

**THE RELATIONSHIP BETWEEN THE POLITICAL
BRANCHES AND THE JUDICIARY WITH REFERENCE TO
THE PRINCIPLE OF JUDICIAL INDEPENDENCE**

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Dedicated to my Parents

Nebo and Alfred Legoabe

My siblings

And all my loved ones who supported me throughout this journey.



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Professor JJ Koos Malan for all your helpful supervision and caring guidance.

I truly value your insight.



In Memory of

Uncle Mbu

(Mbuyiseli Deliwe)

For all the conversations we had together and those we continue to have in spirit.



SUMMARY

The concept of judicial independence arguably forms the basis of the relationship between the legislature, the executive and the judiciary. It is also an integral part of the functioning of the courts and therefore requires some protection.

This paper looks at the relationship between the political branches, being the legislature and the executive on the one hand, and the judiciary on the other. In order to explore the concept of judicial independence, the doctrine of the separation of powers ought to be discussed. The introductory part of this paper will be dedicated to uncovering the origins of the doctrine of the separation of powers along with its modern day application within South Africa and other jurisdictions across the world.

The core of this paper analyses whether there are any political pressures or influences on the judiciary and on judges when they make decisions. In order to assist with the above, five judgments of the Constitutional Court and the Supreme Court of Appeal will be discussed and an assessment of the reasoning of the courts' decisions will be made. As will be discussed, although the decisions appear legally justiciable, politics arguably remains an underlying factor in the judicial decision-making process and as will be argued the courts have over the years created mechanisms of protecting their institutional security.

The latter part of this paper focuses on the Judicial Service Commission and the consequences of the involvement of the political branches within the judicial appointment-making process. An assessment of the present relationship between the political branches and the judiciary will also be made in this paper with a particular focus on the relationship between the executive and the judiciary. Recent case law and public discussions will be used to illustrate where this relationship may stand and whether it is possibly strained. This paper is centered around the principle of judicial independence and how courts are able to maintain their institutional security along with their relationship with the political branches.



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CHAPTER ONE

Introduction

1.1 Introduction

Some of the many decisions handed down by the South African Constitutional Court since its inception in 1995 have earned judicial applause from legal scholars across the world.¹ Certainly,² judicial independence is crucial in relation to the legislative and the executive authority which both take their cue from the Constitution as the ultimate overarching authority that determines their terms of reference. These terms of reference include the mutual obligation to uphold human rights, build a society based on non-racialism and non-sexism, and uphold the supremacy of the Constitution and the rule of law.³ According to section 165(2) and (3) of the Constitution, courts are independent from the organs of state⁴ and no one can interfere with how they function. Moreover, courts are subject only to the Constitution. The concepts of judicial independence and judicial appointments will be discussed in the chapters to follow. This will be in the context of the involvement of the organs of state within the structures responsible for the appointment and conduct of judicial officers.

The overriding concern addressed by this dissertation is how the judiciary balances its institutional security⁵ and its relationship with the legislative and the executive branch, with particular reference to the latter as exemplified in the following landmark cases: *Two Democratic Alliance*⁶ cases, as well as *Glenister*,⁷ *Justice Alliance of SA*⁸ and *Opposition to Urban Tolling Alliance*.⁹ The legal reasoning in each instance and the consequent judgment will

¹ *Constitution of the Republic of South Africa*, 1996 hereafter referred to as the Constitution.

² *Ibid* section 165(1): The judicial authority of the Republic vests in the courts.

³ *Ibid* section 1.

⁴ *Ibid* section 239: "organ of state" means - (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution - (i) exercising power or performing a function in terms of the Constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

⁵ See T Roux "Principle and Pragmatism on the Constitutional Court of South Africa" (2009) 7 *ICON* 106-138, 108 - where Roux defines institutional security as "the court's capacity to resist real or threatened attacks on its independence".

⁶ *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) BCLR 291(SCA); *Democratic Alliance v President of the RSA and others* 2013 (1) SA 248 (CC).

⁷ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

⁸ *Justice Alliance of SA v President of the RSA and Others* 2011 (10) BCLR 1017 (CC).

⁹ *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC).



be reviewed with particular reference to the involvement of the legislative and executive branches as noteworthy elements. The judgments are especially relevant because of the fact that they are recent decisions. They could also indicate how the Constitutional Court and the Supreme Court of Appeal make decisions of a broad nature in cases that are politically sensitive or involve the political branches, yet still stay within bounds acceptable to the political branches.

Undue executive influence on judicial appointments is a source of concern that judicial officers may be constrained to defer unduly to executive wishes lest their career prospects be harmed by raising executive ire. A judge's adjudicative track record should be sufficient to assess his/her Bench fitness, but the assessment may be skewed by political concerns gaining excessive traction. An assessment of the potential effect of such traction on the institutional security of the judiciary follows.

Since starting at law school, I have always wondered how politics affected judges and their judgments in court. It transpires that despite legislative protection the judiciary is subject to significant influence as regards judicial appointments and conduct, to the extent that judicial decisions are not exempt from influence, however subtly. Nevertheless it is patent from the Constitutional Court's jurisprudence that it has remained relatively untouched by such inroads. However, relations between the judiciary and the other branches have to be maintained on an even keel without compromising the integrity of the judiciary or incurring undue displeasure from the other branches. The doctrine of separation of powers and its implications will be discussed in the next chapter.

The aim of this dissertation is to validate the view that although the Constitutional Court is praised for its realisation and protection of the Bill of Rights and the Constitution, it is still compelled to take cognisance of its relationship with the other branches of government while yet meeting the obligation to preserve its own integrity. The question whether the judiciary succumbs to political pressure and the resultant threat, if any, to the independence and impartiality of judicial officers will also be discussed.



While chapter one introduces the topic of this dissertation, chapter two will discuss the origins of the separation of powers, as well as its developments and application in South Africa and other jurisdictions. Chapter two will also have an introductory discussion on judicial independence. Chapter three will focus on the five cases mentioned above, the institutional security of the judiciary, and the political branches' (specifically the executive) influence on the judicial decision-making process. Chapter four will centre on judicial independence as well as the composition of the JSC and the influence of the political branches on the appointment of judges. Chapter five will contain the conclusion with due attention to the findings noted in the body of the dissertation.

CHAPTER TWO

The Origins of and South Africa's Approach to the Separation of Powers

2.1 Introduction

This chapter contains a review of how the doctrine of separation of powers originated and flourished in South Africa and other jurisdictions, for example the United States of America (USA), France, Canada and Botswana. The roles of the legislature, the executive and the judiciary in relation to the doctrine of the separation of powers and the checks and balances applied to safeguard the integrity of the judiciary in South Africa will be explored with a view to proceeding to a discussion of judicial independence.

2.2 Origins of the doctrine of separation of powers

The origins of the doctrine and consequent developments will be discussed in this part of the chapter.

The concept of separation of powers refers to three distinct branches of government: the legislature, the executive and the judiciary, each having a distinct set of powers, functions and responsibilities. The legislature has the power to make, repeal and amend laws while the executive enforces and implements them. The judiciary interprets the laws and resolves consequent disputes about them. The doctrine asserts institutional and functional independence by dividing government functions into three branches, each with inalienably autonomous decision-making authority in its own right.¹ This is a defining feature of the doctrine.

In his second treatise on Civil Government English Philosopher, John Locke (1632-1704) stated:

“It may be too great a temptation to human frailty, apt to grasp at Powers, for the same Persons who have the power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage.”²

¹ See O'Regan “Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution” (2005) 8 *PELJ* 120-150.

² Locke Second treatise, XII, para 143, as quoted in *Vile Constitutionalism and the Separation of Powers* 2 ed (1967) 68. <<http://oll.libertyfund.org/titles/677>> (last accessed on 12 April 2014).

Locke is saying explicitly that ‘human frailty’ requires a separation between the function of making and the function of implementing the law, and he is therefore credited with being the progenitor of the doctrine of separation of powers.

French philosopher, Charles de Secondat, Baron de La Brède et de Montesquieu (1689 – 1755), however is considered the true inceptor of the modern concept of the principle of the separation of powers. Montesquieu contends that in order to avoid any abuses of power, the functions of the executive and the judicial cannot be assigned to the same body.³ A clear distinction was therefore made between legislative, executive and judicial functions, and the branches thus created had distinctive powers exclusive to themselves.

The separation of powers doctrine developed from quite a particular context. During the eighteenth century, European monarchs controlled all the powers and functions of the state, and this absolute power needed to be limited somehow.⁴ Assigning state power to branches of government rather than monarchs was considered the solution to absolutism⁵ since it curbed absolute power embodied in a single body or personage and dispersed it across several systems, each constituting a separate branch of government as noted. The doctrine came at a time when public sentiment was favourably disposed towards separation of powers, with the result that it exerted a significant influence on constitutions drawn up around the world at the time.⁶

The USA not only implemented the doctrine but adopted measures (referred to as checks and balances) to ensure that the branches did not usurp each other’s terms of reference or abuse their powers in any way.⁷ Safeguards included powers given to branches to monitor each other’s actions for unconstitutionality,⁸ thus allowing them to encroach on each other’s terrain to some extent and proving thereby that separation can never be complete in what is after all a unitary

³ Montesquieu *Esprit des Lois* (1748) Edition published in Parid in 1877, 11.6. Title of the chapter is “De la constitution d’ Angleterre.” See Mojapelo (note 10 below) at 37.

⁴ Currie & de Waal *The New Constitutional and Administrative Law* 1 ed (2001) 91.

⁵ Ibid.

⁶ Noticeably the French Declaration of the Rights of Man (1789) and the United States of America Constitution (1787).

⁷ Currie & De Waal (note 4 above) at 18.

⁸ Ibid.

system.⁹ Some relevant aspects of the checks and balances applicable in South African law will be discussed in paragraph 2.8 below.

Four principles of the doctrine of separation of powers can be attributed to Montesquieu and the developments following in his wake:¹⁰ (1) The *trias politica* principle necessitated the formal distinction between the legislature, the executive and the judiciary.¹¹ (2) Separate *personnel* meant that in order to avoid any abuse of power, the functions of the different government branches had to be administered by different staff.¹² (3) Separate *functions* meant that functions had to be crafted to suit the terms of reference of a particular branch and were not allowed to be interchangeable, duplicated or to overlap.¹³ (4) *Checks and balances* in order to ensure that the three branches were able to monitor each other and ensure that there was a proper distribution of governmental power according to the functions of each branch.¹⁴ This concept enabled the governmental branches to encroach on each other's terrain by monitoring one another's powers.

2.3 Foreign models of the separation of powers doctrine

Application of the separation of powers doctrine across various states is explored here in light of the variability of application, which is really the object of the exercise here. The countries that will be used to illustrate the variations of the doctrine are the USA, France, Canada and Botswana. The application of the doctrine in South Africa will conclude this discussion. Each country is used as an example for different reasons. The USA has a separation of powers that is not really similar to South Africa, although the checks and balances are largely alike. France has a rather unique adaptation of the separation of powers doctrine, and it was chosen to display the wide diversification of the doctrine since its inception. Canada is an illustration of how the separation of powers can be altered over time, while Botswana will be an example of the application of the doctrine in a comparable African country. The similarities and differences between the various jurisdictions chosen will be aired.

⁹ *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para 108-109.

¹⁰ Mojapelo "The doctrine of separation of powers (a South African perspective)" April 2013 *Advocate* 37-46, 38 <http://www.sabar.co.za/law_journals/2013/april/2013-april-vol026-no1-pp37-46.pdf> (last accessed on 12 April 2014).

¹¹ *Ibid* 38.

¹² *Ibid*.

¹³ *Ibid*.

¹⁴ *Ibid*.

2.4 The United States of America

Separation of powers is embodied in the Constitution of the United States of America passed in 1787.¹⁵ Strict oversight is maintained to ensure separation of the legislature and executive, with particular reference to personnel.¹⁶ However, mutual checks and balances allow some encroachment among branches. Various examples of these checks and balances are as follows: The executive is entrusted with the legislative power to repeal or amend executive agency statutes, but Congress, as the legislative branch comprising Senate and the House of Representatives can control this legislative power.¹⁷ Executive agency statutes are enacted on the initiative of the President in order to create administrative agencies that develop and oversee the administration and enforcement of executive statutes and orders.¹⁸

The Vice-President in his capacity as president of the Senate is the only member of the executive branch who is allowed to sit in Congress and cast a vote,¹⁹ provided such vote is exercised only when the House is equally divided on a particular issue.²⁰ The President and other members of the executive do not sit and consequently do not vote in Congress.²¹ Again, Senate is involved in executive actions because it is entitled to approve treaties and the appointments of senior officials (including judicial officers) made by the President,²² and because Congress is authorised to create and regulate federal and lower courts.²³ Furthermore, impeachment proceedings can only be tried by Senate,²⁴ which can remove or disqualify the President, Vice President and all civil Officers of the USA²⁵ who hold or enjoy an office of honour, trust or profit.²⁶ The judicial branch has the power to ensure compliance with the constitutional provisions and can declare

¹⁵ The Constitution of the USA (note 6 above), Article I confers law-making powers on Congress (Senate and House of Representatives), Article II grants the President of the USA executive powers, and Article III grants judicial power to the courts.

¹⁶ Ibid Article I, section 6, clause 2.

¹⁷ Fombad "The Separation of Powers and Constitutionalism in Africa: The Case of Botswana" (2005) 25 *Boston College Third World Law Journal* 301-342, 311.

¹⁸ Justia Website: <<https://www.justia.com/administrative-law/executive-agencies/>> (last accessed on 18 February 2016).

¹⁹ United States Constitution (note 6 above) Article I, Section 3, clause 4.

²⁰ Ibid.

²¹ Ibid Article I, Section 6, clause 2.

²² Ibid Article II, Section 2, clause 2.

²³ Ibid Article III, Section 1.

²⁴ Ibid Article I, Section 3, clause 6.

²⁵ Ibid Article II, Section 4.

²⁶ Ibid Article I, Section 3, clause 7.

statutory enactments unconstitutional.²⁷ Noteworthy though, is that judicial decisions can be nullified by Congress through legislative resolutions and amendments of the law.²⁸ This will effectively set aside or cancel the judicial decisions.

2.5 France

France deems the doctrine integral to its constitutional order, but implementation of the principle is unconventional. There is close collaboration between the legislature and executive, with elements of parliamentarianism²⁹ in that government is collectively responsible to parliament,³⁰ besides which the executive has two heads, a President and a Prime Minister.³¹ Remarkably, the legislative competence of the legislature is defined by the Constitution, while the executive is free to legislate on all other issues, making surplus legislation a power of the executive.³² According to Fombad the autonomy of the judiciary is to some extent subordinate to the executive³³ because unlike many other jurisdictions, it is incumbent on the President, rather than the Chief Justice, to preserve the independence of the judiciary.³⁴ Furthermore, the country's President also heads the High Council of the Judiciary, which is the body that recommends judicial appointments and enforces judicial discipline.³⁵ Moreover, the constitutionality of legislation is determined by the Constitutional Council, which is a quasi-administrative rather than a judicial body.³⁶ Instead of courts in the general sense of the word, citizens that are disgruntled by government actions can seek redress from administrative courts, which have limited legislative, executive and judicial functions.³⁷ Curbs on the judiciary are a leftover from public skepticism incurred during the French Revolution.³⁸

²⁷ *Marbury v Madison* 5 U.S 137 (1803) Established the Supreme Court's power of judicial review and become a widely accepted concept. The court found that any legislative Act that is in conflict with the constitution is invalid

²⁸ Fombad (note 17 above) at 312.

²⁹ *Ibid* 316.

³⁰ The French Constitution (1958), Article 34-40, see *supra* note 17 at 316.

³¹ *Ibid* Article 8.

³² *Ibid* Article 34, 37-39 says Prime Minister also has right to introduce bills to parliament on behalf of government.

³³ Fombad (note 17 above) at 317-318.

³⁴ French Constitution (note 30 above) at Article 64.

³⁵ *Ibid* Article 65.

³⁶ Fombad (note 17 above) at 317.

³⁷ *Ibid*.

³⁸ See Article 13 of The Decree of August 16-24, 1790 which states that "Judges will not be allowed, under penalty of forfeiture, to disturb in any manner whatsoever, the activities of the administrative corps, nor to summon before them the administrators, concerning their functions." (this law is still in force) As quoted in Fombad (note 17 above) at 317.

