section 8(4)(b) – (c)). The Act provides that the court manager, as the senior executive manager of the particular superior court or division, exercises administrative control over the support staff (including the registrar) under the control and direction of the head of court (section 11 (c)).

<sup>101</sup> Section 10.

<sup>102</sup> Section 167(3).

<sup>103</sup> Item 16(6)(a).

<sup>104</sup> Preamble of the Renaming of High Courts Act 30 of 2008, which has since been repealed by the Superior Courts Act of 2013.

a comprehensive new policy for transforming the judicial system. This policy is entitled: *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State*.

As part of the government's vision to rationalise the courts in line with the Constitution, the Constitution Seventeenth Amendment Act of 2012 and the Superior Courts Act 10 of 2013 were adopted. These two interdependent Acts, which both came into operation on 23 August 2013, were intended to provide for a single High Court of South Africa and to provide that the Constitutional Court is the highest court in *all* matters. The Acts also regulate the jurisdiction of the Constitutional Court and the Supreme Court of Appeal to a greater extent. The Superior Courts Act consolidates and rationalises the statutes that have governed the superior courts up to 2013. It repeals and replaces the Supreme Court Act of 1959 and ensures that there is a division of the High Court with a main seat in each of the nine provinces.<sup>105</sup>

The *Discussion Document* envisions further measures of rationalisation by creating a unitary system consisting of superior and lower courts and integrating some of the specialized courts into a single High Court.<sup>106</sup>

The constitutional provision creating the Constitutional Court as the 'highest court in all constitutional matters' left room for disagreement about the exact scope and roles of the CC and the SCA. Questions have been raised since the outset about the possibility of distinguishing between constitutional and non-constitutional matters.<sup>107</sup> The SCA attempted to demarcate an area of exclusive jurisdiction within administrative law in which it would be the highest court. In the *Container Logistics* case<sup>108</sup>, the SCA held that the common-law grounds for administrative review continued to exist along with the constitutional right to just administrative action. The SCA was of the view that, as long as the common law grounds were not inconsistent with the Constitution, they could continue to be operational. The CC, however, made it clear that the common law is not a body of law distinct from the Constitution but is shaped by the Constitution as part of one system of law.<sup>109</sup> The CC has furthermore widened its own jurisdiction by interpreting 'constitutional matters' broadly.<sup>110</sup> The Constitution Seventeenth Amendment Act has clarified the role of the CC by making it the highest court in *all* matters and not only constitutional matters.<sup>111</sup>

The courts have embraced the new role that the Constitution accorded to the judiciary. The Constitutional Court in particular has established a track record which clearly illustrates a particular understanding of its role and purpose within the democratic dispensation. During the CC's first 17 years of existence, it considered 147 cases involving constitutional challenges to legislation. In 90 of these cases, the court found that the legislative provisions at issue were inconsistent with the Constitution.<sup>112</sup> The Court has also displayed respect for the role of Parliament when crafting remedies after finding that legislation is unconstitutional. In many cases, the Court would provide for an interim remedy while affording Parliament the opportunity to remedy the defect.<sup>113</sup>

In *President of the Republic of South Africa v Hugo*<sup>114</sup> the CC seized its first opportunity to affirm that it had the authority to review the exercise of executive power.<sup>115</sup> At issue was the exercise of the President's power to pardon certain categories of prisoners. A male prisoner had challenged the presidential pardon of women prisoners with young children<sup>116</sup> as unfairly discriminating against him on the basis of sex. Even though the CC ruled in favour of the President, it was made clear that under the Interim Constitution, the Court did have to power to review the exercise of the Presidential pardon and reprieve.<sup>117</sup> The Court has since reviewed the President's action as head of state on numerous occasions, including in the matter of *President of the RSA v*

<sup>105</sup> Section 6. Prior to this enactment, there were thirteen High Courts in South Africa of which not a single one was based in Mpumalanga.

<sup>106</sup> *Discussion Document*, 2012: 2.

<sup>107</sup> Lewis, 2005: 512.

<sup>108</sup> *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd* 1999 (3) SA 771 (SCA).

<sup>109</sup> *Pharmaceutical Manufacturers Association of S.A: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 44.

<sup>110</sup> Rautenbach, 2013: 407.

<sup>111</sup> Section 167 as amended.

<sup>112</sup> O'Regan, 2012: 122-123.

<sup>113</sup> See for example: *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19; 2006 (1) SA 524 (CC) at para 162; *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC) at para 251 and *J v National Director of Public Prosecutions and Another* [2014] ZACC 13; 2014 (2) SACR 1 (CC) at para 58.

<sup>114</sup> 1997 (4) SA 1 (CC).

<sup>115</sup> Corder, 2014: 385.

<sup>116</sup> These prisoners were serving time for less severe crimes.

<sup>117</sup> *Hugo* paras 28-29.

*SARFU*<sup>118</sup>, *Democratic Alliance v President of South Africa*<sup>119</sup> and *Masetbla v President of the RSA*<sup>120</sup>. Significantly, the CC refused to grant an interim interdict preventing the South African National Roads Agency Limited (SANRAL) from levying tolls on Gauteng freeways in the matter of *National Treasury v Opposition to Urban Tolling Alliance*<sup>121</sup>. The case was brought following the decision of Cabinet to fund a freeway improvement project by means of an electronic tolling system. The Court affirmed the power of the executive branch of government to formulate and implement policy (and, in particular, to raise revenue) and held that, unless there is proof of fraud and corruption, the courts are not to interfere in such decisions.<sup>122</sup> The decision has been criticised though as being overly deferential.<sup>123</sup>

The Constitutional Court has also considered the reasonableness of policies adopted by the executive in order to comply with the State's obligations to fulfil socio-economic rights.<sup>124</sup>

These cases and many others demonstrate that the judiciary has achieved the goal of becoming a branch of government which is able to exercise checks and balances over the other two branches of government. Although the rationalisation process has not been completed, the most crucial elements of an independent judiciary within a democratic dispensation are functioning effectively.

The Constitutional Court has also embraced the approach prescribed in section 39. In the matter of *Carmichele v Minister of Safety and Security*,<sup>125</sup> the Court interpreted section 39(2) to mean that there is a duty on a court to develop the common law 'where the common law deviates from the spirit, purport and objects of the Bill of Rights'.<sup>126</sup> In this case, the assailant, who was awaiting trial on charges of attempted rape, violently assaulted the applicant after he had been released on bail. The applicant argued that the police and prosecutors ought to be held delictually liable for their negligent recommendation of the assailant's release. The Court held that, in light of the Constitutional imperative to prevent gender discrimination and the police's constitutional duty to protect vulnerable members of society, the common law ought to be developed to hold the police and prosecutors liable for their omission. The Constitutional Court has confirmed that section 39(2) creates a similar duty to develop customary law.<sup>127</sup> The courts have clearly abandoned the 'value neutral' approach of the apartheid era and are applying the values of the Constitution in their reading of the law. Whether the Court has sufficiently assumed the mandate provided to it by this provision is a matter of debate amongst academics, with some arguing that there is still too much formalism in judicial thinking and the common and customary law has not been transformed as much as it could have been.<sup>128</sup>

The performance in relation to the constitutional goal of access to justice is more mixed. This goal is supported by the Constitution's protection of fair trial rights of an accused which includes 'the right to have a legal practitioner assigned [to the accused person] by the state and at state expense, if substantial injustice would otherwise result...' in terms of section 35(3)(g). The Constitution's provision on standing<sup>129</sup> which introduced the possibility of instituting cases on behalf of a class of people or in the public interest also supports the goal of access to justice. The CC has furthermore taken a broad approach to the right of access to justice: it has developed a rich jurisprudence on 'open justice' which is a constitutional principle derived from section 34 that has been held to apply to access to court documents and the right of the media and public to have access to court

<sup>118</sup> 2000 (1) SA 1 (CC).

<sup>119</sup> 2013(1) SA 248 (CC).

<sup>120</sup> 2008 (1) SA 566 (CC).

<sup>121</sup> 2012 (6) SA 223 (CC).

<sup>122</sup> *Opposition to Urban Tolling Alliance* para 67.

<sup>123</sup> Raboshakga, 2014: 755.

<sup>124</sup> The realisation of socio-economic rights is discussed at length in chapter 3 which deals with rights. See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC); *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) and *Mazibuko v City of Johannesburg* 2010 (4) SA 55 (CC).

<sup>125</sup> 2001 (4) SA 938 (CC).

<sup>126</sup> *Carmichele* para 33.

<sup>127</sup> *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 48.

<sup>128</sup> Davis and Klare, 2010.

