Challenges to judicial independence in South Africa

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Abstract

South Africa has a robust and supreme justiciable Constitution. Since 1994 South Africa has made significant progress in terms of how the judiciary dispenses justice and the Constitutional Court in particular has consistently stood firm in promoting and protecting the rule of law and human rights in South Africa. Acknowledging that a constitutional commitment to judicial independence may provide the climate for genuine democracy, political stability and respect for the rule of law, the fundamental question that has arisen in South Africa is whether the independence of the judiciary is being undermined and/or compromised. Current events in South Africa have brought into sharp focus challenges to judicial independence in South Africa. The theoretical framework within which the challenges to the independence of the judiciary will be analysed is under the broad remit of the independence of the judiciary generally, but six specific contentious issues will be investigated with specific focus on the appointment process.

These six contentious issues are the [problematic and overtly political] composition of the Judicial Service Commission (JSC), which is the constitutionally-established body created to uphold the integrity and independence of the judiciary; the President's pronounced role in the appointment of the Chief Justice, the Deputy Chief Justice of the Constitutional Court; the lack of transparency in the appointment of the judiciary; the modus operandi of the JSC; the executive's attacks on the judiciary; and the government's threats not to implement decisions and/or

tardiness even when they do implement. It is these challenges to the independence of the judiciary which will be explored in order to assess whether Constitutional Law in South Africa is making advances or whether the not-so-subtle erosions of the independence of the judiciary are cause for concern.

Les enjeux de l'indépendance judiciaire en Afrique du Sud

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Résumé

L'Afrique du Sud a une Constitution justiciable robuste et suprême. Depuis 1994, l'Afrique du Sud a accompli des progrès significatifs en termes de la façon dont le système judiciaire rend la justice. La Cour constitutionnelle, en particulier, a constamment préconisé la promotion et la protection de l'État de droit et des droits de l'homme en Afrique du Sud. Reconnaissant qu'un engagement constitutionnel à l'indépendance judiciaire permet de créer un climat propice à la véritable démocratie, la stabilité politique et le respect de l'Etat de droit, la question fondamentale qui s'est posée en Afrique du Sud est de savoir si l'indépendance du pouvoir judiciaire est mise à mal et / ou compromise. Les événements actuels en Afrique du Sud ont mis en évidence les défis auxquels est confrontée l'indépendance judiciaire en Afrique du Sud. Le cadre théorique, dans lequel les défis de l'indépendance judiciaire seront analysés, est sous le vaste mandat de l'indépendance de la justice en général. Toutefois, six questions controversées spécifiques seront examinées avec un accent mis sur le processus de nomination.

Ces six questions controversées sont : la composition [problématique et ouvertement politique] de la Commission du Service Judiciaire (CSJ), qui est un organe créé en vertu de la Constitution pour préserver l'intégrité et l'indépendance du pouvoir judiciaire ; le rôle prononcé du Président dans la nomination du Président de la Cour constitutionnelle et de son adjoint (Juge en chef et le juge en chef adjoint de la Cour constitutionnelle); le manque de transparence dans la nomination des magistrats; le *modus operandi* de la CSJ; les attaques de l'Exécutif contre le pouvoir judiciaire; et les menaces du gouvernement de ne pas mettre en œuvre les décisions et / ou leur application tardive.

Ce sont ces défis, auxquels se heurte l'indépendance du pouvoir judiciaire, qui seront explorées dans le but de déterminer si la loi constitutionnelle en Afrique du Sud a fait des progrès ou si les érosions pas si subtiles de l'indépendance du judiciaire donnent des raisons de s'inquiéter.

التحديات التي تواجه استقلالية القضاء في جنوب افريقيا

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ملخـــــــص

يعد دستور جنوب إفريقيا دستورا قويا وساميا قابل للتقاضي. فمنذ سنة 1994، بذلت جنوب افريقيا جهودا كبيرة في مجال كيفية إقامة القضاء للعدالة، وبوجه خاص، وقفت المحكمة الدستورية بثبات في عملية إرساء وحماية دولة القانون وحقوق الانسان في جنوب افريقيا. ويقينا منها بأن الالتزام الدستوري باستقلالية القضاء هو الكفيل بتوفير مناخ للديمقراطية الحقيقية والاستقرار السياسي واحترام دولة القانون.

كان السؤال الذي طرح في جنوب افريقيا هو ما إذا كان القضاء في تزعزع و/ أو وصل إلى تشويه. لقد كان للأحداث الراهنة في جنوب افريقيا أن أبرزت بشكل حاد التحديات التي تواجهها استقلالية القضاء في جنوب افريقيا. إن الإطار النظري الذي سيتم من خلاله تحليل التحديات التي تواجه استقلالية القضاء تقع ضمن نطاق الصلاحيات الواسعة لاستقلالية القضاء عموما، غير أنه سيتم سبر ستة (6) مسائل خلافية محددة مع التركيز بشكل خاص على عملية التعيين.

تتمثل هذه المسائل الخلافية الستة في: التشكيلة [الإشكالية والسياسية العلنية] للجنة الخدمات القضائية CSJ، وهي الجهاز الذي أنشئ بناء على الدستور لتعزيز اندماج واستقلالية القضاء؛ الدور البارز للرئيس في تعيين رئيس المحكمة الدستورية ونائب رئيس المحكمة الدستورية؛ الضبابية التي تكتنف تعيين الجهاز القضائي؛ أسلوب عمل لجنة الخدمات الدستورية؛ تهجمات الجهاز التنفيذي على القضاء، وتهديدات الحكومة بعدم تطبيق القرارات و/ أو تأخير تنفيذها. هذه التحديات التي تواجهها استقلالية القضاء هي التي سيتم بحثها من أجل تقييم مدى التطور الذي أحرزه القانون الدستوري في جنوب افريقيا أو ما إذا كانت الانتهاكات الخفية لاستقلالية القضاء مدعاة للقلق.