France's lack of faith in the judiciary has left it subservient to the legislative and executive branches (attested by relief sought from administrative courts, and testing of statutory constitutionality by a Constitutional Council). According to Fombad, France has a form of "parliamentary democracy" which does not uphold a strict separation between the legislature and executive, although the executive is regarded as being the more dominant body.³⁹ Fombad concludes that the passivity of the judiciary invites the view that the legislature and the executive are the chief actors in the triad of powers.⁴⁰

2.6 Canada

In Canada the doctrine of the separation of powers is recognized. Initially however, there was no follow-through on provincial or federal levels⁴¹ because the delegation of legislation from the legislature to the executive was largely acceptable.⁴² The executive's exercise of judicial functions (in line with section 96 of the British North America Act 1867) and the judiciary's practice of both non-judicial and judicial functions were also accepted.⁴³ However, as various developments in the principles of the doctrine and the significance of judicial independence became more relevant, courts could assist aggrieved parties where governmental power had infringed on their rights.⁴⁴ These developments introduced some balance of power between the branches of the state which limited the legislature and the executive's means of applying political pressure on the judiciary.⁴⁵ The judiciary is able to test government actions against the Constitution without necessarily being dissuaded by the political sensitivity of the cases before it.⁴⁶

2.7 Botswana

For an African perspective it is instructive to compare similarities and differences between Botswana and South Africa. In Botswana the separation of powers is incorporated in all

³⁹ Fombad (note 17 above) at 318.

⁴⁰ Ibid.

⁴¹ Mojapelo (note 10 above) at 45.

⁴² Venter *Constitutional Comparison* 1 ed (2000) 219, see Mojapelo (note 10 above) at 45.

⁴³ Ibid.

⁴⁴ Section 24(1) of the Canadian Charter of Rights and Freedoms to the Constitution (1982).

⁴⁵ Venter (note 42 above) at 220-221.

⁴⁶ Ibid 219.



governmental branches.⁴⁷ Elements of checks and balances are a constitutional requirement that is realised by mixing the governmental branches functions (see below).⁴⁸ The legislature and executive are indissolubly linked since a third of MPs are members of Cabinet who are appointed by the President in virtue of the principle of collective responsibility (that is collective accountability) that obtains in that country.⁴⁹ The President of Botswana has voting and speaking powers in Parliament, and delegated legislation far outweighs the normal legislative process, which means that law-making is intrinsic to the executive function⁵⁰ and attests to the executive control of the legislature.⁵¹

With regard to the judiciary, the President appoints the highest judicial officers (Chief Justice and President of the Court of Appeal) with no obligation to consult the Judicial Service Commission (JSC).⁵² However, judges are financially independent because their removal depends on the JSC.⁵³ Fombad argues that independence does not extend to operation in complete isolation since functions assigned to the judiciary may be performed by other branches in some instances.⁵⁴ This “mixing of functions” is discussed below.

Checks and balances are applied by swapping functions between branches. The executive can exercise legislative functions through delegated legislation (the number of which surpasses legislation passed by parliament),⁵⁵ and members of the executive account to the legislature.⁵⁶ The legislature can enact laws which regulate the judiciary just as the judiciary can abrogate unconstitutional legislation.⁵⁷ Moreover, the legislature can authorise the judiciary to legislate in specific instances, just as the legislature can legislate in matters where there is legal

⁴⁷ The Constitution of Botswana (1966), section 30-56 (the executive), section 57-94 (the legislature), section 95-107 (the judiciary).

⁴⁸ Fombad (note 17 above) at 319-340.

⁴⁹ Ibid 320-321, see also section 50(1) of the Constitution of Botswana (note 47 above) on cabinet members being accountable to parliament.

⁵⁰ Ibid 321.

⁵¹ Ibid 322.

⁵² Ibid 328.

⁵³ Ibid 328-329.

⁵⁴ Ibid 327.

⁵⁵ Ibid 322.

⁵⁶ Ibid 325.

⁵⁷ Ibid 336-337.

uncertainty.⁵⁸ The executive can also exercise judicial functions through the presidential office which may commute sentences or even issue a full pardon.⁵⁹ The judiciary can also attend to executive matters through the Chief Justice, who is authorised to oversee legal compliance in electoral matters, including presidential elections.⁶⁰ This mixing of functions between the branches ensures adequate separation to safeguard a concentration of power by one of the branches.⁶¹ According to Fombad, courts regularly invalidate legislative and executive actions which are irregular or illegal, and it is this strong judicial freedom that differentiates Botswana from many of the African jurisdictions that apply the French based model of the separation of powers, which places a limit on judicial independence.⁶²

2.8 The South African model of the separation of powers doctrine

Parliament held complete legislative sway before the present political dispensation.⁶³ The legislature could make and alter laws as it deemed fit. Indeed, “Parliamentary supremacy meant that there could be no restrictions on the *substance* of any legislation that Parliament may pass.”⁶⁴ Although lawmaking was subject to procedural strictures,⁶⁵ courts in South Africa had hardly any powers of judicial review. As noted in 1903 by Chief Justice Innes, if a public body was authorised by law to make particular decisions, then courts could only intervene where the body concerned had acted in flagrant disregard of the authorising legislation, amounting to gross irregularity and dereliction of duty.⁶⁶ As noted, judicial review was restricted,⁶⁷ and courts could only intervene on procedural grounds without reference to substantive issues such as why legislation was created or amended. Ultimately decisions of public bodies were subject to review under the common law principle of *ultra vires*, whereby administrative actions beyond the powers and scope of the operative law entitled the courts to exercise powers of review.⁶⁸

⁵⁸ Ibid 339-340.

⁵⁹ Botswana Constitution (note 47 above) at section 53-55; see also Fombad (note 17 above) at 330.

⁶⁰ Ibid section 35, 38. See also Fombad (note 17 above) at 332.

⁶¹ Fombad (note 17 above) at 341.

⁶² Ibid.

⁶³ Currie & de Waal (note 4 above) at 45.

⁶⁴ Ibid 47.

⁶⁵ Ibid.

⁶⁶ *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111, 115.

⁶⁷ Ibid.

⁶⁸ Hoexter *Administrative Law in South Africa* 2 ed (2012) 115.

After the above-mentioned transition from parliamentary sovereignty to constitutional supremacy in 1994 the separation of powers was introduced together with the system of checks and balances enabling branches to monitor each other's actions for compliance with the provisions of the Constitution.⁶⁹ As discussed below and according to Chief Justice Langa, “[t]he Court has a primary role in safeguarding the rule of law and the supremacy of the Constitution.”⁷⁰

In South Africa the President of the Republic appoints members of the executive (Cabinet) from members of the National Assembly.⁷¹ The President's membership of the National Assembly ceases with his election by the National Assembly from its members, even though he is allowed to appear and speak in the legislature.⁷² By contrast the members of Cabinet remain part of the legislature. The reason why membership of legislature and executive coincides in this instance is that Cabinet has a responsibility towards the legislature. This is a mechanism of checks and balances that the legislature has *vis-à-vis* the executive and according to the provisions of the Constitution:

“Members of Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.⁷³ [They] must provide Parliament with full and regular reports concerning matters under their control.”⁷⁴

It is therefore made easier for this mechanism of checks and balances to be properly enforced if the people that are directly responsible to the legislature are actual members of that body. Close ties therefore subsist between legislature and executive without clear limits to demarcate the separation between the two branches.

Mingling of powers is not a feature of the judiciary, which has to function according to the provisions of the Constitution without let or hindrance from the political branches.⁷⁵ The

⁶⁹ Legislature – makes laws, Executive – implements laws, Judiciary – interprets laws.

⁷⁰ Langa “The Separation of Powers” in *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006) (ed Klaaren) 27-34, 29.

⁷¹ The Constitution of the Republic of South Africa (1996), section 86(1). (Hereafter referred to as the Constitution)

⁷² Ibid section 87.

⁷³ Ibid section 92(2).

⁷⁴ Ibid section 92(3) (b).

⁷⁵ Ibid section 165 (2) and (3).

Constitution also specifically instructs that the protection and assistance of courts through legislative means is essential in order to ensure the dignity, impartiality, effectiveness, accessibility and independence of the judiciary.⁷⁶ Membership of the judiciary cannot therefore coincide with membership of another branch of government. The Constitutional Court has indicated the crucial significance of an independent judiciary, and has also dealt with the relationship between the executive and legislature.⁷⁷ The Court discussed the relationship between the political branches by dealing with the delegation of power by the legislature to the executive and finding it not only lawful in particular instances, but necessary for efficiency and implementing primary legislation that is enacted by the Legislature.⁷⁸

The Constitution proclaims adherence to the separation of powers, with inclusion of checks and balances, as follows:

(a) Chapter four essentially deals with the legislative authority vested in Parliament, which consists of two bodies, the National Assembly together with the National Council of Provinces. The National Assembly represents the citizens who have participated in the general elections while the National Council of Provinces represents the nine provinces of the Republic.⁷⁹ Sections 43 and 44 state the functions of the legislature, foremost being enactment of legislation.

(b) Chapters five, six and seven deal with the executive branch comprising three levels of government. First is the national executive, headed by the President⁸⁰ as head of state (section 84) and head of the executive (section 85), as well as his appointment and assignment of powers of ministers and deputies. Chapters six and seven cover the provincial executive and local government, respectively. The primary functions of the executive are listed under section 85(2) and include the implementation of legislation.

(c) Chapter eight deals with the judiciary, emphasising judicial independence and specifying the appointment of judicial officers, the powers of the courts in constitutional matters, as well as the powers of the National Prosecuting Authority (NPA).⁸¹ The primary functions of each of the

⁷⁶ Ibid section 165 (4).

⁷⁷ See *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877

⁷⁸ Ibid para 62.

⁷⁹ Constitution (note 71 above) at section 103.

⁸⁰ Ibid Chapter 5.

⁸¹ Ibid section 165-180.

courts comprising the judiciary are indicated in sections 167 to 173. These include definitive assessment of the constitutionality of acts of Parliament and adjudicating attendant disputes.

Only some of the checks and balances provided by the Constitution are discussed here. It must first be noted that the legislature has the power to amend the Constitution and pass legislation,⁸² thereby conferring its constitutive powers on the executive and the judiciary. Consequently, the legislature can overturn judicial decisions by changing the law. The nature of the membership of the Judicial Service Commission (JSC), which is tasked with appointing and regulating the conduct of judges, as well as determining the structure of the Bench,⁸³ is a check and balance analysed in the chapters to follow. The executive accounts for a further contingent of the JSC.⁸⁴ The removal of judges is supervised by the legislature. If the JSC considers the capacity of a judge deficient in terms of section 177 of the Constitution, or if he/she is found “grossly incompetent or is guilty of gross misconduct” by the same token,⁸⁵ then the legislature can decide in virtue of a two-thirds majority that the judge should be removed, whereupon the President must set the seal and duly remove the official.⁸⁶ Removal of judges therefore depends on concerted action by the President and the executive as noted. The constitutionality of legislative and executive decisions and actions is controlled by judicial review before a court of law.⁸⁷ This is discussed below.

The application of checks and balances, through overseeing each other’s powers, render intrusion by the branches into each other’s terrain inevitable. Through exercising checks and balances, they are able to ensure mutual compliance amongst each other. Judicial review is among the most critical checks and balances at the disposal of the judiciary to curb unconstitutionality of legislation and the conduct of the political branches, thereby protecting the integrity of the Bill of Rights and the provisions of the Constitution.⁸⁸ According to the Constitutional Court, “it is important that we bear in mind that there are functions that are properly the concern of the court and others that are properly the concern of the legislature. At times these functions may overlap.

⁸² Ibid section 44(1)(i) and (ii), read with section 44(2).

⁸³ Ibid section 178(1).

⁸⁴ Ibid (to be discussed further under Chapter four).

⁸⁵ Ibid section 177(1)(a).

⁸⁶ Ibid section 177(1)(b) and (2).

⁸⁷ Ibid section 172.

⁸⁸ Ibid section 172.

But the terrains are in the main separate, and should be kept separate.”⁸⁹ So although the principle of judicial review is firmly in place, it should still be read in line with the separation of powers doctrine which means that the legislature should be given an opportunity to legislate where necessary and courts should limit intrusion in areas that are reserved for political branches, unless such intrusion is warranted by the court’s duty to interpret and enforce the Constitution.⁹⁰

Though not an express condition in the Constitution of 1996 the principle of separation of powers was clearly enunciated in the Constitution of the Republic of South Africa, Act 200 of 1993 (the Interim Constitution) together with appropriate checks and balances,⁹¹ and the validity of the principle is by no means drawn into question by its absence in the express wording of the current Constitution, as confirmed by the Constitutional Court.⁹² As noted, separation of powers is widely applied in jurisdictions globally, but since the form is not invariant per definition its form is adapted to suit the relevant circumstances in each instance. In fact the Constitutional Court has acknowledged this variability⁹³ in its finding that:

“because of the different systems of checks and balances that exist in these countries, the relationship between the different branches of government and the power or influence that one branch of government has over the other, differs from one country to another.”⁹⁴

In democratic South Africa no governmental decision or action is completely beyond judicial review.⁹⁵ Therefore, the application of the separation of powers doctrine and the power of judicial review boils down to three fundamental requirements:

1. although courts need to guard against the abuse of power, they should still ensure their institutional integrity and the efficiency of the other two branches of the state;
2. competent execution of government powers require adequate protection; and
3. restriction of court intervention to justifiable circumstances and substantial legal grounds.

⁸⁹ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell and Others* 1996 (1) SA 984 (CC) para 183. As quoted in Langa (note 68 above) at 32.

⁹⁰ T Roux “Principle and Pragmatism on the Constitutional Court of South Africa” (2009) 7 *ICON* 106-138, 121-122.

⁹¹ Section 4 of the Constitution of the Republic of South Africa, Act 200 of 1993.

⁹² *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) at para 22.

⁹³ *Certification* case (note 9 above) at para 108-109.

⁹⁴ *Ibid.*

⁹⁵ Constitution (note 71 above) at section 172.

As noted, separation of powers is not a rigid doctrine and its application varies with jurisdiction. Its application in South Africa is not rigid either, but separation remains the overriding principle in order to preserve the functional integrity of the branches. The Constitutional Court supervises the separation of powers and adherence to provisions of the Constitution,⁹⁶ in that “[o]nly the Constitutional Court may decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs.”⁹⁷

2.9 What is Judicial Independence?

Judicial independence as a factor relating to judicial review will be discussed at some length with reference to section 165 of the Constitution) along with inroads made on judicial independence by judicial officers.

The judiciary must be independent so that it can adjudicate disputes in law and fulfil its guardianship of the Constitution.⁹⁸ Section 165 of the Constitution reads as follows:

“(1) The judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. (3) No person or organ of state may interfere with the functioning of the courts. (4) Organs of state through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.”

Courts are therefore exempt from interference from any quarter,⁹⁹ in fact, as noted by Hoexter and Olivier, the judiciary should have institutional, administrative, substantive and personal independence from the legislature and the executive.¹⁰⁰

Institutional independence relates to how the judiciary should be able to protect itself collectively as an institution from the political branches.¹⁰¹ It can be associated with financial and

⁹⁶ O’Regan (note 1 above) at 129.

⁹⁷ Constitution (note 71 above) at section 167(4) (a).

⁹⁸ Hoexter & Olivier *The Judiciary in South Africa* (2014) 102.

⁹⁹ Constitution (note 71 above) at section 165(3).

¹⁰⁰ Hoexter & Olivier (note 98 above) at 102.

¹⁰¹ *Ibid* 103.



administrative autonomy (like funding, and the management and administration of the courts).¹⁰² According to Shimon Shetreet, “It expresses the idea that the judiciary should in no way be subject to the control of any other person or institution in its day-to-day operations.”¹⁰³ Substantive independence requires absence of influence from any source on the decisions and performance of judicial functions of the judicial officer.¹⁰⁴ Security of remuneration, tenure and conditions of service are required to guarantee judges’ personal independence.¹⁰⁵

The following interpretation of judicial independence by Read is appropriate. He states:

“The meaning of this independence is, in essence, that judges and magistrates are free from executive or legislative interference or other improper influences in deciding cases; but it also requires that the courts are accessible to the people...; that judges and magistrates alone are free to manage the courts, including allocation of cases; that the judiciary enjoys sufficient resources, within national economic constraints, to deliver timely and effective justice, including an adequate judicial establishment and an effective support service controlled by registrars; that the judicial role is respected by the people and particularly by their rulers; that judgments are obeyed; and that the state does not establish rival tribunals devoid of proper judicial safeguards and procedures. The fruits of judicial independence will then be seen in the quality of justice administered; in upholding the constitution and its values, in protecting human rights and in maintaining the balance between the individual and the state.”¹⁰⁶

A judge’s behaviour should in no way create the impression that it is calculated to undermine the independence of the judiciary. This is exemplified by Read as “collaboration between judges and public authorities; making statements which give the impression of bias; serving in politically sensitive capacities; and... [continuously delaying when] adjudicating on matters which involve the executive.”¹⁰⁷ Instead, judges are required to have opinions and craft decisions that are impartial and based on the facts and law before them.¹⁰⁸ Read argues that if judges are unable to

¹⁰² Ibid.