<sup>129</sup> Section 38 provides: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interests of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.'

hearings.<sup>130</sup> The Constitutional Court has encouraged an understanding of its work by issuing media statements on matters prior to hearings and along with the judgments.<sup>131</sup> Early in 2015, the Constitutional Court opened a Twitter account, which keeps the public up to date with upcoming hearings, hand-downs and news. At the same time, there is no doubt that, given the high levels of poverty in South Africa, the cost of representation and the complexity of the court system, it remains difficult for the majority of people to gain access to justice. The Constitutional Court has, at times, worsened the position of the poor in this respect by formalistic rulings which fail to take account of the difficulty in gaining access to justice.<sup>132</sup>

The *Discussion Document* envisions a reorientation of the courts in terms of court processes, procedure and management, towards a service culture which will promote access to justice. The document suggests that the judiciary ought to be involved in making the rules of the court as this will have a definite impact on the cost and complexity of litigation.<sup>133</sup>

### **Conclusion: thin compliance**

In a thin sense, almost all of the goals of the Constitution in respect of the judiciary have been achieved. The racial and gender composition has been shifted to reflect the demographics of the country to a much greater extent. Steps have been taken to ensure the independence of the judiciary in respect of the appointment of judges, judicial discipline and the administration of the judiciary. The judiciary has furthermore been restructured to be better suited to a democratic South Africa: a Constitutional Court has been established; legislation has been adopted to rationalise the courts; steps have been taken to ensure a greater accessibility of the courts and the courts have embraced their role within the separation of powers.

### **Thick compliance**

#### **Representivity**

As we understand it in this chapter, thin compliance with section 174(2) would be measured according to the notion that the judiciary reflects the racial and gender composition of South Africa in terms of numbers. Thick compliance, on the other hand, would mean that the JSC makes appointments in pursuit of the transformative vision of the Constitution in a broad sense.<sup>134</sup>

The JSC has been given the difficult task of ensuring that the bench retains a high degree of competence and excellence whilst fast-forwarding the demographic transformation of its composition. Of course, there is no necessary contradiction between these two elements, and diversity can in fact be seen to be an important feature of an excellent judiciary. Yet the JSC's decision-making process in respect of appointments and its particular understanding of how the requirements of section 174(2) are to be met has been the subject of much contestation.

One criticism of the JSC's appointment process is that aspects of diversity other than race and gender, which ought to be valued for their potential contribution to a wider range of perspectives on law, are often not considered and, sometimes, taken to hinder rather than encourage the appointment of a judge. Kathleen

<sup>130</sup> Corder and Brickhill, 2014: 380. *Independent Newspapers (Pty) Ltd v Minister of Intelligence Services; In re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC); *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 (1) SA 523 (CC); *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 (4) SA 222 (CC).

<sup>131</sup> Corder and Brickhill, 2014: 365.

<sup>132</sup> In *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC), the majority opted not to declare constitutionally invalid an inflexible time bar to the lodging of claims with the Road Accident Fund. This judgment had the effect of denying an illiterate, physically disabled and unemployed man who had been hit by a car the ability to claim compensation from the Road Accident Fund since his claim was lodged three days out of time. In *Grootboom*, the Court granted declaratory relief to the effect that the government was under the obligation to devise and implement a comprehensive programme in order to realise the right to housing. The Court has been criticised for deciding not to grant a structural interdict which would have enabled it to retain jurisdiction over the implementation of its order and would have allowed the parties more easily to approach the Court for further relief without having to institute fresh proceedings. See Davis, 2008: 700-701. See also Chapter 3 for a detailed discussion of this case).

<sup>133</sup> At 4.3.5.4. A Legal Practice Act has been enacted which broadens access to justice by putting in place a mechanism to determine fees chargeable by legal practitioners which are within reach of the citizenry and to provide for the rendering community services by legal practitioners (section 3(b)).

<sup>134</sup> According to Albertyn, section 174(2) ought to be interpreted as advancing a judiciary which is 'sensitive to multiple differences', which creates 'a more caring and egalitarian democracy' and which 'promotes the values of the Constitution'. She defines diversity, as opposed to the mere demographic requirement of 'representivity', as expressing an idea of 'differences in norms, values, judicial attitudes and philosophies', 2014: 247.

Satchwell and Anna-Marié de Vos were two outstanding candidates who were interviewed by the JSC but, to the surprise of many, not appointed to the positions they were nominated for. Both of these women are also openly lesbian. While this aspect of diversity could have contributed to a deepened sense of diversity in the judiciary, particularly in the case of Judge Satchwell<sup>135</sup> who had been nominated to the Constitutional Court, they were both overlooked and Judge de Vos was asked whether her sexual orientation might adversely affect perceptions of her as a judicial leader.<sup>136</sup> At the same time, it cannot be said that there have been no gay appointments as one of the current Constitutional Court judges, Justice Edwin Cameron, is openly gay.

While the Constitution requires 'consideration' to be given to race and gender when appointments are made, the JSC has been accused of elevating this requirement into a hard-and-fast rule. The JSC is viewed as sometimes commencing its enquiry by an examination of the gender and racial composition of a particular court.<sup>137</sup> This results in a situation where the JSC focuses entirely in some cases on race and gender rather than on the candidate's suitability and ability to further the constitutional project. The JSC has also been accused of overlooking outstanding candidates purely on the basis of their race and gender.<sup>138</sup> While the JSC cannot necessarily be faulted for deciding not to appoint the most experienced candidate in favour of pursuing representivity, the perception of independence of the judiciary would be greatly enhanced if the JSC was to adopt a unified, transparent and consistent approach to dealing with this challenge.

In October 2012, the JSC interviewed eight candidates to fill five vacancies at the Western Cape High Court. The JSC advised the President to appoint five candidates but did not include Jeremy Gauntlett, an accomplished senior advocate who is also a white male, in its recommendation.<sup>139</sup> In response, former Deputy President of the SCA, Justice Harms, requested reasons for the JSC's decision not to recommend Gauntlett. The reasons proffered were based on the candidate's lack of suitable temperament as well as the belief that appointing 'two white males' to the Western Cape High Court would do 'violence' to the provisions of section 174(2) of the Constitution.<sup>140</sup> In June 2013, the Helen Suzman Foundation instituted legal proceedings against the JSC out of concern for the manner in which the JSC engages in its decision-making processes and what is perceived as the elevation of some factors over others.<sup>141</sup> At the time of writing, the main application had not yet been heard. It is hoped that the outcome of this case would be the clarification of the JSC's procedure and a measure of judicial guidance on the interpretation of the Constitution's appointment criteria.

The JSC faces the immense challenge of formulating and agreeing upon a unified approach which would best achieve the broad ideals of the Constitution in its efforts to ensure both the quality and the swift demographical transformation of the bench. This challenge is exacerbated by the sheer size of the JSC, the fact that the majority

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<sup>135</sup> Even though Judge Satchwell was not appointed to the Constitutional Court, she has driven transformation of the judiciary on a different front. Prior to legal recognition of same-sex marriage, she successfully challenged statutory provisions which provided benefits to the spouses of judges but excluded their gay or lesbian life partners. See Chapter 3.

<sup>136</sup> Hoexter & Olivier, 2014: 180. Judge Satchwell was not blatantly questioned about her sexual orientation during her JSC interview, but an attorney did make a submission to the JSC that the majority of South Africans would not be able to identify with her due to her 'unusual lifestyle'. Maughan, K. (2009). Lesbian Judge lashed. *IOL News* [online]. Available at <http://www.iol.co.za/news/south-africa/lesbian-judge-lashed-1.456648#.VfjDohEVjIU> [Accessed 12 March 2016].

<sup>137</sup> Davis, 2010: 42.

<sup>138</sup> This criticism was meted out by Izak Smuts, a former member of the JSC who had resigned this position due to his dismay at the manner in which the JSC reached decisions. Tolsi, N. (2013). JSC's Izak Smuts resigns after transformation row. *Mail and Guardian* [online] available at <http://mg.co.za/article/2013-04-12-izak-smuts-resigns-after-transformation-row> [accessed on 12 March 2016].

<sup>139</sup> The five candidates recommended for appointment were Judith Innes Cloete, Babalwa Pearl Mantame, Mokgoatji Josiah Dolamo, Owen Lloyd Rogers and Ashton Schippers. One of the recommended candidates, Owen Lloyd Rogers, is a white male. Jeremy Gauntlett, Nonkosi Saba and Stephen John Koen were not appointed.