1. Introduction

While the very definition of judicial independence is elusive and vague, it is beyond dispute that it is a 'distinctive feature of a constitutional democracy',[1] which South Africa proclaims to be.[2] On the face of it, South Africa is characterized by a strong constitutional democracy, with a supreme constitution that regulates the effective functioning of the judiciary with a view to ensuring its independence and impartiality. The root of South Africa's constitutional democracy is the Freedom Charter adopted by the African National Congress and its allies in 1955. This Charter was a response to the oppression being perpetrated against the majority of the South African population. On the topic of judicial independence, it declared: a key cornerstone of any democracy is an effective, independent, impartial and accessible justice system.[3]

Judicial independence is widely regarded as a sacrosanct principle in international and constitutional law[4] yet has a variety of different meanings, depending on the person or institution professing such definition. Even if consensus is arrived at with respect to the definition, Fombad points out that the flaw inherent in the very concept of judicial independence is the human element: given the fact that judges are human and fallible, 'judicial

[1] R De Lange and PAM Mevis, 'Constitutional guarantees for the independence of the judiciary' Electronic Journal of Comparative Law 11(1):1-17 at 7, as quoted in P De Vos and W Freedman (eds) South African Constitutional Law in Context (2014) 225.

[2] Section 1(c) of the Constitution of the Republic of South Africa, 1996 (the Constitution) declares that the Republic of South Africa is one, sovereign, democratic state founded on … supremacy of the constitution and the rule of law.

[3] Clause 5 of the Freedom Charter, available at http://www.anc.org.za/show.php?id=72.

[4] See, inter alia, the United Nations Basic Principles on the Independence of the Judiciary, adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; and The Bangalore Draft Code of Judicial Conduct 2001 (the Bangalore Principles) adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague 25-26 November 2002).

independence has never been a condition that is established fully once and for all or is enjoyed without debate, controversy or challenge'.[5] Appositely, Justice Emeritus Ackermann, formerly of the Constitutional Court states that 'the judiciary is a noble institution, not because its members are noble, but because the Constitution is'.[6] The Constitutional Court itself has emphasized the significance of judicial independence in a constitutional democracy when it asserted that the independence of the judiciary is 'foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law'.[7]

There are certain clearly established factors that are used to gauge judicial independence.[8] When viewed cumulatively, they provide insight into the fundamentals of judicial independence and include: financial autonomy; institutional autonomy; security of tenure; adequate remuneration; transparent appointments; and accountability.[9] Notwithstanding the fact that each of these factors is in place and that the Constitution regulates the effective functioning of the judiciary – in elaborate depth – upon closer inspection it is clear that there remain anomalies in the actual

[5] PH Russell 'Judicial Independence in Comparative Perspective' in Judicial Independence in the Age of Democracy: Critical Perspectives from around the world, as quoted by CM Fombad 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' 59 Buffalo Law Review 1007, 1061.

[6] Justice Emeritus LWH Ackermann 'Opening remarks on the Conference Theme' in A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy. Proceedings of the symposium to mark the retirement of Arthur Chaskalson, Former Chief Justice of the Republic of South Africa, (2006) SiberInk, 9.

[7] Justice Alliance of South Africa v President of the Republic of South Africa 2011 (5) SA 388 (CC) para 36.

[8] CM Fombad 'Preliminary assessment of the prospects for judicial independence in post-1990 African constitutions' (2007) 2 Public Law 233, 242.

[9] *Ibid*.

implementation of the relevant constitutional provisions as they relate to judicial independence in South Africa.

The primary thrust of this paper is therefore a consideration of the challenges with respect to ensuring the independence of the judiciary in South Africa through an analysis of the processes and criteria for appointment of the judiciary by the Judicial Service Commission (JSC). Thereafter, the paper will proceed with a brief reflection on the status (and treatment) of the judiciary in South Africa.

2. Contextualisation of the judiciary in South Africa

The South African Constitution contains provisions that can considerably enhance the chances of the judiciary operating relatively independently. In particular, section 165(2) of the Constitution confirms that 'the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'.[10] Section 165(3) and (4) then go further to declare that 'no person or organ of state may interfere with the functioning of the courts'; and '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'.

The Constitution has therefore placed the independence and impartiality of the judiciary at the centre of the South African constitutional system.[11] This is notwithstanding the age-old counter-majoritarian dilemma, characterized by an unelected judiciary seemingly having powers far in excess of the

[10] Section 2 of the Constitution.
[11] Section 2, the supremacy clause, is evidence of this as it declares that all law or conduct inconsistent with the Constitution is invalid [and must be declared invalid by a court of law].

legislature and the executive. Unsurprisingly, this causes tension. The tension is further exacerbated by the fact that South Africa is aptly described as a transformative state[12] transitioning from the oppression of the apartheid era to a democratic and free state. The courts are thus confronted with the unenviable task of imbuing the Constitutional provisions with life, while at the same time being cautious of the consequences of involving themselves in polycentric reasoning that is tied up with policy,[13] which is effectively the domain of the executive branch, while simultaneously maintaining the supremacy of the Constitution. A well-known non-governmental organization, the Institute for Democracy in South Africa (IDASA) puts it thus:

> The judiciary is essentially developing and re-defining South African jurisprudence and therefore playing an important role in the transformation of South Africa into an open and inclusive constitutional democracy that guarantees the progressive realization of social and economic rights. Viewed in this light, the independence of the judiciary must not only be constitutionally protected; it must also capture and maintain the confidence of the public it seeks to protect."[14]

[12] See generally K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 147. By transformative constitutionalism he meant: 'a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law'.

[13] See, among others, *Minister of Environmental Affairs & Tourism & others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA); [2003] 2 All SA 616 para 50.

[14] Institute for Democracy in South Africa (IDASA) Judicial Accountability Mechanisms: A Resource Document (2007) 3.

For purposes of an historical perspective, prior to 1994, 'political considerations often played a decisive role in the appointment of judges, thus potentially affecting the impartiality and independence of judges.'[15] Notwithstanding the obvious problems associated with political appointments, especially in the context of the political situation in South Africa during apartheid, the problems associated with political appointments was perpetuated by the fact that even after South Africa became a democracy in 1994,

> no judges were relieved of their duties and the courts did not only retain their powers, but were given extended powers far exceeding those they had enjoyed under apartheid. The only change came in the form of the addition of the Constitutional Court to the existing court structure and changes to the manner in which judges are appointed.[16]

In 1994, the total number of judges was 166. These judges were appointed by the Minister of Justice (and subsequently merely formalized by the State President). Moreover, the process of identifying potential candidates and their selection was 'shrouded in secrecy' and 'political factors played a role in determining who secured appointment and who was promoted'.[17] Of these 166 judges, 161 of those were white males, 3 were black males, 2 were white females and there were no black females.[18]

Presently, the composition of the judiciary in South Africa is as follows: 37% are black African (of these, 29.5% are male; 7.5% are female); 8% are

[15] De Vos and Freedman (note 1 above) 229.
[16] Ibid 224.
[17] M Wesson and M du Plessis 'Fifteen years on: Central issues relating to the transformation of the South African judiciary' (2008) South African Journal on Human Rights 24(2) 187, 190, as quoted in De Vos and Freedman (note 1 above) 206.
[18] De Vos and Freedman (note 1 above) 207.

coloured (5% are male; 3% female); 9% are indian (5.5% male; 4% female) and 46% are white (39% male and 6.5% female).[19] Still having some way to go, the judiciary has embarked on a concerted programme of transformation which will foster confidence of the public and therefore inculcate a culture of respect for the high office of the judiciary.