¹⁰³ Ibid. See also Shetreet “Judicial independence and accountability: Core values in liberal democracies” in *Judiciaries in Comparative Perspective* (2011) (ed Lee) 3 at 16.

¹⁰⁴ Ibid 102-103.

¹⁰⁵ Ibid 102.

¹⁰⁶ Read “The Constitution, Parliament and the Courts: Towards a Commonwealth Model” in *Parliamentary Supremacy and Judicial independence* (1999) (eds Hatchard & Slinn) at 36.

¹⁰⁷ Ibid 47.

¹⁰⁸ Ibid.

display complete impartiality and neutrality they should “at least [have] the ability to detect and discount such feelings so that they do not becloud the fairness of the judgment.”¹⁰⁹

2.10 Conclusion

The doctrine of separation of powers has undergone various evolutions and interpretations since its inception. Varying forms of application in different jurisdictions is endorsed by the Constitutional Court. As discussed, besides adherence to the principle, checks and balances are applied in South Africa. Moreover, under the current order where the Constitution is the supreme law of the country, the courts are obliged to honour that law and secure compliance with its provisions.

Judicial independence becomes an essential element in this context, as it allows the courts to perform their functions effectively, even where an organ of state may be one of the litigating parties. As discussed above, there are various types of independence where judicial powers may be encroached upon. Consequently, it is ironic that protective measures against such encroachment must come from the organs of state. Thus checks and balances demonstrate that, despite the principle of separate functions, the object, ultimately, is to serve a united state governed with the same overarching constitutional values. These checks and balances ensure that the state branches serve with the common goal of a proper application of governmental powers. The application and implications of judicial independence warrant further exploration in chapter four.

¹⁰⁹ Ibid 48.

CHAPTER THREE

The Politics of Judicial Decisions

3.1 Introduction

The subject at issue here is institutional security and its protection by the courts, with particular reference to five politically controversial judgments emanating from South Africa's superior courts. The judgments and legal reasoning in each instance will be analysed for the presence of political (executive) pressure, or the extent to which politics influence judges' decisions, that is, whether and to what extent politics affect the outcome of cases. Could a judicial decision that seems consistent with the Constitution nevertheless harbour a political consideration ('playing to the gallery') that cannot be pinpointed literally yet takes a toll in that judges are aware of it and shrink intuitively from jeopardising the institutional security of the judiciary by 'stepping on political toes' so to speak, that is, they tread warily where they should step in more boldly? Do politics take a toll on judges' decisions? These considerations will be explored below.

3.2 The weakness of the judiciary and institutional security

Roux describes institutional security as the courts' ability to survive and resist a real or threatening attack by the political branches on their independence.¹ It also includes the willingness of the political branches to respect court decisions.² According to Roux survival depends on the frequency of attack and the response mounted by the Constitutional Court and other political actors.³ A quick glance at section 165(4) of the Constitution reveals the dependent nature of the judiciary on the political branches. The provision states 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." Malan argues that the fact that the political branches are required to assist the judiciary means that without such assistance the functions of the judiciary will collapse and court orders will become mere

¹ T Roux "Principle and Pragmatism on the Constitutional Court of South Africa" (2009) 7 *ICON* 106-138, 108.

² *Ibid.*

³ *Ibid.*

“unfulfilled judicial wishes.”⁴ Consequently, continues Malan, legal principle alone cannot suffice and must be shored up by strategic initiative, as will be shown later in this chapter.⁵

According to Malan:

“The inference can hardly be resisted that in order to account for the judiciary’s dependence, the courts must always, specifically when dealing with politically charged matters, heed the potential negative reaction of the ruling party in the legislature and the executive, and also of a disagreeing public. It must go about such situations very carefully and very tactfully to ensure the goodwill, protection and assistance of the political branches. It must also guard against jeopardising its own institutional security and avoid antagonising the political branches. It cannot afford to forfeit their assistance and support, on which it is so vitally dependent...”⁶

Malan notes that since the judiciary is inevitably exposed to politics it must be thoroughly cognisant of the political landscape and dynamics, and the attendant risks for the judiciary⁷, failing which judgments that disregard such circumstances may be rejected by the political branches and leave the judiciary at a loss to remedy the retaliatory non-compliance.⁸

Malan observes that despite its powers of judicial review the judiciary is critically dependent on the other branches and on society⁹ Malan notes further that the judiciary “is appointed and financed by the political branches, devoid of its own resources and dependent upon the goodwill and cooperation of the legislature, executive, state administration and the public in general to give effect to its rulings.”¹⁰ The relationship between the executive and the judiciary will be further explored below under paragraph 3.6.

⁴ Malan “Reassessing Judicial Independence and Impartiality against the backdrop of judicial appointments in South Africa” *PELJ* 2014 (17) 5 1965-2042, 1986.

⁵ *Ibid* 1987.

⁶ *Ibid* 1986.

⁷ *Ibid* 1989, 1990.

⁸ *Ibid* 1990.

⁹ *Ibid* 1985.

¹⁰ *Ibid*.



3.3 How does the Constitutional Court protect its institutional security?

Since it is paramount for the Constitutional Court to be able to protect itself against possible inroads on its independence it must defend its institutional security.¹¹ The issue is discussed below. As argued in this dissertation, judicial decisions must always stay within a framework that is acceptable to the political branches in order to protect judicial independence and shield institutional security. This is to say that in order to protect itself, judicial decisions are not meant to disrupt the fundamental policies of the ruling party. The three branches must take account of each other and watch over each other's interests with appropriate checks and balance, so courts must be alert to the possible consequences of judicial decisions for their independence and institutional security.¹² So, how does the judiciary protect its institutional security?

Roux mentions the following mechanisms in this regard:¹³

1. Separation of powers must be applied circumspectly to help the Constitutional Court to decide whether to adjudicate primarily for institutional security or on legal principles.¹⁴ It can use the doctrine to justify an approach based on legal principles, or it can seek to accommodate the Constitutional Court's relationship with the political branches if that relationship is directly implicated.¹⁵ The doctrine can therefore be used to "minimize the impact of these cases on its institutional security."¹⁶
2. Balancing tests can be used on a case-by-case basis to safeguard unpredictability of future cases concerning the same issue, thus affecting the opportunity to weigh the risk to institutional security in each instance.¹⁷
3. Regardless of powers of judicial review the Court must maintain standards that display due awareness of political significance¹⁸ so that review standards can be adjusted for flexibility in relating to the political branches.¹⁹

¹¹ Roux (note 1 above) at 108.

¹² Ibid.

¹³ Ibid 117.

¹⁴ Ibid 128.

¹⁵ Ibid 138.

¹⁶ Ibid 117.

¹⁷ Ibid 135.

¹⁸ Ibid 116-117.

¹⁹ Ibid 136. Roux uses the Constitutional Court's rejection of the minimum core rule in the socio-economic cases of *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) and *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC).



4. Probity of decisions based on legal principle will win public support in case threats from the political branches occur.²⁰

New democracies may be well-advised to take decisions that compromise on legal principle in the interest of protecting their institutional security rather than risking a hostile reception and possible attack from the political branches.²¹ Roux notes that “it would seem to make sense for a court to trade off some gains in legal legitimacy in exchange for protecting its institutional security.”²² He states the following:

“a constitutional court in a new democracy should assess the likely impact of its decision on its institutional security and then decide the case in a way that optimally balanced its need for legal legitimacy with its ability to continue functioning.”²³

3.4 Five controversial judgments handed down by the Constitutional Court and the Supreme Court of Appeal

As noted, five politically controversial judgments from South Africa’s superior courts are discussed below with reference to analysis of the court’s decision and rationale in each instance. As noted in Chapter one, the cases demonstrate how courts deal with politically sensitive matters without straying beyond bounds that are acceptable to the political branches, but nevertheless reach a legally acceptable solution.

1. *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)

In this decision, the Constitutional Court was split five in the majority judgment with four in the minority. I focus primarily on the majority decision of Deputy Chief Justice Moseneke and Justice Cameron. I first relay the facts of the case.

In 2001, the Directorate of Special Operations (DSO), commonly known as the Scorpions, was established within the National Prosecuting Authority (NPA) to add weight to the efforts of existing law enforcement agencies to combat organised crime. The role and functioning of the DSO gradually became controversial until the President appointed a commission of enquiry (the

²⁰ Ibid 110.

²¹ Ibid 116.

²² Ibid 110.

²³ Ibid 115.

Khampepe Commission) to investigate the mandate and establishment of the DSO. The Khampepe Commission duly found that the relationship between the DSO and the South African Police Service (SAPS) was ‘unhealthy’ and had to be dealt with, and further that the DSO should preferably remain with the NPA rather than move to the SAPS. The Khampepe Commission found that the existence of the DSO was just as relevant as the time when it was formed.²⁴

After the Commission was dissolved it was rumoured that Cabinet would take the matter further but instead dissolution of the DSO was recommended at the national conference of the ANC in Polokwane in 2007. By the end of 2008 bills to enable dissolution had been passed and by end January 2009, they became law. Specifically the laws were the National Prosecuting Authority Amendment Act²⁵ (NPA Amendment Act) and the South African Police Service Amendment Act²⁶ (SAPS Amendment Act), which dissolved the DSO and substituted it with the Directorate of Priority Crime Investigation (DPCI) to be located in the SAPS. In April 2009 Hugh Glenister brought an application to challenge the amendment Acts in the Western Cape High Court²⁷ questioning the constitutional validity of the two statutes. The High Court found the decision to proclaim the statutes rational,²⁸ but declared that it had no jurisdiction to consider the applicant’s challenges to the effect that in its enactment of the statutes Parliament had been remiss in meeting its constitutional obligations.²⁹ These obligations included Parliament’s duty to act reasonably and accountably; to respect and protect the values embodied in the Bill of Rights; to allow the public to participate in the legislative process; to respect its obligations under international treaties; to maintain an anti-corruption unit that is independent; and to grant the leeway for the NPA to exercise its functions with due diligence.³⁰

On appeal to the Constitutional Court the applicant (Glenister) contended that the change from the NPA to the SAPS was unconstitutional and irrational, and consequently it was in breach of

²⁴ IOL (5 May 2008) “Scorpions disbanding Bills should be tested” <<http://beta.iol.co.za/news/politics/scorpions-disbanding-bills-should-be-tested-399001>> (last accessed on 28 July 2015).

²⁵ Act 56 of 2008.

²⁶ Act 57 of 2008.

²⁷ *Glenister v The President of the Republic of South Africa and Others*, Case No 7798/09, 26 February 2010, Western Cape, Cape Town, unreported.

²⁸ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 15.

²⁹ *Ibid* para 14.

³⁰ *Ibid* para 17. See also *Glenister* (note 27 above) at para 13.

Parliament's constitutional obligations.³¹ The respondents, including the President, the Minister for Safety and Security, and the Minister of Justice, argued that the Constitution supported the statutes and that constitutionally there was nothing wrong with an anti-corruption body being situated within the SAPS.³² They further argued that the SAPS Amendment Act contained various safeguards that would ensure the independence of the DPCI and that the decision to establish the new body was rational, logical, connected to a legitimate purpose and consistent with the Constitution.³³ The argument of the Helen Suzman Foundation, which acted as *amicus curiae*, was that the statutes were in violation of the Republic's international obligations to establish an independent anti-corruption agency.³⁴

Therefore, the issues before the Constitutional Court involved the rationality of the statutes, whether they infringed the Bill of Rights, and their constitutionality regarding the powers and functioning of the NPA.³⁵ Briefly, the minority decision of Ncgobo CJ found that the establishment of the DPCI as a separate division of the SAPS was undoubtedly a legitimate government action that was rationally related to its purpose.³⁶ Regarding the independence of the DPCI, Ncgobo CJ also found that the type of independence required was not like that of the judiciary where the executive branch was not allowed to play any part in the functioning of the DPCI.³⁷ The DPCI could therefore not be fully independent but needed to be accountable.³⁸ The type of independence required was therefore "an adequate level of *structural and operational autonomy* secured through institutional and legal mechanisms aimed at preventing undue political interference."³⁹

By contrast the majority decision found that the following questions were at issue:⁴⁰

1. Does the Constitution require the state to establish an independent body to deal with organised crime and corruption?

³¹ Ibid.

³² Ibid para 19.

³³ Ibid para 19-20.

³⁴ Ibid para 18.

³⁵ Ibid para 54.

³⁶ Ibid para 58.

³⁷ Ibid para 124.

³⁸ Ibid para 122-123.

³⁹ Ibid para 121.

⁴⁰ Ibid para 163.

2. If so, does the DPCI meet the requirements of independence?

After the Court placed great emphasis on the corruption battle and the need to curtail it,⁴¹ it turned to South Africa's obligations under international law and found that the Republic was legally bound by ratified international agreements.⁴² It further found that the state's obligation under section 7(2) of the Constitution to respect, protect, promote and fulfil the Bill of Rights inescapably created a duty to produce efficient anticorruption mechanisms.⁴³ The Court then indicated that in fulfilling these section 7(2) obligations it would be unreasonable to expect the state to create a sufficiently independent and wholly effective anticorruption unit.⁴⁴ Instead, to be effective it would have to be extraneous to executive control⁴⁵ and would have to inspire public confidence to be deemed sufficiently independent.⁴⁶ The Court then proceeded to assess the independence of the DPCI.⁴⁷

Ultimately, the Court found the measures introduced as safeguards for the DPCI's protection less robust than those characterising its precursor, the DSO.⁴⁸ More specifically elements in its make-up raised doubts concerning the security of its independence.⁴⁹ First, unlike the DSO, employment security, especially for the head and top personnel, was by no means guaranteed although the appointments emanated from the executive.⁵⁰ Elements endangering the DPCI's independence included the following: First, the National Police Commissioner's term of office was renewable, which created an opportunity for the executive to exert long-term pressure on the DPCI.⁵¹ Secondly the Commissioner was authorised to appoint all DPCI members except the head, as well as to dismiss these individuals (contentiously on grounds of redundancy or in the interests of the SAPS).⁵² Thirdly the Commissioner decided what crimes warranted referral to the

⁴¹ Ibid para 166-174.

⁴² Ibid para 193.

⁴³ Ibid para 177.

⁴⁴ Ibid para 194.

⁴⁵ Ibid para 200.

⁴⁶ Ibid para 207.

⁴⁷ Ibid para 208.

⁴⁸ Ibid para 209-210.

⁴⁹ Ibid para 211.

⁵⁰ Ibid para 219.

⁵¹ Ibid para 223, 229.

⁵² Ibid para 220.

DPCI,⁵³ however this was still subject to the Ministerial Committee's policy guidelines, which left the Commissioner's decision vulnerable to political discretion that fell outside the confines of the legislation itself.⁵⁴ Furthermore, the Commissioner's renewable tenure and powers of appointment and dismissal posed a distinct threat to DPCI members' security of tenure and were therefore not conducive to independence, with the expected result that the Court found that the said conditions undermined confidence in the body.⁵⁵ Fourth, while the remuneration package of the DSO was decided under the auspices of a judge of the High Court, the salary of the DPCI was determined by regulations⁵⁶ made by the Minister of Police⁵⁷, thus a critical cause for concern as regards independence.

Moreover, the DPCI offered no protection for whistle-blowers, unlike the DSO which could rely on Parliament to look after its employment interests.⁵⁸ The comparative particulars offered above clearly illustrate the detrimental discrepancy incurred by the DPCI in its transfer to the SAPS. Lastly, the provisions of the SAPS Amendment Act stipulated that Cabinet would coordinate the activities of the DPCI through an interministerial committee that would set the body's functioning policy guidelines and determine its national priority offences.⁵⁹ The Court found this arrangement oppressive in that it rendered the body subservient⁶⁰ and could result in the difficulty that an interministerial member could be subject to investigation.⁶¹ The operational involvement of the interministerial committee coupled with its oversight of the anticorruption body could prove a hindrance to the investigation in the instance foreseen and jeopardise institutional independence of the DPCI.⁶²

Notably in this regard the Constitutional Court emphasised that protection against powerful executive threats to the independence of an anticorruption unit should not be construed as

⁵³ Ibid para 228.