<sup>140</sup> The current Chief Justice expressed strong criticism of those who lament the non-appointment of white men to the bench and accused them of failing to express an 'equal passion' against 'apartheid-style ... briefing patterns' and attempting to delegitimize the JSC. M. Mogoeng, Chief Justice of the Republic of South Africa 'The duty to transform' speech delivered at the Annual General Meeting Dinner of Advocates for Transformation, 6 July 2013 [online] available at <http://www.politicsweb.co.za/documents/war-has-been-declared-against-transformation--mogo> [accessed on 1 October 2015].

<sup>141</sup> Mabuza, E. (2013). Helen Suzman Foundation heads to court to declare JSC appointments 'irrational'. *BDlive* [online] available at <http://www.bdlive.co.za/national/law/2013/06/07/helen-suzman-foundation-heads-to-court-to-declare-jsc-appointments-irrational> [accessed on 12 March 2016]. In their founding affidavit, the HSF requested a declaration that the decision to advise the appointment of the five chosen candidates and not the other three was unlawful and/or irrational and invalid. In the alternative, the HSF seeks a declaration that the process followed by the JSC before making this decision was unlawful and/or irrational and invalid. HSF, 2013: 2-3.



of its members are associated with the governing party and the tendency of many commissioners to use these complex criteria as a guise for politically-motivated decisions.<sup>142</sup>

Section 174(2) of the Constitution was clearly important given South African history: at the same time, the manner in which demographic change was to take place perhaps needed some clearer guidance than the vague provision which has led to much contestation and criticism.

Considering public perceptions of the representivity of the judiciary, it seems that this goal is perceived to have been achieved at a thick level since 64 percent of survey respondents do feel that the courts reflect the race and gender make-up of the country. The view that the bench is representative is strongly held by black (71 percent), coloured (68 percent) and Indian (77 percent) respondents. It is interesting to note that even though whites only make up 8.4 percent of the population but 36 percent<sup>143</sup> of the bench, they are nevertheless the only race group where only 29 percent holds the view that the judiciary is representative.<sup>144</sup>

## **Independence**

### ***Appointment of judicial officers***

While a transparent process has been put in place whereby a body representative of all three branches of government – the JSC – selects judges, the more detailed congruence between judicial appointments and the goal of independence is questionable.

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 toward government and deferential to its policies. The JSC has received much criticism for its judicial selection. Numerous stress points have played out over the past few years which expose a lack of transparency and rationality in the appointment process and which have, in turn, affected the perception of the independence of the judiciary broadly conceived.

Jeff Radebe was appointed as Minister of Justice by President Zuma in 2009. In June 2009, Mr Radebe requested a postponement of the interviews on the first day of the JSC's meeting because the JSC 'needed time to consider the transformation of the judiciary with regard to race and gender' and that the JSC's newest members were unfamiliar with the body's proceedings and needed more time to prepare for the meeting. By the time the JSC reconvened by the end of July 2009, President Zuma had designated four new JSC members in terms of section 178(l) of the Constitution. The only opposition nominee of the National Council of Provinces was also replaced with an ANC delegate.<sup>145</sup> As a result, the JSC has come to be viewed by some as 'an extension of the ANC'<sup>146</sup>, yet the executive did not act outside the bounds of the Constitution's prescribed composition for the body. The Constitution has allowed for a situation where the balance of power in the JSC remains in the hands of the political branches and the ruling party. The worry is that this affects both the reality and perception of the judiciary's independence.

During the 2009 round of appointments, the interviewing of candidates was markedly inconsistent. While some candidates were asked intrusive and even aggressive questions on transformation, others were asked questions which were not particularly probing or challenging. Questions relating to the contested race, gender and merit debate were put to some candidates and not to others.<sup>147</sup> The JSC has on at least three occasions appointed judges despite receiving negative comments about their performance.<sup>148</sup> There is also a strong perception that 'liberal-leftist' judges who have shown themselves willing to make decisions which are not favourable to the government are often over-looked for appointment.

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<sup>142</sup> Political preference in judicial appointments and the composition of the JSC will be discussed in more detail below.

<sup>143</sup> 86 of 239 judges are white.

<sup>144</sup> Only 29 percent of white respondents felt that the bench was representative in terms of race and gender.

<sup>145</sup> Hoexter, 2014: 171.

<sup>146</sup> Zille, H. (2011). The design flaw of the JSC – Helen Zille. *Politicsweb* [online] available at <http://www.politicsweb.co.za/news-and-analysis/the-design-flaw-of-the-jsc-helen-zille> [accessed on 28 September 2015].

<sup>147</sup> It is believed that Judge Clive Plasket's response to such a question in which he expressed that merit could trump race and gender in some cases prevented his appointment (Hoexter and Olivier, 2014: 177). Mokone, T. (2013). Merit must trump race, says judge. *Times Live* [online] available at <http://www.timeslive.co.za/thetimes/2013/04/10/merit-must-trump-race-says-judge> [accessed on 12 March 2016].

<sup>148</sup> These appointments were Judge Ronnie Pillay in 2012 and Judges Willie Seriti and Halima Saldulker in 2013.

Section 174(3) of the Constitution provides that the President must appoint the Chief Justice and the Deputy Chief Justice after consulting the JSC and leaders of parties presented in the National Assembly. The process means that the President has a limited discretion: at the same time, there is no clarity as to how and when consultation ought to take place,<sup>149</sup> which is potentially a design flaw in the Constitution.

In 2009 and 2011, President Zuma announced his preferred candidate for Chief Justice before he had formally consulted with any of the relevant parties.<sup>150</sup> The JSC has come to interpret its role as only interviewing the President's nominated candidate to determine his suitability for appointment as Chief Justice. With the appointment of Chief Justices Pius Langa in 2005, Sandile Ngcobo in 2009 and Mogoeng Mogoeng in 2011, only the President's nominee was interviewed. In 2009, three opposition parties, the Democratic Alliance, Congress of the People and the Independent Democrats issued a joint statement in which it urged President Zuma to reconsider his nomination of Justice Ngcobo in favour of Deputy Chief Justice Dikgang Moseneke.<sup>151</sup> The three parties also criticized President Zuma for failing to consult them before making his nomination public.

After the nomination of Justice Mogoeng in 2011, the JSC spokesperson, Dumisa Ntsebeza SC, suggested that the Commission could either support the President's candidate or ask him to consider a different candidate. However, at a special meeting held shortly thereafter, the JSC resolved that it was not permissible or desirable to call for further nominations. It invited written submissions on the suitability of Justice Mogoeng for appointment.

In the absence of guidance on what 'consultation' entails in the context of section 174(3), it has been taken to mean 'announcement of a preferred candidate prior to his appointment'. In a memorandum on the appointment of the Chief Justice, prepared on behalf of Freedom Under Law (FUL), it has been expressed that consultation ought to take place during the formative stages before the mind of the President has become fixed; 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>152</sup>

In order to remedy the deficiency of the current form of 'consultation' as well as the situation where a JSC interview has become a mere 'confirmation hearing', it has been suggested that the Constitution ought to be amended so that the process for appointing the Chief Justice is similar to the appointment process of other CC justices.<sup>153</sup> The JSC could call for nominations from the President as well as the leaders of the parties represented in the National Assembly. After short-listing and interviews by the JSC, a list of all candidates can be submitted to the President and thereafter the process of consultation (as defined after the Constitutional amendment) between the President and the leaders can take place.<sup>154</sup>

On 12 April 2011, the JSC interviewed candidates for judicial appointments in the Western Cape High Court and decided against filling any of the vacancies. The Cape Bar Council took the JSC to court for this decision. The High Court held that the failure by the JSC to fill two judicial vacancies when qualified candidates were available was unconstitutional and unlawful.<sup>155</sup> This decision was confirmed on appeal in *Judicial Service Commission v Cape Bar Council*<sup>156</sup> where the SCA held that the JSC is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates. The JSC's duties include giving reasons for

<sup>149</sup> Olivier, 2014: 128.

<sup>150</sup> Some regarded this as subversion of the consultation requirement. Apart from the President's troubling interpretation of his duty to consult, his choice of candidate was also met with much opposition in both 2009 and 2011. Chief Justice Mogoeng was the most junior and one of the least active members of the Constitutional Court at the time of his nomination. The public was astounded that Deputy Chief Justice Dikgang Moseneke was once again passed over, despite his record as a distinguished lawyer, activist, businessman and judge. Before his appointment to the Constitutional Court, Chief Justice Mogoeng had been a Judge President of one of the country's smallest divisions and after he had spent more than a decade on the bench, he had only ten reported judgments to his name. He thus did not appear to have the experience to be Chief Justice. His judgements were furthermore criticised for exhibiting an attitude toward gender and sexual violence which seemed inconsistent with the ideals of the Constitution. Olivier, 2014:14.