Despite its excellent reputation both locally and internationally[20] as well as the positive gains made, criticism has been raised in some quarters that 'the "mind-set" of those interpreting the law should be changed',[21] that the judiciary is 'counter-revolutionary'[22] and that 'opposition forces are trying to use courts to govern' (and that the judiciary is complicit in this endeavour).[23] Previously, the ANC asserted that the bench should be brought into 'consonance with the vision and aspirations of the millions who engaged in the struggle', and that judges should undergo a shift in their 'collective mindset' so as to be 'accountable' to the electoral 'masses'.[24] This brings us to a discussion of the specific challenges to the independence of the judiciary in South Africa, commencing with the institution established

[19] *Ibid* 235.
[20] F Chothia 'Oscar Pistorius case: Is South Africa's legal system reliable?' BBC News, 22 February 2013, available at www.bbc.com/news/world-africa-21535387.
[21] Keynote address by President Jacob Zuma during the 103rd birthday celebrations of the African National Congress, 11 January 2015, referred to in 'Zuma "contemptuous" of judiciary – DA', Legalbrief, Issue No. 3667, available at www.legalbrief.co.za.
[22] 'Apartheid returns via the back door' *Times Live*, 11 September 2011, accessible at http://www.timeslive.co.za/politics/2011/09/15/apartheid-returns-via-the-back-door. See also 'ANCs Mantashe lambasts judges' Sowetan, 18 August 2011, accessible at http://www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambasts-judges.
[23] At the 3rd Conference on Access to Justice, President Jacob Zuma argued that opposition parties must not "use" courts in assisting them to co-govern with the ruling ANC. See 'Opposition forces trying to use courts to co-govern – Jacob Zuma' at www.politicsweb.co.za. This was echoed by ANC Secretary-General Gwede Mantashe when he stated that "the judiciary needs to depoliticize itself" ('Judiciary must be de-politicised' at www.sowetanlive.co.za).
[24] Statement by the ANC during the ANC's 93rd anniversary celebrations in Umtata on 8 January 2005.

to uphold an independent judiciary in South Africa, the Judicial Service Commission (JSC).

3. The Judicial Service Commission

Due to the issues associated with the counter-majoritarian dilemma, 'it was felt that the appointment of judges could not be entirely insulated from the political process'.[25] However, recognition was given to the fact that 'it would be undesirable to leave the appointment of all judges in the hands of the President or other elected politicians'.[26] To mitigate any overt politicization of the judiciary, the JSC was established.

The JSC was primarily created to give meaningful effect to section 165 of the Constitution and plays a 'pivotal role in the appointment of and removal of judges'.[27] It is mandated to advise the President on all matters relating to the judiciary, and to oversee that the 'important issues such as appointments, promotions, and dismissal of judges are made less vulnerable to partisan manipulation'.[28] The composition and *modus operandi* of the JSC as well as the processes and criteria employed when appointing judges is thus crucial to our perception of the integrity and dignity of the JSC and the judiciary itself.

3.1 The composition of the Judicial Service Commission

Fombad argues that ideally, a body such as the JSC should be constituted in such a manner that the chairperson and the majority of members are independent of the government in power.[29] Alarmingly, the composition of

[25] De Vos and Freedman (note 1 above) 229.
[26] *Ibid* 230.
[27] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 120.
[28] Fombad 'Constitutional Reforms and Constitutionalism in Africa' (note 5 above) 1063.
[29] *Ibid*.

the JSC is fairly political in nature in that more than 65% of the JSC is either directly or indirectly appointed by the executive, which defeats the very essence of a non-partisan body responsible for ensuring the independence of the judiciary.

When the interim Constitution was drafted in the early 1990s, the African National Congress favoured the establishment of a politically dominated body while, unsurprisingly, the judges and legal profession favoured a body in which the legal community would be in the majority. The JSC in its current guise reflects a compromise between these two positions. The JSC is normally composed of 23 members who are drawn from the judiciary, two branches (attorneys and advocates) of the legal profession, the two Houses of the national legislature, the executive, civil society and academia.[30] The chair is taken by the Chief Justice who also heads the Constitutional Court. Significantly, the Chief Justice himself is appointed by the President. Of the 23 members, '15 represent political interests, including the Minister of Justice, the six members of the National Assembly (three members from minority parties), four members of the National Council of Provinces (representing the majority party) and four presidential nominees'.[31]

Hoffman, a lawyer and activist in South Africa criticizes the composition of the JSC

[30] The 23 members constituting the JSC include the Chief Justice; the President of the Supreme Court of Appeal; one Judge President designated by the Judges President; the Cabinet member responsible for justice; two practicing advocates; two practicing attorneys; one law teacher at a South African university; six persons designated by the National Assembly; four permanent delegates to the National Council of Provinces; four persons designated by the President after consulting the leaders of all parties in the National Assembly; and when dealing with matters relating to a specific High Court, the Judge President of that Court and the Premier of the Province concerned, or an alternate designated by them. See section 178(1)(a)-(k) of the Constitution.

[31] De Vos and Freedman (note 1 above) 230. See also, C Powell and J Franco 'The meaning of institutional independence in *Van Rooyen v S' South African Law Journal* (2009) 121(3) 562.