⁵⁴ Ibid para 233.

⁵⁵ Ibid para 222.

⁵⁶ Section 17G and 24 of the South African Police Service Act 68 of 1995.

⁵⁷ *Glenister* (note 28 above) para 227.

⁵⁸ Ibid para 224 – 226.

⁵⁹ Ibid para 228.

⁶⁰ Ibid para 228-229.

⁶¹ Ibid para 232.

⁶² Ibid para 232-235.



exemption from political accountability that accrues to the body concerned by that token.⁶³ However, the Court did find in the end that the DPCI was insufficiently protected from political influence in its composition and functioning, and therefore determined that the amendment to the SAPS Amendment Act was inconsistent with the provisions of the Constitution, given the noted risks to its independence.⁶⁴

2. *Justice Alliance of South Africa v President of the RSA and Others* 2011 (10) BCLR 1017 (CC)

The background and relevant facts of the case are briefly relayed. In 2001 section 176(1) of the Constitution which deals with the terms of reference and remuneration of a Constitutional Court judge was amended to include an extension. The provision reads:

“A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.” (The underlined part was only inserted in the 2001 amendment of the Constitution).⁶⁵

Since an Act of Parliament was required for such an extension, in the same year of 2001, the Judges’ Remuneration and Conditions of Employment Act 47 of 2001 (the Act) was passed to effect the amendment to section 176(1) of the Constitution. Section 4 of the Act essentially created the extension by stipulating that if the 12 year term expired or the age of 70 approached, as indicated in section 176 of the Constitution, then a Constitutional Court judge could continue serving until completion of 15 years’ active service on the Bench or up to the age of 75 years, depending on which date occurred first. Furthermore, section 8(a) of the Act allowed the President of the Republic to extend the term of office of the Chief Justice once it had expired, or was about to, for a period of time determined by the President.⁶⁶

⁶³ Ibid para 244.

⁶⁴ Ibid para 248, 251.

⁶⁵ Section 15 of the Constitution of the Republic of South Africa Amendment Act 34 of 2001.

⁶⁶ Section 8 (a): A Chief Justice who becomes eligible for discharge from active service in terms of section 3(1)(a) or 4(1) or (2), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years.

In August 2011 then Chief Justice Sandile Ngobo would have served 12 years on the Constitutional Court Bench and therefore according to the Constitution, his term of office would have expired. Accordingly before the expiry date in April 2011, President Jacob Zuma sought to exercise his powers as stipulated in section 8(a) of the Act by writing a letter to the Chief Justice inviting him to serve an additional five years as Chief Justice since several important programmes and judicial transformative initiatives were pending and required continuity in leadership. The Chief Justice consequently decided to remain in office for a period of five years until August 2016, as requested by the President. This decision was formalised in June 2011. A few days later, after the decision had been published, the Justice Alliance of South Africa (a coalition that works through Parliament, courts, media and any other effective way to support and fight for justice and high moral values in South Africa's society),⁶⁷ with others of their ilk, lodged a direct application in the Constitutional Court concerning the constitutionality of the statutory provisions extending the term of office of the Chief Justice as noted. The following case then ensued.

The main issue of relevance before the Court was whether section 8(a) of the Act was consistent with section 176(1) of the Constitution,⁶⁸ that is, whether there was a valid delegation of the power given to the President to extend the Chief Justice's term (through the Act of Parliament), and if so, whether guidelines were required for the President to consult with the JSC and other political parties beforehand.⁶⁹ In the matter of delegation the respondents (the President and the Minister of Justice) contended that the power to appoint the Chief Justice was not delegated to the President, but that instead parliamentary power was rightfully extended to the President.⁷⁰

In contrast the Constitutional Court found that there had been no mere extension of Parliament's power, but that Parliament had in fact delegated its power to the President, who therefore had discretionary power to extend, and to determine the duration of the extension, of the Chief

⁶⁷ See the Justice Alliance Website <<http://justicealliance.co.za/>>; see also the objective of the Justice Alliance of South Africa on <<http://justicealliance.co.za/download/Constitution%20of%20JASA-amended.pdf> > (last accessed on 18 February 2016).

⁶⁸ *Justice Alliance of SA v President of the RSA and Others* 2011 (10) BCLR 1017 (CC) para 41.

⁶⁹ *Ibid.*

⁷⁰ *Ibid* para 45, 46.



Justice's term of office.⁷¹ This determination was made without taking any steps from subordinate legislation or other prerequisites necessary in delegated actions or legislation.⁷² The Court found that the decision to delegate was made by the President as head of the executive, and having consideration to section 8(a) of the Act, Parliament effectively surrendered its legislative power by delegating the said powers of extension to the executive.⁷³ It found too that in terms of section 176(1) of the Constitution an "Act of Parliament" was required to extend the term of office, hence it was incumbent on Parliament to take enabling steps to achieve the extension sought.⁷⁴ The Court held that the phrasing of section 176(1) of the Constitution was an indication of a non-delegable power.⁷⁵ Furthermore the delegation was rendered unlawful in that it was not confined to mere details but encompassed the right as a whole.⁷⁶

According to the Constitutional Court, the "Act of Parliament" referred to in section 176(1) required the actual involvement of Parliament in the extension process because the decision affected the separation of powers and judicial independence.⁷⁷ Therefore it was Parliament itself that had to provide for the extension of the term of office of the Chief Justice because of this constitutional importance. The Court noted that the President's act of extending the Chief Justice's term of office at his sole discretion may create a reasonable anxiety of the executive's ability to interfere at will in the judicial process,⁷⁸ thus undermining the separation of powers and tainting the independence of the judiciary. The Court therefore found section 8(a) of the Act inconsistent with section 176(1) of the Constitution and duly declared the President's extension of the Chief Justice's term of office invalid.⁷⁹

⁷¹ Ibid para 50.

⁷² Ibid.

⁷³ Ibid para 52.

⁷⁴ Ibid para 57.

⁷⁵ Ibid para 58.

⁷⁶ Ibid para 62.

⁷⁷ Ibid para 65.

⁷⁸ Ibid para 68.

⁷⁹ Ibid para 69.



3. *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) BCLR 291 (SCA)

The background and relevant facts of the case are briefly as follows. On 22 April 2009 South Africa was getting ready for its fourth democratic general elections. Mr. Jacob Zuma had been elected president of the ANC during its National Conference held in Limpopo in 2007 and stood to become the President of the Republic once the ANC won the elections. During the early days of April however, the country was focused on numerous charges of corruption and other criminal offences against Zuma. The protracted proceedings finally ended on 6 April 2009 when then acting National Director of Public Prosecutions (NDPP) dropped all charges against Zuma. This meant Zuma would not stand trial for any of the charges, which gave him the freedom to comfortably become the President of the Republic without any legal obstacles threatening his presidential seat. During the same month of April however, the Democratic Alliance (DA) applied to the North Gauteng High Court to review the decision of the acting NDPP in discontinuing the prosecution then in progress against Zuma.

While the judicial review application was before the North Gauteng High Court, two interlocutory applications were lodged in the same Court. In the first one the DA demanded that the NPA provide it with records of the process and circumstances leading to the decision of the acting NDPP to discontinue the prosecution that was in process against Zuma. The NPA declined on grounds that the records were not available for review. The second interlocutory application concerned the *locus standi* of the DA (and the two other applicants) and its ability to challenge the decision of the acting NDPP. Although heard in the North Gauteng High Court, these matters were taken on appeal to the Supreme Court of Appeal (SCA) and that is the decision at issue here.

The questions before the SCA concerned both interlocutory applications and did not involve the merits of the decision taken by the acting NDPP to drop the charges against Zuma. Rather, the relevant issues revolved around whether decisions made by the NPA could be subject to review by a political party, whether the NPA was obligated to furnish the DA with records for the acting

NDPP's decision, and whether the DA actually had *locus standi* to come before the courts and make its requests.⁸⁰

The Court made its order and found that the acting NDPP's decision in dropping the charges was subject to review under the rule of law since the exercise of all public power must comply with the Constitution.⁸¹ Moreover, the NPA was obliged to hand over to the DA a reduced record of the report, which excluded Zuma's representations that were classified as privileged information.⁸² Because the Court found no *mala fides* on the part of the DA and also regarded the matters raised in the review application to be of public interest, it concluded that the DA indeed had *locus standi*.⁸³

4. *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC)

In 2007 the Gauteng Freeway Improvement Project (GFIP) was approved by Cabinet in order to upgrade and improve the province's main roads. The South African National Roads Agency Limited (SANRAL) was appointed as the body responsible for carrying out the task and establishing its funding process, and so the project commenced. Since SANRAL had taken out a loan to finance the upgrade, by the end of the project it had accumulated a debt of over R20 billion which would become due to the third parties involved in granting the loan. The government of the Republic later guaranteed the payment of that debt.

After completion of the upgrades SANRAL's main task was to recoup the costs of the whole project. SANRAL therefore decided to convert some of the upgraded roads to toll roads; specifically electronic tolling (e-tolling) where motorists would essentially pay per kilometre for the use of the road. Once government was ready to roll out the e-tolling in 2011 the first proposed tariffs were announced to the public and these caused uproar. Many Gauteng motorists felt that the amounts were exorbitant and also believed that government and SANRAL had failed

⁸⁰ *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) BCLR 291 (SCA) para 22.

⁸¹ *Ibid* para 30-31.

⁸² *Ibid* para 37.

⁸³ *Ibid* para 45.



to provide adequate public participation and consultation. Consequently the Opposition to Urban Tolling Alliance (OUTA) was formed in 2012 before the project was implemented.

In short order OUTA submitted an application to the North Gauteng High Court for the review of SANRAL's e-tolling system and, pending the outcome of its application, asked for and was granted an urgent interim interdict to halt implementation of the project.⁸⁴ National Treasury and SANRAL were then granted leave to appeal the interim interdict directly to the Constitutional Court.⁸⁵ Because the case raised constitutional issues and affected the doctrine of the separation of powers, the Constitutional Court found it necessary to allow the direct appeal and deal with the matter.⁸⁶

The Court noted that in proceedings concerning urgent interim interdicts, where one of the parties to the application was a public body, a more profound analysis of the impact and the relevant factors was required as the doctrine of separation of powers was implicated.⁸⁷ The Constitutional Court realised that rather than a simple matter of interim interdicts and private parties,⁸⁸ the political branches of government were exclusively concerned.⁸⁹ OUTA demurred, contending that e-tolling did not require judicial deference.⁹⁰ However, the Constitutional Court found that assembling and collecting public resources involved a polycentric decision making process that was policy-laden, with the result that courts were "not always well suited to make" those kinds of decisions.⁹¹

The Court found that as in this case, interdicting a state organ from making a decision within its statutory powers called for special circumstances (*Gool*).⁹² The Court held that courts must take account of the possible impact of an interdict on a public body's constitutional and statutory powers, as well as on duties incumbent on the relevant body if it were restrained as requested.⁹³

⁸⁴ *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) para 8.

⁸⁵ *Ibid* para 30.

⁸⁶ *Ibid*.

⁸⁷ *Ibid* para 43.

⁸⁸ *Ibid* para 42.

⁸⁹ *Ibid*.

⁹⁰ *Ibid* para 39.

⁹¹ *Ibid* para 68.

⁹² *Gool v Minister of Justice and Another* 1955 (2) SA 682 (CPD) 689B-C.

⁹³ *OUTA* (note 84 above) at para 46, 66.

In deference to the principle of separation of powers, the Court said a directive from one branch of the state to another that intrudes on the latter's powers will only be given if the Constitution itself mandates it.⁹⁴

The Court found that in accordance with the principle of separation of powers the duty to determine how public resources are disbursed lies primarily with the executive, and that failing evidence of corruption or fraud, courts cannot simply intervene or second-guess such determinations as they deem fit.⁹⁵ As with the common law position, the Court found that interim interdicts that potentially intruded upon the domain of the legislative or executive branches would only be granted in the clearest of cases.⁹⁶ In setting aside the North Gauteng High Court's interim interdict, the Court concluded that the potential prejudice to Gauteng motorists should the e-tolling continue did not exceed the prejudice and monies already lost by SANRAL, together with the possible prejudice to government, if it had to honour its guarantee of paying the debt.⁹⁷ In any case, if the system was scrapped on review, motorists that had paid in the process would surely have appropriate remedies under the law.⁹⁸

5. Democratic Alliance v President of the RSA and others 2013 (1) SA 248 (CC)

The background and relevant facts of the case are briefly as follows. On 6 October 2009 Advocate Menzi Simelane was appointed as the deputy National Director of Public Prosecutions (NDPP) before being appointed by President Jacob Zuma as NDPP a little over a month later. The real issues, however, arose back in 2007 while Simelane was still Director-General (DG) of the Department of Justice and Constitutional Development and Advocate Vusi Pikoli was still heading the NPA.

During this period, Pikoli was suspended by then President Thabo Mbeki who then established a commission of enquiry into Pikoli's fitness to hold office as NDPP. Dr Frene Ginwala, former Speaker of Parliament, was appointed to chair the enquiry, generally known as the Ginwala Commission. At the time Simelane as DG of the Justice Department was called upon to testify

⁹⁴ Ibid para 44.

⁹⁵ Ibid para 67, 71.

⁹⁶ Ibid para 47.

⁹⁷ Ibid para 72.

⁹⁸ Ibid para 54.



before the Commission which found his oral testimony contradictory, inaccurate and without any factual or legal basis.⁹⁹ The Commission concluded accordingly that Simelane's untoward conduct bespoke his "disregard and lack of appreciation and respect for the ... [importance of]... an Enquiry established by the President [of the Republic]." ¹⁰⁰ Enver Surty, then Minister of Justice, called upon the Public Service Commission (PSC) to investigate the said findings of the Ginwala Commission, with the result that the PSC recommended that disciplinary action be taken. At the end of the PSC's report it had recommended that disciplinary action be taken against Simelane as a result of his conduct in the Ginwala Commission. During this time, Minister for Justice Jeff Radebe, who had taken over from Surty, rejected the recommendations of the PSC and advised President Zuma to appoint Simelane as head of the NPA.

Consequent to the above, the DA lodged an application with the North Gauteng High Court questioning the constitutionality of Simelane's appointment in light of the findings of both commissions. The High Court, however, found that the concerns raised in the application did not warrant the actions as contravening the Constitution.¹⁰¹ The matter was then taken on appeal to the SCA, where the Court found that Simelane had not been appointed on rational grounds¹⁰² and that the decision was therefore in breach of the Constitution, which states in s 167 (5) that the final decision as to the constitutionality of the President's conduct rests with the Constitutional Court, which would therefore have to adjudicate the matter of Simelane's appointment.

In the Constitutional Court the DA maintained as before that the reports of the Ginwala Commission and the PSC furnished objective grounds to declare Simelane unfit for appointment as head of the NPA, moreover that the President had made the appointment for an ulterior reason.¹⁰³ The President, the Minister of Justice and Simelane himself (all acting as respondents) countered that since no procedure for appointment of the NDPP was prescribed it followed that the President had discretionary power to make the appointment.¹⁰⁴ The Minister further argued that instead of just using the rationality test, the SCA had erred in using the standard of

⁹⁹ *Democratic Alliance v President of the RSA and others* 2012 (12) BCLR 1297 (CC) para 51-52.

¹⁰⁰ *Ibid* para 51.

¹⁰¹ *Democratic Alliance v President of the Republic of South Africa and Others* (59628/2009) [2010] ZAGPPHC 194 (10 November 2010).

¹⁰² *Democratic Alliance* (note 99 above) at para 7.

¹⁰³ *Ibid* para 11.