<sup>151</sup> The parties said that Deputy Chief Justice Moseneke was 'more suitable candidate' and a 'wise and humble jurist' with a fierce commitment to the independence of the judiciary. SAPA. (2009). Krieglger: 'Don't sacrifice judicial independence'. *Mail & Guardian* [online] available at <http://mg.co.za/article/2009-08-19-krieglger-dont-sacrifice-judicial-independence> [accessed on 17 September 2015].

<sup>152</sup> Gauntlett, 2011.

<sup>153</sup> Olivier, 2014: 130.

<sup>154</sup> Such a procedure resembles the procedure prescribed for the appointment of the other Constitutional Court Justices in terms of section 174 (4) of the Constitution.

<sup>155</sup> *Cape Bar Council v Judicial Service Commission* (Centre for Constitutional Rights and another as amici curiae) 2012 (4) BCLR 406 (WCC).

<sup>156</sup> *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115.

decisions not to recommend a particular candidate if called upon to do so.<sup>157</sup> The High Court further held that the JSC's actual voting procedure was unconstitutional, but the SCA did not confirm this ground of invalidity.<sup>158</sup> The JSC was ordered to consider afresh the applications of the short-listed candidates who were not selected for appointment in April 2011.<sup>159</sup>

The appointment of acting judges also raises concerns as it bypasses the JSC selection procedure altogether. Section 175(1) provides that '[t]he President may appoint a woman or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice'. Section 175(2) of the Constitution provides that '[t]he 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'. Acting judges are appointed for a period of six months to the Constitutional Court. In the High Court, three weeks is considered the minimum period for which a judge can act and some acting judges serve continuously for up to three years.<sup>160</sup>

Considering that there are large numbers of judges who act at any one time, this provision grants the executive too much power. Moreover, the current practice of appointing 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 a permanent appointment. Du Bois describes this state of affairs as a 'preliminary sifting' by the Minister in conjunction with the heads of courts.<sup>161</sup> Furthermore, the protection afforded to permanent judges in terms of security of tenure is not available to acting judges. Acting judges are placed in a compromising position since they are aware that an unpopular stance may influence their prospects of permanent appointment.<sup>162</sup> Acting appointments have been particularly troubling in the case of Constitutional Court judges.<sup>163</sup> At a stage in 2015, 4 of the 11 Constitutional Court justices were acting appointments which inevitably influences perceptions concerning the independence of the highest Court.<sup>164</sup>

During the certification proceedings, section 175 was challenged on the basis of the ministerial control over the appointment of acting judges, and the lack of security of tenure as a threat to judicial independence. The Constitutional Court, however, dismissed these objections, mainly on the basis of the urgency and the temporary nature of acting appointments.<sup>165</sup>

A stress-point which surfaced in this regard was the appointment of the acting head of the National Prosecuting Authority, Mokotedi Mpshe, as an acting judge in the North West High Court in 2010. The prospect of a former head of the National Prosecuting Authority serving as a judge raised difficult questions concerning the separation of powers, particularly since Mr Mpshe was the official who had withdrawn the corruption charges against President Jacob Zuma.

According to Olivier, the administration of justice in South Africa would not be able to function without acting judges.<sup>166</sup> Such judges play a crucial role but, ideally, this problematic state of affairs should be addressed by making more permanent appointments or, at the very least, including the JSC in the appointment of acting judges.

This track record clearly indicates some failures on the part of the judiciary to achieve the goal of independence in a thicker sense. The constitution allows for a situation where the President effectively decides who will be appointed as Chief Justice by himself. The Constitution also allows for a situation where the executive can sift candidates prior to their selection since it has the authority to make acting appointments. It also places the balance of power of the JSC in the hands of political appointees. All these features of the constitutional design in South

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<sup>157</sup> *Judicial Service Commission* para 51. The JSC's response that the particular candidate did not garner enough votes was held to be 'no answer'.

<sup>158</sup> *Judicial Service Commission* para 53.

<sup>159</sup> *Judicial Service Commission* para 55.

<sup>160</sup> Trengove, 2007: 37.

<sup>161</sup> 2006: 14.

<sup>162</sup> Olivier, 2014: 150.

<sup>163</sup> Boonzaier, 2014.

<sup>164</sup> This was due to the fact that three of the judges were on long leave and no appointment had been made to replace Justice Thembile Skweyiya after his retirement in May 2014.

<sup>165</sup> *First Certification* case paras 128-129.

<sup>166</sup> 2014: 150.

Africa have led to concrete empirical problems and, arguably, affected the real and perceived independence of the judiciary.

### *Judges and discipline*

The so-called 'Hlophé-saga' was a major stress-point in the life of the judiciary which highlighted the lack of a procedure to deal with judicial discipline. A complaint was lodged initially with the JSC after it came to the fore that Judge President John Hlophé of the Western Cape High Court received regular monthly payments from an asset management company. This company sought and obtained his permission to sue one of his fellow judges for defamation.<sup>167</sup> Initially, Judge Hlophé explained that the payments were for expenses incurred in his service as chair of a trust run by the company, but he eventually conceded that the payments had been in the form of a retainer. In terms of the Supreme Court Act and the Judges' Remuneration Act, judges are not allowed to receive remuneration apart from their salaries without the permission of the Minister of Justice. Judge Hlophé claimed that he had the permission of the deceased former Minister Dullah Omar, but no record of this existed. Further complaints were lodged against Judge Hlophé, in terms of which it was alleged that he had subjected a legal practitioner to a racist insult and also made insulting remarks about a fellow judge.

It was expected that the JSC decision would lead to a finding of gross misconduct, but in October 2007, the JSC announced that it had decided not to pursue an investigation into the matter. The JSC explained that since it had no general disciplinary powers, it could only make a finding of gross misconduct. The JSC furthermore reasoned that it could not make such a finding without a formal hearing and that a formal hearing could only be held if there was prima facie evidence of gross misconduct, which the majority decided there was not. This decision was met with considerable criticism and public outcry.<sup>168</sup>

In May 2008, the judges of the Constitutional Court lodged another complaint alleging that Judge Hlophé had attempted to interfere improperly with an appeal to the CC by Jacob Zuma<sup>169</sup> by meeting with two of the judges and discussing aspects of the case with them. Judge Hlophé lodged a counter-complaint against the Constitutional Court judges, alleging unwarranted harm to his dignity and reputation. In mid-2009, the JSC finally reached a decision that neither the judges' complaint nor Judge Hlophé's counter-complaint disclosed prima facie evidence of gross judicial misconduct such as to warrant a full inquiry.

The then-Premier of the Western Cape, Helen Zille, sought to review and set aside the decision on the basis that she should have been included as a member of the JSC when a decision was taken relating to the Western Cape High Court.<sup>170</sup> The High Court upheld the application and found that section 178(1)(k) made it clear that the Premier of a province has to be included in the JSC when a matter relating to their High Court is considered.<sup>171</sup> An appeal to the Supreme Court of Appeal was dismissed. The SCA held that the failure to invite the Premier to be present rendered the decision unlawful and it was accordingly set aside.

An NGO also brought an application to the North Gauteng High Court to set aside all the decisions taken by the JSC in mid-2009 relating to the dispute between the Constitutional Court judges and Judge Hlophé.<sup>172</sup> This application was dismissed by Judge Mabuse. On appeal, the SCA overturned the decision of the High Court and dismissed a conditional counter-appeal by Judge Hlophé. The SCA found that there were untested contradictions in the evidence of Justice Jafta and Justice Nkabinde of the Constitutional Court and that of Judge Hlophé as to what transpired in the meetings between them. The SCA found that the JSC's failure to find that these contradictions related materially to the question of Judge Hlophé's fitness to hold office was irrational.<sup>173</sup> The SCA also found that the JSC had employed an inappropriate standard of proof in an inquiry into judicial

<sup>167</sup> Section 25(1) of the Supreme Court Act prevented summons being issued against a judge without the consent of that court. This provision has been replaced by section 47(1) of the Superior Courts Act 10 of 2013.

<sup>168</sup> Kriegler, J. (2007). Judge Hlophé betrayed the nation with his greed. *Sunday Times* [online] available at <http://www.sabir.co.za/law-journals/2007/december/2007-december-vol020-no3-pp33-34.pdf> [accessed on 12 March 2016].

<sup>169</sup> Jacob Zuma was the leader of the ANC at this stage but not yet president of the country.

<sup>170</sup> *Premier, Western Cape v Acting Chairperson, Judicial Service Commission* 2010 (5) SA 634 (WCC).