> There are flaws in the composition of the JSC that lead to the perpetration of errors and injustices. The problem, stated more bluntly than it was possibly implied by O'Regan (a former justice of the Constitutional Court), is that there are too many politicians on the JSC and not enough lawyers. Some of the lawyers on the JSC are also there as politicians – this serves to bedevil the deliberations that are supposed to be aimed at finding appropriately qualified lawyers who are fit and proper to grace the bench and legitimately dispense justice in a manner that inspires the confidence of the public.[32]

The sentiment articulated by Hoffman resonates deeply because it represents the antithesis of the separation of powers doctrine which has its underlying purpose to thwart tyranny.[33] While South Africa has its own unique form of separation of powers,[34] the fundamental basis and object of the doctrine remains intact: ensuring an efficient government with the three principal organs each having their own powers and functions, but with sufficient checks and balances to give effect to the South Africa's transformative ideals. In this regard, the case of *De Lange v Smuts NO* is the seminal case, where it was held per Ackermann J that:

> I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand,

[32] P Hoffman (Executive Director of the Institute for Accountability in Southern Africa) 'Irrational decisions demand urgent reform of the JSC' *Business Day*, 1 June 2011, accessible at http://www.businessday.co.za/articles/Content.aspx?id=144416.
[33] CM Fombad 'The separation of powers and constitutionalism in Africa: The case of Botswana' (2005) 25 *Boston College Third World Law Journal* 301, 309.
[34] *S v Dodo* 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) para 17.

> to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measure in the public interest.[35]

The judiciary's ability to undertake this 'delicate balancing' is compromised when the judiciary is politicized by virtue of an overwhelming number of political appointments; particularly at the highest levels.

3.2 The President's role in the appointment of the Chief Justice and Deputy Chief Justice

The President's prominent and virtually unfettered role in the appointment of the Chief Justice and Deputy Chief Justice is one of the major weaknesses of South Africa's constitutional system and has far-reaching effect.

In both the 1994 and 1996 Constitutions a radical change from the apartheid-era past seemed promising. Unfortunately, though, we now see that all that has actually happened is that the weaknesses evident in other Anglophone countries in the manner in which the Chief Justice and Deputy Chief Justice are appointed, have been reinforced.[36] For example, the President is required merely to 'consult' when appointing a Chief Justice or Deputy Chief Justice. The parties required to be consulted are the JSC as well as the leaders of opposition parties in the National Assembly.

[35] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 60.

[36] An example is Zimbabwe, where Mhodi (PT Mhodi 'An analysis of the doctrine of constitutionalism in the Zimbabwean Constitution of 2013' (2013) 28 *Southern African Public Law* 383, 395) laments the fact that the president has very wide discretion to appoint members of the judiciary (including the Chief Justice) and so 'allows the process to be tainted by political considerations'.

However, the final decision remains the President's alone.[37] Accordingly, it is submitted that the concept of consult is so vague that it is susceptible to abuse. As a case in point, in the renewal of the term of former Chief Justice Sandile Ngcobo, the President was accused of having made a final decision without the requisite consultation.[38] Importantly, when appointing the Chief Justice, consultation has to occur prior to the appointment. *Ex post facto* consultation after the President has made a final decision on an appointment is not acceptable. Such consultation must entail 'at least … the good faith exchange of views, which must be taken seriously'[39] so as to ensure that any perception that the Chief Justice is beholden to the President is eliminated.

3.3 Transparency in the appointment process

A glaring problem in the South African system of appointment of members of the judiciary is that the Constitution is silent on the criteria for appointment of judges. The only guidance is found in section 174 of the Constitution, which is ambiguous and incomplete in that it does not provide sufficient clarity. Section 174(1) of the Constitution states that 'any appropriately qualified woman or man who is a fit and proper person' may be appointed as a judicial officer. Section 174(2) qualifies this further by stating that the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when appointing new judicial officers.

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[37] De Vos and Freedman (note 1 above) 231.

[38] *Centre for Applied Legal Studies, Council for the Advancement of the South African Constitution; Freedom Under Law and Justice Alliance of South Africa v The President of the Republic of South Africa; The Minister of Justice and Constitutional Development; Chief Justice Sandile Ngcobo (National Association of Democratic Lawyers and Black Lawyers Association as* Amicus Curiae) (Case No. CCT 62/11; 54/11; 53/11 (joined)), Minister's Submissions, para 20.1.

[39] De Vos and Freedman 231.

The outward appearance of transparency is deceptive, though. Legislation exists guiding the appointment process, but the reality is that this legislation is not utilized as intended (or even used at all). In 2010 the JSC developed its own set of criteria for appointments to the judiciary, as follows:

(1) Whether the particular applicant is an appropriately qualified person;
(2) Whether he or she is a fit and proper person; and
(3) Whether his or her appointment will help to reflect the racial and gender composition of South Africa?

These criteria were then supplemented with the following criteria:

(1) Is the proposed appointee a person of integrity?
(2) Is the proposed appointee a person with the necessary energy and motivation?
(3) Is the proposed appointee a competent person?
    (a) Technically experienced
    (b) Capacity to give expression to the values of the Constitution
(4) Is the proposed appointee an experienced person?
    (a) Technically experienced
    (b) Experienced in regard to values and needs of the community
(5) Does the proposed appointee possess appropriate potential?
(6) Symbolism. What message is given to the community at large by a particular appointment?[40]

The procedure that is invoked when there are vacancies in a court is that the Chief Justice, as Chairperson of the JSC, calls for nominations after which

[40] 'Summary of the Criteria used by the Judicial Service Commission when considering candidates for judicial appointments', issued by the JSC, 10 September 2010.

shortlisted candidates are interviewed in a public forum.[41] On the basis of the outcome of these interviews, the JSC makes recommendations to the President on whom to appoint.

While the JSC may conduct its interviews in public there is virtually no transparency in the criteria used for selection and the subsequent deliberations of the JSC are kept confidential".[42] Moreover, the general practice is that questions posed to different candidates are not the same, thus allegations of bias arise. More alarming is the fact that the evidence suggests that the appointees do not necessarily fulfill these criteria and candidates who should rightly have been appointed, are not so appointed.[43] As the Helen Suzman Foundation puts it 'there is a growing perception that talented candidates for judicial appointment and advancement are being overlooked for reasons that are not clear, or explicit.'[44]

The case of *Judicial Service Commission and Another v Cape Bar Council and Another*[45] has provided some clarity on the manner in which the members of the JSC ought to arrive at decisions about the appointment of judges. Apart from the requirement that the JSC can only make a valid

[41] This is in contrast to the secretive interview process that took place in the apartheid era.

[42] De Vos and Freedman 230. The case of *Helen Suzman Foundation v Judicial Service Commission and Others* (8647/2013) [2014] ZAWCHC 136 (5 September 2014) (also known as the '*Gauntlett* case') is equally relevant here.

[43] See the '*Gauntlett* case' (*ibid*).

[44] Press Release: 'Helen Suzman Foundation takes Judicial Service Commission to Court' accessible at http://hsf.org.za/media/press-releases-1/helen-suzman-foundation-takes-judicial-service-commission-to-court.