¹⁰⁴ *Ibid* para 8.

reasonableness fit for administrative law cases and the Promotion of Administrative Justice Act 3 of 2000.¹⁰⁵ It further argued that in view of the political implications and policy relations associated with the appointment a deferential approach to the matter was required of the courts to safeguard the principle of separation of powers.¹⁰⁶ The Constitutional Court therefore mainly had to establish whether the President's discharge of the findings of the two commissions relating to Simelane's conduct and credibility had been rational, and ultimately whether Simelane's appointment had therefore been made on rational grounds.¹⁰⁷

Concerning the contention that the President had discretionary power to make the appointment at issue, the Constitutional Court found that the Constitution provided that suitable qualifications for the NDPP were subject to a decision in terms of an act of parliament,¹⁰⁸ otherwise the provision¹⁰⁹ would have stipulated that the matter would be subject to the President's discretion.¹¹⁰ Consequently the procedure was a matter for the legislature and not the President. The Court noted that the admittedly subjective discretionary element in the appointment process did not render the process subjective in essence and therefore subject to the exclusive discretion of the President.¹¹¹ If that were so, appointments to the position of NDPP would be unacceptably dependent on the opinion of the President of the day.¹¹² Therefore, the test and requirements for a suitable appointment as NDPP were objective as they would be consistent with the constitutional guarantee of the independence of the NPA.¹¹³ The Constitutional Court further determined that the President's appointment of the NDPP as head of the national executive did not amount to presidential appointment of a political chief executive officer¹¹⁴ since that would be inconsistent with the Constitution.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid para 12.

¹⁰⁸ Ibid para 21.

¹⁰⁹ Section 179(1) (a) of the Constitution of the Republic of South Africa (1996).

¹¹⁰ *Democratic Alliance* (note 99 above) at para 22.

¹¹¹ Ibid para 23.

¹¹² Ibid para 25.

¹¹³ Ibid para 24.

¹¹⁴ Ibid para 16.



The court found that rationality consisted in calculating the means employed to a particular end¹¹⁵; moreover the decision-making process also had to comply with the rationality test.¹¹⁶ The Court found too that omission of relevant material that could have affected the rationality of the decision had it been heard, or that would have been intrinsic to the process of securing the rationality of the decision, could consequently become pivotal and jeopardise the whole process of appointment.¹¹⁷ At the same time, though, the court found that omission of material that would not affect the rationality of the decision could be ignored.¹¹⁸ Thus the Court found that ignoring the reports of the two commissions and proceeding without paying attention to the substance of the reports meant that the dishonesty of a senior official, brought to light in the proceedings of a commission of enquiry, had been disregarded.¹¹⁹

In the end, the Constitutional Court stated that Simelane's conduct, dishonesty and contradictions as discussed in the reports of the Ginwala Commission and the PSC definitely reflected on his integrity, conscientiousness and fitness to hold office.¹²⁰ The Court found the reports of the Ginwala Commission and the PSC significant in its deliberations concerning the appointment of the NDPP and held that the President had tainted the whole process by ignoring the reports, with the result that the process of Simelane's appointment had been rendered irrational.¹²¹ The Court concluded that either the Minister or the President should have realised and duly followed up on the findings of the Ginwala Commission and the PSC, which raised serious questions about Simelane's suitability, integrity and overall fitness for appointment as a key government official.¹²²

3.5 Any political controversies surrounding the above judgments?

In this part of the chapter, I will be looking at any political controversies surrounding the judgments and whether any covert political pressures might have been exerted on the judges to

¹¹⁵ Ibid para 27.

¹¹⁶ Ibid para 34-35.

¹¹⁷ Ibid para 40.

¹¹⁸ Ibid.

¹¹⁹ Ibid para 77.

¹²⁰ Ibid para 69.

¹²¹ Ibid para 86.

¹²² Ibid para 88.

sway their decisions. Moreover, I will be assessing how influential the political branches may be when judges decide their cases.

It seems obvious that besides the legalities of the above decisions, they were also politically controversial as they implicated government. Consequently, the Constitutional Court and the SCA had to be aware of the executive's involvement and response to its decisions, and therefore were constrained to deliver legally sound judgments that could not be accused of bias against the executive. The legal reasoning and findings as noted in discussing the above judgments seem sound despite the politically fraught atmosphere surrounding them.

The case of *Glenister* is not above criticism. According to Ziyad Motala, the decision of the majority "lacks cogency, depth of reasoning, or logic and fundamentally ignores the text and separation of powers."¹²³ Motala's argument was that courts were obliged to defer to the principle of separation of powers, particularly in matters of second-guessing policies of the political branches,¹²⁴ and that the "design, formulation and organisation of the anti-crime unit involves policy choices which are not the prerogative of the court."¹²⁵ He concludes that the majority decision in *Glenister* had the effect of appropriating the role of the political branches in making policy decisions.¹²⁶

The *Justice Alliance* case is a clear example of a legally reasonable decision. The very nature of judicial review is to ensure that the political branches act within their constitutional mandate and that their actions do not exceed the powers granted within the Constitution. In essence, the Court invalidated an Act of Parliament because it extended a power reserved for Parliament to the President of the Republic. The Court provided a reasonable basis for the distinction in section 176(1) and (2) of the Constitution between an Act of Parliament and "in terms of an Act of

¹²³ Motala The Times Live (26 March 2011) "Divination through a strange lens"
<<http://www.timeslive.co.za/opinion/columnists/2011/03/26/divination-through-a-strange-lens>> (last accessed on 10 December 2015).

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

Parliament.”¹²⁷ In the former instance, the legislature ought to act directly and cannot delegate this power whereas the latter is open to delegation.¹²⁸

My argument is that the Constitutional Court and the SCA proved their allegiance to the Constitution by faulting the executive branch in four of the five decisions. The third case, *DA v NDPP*, involved a political *contretemps* because it issued in the hand-over of the infamous spy tapes and information that led to the dropping of charges against President Zuma. The contentious element in this matter became evident in the delay of executing the court order which bound “organs of state to which it applies.”¹²⁹ This bore no appreciable weight since the NPA assiduously avoided the hand-over of tapes for two whole years after the SCA’s decision, made in 2012.¹³⁰ This is further discussed under paragraph 3.6.

A notable exception in the above cases is that government lost all the decisions except *OUTA*, which did not concern the lawfulness of e-tolling *per se*, yet promptly caused the Court to raise the matter of the underlying principle of the separation of powers.¹³¹ As discussed under paragraph 3.3, the Constitutional Court has means of protecting the courts’ institutional security, and one of these is through the use of the separation of powers doctrine.¹³² In the *New National Party* case,¹³³ the Court found that the decision to determine whether a statutory provision is reasonable or not, is one that is ordinarily made within the exclusive competence of the legislature, and that this is in line with the separation of powers and fundamental to the role of the courts.¹³⁴ Courts will only review legislation on the basis of reasonableness if it is arbitrary, that is if the Act is not connected to a legitimate governmental purpose.¹³⁵

¹²⁷ *Justice Alliance of SA* (note 68 above) at para 59.

¹²⁸ *Ibid.*

¹²⁹ Section 165 (5) of the Constitution (note 109 above).

¹³⁰ eNCA (4 September 2014) “Spy tapes finally in Zille’s hands”

<<http://www.enca.com/zuma-happy-release-spy-tapes>> (last accessed on 28 July 2015).

¹³¹ *OUTA* (note 84 above) at para 30.

¹³² See note 15, 16 and 17 above. Roux argues that the court can use the doctrine to limit the application of legal principles, or to alter its interpretation of legal principles in order to accommodate its relationship with the political branches. Therefore, the doctrine can affect the impact of cases on the institutional security of the judiciary.

¹³³ *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC).

¹³⁴ *Ibid* 24.

¹³⁵ *Ibid* 24.

Mia Swart and Thomas Coggin criticise the Court for raising the separation of powers shield instead of using the opportunity to deliver a more substantive judgment.¹³⁶ The authors argue that in cases considered by the Court as polycentric, there are no certainties because the Court tactically applies the separation of powers doctrine on an ad-hoc basis which precludes litigants from predicting the direction of the Court.¹³⁷ They contend that the doctrine is used by the Court in order to manage its relationship with the political branches.¹³⁸ Thus the authors conclude the following:¹³⁹

The granting of an interim interdict would not have overturned the state's policy, but rather sent a signal to the executive of the need to further reflect on the actual impact of e-tolling on users. It would have required the executive to take into account *how* e-tolling could impact on the rights of road users. In other words, politically it would have been 'safe' for the Court to have ruled against government in the e-tolling case because a negative decision would not have resulted in a *permanent* end to the system. Instead it would have initiated a rights-based conversation on the impact of the policy. This interim finding does not involve an intrusion *per se* on policy, but rather an exercise of the Court's constitutional responsibility to voice concerns on policies that have a palpable effect on the rights of those affected by such policy.

The *DA v President of the RSA* case also had to field some political flak. According to Motala the "SCA considered the findings of the inquiry to be an objective truth and not something for the President to assess. The court pays lip service to the core values of the Constitution such as the rule of law and legality. The ultimate decision and reasoning, which underpins the result, are extraordinarily brazen. It signifies an abject dereliction of the court's judicial function and lack of respect for the core values of the Constitution. The inquiry was neither by a court of law nor a competent independent tribunal in terms of what our Constitution or international human rights requires. Instead, it was an *ad hoc* inquiry led by a political appointee (the former speaker of the National Assembly) selected by a prior President during a period of Machiavellian subterfuge and political maneuverings within the ruling party. The court takes no cognizance of this reality."¹⁴⁰ This view is essentially that the SCA had unduly encroached the domain of the executive and consequently, undermined the doctrine of the separation of powers.¹⁴¹

¹³⁶ Swart and Coggin "The Road Not Taken: Separation of Powers, Interim Interdicts, Rationality Review and E Tolling in *National Treasury v Opposition to Urban Tolling*" 2014 CCR 346-365, 348.

¹³⁷ Ibid 359.

¹³⁸ Ibid 348.

¹³⁹ Ibid 360-361.

¹⁴⁰ Motala News24 (19 December 2011) "When a court turns politics into law

I am of the view that the above decisions were favourable to the Constitutional Court and the SCA from a legal perspective because the legal reasoning in each instance could be justified by law, notably in the *Justice Alliance* case. According to Roux, if a judicial decision is legally defensible it will probably gain acceptance and legitimacy among the legal fraternity.¹⁴²

My contention is that there is no directly measurable evidence of deference paid by the executive to judicial decisions that it finds repugnant. The decisions discussed above indicate, however, that the Constitutional Court is able to pay due deference to the law in formulating its legal reasoning and judgment in each instance, leaving no obvious evidence of undue political influence, although such absence of patent evidence cannot be taken as conclusive.

3.6 Is there a strained relationship between the executive and the courts as a result of judicial decisions?

The relationship between the legislature, the executive and the judiciary will be discussed under this heading, with particular reference to possible inroads that the political branches could make on the prestige and institutional standing of the judiciary, as well as whether evidence of such inroads is patent. The relationship between the executive and the judiciary will then be examined for possible strain.

Generally speaking, there should be a cooperative relationship between the three branches of government, demonstrable, for instance, in deference to each other's decisions. The judiciary must pay deference by not presuming a status that is inherently superior to that of the legislature and the executive, for instance by taking less than due cognisance of decisions emanating from that quarter. This is not to detract at all, however, from the purport of section 165, which unambiguously spells out the authority of the judiciary: "[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies."¹⁴³ The deferential principle is therefore reciprocal in that the political branches are equally obliged to respect and comply with

<<http://www.news24.com/Archives/Witness/When-a-court-turns-politics-into-law-20150430>> (last accessed on 10 December 2015).

¹⁴¹ Malan (note 4 above) at 2012.

¹⁴² Roux (note 1 above) at 108.

¹⁴³ The Constitution (note 109 above) section 165.

judicial orders. Mutual respect between the three branches for one another's powers and functions is therefore necessary.

Practical credence should be given to a relational bond between branches because all three serve the same state under the same Constitution. The checks and balances exemplifying the bond emphasise the need for an independent judiciary to balance the powers in a democracy. The relationship between the powers may not always be harmonious but mutual respect and deference between them is indispensable at all times, for example in view of the sobering realisation that despite its declared and acknowledged independence the judiciary remains vulnerable to the legislature and the executive since after all, it is they who have to take legislative measures to protect the independence of the courts and, as discussed in the next chapter, are principally involved in appointing judicial officers. As noted by Roux political inroads on the domain of the judiciary can take the following routes:¹⁴⁴

1. reneging on compliance with judicial orders,
2. utterances made in public that lower the prestige of the judiciary;
3. amendments to, or threats to amend and reduce the powers of the judiciary; and
4. placing more compliant judicial officers on the Bench.

Through the use of Roux's argument and analysis above, what follows are examples of how the political branches have tried to undermine the judiciary.

First, as regards executive compliance with judicial orders the notable example held to view above was that of *DA v NDPP*.¹⁴⁵ The NPA had extensively delayed compliance with the court order, which resulted in the DA approaching the Supreme Court of Appeal, and the Court ordering the NPA to submit the spy tapes.¹⁴⁶ The NPA's compliance with the court order was ultimately a two year battle.¹⁴⁷ In the *Nyathi* decision,¹⁴⁸ Madala J highlighted the actions of state officials in delaying or failing to comply with court orders. He acknowledged that creditors may find they are unable to enforce an order sounding in money against the state.¹⁴⁹ He stated that in

¹⁴⁴ Roux (note 1 above) at 109-110.

¹⁴⁵ See note 80 above.

¹⁴⁶ *Zuma v Democratic Alliance and Others* [2014] 4 All SA 35 (SCA).

¹⁴⁷ Spy tapes finally in Zille's hands (note 130 above).

¹⁴⁸ *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 9 BCLR 865 (CC).

¹⁴⁹ *Ibid* para 59.

recent years state officials had a tendency of disobeying court orders and providing insubstantial excuses which reveal that the state was merely delaying compliance.¹⁵⁰ He found that “public officials seem not to understand the integral role that they play in our constitutional state, as the right of access to courts entails a duty not only on the courts to ensure access but on the state to bring about the enforceability of court orders.”¹⁵¹

Madala J went on to state the following:

“In my view, there can be no greater carelessness, dilatoriness or negligence than to ignore a court order sounding in money, even more so when the matter emanates from a destitute person who has no means of pursuing his or her claim in a court of law. But we now have some officials who have become a law unto themselves and openly violate people’s rights in a manner that shows disdain for the law, in the belief that as state officials they cannot be held responsible for their actions or inaction. Courts have had to spend too much time in trying to ensure that court orders are enforceable against the state precisely because a straightforward procedure is not available.”¹⁵²

American political scientist, Terri Jennings Peretti notes that when it comes to public body compliance with court orders judges also need to consider various external constraints, for example that funds have to be voted by the legislature and the executive need to support its implementation.¹⁵³

The recent case of the North Gauteng High Court¹⁵⁴ involving the President of the Republic of Sudan, Omar Hassan Ahmad Al Bashir (Mr Bashir) offers a prime example of the executive undermining the judiciary by refusing to comply with a court order that prohibited Mr Bashir from leaving the Republic after attending an African Union Summit that was hosted in Johannesburg.¹⁵⁵ The court stated that where government undermines the rule of law the courts

¹⁵⁰ Ibid para 60.

¹⁵¹ Ibid.

¹⁵² Ibid para 63.

¹⁵³ Peretti “Does judicial Independence Exist? The Lessons of Social Research” in *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (2002) (eds Burbank & Friedman) 103-133, 111.

¹⁵⁴ *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402 (24 June 2015).

¹⁵⁵ Ibid para 9.

need to keep it in line without fear or favour by handing down judgments accordingly.¹⁵⁶ The court found the following:

“A democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the cornerstone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.”¹⁵⁷

The judiciary should be consciously at ease that its institutional security is not at risk, that it need not consider itself in opposition to the government of the day as embodied in other branches of government, but at the same time that it cannot enforce decisions that may require particular expertise, polycentricism or technicalities, as these should essentially be left to the relevant branches of state.¹⁵⁸ As will be discussed below, courts have on various occasions been threatened by the executive branch. Members of the ANC have in public reminded the judiciary that it is not an invincible body and where necessary, its powers can potentially be limited through legislation and various other methods.¹⁵⁹ In 2012 President Zuma himself stated during an interview with *The Star* (daily newspaper) that he wanted the powers of the Constitutional Court reviewed.¹⁶⁰

The Constitutional Court has incurred some displeasure from the executive by pronouncing against it in four out of the five cases under discussion where political interests were prominently involved. Yet the Court has nevertheless managed to pronounce said verdicts against the executive without incurring a significant threat to its institutional security from that quarter. The pertinent question therefore is how the Court managed to retain its integrity and security in the

¹⁵⁶ Ibid para 38.

¹⁵⁷ Ibid para 37.2.

¹⁵⁸ See Hoexter “The Future of Judicial Review in South African Administrative Law” (2000) 117 *SALJ* 484, 507.

¹⁵⁹ IOL (17 August 2015) “Judiciary concerns for ANC”

< <http://www.iol.co.za/news/crime-courts/judiciary-concerns-for-anc-1.1901237>> (last accessed on 10 December 2015).