<sup>171</sup> Judge Jones from the Eastern Cape High Court was brought in to hear the matter.

<sup>172</sup> *Freedom Under Law v Acting Chairperson, Judicial Service Commission* (GNP) Case no 63513/09 of 10 December 2010.

<sup>173</sup> *Freedom Under Law v Acting Chairperson: Judicial Service Commission* 2011 (3) SA 549 (SCA).

misconduct. The SCA held that the JSC's decisions were administrative action and that it had failed to comply with the requirements of lawfulness and reasonableness.<sup>174</sup>

Both of these matters were taken to the Constitutional Court and were heard together.<sup>175</sup> The majority of the Court considered themselves disqualified from determining the merits of this dispute.<sup>176</sup> Justices Jafta and Nkabinde as well as Deputy Chief Justice Moseneke recused themselves before the matter was heard since they testified in the proceedings before the JSC. The Court sat with a bare quorum of 8 justices,<sup>177</sup> which included 5 judges who would have recused themselves had it not been for this quorum requirement.<sup>178</sup> The Court recognised the need to bring finality to this drawn-out matter, but nevertheless denied leave to appeal in order to 'preserve the fairness of its own processes'.<sup>179</sup> Subsequently, the matter has been referred back to the JSC.

In October 2012, the JCC resolved to request the Chief Justice to appoint a Tribunal in terms of section 21 of the Amended JSC Act. In January 2013, Chief Justice Mogoeng appointed the Labuschagne Tribunal to investigate and report on the complaint against Judge Hlophe.<sup>180</sup> When the tribunal sat in September 2013, Justices Jafta and Nkabinde objected to the competence of the tribunal to hear the complaint on the basis that the complaint was instituted in terms of the rules of the JSC which prevailed prior to the amendment of the JSC Act (the 'old' rules). The President of the Tribunal, retired Judge Joop Labuschagne, dismissed the objection. Subsequently, in October 2013, the two Constitutional Court Justices instituted proceedings in the High Court on the same basis. The High Court held that the decisions taken by the JSC in April and October 2012 should not be set aside since the rights of the applicants or any other party were not retrospectively violated by dealing with the complaint in terms of the 'new' rules.<sup>181</sup> Justice Nkabinde and Justice Jafta's appeal against this decision was dismissed by the SCA. The matter is yet to be finalised. It is extraordinary that no finality has been reached in this crucially important matter after eight years and represents a major failing of existing structures and institutions adequately to address judicial discipline which affects the very confidence members of the public can have in the judiciary.

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>182</sup> Judge Motata was suspended on full pay after the incident occurred. The *Motata* matter was the first to make use of the new procedure laid down in the JSC amendment Act 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. The JSC decided to examine the submissions made by the parties to the committee before agreeing to appoint a tribunal. 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 Chief Justice to appoint a Judicial Conduct Tribunal.

Early in 2012, the Judge lodged proceeding to review the decision of the JSC, and requested that the body be directed to stop its investigation and his suspension be lifted.<sup>183</sup> Judge Motata argued that because Parliament had yet to approve a Code of Judicial Conduct, no guidelines existed against which it could be measured whether the conduct of a judge constitutes gross misconduct or not. Neither the Constitution, nor the JSC Act provide any definition of gross misconduct or offences with which a judge can be charged. The High Court held that it was up to the JSC to exercise a value judgment and to determine whether any conduct by a judge amounts to gross

<sup>174</sup> *Freedom Under Law* paras 46-50.

<sup>175</sup> *Hlophe v Premier of the Western Cape Province; Hlophe v Freedom Under Law and Others* [2012] ZACC 4; 2012 (6) SA 13 (CC).

<sup>176</sup> *Hlophe* para 16, fn 11.

<sup>177</sup> Section 167(2) of the Constitution provides that a matter before the Constitutional Court must be heard by a minimum of 8 judges.

<sup>178</sup> Justices Skweyiya, Van der Westhuizen and Yacoob were parties to the JSC complaint lodged against Judge Hlophe and Justices Mogoeng and Zondo were involved in an attempted mediation of the matter. The decision to deny leave to appeal on this basis was made regardless of the fact that the parties gave their consent to the 5 conflicted judges to determine the case.

<sup>179</sup> *Hlophe* para 48.

<sup>180</sup> *Nkabinde and Another v Judicial Services Commission and Others* 2015 (1) SA 279 (GJ).

<sup>181</sup> *Nkabinde* para 93.

<sup>182</sup> Judge Motata was convicted in the Johannesburg Regional Court and the full bench of the South Gauteng High Court dismissed his appeal. *Motata v S* [2010] ZAGPJHC 134 (29 November 2010).

<sup>183</sup> *Motata v Minister of Justice and Constitutional Development* [2012] ZAGPPHC 196 (7 September 2012).

misconduct. 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 procedures as it may decide upon.<sup>184</sup>

Neither the *Hlophe* nor the *Motata* matters have been resolved, even though years have passed since their occurrence. The JSC is showing itself unwilling to act decisively in the exercise of its disciplinary powers. Both of these cases undoubtedly have caused damage to the status and trust in the judiciary as an institution. It seems that even when the JSC is sitting without the members designated from the two houses of parliament (who, in terms of section 178(5) are only members of the JSC when it is appointing judges), its decision-making can still be manipulated. The failure to finalize the Hlophe affair is particularly troubling and raises major questions concerning the ability of the judiciary to hold judges to account for their unacceptable behaviour. It also almost amounted to a constitutional crisis of a type in that it pitted a High Court judge against two Constitutional Court judges (who themselves have seemed to back-track from the original allegations). Whilst the JSC has clearly failed in its disciplinary mandate, the courts themselves appear to have been resilient and the institutions in question remain strong despite this incident.

### *The administration of the judiciary*

The creation of the OCJ is viewed as a positive step towards an independently governed judiciary, yet this measure in itself will not be sufficient to achieve this goal. The DOJ regards the OCJ as a temporary measure in the establishment of a separate court administration.<sup>185</sup> As it stands, it is a mere creature of regulation<sup>186</sup> and it is still a government department located in the public administration. It has been suggested in the *Discussion Document* that the purpose of this location, though seemingly contrary to the sought-after independence of judicial administration, is to equip the OCJ with resources and personnel up until a permanent, independent court administration is established.<sup>187</sup> It has also been argued that the creation of the OCJ may be a *distraction* from the real project of creating an independent, judiciary-based system of court administration.<sup>188</sup>

It must be borne in mind that the OCJ was primarily created to provide institutional support to the Chief Justice in the performance of his extensive substantive and ceremonial duties and that it cannot take the place of an independent court administration.<sup>189</sup> A related concern is that authority granted to the Chief Justice to establish 'norms and standards for the exercise of judicial functions of all courts'<sup>190</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>191</sup>

While strides have been made toward placing the administration of the judiciary within the judiciary itself, there is still a long way to go before the judiciary will be truly independent in this regard. Creating judicial control over its own affairs will need to involve the development of procedures and institutions within the judiciary to accomplish this aim.

### *Conclusion: Thick compliance with goal of independence*

The Constitutional Court has affirmed the principle that judges must not only be independent but must be perceived to be independent too.<sup>192</sup> In order to gauge perceptions in this regard, the survey we conducted within the province of Gauteng sought to understand the public's perception of this independence.

It is significant that only a minority of respondents supports the notion that the President should be allowed to appoint the judges that he wants.<sup>193</sup> In light of this, the fact that the President alone decides who to appoint as chief justice does much damage to the public's perception of the independence and legitimacy of the courts.

<sup>184</sup> Section 178(6) of the Constitution provides that the JSC may determine its own procedure.

<sup>185</sup> DoJ *Annual Report 2009-2010* para 2.8.4.

<sup>186</sup> The OCJ was established in terms of Proclamation 44 *Government Gazette* 33500 of 3 September 2010.

<sup>187</sup> *Discussion Document*: 2012 at para 4.3.6.2.

<sup>188</sup> 2014: 111.

<sup>189</sup> Ebrahim, 2014: 114.

<sup>190</sup> Section 165 (6) of the Constitution.

<sup>191</sup> Ebrahim, 2014: 114.

<sup>192</sup> *Van Rooyen v S* 2002 (5) SA 246 (CC) at para 32.

<sup>193</sup> This notion is supported by 36 percent of respondents overall (40 percent of black, 37 percent of coloured, 53 percent of Indian and 9 percent of white respondents).

Public opinion on judges' performance in achieving justice is low across the board which is worrying.<sup>194</sup> Only 53 percent of respondents are confident that judges act fairly.<sup>195</sup> Almost 70 percent of respondents think that courts are influenced by the government in their decision making.<sup>196</sup> It seems that South Africans in Gauteng do not view the courts as fully independent and lack full confidence in their decision-making powers.