[45] (818/2011) ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA) (14 September 2012).

decision if it is properly constituted,[46] the SCA also found that the JSC was obliged to provide reasons for a decision not to appoint a candidate. As the JSC is an organ of state it is under a constitutional duty to exercise its powers in a way that is not irrational or arbitrary and is bound to the values of transparency and accountability. The court unequivocally held that in the absence of the JSC giving reasons, it would not be possible for it to be held accountable and to act in a transparent manner.[47] Accordingly, the court held that the JSC is obliged to give reasons for its decision not to recommend a particular candidate if properly called on to do so. Significantly, the court held such reasons may not be restricted to a statement that the unsuccessful candidate failed to secure enough votes as this would amount to no reason at all[48] and would fall foul of the minimum standards expected of an independent and accountable judiciary.

3.4 The *modus operandi* of the Judicial Service Commission

The JSC has been criticized and condemned for its handling of an extremely controversial case where Judge John Hlophe, the Judge President of the Cape High Court, allegedly improperly tried to influence/persuade[49] judges of the Constitutional Court (Justice Bess Nkabinde and Acting Justice Chris Jafta of the Constitutional Court) in the case that had been brought against President Jacob Zuma in 2008 (just before he became President). The words alleged uttered were:

[46] *Cape Bar Council* paras 20-2.
[47] *Cape Bar Council* paras 43-4.
[48] *Cape Bar Council* para 45.
[49] Statement by Chief Justice Pius Langa 'Statement in support of the complaint to the Judicial Service Commission by the Judges of the Constitutional Court made on 30 May 2008', para 9(c), available at http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=92275&sn=Detail.

> *I have a mandate. You are our last hope. You must find in favour of our comrade.*[50]

The legitimate expectation is created that this institution, created to uphold an independent judiciary, will not protect any questionable conduct of judges, such as in the *Hlophe* matter; specifically with regard to the fact that the JSC has a constitutional duty to exercise its powers and determine that a case of gross misconduct has been made out or not, pursuant to section 177 of the Constitution.

Notwithstanding the seriousness of the complaint made against Judge Hlophe, the JSC abandoned its inquiry into the complaint and ultimately decided not to follow up with a formal hearing. However, Ms Helen Zille, in her capacity as the Premier of the Western Cape Province, applied to the Western Cape High Court for an order declaring that the JSC should re-open the investigation into the allegations of improper conduct perpetrated by Judge Hlophe. The reason for this application is that section 178(1)(k) of the Constitution states that when considering matters relating to a specific High Court, the Judge President of that Court and the Premier of the Province concerned (or an alternate designated by each of them) should be present during any matter dealt with by the JSC. Ms Zille argued that even though there was a constitutional imperative that she be part of the JSC hearing, she was not invited to participate. Consequently, the High Court declared that the matter should be reconsidered in her presence.

In parallel with the Premier of the Western Cape Province's case, Freedom Under Law (a non-governmental organisation which has declared that its

[50] S Choudhry '"He had a mandate": The South African Constitutional Court and the African National Congress in a dominant party democracy' 2009 *Constitutional Court Review* (2) 1, 2.

mandate is to ensure adherence to the rule of law), successfully challenged the JSC's decision "that the evidence in respect of the complaint does not justify a finding that Hlophe JP is guilty of gross misconduct". The effect was that the JSC was ordered to reconsider the complaint against Judge Hlophe by the judges of the Constitutional Court.

Consequently, Judge Hlophe appealed the decision that the JSC should re-consider the matter but the Constitutional Court refused to hear Judge Hlophe's appeal. In reaching its decision, the Constitutional Court in the case of *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Others*[51] pronounced that the law governing how the JSC deals with complaints of misconduct has changed. The result is that "one of the first things [that the JSC] will have to decide is whether the dispute should be resolved under an amendment to the Judicial Service Commission Act, which came into force in 2010, or under its previous rules for dealing with complaints". The Court noted that under the rules, a formal misconduct inquiry is presided over by the JSC (excluding MPs; whereas under the Act, such an inquiry is conducted by a judicial conduct tribunal – consisting of two judges and another person whose name is on a list kept by the Chief Justice's Office). Secondly, under the rules, the default position was one of openness; whereas under the Act, the default position is closed proceedings. However, any inquiry must now allow cross-examination, and the premier of the relevant province and its judge president are entitled to be part of the JSC when it makes its decision – pushing the JSC's members from 13 to 15. Finally, the JSC's final decision must be made by a majority of its members – and not by a majority of those present and voting. Thus, at least eight votes are needed for a particular outcome to make it a decision of the JSC.

[51] 2012 (6) SA 13 (CC).

It must be pointed out that as at the present time, the Hlophe matter has yet to be heard – let alone decided – despite commitments made that the matter would be deliberated upon over two years ago.

4. Politicisation of the judiciary itself

To quote Marshall, 'the rights of people are best secured by a written guarantee of fundamental freedoms, enforced by a judiciary composed of judges 'as free, impartial and independent as the lot of humanity will admit''.[52] Given what has been said above about the dominance of politics and the role of politicians in judicial processes in South Africa, the true independence and impartiality of the judiciary is questionable.

4.1 Executive attacks on the judiciary

At its essence, an independent judiciary is one which is not subject to executive interference. By extension, it should also entail some measure of respect by each of the three principal organs of state, towards each other. In not so subtle ways, however, in South Africa the government is openly hostile to the judiciary. For example, at the present time, the judiciary is being reviewed by the University of Fort Hare and the Human Sciences Research Council. According to the available literature, 'the overall aim of the proposed 18 month research project is to assess the impact of the two highest courts, the Constitutional Court and the Supreme Court of Appeal, on the lived experiences of all South Africans'.[53] Although there appears to be nothing sinister about this review, one senses that at its heart is a palpable distrust of the judiciary and may even be construed as an attempt to

[52] MH Marshall, A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy. Proceedings of the symposium to mark the retirement of Arthur Chaskalson, Former Chief Justice of the Republic of South Africa (2006) SiberInk, 26.

[53] See http://www.hsrc.ac.za/en/media-briefs/democracy-goverance-and-service-delivery/hsrc-fort-hare-assigned-review-of-highest-courts#sthash.xUvZ5Fme.dpuf.

undermine the work of the judiciary. It is submitted, therefore, that this illustrates extreme bad faith on the part of government.