¹⁶⁰ See *The Times Live* (13 February 2012) “Zuma wants Constitutional Court powers reviewed: report” <<http://www.timeslive.co.za/politics/2012/02/13/zuma-wants-constitutional-court-powers-reviewed-report>> (last accessed on 12 April 2014); see also Raymond Louw graduation speech “meddling with Constitutional Court powers a threat to all” at: <http://www.ru.ac.za/media/rhodesuniversity/content/communications/documents/Raymond_Louw%20Grad%20Address.pdf> (last accessed on 28 July 2015).

circumstances. Roux notes that since institutional security is not fully developed and solidified in newly formed democratic states,¹⁶¹ it may seem inconsequential that judicial officers take liberties with decisions under the purported umbrella of some long-standing assurance of safety from an executive assault on their institutional security.¹⁶² Roux also concludes that the doctrine of the separation of powers, is but one of a variety of legal mechanisms that the Constitutional Court can use to shield its institutional security in cases where political interest has a prominent role.¹⁶³ More about this below.

Malan rightly contends that the judiciary may correct or amend the frameworks embodied in the policy aims of the dominant political leadership, but for all that will never fundamentally derail, frustrate or disrupt such frameworks because in so doing they would be undermining their own terms of reference in the overarching context of the political leadership.¹⁶⁴ Roux concurs, noting that decisions handed down by the Constitutional Court must be calculated to be acceptable to the political branch,¹⁶⁵ which means the courts must be sensitive to the range of acceptability of such decisions for the political branch.¹⁶⁶ Lenta argues in the same vein that the measure of conservatism or liberalism adopted by judges when deciding cases of judicial review is dependent on the extent of the open-mindedness of the relevant government branch before the court.¹⁶⁷ Furthermore, the position adopted by the court will be firm but within range of the branches' sense of acceptability lest the decision be spurned for overstepping the bounds.¹⁶⁸ Constitutional Court decisions taken in contradiction of policies of the political branches will be passed without demur so long as they fulfil "some function useful to the political branches over the long run".¹⁶⁹

¹⁶¹ Roux (note 1 above) at 136-137.

¹⁶² Ibid.

¹⁶³ Ibid 126.

¹⁶⁴ Malan "The unity of powers and the dependence of the South African Judiciary" (2005) *De Jure* 99, 112-113.

¹⁶⁵ Roux (note 1 above) at 113.

¹⁶⁶ Ibid.

¹⁶⁷ Lenta "Judicial Restraint and Overreach" (2004) 20 *SAJHR* 544-576, 548.

¹⁶⁸ Maltzman, Spriggs and Wahlbeck "Strategy and Judicial choice: New Institutional approaches to Supreme Court decision-making" in *Supreme Court decision-making: New Institutional Approaches* (1999) (eds Clayton & Gillman) at 49. As quoted in Peretti (note 153 above) at 113.

¹⁶⁹ Roux (note 1 above) at 111.

Judicial officers' approaches to cases before them differ, however, for example in that some may be more open-minded than others. Dennis Davis states that although judges receive legal training that represents broadly similar legal customs, their interpretation of like matters before them may differ markedly.¹⁷⁰ Nonetheless, as matters stand Constitutional Court judges are careful not to instigate a political climate that is predisposed against them (the judiciary), and that may therefore compromise their institutional security despite even their most open-minded decisions. The judiciary therefore has a crucial mandate to balance the power of the executive against the rights of the citizenry.¹⁷¹

Roux concludes that the Constitutional Court can maintain quite open-minded views without stirring political discontent by adopting strategies that will not give cause for political aggravation:

“the[Constitutional Court] has been careful to manage its relationship with the political branches, retreating from principle where such compromises were in the long-term interests of the constitutional project. In this way, a mutually beneficial relationship has developed between the [Constitutional Court]and the ANC government, with the [Constitutional Court]’s reputation for legally credible decision making lending considerable legitimacy to the ANC’s social transformation policies, and the ANC government’s continued respect for, and obedience to, the [Constitutional Court]’s decisions helping to cement the [Constitutional Court]’s reputation as one of the most successful of the post-1990 constitutional courts.”¹⁷²

After the debacle of Mr Bashir’s visit to South Africa the Chief Justice announced an intention to arrange a meeting with the President to discuss executive animus towards the judiciary.¹⁷³ On 27 August 2015 the meeting called for was held with President Zuma, members of his cabinet, Chief Justice Mogoeng Mogoeng, and senior members of the judiciary present to discuss relations between the two branches.¹⁷⁴ A statement issued after the meeting indicated that the two branches had agreed on the following 10 points:

¹⁷⁰ Davis “Competing Conceptions: Pro-Executive or Pro-Democratic – Judges Choose” (1987) 3 *SAJHR* 96-105, 105.

¹⁷¹ *Bloem v State President* 1986 (4) SA 1064 (O) at 1075E.

¹⁷² Roux (note 1 above) at 138.

¹⁷³ eNCA (8 July 2015) “Chief Justice wants to meet Zuma over attacks on judiciary”

<<http://www.enca.com/south-africa/mongoeng-wants-meet-zuma-over-unfair-attacks-courts>> (last accessed on 10 December 2015). According to the report, these were statements made by Gwede Mantashe, Secretary General of the ruling party, regarding negativity displayed by some courts towards government, and allegations made by the Police Minister that judges were taking bribes.

¹⁷⁴ Ackroyd eNCA (27 August 2015) “Zuma and Mogoeng meeting: key points”



“Mutual respect for the separation of powers and the integrity of the two institutions; to exercise care and caution with regard to public statements and pronouncements criticising one another; promotion of the values and ethos of the Constitution. The arms of the state should not be seen to be antagonistic towards one another in public; transformation of the judiciary and the legal profession are at the heart of our constitutional enterprise and the parties have a responsibility to strive towards achieving it; complaints against judges and magistrates must be reported to the respective commissions; protect and promote the Constitution as the supreme law of the land; court orders should be respected and complied with; promote access to justice. We also underscore our responsibility to the people of South Africa to uphold the Constitution of the Republic; this meeting is the foundation of future engagements to discuss issues that may arise from time to time; the administration of the courts, access to justice and transformation have been identified as issues requiring specific focus in future engagements.”¹⁷⁵

As noted above, the relationship between the executive and the judiciary has not always been one of full agreement, to the extent that *quo vadis* meetings such as the above have become necessary. The effect of the said meeting (and a sequel at times) on future relations is awaited with interest.

3.7 Conclusion

As seen above, although politics finds a role in judicial decisions, it seems that judges are usually able to justify their decisions in terms of relevant legal principles, rather than political interests that may take a toll on the probity of the outcome. Nevertheless judges do understand that the political branches ultimately have the whip-hand and therefore take care not to provoke ill-feeling by dealing harshly with the applicant but offer an olive branch to avert aggravation in their judgements. Malan notes as a matter of interest that a judge will never let slip in the process of delivering a judgment or outside the courtroom that a judicial decision was made to accommodate political considerations with a view to preserving the institutional security of the judiciary.¹⁷⁶ As noted, the Constitutional Court as well as the SCA have steered a path of discretion by taking liberal decisions without compromising the institutional security of the judiciary *vis-à-vis* the political branches of government. This strategy has paid off for the

<<http://www.enca.com/south-africa/ten-key-points-agreed-zuma-and-mogoeng>> (last accessed on 10 December 2015).

¹⁷⁵ Ibid.

¹⁷⁶ Malan (note 4 above) at 2007.



Constitutional Court which has thereby ensconced itself in a niche from where it can operate safely and optimally.

As noted, there are various strategies that the Constitutional Court can utilise to safeguard the institutional security of the judiciary. The dynamics of the relationship between the executive and the judiciary are bound to change now that communication channels are open between them. Yet, the inherently dominant position occupied by the political branches in the triad of government remains problematic and will be discussed in depth in the next chapter.

CHAPTER FOUR

The political factor in the context of the Independence of the Judiciary

4.1 Introduction

Judicial independence will be considered further, with particular reference to the dynamics of the judiciary's independence *vis-à-vis* the political branches. This discussion will proceed from an American and a South African perspective respectively. Also considered will be the establishment of the Judicial Service Commission (JSC) and the process of making judicial appointments before and since the political watershed year of 1994 when the present democratic government was inaugurated in South Africa. The role of the JSC and its powers and functions under the Constitution and national legislation will also be discussed. Furthermore the composition of the JSC and involvement of the political branches in the JSC will be discussed, as will political influence on judicial appointments.

4.2 Judicial independence from an American perspective

Judicial independence has a long history in the United States of America (USA). I consider a discussion of the US perspective instructive because its jurisprudence is mature and can offer some insight to South Africa. As discussed in chapter two, although the USA applies the separation of powers differently to South Africa, the principle of an independent judiciary remains alike.

American jurist Owen Fiss stated in the mid-nineties that inflation and political control of judges' remuneration would likely see judicial officers alter their activities in a way that could "win the good will of... [the other] branches."¹ According to Fiss, this meant that if judges' remuneration was left in the hands of the political branches their independence would be unacceptably at risk.² Fiss observed the following:³

"Presumably, the President will not choose someone to do his bidding, and recognizes that the judge's job is law, not politics. This limit on the discretion of the President is reinforced by the expectations of the

¹ Fiss "The Limits of judicial Independence" (1993-1994) 25 *U Miami Inter-Am L Review* 57-76, 63.

² *Ibid* 64.

³ *Ibid* 62.

public and the bar. Nonetheless, the President is likely to appoint someone whose concept of justice approximates his own and who is likely to further rather than impede the policies of his administration.”

Peretti argues that the selection process for superior court judges momentarily limits judicial independence because judges in that court are appointed by the political branches, the President and the Senate, which therefore wield influence that is hard to resist for those depending on their munificence or otherwise.⁴ David O’Brien concludes rather bluntly that a concept of judicial selection based solely on merit is a myth because it is “partisan politics” that decides who makes it to the Bench.⁵ Natural ambition must surely be a powerful motive for judicial officers to tread warily around political sensitivities when handing down decisions since their futures depend on the goodwill of those affected. Alternatively, the judicial officer could cultivate a position of unrelenting aloofness at the risk of incurring political displeasure and a generally unsatisfactory, adversarial relationship.

In light of these introductory remarks it is imperative to note that absolute judicial independence that holds aloof from other branches may not necessarily be to the judiciary’s advantage since cooperation among branches would assuredly work better than contrarianism and estrangement since cooperation would be amenable to the application of checks and balances among the branches that would assist their attunement to the overall goal of serving the state. That said however, it is paramount for the judiciary (in a democratic state) to be unfettered in the fulfilment of its constitutional mandate. As noted by Peretti, the goal of judicial independence:

“is impartial, “law-based” decision making by judges and thus, the certain protection of text-based rights, even those unpopular with current majorities and powerful politicians. Impartiality is secured by freeing judges of popular and partisan pressures—in obtaining their positions, retaining their positions, and making their decisions. Because the people can be confident that judges made their decisions fairly and objectively, compliance with court rulings is thereby assured. High regard for courts continues, as then does their legitimacy, power, and unique ability to protect our treasured rights and liberties.”⁶

⁴ Peretti “Does judicial Independence Exist? The Lessons of Social Research” in *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (2002) (eds Burbank & Friedman) 103-133, 104.

⁵ O’Brien *Judicial roulette: Report of the Twentieth Century Fund Task Force on judicial selection* (1988) 35, as quoted in Peretti (note 4 above) at 105.

⁶ Peretti (note 4 above) at 103.



Peretti is completely unimpressed by the notion of judicial independence, which she even calls a ‘myth’ however, because it is mistakenly regarded as a self-evident, objective fact rather than an ideal or value of the court,⁷ which would be nearer the mark as in truth it has a “modest degree of independence” which is just the way that the separation of powers and checks and balances requires it to be.⁸ Peretti believes that this limited degree of independence as a shared feature of the three branches provides a balanced system because singling out judicial independence to stand guard over human rights or freedoms would result in “an unhealthy expansion of judicial power.”⁹

The independence of judges is a crucial consideration in the selection of appointees to the Bench. Peretti argues that no matter how many mechanisms may exist, judicial neutrality and independence are ultimately weakened because a judge’s “personal policy preference” is brought to bear *nolens volens* in deference to the President and the (ruling) executive body that selected him/her in the process of interpreting the law, hence assertion of independence of the judiciary cannot be a self-evident fact¹⁰ since it is already qualified by the process of selection for appointment to the Bench, which does limit judicial independence but at the same time serves the important purpose of upholding democratic accountability because the bodies that elect judges are elected by the public and thus express the views and demands of the population.¹¹ Fiss is in favour of some form of political control because excessive judicial independence could upset the balance of popular sovereignty, hence judicial insularity should be pitched at the right level where an optimal operational balance is struck.¹² Fiss concludes that if the judiciary is overprotected against the elected branches it gains a comparative surfeit of power by default which it could wield to interfere unduly with other branches’ decisions and thereby frustrate the will of the people.¹³ Christopher Larkins notes that judicial independence is at a premium in young democracies, failing which they may lack the muscle to stand firm against manipulation

⁷ Ibid.

⁸ Ibid 125.

⁹ Ibid.

¹⁰ Ibid 114.

¹¹ Ibid 115.

¹² Fiss (note 1 above) at 66-67.

¹³ Ibid 65.

and may be unable to assess the legality of state actions and combat arbitrariness.¹⁴ If its independence is duly shored up, however, it can be a strong defensive bulwark against injustice and contraventions of the constitution.¹⁵

On another tack it is difficult, given the dearth of relevant studies, to assess the possible influence of judicial appointments and career-progression movements on judicial officers' behaviour (for example when facing reselection and retention processes).¹⁶ For instance, it is not readily ascertainable whether the judiciary's loyalties to the executive are attributable to the president's appointment of judicial officers whose mindset is in accord with theirs, or whether judicial officers would feel constrained by the appointment process.¹⁷ Intuitively though, they opt for the sympathetic influence of the presidential mindset.¹⁸ Burbank and Friedman contend that "Judges may stand for reelection or retention, but if it is virtually a sure thing – either because there is no opponent or denial of retention is infrequent to the extent that it can be discounted – it is unlikely that it will affect judicial behaviour. On the other hand, a close retention election of a colleague might well induce greater sensitivity among all judges in a jurisdiction or at a particular level."¹⁹ My inclination however, remains with Peretti and O'Brien.

4.3 The judicial appointment process in South Africa

Towards the end of the white minority government and as the negotiation stages became imminent, the realisation dawned that the judicial appointment process would have to change.²⁰ As will be discussed, the pre-1994 appointment process was racially exclusive, not transparent and not accountable to the public.²¹ The Supreme Court Act²² made the State President responsible for appointing judges to the Bench, although the Minister of Justice was the *de facto*

¹⁴ Larkins "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis" (1996) 44 *Am J Comp L* 605-626, 606.

¹⁵ *Ibid.*

¹⁶ Burbank and Friedman "Reconsidering Judicial Independence" in *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (note 4 above) at 27.

¹⁷ *Ibid.* 26.

¹⁸ *Ibid.*

¹⁹ *Ibid.* 27.

²⁰ Hoexter & Olivier *The Judiciary in South Africa* (2014) 155.

²¹ *Ibid.*

²² Section 10 of the Supreme Court Act 59 of 1959.

decision-maker and would inform the President of which candidate to choose as judge.²³ However as time went on, the Chief Justice or the Judge President of the court where the vacancy existed would make a recommendation to the State President from candidates who were senior counsel and essentially exclusively white males.²⁴ Although the process was common cause its execution took place behind closed doors.²⁵ Politics however, was said to play a decisive role.²⁶ This may lead to the determination that judges were strategically placed, or their progression on the Bench was assured, because they did not express views that disturbed the sovereignty of Parliament or that went against the policies of the white minority government that were being implemented. Since parliamentary sovereignty forbade the judiciary from striking down legislation substantively, it meant that judges commonly maintained the *status quo* in terms of the legislation of the time and did not see themselves as guardians and defenders of human rights.²⁷

As noted therefore, with the demise of white minority government the need arose to restructure the judicial appointment process in line with a democratic state. The JSC was established in order to escape South Africa's history of non-transparent appointment practices and political favouritism.²⁸ It would be regarded as a more accountable and transparent way of appointing judicial officers.²⁹ According to section 178 of the Constitution the JSC is the main body involved in and also responsible for the appointment and conduct of judicial officers through its various powers and functions (see below). The Commission has a role in the suspension and removal of judicial officers,³⁰ as well as in appointing the Chief Justice and all the judges in the SCA.³¹ The JSC also has a role in appointing the rest of the justices on the Constitutional Court³² as well as the judges of all the other superior courts in South Africa.³³ Although candidates are

²³ Wesson and Du Plessis "Fifteen years on: Central issues relating to the transformation of the South African Judiciary" (2008) 24 *SAJHR* 187-213, 190.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Kentridge "Telling the truth about law" (1982) 99 *SALJ* 648-655, 652.