### ***A judiciary suited to a democratic South Africa***

It has been noted that, in a thin sense, a judiciary suited to a democratic South Africa has been established. The Constitutional Court has been created and the courts have embraced their role of keeping the executive and legislature within the bounds of the Constitution. In order to consider the 'thick' achievement of this goal, there have been multiple stress-points which have challenged the role and independence of the judiciary.

#### ***Executive's response to orders against the State***

The Constitution establishes a separation of powers between the three branches of government and clothes the courts with the power to invalidate legislation and executive conduct which is inconsistent with the Constitution.<sup>197</sup> In this way, the judiciary is placed in a position where it can overrule both the legislature and the executive.

In order for a democratic system to function effectively, it is essential that the different branches of government adhere to the rule of law and submit 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.

Over the past decade, the relationship between the 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 Constitution and does not view itself as 'accountable to the masses'.<sup>198</sup>

In 2011, the executive was quick to express its irritation at losing two high profile, politically- loaded cases in the Constitutional Court. In the matter of *Glenister v President of the Republic of South Africa*<sup>199</sup> 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 (NPA), with a different body and located it within the South African Police Service (SAPS).<sup>200</sup> The Court held that the Constitution imposes an obligation on the state to create an independent body to prevent and combat corruption.<sup>201</sup> The Court found that since the new anti-corruption unit's activities were to be coordinated by the Cabinet, its operations and structures were not satisfactorily independent and shielded from political influence.<sup>202</sup>

In the other matter, *Justice Alliance v President of the Republic of South Africa*<sup>203</sup>, the Court struck down legislation in terms of which the President extended the term of Chief Justice Ngcobo. The Constitution provides that a Constitutional Court judge 'holds office for a non-renewable term of 12 years, or until he or she attains the age

<sup>194</sup> Only 52 percent of the population feel that judges do well in achieving justice. The percentage of support is not high among all race groups though, particularly low among white South Africans (33 percent).

<sup>195</sup> The view that judges act fairly are low among all race groups: 56 percent of black, 65 percent of coloured, 61 percent of Indian and 34 percent of white respondents.

<sup>196</sup> Overall, 68 percent of the population feel that government officials sometimes influence court decisions.

<sup>197</sup> Section 172(1)(a) provides that a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, when deciding a constitutional matter.

<sup>198</sup> Statement of ANC National Executive Committee, 8 January 2005. Quoted in Gordon and Bruce, 2007: 32.

<sup>199</sup> 2011 (3) SA 347 (CC).

<sup>200</sup> The Acts which brought about this change were the National Prosecuting Authority Amendment Act 56 of 2008 and the South African Police Service Amendment Act 57 of 2008.

<sup>201</sup> *Glenister* para 175.

<sup>202</sup> *Glenister* paras 207 – 208.

<sup>203</sup> 2011 (5) SA 388 (CC).

of 70, whichever occurs first, except where an Act of Parliament extends the term of office ...'.<sup>204</sup> The Judges' Remuneration and Conditions of Employment Act provided that a Chief Justice who is nearing the end of his term of retirement age may, if so requested by the President, remain in office for a period determined by the President.<sup>205</sup> When former Chief Justice Sandile Ngcobo was nearing the end of his term, President Zuma requested that he remain in office for a further five years, to which request he acceded.<sup>206</sup> Three separate applications for direct access to the Constitutional Court were lodged to contest the constitutional validity of the relevant section of the Judges' Remuneration and Conditions of Employment Act. The Court held that the legislation was constitutionally invalid because it amounted to an 'unlawful delegation of legislative power'.<sup>207</sup> The effect of the judgment was that Chief Justice Ngcobo had to vacate his office a month after the judgment was handed down. The Secretary-General of the ANC, Gwede Mantashe, accused the Constitutional Court judges of invalidating the legislation and effectively preventing the extension of Chief Justice Ngcobo's term with the motive of allowing the other justices, who may have had ambitions to become the chief justice themselves, to 'take over quicker'.

In February 2011, then Minister of Justice Jeff Radebe announced that the DoJ will engage the services of research institutions to undertake an assessment on how the decisions of the Constitutional Court advance social transformation.<sup>208</sup> Since this announcement, the initiative has been labelled both an 'assessment' and a 'review' of the CC and SCA's decisions.<sup>209</sup> In an interview in February 2012, President Zuma expressed the view that the powers of the Constitutional Court need to be reviewed since it often delivers dissenting judgements, which he views as casting a shadow of doubt on whether or not the majority decision is 'absolutely correct'.<sup>210</sup>

Initially, the combination of the president's criticism of the Constitutional Court and the announcement of a review created an impression that the future of the Court could be at stake. However, it seems that government had backtracked on these initial plans and adopted a different approach to the review. In March 2012, the DoJ published the terms of reference for 'the assessment of the impact of decisions of the Constitutional Court and the Supreme Court of Appeal on the South African law and jurisprudence'.<sup>211</sup> According to the terms of reference, the government had in mind that a comprehensive analysis of the decisions of the Supreme Court of Appeal and the Constitutional Court should be undertaken to 'establish the extent to which such decisions have contributed to the reform of South African jurisprudence and the law to advance the values embodied in the Constitution'<sup>212</sup> and to assess the impact of the evolving socio-economic rights jurisprudence on the eradication of inequality and poverty.<sup>213</sup> The purpose of the review was furthermore stated to be an assessment of the transformation of customary law and the common law in accordance with the Constitution and to determine the impact of South African constitutional jurisprudence on the development of regional and international jurisprudence.<sup>214</sup> The review is also aimed at investigating complexities in implementing court orders,<sup>215</sup> seeks to identify factors which inhibit direct access to the CC<sup>216</sup> and will consider the cost of litigation and speed with which cases are finalised.<sup>217</sup>

The government has awarded the contract to the Human Sciences Research Council (HSRC) and the School of Law at the University of Fort Hare (UFH) in August 2013. In a progress presentation to the Justice Portfolio Committee dated 5 September 2014, the HSRC and UFH states that: 'the Constitutional Justice Project is *not*

<sup>204</sup> Section 176(1).

<sup>205</sup> Section 8(a).

<sup>206</sup> *Justice Alliance* paras 7 – 10.

<sup>207</sup> *Justice Alliance* para 62. Section 176(1) of the Constitution envisaged that Parliament may enact a law extending the terms of service of Constitutional Court judges; delegating the power to extend the term of a specific chief justice for a discretionary period to the President goes beyond the limits of the Constitution.

<sup>208</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 March 2012 available at [http://www.justice.gov.za/m\\_statements/2012/20120326\\_m\\_transformation-tor.pdf](http://www.justice.gov.za/m_statements/2012/20120326_m_transformation-tor.pdf) (accessed on 6 October 2015).

<sup>209</sup> Klaaren, 2015: 483.

<sup>210</sup> Monare, M. (2012). Concourt's powers need reviewing, says Zuma. *The Star* [online] available at <http://www.iol.co.za/the-star/concourt-s-powers-need-reviewing-says-zuma-1.1232428#.VhPfixEVjIU> [accessed on 6 October 2015].

<sup>211</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 March 2012 available at [http://www.justice.gov.za/m\\_statements/2012/20120326\\_m\\_transformation-tor.pdf](http://www.justice.gov.za/m_statements/2012/20120326_m_transformation-tor.pdf) (accessed on 6 October 2015).

<sup>212</sup> Terms of Reference, 3.1 (a).

<sup>213</sup> Terms of Reference, 3.1 (b).

<sup>214</sup> Terms of Reference, 3.1 (c) and (d).

<sup>215</sup> Terms of Reference, 3.2.

<sup>216</sup> Terms of Reference, 3.3.

<sup>217</sup> Terms of Reference, 3.4.



about reviewing the decisions of the highest courts in the land – doing so would contravene the Constitution.<sup>218</sup> It is stated that what the review is about is understanding how the highest courts interpret laws and policies, how their jurisprudence is contributing to law reform and how court decisions are implemented through programmes and policies. The objectives of the project are stated to be the location of the courts' jurisprudence within the developmental state; to assess the state's capacity to implement court decisions and to advance the administration of justice in respect of access to justice, cost of litigation and development of the common law and customary law.<sup>219</sup>

It seems that, despite the threatening origins of this project, it might turn out to have a constructive outcome.<sup>220</sup> Klaaren has noted that the assessment has seemingly transformed from a 'frontal assault on the judiciary' to a potentially productive applied research project, sponsored by the state.<sup>221</sup> The final report, the release of which is still awaited, will reveal the true nature of the project.