Moreover, senior ANC politicians argue that the ANC was tricked when the constitution was drafted thus they do not view it as being legitimate. President Zuma himself has been known to attack the judiciary[54] and question their integrity.[55] In fact, some utterances by politicians are intended to intimidate judges.[56]

4.2 Government ignoring court orders or being tardy in implementing them

In his judgment concerning the provision of antiretroviral treatment to HIV positive detainees at the Westville Correctional Centre, Judge Chris Nicholson warned that court orders would amount to what the law calls *brutum fulmen* ("useless thunderbolts") if they are not enforced.[57] He cautioned further that if the Government of the Republic of South Africa had given an instruction to the respondents (the various departments of State) not to comply with the order, then a grave constitutional crisis will inevitably arise, involving a serious threat to the doctrine of the separation

[54] In March 2012 Mr Zuma stated: 'We are a Government … and the Judiciary is not a government and it cannot simply review all government policies. They cannot be elevated to do something they are not supposed to do', *The New Age* 27 March 2012.

[55] See 'Judiciary under attack from the ruling party – but holding firm' by Dr Anthea Jeffery, *Acts Online*, 21 October 2013; 'The Dispensable Judiciary' *Legalbrief Today*, 10 September 2008; 'Pityana criticizes judge-bashing' *Legalbrief Today*, 5 September 2008; 'Langa calls for an end to unjustified attacks' SABC News, 18 August 2008; 'ANC continues attacks on judiciary' *Legalbrief Today*, 5 August 2008; 'Langa calls for defence of judicial independence' *Legalbrief Today*, 4 August 2008;; 'ANC stands by right to criticize judges' *Legalbrief Today*, 15 July 2008.

[56] President Zuma's Keynote address during the 103rd birthday celebrations of the African National Congress on 11 January 2015 is a case in point when he suggested that the "mind-set" of those interpreting the law should be changed.

[57] *EN and Others v Government of the Republic of South Africa* 2006 2007 (1) BCLR 84 (D).

of powers. Judge Nicholson's warning highlights the apparent reluctance on the part of the government to enforce decisions which are not in their favour (of which there have been a few).

Even when the government states that it does intend to implement decisions, however, the government is often tardy. The tardiness in implementing comprehensive anti-retroviral treatment programmes in accordance with the ruling by the Constitutional Court in the case of the *Treatment Action Campaign v Minister of Health*[58] is one such instance. Another example is the Eastern Cape provincial administration's sloth and ineptitude in processing pensions and disability grants to eligible persons, as ordered to do so by the court.[59] Possibly an even more extreme example of government foot-dragging is evident in the outcome of the *Grootboom* case.[60] In May 2000, government promised in the Constitutional Court that it would provide a community of squatters led by Irene Grootboom with toilets, a regular water supply and tents while simultaneously building low cost housing for those in need. Irene Grootboom eventually died without ever having received a permanent home.

5. Conclusion

Former Chief Justice Arthur Chaskalson poignantly stated that:

Independence is a central tenet of the [judiciary]. It is demanded so that judges can discharge their constitutional duty of deciding cases impartially,

[58] Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (10) BCLR 1033 (CC).

[59] See, amongst numerous others, the cases of Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another 2001 (1) SA 609 (SE) and Vumazonke v MEC for Social Development, Eastern Cape 2005 (6) SA 229 (SE).

[60] Government of the Republic of South Africa and Others v Grootboom 2001 (1) SA 46.

without fear or favour…The public must be assured that judicial officers are not subject to influence from any source, that their decisions will be implemented whether they are perceived to favour or be against government or powerful institutions within society that may be affected by them, and that judicial officers will not suffer any adverse consequences, as a result of decisions given by them.[61]

For the fact that judges own personal, political and philosophical views may be implicated in interpreting the Constitution and the law[62] it is necessary to ensure a bench which is beyond reproach. The JSC is the constitutionally-mandated body that has been established to safeguard the integrity of the judiciary. At a minimum, therefore, we should be able to expect that judges will be immune from improper influence or exhibit blatant bias and prejudice. However, if the appointment of the judiciary is fraught with bias, the pessimistic view is that it is submitted that it does not hold out much hope for a truly independent judiciary. In addition, if the very institution tasked with guaranteeing the integrity, independence and impartially of the judiciary is doing everything in its power to protect an errant judge then the only conclusion that can properly be drawn is that South Africa has a long way to go in ensuring the independence, integrity and dignity of the judiciary.

It would not be giving justice to the South African judiciary if this paper did not end on a more positive and optimistic note. Overwhelmingly, the judiciary has illustrated its profound understanding and commitment to the

[61] *A Chaskalson, 'Address at the Opening of the Judges Symposium, 2003', reproduced in South African*
Law Journal vol 120, part 4, 2003, 660.

[62] *See, inter alia, Zuma v National Director of Public Prosecutions (8652/08) [2008] ZAKZHC 71; [2009] 1 All SA 54 (N); 2009 (1) BCLR 62 (N) (12 September 2008) para 17.*

Constitution and has not hesitated to engage in progressive interpretation in order to uphold its provisions. For its part, government has initiated and implemented laws to give effect to the judgments of the courts (such as the Civil Unions Act of 2008 which permits same-sex marriage). As such, while challenges certainly exist for the judiciary, it is the judiciary itself which is 'fighting back' and claiming its place as an independent branch of the state, irrespective of any apparent executive interference or overt politicization.

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Debate (1st session) 24 11 2014

Questions relating to the communication of Ms **Lee STONE**

A member of the Gambian delegation

Congratulation on holding this conference, I pray for a success, and thank the President for organizing it.