²⁷ Wesson & Du Plessis (note 23 above) at 191.

²⁸ *Ibid.* 192.

²⁹ Hoexter & Olivier (note 20 above) at 155.

³⁰ Section 177 of the Constitution of the Republic of South Africa (1996).

³¹ *Ibid.* section 174(3).

³² *Ibid.* section 174(4)(a): The [JSC] must prepare a list of nominees... and submit the list to the President.

³³ *Ibid.* section 174(6).

interviewed by the JSC on a public forum that is open to anyone, its considerations around whom it ultimately shortlists for the President to make an appointment from remains confidential, fueling criticisms that its reasons for a preferred candidate may be uncertain,³⁴ as will be shown in this chapter. Section 178(4) further states that the Commission is free to define its own procedures as long as most JSC members support its decisions.

4.4 The powers and functions of the JSC

The various powers and functions of the JSC are embodied in the provisions of the Constitution and legislation.³⁵ Some of these powers and functions include advising national government on matters affecting the judiciary or the administration of justice.³⁶ It remains unclear whether the JSC can only step into its advisory role once specifically requested to do so by national government, or if explicitly required by legislation or the Constitution, or whether it can step in on its own initiative.³⁷ Cora Hoexter and Morné Olivier suggest that since there is no provision addressing this, and in order to keep “with the constitutionally envisaged role of the JSC as a general guardian of the administration of justice in the superior courts”, the Commission should be able to offer advice of its own volition whenever it deems fit.³⁸

As discussed above, one of the main reasons for creating the JSC was its envisaged involvement in appointing judicial officers³⁹ and by that token making the appointment process more transparent. Therefore, when it comes to the appointment of Constitutional Court judges and the President and Deputy of the SCA, it would only be appropriate that the Constitution stipulate a prescribed procedure. If the President appoints a Chief Justice, a President of the SCA or any of their deputies, then he or she is obliged to consult the JSC and the leaders of the political parties represented in the National Assembly with a view to effecting such appointments.⁴⁰ When the President appoints other Constitutional Court justices, the JSC has to compile a list of candidates

³⁴ Wesson & Du Plessis (note 23 above) at 193.

³⁵ The Constitution (note 30 above) at section 178(4).

³⁶ Ibid section 178(5).

³⁷ Hoexter & Olivier (note 20 above) at 161.

³⁸ Ibid 161-162.

³⁹ The Constitution (note 30 above) at section 174(3): The President as head of the national executive, after consulting the [JSC] and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the [JSC], appoints the President and Deputy President of the Supreme Court of Appeal.

⁴⁰ Ibid section 174(3) and (4).



and submit it to the President⁴¹ who then has to consult with the Chief Justice and leaders of the political parties represented in the National Assembly. Section 174(4)(b) provides as follows in this regard:

“The President may make appointments from the list, and must advise the [JSC], with reasons, if any of the nominees are unacceptable and any appointment remains to be made.”⁴²

The JSC must then conduct further interviews and compile a supplemented list with more judicial candidates from which the President must choose a candidate.⁴³

The powers and functions of the JSC are set forth in the Judicial Service Commission Act (JSC Act). The Constitution assigns an important role to the JSC in the removal of judges.⁴⁴ Although it gives three reasons for the removal of a judge,⁴⁵ it does not prescribe a process for the JSC to follow during such removal and the provisions of the Act were expected to serve that purpose and regulate other JSC functional issues as well. The Act has been criticised for reasons including making no provision for the JSC’s disciplinary processes against judicial officers and for having no procedure in the handling of complaints against judges.⁴⁶ The Act was then amended to address these *lacunae* and create a more satisfactory dispensation.⁴⁷ Importantly, the Amendment Act now gives effect to the constitutional provision on the removal of a judge, this is section 177 of the Constitution.⁴⁸ It establishes a judicial conduct committee and has set out a procedure for lodging complaints against judicial officers.⁴⁹

4.5 Composition of the JSC

Section 178 of the Constitution is discussed under this heading with reference to the establishment and composition of the JSC, and with particular reference to the controversy about

⁴¹ Ibid section 174(4)(a).

⁴² Ibid section 174(4)(b).

⁴³ Ibid section 174(4)(c).

⁴⁴ Ibid section 177.

⁴⁵ Ibid section 177(1): A judge may be removed from office only if (a) the Judicial Service Commission finds that the judge suffers from incapacity, is grossly incompetent or is guilty of a gross misconduct; and (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

⁴⁶ Hoexter & Olivier (note 20 above) at 160.

⁴⁷ Judicial Service Commission Amendment Act 20 of 2008, (hereafter the Amendment Act).

⁴⁸ Hoexter & Olivier (note 20 above) at 160.

⁴⁹ Chapter 2 of the Amendment Act (note 47 above) titled oversight over judicial conduct and accountability of judicial officers has (i) establishment and objects of committee (ii) establishment and composition of judicial conduct committee, Part (iii) lodging of complaints.

the heavy involvement of the political branches in the composition of the JSC, and the resolution of the matter by the Constitutional Court in the *First Certification* case.⁵⁰

Section 178 of the Constitution stipulates the structure of the JSC. The Commission has 23 permanent members. Where matters relating to a specific High Court are at issue provision is made for the Judge President of the High Court in question as well as the Premier of the province concerned to attend JSC proceedings as added members.⁵¹ As regards the 23 permanent members the following attendance list applies:

1. The Chief Justice (the President of the Republic, as head of executive, appoints the Chief Justice after consulting with the National Assembly and the JSC).
2. The President of the Supreme Court of Appeal (the President of the Republic appoints the President of the SCA after consultations with the JSC).
3. A High Court Judge President (this member is elected to the JSC by the Judges President of the various High Courts).
4. The Minister of Justice – or deputy (the President of the Republic appoints the Minister as part of the executive/Cabinet).
5. Two advocates (the President of the Republic decides who to appoint from the profession).
6. Two attorneys (again, the President of the Republic decides who to appoint from the profession).
7. One law teacher (this member is chosen by colleagues from the universities around the country).
8. Six members from the National Assembly (these members are chosen by the National Assembly from its membership – three of the six appointees must be from opposition parties).
9. Four members from the National Council of Provinces (these members are selected by the NCOP).
10. Four presidential appointees (these members are chosen by the President of the Republic as head of the executive).

⁵⁰ *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

⁵¹ The Constitution (note 30 above) at section 178(1)(k).

A brief review of the above list reveals that six members are appointed by the legal profession, and another six are appointed by the National Assembly from its ranks (three being members of opposition parties). Significantly, the ruling party has a hand in the appointment of eleven of the 23 members of the JSC. This includes the Commission's chair and deputy. The same brief appraisal also reveals that political appointees clearly outnumber members representing the legal profession.⁵² Membership of the JSC is thus dominated by members of the political branches at the expense of the legal profession,⁵³ thereby giving the President, and consequently the ruling party, an extraordinary hold on appointments to the JSC. As will be discussed under paragraph 4.7, this is what Richard Calland refers to as the "dominant caucus" of the JSC.⁵⁴

An example is that three of the six members of the National Assembly might well be members of the ruling party, with the result that effectively 14 of the 23 members of the JSC are potentially directly known and accessible to the President and the ruling party. This could hardly help being cause for concern that the President's hold on the JSC could lead to political meddling in the affairs of the judiciary. This situation would tend to undermine the original reason for establishing the JSC, which was to break out of the impasse of the former closed-shop state of affairs (for example by promoting transparency of appointments to the Commission), as noted above. The membership issue, as noted, indicates that the executive still looms unacceptably large as a presence in the JSC.

This executive overhang in the JSC was raised in the first *Certification Case* in which the President's role in the appointment of judicial officers was opposed because it was considered excessive.⁵⁵ The Constitutional Court found, however, that the executive presence in the membership of the JSC was not objectionable from the viewpoint of the separation of powers or

⁵² Hoexter & Olivier (note 20 above) at 168.

⁵³ Ibid.

⁵⁴ Calland *Mail & Guardian* (12 April 2013) "JSC's attitude opens door to conservatism"

<<http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>> (last accessed on 12 April 2014).

⁵⁵ *Certification case* (note 50 above) at para 121.



Constitutional Principle (CP) VII.⁵⁶ It found the provisions of the Constitution consistent with CP VII, since they also required candidates to be appropriately qualified as well as fit and proper for judicial office.⁵⁷ The Court emphasised that the political branches' involvement in judicial appointments did not make the practice inconsistent with judicial independence or the separation of powers, because what mattered was that the judiciary had to be impartial in applying the law.⁵⁸ Besides, there were other countries where judicial appointments followed a similar pattern.⁵⁹ For judges to be independent, therefore, it was only necessary that judicial authority vest in the judiciary, which had to be protected against interference with its authority.⁶⁰ The Court finally dismissed the whole argument about the heavy involvement of the political branches in the composition of the JSC and held as follows:⁶¹

“[The] [a]ppointment of judges by the executive or a combination of the executive and Parliament would not be inconsistent with the [Constitutional Principles]. The JSC contains significant representation from the judiciary, the legal professions and political parties of the opposition. It participates in the appointment of the Chief Justice, the President of the Constitutional Court and the Constitutional Court judges, and it selects the judges of all other courts. As an institution it provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments. In the absence of any obligation to establish such a body, the fact that it could have been constituted differently, with greater representation being given to the legal profession and the judiciary, is irrelevant. Its composition was a political choice which has been made by the [Constitutional Assembly] within the framework of the [Constitutional Principles]. We cannot interfere with that decision, and in the circumstances the objection to [section] 178 [of the Constitution] must be rejected.”

The Court's view in the *First Certification* case regarding the involvement of the political branches is not above criticism. The fact that the Constitution stipulates that the judiciary needs to be independent or that judges need to act impartial does not *actually* warrant that they will be treated as such by the other branches. The reality is that effective mechanisms need to be put in

⁵⁶ Ibid para 122. Constitutional Principle VII stated that: “The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.” (Annexure 2 of the *Certification* case on page 274).

⁵⁷ Ibid.

⁵⁸ Ibid para 123.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid para 124.



place to ensure that the judiciary is not susceptible to political meddling. In the *First Certification* case, the Court does not seem to have enough regard to the dominant involvement of the political branches within the membership of the JSC and the fact that they could heavily influence the kind of judges appointed on the Bench. This conclusion is potentially regressive and can be seen to imitate the controversial ways of the pre-constitutional process.

4.6 To what extent is South Africa's judiciary independent?

Chapter 8 of the Constitution deals with the courts and the administration of justice. Its first provision, section 165, governs judicial authority and states, among other things, that the courts are independent subject only to the Constitution and the laws of the country.⁶² Furthermore, in applying and interpreting the Constitution and the laws of the Republic, courts are to do so impartially, without fear or favour.⁶³ To that end no person or organ of state may disrupt or cause a hindrance to the functioning of the courts.⁶⁴ Moreover, legislative and other measures are an indispensable safeguard for the "independence, impartiality, dignity, accessibility and effectiveness" of the judiciary.⁶⁵ Initially, security of tenure was regarded as the most effective way to ensure that the judiciary was not submissive to the other branches and that it remained independent.⁶⁶ As American jurist, Owen Fiss, stated in the mid-nineties, inflation and the authority of the legislature and executive over the remuneration of judges would likely see judicial officers alter their activities in a way that could "win the good will of...[those political] branches."⁶⁷

Although I agree with Peretti's position, there does seem to be an imbalance in the South African context in that there is a ruling party which is dominant in both the legislature and the executive, and this has filtered straight into the composition of the JSC. The dominant presence of the ruling party in the JSC could have an overbearing effect on the relationship between the political branches and the judiciary.

⁶² The Constitution (note 30 above) at section 165(2).

⁶³ Ibid.

⁶⁴ Ibid section 165(3).

⁶⁵ Ibid section 165 (4).

⁶⁶ See the Judges Remuneration and Conditions of Employment Act 47 of 2001.

⁶⁷ Fiss (note 1 above) at 63.

Former Chief Justice Ngcobo states that in this day and age, to simply shore up security of tenure for judicial officers is not enough to secure judicial independence because besides remuneration all other factors concerning the functioning and administration of the courts are controlled extraneously,⁶⁸ imposing a potentially crippling impediment on the independence of the judiciary.⁶⁹ It is hard to find fault with this reasoning, for unless and until the judiciary controls its own budgetary provision and processes to render it more effective it may be considered little more than an instrument of the political branches.

4.7 The political involvement with judicial appointments in the JSC

It is important for the JSC to be an objective body when exercising its powers and fulfilling its functions. It should not be regarded as an institution that promotes and maintains political allegiances, since that would fly in the face of judicial independence as well as the separation of powers.⁷⁰ The executive cannot in all conscience be kept severely away from judicial appointments because the state branches maintain checks and balances among each other; yet by the same token the executive cannot be allowed to dominate the JSC either. As the composition of the JSC stands now “there is nothing to prevent a majority of its members from voting for candidates loyal to the majority party rather than those most appropriately qualified in an objective sense.”⁷¹ The controversy concerning political influencing of the JSC has resurfaced in recent years. Such influence where judicial appointments are concerned will be considered to ascertain whether political considerations are dominant in appointments made to the JSC.

Back in 1982 Sydney Kentridge stated that “over the past thirty years political factors have been placed above merit – not only in appointments to the Bench but in promotions to the Appeal Court.”⁷² Moreover, “a number of judicial promotions have been made which are explicable solely on the ground of the political views and connections of the appointees and on no other conceivable ground.”⁷³ This was the position that prevailed during white minority rule in South Africa. Consequently, the JSC was created to intervene remedially and render the appointment

⁶⁸ Ngcobo “Delivery of Justice: Agenda for change” (2003) 120 *SALJ* 688-708, 696.

⁶⁹ *Ibid.*

⁷⁰ Hoexter & Olivier (note 20 above) at 169.

⁷¹ *Ibid.*

⁷² Kentridge (note 26 above) at 652.

⁷³ *Ibid.*



process more transparent. As noted, however, political influence effectively continued unabated. Nevertheless, in the final analysis competence and judicial independence should be paramount qualifications for appointment as judicial officers. Moreover, there should be unqualified acceptance that the actions of judicial officers are governed by the Constitution and the laws of the Republic, and not by the population, the ruling party or factors outside the laws and the Constitution.⁷⁴

In the prevailing climate of political involvement the selection of candidates for the Bench is particularly fraught in this regard, to the extent that fitness and competence are actually redefined and dictated by political interests, thus rendering the judiciary unacceptably vulnerable to depredations by the executive. This will be further discussed below. Read notes in this regard that “[n]ever must the motivation be to appoint [or promote] someone, however able he or she may be, because of an avowed political affiliation.”⁷⁵ This observation turns to the question of whether and to what extent the career advancement of a judicial officer rests on the influence of political considerations.

As noted above, Calland contends that the “dominant caucus” of the JSC seeks to select compliant judges who, instead of being staunch defenders of human rights and upholders of constitutional values,⁷⁶ will be susceptible to extraneous influences. He contends further that in his view this is the reason why only constitutionally open-minded “liberal-left white men” face disqualification from the Bench.⁷⁷ He contends, furthermore, that in seeking to secure the appointment of ‘pliant, weak judges’ to the Bench the ANC is showing unmistakable signs that it has lost the constitutional plot.⁷⁸ Frans Rautenbach joins the fray in his swingeing criticism of the high volume of political appointees to the JSC and insists that the door admitting entry into the JSC should be firmly closed to political influence of any kind.⁷⁹ And indeed, his adjuration may

⁷⁴ Malan “The unity of powers and the dependence of the South African Judiciary” (2005) *De Jure* 99, 102.

⁷⁵ Read “The Constitution, Parliament and the Courts: Towards a Commonwealth Model” in *Parliamentary Supremacy and Judicial Independence* (1999) (eds Hatchard & Slinn) at 48.

⁷⁶ Calland (note 54 above).

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Rautenbach “The judicial Service Commission: Quis custodiet ipsos custodes?” December 2009 *Advocate* 32. <<http://www.sabar.co.za/law-journals/2009/december/2009-december-vol022-no3-pp32-33.pdf>> (last accessed on 10 December 2015).

not come amiss, for there are many who openly declare that South Africa's JSC⁸⁰ is ruled by partisan politics.