Apart from outspoken criticism against the judiciary and the potentially controversial 'review' of the courts, there has also been a pattern of non-compliance with particular types of orders on the part of particular state departments. One such a recalcitrant department is the Department of Home Affairs. This department failed to adhere to an order invalidating provisions of the Immigration Act which allowed for the arrest, detention and deportation of foreign nationals without ensuring adequate procedural protections.<sup>222</sup> The Department was brought before the court on two separate occasions due to this non-compliance.<sup>223</sup>

Most recently, the international community and many South Africans were up in arms about the fact that the Department allowed Sudanese President Omar al-Bashir to leave the country in violation of a court order. Two warrants for the arrest of the president have been issued by the International Criminal Court (ICC). President al-Bashir has been accused of genocide, war crimes and crimes against humanity committed in the Darfur region of the Sudan. On Sunday, 14 June 2014, the North Gauteng High Court made an interim order on an urgent basis compelling the Department of Home Affairs to take all necessary steps to prevent the President al-Bashir from leaving the country until the Court handed down its final order. On Monday, 15 June 2015, a full bench of the North Gauteng High Court made an order compelling the State respondents to take all reasonable steps to prepare an arrest of the President, without a warrant, and to detain him pending a formal request for his surrender by the ICC. Immediately after the order was made, the State confirmed that the president had been allowed to leave the country, contrary to the order of the previous day. The State's case was that the cabinet had taken a decision to grant President al-Bashir immunity from arrest and that this decision 'trumped' the government's duty to arrest the President in South Africa in terms of the two ICC arrest warrants and the High Court's order.

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>224</sup> These comments seemed to suggest the government was of the view that there was a 'foreign affairs' exception whereby courts would be excluded from addressing matters that had a strong foreign affairs component. It was, however, not for the political leadership to determine whether such an exemption exists or not but a matter for the courts. The blatant disregard of a court order had the potential to result in a constitutional crisis.

On 8 July 2015 the Chief Justice issued a request on behalf of the heads of court and senior judges of all divisions to meet with the head of state to point out and discuss the dangers of repeated and unfounded criticism of the judiciary as well as a refusal to follow court orders. He stated that criticism of that kind has the potential to delegitimise the courts and undermine their public purpose. Chief Justice Mogoeng and top officials of the judiciary met with President Zuma and executive members of government on 27 August 2015.<sup>225</sup> The parties agreed to exercise care when it comes to pronouncements criticizing one another and that court orders should

<sup>218</sup> DoJ 'Constitutional Justice Project: Assessment of the impact of the decisions of the Constitutional Court and the Supreme Court of Appeal on the transformation of society' *Representation to the Justice Portfolio Committee* 5 September 2014.

<sup>219</sup> The results of the assessment is expected to be released late in 2015.

<sup>220</sup> Klaaren, 2015: 488.

<sup>221</sup> *Ibid.*

<sup>222</sup> *Lanvay for Human Rights and Another v Minister of Home Affairs and Another* 2003 (8) BCLR 891 (T); *Lanvay for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC).

<sup>223</sup> *South African Human Rights Commission and 40 Others and the Minister of Home Affairs: Naledi Pandor and 4 Others* [2014] ZAGPJHC (28 August 2014).

<sup>224</sup> eNCA . (2015). Gwede Mantashe criticizes judiciary as being problematic. [online] available at <https://www.enca.com/south-africa/gwede-mantashe-criticises-judiciary-being-problematic> [accessed on 18 September 2015].

<sup>225</sup> eNCA. (2015). 'Zuma on judiciary: We musn't antagonise each other'. [online] available at <https://www.enca.com/south-africa/zuma-judiciary-we-musnt-antagonise-each-other> [accessed on 6 September 2015].

be complied with. Both parties agreed to uphold the Constitution and serve the public as independent arms of the State. Whether or not this unprecedented approach to upholding the rule of law will be effective remains to be seen.

The Constitution has aided the courts in ensuring compliance with its orders by granting it extensive remedial powers.<sup>226</sup> In cases where the executive might experience difficulty in complying with an onerous order, the court may issue a structural interdict. In terms of this remedy, the court remains seized of the matter even after handing down judgment. Parties are required to report back to the court on progress made and it is open to the court to make further orders which can assist the state and ensure compliance. One example of where this remedy has been applied was in the case of *City of Cape Town v Rudolph*<sup>227</sup>. In this matter the City brought an application for the eviction of an impoverished community from a public park in a residential area. The community filed a counter-application for an order declaring that the local authority's housing programme did not comply with its obligations to make short-term provision for people of the area who are in crisis. The Court held that the City of Cape Town failed to implement a housing programme to provide for people in urgent need and has not provided adequate priority to the needs of the respondents, who have no access to places where they may lawfully live. The court ordered the City to report back to it on the steps it was taking to comply with its constitutional obligations to make short-term housing provision for the respondents. The residents were also given the opportunity to comment on the City's reports. The Court considered a supervisory order necessary since the City had already failed to comply with a declaratory order, issued in a previous judgement<sup>228</sup>, in terms of which short-term housing programmes for those in desperate need ought to have been implemented.<sup>229</sup> The City delivered four reports in response to the structural interdict and the court delivered a final judgment in December 2005.<sup>230</sup>

The courts have also used their own remedial powers to ensure compliance with orders against the state sounding in money. The applicant in the matter of *Nyathi v MEC for Department of Health, Gauteng*<sup>231</sup> suffered severe physical harm due to medical negligence in two state hospitals. The MEC for Health, Gauteng, was ordered to pay the individual in question an amount in damages, but failed to comply with this order. In terms of section 3 of the State Liability Act 20 of 1957, the applicant was precluded from attaching assets belonging to the State as way of enforcing the court order.<sup>232</sup> The CC held that the prohibition on execution against the property of the State meant that an ordinary citizen had no effective remedy where State officials fail to comply with a court order.<sup>233</sup> The section was declared constitutionally invalid and parliament was given 12 months to pass legislation providing for the effective enforcement of court orders.<sup>234</sup>

At the time this case was heard by the CC there were approximately 200 cases against the State for the payment of outstanding judgment debts.<sup>235</sup> The State acknowledged that the reason for non-payment was not a lack of resources, but rather administrative obstacles.<sup>236</sup> The Court decided to exercise supervisory jurisdiction over the settlement of these outstanding orders. The Minister of Justice and Constitutional Development was ordered to provide 'a list of all unsatisfied court orders against national and provincial state departments' and to make available to the Court a plan of how it would ensure the settlement of these court orders.<sup>237</sup> The Court held that judicial oversight was essential in the circumstances of the case, as there was no other effective remedy for ensuring that the State complies with court orders.<sup>238</sup>

The judiciary has creatively exercised its authority in terms of the Constitution in order to facilitate compliance with court orders. However, it cannot be denied that where the executive expresses an attitude of disregard for

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<sup>226</sup> Section 172.

<sup>227</sup> (8970/01) [2003] ZAWCHC 29; 2004 (5) SA 29 (C).

<sup>228</sup> *Grootboom* para 99.

<sup>229</sup> Liebenberg, 2010: 430.

<sup>230</sup> Liebenberg, 2010: 430. *City of Cape Town v Rudolph* Case No 8970/01 (unreported).

<sup>231</sup> 2008 (5) SA 94 (CC).

<sup>232</sup> Section 3 read: 'No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the state, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund as the case may be.'

<sup>233</sup> *Nyathi* para 79.

<sup>234</sup> *Nyathi* para 92.

<sup>235</sup> *Nyathi* para 86.

<sup>236</sup> *Nyathi* para 86.

<sup>237</sup> *Nyathi* para 92.

<sup>238</sup> Liebenberg, 2010: 455.

the rule of law and the supremacy of the Constitution and refuses to comply with court orders, there is little that any constitutional provision by itself can do to protect the democracy.

It seems that the population as a whole supports the judicial review function of the judiciary since 82 percent of respondents felt that the President must comply with court orders. 68 percent of the sample feel that the Constitutional Court should be able to decide whether or not the death penalty is constitutional or not and 78 percent are of the view that the government must obey the Court's decision in that regard. Furthermore, the courts' function within the democratic structures are accepted in that around 60 percent of people in all racial groups agree that a court can go against the will of the majority to protect vulnerable minorities.