Now, coming to second question quickly. Second speaker, I would say she has not provided solution. The question is: what is the position of the bar? Because bar and bench are two parts, two wheels of the same chariot. Now, if bar is strong, then, of course we see that the courts, you know, function strictly under that impact

Intervention from the floor

I would like to comment on the South African case and tell to Ms Stone that nobody is perfect. And indeed, I agree with you. I have been very closed to South Africa for many years, since 1993, and for the post-apartheid period being involved in the Kempton Park process and in the establishment of the Constitutional Court of South Africa. I agree with you, South Africa has got

one of the best constitutions in the world, and one of the best constitutional courts in the world. The Constitutional Court under the presidency of Arthur CHASKALSON and then by Pius LANGA, distinguished itself for many important decisions. Then, I would say that during the presidency of MANDELA and MBEKI, you didn't tell so many cases as such you have referred to. Things started later, I remember, even during Pius LANGA presidency, there were some attacks to the Constitutional Court in the independence, and these attacks grew up later with President ZUMA. But, when you say that the Judicial Service Commission is a political body, etc... I will not agree completely with you. In many countries, the High Judicial Council is the equivalent of your Commission. It is a body which is elected by the Parliament composed, sometimes, of political figures and also composed of judges themselves. Then, this Commission, for instance, it is not a favour of a Council composed exclusively or with a majority of judges, in order to avoid corporatism. So, you need a balanced composition. But all this brings me to the same consideration than you, the laws are good, the implementation does not follow, and this is the problem. This is why the World Conference on Constitutional Justice, has decided to have, always, for each congress, one fixed subject, the independence of the judiciary. You referred also to the fact that constitutional judges are, in your country, appointed by the President, so, by political body, this happens also in other countries. Because we must recognise that the Constitutional Court is a political court, in a way. But, what I would like to say, I will say this again this afternoon, the judges once elected, or appointed, should have the duty of ingratitude. Many judges, once elected by the executive power, behave correctly and independently. Thank you very much.

Chief Justice of Namibia

Thank you. I wish to comment very briefly about the paper presented by the last speaker. I think it was a good presentation, but I think that the paper is rather, may be overly pessimistic really. I think there is a lot that have been achieved in South Africa and it's well documented and being close, I neighbour, I know of developments that have taken place there. I think that would be more useful to give comparative statistics of how many judges have been appointed since the advent of democracy, as opposed to the numbers that we indicated in the paper, and helps also to give certain solutions. Now, I will tell that I disagree with respect to that the appointment of the Chief Justice and the Deputy Chief Justice should not be political. In its nature, these are, whether we like to say it or not, political officers you are absolutely right to say that they were political appointments. Many of the things you have said resonate with me because I chair the Judiciary Service Commission, I represent the Supreme Court of Namibia, I am the Chief Justice of Namibia, but our Court consists of 05 members only, as opposed to yours. Of course, often, we also hear criticisms of it has not been transparent, and so forth. I think every system has its own judge timings, it is not the perfect system, but I think it would have been an ideal to concentrate on much more including positive aspects than on the negative aspects of your system. Which I am very fully aware of them. Thanks Mister Chairman.

Professor Bouzid LEZHARI, Constantine Algeria

For Ms Lee STONE, I thank you for your very important and informative intervention; I just have a brief question about the relation and friction between the Executive and the Judiciary. What about the role of the

Parliament. Parliament is the producer of laws and so on, is it silent in this struggle between the Executive and the Judiciary? Thank you very much.

Professeur BENHAMMED, Université de Tunis, TUNISIE

Une autre question concernant la conférence de notre collègue à propos de l'Afrique du Sud. L'Afrique du Sud a réalisé des avancées considérables en matière de démocratie et en matière des droits de l'homme, on est donc un peu étonné de voir que l'indépendance de la justice est un peu sujette à des interrogations du fait de la politisation de la justice à travers la nomination des magistrats par le pouvoir politique, et surtout la consultation des partis politiques pour la nomination de ces derniers. Comment peut-on expliquer cette situation qui me semble un peu paradoxale ? Merci.

Un intervenant de la salle

Sur l'indépendance et l'impartialité : C'est un problème extrêmement important, l'indépendance doit exister à la fois à l'égard du politique et à l'égard du financier pour éviter la corruption du juge. Il y a les conditions de nomination des juges. Qui a nommé les juges ? Le pouvoir politique ? Il y a déjà un problème politique ! Est-ce qu'il faut élire le juge ? Qui va l'élire ? Il y a l'indépendance de l'institution, l'indépendance des personnes, des hommes qui animent l'institution. C'est un problème délicat ! Nous y réfléchissons sans trouver la moindre solution. Il y a aussi les conditions d'exercice de la fonction. Alors je vois qu'il faut continuer à réfléchir sur le meilleur mode de désignation, les meilleures conditions d'exercice de la fonction. Il faut que l'indépendance soit inscrite dans les textes de la Constitution certes, mais je crois que les juges eux-mêmes doivent vivre leur indépendance. Il faut que l'indépendance s'inscrive dans la personnalité des juges eux-mêmes, parce qu'il n'y a pas de mode de désignation qui soit à l'abri des pressions. Donc, il appartient aux juges en s'appuyant sur leur

statut de vivre effectivement leur rôle de juges indépendants et impartiaux. Merci.

Monsieur Diop du Conseil constitutionnel du Sénégal

Je remercie les deux conférenciers pour leur brillante contribution. J'ai été particulièrement intéressé par la contribution de l'Afrique du Sud. Après l'avoir entendu, je me suis posé trois questions. La première : Mme STONE a dit qu'après plus de 20 ans, on a constaté qu'en Afrique du Sud il y a plus de juges blancs que de juges noirs et peu de femmes et je me suis demandé pourquoi ? Cette question m'a poussé à me poser une autre question, quel est le cursus pour devenir juge en Afrique du Sud. On ne peut pas parler d'indépendance sans parler de garantie et pour faire du droit comparé, j'aimerais savoir quelles sont les garanties de l'indépendance prévues en Afrique du Sud ?

الأستاذ شيهوب مسعود، جامعة الأمير عبد القادر، قسنطينة

بالنسبة للأستاذة من جنوب افريقيا، أريد أن أركز على نقطة واحدة وهي استقلالية القضاء. كذلك هذا المبدأ يعلن عليه في أغلب الدساتير الحديثة لكن الإشكالية هي ضمانات تجسيد المبدأ. ما هي هذه الضمانات؟ الضمانات هي ضرورة إيجاد هيئة محايدة مستقلة عن السلطة التنفيذية تتولى متابعة مسيرة القضاة الوظيفية وترقيتهم وتأديبهم مثل ما هو الحال عندنا " المجلس الأعلى للقضاء"، هيئة مستقلة عن السلطة التنفيذية يرأسها الرئيس الأول للمحكمة العليا لتأديب القضاة، وهناك بعض الفقهاء يطالبون بأن تكون الرئاسة دائما لرئيس المحكمة العليا ولا يمكن لوزير العدل أن ينوب عن الرئيس في مسائل أخرى إدارية غير تأديبية.