The resignation of Advocate Izak Smuts SC in 2013 also brought a tale to bear regarding the inner workings of the JSC. Smuts, who served on the JSC from 2009, wrote a statement giving his reasons for leaving the JSC,⁸¹ which hinged crucially on the criteria for appointing judicial officers according to section 174(1) and (2) of the Constitution.⁸² Transformation of the judiciary was the specific concern. In his statement Smuts particularly mentioned his commitment to and respect for the foundational values of the Constitution, noting in particular the importance of protecting such values and the Bill of Rights.⁸³ He allegedly asserted that the JSC's reputation had been tainted by its embroilment in litigation due to mishandling of the Commission's affairs by the majority of its membership.⁸⁴ Smuts added that there had been a real wastage of legal talent by the JSC in failing to nominate or appoint the best experienced lawyers that surely would have contributed towards the realisation of the Constitution, simply because they are white men.⁸⁵ He admitted that he had frequently been aghast at the decisions of the majority members of the JSC and found himself seeking advice from colleagues and former colleagues, and endeavouring to speak "truth to power".⁸⁶ He had nevertheless come to the unfortunate realisation that his own understanding of the constitutional values, the constitutional role and duty of the Commission, and even of basic rights such as those of human dignity and freedom of

⁸⁰ Hoexter & Olivier (note 20 above) at 169.

⁸¹ Smuts Politicsweb (12 April 2013) "Why I'm resigning from the JSC" <<http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=369581&sn=Detail&pid=71654>> (last accessed on 12 April 2014).

⁸² Section 174(1) of the Constitution (note 30 above): Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

⁸³ Smuts (note 81 above).

⁸⁴ Ibid. These cases include *Judicial Service Commission v Cape Bar Council* 2012 11 BCLR 1239 (SCA) – which dealt with the failure of the JSC to fill remaining vacancies in the Western Cape High Court, despite the presence of qualified white candidates shortlisted for the positions; see also *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* 2011 (3) SA 549 (SCA) – where the Court set aside a decision by the JSC and ordered it to reconsider a complaint and counter-complaint respectively lodged by the Justices of the Constitutional Court and John Hlope, Judge President of the Western Cape High Court.

⁸⁵ Ibid. Smuts specifically notes Azhar Cachalia, Geoff Budlender, Willem van der Linde, Torquil Paterson, Jeremy Gauntlett and Judge Clive Plasket.

⁸⁶ Ibid.



speech, was so far removed from that displayed by the majority of the Commission's membership that it was no longer possible for him to play an effective role in that body.⁸⁷

Malan endorses the suggestion made by Smuts that fitness and propriety as provided under section 174(1) is a constitutional imperative that ranks above the need to promote appointments based on race and gender, under section 174(2),⁸⁸ which is a consideration but not an imperative.⁸⁹ Malan notes, in fact, that Smuts warns against making judicial appointments merely to reach racial and gender quotas⁹⁰ on the ground that the provisions of section 174(2) are a secondary consideration in weighing the suitability of candidates for judicial appointments.⁹¹ Smuts drew heavy criticism, particularly from members of the JSC, and most notably from the Chief Justice and chairperson of the JSC, Mogoeng Mogoeng who upheld the importance of race when he gave a speech on the duty to transform at the Advocates for Transformation Dinner held on the occasion of the Annual General Meeting.⁹² The Chief Justice stated that transformation, meant radically and not cosmetically transforming the profession by consistently reminding government entities and big business of the need to create as many opportunities for black and female lawyers as is done for their white colleagues. As discussed above and according to De Vos, during the rule of the white minority government, an appointment to the Bench used to be reserved exclusively for white male lawyers to the detriment of their black and female counterparts.⁹³ Therefore according to the Chief Justice, section 174(2) was an imperative part of transformation, not to be soft-pedalled but to be prioritised.⁹⁴

⁸⁷ Ibid.

⁸⁸ The Constitution (note 30 above) at section 174(1): Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

⁸⁹ Malan "Reassessing Judicial Independence and Impartiality against the backdrop of judicial appointments in South Africa" *PELJ* 2014 (17) 5 1965-2042, 1976.

⁹⁰ Ibid.

⁹¹ Ibid 1975.

⁹² See De Vos Constitutionally Speaking (16 July 2013) "Speech by Chief Justice defending the JSC" <<http://constitutionallyspeaking.co.za/speech-by-chief-justice-defending-the-jsc/>> (last accessed on 28 July 2015).

⁹³ Ibid.

⁹⁴ Ibid.

As regards judicial promotions a case of special concern occurs, namely that of Dikgang Moseneke, Deputy Chief Justice of the Constitutional Court, who was overlooked twice by President Jacob Zuma for the position of Chief Justice, most recently after former Chief Justice Sandile Ngcobo had completed his term on the Bench in 2011. In a report carried by the *Mail & Guardian* it was alleged that President Zuma would not appoint Moseneke as Chief Justice because the latter had asserted on a public platform, back in 2008, that the overriding concern of the judiciary was the goodwill of the people and not that of the ANC.⁹⁵ Malan's view is that the *Glenister* case is likely to be the reason why the President overlooked Moseneke for the second time.⁹⁶ Moreover, as Zuma returned to the presidency for a second term six of the eleven judges on the Constitutional Court Bench were his appointees. With the late Justice Skweyiya on pension and Justice Nonkosi Zoliswa Mhlantla joining the Bench from 1 December 2015, two more Justices (including deputy Chief Justice Moseneke) are due to retire during Zuma's next five-year term, at which point the Bench would be thickly populated with Zuma's appointees, bar two left over from previous Presidents. The *Mail & Guardian* has reported that Zuma's meddling in judicial appointments has caused growing concern that the Constitutional Court will be mainly populated by "executive-minded" judges who might be leniently disposed towards government actions brought before them.⁹⁷ However, the outcome of this developing situation has yet to be seen. In the meantime the large presence of the executive in the judiciary seems a legitimate concern.

Hoexter and Olivier rightly complain about the size of the JSC as well as its composition, asserting that it is oversized with supernumeraries from the executive branch.⁹⁸ They state that there are other jurisdictions which have recognised the importance of including members of the political branches in their judicial appointment committees, but which have also taken precautions to limit the numbers of political representatives.⁹⁹ Examples of these jurisdictions include Namibia, where the JSC consists of five members, four being legal and one a political

⁹⁵ *Mail & Guardian* (9-15 May 2014) "Zuma judges to dominate"

⁹⁶ Malan (note 89 above) at 2010, 2011.

⁹⁷ *Mail & Guardian* (9-15 May 2014) "JZ and the judges – what now?"

⁹⁸ Hoexter & Olivier (note 20 above) at 198.

⁹⁹ *Ibid* 168-169.



representative.¹⁰⁰ The JSC in Kenya has eleven members, two being government officials, namely the Attorney General¹⁰¹ and a person nominated by the Public Service Commission.¹⁰² The Kenyan constitution also makes provision for the presidential appointment of a woman and a man from the laity, subject to approval by the National Assembly, to act as public representatives.¹⁰³ The seven remaining members of the JSC are legal professionals.¹⁰⁴ Interestingly, in Northern Ireland there are 13 members on the Northern Ireland Judicial Appointments Commission, eight of which are legal professionals and five lay members.¹⁰⁵ Twelve members are appointed by the Lord Chancellor (who is responsible for the administration of justice).¹⁰⁶

The overbearing presence of members from the ranks of the ruling party amongst the JSC is cause for concern, for example in that it enables the ruling party to steer the judicial selection process greatly to the detriment of the doctrine of separation of powers and judicial independence. To quote Hoexter and Olivier:

“The number of politicians and political appointees on the commission certainly makes it more likely that political considerations will play a role in selections. This is not necessarily problematic when one considers that in many other democratic jurisdictions the selection of judges is in the hands of the executive. However, a politically dominated process is precisely what South Africa was trying to move away from, and for very good reasons, when it opted for a judicial service commission in the first place. The great danger of a party-political agenda is that it jeopardises the quality of the judiciary and the independence of the JSC, and very possibly of the judges chosen by it. If JSC commissioners are not obliged to apply their minds to the criteria and which candidates best meet them, this facilitates the appointment of judges simply on the basis that they are sympathetic to the government.”¹⁰⁷

4.8 Conclusion

As seen throughout this chapter, judicial independence does not hinge on exclusion of the executive and the legislature from judicial appointments. Rather, it is about creating mechanisms

¹⁰⁰ Section 85(1) of the Constitution of the Republic of Namibia (1990); see Hoexter & Olivier (note 20 above) at 168.

¹⁰¹ Article 171(2)(e) of the Constitution of Kenya (2010)

¹⁰² Ibid Article 171(2)(g).

¹⁰³ Ibid Article 171(2)(h).

¹⁰⁴ Ibid Article 171(a),(b),(c),(d),(f); see further Hoexter & Olivier (note 20 above) at 168.

¹⁰⁵ Section 3 of the Justice (Northern Ireland) Act, 2002. See Hoexter & Olivier (note 20 above) at 169.

¹⁰⁶ Ibid.

¹⁰⁷ Hoexter & Olivier (note 20 above) at 175.



that ensure that the judiciary is not vulnerable to undue political influence by being dependent on the political branches through monetary and administrative control. Moreover, the dominant presence of the executive could skew determination of the fitness of candidates for higher office and effectively detract from the true independence of the judiciary. After all, judicial officers remain office bearers of the state and as a consequence it is likely that their employment is somewhat considered when effecting decisions that may cause strain to their relationship with the political branches as a result of the configuration of the JSC.

Although Peretti concluded that the independence of judges and the notion of taking impartial decisions are essentially insubstantial because cases are ultimately decided in line with the political convictions of the presiding judge,¹⁰⁸ the fact remains that the judiciary must be in control of its own administration, failing which the risk is incurred that the judiciary may find its actions inhibited by fear of political consequences.

Despite views favouring political involvement I am convinced that such involvement must be kept in check as it may jeopardise judicial integrity if allowed to breed to excess. Moreover, the fact that members of the JSC vote by secret ballot takes a toll on transparency and militates against the original *raison d'être* of the JSC.¹⁰⁹ As stated by Hoexter and Olivier, “Closed deliberations make it impossible to establish to what extent there has been debate about the merits and demerits of the various candidates and their suitability for appointment.”¹¹⁰

¹⁰⁸ Peretti (note 4 above) at 121.

¹⁰⁹ Hoexter & Olivier (note 20 above) at 199.

¹¹⁰ *Ibid.*

CHAPTER FIVE

Conclusion

5.1 Conclusion

Twenty two years into South Africa's democracy invites a retrospective appraisal of the country's progress towards realisation of the goals set for South Africa in the Constitution. I have realised that judicial independence does not necessarily warrant strict independence since South Africa's adaptation of the separation of powers adopts principles of checks and balances amongst branches of government to ensure accountability and allegiance to the Constitutional goals. Thus there are clear relational ties between the judicial and political branches of government as discussed throughout the above chapters. The judiciary/executive nexus however, is particularly prominent, as is evidenced by the executive's dominance in the membership of the JSC. As a consequence, the overbearing political presence in the selection of candidates for appointment to the Bench has the risk of clouding the essence of judicial independence.

Given that the executive has only secured one court order in its favour in the cases discussed above, it seems that the Constitutional Court has proved its ability to safeguard judicial independence in that it has developed a formula to steer a course that enables it to pronounce against the political branches without provoking too much of a negative retaliatory response. A critical consideration is that the three branches of governmental power need to understand the nature of their relatedness to each other, for example that their relations are on an equal footing. In order for the courts to share in the constitutional project alongside the political branches, they should occasionally defer their views on how this project ought to be promoted.¹

Furthermore, as discussed, although political involvement in judicial appointments is generally warranted, executive dominance in the composition of the JSC has been regarded with concern for the potential risk to judicial independence. A related concern has been that political control of the budgetary provision for the courts and the administrative costs for effective justice leave the judiciary unacceptably vulnerable and susceptible to political will. However, the recent transfer

¹ T Roux "Principle and Pragmatism on the Constitutional Court of South Africa" (2009) 7 *ICON* 106-138, 121-122.

of control, together with a relevant staff contingent, to the office of the Chief Justice, has brought some relief pertaining to budgetary and administrative control of the judiciary.² The relevant functions transferred include the appointment of registrars, court managers and interpreters, and the procurement of goods and services associated with administrative support for the superior courts.³ Transfer of budgetary control is incomplete as yet, but the process of transfer is clearly intended, as it should be, to give due effect to the separation of powers and judicial independence by ensuring that administration of the courts is controlled by the judiciary instead of the political branches, and that the judiciary's dependence on its counterparts is minimised.

Despite these laudable measures, however, the dominant political presence of the ruling party in the JSC remains a problem that should not be underestimated. As noted earlier, therefore, it should be reemphasised that fitness for appointment to the Bench should hinge on commitment to upholding the values of the Constitution and the independence of the judiciary, rather than keeping a weather-eye cocked for threatening political inroads into the authority of the JSC.

As discussed in chapter two, despite a degree of political controversy attaching to each of them, the five judgments under review were legally justifiable. As noted by Roux, the Constitutional Court has devised means to safeguard institutional security of the judiciary, such as strategic decision-making in the sense that it does not close doors against itself when pronouncing findings against the political branches but seeks to promote mutual tolerance. This may be why minimal serious clashes have arisen between the judiciary and the political branches and many of the Court's decisions that might have been seen as 'pushing the envelope' were allowed to pass unchallenged. However, as discussed in chapter three, the instances where the executive and the judiciary clashed did not go unnoticed, and it is essential that the political branches do not consider court orders to be mere recommendations that are capable of being flouted. Nonetheless, and as noted earlier, as long as the Constitutional Court remains functionally useful to the political branches its presumably contentious decisions in a political context may win acceptance.

² Benjamin Mail & Guardian (September 2014) "No financial independence for chief justice" <<http://m.mg.co.za/article/2014-09-30-no-financial-independence-for-chief-justice>> (last accessed on 28 July 2015).

³ Ibid.



Part of the agreement between the executive and the judiciary in the 27 August 2015 meeting discussed in chapter three is that there will be future engagements between the two branches to discuss issues that arise between them. The question whether these engagements ultimately promote the separation of powers and judicial independence may warrant a full investigation in its own right. As matters stand, though, they could be a step well worth taking to realise the society envisaged by the Constitution, provided the engagements are characterised by openness and transparency, and the independence of the judiciary is a consistent underlying theme of the proceedings. Provided further that independence, as noted in chapter two, is comprehensive in the sense that it includes institutional, administrative, substantive and personal independence. If these conditions are met, I have no doubt that the envisaged engagements will be legitimised in the eyes of the public and the legal community and will be a strong bastion against possible inroads into its functional probity, with particular reference to the said engagements as an institutionally constructive measure.

A conclusion that seems inevitable from the above chapters is that judicial independence is of necessity and inescapably undermined by the extent of political dominance of the judiciary. It remains important that the institutional legitimacy of the judiciary remain unassailably embedded as a self-evident fact in the consciousness of the public and the judiciary itself. Members of the public have grown to depend on the judiciary for relief where the organs of state have seemed to fail them, and although they have not always been successful in their legal battles, when their issues are heard in a court of law, then their plight along with any legal issues are brought to attention and cannot be overlooked. Such reliance in my view betokens a significant residue of faith in the justice system. However, the heavy political shadow hanging over the JSC in virtue of its composition does render the judiciary highly susceptible to the taint of political influence in judges' decisions. This seriously compromises the high regard that the Constitution has for judicial independence.

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AMOUNT OF WORDS

The dissertation contains 20 956 words excluding summary, table of contents and bibliography.



List of Abbreviations and Acronyms

ANC – African National Congress

CJ – Chief Justice

CP – Constitutional Principle

DA – Democratic Alliance

DG – Director-General

DPCI – Directorate of Priority Crime Investigation

DSO – Directorate of Special Operations

GFIP – Gauteng Freeway Improvement Project

JSC – Judicial Service Commission

NCOP – National Council of Provinces

NDPP – National Director of Public Prosecutions

NPA – National Prosecuting Authority

NPAA Act – National Prosecuting Authority Amendment Act

OUTA – Opposition to Urban Tolling Alliance

PSC – Public Service Commission

SANRAL – South African National Roads Agency Limited

SAPS – South African Police Service

SAPSA Act – South African Police Service Amendment Act

SCA – Supreme Court of Appeal

USA – United States of America