### *Access to justice*

For the most part, people facing criminal charges who cannot afford to pay for their own legal representation do receive legal aid at state expense.<sup>239</sup> In terms of the Legal Aid Board's records, about 1 percent of criminal matters are excluded from their scheme and thus heard without legal representation.<sup>240</sup> In civil matters, however, access to legal representation is not as readily available.<sup>241</sup> This state of affairs can be attributed to the fact that the Constitution provides that an accused facing criminal charges have a right to legal representation at state expense while no such provision is made for litigants in civil cases.<sup>242</sup> It has been argued that section 34 ought to be interpreted to constitutionalise a right to legal representation in civil cases.<sup>243</sup>

The Constitutional Court has exercised its extensive powers in favour of ensuring access to justice to those who are not properly represented before it. In 2012, 46 applicants approached the Constitutional Court to challenge systemic failures to the procedure of eviction and execution of residential property.<sup>244</sup> The applicants refused representation, yet the Court nevertheless requested assistance from two civil society organisations in order to understand the case better. The Legal Resources Centre (LRC) and the Socio-Economic Rights Institute of South Africa (SERI) conducted an initial investigation into the matter and compiled a report which the Court took into consideration.<sup>245</sup>

In another instance, the Court received an application from the Ngaka Modiri Molema District Municipality to gain access to the Court on a direct basis. The Municipality had been dissolved in terms of section 139(1) of the Constitution<sup>246</sup> and found itself embroiled in a power struggle with the Provincial authorities.<sup>247</sup> The Municipality sought interdictory relief against the interference of the Provincial authorities on an urgent basis.<sup>248</sup> The Court responded to the application by directing both parties to file affidavits reporting on the state of the delivery of basic services to the community which the Municipality serves that had been interrupted by events surrounding this conflict.<sup>249</sup> Even though the community members were not party to the application before the Court, the Court made the provision of essential service to them its main concern and dismissed the application only after satisfying itself that an emergency plan for the provision of these services was in place.<sup>250</sup>

Despite the Court's display of judicial involvement in instances such as these, it has nevertheless been criticised for not doing enough to accommodate the under-represented poor.<sup>251</sup> Jackie Dugard has suggested that the Constitutional Court ought to use its direct access function as a way for poor people who do not have access to

<sup>239</sup> Dugard, 2013:7.

<sup>240</sup> Such matters would contemplate minor offences, such as traffic violations and are susceptible to automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977. Over the past five financial years, 5000 to 7000 criminal cases were heard in lower courts where the accused did not have legal representation. The exact figures are as follows: 2010/2011:6359; 2011/2012: 7094; 2012/2013: 5666; 2013/2014: 5180 and 2014/2015: 4595.

<sup>241</sup> Dugard, 2013: 7.

<sup>242</sup> Section 35(3)(g) of the Constitution.

<sup>243</sup> Budlender, 2004: 342.

<sup>244</sup> *Beatrice Mzimela (Protea Glen) and Others v Nedbank Ltd of South Africa and Others* CCT 79/12.

<sup>245</sup> Report to the Constitutional Court in the matter of *Mzimela and Others v Nedbank Ltd and Others* (2013).

<sup>246</sup> Section 139(1) in relevant part provides: 'When a municipality cannot and does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including— ... (c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.'

<sup>247</sup> *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* [2014] ZACC 31 at para 3.

<sup>248</sup> *Ngaka Modiri* para 4.

<sup>249</sup> *Ngaka Modiri* para 15.

<sup>250</sup> *Ngaka Modiri* para 23.

<sup>251</sup> Dugard, 2013: 7.

legal representation to 'by-pass' the lower courts and be heard by the highest court directly. Instead, the Court does not encourage litigants to approach it as a 'court of first instance'. It has also taken the stance that only a few matters of the utmost importance ought to be decided upon by it.<sup>252</sup> Even with its extended jurisdiction (which makes it the apex court of the country), it still has a low case-load and hears far fewer matters than the supreme courts or constitutional courts of other states with high levels of poverty and inequality like India, Colombia, Costa Rica and Argentina.<sup>253</sup>

It seems that access to courts are hampered by the fact that only just over a half of people in Gauteng (55 percent of survey respondents) seemed to be aware of the existence of the Constitutional Court. Of the people who are aware of the Court, few understand its role and purpose as is indicated by the qualitative answers to the question we asked. The majority of respondents (59 percent) view it difficult to challenge a violation of their rights in courts and 63 percent feel that it is difficult to approach the Constitutional Court directly to assert their rights.<sup>254</sup>

## 5.4. Conclusion

This chapter has identified key areas of performance, under-performance and flaws in the constitutional design in respect of the judiciary. Overall, the judiciary has performed well in terms of the creation of a Constitutional Court, the adoption of measures for greater transparency in the appointment of judges, improved access to courts and in fulfilling its judicial review role.

In terms of compliance with Ginsburg's external criteria, the representivity of the bench adds to the judiciary's legitimacy, though this is undermined by the political composition of the JSC and perceptions of bias in the appointment procedure. The courts have played an important part in ensuring access to public goods through its socio-economic rights jurisprudence and by taking measures to provide easier access to justice to the public (although these are still insufficient). It seems that corruption and bribery are not issues which plague the South African judiciary and that agency costs in this sense are low though the perceptions of courts are not flattering. The courts are playing an effective role in the channelling of conflict, between individuals as well as between the different branches of state despite challenges in this regard.

### ***Key areas of performance and under-performance of the judiciary***

The Constitution has performed well in respect of the judiciary in the establishment of a JSC and the adoption of a transparent process for the appointment of judicial officers. The change in the composition of the bench in order to reflect racial (and to a more limited extent gender) demographics of the country can also be counted as a success of the Constitution in respect of transforming the judiciary. Another area of positive performance is the creation of a Constitutional Court to serve as the highest court in constitutional matters and the ultimate guardian of the Constitution along with the establishment of a judicial review role for the courts within the separation of powers.

As we have seen, under-performance has taken place in that procedures and mechanisms to deal with judicial discipline were established belatedly and the JSC has not exhibited a willingness to hold judges to account. While a transparent appointment process for judicial officers has been adopted, this process is not independent from overt political bias. In particular, the appointment process for the Chief Justice is not perceived to be adequately independent, fair, and transparent. A system of governance for the judiciary by the judiciary which does not place too much power in the hands of the Chief Justice has not yet been established. In cases where the government purposefully disregards court orders, the constitutional order has not been optimally effective in upholding the rule of law.

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<sup>252</sup> The Court sets down an average of 11 cases per term, which means that fewer than 50 judgments are delivered per year.

<sup>253</sup> The Constitutional Court received 134 applications 2012, a year before the Constitution Seventeenth Amendment Act came into Operation (which extended the Court's jurisdiction to "point of law of general public importance which ought to be considered by the Court", section 167) and 232 applications in 2014, the year thereafter. Even with this extended jurisdiction, it can nevertheless be argued that the Court is not functioning at its full capacity. In comparative perspective, the Constitutional Court of Costa Rica considers around 17 000 cases a year (Dugard, 2013: 11) and the Supreme Courts of Argentina and India decide around 15 000 and 30 000 cases a year respectively (Gloppen, 2008: 353).

<sup>254</sup> The majority of people from all race groups consider it difficult to assert their rights in court.

***Flaws in constitutional design and recommendations***

This final section contains a number of recommendations to remedy the flaws in constitutional design and implementation that have been identified in this chapter.

In terms of the composition of the JSC, section 178 allows for an unmanageably large body with too many political appointees. It can be considered a flaw in the Constitution that the National Council of Provinces provision also does not require opposition leaders to be represented in the JSC. The Constitution ought to be amended to decrease the size of the JSC and reduce the number of political appointees to create a better balance between professional and political members.

There are flaws in the Constitution regarding the appointment of judges. The limited grounds of representation required by section 174(2) of the Constitution and the rather vague approach to positive discrimination has led to much confusion and contestation. This section could perhaps be amended to provide that other aspects of diversity should also be considered when judicial appointments are made.

Section 174(3) lacks guidance about how and when the President is to consult with the JSC and the leaders of the parties represented in the National Assembly when appointing the Chief Justice. The provision in this regard ought to be amended to bring the appointment procedure for the Chief Justice in line with that for other Constitutional Court judges.

Entrusting acting judicial appointments to be made by the executive in terms of section 175 without oversight is unacceptable. The institution of acting judges ought to be reconsidered in light of democratic concerns. If they are to remain, the JSC ought to be involved in the selection of acting judges.

The Constitution does not require the establishment of system of governance over the judiciary by the judiciary. This can be considered as a flaw in the constitutional design.

It is also a flaw that the Constitution does not require the establishment of a mechanism to deal with judicial discipline short of removal or the adoption of a Code of Judicial Ethics.

Finally, the Constitution does not explicitly provide for legal representation at state expense to parties to civil matters who are unable to afford representation and it is recommended that this be changed.

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