متدخل من القاعة (رجل قضاء من قارة ثانية غير افريقيا)

ما يهمني أو ما أحبّ أن أؤكد عليه أن للمحاكم والمجالس الدستورية دور كبير في تطوير القانون أو الدساتير. ليس هناك إشكال في صياغة الدساتير ووضعها وايراد جميع المبادئ السامية فيها،

ولكن تطبيق هذه المبادئ على أرض الواقع وحمايتها هي المسؤولية الكبيرة التي تقع على القضاء الدستوري. يجب أن تكون للمحاكم والمجالس الدستورية قدرا من الشجاعة ومن النزاهة والحياد بحيث تصون تلك المبادئ الدستورية، وهذا لا يتأتى إلاّ بخطوة أساسية وهي أن يكون القضاء الدستوري قضاء مماثلا للقضاء العادي من حيث أشخاصه وكيفية اختيارهم وتهيئة جميع سبل الاستقلال لأعضاء المحاكم والمجالس الدستورية، فقط، أحب أن أ ؤكد على ضرورة أن يتحلى بالشجاعة من يتبوأ الفصل في الخصومات الدستورية من محاكم أو مجالس دستورية، وأن يكون قويا لا يخاف لومة لائم.

Un membre de la délégation du Centre Afrique

Une remarque en ce qui concerne le deuxième conférencier. Lorsque dans un pays le premier magistrat est le chef de l'Etat, ce n'est pas bon pour l'indépendance judiciaire. Je voudrais partager avec vous l'expérience du Centre Afrique. Avant d'être juge constitutionnel, j'ai été membre du Conseil supérieur de la magistrature. On s'est battu pour que ce Conseil soit présidé par un juge, ce Conseil qui recrute et qui fait l'avancement des magistrats. Malheureusement, le point de vue des universités sur cette question n'a pas été respecté, et les pouvoirs constituants en sont revenus au système traditionnel. Le chef de l'Etat est le premier magistrat. Quand on se réunit lors de la Commission des avancements et recrutements, la Commission est présidée par le Chef de l'Etat et c'est son ministre de la justice qui déroule l'ordre du jour. A ce moment-là, on se rend compte que les langues ont tendance à ne pas se délier et les bouches se ferment. Effectivement pour dire si on veut l'indépendance de la justice, il faut éviter que le politique se mêle des recrutements et des avancements des magistrats. Merci.

Answers of Ms Lee STONE

I am very indebted particularly to the question asking for solutions, I like that! In fact, I will admit, Chief Justice of Namibia, I was biased to be negative and pessimistic. But in fact, in South Africa, the solutions are there because the judiciary itself fights back whenever there are allegations that the JSC has not acted constitutionally, the Courts themselves that will make a decision and say this case is an important case and, therefore, the JSC must reopen the case. So, it is the courts themselves, that is, we are not going to be subject to manipulation, we are going to assert our place on constitutional dispensation. As far as solutions gone, respect of Chief Justice Johan's question.

There is also, I think it is related to many of the questions, South Africa is also in a position right now, where the political body, the executive, is looking carefully at itself, it is engaging a process of introspection. And what has now done is it is appointed a University, in conjunction with Human Sciences Research Council, to undertake what is called a review of the effectiveness of the decisions handed down by our Court. Mostly, according to literature, the objective is to see whether the decisions are actually giving meaning for effect to the Constitution. So, the executive is really committed to it, ensuring that the decisions are implemented and reinforced. So, there is hope. My reservation is that why is the executive going to this level? Are they afraid of something? So, that's why I am a little bit ambivalent about what their true intentions are.

So, the paradox then; why do we have the situation of Executive fighting against Judiciary? And how the two try to work together? Effectively, our Judiciary is giving effect to the Constitution, which the Executive also has as its primary mandate, to make sure that people in South Africa live

dignified meaningful life, but it appears to me a lack of prioritization. Money will be spent on, seemingly, trivial matters and not allocated to the real pressing issues like sufficient water. We have had a case recently in South Africa, with a person who was receiving, in fact a whole community, six (6) litters of water a day. That is below the amount required for survival; the Court says we cannot intervene. We know that is something that is for the government to deal with, because the government is proving that, they are actually committed to ensuring the right for all and they did have a plan and place, just takes a little bit longer because of the history of South Africa. Speaking of the statistics of our judiciary, I did not present them in the paper, because I have to move quickly, but in fact, there have been dramatic advances within our judiciary. We have 46% white in contrast with 37% black judges. So, it is almost equal, it is just that we have on the fact that there are too many white judges. Significant improvements with respect to gender equality. There are now many more women judges, not enough, but we are getting there. So, I think we try to bring this too close by answering the question about how judges are even appointed? They are appointed on a nomination process, which is a little bit politically manipulated as well, because it often relies on your reputation. If your reputation precedes you, the judge president of a particular court, will approach you, if you are an academic, for example. So, there is a little bit of politicization there, but there is nothing necessarily wrong with that. Because, if you approve over time that you are committed to the constitution and the rule of law, there should nothing barring your appointment, and what the Constitution itself specifically says in Section 174 about our Constitution is: “any man or woman who is appropriately qualified and who is fit and proper, shall be appointed as a judge”. That is quite fair, but that is also enough to satisfy our selves that if the person has the relevant experience as well as the

academic qualifications. They are deemed to have moral standing and esteem in society that should be nothing barring their appointment.

And in last, I am just going to end here. There is just one point I want to deal with. I admit that the independence of the Judiciary is relied on the Judiciary itself. The Section 165 of our Constitution, which unambiguously says in the section 1/ 65/2, that "the courts are independent and subject only to the Constitution and the law, which they must apply without fear, favour or prejudice". So, it is that rule of law which governs the effective functioning of our Constitution and our constitutional system and the judges with in that. I am sure, I haven't answered all your questions, I want just to highlight the fact that it's not only the Executive that is in tension with the Judiciary, Parliament is equally and sometimes more so.

As I have said, I can agree and admit this, we do have an extremely progressive Constitution, with a progressive Judiciary, and our Judiciary has the effort often to make decisions on controversial cases, such as same sex marriages. Parliament didn't like it. If Parliament had wanted to regulate same sex marriage, they would have done so, but, they didn't. And, of course, we have distinction. With the Judiciary said the law must change, Parliament didn't want to change it, and, eventually, Parliament will be forced by the Judiciary to change it. So, the base equal tension with Parliament. There is numerous cases; the Executive will make certain decisions on policy level, for example, on how corruption will be dealt with in South Africa. Parliament will draft a law. The Judiciary will tell Parliament this law is unconstitutional. So, there is a lot of tensions relating to it… all right! I think I have answered everything… Thank you.